

Tarini Kumar Vs. Chief Commercial Superintendent Eastern Railway and anr.

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Court : Kolkata

Decided On : Sep-18-1964

Reported in : AIR1965Cal75

Judge : D. Basu, J.

Acts : [Constitution of India](#) - Article 311(2)

Appeal No. : Matter No. 328 of 1963

Appellant : Tarini Kumar

Respondent : Chief Commercial Superintendent Eastern Railway and anr.

Advocate for Def. : Sambhu Ghose, Adv.

Advocate for Pet/Ap. : Trivedi, Adv.

Judgement :

ORDER

D. Basu, J.

1. This petition under Article 226 relates to the petitioner's claim for pay and allowances for the period between the 29th of July, 1959 and the 4th of May, 1961 and arises from the following circumstances:

The petitioner was a clerk in the office of Opposite Party No. 1, the Chief Commercial Superintendent, Eastern Railway. On 1-11-56, the petitioner was arrested by the Police in connection with a Postal fraud case and was suspended with effect from 4-5-56, pending trial. The petitioner was tried, simultaneously, by the Sessions Judge, City Sessions Court, Calcutta and the Sessions Judge, Bhagalpur, on different charges, and was convicted. As a result of this conviction, the Petitioner was dismissed from his service on 29-7-59 but he was, later, acquitted, on appeal, by the High Courts of Calcutta and Patna, respectively. Following this acquittal, the order of dismissal was set aside by the Opposite Party No. 1 by his letter of the 25th August 1961 and the Petitioner was reinstated in service with effect from 27-8-61, but the petitioner has not been allowed his full pay and allowances for the period intervening the date of his dismissal and 'the date of his acquittal' by an order made by the Opposite Party No. 1, and it has been directed by that order that the Petitioner 'shall be deemed to have continued to be under suspension during that period. It would be useful to reproduce that impugned order, which is at annexure A to the petition:

'Sri Tarini Kumar, Clerk C. C. S.'s office (Claims) P.F.A./C No. 337282 who was dismissed from service with effect from 29-7-59 on account of his conviction on a criminal charge has been acquitted by the appellate Court and accordingly he has been re-instated on 28-8-61 vide office Order No. 129/61 dated 26-8-61. Upon a careful consideration of his case it has now been decided by C.C.S. to regularise the intervening period of his absence from 29-7-59 to 27-8-61 as under:

Period From To Details How regularised

(a) 29-7-59 4-5-61 From the date of dismissal to date of acquittal. He is deemed to have been continued under suspension upto the date of acquittal i.e., 4-5-61. He should be paid the subsistence allowance at the rate he was drawing on the date of dismissal.

(b) 5-5-61 27-8-81 From the date of acquittal to the date of reinstatement. He should be treated as on duty and full pay and allowance should be paid.'

2. It is against para (a) of the foregoing order that the instant petition is directed. It should be pointed out in this context that the reference in that paragraph to 4-5-61 as the date of 'acquittal' is wrong inasmuch as the judgments of the Calcutta and the Patna High Courts in the two cases, by which the petitioner was acquitted bear the dates--the 4th August 1959 and the 29th July, 1960. This discrepancy, however, is not material for the purposes of this petition, for the point of law involved is the same, namely: Whether, upon the setting aside of the conviction in view of which the railway servant was dismissed from service, the authority had any right to deprive the railway servant of his pay and allowances for any period during which he could not render his services owing to that order of dismissal?

