
(2006) 05 GAU CK 0005
In the Gauhati High Court

Bijoy Kumar Pandey

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 31-05-2006

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2007) 1 GLR 440 : (2006) 2 GLT 840

Hon'ble Judges : B. Sudershan Reddy, C.J; T. Nandkumar Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

T. Nandkumar Singh, J.—The petitioner was unsuccessful in challenging the termination of his service as TGT (Maths) Teacher in the Navodaya Vidyalaya Samity under the order of the Deputy Director, Navodaya Vidyalaya Samity, Ministry of Human Resource Development, Regional Office, Shillong dated 23.1.1998 by filing O.A. No. 254/03 before the Central Administrative Tribunal, Guwahati Branch and the Tribunal by passing the reasoned judgment and order dated 14.6.2003 dismissed the O.A. No. 254/03. Hence, the present writ petition for assailing the reasoned judgment and order of the learned Tribunal dated 14.6.2003.

2. Heard Mr. S.N. Sharma, learned senior counsel assisted by Mr. J. Roy, learned Counsel for the petitioner and. Mr. K.N. Choudhury, learned senior counsel assisted by Mr. R.S. Choudhury, learned Counsel for the respondents.

3. The facts, stated in short, of the petitioner are that his educational qualifications are M.Sc. (Chemistry), B.Ed. and M.Ed from the recognized universities. In the year 1992 Navodaya Vidyalaya. Samity invited applications from the eligible candidates for the post of TGT (Math) teacher by direct recruitment for the Navodaya Vidyalaya situated all over the country and in response to that advertisement; the present petitioner and others appeared in the interview for the post of TGT (Math) teachers. The petitioner was duly

selected for appointment to the said post and appointed vide order dated 16.12.1992 under the terms and conditions mentioned therein to the post of TGT (Math) Teacher. The terms and conditions in the said order for appointment dated 16.12.1992 had been accepted by the petitioner. There are as many as 15 terms and conditions. Out of which two terms and conditions would be relevant for deciding the present writ petition. The said two terms and conditions are quoted hereinunder:

(ii) You will be on probation for a period of two years from the date of appointment which may be extended at the discretion of the competent authority. Failure to complete the period, of probation to the satisfaction of the competent authority will render you liable to discharge from service.

(xii) The appointment is on probation and purely on temporary basis, hence, it can be terminated at any time from either side by giving a month's notice or a month's pay in lieu thereof.

The case of the writ petitioner for challenging the termination order dated 23.1.1998 are based on three grounds, i.e., (i) The writ petitioner could not be treated at the time of issuing the termination, order elated 23.1.1998 as probationer in as much as he had served, as TGT (Math) teacher for more than four years, did the termination order dated 23.1.1998 is stigmatic (in the termination order was punitive on the attending circumstances mentioned hereinbelow:

(i) On 5.7.1996 while the petitioner was serving as TGT (Math) teacher in Jawaharlal Navodaya Vidyalaya he was served with an Office order being No. 34/96 dated 5.7.1996 issued, by the Principal (respondent No. 5) directing the writ petitioner to issue transfer certificate (for short T.C.) of Master Gaurav Gupta son of the Principal. In compliance of the said office order the petitioner directed his subordinate to prepare the T.C. and while the same was under preparation, the Principal (respondent No. 5) compelled, the petitioner to make entries which were not correct according to the Admission Register. Having no alternative the petitioner after preparing the T.C. forwarded the same to the Principal for his signature and seal on the certificate on 6.7.1996.

(ii) That the Principal (respondent No. 5) had issued another letter/ office order being No. 37/96 dated 8.7.1996 directing the petitioner to issue new T.C. on the same day by cancelling the earlier entry and also to rectify the mistake. That the petitioner had shown his inability to prepare the new T.C. of Master Gaurav Gupta unless he had been directed from Regional Office, Shillong.

