
(2005) 03 GAU CK 0067
In the Gauhati High Court

Abhijit Ghosh

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 23-03-2005

Acts Referred:

Citation : (2005) 107 FLR 785 : (2006) 3 GLT 560

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.B. Misra, J.—None appears for the petitioner. Heard Mr. U.B. Saha, learned Government Advocate assisted by Mr. J. Majumder, learned Counsel for the respondents.

2. Record has been perused.

3. The petitioner vide order dated 15th November, 1990 of the Deputy Secretary to the Government of Tripura was appointed as Dental Surgeon in the Department of Health & Family Welfare Department on ad-hoc basis for a period of six months with effect from 4.9.1990 with certain condition indicated in the appointment order. By Order dated 22nd February, 1993 passed by the Joints Secretary to the Government of Tripura the petitioner's service was terminated under the proviso to sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965 with the payment of sum equivalent to the amount of his pay plus allowances for one month in lieu of one month's notice thereof.

4. Counter affidavit has been filed by the respondents which indicates that the petitioner had also submitted a forged certificate asserting him to be a scheduled caste candidate, however, on verification it was found that the certificate of the petitioner was not a genuine certificate, however, in respect of that aspect a disciplinary proceeding could have been started against petitioner for taking appropriate action against the petitioner. However, the respondent had not

resorted to take any disciplinary action and passed an order terminating the service by an order simplicitor.

5. In *State of Uttar Pradesh and Anr. v. Kaushal Kishore Shukla* 1901 (62) FLR 350 (SC) the employee had been appointed on a temporary basis for a fixed tenure. During the period of his service, adverse entries were made in his character roll. Complaints were also received by the auditors of the employer. A summary inquiry was held. It was found that the auditor's complaint was correct. The employee was transferred to another post where he did not join and the employer terminated his services, the Supreme Court, while upholding the order of termination, observed that mere fact that prior to the issue of the termination an enquiry was held against the employee" did not make the order of termination. as punitive. It was observed by the Hon"ble Supreme Court in *Kaushal Kishore Shukla* (supra) as below :

(1) The Principle of "last come first go" is applicable to a case where on account of reduction of work or shrinkage of cadre retrenchment takes place and the services of employees are terminated on" account of retrenchment. In the event of retrenchment the principle of "last come first go" is applicable under which senior in service is retained while the junior's services are terminated. But this principle is not applicable to a case where the services of a temporary employee are terminated on the assessment of his work and suitability in accordance with terms and conditions of his service. If out of several temporary employees working in a department senior is found unsuitable on account of his work and conduct, it is open to the competent authority to terminate his service and retain the services of juniors who may be found suitable for the service. Such a procedure does not violate principle of equality, enshrined under Article 14 and 16. If a junior employee is hard working, efficient and honest his services could not be terminated with a view to accommodate the senior employee even though the is found unsuitable for the service it this principle is not accepted there would be discrimination and the order of termination of a junior employee would be unreasonable and discriminatory. On the admitted set of facts, the order of termination in the instant case, could not be rendered illegal or unjustified on the ground of juniors being retained in services. The view taken by the High Court is not sustainable in law."

(2) A temporary Government servant has no right to hold the post. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or She relevant rules or it may decide to take punitive action against the temporary Government servant. If the services of a temporary Government servant is terminated in accordance with the terms and conditions of service, it will not visit him any evil consequences. If on the perusal of the character roll entries or on the basis of preliminary inquiry on the allegations made against an

employee, the competent authority is satisfied that the employee is not suitable for the service whereupon the services of the temporary employee are terminated no exception can be taken to such an order of termination. Before terminating the services of a temporary servant or reverting the person officiating in a higher post to his substantive post, the government may hold a preliminary enquiry to form the requisite satisfaction for the continuance of the officiating Government servant. Such an inquiry does not change the nature of the order of the termination or reversion. If, however, it is decided to take punitive action the competent authority may hold a formal inquiry by framing charges and giving opportunity to the Government servant in accordance with Article 311 (2) which is applicable to temporary Government employee also.

6. In *Radhey Shyam Gupta Vs. U.P State Agro Industries Corporation Ltd. and Another*, full scale inquiry was conducted in reference to the allegations of bribery against a temporary employee where the Court set aside the termination as that the report submitted was not a preliminary inquiry report but was in fact a final one which gave findings as to the guilt of the employees. It was observed by the Supreme Court in *Radhey Shyam Gupta* (supra) as below:

The termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as the above facts are merely the motive and not the foundation., The reason why they are the motive is that assessment is not done with the object of finding out any misconduct on the part of the officer. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary enquiry is held because the purpose of preliminary enquiry is to find out if there is prima facie evidence or material to initiate a regular departmental enquiry. The purpose of the preliminary enquiry is not to find out misconduct on the part of the officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental enquiry is started, a charge-memo issued, reply obtained, and an enquiry officer is appointed, If at that point of time, the enquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. The departmental enquiry was stopped because the employer was not sure of establishing the guilt of the employee. The employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer by opting to pass a simple order of termination as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found, and were merely the motive.

