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Court : Rajasthan

Decided On : Nov-08-1982

Reported in : 1982WLN(UC)286

Judge : S.C. Agrawal, J.

Appeal No. : S.B. Civil Writ Petition No. 1888 to 1890/81

Appellant : Karan Singh and 2 ors.

Respondent : The Union of India (Uoi) and anr.

Disposition : Petition allowed

Judgement :

S.C. Agrawal, J.

1. These three writ petitions raise common questions for determination and, therefore, they are being disposed of by a common order. The petitioners in these writ petitions were employees of the Northern Railway at Jodhpur. Karan Singh (petitioner in S B, civil writ petition No. 1888/81) was employed as Driver Grade C and on February 2, 1981, he had put in 26 years of service. Lekh Raj and Dewa Ram (petitioners in writ petitions no. 1889/81 and 1890/81) were employed as shunters and on February 2, 1981, they had put in 23 and 26 years service respectively. All the three petitioners were posted at the Loco Running Shed,

Jodhpur, With a view to press their demands with regard to the amentioneration of their conditions of service certain workmen employed at the Loco Running Sheds of the Indian Railways commenced an agitation in the last week of January and first week of February, 1981. During the course of the aforesaid agitation, about 305 out of 908 employees employed at the Loco Running Shed of Jodhpur Division of the Northern Railway did not report for duty on and from February 2, 1981. The said agitation was called off on February 25, 1981. The petitioners did not report for duty during the period from February 2, 1981 till February 25, 1981 and returned to their duty on February 26, 1981 at 9 a.m. Sometime in the month of March, 1981, the Divisional Personnel Officer, Northern Railway, Jodhpur (respondent No. 2 in these writ petitions) issued order (Ex. 1) whereby it was directed that the Drivers, Shunters and Firemen whose names were mentioned in the list appended to the said order were unauthorisedly absent from duty during the period from February 2, 1981 to February 25, 1981 and for that reason, it was being ordered that their earned leave be forfeited, the date of increment be postponed and the benefit of their earlier se vice be denied to them for the purpose of leave, passes and qualifying services for the purpose of pensionary benefits. The names of the petitioners are included in the list appended to the said order. Being aggrieved by the aforesaid order, the petitioners have filed these writ petitions and the petitioners have prayed that an appropriate writ, order or direction be issued quashing the said order (Ex. 1) passed by respondent no 2 and restraining the respondents from giving effect to the said order.

2. In the writ petti(sic)ions, the petitioners have submitted that the impugned order in substance amounts to dismissal of the petitioners from service and their reappointment afresh and that an order of dismissal could not be made except after holding an enquiry according to the procedure laid down for imposing a major penalty as provided in Rules 9 to 13 of the Railway Servants' (Discipline and Appeal) Rules, 1968 hereinafter referred to as 'the Rules') and that such enquiry was not held before passing the impugned order. In the writ petitions, it has further been submitted that in any event, the impugned order amounts to reduction to a lower stage in the time scale of pay for a specified period falling within the scope of clause(v) of rule 6 of the Rules, and that such a penalty, being major in character, could be imposed only after holding an enquiry in accordance with the

rules 9 to 13 of the Rules, but such an enquiry was not held. In the writ petitions, it has further been submitted by the petitioners that the impugned order results in the postponement of the date of increment which in effect means nothing but imposition of the penalty of withholding of increments of pay for a specified period and that such a penalty could not be imposed except after holding an enquiry according to rule 11 of the Rules, which had not been done. The case of the petitioners is further that withholding of privilege of passes is also a penalty within the meaning of clause (iii-a) of rule 6 and such a penalty could be imposed only after holding an enquiry in accordance with rule 11 of the Rules, which had not been done. The petitioners have further submitted that even if it be assumed that the order does not fall within the scope of the Rules, aforesaid, then too, the order being penal in character and impugned being passed for an alleged misconduct, namely, going on strike, could not be passed without first holding an enquiry according to the principles of natural justice. The petitioners have also submitted that the impugned order would result in denial of the post retirement benefits to the petitioners in as much as they have acquired a right of getting the service rendered by them counted as qualifying service and the said right is vested right and the said vested right has been denied to the petitioners by the impugned order and such an order could not be made except after holding an enquiry, which had not been done. In the writ petition, the petitioners have also challenged the validity of the impugned order on the ground that it was passed in violation of Articles 14 and 16 of the Constitution of India in as much as by the impugned order, the respondents have arbitrarily discriminated between persons similarly situated in as much as while persons who reported on duty upto 16 hours on February 25, 1981 have been taken back without being deprived of any of the benefits whereas the petitioners and others who joined after 16 hours on February 25, 1981 have been awarded the various penalties referred to in the impugned order. According to the petitioners, reporting for duty upto 16 hours on February 25, 1981 could not constitute a valid ground for differential treatment between persons who had gone on strike.

