

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No. 1076/88
TxxNox

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DATE OF DECISION 14.11.1990.

Balwinder Singh	Petitioner
Shri B.S. Mainee.	Advocate for the Petitioner(s)
Versus	
Union of India & Ors.	Respondent
None.	Advocate for the Respondent(s)

CORAM

The Hon'ble Mr. Justice Amitav Banerji, Chairman.

The Hon'ble Mr. I.K. Rasgotra, Member(A).

1. Whether Reporters of local papers may be allowed to see the Judgement ? ✓
2. To be referred to the Reporter or not ? 41
3. Whether their Lordships wish to see the fair copy of the Judgement ? ✓
4. Whether it needs to be circulated to other Benches of the Tribunal ? ✓

AB
(AMITAV BANERJI)
CHAIRMAN
14.11.90.

VP

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI.

DATE OF DECISION: November 14, 1990.

REGN. NO. DA 1076/88

Balwinder Singh

... Applicant.

Versus

Union of India & Ors.

... Respondents.

CORAM: The Hon'ble Mr. Justice Amitav Banerji, Chairman.
The Hon'ble Mr. I.K. Rasgotra, Vice-Chairman(A).

For the Applicant.

... Shri B.S. Mainee,
Counsel.

For the Respondents.

... None.

(Judgement of the Bench delivered by
Hon'ble Mr Justice Amitav Banerji,
Chairman).

The applicant who is a sportsman of some distinction, was appointed as a temporary Railway servant in the 'Sports Quota' as Special Ticket Examiner, in the grade of Rs.330-560 on 25.8.1976. The applicant remained absent from duty with effect from 2.5.1979. He fell ill on 20.5.1979 and had submitted medical certificates about his illness. He was deemed to have resigned from service with effect from 20.8.1979 under a particular provision of the Railway Rules. His plea was that the said rules are no longer good law in view of the various judicial pronouncements. He was entitled to protection under Article 311 of the Constitution and he could not be removed from service without holding a disciplinary proceeding. Although he was thereafter reappointed w.e.f. 21.5.1980 but he had been denied the

benefit of his past service. In other words, his stand was that the order of his 'deemed resignation' was patently erroneous and had no effect and consequently, he was entitled to have his past service taking into consideration for assessing his position in the seniority list.

The stand taken by the respondents is that the applicant was originally appointed temporarily and his service could be terminated under the provisions of Rule 732-R1 vide the Notification No. 729-E/28/1058-P 1A dated 30/31.8.1979. Since he was absent from duty w.e.f. 2.5.1979, he would have deemed to have resigned from service w.e.f. 20.8.1979. It was further pleaded that the subsequent appointment was a fresh appointment and no credit on the basis of his past service will be admissible. It was also pleaded that even a temporary railway servant can be removed from service on the ground of 'deemed resignation' because of his unauthorised absence. At that time Rule 732-R1 was applicable. Various representations had been made by the applicant and he was informed that he was not entitled to the benefit of his past service. The modifications introduced by the Railway Board's letter dated 23.3.1985 had no relevance to the present case.

We have heard Shri B.S. Mainee, learned counsel for the applicant. No one appears for the respondents although names of two counsel viz., Sarvashri R.S. Renu and I.J.S. Gulati are mentioned as counsel for the Union of India.

Shri Mainee, learned counsel for the applicant, urged that the Rule 732-R1 was obsolete and unenforceable in view

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of the decision of the Supreme Court in respect of the similar provision in Jodhpur Service Regulation, which came for consideration in the case of JAI SHANKER VS. STATE OF RAJASTHAN (AIR 1966 SC 492). The Supreme Court had ruled that the removal of a Govt. servant from service for overstaying his leave is illegal even though it is provided by the service Regulation that any individual who absents himself without permission after the end of his leave would be considered to have sacrificed his appointment and may be reinstated only with the sanction of the competent authority. The Supreme Court negatived the argument that the removal was automatic and beyond the protection of Art. 311. The Supreme Court observed " the removal is removal and if it is punishment for overstaying one's leave an opportunity must be given to the person against whom such an order is proposed, no matter how the Regulation describes it!"

The respondents had relied on the provision of Rule 732-R1 which provided that an employee who is absent without permission, would be deemed to have resigned from service under the said rules. Shri B.S. Mainee also referred to Annexure A12 which is a copy of the Railway Board's letter dated 25.3.1985, addressed to the General Managers, All Indian Railways. In that letter, the Ministry of Railways had reviewed the provisions contained in Note(2) below Rule 732-R1 and observed -

"Keeping in view the provisions contained in Rule 2014-R1 and current judicial pronouncements on this subject, it would not be correct to remove a temporary railway servant from service on grounds of 'Deemed resignation', for reasons of unauthorised absence. Temporary railway servants also should be afforded an opportunity to show cause under the Discipline and Appeal Rules, before they are removed from service for unauthorised absence".