(iii) On 10.7.1996, the petitioner received a letter from the Principal (respondent No. 5) advising him to behave properly and not to indulge any activity which, may break peace at the campus and to maintain discipline and status quo. In that letter dated 10.7.1996 it is also mentioned that the result of 1996 of the subject to the petitioner, i.e., Mathematics was very bad qualitatively as well as quantitatively. Out of 11 students one secured "0" mark, 5 secured only "1"

mark, one secured "2" marks, one secured only "3" marks, one secured only "7" marks and only two students were passed. The petitioner has further alleged that the petitioner was shocked on receiving a memorandum being No. F.I-32/94/ACR/NVS(SHK)" 934 dated 13.5.1997 along with extracts of ACR issued by the respondent No. 3 wherein the adverse remarks in the entry of ACR for the year 1995-96 have been entered and further the petitioner was asked to represent to the Director Navodaya Vidyalaya Samity through Deputy Director, NVS, Regional Office, Shillong. On receipt of the said memorandum dated 13.5.1997, the petitioner filed representation, dated 29.8.1997 for correcting the adverse entries were made in the ACR for 1995-96.

(iv) On the attending circumstances mentioned above, the termination order dated 23.1.1998 had been issued as a punishment without holding proper enquiry or without giving opportunity of Show cause in violation of Article 311 of the Constitution.

4. The respondent filed their affidavit in opposition in the O.A. No. 254/03 of the Central Administrative Tribunal, Guwahati Branch and also in the present writ petition. In the affidavit in opposition, the respondents simply gave replies to the allegations made by the petitioner against the respondent No. 5 (Principal) more particularly and other respondents. In the affidavit in opposition it is stated that the Principal (respondent No. 5) did not compel the petitioner to make wrong entries in T.C. of Master Gaurav Gupta but the petitioner made intentionally wrong entries in the T.C. of Master Gaurav Gupta in column 5, 6, 15, 16 and 18 and such intentional wrong entries are the clear example of subordination of the superior.

5. The respondent No. 5 (Principal) in his letter office order dated 6,7.1996 had simply directed that the writ petitioner to make correction of the wrong entries made in T.C. of Master Gaurav Gupta on the basis of correct entries in the admission register and for that purpose the writ petitioner had been directed to issue the new T.C. of the Master Gaurav Gupta by making correct entries on the basis, of the school admission register.

6. The respondent also stated in the affidavit in opposition that respondent No. 5 (Principal) is only the reporting officer who can report adverse remark against the performance of subordinate staff working under his jurisdiction. The petitioner was given the opportunity to submit objection to the adverse entries made in his ACE for the year 1995-96. It is also Stated in the affidavit that the writ petitioner used to teach subject Mathematics in Hindi medium. The respondents in the affidavit in opposition categorically denied that the termination order dated 23.1.1998 was issued as a punishment, Further the respondent denied, that the termination, order dated 23.1.1998 is stigmatic. The case of the respondents from the affidavit in opposition are that the petitioner was probationer at the time of issuing the termination order dated 23.1.1998 and it was issued under the terms and conditions of the, appointment, of the petitioner. The respondents also categorically denied that the termination order

dated 23.1.1998 was issued as a punitive measure basing on the attending circumstances alleged by the petitioner in the writ petition. The respondents further stated in the affidavit in opposition that there is absolutely no direct nexus between the attending circumstances alleged, by the petitioner and the action taken up by the respondents for terminating his service under the termination order dated 23.1.1998 and also categorically stated that the said termination order dated 23.1.1998 is a termination simpliciter.

7. Since the language of the termination order plays important role in deciding as to whether the termination order itself is stigmatic or not, the impugned termination order dated 23.1.1998 is quoted herein in entirety for easy reference.

Ref. No. F.1-10/97-98/NVS(SH)/dtd 23.1.1998 FORM-IV

Order of termination of service issued under the Proviso to Sub-rule (1) of Rule 5 of Central Civil Services (Temporary Service) Rules, 1965, where the Appointing Authority is the Deputy Director, Novodaya Vidyalaya. Samiti, Regional Office Shillong.

In pursuance of the Proviso to Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965 the Deputy Director hereby terminate forthwith the services of Shri B.K. Pandey, TGT (Mathematics) and directs that he shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of notices at the same rates at which he was drawing them immediately before the termination of his service, or, as the case may be, for the period by which, such notice, falls short of one month.

Station : Shillong (D.C. Mishra) Date 23.1.1998 Deputy Director To

Shri B. K. Pandey, TGT (Mathematics)

J.N.V. Lunglie, Dist. Lunglie, Mizoram

Memo No. F. I-10/97-98/NVS(SHR) 7257 date 23.1.1998

Copy to the Principal, JNV, Lunglie, Mizoram with a request to calculate the salary of the above individual one month from the date of receipt of the Termination Order, and also obtaining a receipt of the draft/AC payee Cheque. RO Shillong be informed accordingly.

