
(1987) 07 KAR CK 0042
In the Karnataka High Court
Case No : W.P. No. 17958/1985

B.Rajanna

APPELLANT

Vs

Nimhans, Bangalore and Another

RESPONDENT

Date of Decision : 22-07-1987

Acts Referred:

Citation : (1987) 3 KarLJ 575

Hon'ble Judges : M. P. Chandrakantaraj Urs, J

Judgement

Chandrakantaraj Urs, J.-The petitioner was appointed as a lecturer in Neuro Physiology in the National Institute of Mental Health and Neuro Sciences (NIMHANS) by a Memorandum dated 19th December, 1984. The Memorandum sets out several terms and conditions under which the appointment has been made to which reference will be made in the course of this order later.

2) By an official Memorandum dated 16-11-1985 as at Annexure-F, his services were terminated in accordance with the provisions contained in the Bye-laws. The termination was to take effect immediately. Aggrieved by the same, the petitioner has approached this Court for relief under Article 226 of the Constitution inter alia contending that the order is arbitrary, Violative of rules of natural justice and motivated on account of the mala fides of the 2nd respondent-Dr. G.N.Narayana Reddy, the Director of the first-respondent Nimhans. It is also urged that the order terminating the service of the petitioner is made in colourable exercise of power.

3) The prayer of the petitioner is resisted by the respondents. They have filed their statement of objections. In the said return it is contended that under the general bye-laws of Nimhans, the appointing authority had the power to terminate the service of any employee without assigning reason after giving due notice or in lieu of notice the salary for the prescribed period. However, it is asserted that the removal of the petitioner was not motivated; it is not made with mala fide intention. It is further asserted that the 2nd respondent or the governing body of NIMHANS has no reasons to nurture any grievance or illwill

against the petitioner. There is reference to certain other working arrangements obtaining in the organisation of the respondents in regard to research facilities for different Departments with which we may not seriously concern ourselves.

4) The contention advanced for the respondent is purely technical and legal. In that they have the authority to do so not only in terms of the bye-laws but also in terms of the very appointment order. In fact the learned Counsel for the respondent has relied upon a decision of the Supreme Court rendered in 1958 in the case of *PARSHOTAM LAL DHINGRA. v UNION OF INDIA*, (AIR 1958 SC-43). It is a ruling of the Constitution Bench touching upon various aspects of service under the State particularly with reference to Article 311. However at page 49 of the report, it has been observed that every termination of service is not a removal or reduction in rank. That observation does no more than state what is really obvious in the light of the earlier decisions rendered by the Supreme Court. However, Court before which a cause is pleaded has to examine the facts of that case and decide the nature of tenure or conditions of service held by the employee either under a contract express or implied or under relevant rules regulating the service conditions of the employees. Therefore nothing said in *Dhingra's* case is of any special assistance to the respondents.

5) No doubt, bye-laws do empower the Governing Body of NIMHANS to terminate services of its employees in terms thereof. Since *Ajay Hasia's* case was decided by the Supreme Court [AIR 1981 SC page 487] there cannot be any doubt that the first-respondent is State within the meaning of that expression occurring in Article 12 whether it is a Society registered under the Societies Registration Act or a Company incorporated under the Companies Act, as long as it is solely and wholly manned, controlled and financed by the State and Central Governments. It is but an extended limb of the Government and must be treated as such. What the State itself cannot do that is hire and fire at will, its extended limb or its manifestation in some other form also cannot do.

6) In a more recent decision in the case of *O.P. BHANDARI v INDIAN TOURISM DEVELOPMENT CORPORATION LTD., AND OTHERS*, [AIR 1987(1) S.C. page 111] a question was posed and answered as follow:

"Whether a rule or regulation framed by a public sector undertaking which is an authority under the control of Government of India and is a "State" within the parameters of Article 12 of the constitution of India empowering the employer to terminate the services of an employee by giving notice of the prescribed period or payment of salary for the notice period in lieu of such notice is constitutional?

The Court ruled having regard to the language of the rule which fell for consideration before it, "that the Rule may co-exist with Articles 14 and 16 (1) of the Constitution of India, the said rule must therefore die, so that the fundamental rights guaranteed by the aforesaid constitutional provisions remained alive. For, otherwise, the guarantee enshrined in Articles 14 and 16 of the Constitution may be set at naught simply by framing a rule authorizing

termination of an employee by merely giving a notice. In order to uphold the validity of the rule in question it will have to be held that the tenure of service of a citizen who takes up employment with the State will depend on the pleasure or whim of the competent authority unguided by any principle or policy x x x x."

7) The ruling in AJAY HASIA'S case and BHANDARI's case are to be regarded as binding on this Court, this Court has no choice but to allow the prayers in the writ petition. Before doing so it is necessary to advert to some of the Annexures produced by the petitioner. Annexure-A is the appointment order. Strangely it reads:

"The post is permanent but the appointment shall be on officiating basis."

One fail to understand how it is possible if the post is permanent then an appointment to the post shall be on some basis depending on a particular contingency that arises at a given point of time. A post may be filled temporarily till a permanent arrangement is made. It may be on an officiating basis. The latter expression or method is used when holder of an inferior post is asked to function in the post which is otherwise permanent but vacant. Then only the expression officiating has any meaning.