3. That a Government servant may be dismissed, from his service solely on the basis of his 'conviction on a criminal charge' would appear from Proviso (a) to Article 311(2) of the Constitution. In the instant case, the dismissal was based solely on the fact of the Petitioner's conviction.--on a charge which was not connected with his employment under the Opposite Party, Hence, when that conviction was set aside by the appellate Court, the position at law would be as if the Petitioner was never convicted at law and the dismissal not having been made in conformity with Article 311(2), became a nullity from the date of acquittal on appeal (Vide Union of India V Akbar Sheriff, : (1961)ILLJ615Mad ; R.S. Das v. Divisional Superintendent, Allahabad, : AIR1960 All538 and since the employer had prevented the employee from rendering his services from the date of dismissal onwards, the employer should be liable to pay the wages of the employee from the date of acquittal till the date of reinstatement Vide Davendra v. State of U.P., : (1962)ILLJ266SC . This also follows from Rule 2042 of the Railway Establishment Code, Vol. I, which governs the parties in the instant case. This Rule says that the right of a Railway servant to pay ceases from the date of the order of his removal or dismissal. This 'dismissal' must be a valid legal dismissal. When, therefore, it is established that the dismissal had no legal foundation, the right to wages revives, because it was the employer who had unlawfully prevented the employee to render his service.

4 According to the Respondents, the above general rule has been modified by Rule 2044 of Vol. 1 of the Railway Establishment Code which forms a part of the

conditions of service of the petitioner. This Rule is as follows:

'(1) When a railway servant who has been dismissed, removed or suspended is reinstated, the authority competent to order the reinstatement shall consider and make a specific order:

(a) regarding the pay and allowances to be paid to the railway servant for the period of his absence from duty; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority mentioned in Sub-rule (1) is of the opinion that the railway servant has been fully exonerated or, in the case of suspension, that it was wholly unjustified, the railway servant shall be given the full pay and allowances to which he would have been entitled, had he not been dismissed, removed, or suspended, as the case may be.

(3) In other cases, the railway servant shall be given such proportion of such pay and allowances as such competent authority may prescribe:

Provided that the payment of allowances under Clause (2) or Clause (3) shall be subject to all other conditions under which such allowances are admissible. (4) In a case falling under Clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under Clause (3) the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose.'

5. It is contended on behalf of the Opposite Party that the instant case falls under Sub-rule (3) of the above Rule, and it is as to the applicability of this Sub-rule to the facts of this case that the controversy in the instant proceeding relates. It must be stated at once that if Sub-rule (3) of this Rule be applicable, the Opposite Party was justified in directing that, instead of getting full pay and allowances in respect of the material period, the Petitioner should be allowed to draw only subsistence allowance, as if his suspension continued till the date of acquittal, for, the power to

make such an order would follow from Sub-rules (3) and (5) of Rule 2044, when read with the instruction contained in App. XXXI, Ch. III of the Code (p. 228 of the 1958 Ed.), inasmuch as, from a reading of the judgment of both the High Courts it would appear that the Petitioner was acquitted not without any blemish altogether. His part in the alleged fraud was suggested and also established in part but not to the hilt as would be required to sustain a criminal conviction,--so that it could not be said that he was 'fully exonerated.'

6. The question for determination is whether Rule 2044 of the Code is applicable to the facts of this case, namely, where the dismissal was founded on a conviction by a Criminal Court and that conviction has subsequently been set aside by the appellate Court. The mind of the Government of India in incorporating this Rule, which corresponds to F.R. 54 of the Fundamental Rules, is evident from the Note which appears at p. 228 of the Code,--

'The Government of India with the concurrence of the Auditor-General have decided that F.R. 54 (Rule 2044-R) applies to departmental punishment and not to cases of punishment by a Court of law for an alleged offence which has nothing to do with his official duties.'

7. This interpretation, in so far as it goes, is in consonance with common sense, for, where the dismissal has been founded upon conviction for an offence unconnected with the official duties of the Government servant, there is no justification for withholding his pay even where he has been acquitted, with adverse remarks, because, the acquittal takes away the basis of the dismissal and thereafter the employer has no justification to withhold the wages because, even if it be said that notwithstanding the acquittal, suspicion remains, that suspicion was not connected with the work which he was bound to render under the contract of employment. The view of the Auditor-General or that of the Government of India is not, of course, acceptable as an interpretation of a statutory rule such as Rule 2044 and such interpretation must be a business of the Courts.

8. This Rule, or the corresponding rule in F.R. 54 has, however, come up before the Courts in several cases, and the scope of the Rule may be deduced therefrom.