DEPUTY DIRECTOR.

8. It is understood that when an appointment is made on probation, it pre-supposes the conduct, performance, ability and the capacity of the employee concerned have to be watched and examined during the period of probation. If the decision is taken to terminate the service of an employee during the period of probation, after taking into consideration of the over all performance of the action or inaction on the part of such employee then it cannot be said that it amounts to removal from service as punishment.

(A) The core question is that when the period of probation is completed or how

long the period of probation shall be continued or when the period of probation shall deem to have been completed. This core question is to be decided basing on the attending circumstances of the case. In the present case in the terms and conditions of the appointment letter dated 16.12.1992 appointing the petitioner to the post of TGT (Math) teacher, it has been mentioned in the clear and unequivocal term that the period of probation of the petitioner will be for a period of two years from the date of his appointment which may be extended at the discretion of the competent authority. Failure to complete the period of probation to the satisfaction of the competent authority will render him liable to discharge from service.

(B) In the case in hand no maximum period for extension of the period of probation of the petitioner has been mentioned/prescribed and also there are no conditions that on completion of maximum period, of probation, the service of the petitioner shall be deemed to have been confirmed or he will not be on probation and also that no order for confirmation for service or order for stating that the petitioner had completed his period of probation is required.

(C) The Apex Court considered the period of probation mentioned in Punjab Civil Service (Executive Branch) Rules, 1930 in the State of Punjab and Anr. v. Sukh Raj Bahadur in AIR 1968 SCC 1089. According to Rule 22 of the said rule the period of probation is 18 months subject to completion of training and subject to further extension of the period of probation as the case may be. In the said Rules, 1930 maximum period for extending the period of probation has not been prescribed. The Apex Court in Punjab v. Sukh Raj Bahadur (supra) has held that as there was no formal order for extending the period of probation nor order for confirming the concerned employee in service, the concerned employee shall continue to be in probation and laid down the following proposition that:

1. The service of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.
2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.
3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.
4. An order of termination of service in unexceptionable form preceded, by an enquiry lunched, by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.

(D) The Apex Court had classified three categories of probationers in the High Court of High Court of Madhya Pradesh thru. Registrar and Others Vs. Satya

Narayan Jhavar, in para No. 11 which reads as follows:

The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject-matter of consideration before this court, times without number in cases where in the service rules or in the letter of appointment : a period of probation is specified, and power to extend, the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed, or extended period he cannot be deemed, to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer, concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purpose of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has expired and neither any order of confirmation has been, passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.

From the above discussion we are of the considered view that the petitioner was only probationer at the time of issuing termination order dated 23.1.1998 for simple reason that there was no maximum period for extending the period of probation of the petitioner in the terms of condition of his appointment as TGT (Math) teacher and also that there is no condition that the period of probation of the petitioner shall deem to have been completed without issuing any formal orders and also in the absence of formal order for extending the term of probation of the petitioner, he continues to be a probationer.

9. The form of order is the important factor for deciding whether it is a termination simpliciter or punitive in nature but it is not the decisive factors. In this regard, we are not required to burden ourselves by referring to several decision of the Apex Court and the decision of the Apex Court (Constitution Bench) in *Samser Singh v. State of Punjab* reported in (1974) 2 SCC 833 will be sufficient. The learned senior counsel appearing for the petitioner submits that the termination order dated 23.1.1998 terminating the service of the petitioner is stigmatic. The word "stigma" concerning with the termination order has been discussed by the Apex Court in *Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others*, The Apex Court in *Dipti Prakash* (supra) held that the order of termination of a person, affects his future prospect of employment, the order itself is stigmatic. The Apex Court also held

that "stigma" as a matter for moral reproach. Any word which would adversely affect the moral of the concerned employee mentioned in a termination order that would be a termination order with stigma. The Apex Court in para Nos. 25, 27 and 29 of the judgment in Dipti Prakash (supra) held as follows:

25. In the matter of "stigma", this court has held that the effect which an order of termination may have on a person's future prospect of employment is a matter of relevant consideration. In the seven-Judge Bench decision in Samser Singh v. State of Punjab Ray, CJ observed that if a simple order of termination was passed, that would enable the officer to "make good in other walks of life without a stigma". It was also stated in Bishan Lal Gupta v. State of Haryana that if the order contained a stigma, the termination would be bad for "the individual concerned must suffer a substantial loss of reputation which may affect his future prospects".