3. In the reply that has been filed on behalf of the respondents, it has been submitted that the strike that had been called with effect from February 2, 1981 was an illegal strike in as much as it was called by the All India Loco Running Staff

Association, which is an un-recognised union and the said strike had been called without complying with the provisions of Sections 22 or 23 of the Industrial Disputes Act, 1947. In the reply, it has been further stated that the petitioners deliberately and wilfully did not report on duty during the period February 2, 1981 to February 25, 1981 and they remained absent from duty and participated in illegal strike during this period. In the said reply, it has further been stated that all possible efforts were made to persuade the petitioners to return on duty and that the petitioners and others who participated in the illegal strike, were requested to resume their duties on or before 16 hours on February 25, 1981 or in the alternative, they would face the consequences of break in service and that said call had been given wide publicity and the same was placed on the notice boards at Jodhpur, Merta Road and Simdari but in spite of these calls and efforts, the petitioners did not report for duty on or before 16 hours on February 25, 1981. In the said reply, the respondents have also submitted that Chapter XIII of the Indian Railway Establishment Manual (hereinafter referred to as 'the Manual') clearly provides for the consequences of participating in an illegal strike and that the impugned order has been passed strictly in accordance with the provision contained in Chapter XIII of the Manual. In the said reply, the respondents have submitted that forfeiture of earned leave, postponement of the date of increment, losing of benefit of their earlier service for the purpose of leave and passes and qualifying service for the purpose of pensionary benefit etc, are the consequences of break in service which follows participation in illegal strike. In the said reply, it has also been stated that the impugned order, does not violate the provisions of Articles 14 and 16 of the Constitution in as much as by the call given by the Railway Administration, all the employees were informed that those employees who had participated in the illegal strike and did not join their respective duties in their sheds up to 16 hours on February 25, 1981 would face the consequences of break in service and since the petitioners remained absent from duty wilfully and unauthorisedly in spite of the aforesaid call they had to face the consequences of break in service and those employees who responded to the said call and reported on duty up to 16 hours on February 25, 1981 did not have to face the consequences of break in service.

4. Shri Mridul, the learned Counsel for the petitioners in all these writ petitions as well as Shri J.P. Joshi, the learned Counsel for the respondents, requested that the writ petitions may be finally disposed of at this stage of admission and arguments were heard on that basis.

5. The first contention that was urged by Shri Mridul, the learned Counsel for the petitioners, was that in view of the consequences which flow from the impugned order, it was incumbent upon the respondents to have afforded an opportunity of a hearing to the petitioners before passing the impugned order. Shri Joshi, the learned Counsel for the respondents has, on the other hand, submitted that it was not necessary to afford such opportunity in view of the provisions contained in Chapter of XIII of the Manual.

6. According to Shri Joshi, the automatic consequence of participation in an illegal strike is break in service, which cannot be condoned without the sanction of the President and that it is not necessary to afford an opportunity of a hearing to the railway employee before passing an order regarding break in service on the ground of participation in an illegal strike.

7. I am unable to accept the aforesaid contention urged by Shri Joshi.

8. Chapter XIII of the Manual deals with condonation of break in service. Para 1303 of the said Chapter relates to break in service due to illegal strike and it reads as under:--

1303. Breaks in service due to an illegal strike.

Strikers may be divided into two categories, viz., legal and illegal

(a) Legal strikes are those which comply with the provisions of the Industrial Disputes Act, 1947; and

(b) Illegal strikes are those other than in (a) above and include mere Demonstrations, involving cessation of work even of short duration.

