
(1999) 11 GAU CK 0037
In the Gauhati High Court
Case No : Civil Rule No. 443 of 1994

Badal Dutta

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 24-11-1999

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(2)

Citation : (2000) 1 GLT 256

Hon'ble Judges : M.L. Singhal, J

Bench : Single Bench

Advocate : B. Das and A. Bhattacharjee, for the Appellant; S. Das, for the Respondent

Final Decision : Allowed

Judgement

M.L. Singhal, J.—This is a petition u/s 226 of the Constitution of India for quashing the order dated 8.10.91 (Annexure-A) discharging the Petitioner from service.

2. I have heard Mr. B. Das, learned senior counsel for the Petitioner as well as Mr. S. Das, learned Counsel for the Respondents.

3. The Petitioner Sri Badal Dutta was appointed as a constable in South Tripura district and joined the service on 18.1.85. By impugned order dated 8.10.91 (Annexure-A to the writ petition), the Petitioner has been discharged from service under Police Regulations of Bengal, 1943 (for short, the PRB) Regulation 746(k). The grievance of the Petitioner as stated by the learned Counsel for the Petitioner is that the impugned order puts a stigma on the Petitioner, and as such his services could not be dispensed with without a proper inquiry envisaged under Article 311(2) of the Constitution of India. On the other hand, the argument of the learned Counsel for the Respondent appointing authority is that the performance of the services of the Petitioner during the probation period was highly unsatisfactory, he repeatedly absented himself from duty for days

together and so he has been rightly discharged under Regulation 746(k) of the PRB.

4. Undisputedly the Petitioner's service has been dispensed with by way of discharge under Regulation 746(k) of the PRB. The said Regulation 746(k) provides as under:

746(k) Discharge - Probationers may at any time be discharged from service by the Superintendent, without proceedings, if found unsuitable, provided that the grounds for discharge shall be stated in the order of discharge which however, shall not be given effect till it has been submitted to and confirmed by the Deputy Inspector General. No appeal shall lie against such an order.

5. The impugned discharge order dated 8.10.91 runs as follows:

Government of Tripura

Office of the Superintendent of Police

South Tripura District

D.O.No.2107 dated 8.10.91

Subject : Discharge from service.

In pursuance of the Dy. Inspector General of Police (Range), Tripura, vide letter No. 4906/F.A.-10(B)/DIG(R)/91 dated 4.10.91, recruit Constable T/4166 Badal Dutta of Un-Armed Branch, South Tripura district is hereby discharged from service w.e.f. 6.10.91 AN under Regulation 746(k) of PRB as he had been found to be in the habit of absenting himself from the lines of P.T.C. without authority.

His name is struck off from the strength of Police Department w.e.f. 6.10.91 AN.

The period of absence w.e.f. 3.4.91 FN TO 7.5.91 AN i.e. 35 days, 15.6.91 FN to 18.8.91 AN i.e. 65 days, 26.8.91 AN to 30.9.91 AN i.e. 35 days (total 135 days) is treated not on duty and his attendance was accepted w.e.f. 1.10.91 FN.

His withheld pay vide D.O. No. 922 dated 13.4.91 for the period he had performed his duty is hereby released.

(A. Kar) Superintendent of Police South Tripura District.

6. The period of probation under Regulation 746(i) is two years and it is specifically provided by the said Regulation that no extension of that period shall be allowed. The Respondents in their reply have also stated that the probation is two years and it cannot be further extended. It was not the case of the Respondent that the two years period of probation was ever extended by the Respondents. The Petitioner was appointed in the year 1985, so his probation period of two years came to an end in the year 1987. Therefore, since the Petitioner had completed the probation period of two years, he could not be discharged under Regulation 746(k) of the PRB. Further more, the impugned

discharge order, as stated above, clearly shows that the ground on which the action has been taken against the Petitioner is that "he had been found to be in the habit of absenting himself from the lines of P.T.C. without authority". The aforesaid discharge order also shows clearly that in fact the service of the Petitioner has been dispensed with on account of misconduct of unauthorised absence from duty. As has been held by the Supreme Court in the case of Anoop Jaiswal Vs. Government of India and Another, the form of the order is not decisive as to whether the order is by way of punishment and that even an innocuously worded order terminating the service may in the fact 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(2). Where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.

7. Even for the sake of argument, it is accepted that the probation period of the Petitioner was still continuing, though there is no iota of evidence on record to show that the Petitioner was under probation, for termination/discharge of service of an employee on account of misconduct, disciplinary proceedings contemplated under Article 311(2) of the Constitution of India are necessary which has not been done in the present case. In Samsher Singh Vs. State of Punjab and Another, it has been held by the Supreme Court as under:

No abstract proposition can be laid down that where the services of a probationer are terminated it can never amount to a punishment. Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperament or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an enquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection. The fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a

probationer is entitled to the protection of Article 311. The substance of the order and not the form would be decisive.

8. Since the service of the Petitioner in the present case has been dispensed with on account of misconduct, after expiry of probation period, disciplinary proceedings were necessary, the impugned discharge order dated 8.10.91 is vitiated on account of infraction of the provisions of Article 311(2) of the Constitution of India.

9. With the aforesaid observation, this writ petition is disposed of and it is accordingly allowed. The impugned order of discharge dated 8.10.91 (Annexure-A to the writ petition) is hereby set aside. The Petitioner continues to be in service and he shall be entitled to all the benefits incidental to the service including his pay and allowances. Costs on parties.