27. As to what amounts to stigma has been considered in Kamal Kishore Lakshman v. Pan American World Airways Inc. This court explained the meaning of "stigma" as follows SCC p. 150, para 8).

8. According to Webster's New World Dictionary, it (stigma) is something that detracts from the character or reputation of a person, a mark, Sign, etc., indicating that something is not considered normal or standard. The Legal Thesaurus by Buron gives the meaning of the word to be blemish, defect, disgrace, disrepute, and imputation mark of disgrace or shame. The Webster's Third New International Dictionary gives the meaning as a mark or label indicating a deviation from a norm. According to yet another dictionary "stigma" is a matter for moral reproach.

Similar observations were made in Allahabad Bank Officers' Assn. v. Allahabad Bank.

29. We may advert to a few cases on the question of stigma, We shall refer initially two cases where a special rule relating to termination of a probationer required a particular condition to be satisfied and where the said condition was referred, to in the order of termination. In Hari Singh Mann v. State of Punjab the probationer was governed by Rule 8(b) of the Punjab Service Rules, 1959 and the fact that the word "unfit" as required by the Ruler was used, was held not to be a ground for quashing the order on the ground of "stigma", for to hold that it amounted to a "stigma" would amount to robbing the authority of the right under the rule. Similarly, where a rule required a show cause notice to be issued and an enquiry to be conducted before terminating probation, such as Rule 55-B of the Central Civil Services (CCA) Rules, there would be no question of characterizing the simple order of termination as one founded on the allegations which were the subject of the enquiry. That was because, in such a case, the purpose of the enquiry was to find out if the officer was to be continued in service and not to find out if he was guilty (State of Orissa v. Ram Narayan Das, Ranendra Chandra Banerjee v. Union of India). In. State of Gujarat v. Akhilesh C.

Bhargav the termination order merely referred to Rule 12(bb) of the Indian Police Service (Probationer) Rules, 1959. It was contended that the reference to the said Rule 12(bb) itself amounted to a stigma but this was rejected following Ram Narayan Das case.

We, keeping in view of the decision of the Apex Court, have carefully perused the termination order dated 23.1.1998 and found that there is no word of moral reproach against the petitioner and also no words for disgracing or condemning the service of the petitioner in the order of termination dated 23.1.1998 which should have the effect of affecting the petitioner's future prospect of employment.

10. The rival contentions of the learned Counsel, for the petitioner and respondents as to whether the termination order dated 23.1.1998 was punitive or not can be decided only on deciding the points that whether the attending circumstances alleged by the writ petitioner is a motive/ inducing factor or foundation, in issuing the termination order. Both the learned senior counsel are not disputing the settled law that the principle of tearing of the veil for finding out the real nature of the order shall be applicable only in case where the court is satisfied that there is a direct nexus between the charge so levelled and the action taken. Further both the learned senior counsel are not disputing the law that the preliminary enquiry or enquiry against the employee is for the purpose of finding of his guilt/misconduct and basing on the findings of such enquiry, termination is made, it would be punitive and the constitutional mandate under Article 311 is, attracted, and that if the preliminary enquiry/enquiry is only for the purpose of deciding as to whether the probationer is required, to be retained in service and basing on the findings of each enquiry, termination simpliciter is issued, it is not punitive and that even enquiry or preliminary enquiry is held against the probationer as to whether there is a misconduct or not but the termination order was issued taking it as an inducing factor, it will not be punitive.

11. In order to satisfy ourselves as to whether there was any direct nexus between the charge so levelled by the petitioner in the present, writ petition and action taken by the respondent by issuing termination order dated 23.1.1998, we have perused the relevant original record maintained by the Navodaya Vidyalaya Samity relating to the appointment and termination of the petitioner which had been placed, for perusal by the learned senior counsel appearing for the respondents.

12. In the case of Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, the Apex Court held that failure to hold enquiry would not automatically vitiate the order of dismissal, for the reasons mentioned in Para Nos. 53 and 54 of the judgment which reads as below:

53. Master and servants cannot be permitted, to play hide and seek with the law of dismissal and the plain and proper criteria are not to be misdirected by terminological coverups or by appeal to psychic processes but must be grounded

on the substantive reason for the order, whether disclosed or undisclosed. The court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination. If, thus, scrutinized, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied, of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used.