Strikes falling under (a) above do not constitute a break in service and it would be appropriate to treat the period of absence as leave with or without allowances, as

the case may be, without reference to the Railway Board.

9. In the case of illegal strikes referred to in (b) above the absence of the railway servants concerned is tantamount to a break in service and cannot be condoned without the sanction of the President. When such a break in service due to participation in an illegal strike is condoned by the President as dies non i.e, neither constituting a break in service nor counting as service, such period is treated according non-existent in so far as the particular railway servant(s) is/are concerned and, therefore, the status quo ante the interregnum is restored in all respects from the date following the last day of the period treated as dies non In other words, service prior to the break so condoned will be treated as continuous with the service after break, for all purposes but the period of the break itself will not be taken into account for any purpose.' Para 1301 deals with a break in service caused by participation in an illegal strike or by re-engagement after retirement, discharge, resignation etc. and lays down that break in service entails forfeiture of the service of a railway servant before the break unless condoned by the competent authority. Para 1304 prescribes the various particulars, which must be furnished before the consideration of condonation of a break in service can be under-taken in respect of railway servants who participate in an illegal strike. In the event of condonation of the break in service, the service prior to break is to be treated as continuous with the service after the break but the period of the break itself cannot be taken into account for any purpose.

10. As noticed earlier, para 1301 of the Manual lays down that a break in service caused by participation in an illegal strike entails forfeiture of the service of a railway servant before the break. In other words, the consequences of break in service is that the service rendered prior to the strike is wiped out and as a result thereof the rights of the employee in the matter of pension etc. are adversely affected.

11. In *Jai Shanker v. State of Rajasthan* : (1966)11LLJ140SC the Supreme Court was dealing with a case where a government servant had been removed from service for overstaying his leave. The aforesaid removal was made in exercise of the power conferred by Regulation 13 of the Jodhpur Service Regulations, which

provided that an individual who absents himself without permission for one month or who remains absent without permission for one month or longer after the end of his leave should be considered to have sacrificed his appointment and may only be reinstated with the sanction of the competent authority. On behalf of the State, it was urged that the said Regulation operated automatically and that no question of removal from service could arise and that under the said Regulation, the government servant could only be reinstated with the sanction of the competent authority. The Supreme Court held that the employee concerned was entitled to an opportunity to show cause against the purposed removal from service on his overstaying his leave and since such an opportunity was not given to him, his removal from service was illegal. In this context, it has been observed as under:--

The Regulation, no doubt, speaks of reinstatement but it really comes to this that a person would not be reinstated if he is ordered to be discharged or removed from service. The question of reinstatement can only be considered whether the person should be removed or discharged from service. Which ever way one looks at the matter, the order of the Government involves a termination of the service when the incumbent is willing to serve. The Regulation involves a punishment for overstaying one's leave and the burden is thrown on the incumbent to secure reinstatement by showing cause. 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. If this is done the incumbent will be entitled to move against the punishment for, if his plea succeeds, he will not be removed and no question of reinstatement will arise.

12. In *Dayal Saran v. Union of India* : AIR 1980 SC554 , the Supreme Court was dealing with an order with regard to the forfeiture of service of a Government employee and has observed as under:

We do not also think that an order of forfeiture of past service can be made without observing the principles of natural justice. Admittedly, disciplinary action was not

taken against the appellant in connection with his absence from duty without leave. Nor was any notice given to the appellant that his past service was proposed to be forfeited under Article 420 of the Civil Services Regulations and his explanation sought.

13. In view of the decisions aforesaid, it must be held that an order with regard to the break in service which resulted in forfeiture of the past service of a railway employee, cannot be made without observing the principles of Natural Justice. It was, therefore, incumbent upon the respondents to have given a notice to the petitioners before passing the impugned order relating to the break in service on account of their having participated in the strike, which took place from February 2, 1981 to February 25, 1981.