8) The very next sentence in the appointment order speaks of appointee being on probation for two years which may be extended or curtailed. Now the expression "probation" is always used with reference to an appointment which in its very nature is considered to be permanent and a period is prescribed as probation period so that his suitability for that post is judged by the appointing authority. If he is found suitable he may be confirmed and if he is not found suitable he may be discharged during the period of probation.

9) Thereafterwards paragraph-2 of the appointment order says that the appointee's services may be terminated by giving him one month's notice or corresponding compensation in lieu thereof without assigning any reasons during the period of probation. That condition in the appointment order is no other than the repetition of bye-law-6 of the bye-laws of the first-respondent. It would be useful to set out the bye-law in question.

Bye-law 6 is as follows:

Termination:

i) All appointments shall be terminable on a notice in writing either by the appointing authority or the employee without assigning any reason as set out below:

a) During the period of: 1 month probation b) After completion of 3 months the period of probation ii) The notice referred to in sub-Bye-Law (i) above shall not be necessary if in lieu thereof an amount equal to the pay and allowance for the period of notice is paid.

10) This bye-law is very similar to the Rule which fell for consideration in

BHANDARI's case. If the Supreme Court said such a rule should die then bye-law-6 also should die.

11) Therefore action taken on that basis is clearly impermissible and the impugned order of termination, removal or dismissal whatever that may be, has to be quashed and set aside.

12) It is also seen from the records produced by the learned Counsel for the respondents that a resolution is passed by the governing body at its meeting held on 17.8.1985 at item No. 28 on its agenda. The resolution reads merely as follows:

"Item No. 28 Report on Sri. Rajanna, lecturer in Neuro Physiology.

Resolved to terminate forthwith the services of Shri. B. Rajanna, Lecturer in Neurophysiology, by paying one month's salary in lieu of notice period."

There is no contemporaneous record as to what report was placed before the members of the Governing body, though it is seen at page-80 of the minutes book in what is described as the Agenda for the meeting of 17.8.1985 that Sri. B. Rajanna, Lecturer in the Department of Neurophysiology, was appointed on 20-12-1984 on Probation for two years; the contents of the letter No.NIMH/PER/(V) 84-85 dated 16-4-1985 submitted to the Chair person, Governing Body, of confidential in nature will be presented during the Governing Body Meeting. Whether that confidential letter was placed before the Governing Body or not is not borne out by the records. However the said letter dated 16-4-1985 has been shown to the Court and it leaves no doubt in the mind of the Court that Rajanna who was removed from service for certain acts of commissions and omissions while he was still a probationer. It is well settled, in the light of a catena of decisions that the discharge of a probationer to be a discharge simpliciter, the foundation should be the suitability of the candidate to hold the post and not his acts of commissions and omissions. Once a view is taken that a particular form of behaviour of the probationer to be objectionable termed as derogatory and unbecoming conduct as well as amounting to indiscipline and insubordination, it cannot but be said that the probationer was punished for those acts of misconduct and not merely discharged simply as he was found not suitable for the post.

13) In Samsher Singh Aggarwal's case (AIR 1971 SC 2192) the then Chief Justice of India clearly laid down the distinction between the discharge of probationer and dismissal of probationer in the following terms:

"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 temperamental 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 inquiry. 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 Art. 311(2) he can claim protection. In *State of Bihar v Gopi Kishore Prasad*, AIR 1960 SC 689 it was said that if the Government proceeded against the probationer in the direct way without casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way of punishment. Instead of taking the easy course, the Government chose the more difficult one of starting proceedings against him and branding him as a dishonest and incompetent officer."

14) In *ANOOP JAISWAL v GOVERNMENT OF INDIA AND ANOTHER* [AIR 1984 SC 636] following the dicta in *Shamsher Singh*'s case it was held as under:

"Eventhough the order of discharge may be non-committal, it cannot stand alone. Though the noting in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis or foundation for the order should be read along with the order for the purpose of determining its true character. If one reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Art. 31 (2) of the Constitution."

15) Applying those very tests in the light of the facts I have already stated the impugned order of termination at Annexure-F can only be an order of dismissal and not an order of simple discharge of a probationer.

16) There is no clear averment in regard to the mala fides of the Director. No specific instance or instances are pointed out by the petitioner which if pleaded could have been properly met by the affected person namely the Director/Second respondent. That not being there, the allegation of mala fides are too vague and therefore do not fall for determination by this Court.

17) For the other reasons given, that is one, that the removal by way of punishment as disclosed by the records, that bye-law 6 is not constitutionally valid and must be declared as such and action taken under invalid Rule or Regulation is liable to be set aside or quashed.

18) Accordingly Rule issued is made absolute. A direction may issue to the respondents to reinstate petitioner in service but he need not be paid salaries as it is admitted that from 7-3-1986 he has been working temporarily elsewhere. But he will be entitled to receive salaries from the date of removal upto 6-3-

1986 and thereafter from the date of reinstatement.

19) Liberty is however reserved to the respondents to assess the petitioner's suitability to the post after he has worked for a period which would totally constitute the period of two years probation having regard to his earlier services with the first respondent or assess his suitability by extending the period of probation in the light of the observations made in the course of this order.

Petitioner is entitled to costs.

Advocate's fee Rs. 250/-

Writ petition dismissed with costs