
(1995) 08 CAL CK 0035
In the Calcutta High Court
Case No : C.O. No. 9038 (W) of 1995

Arindam Chatterjee

APPELLANT

Vs

Coal India Ltd. and Others

RESPONDENT

Date of Decision : 30-08-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1997) 3 LLJ 1070

Hon'ble Judges : Satya Brata Sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Satya Brata Sinha, J.—This application is directed against an order dated May 22, 1995 as contained in Annexure "B" to the writ petition whereby and whereunder the Respondent No. 5 terminated the petitioner's probationary appointment in exercise of its jurisdiction under Clause 6 of Letter of Appointment issued to him being dated December 2 & 6, 1994.

2. The fact of the matter lies in a very narrow compass.

3. The petitioner was a land loser. He was appointed by the respondent company in terms of a letter of appointment dated December 2 & 6, 1994, a copy whereof is contained in Annexure "A" to the writ petition. Clause 6 of the said letter of appointment reads thus :

"6. Your services will be liable to be terminated at any time during your probationary period at the discretion of the management."

4. The contention of the petitioner, inter alia, is that the aforementioned provision is ultra vires Article 14 of the Constitution of India as also Section 23 of the Indian Contract Act.

5. The respondents have filed an Affidavit-in opposition. In the said Affidavit-in-Opposition, the respondents themselves stated as follows:

i) The writ petitioner along with others assaulted Sri Chowdhury, Manager, Tilabani Colliery without any provocation and writ petitioner had taken a main role in organising such assault.

ii) The father of the writ petitioner Sri Ashoke Kumar Chatterjee is working as an Assistant Foreman (E) of Tilabani Colliery under Eastern Coalfields Limited and at the material point of time writ petitioner was working at Jhanjra Project under Eastern Coalfields Limited.

iii) On May 20, 1995 H. K. Chowdhury, Manager of Tilabani Colliery of Eastern Coalfields Limited reported the incident to the General Manager, Bankola Area and the said General Manager appointed Sri S. K. Biswas, the Personnel Manager, Bankola area for holding an administrative level enquiry on the said complaint. The said Personnel Manager made an enquiry and submitted his report before the General Manager, Bankola Area.

iv) The Deputy Chief Personnel Manager, Bankola Area by his letter dated May 22, 1995 forwarded, the report of the Enquiry Officer as well as recommendation of the General Manager, Bankola Area to the General Manager, Jhanjra Area for his kind perusal and necessary action as the petitioner was working in the Jhanjra Area under Eastern Coalfields Ltd. A copy of the said letter dated May 22, 1995 together with all its enclosures are annexed hereto and collectively marked with the letter "C".

6. The General Manager upon receipt of the aforementioned enquiry report, by an order dated May 22, 1995 as contained in Annexure "D" to the affidavit-in-opposition directed :

"I have examined the case of Shri. Arindam Chatterjee who is serving as Cableman (T) at M. I. C., Jhanjra Project, referred to me by General Manager, Bankola Area. After examining the said letter and enclosed papers it has been found that aforesaid workman who had been appointed by the General Manager, Bankola Area, vide appointment letter No. 8A/ PD /A-III (7) / 3679 dated December 2/6, 1994 has been posted in this Area. He is still under probation. It is most unfortunate that being an employee of the Company he can indulge in this way in assaulting the Senior Officer E.C.L. serving in sister Colliery. He has appointment (sic) by such unpleasant action committed by him during his probationary period.

This is fit case where his probationary employment should be terminated as per Clause 6 of his Appointment letter.

Hence, I order for termination of his service accordingly.

7. Mr. Basu, learned counsel appearing on behalf of the petitioner, raised two contentions in support of this application. The learned counsel submitted that as an unguided, unbridled and uncanalised power has been conferred upon the respondent to terminate the probationary period of the petitioner at any time at the discretion of the management, the same is ultra vires Article 14 of the

Constitution of India as also Section 23 of the Indian Contract Act. Reference in this connection has been made to in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, and in case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, . Alternatively, it was submitted that in any event it would be evident from the Affidavit-in-Opposition that the petitioner's services were terminated during his probationary period on the basis of allegation of misconduct which has cast a stigma on the petitioner, the impugned order must be held to be wholly illegal and bad in law as no opportunity of hearing was given to the petitioner prior thereto nor any enquiry was conducted in presence of the petitioner. According to the learned counsel for the petitioner, the impugned order although innocuous on the face of it, must be judged in the light of the materials disclosed in the Affidavit-in-Opposition. The learned counsel in support of his aforementioned contention has relied upon in the case of Samsher Singh Vs. State of Punjab and Another, in Jamuna Ram v. Bihar State Warehousing Corporation reported in 1980 (2) Serv LR 760 : (Patna) and in Dr. T.C. Pillai Vs. The Indian Institute of Technology, Guindy, Madras, .

