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JAI SHANKER

v.

STATE OF RAJASTHAN

September 16, 1965

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[P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO,
[M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.]

Constitution of India, Art. 311—Jodhpur Service Regulations, Regulation 13—Provision for automatic termination of service for over staying leave by more than one month—Such termination whether attracts Art. 311.

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The appellant was Head Warder in Rajasthan and in the permanent service of the State. On April 14, 1950 he proceeded on leave for two months. He later asked for extensions of the leave on medical grounds. He was due to join on August 13, 1950; his request for leave beyond that date was refused. Thereafter he made further applications for leave, the last of them supported by a medical certificate. To his last and some of the earlier applications he received no reply but on November 8, 1950, he received a communication from the Deputy Inspector General of Prisons that he was discharged from service from August 13, 1950. Departmental remedies having failed he filed a suit challenging his removal from service. The trial court decided against him and the first appellate court in his favour. The High Court however restored the order of the trial court whereupon the appellant came to this Court by special leave.

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It was contended on behalf of the appellant that in not giving him any notice before terminating his services the State Government had acted in contravention of Art. 311 of the Constitution. On behalf of the respondent State reliance was placed on Regulation 13 of the Jodhpur Service Regulations which laid down that an individual who absented himself without permission for one month or long after the end of his leave would be considered as having sacrificed his appointment and could only be reinstated with the sanction of the competent authority. On the basis of this Regulation it was contended that the appellant's appointment had terminated automatically and no question of his removal from service attracting the provisions of Art. 311 arose.

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HELD : The constitutional protection given to Government employees by Art. 311 cannot be taken away in this manner by a side wind. Regulation 13 no doubt speaks of reinstatement but it really comes to this that a person will not be reinstated if he is ordered to be discharged or removed from service. The question of reinstatement can only be considered if it is first considered whether the person should be removed or discharged from service. Whichever way one looks at the matter, the order of the Government involves a termination of the service when the incumbent is willing to serve. [828 G; 829 C-D]

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The Regulation involves a punishment for over-staying one's leave and the burden is thrown on the incumbent to secure re-instatement by showing cause. It may be convenient to describe him as seeking reinstatement but this is not tantamount to saying that because the person will only be reinstated by an appropriate authority that the removal is automatic and outside the protection of Art. 311. A removal is removal and if it is punishment for overstaying one's leave an opportunity must be given to

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the person against whom such an order is proposed, no matter how the Regulation describes it. To give no opportunity is to go against Art. 311. [829 E-G] A

The appellant was entitled to a declaration that his removal from service was illegal.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 576 of 1964. B

Appeal by special leave from the judgment and order dated December 11, 1962 of the Rajasthan High Court in S.B. Civil Regulation Second Appeal No. 37 of 1961.

U. M. Trivedi, Chandra Dhar Issar and Ganpat Rai, for the appellant. C

G. C. Kasliwal, Advocate-General, Rajasthan, M. M. Tiwari, K. K. Jain and R. N. Sachthey, for the respondent.

The Judgment of the Court was delivered by

Hidayatullah, J. The appellant Jai Shanker, who appeals to this Court by special leave against the judgment of the High Court of Rajasthan dated December 11, 1962, was a Head Warder, Central Jail, Jodhpur in 1950. He had started his service as a Warder in April 1940, was promoted as Head Warder in 1944 and was a permanent servant of the State. On April 14, 1950 he proceeded on leave for two months ending on June 13, 1950. He applied for extension of leave on medical grounds for 20 days, as he had fallen ill, and again for 10 days. Later he asked for an extension by a month. He was due to join on August 13, 1950. On August 14, 1950 he was told that no more leave would be granted and that his transfer to Jaipur, made while he was ill at Hyderabad, would not be cancelled. D

Jai Shanker returned to Jodhpur from Hyderabad on September 1, 1950 and applied for further leave. He made several applications. His last application was sent by Registered post, supported by a medical certificate, on November 3, 1950 asking for leave till November 11, 1950. To his last and some of the earlier applications for leave he received no reply and on November 8, 1950, he received a communication dated 2/4-11-50 of the Deputy Inspector General, Prisons under endorsement from the Superintendent, Central Jail, Jodhpur that he was discharged from service from August 13, 1950. He preferred an appeal against that order to the Inspector General of Prisons, Rajasthan but it was dismissed on September 24, 1951. Jai Shanker submitted an appeal to the Home Secretary, Rajasthan Government. He was informed by a letter dated December 17, 1953 from the Home E

