

CASE NO.:
Appeal (civil) 463-464 of 2005

PETITIONER:
WEST BENGAL STATE ELECTRICITY BOARD

RESPONDENT:
CHANDERNATH BANERJI

DATE OF JUDGMENT: 06/02/2008

BENCH:
H.K. SEMA & MARKANDEY KATJU

JUDGMENT:
JUDGMENT

O R D E R

CIVIL APPEAL NOS.463-464 OF 2005

These appeals are preferred by the West Bengal State Electricity Board.

Briefly stated the facts leading to the filing of these appeals are as follows:

The respondent was appointed as Junior Superintendent in Telkapara Group Electricity Supply now renamed as West Bengal State Electricity Board. By an order dated 24.1.1972 he was allegedly transferred as Junior Station Superintendent to Hilly Electricity Supply under Maldah (ONM). It is alleged that the respondent did not join the place of posting and unauthorisedly remained absent from duty from 08.02.1972 to 19.03.1975. It appears that inadvertently an order dated 19.03.1975 was passed by which he was given promotion to the post of Sub-Assistant Engineer at Murshidabad. When the respondent went to join at the place of his posting on being promoted the concerned authority asked him to bring the release order from the previous posting. Thereafter, it is stated that he produced as many as 10 Medical Certificates from Homeopathic Doctor in Calcutta showing that he was suffering from gastric ulcer and was under treatment of various Homeopathic Doctors. It is not disputed that his leave applications were never allowed.

After examining all these documents the authority finally terminated the service of the respondent by an order dated 18.12.1976, invoking the power provided under Regulation 33(1)(iii) of the West Bengal State Electricity Board Employees' Service Regulations, 1965 (in short 'Regulations').

Regulation 33(1)(iii) reads:

"33(1)Unless otherwise specified in the appointment order in any particular case, the services of a permanent employee of the Board may be terminated without notice:

(i)
(ii)

(iii) if he remains absent from duty, on leave or otherwise, for a continuous period exceeding 2 years."

The respondent appearing in person relied on the judgment of the Constitution Bench of this Court rendered in Deokinandan Prasad vs. The State of Bihar and others, 1971(2) SCC 330. He would contend that his services were done away without giving an opportunity of hearing and, therefore, the order of termination is in violation of mandate of Article 311 of the Constitution.

The Constitution Bench of this Court in Deokinandan Prasad's case (supra) pointed out in paragraph 22 at page 340 as under :

"22. A contention has been taken by the petitioner that the order, dated August 5, 1966, is an order removing him from service and it has been passed in violation of Article 311 of the Constitution. According to the respondents there is no violation of Article 311 on the other hand, there is an automatic termination of the petitioner's employment under Rule 76 of the Service Code. It may not be necessary to investigate this aspect further because on facts we have found that Rule 76 of the

Service Code has no application. Even if it is a question of automatic termination of service for being continuously absent for over a period of five years, Article 311 applies to such cases as is laid down by this Court in Jai Shanker v. State of Rajasthan, (1966) 1 SCR 825. In that decision this Court had to consider Regulation No.13 of the Jodhpur Service Regulations."

It may be noticed that in the aforesaid decision it was found by the Constitution Bench that the appellant was not absent for a continuous period of 5 years. Hence the observation that Article 311 would apply even if the termination of service is for 5 years continuous absence was an obiter dicta, as it was not necessary to decide the case.

As would appear from paragraph 22 of the Constitution Bench judgment of this Court referred to the decision of this Court in Jai Shanker vs. State of Rajasthan, (1966) 1 SCR 825. In Jai Shanker's case (supra) this Court considered Regulation No.13 of the Jodhpur Service Regulations. Regulation 13 reads :

"13. An individual who absents himself without permission 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."(emphasis supplied)

1. Therefore, it appears that Regulation 13 speaks about the absence without permission for one month or longer. As already pointed out in the present case the Regulation 33(1)(iii) speaks about the absence from duty on leave or otherwise for a continuous period exceeding two years. Undisputedly in the present case the respondent was unauthorisedly absent from 8.2.1972 to 19.3.1975 i.e. for more than three years. The distinguishing facts in the case of Jai Shanker (supra) and the present case is that whereas in Jai Shanker's case (supra) Regulation 13 speaks of absence without permission for one month or longer but in the present case the Regulation 33(1)(iii) speaks about the absence from duty without leave for a continuous period exceeding two years. In our view, therefore, the decision rendered by this Court in Deokinandan Prasad's case (supra) referring to Jai Shanker's case (supra) is distinguishable on facts. In the present case, we are of the view that Regulation 33(1)(iii) is valid and the authority was justified in invoking the power under Regulation 33(1)(iii) of the Regulations terminating the service of the respondent. We clarify that the absence for one month for termination of service under Regulation 13 of the Jodhpur Service Regulations which was considered by this Court in Jai Shanker's case (supra) referred to by the Constitution Bench of this Court in Deokinandan Prasad's case (supra) is different from Regulation 33(1)(iii) of the present case which speaks about absence from duty exceeding two years. Surely, two years' absence is very different from one month's absence.

For the reasons aforesaid the orders of the High Court, First and Second Appellate Court are accordingly set aside. We are of the view that the termination order dated 18.12.1976 has been validly made.

The appeals are allowed. No cost.