8. Mr. Banerjee, learned counsel, appearing on behalf of the respondent, submitted that it is now well-settled that no right is derived by an employee during his period of probation. Reliance in this connection has been made on Unit Trust of India and Others Vs. T. Bijaya Kumar and Another, . It was further submitted that as the Respondent No. 5 has exercised his jurisdiction under Clause 6 of the letter of Appointment, no stigma can be said to have been attached to the petitioner and in this view of the matter, the impugned order cannot be said to be bad in law.

9. Reliance in this connection has been made to Unit Trust of India and Others Vs. T. Bijaya Kumar and Another, State of Uttar Pradesh and Another Vs. Kaushal Kishore Shukla, , Governing Council of Kidwai Memorial Institute of Oncology, Bangalore Vs. Dr. Pandurang Godwalkar and another, and M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another, The learned counsel further submits that an employer has an inherent right to terminate the service of the probationer during the period of probation and in this view of the matter, this Court should not invoke its writ jurisdiction in favour of the petitioner. It was alternatively submitted that if it is held that Clause 6 of the letter of appointment is intra vires, the petitioner being a workman, this application is not maintainable as he should pursue his remedy under the Industrial Disputes Act.

10. Mr. Banerjee in this connection has placed strong reliance on Thakur Majhi v. The Chairman-cum-Managing Director, Eastern Coalfields Ltd. reported in (1996(Supp.) III LLJ 95) .

11. The questions which, thus, arise for consideration in this application are :

(1) Whether Clause (6) of the offer of appointment dated December 2 / 6, 1994

is ultra vires Article 14 of the Constitution and Section 23 of the Indian Contract Act?

(2) Whether in the facts and circumstances of this case the service of the petitioner can be said to have been validly terminated?

(3) Whether this Court should exercise its jurisdiction under Article 226 of the Constitution of India in favour of the petitioner as allegedly he has an alternative remedy under the Provisions of Industrial Disputes Act?

Re: Question (1)

12. It is not in dispute that the petitioner was appointed on Probation. An employee appointed under Probation does not have any right to be confirmed in service. His right to be appointed permanently by the employer would depend upon his performance during the period of Probation. It is also a well settled principle of law that the very purpose of placing a person on probation is to assess his suitability in the job in question, if during the period of Probation his performance is not satisfactory the employer can either terminate his service in terms of offer of appointment on the expiry of the probationary period or extend the period of probation. In such cases the concerned employee even does not have a right to be heard as the principles of natural justice are not required to be complied with.

13. In *United India Insurance Company Ltd. v. Partha Sarathi Banerjee F.M.A.T.* 936 of 1994 speaking for the Division Bench I have held that principles of natural justice have no application while the employer terminates the services of a probationer or extends the period of probation. In the said decision reliance had been placed by me on *Unit Trust of India v. T. Bijoy Kumar*, (supra) *G. Council of K.M.T. of Oncology v. Dr. P. Gadwalker*, (supra) *M. Venugopal v. L.T.C. of India* (supra).

14. If the employer has a right to terminate the services of a probationer owing to his unsatisfactory work and if the principles of natural justice have no application in relation thereto, such a provision in the offer of appointment, in my opinion, cannot be said to be violative of Article 14 of the Constitution of India or Section 23 of the Contract Act. Article 14 strikes at arbitrariness. It encompasses within its fold any right of the employer to hire and fire at his sweet will. Section 23 of the Indian Contract Act makes a provision of the Contract void ab initio if the same is opposed to the public policy but before such a provision can be declared ultra vires Article 14 of the Constitution of India or Section 23 of the Contract Act, the employee must acquire a right thereunder. The probationer has no right to service at all. His services can therefore, be terminated on the expiry of the period of probation if the employer is not satisfied with his performance. Clause (6) of the offer of appointment as quoted hereinbefore confers a right upon the management to terminate the service.