14. In this context, reference may also be made to the decision of the Supreme Court in Gujarat Steel Tubes Ltd v Gujarat Steel Tubes Mazdoor Sabha 1980(2)SSC 593. In that case, the Management had terminated the services of its employees on the ground of their having participated in an illegal strike and the said cetermination was sought to be justified by the Management on the ground that the workman had been called upon to join the service within the stipulated time and they had failed to do so. The Supreme Court rejected the said contention and have observed as under:

We cannot agree that mere failure to report for duty when a strike is on, necessarily means misconduct. Many a workman, as a matter of prudence, may not take the risk of facing the militant workmen or die Management's h(sic)iellings for fear, especially where there is evidence in the case from the Sabha that the Management had hired goondas and from the Management, that the striking vanguard was violent, it is also possible, the absence of evidence to the contr(sic)ry, that several workmen might not be posted with the Management notice of recall or the terms on which they were being recalled.

The aforesaid observations of the Supreme Court show that in a case where the Management seeks to terminate the services of an employee on the ground of his failure to report on duty during the course of a strike, the workman may show that he was not participating in the strike but he had failed to report on duty as a matter of

prudence or that he was not aware of the Management's notice for recall or the terms on which the workmen were being recalled. Similarly, it can be said that an employee against which an order for break in service is to be passed under para 1303 of the Manual on the ground of his having participated in illegal strike, can show that he had not participated in the strike, but he was unable to report on duty on account of the reason beyond his control or as a matter of prudence. The employee can also show that the strike was not illegal. If the petitioners had been afforded an opportunity of a hearing before the impugned order with regard to the break in service was passed against them, they would have been able to place before the authorities the circumstances to show that they had not participated in the strike and were always willing to join their duties but were precluded from doing so on account of circumstances beyond their control and they could also show that they were not aware of the notice that was issued by the railway administration calling upon the employees to resume their duties on or before 16 hours of February 25, 1981 and for that reason, they did not report on duty before 16 hours on February 25, 1981. In my opinion, therefore the first contention urged by Shri Mridul, must be accepted and it must be held that it was necessary for the respondents to have afforded an opportunity of hearing to the petitioners before passing the impugned order with regard to the break in service and since such an opportunity was not afforded to the petitioners, the impugned order cannot be upheld.

15. Shri Mridul also submitted that the impugned order is violative of the provisions of Articles 14 and 16 of the Constitution in as much as by the said order, the railway servants who had participated in the strike have been arbitrarily classified into two categories, i. e. employees who reported for duty upto 16 hours on February 25, 1981 and employees who did not report for duty upto 16 hours on February 25, 1981. And those employees who reported for duty before 16 hours February 25, 1981 have not been punished whereas the employees who reported on duty after 16 hours on February, 25, 1981 have been awarded the penalty of break in service and the consequences during therefrom. Shri Joshi has, however, submitted that there is a valid distinction between employees who reported for duty upto 16 hours on February 25, 1981 and employees who reported for duty after 16 hours on February 25, 1981 for the reason that the

railway administration had issued a call to the employees asking them to join duty and. in that, call, it was mentioned that there would be no break in service in respect of employees who report for duty upto 16 hours on February 25, (sic)⁹⁸ and that in view of the; foresaid call made by the railway administration which was duly published, the railway administration was justified in making a distinction between employees who reported for duty upto 16 hours on February 25, 1981 and those employees who did not report for duty upto 16 hours on February 25, 1981 and reported for duty subsequently Shri Mridul has submitted that no such notice containing the aforesaid call was placed on the no Board. Since I have accepted first contention of Sri Mridul and in view of the facts that the impugned order is liable to be quashed for the reason that the impugned order is liable to be quashed for the reason that an opportunity of a hearing was not afforded to the petitioners before the passing of the said order, I do not consider it necessary to deal the second submission urged by Shri Mridul with regard to the impugned order being violative of the provisions of Articles 14 and 15 of the Constitution.

16. In the result, the writ petitions are allowed and the order (Ex. 1) in so far as it relates to the petitioners is quashed. In the facts and circumstances of the case, there will be no order as to costs in these writ petitions.