(a) In *General Manager Northern Rly. v. Swaroopraj*, the Rajasthan High Court appears to have adopted the interpretation given by the Government of India. In that case, the offence with which the employee had been charged was connected with his official duties, namely, corruption. It was held that to such a case Rule 2044(3) was attracted and the Railway authorities were, not, accordingly, bound to allow full pay since the date of dismissal where the accused had not been fully exonerated by the final Court. But, in the opinion of Wanchoo, C.J. (as he then was), the Rule had no application where the offence did not relate to the official duties of the employee (p. 57, *ibid*).

(b) In the case of : (1961)ILLJ615Mad, however, a Division Bench of the Madras High Court took a narrower view of the scope of Rule 2044. In that case, the offence with which the Railway employee was charged was connected with his official duties, and yet the Court held that Rule 2044 had no application at all, inasmuch as the entire Rule applied in a case where the employee had been acquitted of the charge brought against him by a departmental authority and not where he had been acquitted by the judgment of a competent Court. In coming to this conclusion, Jagadisan, J. relied upon the words 'revising or appellate authority' which occurred in Sub-rule (1) of Rule 2044 as reproduced in that judgment:

'When the suspension of a railway servant, is held to have been unjustifiable or not wholly justifiable; or when a railway servant who has been dismissed, removed or suspended is reinstated, therevising or appellate authority may grant to himfor the period of his absence from duty.....' These words, according to Jagadisan, J., referred to the departmental authority, quashing the charges, sitting in appeal or revision.

The words 'revising or appellate authority' however, do not occur in Rule 2044(1) of the Railway Establishment Code, 1958 Ed., which has been placed before me. It reads as follows:

'When a railway servant who has been dismissed, removed or suspended is reinstated, the authority competent to order the reinstatement shall consider and make a specific order.....' The absence of the words 'revising or appellate authority', however, would not make any material difference if we advert to the

Supreme Court decision in : (1962)ILLJ266SC .

(c) Devendra's case, : (1962)ILLJ266SC (ibid), was, of course, not a case of conviction or acquittal by a Court. The employee was dismissed as a result of departmental proceedings held against him on charges relating to his official duties; but the procedure enjoined by Article 311(2) not having been complied with, the order of dismissal was declared a nullity in a suit brought by the employee. The employee was, accordingly, reinstated but the Departmental authority directed that he would get not his full pay etc., but a token sum of Re. 1/- per month from the date of his dismissal till the date of reinstatement. The Supreme Court held that this order was illegal and that the claim of the State to fix the salary of the employee for the period in question under F.R. 54 (to which Rule 2044 corresponds) was 'wholly unjustifiable', because that Rule is applicable only where, the order or, 'dismissal is set aside in a departmental appeal.' Speaking through Sinha, C.J., the Court observed: 'This rule has no application to cases like the present in which the dismissal of a public servant is declared invalid by a civil Court and he is reinstated. This rule, undoubtedly enables the State Government to fix the pay of a public servant whose dismissal is set aside in a departmental appeal. But in this case the order of dismissal was declared invalid in a civil suit. The effect of the decree of the civil suit was that the appellant was never to be deemed' to have been lawfully dismissed from service and the order of reinstatement was superfluous. The effect of the adjudication of the civil Courts is to declare that the appellant had been wrongfully prevented from attending to his duties as a public servant. It would not in such a contingency be open to the authority to deprive the public servant of the remuneration which he would have earned had he been permitted to work.'

9. It has been contended before me on behalf of the Respondent that this decision of the Supreme Court is to be distinguished in the instant case inasmuch as it relates to a case where the dismissal is directly set aside by a Civil Court, and not to a case where the order of dismissal has to be set aside by the Departmental authority after the conviction is quashed in appeal, for, the Criminal Court has nothing to say about the validity of the dismissal. In such a case, it is contended, Rule 2044 will be attracted and when the Departmental authority reinstates the

employee, it shall be entitled to scrutinise the judgment of the Court of appeal to see whether the accused has been 'fully exonerated' or not, and to fix the salary for the relevant period accordingly.