15. In *Brojonath Ganguly's case* (supra) Rule 9(i) of the Central Water Transport

Corporation Ltd. Service Discipline and Appeal Rules, 1979 empowered the Corporation to terminate services of permanent employees without giving any reason and by giving a notice only. The Supreme Court in that situation held the Court should strike down an unfair and unreasonable contract or unfair and unreasonable Clause in a contract, entered into between the two (sic.) who are not equal in bargaining power. The Supreme Court held that the said Rule 9(1) not only confers an arbitrary power being violative of the principles of natural justice but is also opposed to public policy. In Delhi Transport Corporation's case (supra) the Supreme Court followed Brojonath Ganguly's case and its earlier decisions and struck down the provision of Regulation 9(b) of Delhi Road Transport Authority (Conditions of Appointment and Service) Regulation 1952 which empowered the Delhi Transport Corporation to remove an employee from services without assigning any reason. The said regulation was held to be arbitrary, unfair, unjust, unreasonable and opposed to public policy. It provided that the services of a permanent employee can be terminated without holding any enquiry. The Court inter alia held that a permanent employee cannot be left with an element of uncertainty.

16. Such is not the position here. The word "probation" has a definite connotation. Service jurisprudence envisages that an employee may be put on probation before he is permanently absorbed so as to enable the employer to judge his suitability. It will be against all canons of service jurisprudence that an unsuitable person is thrust upon an employer. It is true that Clause (6) of offer of appointment dated December 6, 1994 stated that the services of the petitioner can be terminated at the discretion of the management but it is well known that such discretionary power of the management which is a State within the meaning of Article 12 of the Constitution of India must be founded on objectivity. Discretion as is well known can neither be whimsical nor fanciful. Discretion means sound discretion in accordance with law and not arbitrariness. In a given case the Court can always exercise its jurisdiction of judicial review if the employer exercises its discretion mala fide or for an unauthorised purpose or arbitrarily or whimsically. It may be noted that the Supreme Court of India recently in A.K. Kaul and another Vs. Union of India and another, upon noting its earlier decisions held that even the satisfaction of the President arrived at while passing an order under Article 356 or Clause (c) of the Second Proviso appended to Article 311(2) of the Constitution of India would be subject to judicial review and the Court would be entitled to peruse the records for obtaining information on the basis of which the President was satisfied for the purpose of exercising his powers and for other reasons.

17. The same rule in my opinion would apply to a case where a discretionary power has been conferred on the employer.

18. In West Bengal Head Masters' Association v. State of West Bengal, C. O. No. 19316 (W) 92 and other analogous cases a Division Bench of this Court of which I was a member, has held that the power of the Director of School Education

and /or any officer authorised by him while exercising power to refuse to tend the services of a teacher would be subject to judicial review, if such an order is passed mala fide and /or on irrelevant consideration not germane for the purpose of exercising the statutory power or if the authorities fail to take into consideration the relevant facts.

19. Clause (6) of the said offer of appointment, thus cannot be held to be ultra vires Article 14 of the Constitution and Section 23 of the Indian Contract Act.

Re: Question-2

20. It is true that a probationer does not have any right to be confirmed. It is also true that the employer is the sole authority to judge the suitability of the employee so as to enable him to arrive at a finding as to whether the performance of such employee is such which rights his permanent absorption in the services. But it is also well settled that such a power cannot be exercised by way of or in lieu of penalty nor can such power be exercised for an unauthorised purpose.

21. The respondents in their affidavit-in-opposition in no uncertain terms clearly stated that the impugned order has been passed on the basis of an ex parte administrative enquiry held by Sri S. K. Biswas, Personnel Manager of Bankoia Area on the basis of a complaint made by Sri H. K. Chowdhury, Manager of Tilabani Colliery (wherein the petitioner was not employed) that he along with others assaulted him and had taken the main role in organising such assault. A bare perusal of the order dated May 22, 1995 as contained in Annexure "D" to the affidavit-in-opposition and which has been reproduced hereinbefore clearly shows that the said report was the sole basis, foundation and motive for passing the impugned order. The said order although innocuous on the face of it, must be read along with the materials placed by the respondents themselves in their affidavit-in-opposition.

22. It is no longer in doubt or dispute that in a given case the Court in exercise of its jurisdiction under Article 226 of the Constitution of India is entitled to lift the veil and try to ascertain the root cause for passing an order of termination of service despite the fact the same is innocuous on its face.

23. In *Samser Singh v. State of Punjab* reported (supra) it was held at P 483 :

"The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity".

24. In *Jamuna Ram's case* (supra) a Division Bench of the Patna High Court, relying on the decisions of the Supreme Court in *Samser Singh's case* as also *State of Maharashtra v. Veerappa R. Saboji* reported in (1979 II LLJ 393) held :

"There can be no hard and fast rule nor any abstract proposition of law for the purpose of determining as to whether the order of termination is a termination simpliciter or by way of punishment. It would depend upon the facts and circumstances of each case as to whether it can be deduced that the order of termination is by way of penalty or not."