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- A** Secretary that the papers had been sent to the Inspector General, Prisons for necessary action. Jai Shanker alleges that he was called by Personal Assistant to the Inspector General and was offered reinstatement if he undertook not to claim back salary but he declined the offer. After serving a notice under s. 80 of the Code of Civil Procedure, Jai Shanker filed the suit from which this
- B** appeal arises. He asked for a declaration that the termination of his service was illegal inasmuch as he was entitled to a notice enabling him to show cause against the termination of his service as required by Art. 311 of the Constitution. He also asked for his back salary amounting to 2369.
- C** The Subordinate Judge, Jodhpur decided that Jai Shanker's allegations about his illness were true but he rejected the contention that the discharge from service was illegal. As a consequence the claim for back salary was disallowed and the suit was ordered to be dismissed. On appeal to the District Court Jai Shanker succeeded in getting a reversal of the decree of the trial Judge. The
- D** District Judge, Jodhpur held that Jai Shanker was entitled to a declaration that his removal from service was illegal and that he continued to remain in employment and was also entitled to all arrears of salary admissible to him under the rules. The State Government appealed against the judgment and decree of the District Judge and by the order under appeal the decree of the District
- E** Judge was set aside and the decree of the Subordinate Judge was restored. Jai Shanker was ordered to pay costs in the High Court and the two courts below.

- The short question in this appeal is whether Jai Shanker was entitled to an opportunity to show cause against the proposed
- F** punishment as required by cl. (2) of Art. 311. It is admitted that no charge was framed against him. Nor was he given any opportunity of showing cause. The case for the State Government is that Government did not terminate Jai Shanker's service, and that it was Jai Shanker who gave up the employment by remaining absent. It is submitted that such a case is not covered by Art. 311.
- G** In support of this contention certain Regulations of the Jodhpur Service Regulations are relied upon and we shall now refer to them. Regulation 7 lays down that leave cannot be claimed as a right and that Government has discretion to refuse or revoke leave of any description. Regulation 11 lays down that an individual who has been granted leave on medical grounds for a period of one
- H** month or more may not return to duty without producing a certificate of fitness signed by an officer authorised by a general or special order to grant such certificate. Regulation 12 lays down

that an individual who absents himself without permission or remains absent at the end of his leave is entitled to no salary for the period of such absence and that period will be debited against his leave account unless the leave is sanctioned or extended under the ordinary rules by competent authority. Regulation 13 is important because it forms the basis of the contention that Art. 311 does not apply to this case. That Regulation may be reproduced here :

"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.

NOTE :—The submission of an application for extension of leave already granted does not entitle an individual to absent himself without permission."

It is contended that this Regulation operated automatically and no question of removal from service could arise because Jai Shanker must be considered to have sacrificed his appointment. Under the Regulation he could only be reinstated with the sanction of the competent authority. We have, therefore, to determine whether this Regulation is sufficient to enable the Government to remove a person from service without giving him an opportunity of showing cause against that punishment, if any.

It is admitted on behalf of the State Government that discharge from service of an incumbent by way of punishment amounts to removal from service. It is, however, contended that under the Regulation 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 over-staying 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 a regulation is made, it is necessary that Government should give the person an opportunity

- A of showing cause why he should not be removed. During the hearing of this case we questioned the Advocate General what would happen if a person owing to reasons wholly beyond his control or for which he was in no way responsible or blameable, was unable to return to duty for over a month, and if later on he wished to join as soon as the said reasons disappeared? Would in such
- B a case Government remove him without any hearing, relying on the regulation? The learned Advocate General said that the question would not be one of removal but of reinstatement and Government might reinstate him. We cannot accept this as a sufficient answer. The Regulation, no doubt, speaks of reinstatement but it really comes to this that a person would not be reinstated if he is
- C ordered to be discharged or removed from service. The question of reinstatement can only be considered if it is first considered whether the person should be removed or discharged from service. Whichever 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
- D 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 over-staying his leave, but we do not think that Government can order a person to be discharged
- E 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. It may be convenient to describe him as seeking reinstatement but this is not
- F tantamount to saying that because the person will only be reinstated by an appropriate authority, that the removal is automatic and outside the protection of Art. 311. A removal is removal and if it is punishment for over-staying 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. To give no opportunity is
- G to go against Art. 311 and this is what has happened here.

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

H The order of the High Court must therefore be set aside and that of the District Judge, Jodhpur restored. The question of what back salary is due to Jai Shanker must now be determined by the

trial Judge in accordance with the rules applicable, for which purpose there shall be a remit of this case to the civil Judge, Jodhpur. **A**

The State Government shall pay the costs of Jai Shanker in this Court, the High Court and the two courts below, incurred so far. The appellant has been permitted to appeal *in forma pauperis*. The State will pay the Court Fee payable on the memorandum. **B**
The Advocate for the appellant will be entitled to recover his costs.

Appeal allowed.