Shri Mainee argued on the basis of the above that even the Railways have taken a different view that the employee is to be afforded an opportunity to show cause under the Discipline and Appeal Rules, before he is removed from service. Learned counsel further stated that notwithstanding the legal position enunciated by the Supreme Court, as indicated above, and the view taken by the Railways Board in their letter dated 25.3.1985, there was no change of position vis-a-vis the applicant and it was held that his 'deemed resignation' from service was effective and that his re-appointment was a fresh appointment and consequently, the applicant was not entitled to the reliefs prayed for.

Shri Mainee also referred to the case of BIJAL RAMJI Vs. UNION OF INDIA (ATR 1988(1)CAT 427), decided by the Ahmedabad Bench of the Tribunal. This was a case where the applicant was deemed to have resigned as per Note-2 of exception-II of Rules 732 of the Indian Railway Code, Volume I and accordingly his services had been terminated w.e.f. 1.12.1971. The applicant Bijal Ramji had made several

representations for reinstatement which had been rejected. He had urged that the impugned order was violative of Article 311 of the Constitution as no opportunity was given to him to be heard before passing such an order. The respondents had taken the stand that since the order by which his service came to an end was not one of punishment, there was no requirement to show cause or to allow the petitioner any opportunity to be heard before it was passed.

The Ahmedabad Bench referred to the case of JAI SHANKER VS. STATE OF RAJASTHAN (Supra) and then observed -

"The resort of deeming resignation is merely a device which effects removal from service and does not exempt the respondent from the requirement of issuing a show cause notice".

We are in entire agreement with this view.

We have considered the matter and we are of the view that the stand taken by the respondents in the present case is erroneous and contrary to law. Under Rule 732-R1 exercise of power which is contrary to the provision of Article 311 of the Constitution/ ^{is bad in law} A temporary employee is also entitled to protection of Article 311 of the Constitution. He cannot be removed from service by exercising an archaic rule that if an employee is absent without leave or permission, then he will be deemed to have resigned. No employee can be removed from service in this manner even on the ground of his long unauthorised absence or leave without permission.

Charges have to be framed and a disciplinary proceeding has to be initiated and if he is held guilty therein, then appropriate punishment may be awarded.

In the present case, the Rule 732-R1 gives no such opportunity to the employee and poses only one form of punishment namely removal from service. It is not permissible to remove a person from Government service without following the Discipline and Appeal Rules. In the case of JAI SHANKER (Supra), the Supreme Court has laid down the law very clearly. The following passage from the judgement in JAI SHANKER's case is apt and makes the position clear:

"It is, however, contended that under the Regulations all that Government does, is not to allow the person to be reinstated. Government does not order his removal because the incumbent himself gives up the employment. We do not think that the constitutional protection can be taken away in this manner by a side wind. While, on the one hand, there is no compulsion on the part of the Government to retain a person in service if he is unfit and deserves dismissal or removal, on the other, a person is entitled to continue in service if he wants until his service is terminated in accordance with law. One circumstance deserving removal may be overstaying one's leave. This is a fault which may entitle Government in a suitable case to consider a man as unfit to continue in service. But even if regulation is made, it is necessary that Government should give the person an opportunity of showing cause why he should not be removed. It is true that the Government may visit the punishment of discharge or removal from service on a person who has absented himself by overstaying his leave, but we do not think that Government can order a person to be discharged from service without at least telling him that they propose to remove him and giving him an opportunity of showing cause why he should not be removed".

Their Lordships further said -

"In our judgement, Jai Shanker was entitled to an opportunity to show cause against the proposed removal from service on his overstaying his leave and as no such opportunity was given to him his removal from service was illegal. He is entitled to this declaration..."

We are of the view that the law declared in the above case is fully applicable to the present case. Since the applicant Shri Balwinder Singh was not afforded an opportunity showing cause against the proposed punishment of removal from service, the order of 'deemed resignation from service' is bad in law and must be set aside. We order accordingly.

As regards the Respondents' plea that the applicant was precluded from raising the question of his past service as per his undertaking Annexure R-1, dated 14.5.1980. We find nothing in the above letter which precluded him from raising the question of his past service. In any event the question raised in this O.A. is an important question of law regarding the legal implication of Rule 732-R1, by which a railway employee's service could be ended under the concept of 'deemed resignation'.

The effect of the above is that the applicant continues to be in service from the date of his original appointment. The period of his absence will be adjusted against the type of leave that was due and the rest of the period, if any, would be treated as leave without pay.

However, for the purpose of seniority his entire period of service has to be taken into consideration. The O.A. is accordingly allowed. However, there will be no order as to costs.

Subhash
(I.K. RASGOTRA)
MEMBER(A)

AB/14/19
(AMITAV BANERJI)
CHAIRMAN

'SRD'