25. In *Dr. T.C.M. Pillai v. The Indian Institute of Technology* reported (supra) it has been held that if the services of a probationer were terminated by way of punishment without following the procedure prescribed by Clause (9) of Statute 13 it would be competent for the High Court to issue an appropriate writ. However, in the fact of that case it was held that by no stretch of reasoning, it can be said that the appellant had been punished and his service had been disposed with as a penal measure.

26. In *Rabindra Kumar Mishra v. U. P. State Handloom Corporation Ltd.* reported in () the Apex Court while considering that where reasons for termination were given, they are bound to disclose adverse features of the employee and the disclosure of such features becomes the ground of challenge of the order on the plea that termination is not innocuous. It was held at P. 79 :

"To meet this position, the distinction between "motive" and "foundation" has been adopted by the Courts. As long as the adverse feature of the employee remains the motive and does not become transformed as the foundation has to be decided by the Court with reference to the facts of a given case. The two are certainly two points of one line ordinarily apart but when they come together "motive" does get transformed and merges into foundation".

27. In *Unit Trust of India v. T. Bijoy Kumar* (supra) the Supreme Court on the fact of the case held that there is nothing in the order to conclude that it is penal or it stigmatises the first respondent. It was further held that the reason which weighed with the Management was his unsuitability for the job based on his unsatisfactory performance during the probation period which was obvious from the office note on which the decision has been taken and the confidential assessment reports were called from the different officers to assess his suitability for the job.

28. In *Governing Council of Kidwai Memorial Institute of Oncology v. Dr. Pandurang Godwalkar* (supra) Supreme Court distinguished its earlier decision in *Anoop Jaiswal Vs. Government of India and Another*, holding that in that case, the Governing Council examined the different reports in respect of the respondents during the period of probation and considered the question as to whether he should be allowed to continue in the services of the Institute. It further came to the conclusion that the impugned decision therein appears to have been taken by the Governing council on the total and overall assessment of the performance of respondents, in terms of the condition of the appointment and the Rule 4 of the offer of appointment. In *Anoop Jaiswal's* case (supra) the Supreme Court clearly held that the order of termination, really amounted to

punishment because the real foundation of the action against the appellant was the act of the misconduct on June 22, 1981. The Supreme Court observed (Para 7):

"If an employee who is on probation or holding an appointment on temporary basis is removed from the service with stigma because of some specific charges, then a plea cannot be taken that as his service was temporary or his appointment was on probation, there was no requirement of holding any enquiry, affording such an employee an opportunity to show that the charge levelled against him is either not true or it is without any basis".

29. In *M. Venugopal's case* (supra) the Supreme Court was considering the provision of Regulation 14 of Life Insurance Corporation of India (Staff Regulation 1960) and held that such rules have overriding effect over the provisions of the Industrial Disputes Act. It merely followed *Dr. Pandurang's case* (supra) and also came to the conclusion that before termination of the services of an employee after making overall assessment of his performance during the period of probation, no notice is required to be given.

30. The decisions of the Supreme Court as referred to hereinbefore, as I read them, therefore clearly state the law that if the foundation for termination of services of a probationer is punitive, the same would be bad in law. The decision relied upon by Mr. Banerjee, therefore, militates against his contention.

31. The said decisions were rendered in the fact situation prevailing therein, but law laid down therein is also attracted in the present case. It may be noticed that the Apex Court in *The Regional Manager and Another Vs. Pawan Kumar Dubey*,

"One additional or different fact can make a world of difference between conclusions in two cases even if the same principles are applied in each case to similar facts".

32. The impugned order dated May 22, 1995 as contained in Annexure "B" states that the petitioner's probationary appointment was terminated by the Management in exercise of its discretion vide Clause (6) of the letter of appointment. The said order is innocuous on its face, but as clearly indicated hereinbefore the respondents themselves have laid down the foundational facts so as to enable this Court to arrive at a decision that the motive for termination merged with the foundation, namely the alleged misconduct on the part of the petitioner. The General Manager did not record any reasons other than the petitioner's misconduct. He relied solely upon a report which was forwarded to him by General Manager Bankila Area, which in turn was based on the report of S. K. Biswas, Personnel Manager, in the enquiry initiated on the basis of a complaint of Sri H. K. Chowdhury, Manager of Tilabani Colliery. The General Manager did not consider any other document. He had not taken into consideration the overall performance of the petitioner. Neither the confidential reports were called for nor any assessment had been made of the job performed

by him during the period of probation. He was admittedly in the said enquiry not given an opportunity of being heard nor any disciplinary proceedings had been initiated against him in terms of the standing order applicable to the Colliery in question.