10. This contention cannot, however, stand, on a closer examination. It is true that the Criminal Court has no jurisdiction to set aside the dismissal which was founded upon the conviction, or to reinstate the employee. But even the Civil Court has no power to directly reinstate the employee *High Commissioner for India v. I.M. Lall* . What the Civil Court does is simply to declare that the order of dismissal is 'void and inoperative and that the plaintiff remained a member of the service at the date of the institution of the suit'. . Hence, an order by the dismissing authority to reinstate the Employee is still required, notwithstanding the declaration made by the Civil Court. At the same time, since the Government cannot, under the Rule of Law, disregard the pronouncement of a Court of law, it has no other alternative than to reinstate the employee *Om Parkash v. U.P.*, ILR : AIR1951 All205 so that, in the words of the Supreme Court, the order of the Government, in this behalf is nothing but 'superfluous' and, in such a contingency it would 'not be open to the authority to deprive the public servant of the remuneration which he would have earned had he been permitted to work.' (*Devendra's case*, : (1962)ILLJ266SC .

11. I do not see any difference, in principle, taking place when the conviction, on which the dismissal was founded, is quashed by a competent Court. Under Article 311, a Government servant may be dismissed only in compliance with the requirements of Clause (2) of that Article. An exception to this is provided by Proviso (a), namely, that where the Government servant has been convicted on a criminal charge, he may be dismissed without undergoing the formality prescribed by Clause (2). But once the conviction is set aside by a competent Court, this exception disappears. However, adverse may be the remarks of the Appellate Court, the result of the appeal being allowed, in law, is to quash the conviction. After this, if the Government so desires, the Government may) in appropriate cases, e.g.. in cases of charges connected with the employee's official duties, pursue the employee, further, in a departmental proceeding on the same charges (as observed by the Supreme Court in *Devendra's case*, : (1962)ILLJ266SC and may, then, subject the employee to a fresh order of suspension or even continue

the existing suspension, if the Rules so permit. But where nothing of this sort is done or can be done, the Government has no other alternative than to reinstate the employee, after setting aside the order of dismissal and, after that, it cannot be ordered that the order of suspension shall be deemed to continue. True, the decision of the Criminal Court of appeal is not self-operative and the employee cannot resume his duties without a further order of the Departmental authority; but such order would be no less superfluous than the similar order which follows the declaration of a Civil Court as pointed out in Devendra's case, : (1962)ILLJ266SC .Supposing the Departmental authority refuses to make such order, notwithstanding the reversal of the order of conviction, the employee would, apart from any other remedies, be entitled to bring a suit for a declaration, that the order of dismissal is void, because of contravention of Article 311(2), which comes into full force as soon as the protection of Proviso (a) disappears. Article 311(2) knows of no adverse remarks or the like. Such declaratory suit is, therefore, bound to succeed in view of the final judgment of the Criminal Court, and the position would then be the same as in Devendra's case, : (1962)ILLJ266SC which came up before the Supreme Court. That is why I have said that there is no difference in principle as between the pronouncements of the Civil and Criminal Courts, in this context.

12. In my judgment, therefore, Rule 2044(3) has no application where the dismissal has to be set aside in view of the reversal of the conviction, on which the dismissal was founded, by a Court of appeal. At any rate, even if the narrower view be taken, namely, that the Rule shall have no application where the conviction was on a charge unconnected with the official duties of the employee, even then the Petitioner before me shall succeed, for, such is the fact in the instant case.

13. I am not called upon to make any pronouncement as to the right of the Petitioner to his salary for the period intervening the date of his suspension and that of his dismissal, for, no claim in that behalf has been made in this Petition. Nothing in this judgment will affect the rights of the Petitioner, if any, in that behalf.

14. In the result the Rule must be made absolute, but, in the circumstances of the case, there will be no order as to costs. The proper order will be an order in the nature, of mandamus, cancelling part (a) of the impugned order at Ann. A (p. 15 of the Petition) and directing the Respondents to treat the Petitioner as on duty and to pay his full pay and allowances (as under part (b) of the impugned order) in respect of the period intervening July 29, 1959 and May 4, 1961.

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