But in cases where the termination is preceded by an enquiry and evidence is

received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence" of a future regular departmental enquiry. In such case, the termination is to be treated as based or founded upon misconduct and will be punitive. There are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definite and clear findings of the enquiry officer; which are all arrived at behind the back of the employee even though such acceptance of findings is not recorded in the order of termination, that is why the misconduct is the foundation and not merely the motive in such case.

7. In *Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others*, the termination order itself referred to three other letters where one of the letters explicitly referred to misconduct on the part of the employee and also referred to an Inquiry Committee's report, mentioning that the employee was guilty of misconduct as such the termination held as stigmatic was set aside. In *Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others*, the Supreme Court held:

28. At the outset, we may state that in several cases and in particular in *State of Orissa v. Ram Narayan Das*, it has been held that use of the word "unsatisfactory work and conduct" in the termination order will not amount to a stigma.

8. In *AIR 2000 1706 (SC)* a Constable had successfully completed his training, and his period of probation without blemish. One year later, his services were terminated by issuance of a notice in terms of Rule 3 of the U.P. Temporary Government Servants' (Termination of Service) Rules, 1975 for which an enquiry was held into the allegations of misconduct. The Hon'ble Supreme Court found that the inquiry was not held to judge the suitability of the constable but with a view to punish him, therefore, the order was held to be punitive and was set aside. The Supreme Court in *Chandra Prakash Shahi (supra)* has occasion to test the applicability of motive or foundation behind termination classifying termination as simplicitor or punitive and the Supreme Court has indicated the real test when the termination of employee was preceded by preliminary enquiry and such inquiry was motivated to find out unsuitability of employee then termination in such circumstances was held to be valid. However, if for allegations of serious misconduct for which preliminary enquiry was conducted behind the back of the employee to ascertain the truth and then termination is brought about, such termination, having regard to other circumstances of a case, has to be taken as founded on misconduct and therefore is treated to be punitive. On the other hand in regard to termination of a probationer, it has to be seen whether enquiry was for the purpose of determining his suitability for retention in service/confirmation or for the purpose of finding out the truth in

allegations against the employee, if the enquiry is to only find out the suitability, the order of termination shall be simplicitor and if it is a case of finding out the truth in the allegations against the employee, the termination shall be founded on misconduct.

9. In Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, the Supreme Court has held that order terminating the service of probationer for unsuitability of the job was not by itself stigmatic when termination order was passed in terms of appointment order shortly after expiry of extended period of probation, stating that even during that period his work and conduct was found not satisfactory and order of termination could not be treated ex facie stigmatic by merely holding of a prior inquiry in which the inquiry report contained nothing more against the employee than his inability to meet the requirements of the post was also further held could not render the said termination order punitive relating to the matters of ad hoc or probationer or temporary employee. The Supreme Court while considering different derisions e.g. Parshotam Lal Dhingra Vs. Union of India (UOI), Samsheer Singh Vs. State of Punjab and Another, Binjamin (A.G.) v. Union of India 1967 (15) FLR 347(SC) V.P. Ahuja v. State of Punjab 2003 SCC 239 Krishnadevaraya Education Trust and Another Vs. L.A. Balakrishna, H.F. Sangati etc. Vs. R.G. High Court of Karnataka and Others etc., and S.P. Vasudeva Vs. State of Haryana and Others, has observed in Pavanendra Narayan Verma (supra) as below:

One of the judiciary evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) terminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.

Therefore, whenever a probationer challenges his termination the Court first task will be to apply the test of stigma or the "form" tests. If the order survives this examination the "substance" of the termination will have to be found out.

Before considering the facts of the case before us one further, seemingly intractable, area relating to the first tests needs to be cleared viz., what language in a termination letter would amount to a stigma? Generally speaking when a probationers appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconducts or in aptitude, what ever the language used in the termination order may be. Although strictly speaking the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which inputs something over and above mere unsuitability for the job.