54. On the contrary, even if there is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant, Than it is not dismissal but termination simpliciter, if no injurious record of reasons or punitive pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge. We need not chase other hypothetical situation here.

13. The fact of the case, Governing Council of Kidwai Memorial Institute of Oncology, Bangalore Vs. Dr. Pandurang Godwalkar and another, is that respondent Dr. Pandurang Godwalkar was appointed as lecturer in Surgical Oncology of Kidwai Memorial Institute of Oncology on probation on the condition that failure to complete, the period of probation to the satisfaction of the competent authority will render him liable to be discharged him from service. Before expiry the period of probation his service was terminated by a simple termination order. The validity of the order was questioned on the ground that an order of dismissal had been passed in the garb of an order of termination and the respondent further alleged in that case some complaints were made against him to the Director of Institute who instead of initiating departmental proceeding on the basis of which charge levelled against him, put up the matter before the Governing Council of the Institute for termination in the service during the period of probation. In that case Apex Court has held that since the Governing Council examined the different reports in respect of the respondent during the period of probation and considered, the question as to whether he would be allowed to continue in his service of the Institute, the decision appears to have been taken by the Governing Council on the total and the over all assessment of the performance of the respondent. The Apex Court has held in paras 6 and 8 as follows:

6. Generally in connection with an order of termination, a question is raised before the court as to what is the motive behind the termination of the service of the employee concerned whether the reason mentioned in the order of termination has to be accepted on its face value or the background in which such order of termination simpliciter has been passed should be examined to find out as to whether an officer on probation or holding a temporary appointment has been, in fact, dismissed from the service without initiating any departmental enquiry. 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 charge, 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. But whenever the service of an employee is terminated during the period of probation or while his appointment is on temporary basis, by an order of termination simpliciter after some preliminary enquiry it cannot be held that as some enquiry had been made against him before the issuance of order of termination it really amounted to his removal from service on a charge as such penal in nature.

8. Even if such employee while questioning the validity of an order of termination simpliciter brings on the record that some preliminary enquiry or examination of some allegations had been made, that will not vitiate the order of termination. Reference in this connection may be made to the case of *Oil and Natural Gas Commission v. Dr. Mohd. S. Iskender Ali* where it was pointed out that a "temporary employee is appointed on probation for a particular period only in order to test whether his conduct is good and satisfactory so that he may be retained". It was also said that even if misconduct, negligence, inefficiency may be the motive or the influencing factor which induced the employer to terminate the service of the employee which such employer admittedly had under the terms of the appointment, such termination cannot be held to be penalty or punishment. Same view has been reiterated in connection with appointment on temporary or on ad hoc basis in the cases of *Ravindra Kumar Mishra v. U.P. State Handloom Corporation Ltd.*, *State of UP v. Kaushal Kishore Shukla* and *Triveni Shankar Saxena v. State of UP*.

14. The Apex Court in *Radhey Shyam Gupta Vs. U.P State Agro Industries Corporation Ltd. and Another*, held that the decision of the Authority looking into the adverse entries or assessment of the works of the probationer that his work is not satisfactory, will not be punitive.

15. The Apex Court in *Kunwar Arun Kumar Vs. U.P. Hill Electronics Corporation Ltd. and Others*, has discussed the termination of probationer and held that during the period of probation authorities are entitled to assess the suitability of the candidates and if it is found that the candidate is not suitable to remain in service they are entitled to record a finding of unsatisfactory performance of the work duties during the period of probation. Under these circumstances,

necessarily the appointing authority has to look into the performance of the work and duties during the period of probation and if they record a finding that during that probation period, the work and performance of the duties were unsatisfactory, they are entitled to terminate the service in terms of the letter of appointment without conducting any enquiry. That does not amount to any stigma. If the record does not support such a conclusion reached by the authorities, a different complexion would arise.

16. The learned Tribunal rightly and correctly by giving reasons had passed the impugned judgment and order dated 14.6.2005 that the writ petitioner has no case that the respondent had declared the probation period of the petitioner is over and made him as a regular teacher of the school and also held that no stigma is cast on the writ petitioner in the termination order dated 23.1.1998 and also the impugned termination order dated 23.1.1998 is not a result of a punitive measure.

17. For the reasons discussed above, we are of the considered view that the writ petition is devoid of any merit and accordingly the same stands dismissed. No order as to cost.