33. The respondent / Company is a "State" within the meaning of Article 12 of the Constitution of India. It is, thus, required to act fairly and not arbitrarily. The exercise of its discretion must be sound in law and based on materials. In the instant case the discretion has been exercised by the General Manager on wholly irrelevant and extraneous consideration. He has also failed to consider the relevant facts. He has failed to pose right questions so as to enable him to acquaint himself with the relevant facts and having failed to do so, he misdirected himself in law.

34. It is not even a case where the Court was required to lift the veil as the materials have been produced by the respondents themselves. The respondents on their own have disclosed that the impugned order has been passed not only by way of punishment but thereby a serious stigma has been cast on the petitioner. By reason of the said order, therefore, petitioner has suffered evil consequences. The impugned order, for the reasons aforementioned cannot be sustained.

Re-Question 3

35. It is true that the petitioner is a workman under the Industrial Disputes Act but before an Industrial Tribunal the petitioner could not have raised the question of vires of Clause (6) of the offer of appointment. It is true that normally this Court would not exercise its jurisdiction under Article 226 of the Constitution of India where there exists an alternative remedy. The order sheet dated June 27, 1995 would, however, show that the matter was entertained by this Court as a question arose as to whether Clause (6) of the condition of appointment is ultra vires Article 14 of the Constitution of India or not. The matter was heard in part by me on the request of the learned counsel for the parties on that date itself. Having heard the learned counsel for the parties at such great length and having considered their respective submissions, I am of the view that it is not a fit case where the petitioner should be asked to take recourse to the provisions of the Industrial Disputes Act. It is also not a case where the respondent could have adduced any evidence other than what have been stated in the affidavit-in-opposition. In fact as no enquiry was held, the question of adducing any independent evidence before the Industrial Tribunal does not arise. It is not the case of the respondents that the services of the petitioner were terminated on the ground that he committed any misconduct. In that view of the matter in the instant case, according to the respondents themselves. Section 11A of the Industrial Disputes Act, 1947 will have no application.

36. This writ application has been heard and the arguments had been advanced before me only on the basis of the Affidavit-in-Opposition. The respondents have

placed all the materials before this Court which could be placed before the Industrial Tribunal, had a reference been made by the appropriate Government in exercise of its jurisdiction u/s 10 of the Industrial Disputes Act.

37. Directing the petitioner to avail alternative remedy as is well known, is the restriction imposed by the Court itself while exercising its discretionary power under Article 226 of the Constitution of India. The question involved in this application is a pure question of law touching the jurisdiction of the respondents. This Court was not required to go into any disputed question in fact.

38. The Supreme Court recently in *Dr. Balkrishna Agarwal v. State of U. P.* reported in 1995 AIR SCW 800 observed :

"Having regard to the aforesaid facts and circumstances we are of the view that the High Court was not right in dismissing the writ petition of the appellant on the ground of availability of an alternative remedy u/s 68 of the Act especially when the writ petition that was filed in 1988 had already been admitted and was pending in the High Court for the past more than five years. Since the question that is raised involves a pure question of law and even if the matter is referred to the Chancellor u/s 68 of the Act is bound to be agitated in the Court by the party aggrieved by the order of the Chancellor, we are of the view that this was not a case where the High Court should have non-suited the appellant on the ground of availability of an alternative remedy."

(Italicising is mine for emphasis)

39. In *Davinder Singh Vs. State of J. and K. and Others*, it has been held that rule required the exhaustion of statutory remedies before the writ will be granted is a rule at policy, convenient and discretion rather than rule of law.

40. In this view of the matter, in my opinion, it is not a case where the decision of mine in *Thakur Majhi v. The Chairman-cum-Managing Director, Eastern Coalfields Ltd.* (supra) can be said to have any application, as the point with regard to the existence of alternative remedy was not raised on the first date of hearing and furthermore the parties have addressed me on the merits of the case.

41. For the foregoing reasons, this application is allowed and the impugned order dated May 22, 1995 is set aside. However, it will be open to the employer to pass a fresh order upon taking into consideration the overall assessment of the petitioner and other relevant factors before terminating the services of the petitioner or confirm his services in the light of the observation made hereinbefore. However, in the facts and circumstances of this case there will be no order as to costs.

Later:

42. Prayer for stay of operation of this order, as prayed for, is refused.