10. In *Shailaja Shivajirao v. President, Honble Khasdar U.G.S. Sanstha and Ors.*, (2002) 2 LLJ 813SC employee assailing the termination of a temporary Government servant during probation period (by mentioning in the order that the services of employee were no longer required as she was warned in writing about certain draw backs in her works and her works were not beneficial to the employer on the ground that it was penal and stigmatory in nature having been passed without holding any enquiry or giving notice to the appellant such plea was turned down by the Supreme Court by observing that the appointment letter itself indicated tenure of appointment, which could be terminated at any time without notice. The Supreme Court in *Shailaja, Shivajirao Patil* (supra) has observed as below:

The question whether an order of termination of a probationer or temporary employee could be held stigmatic came up for consideration before a Bench of this Court, where one of us (Pattanaik, J) was a party, since reported in *Pavanendra Narayan Verma* (supra). In that case also, an enquiry had been held prior to the order of termination. On examining the entire gamut of case-law right from *Purshotam Lal Dhingra* (supra) the Court came to the conclusion that a mere holding of an enquiry does not ipso facto make the order of termination penal in nature, once the employer wishes not to continue the enquiry in exercise of his right in accordance with the terms of appointment. The Court held that the enquiry held prior to the order of termination cannot turn an otherwise innocuous order into one of punishment. An employer is entitled, to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employees concerned. Bearing in mind the decision of this Court in the aforesaid case, and on examining the facts and circumstances together with the impugned order of termination we see no justification for our interference with the impugned order, as in our view the impugned order cannot be held to be stigmatic in any way.

11. In *Dhananjay Vs. Chief Executive Officer, Zila Parishad, Jalna*, the Supreme Court after considering its own decision passed in *Union of India v. Bihari Lal Sidhana* 1997 (76) FLR 9 (SC) (Sum) : 1997 FLR 498 : 1997 (2) CLR 13 had upheld the termination of a temporary Government employee passed in reference to the Central Civil Services (Temporary Service) Rules, 1965 by observing that even if an employee was suspended and an enquiry was contemplated against him, the misconduct of the employee shall not be treated as the foundation for passing the termination order. When the termination of temporary employee passed under the Rules without holding an enquiry then mere allegations or suspension of employee in contemplation of an enquiry culminating in termination order could not be held to be punitive attaching stigma. In *Dhananjay* (supra), the Supreme Court has observed as follows:

Para 2 of the impugned order of termination of services makes a mention of the fact that the appellant was suspended. The learned Counsel for the appellant,

pointing out this paragraph, submitted that it would cast stigma on the appellant and it would adversely affect his prospects. The High Court, in dismissing the writ petition, relied on the decision of this Court in the case of Bihari Lal aforementioned, Para 5 of the said judgment reads thus:

5. It is true that the respondent was acquitted by the criminal Court but acquittal does not automatically give him the right to be reinstated into the service. Whether the delinquent Government servant can be taken into service or disciplinary action should be taken under the Central Civil Services (Classification, Control and Appeal) Rules or under the Temporary Service Rules. Admittedly, the respondent had been working as a temporary Government servant before he was kept under suspension. The termination order indicated the factum that he, by then, was under suspension. It is only a way of describing him as being under suspension when the order came to be passed but that does not constitute any stigma. Mere acquittal of Government employee does not automatically entitle the Government servant to reinstatement. As stated earlier, it would be open to the appropriate competent authority to take a decision whether the enquiry into the conduct is required to be done before directing reinstatement or inappropriate action should be taken as per law, if otherwise available. Since the respondent is only a temporary Government servant, the power being available under Rule 5(1) of the Rules, it is always open to the competent authority to invoke the said power and term the services of the employee instead of conducting the enquiry or to continue in service a Government servant accused of defalcation of public money. Reinstatement would be a charter for him to indulge with impunity in misappropriation of public money.

12. In *Union of India and Ors. v. A.P. Bajpai and Ors.*,¹ the termination of a temporary Government servant in reference to Rule 5(1) of C.C.S. (Temporary Service) Rules, 1965 was held to be justified and the bases stated in the department's counter-affidavit to assess the unsuitability of the employee was held not to be relied on to infer that the termination order was stigmatic. The Supreme Court has observed in para 6 as below:

In a recent case in *Krishnadcavanaya Education Trust v. I.A. Balakrishna* dealing with case of termination simplicitor of a probationer, this Court observed that there can be no manner of doubt that the employer is entitled to engage the service of a person on probation and if his services are not satisfactory during the period of probation, which means he is not suitable for the job, then the employer has right to terminate the services. If such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer were terminated. The Court went on to add:

Mere fact that in response to the challenge the employer states that the services were not satisfactory would not ipso facto mean that the services of the probationer were being terminated by way of punishment.

13. It was observed by Supreme Court (Constitution Bench) that an affidavit cannot be relied on to improve or supplement an order in *Mahinder Singh Gill v. Chief Election Commissioner, New Delhi* 1998 (1) SCC 405. In *Mahinder Singh Gill* (supra):

When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so, mentioned and cannot be supplemented by fresh reason in the shape of affidavit or otherwise.

Equally, an order which is otherwise valid cannot be invalidated by reason of any statement in any affidavit seeking to justify the order. This is also what was held in *Kaushal Kishore Sukla*. (supra):

The allegations made against the respondent contained in the counter-affidavit by way of a defence filed on behalf of the appellants also do not change the nature and character of the order of termination.

14. In view of the above observations, the petitioner is not entitled to get any relief as prayed for. The petition is dismissed accordingly.