

(1999) 03 AHC CK 0053
In the Allahabad High Court
Case No : C.M.W.P. No. 8138 of 1999

Brij Behari and Uttam Chand	Vs	APPELLANT
Nagar Palika Parishad, Mathura and others		RESPONDENT

Date of Decision : 16-03-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Municipal Servants (Appeal) Rules, 1967 — Rule 3
Uttar Pradesh Municipalities Act, 1916 — Section 57, 73, 74, 75, 76

Citation : (1999) 2 AWC 1723 : (1999) 2 UPLBEC 1081

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Janardan Sahai, for the Appellant; S.V. Goswami, for the Respondent

Judgement

D.K. Seth, J.—Sri S. V. Goswami. learned counsel for the respondents had taken a preliminary objection as to the maintainability of the writ petition on the ground that an appeal is provided under Rule 3 of the U. P. Municipal Servants Appeal Rules. 1967. He had also contested the case on merit on the ground that the order of termination impugned in this writ petition is of termination simpliciter without casting any stigma and the decision not to retain the petitioners is followed by a motive that the petitioners were not fit to be retained in service. The reason for non-retention of the petitioners in service was not a foundation for removal of the petitioner as such it was not a punishment. The word used in the termination being a simple removal, on the ground that there was no necessity of their services, no prejudice was meant to the petitioners since it did not cast any stigma from securing any future employment. Therefore. the petitioners cannot maintain the writ petition on merit.

2. Mr. Janardan Sahai. learned counsel for the petitioners, on the other hand, contends that Rule 3 of the said Rule provides an appeal only against an order of punishment. Since the order impugned is a simple order of removal not being an order of punishment. no appeal is maintainable, even though the order of

removal has been passed in exercise of power conferred u/s 74 of the U. P. Municipalities Act. The representation that was filed, though it was described as an appeal, was wholly incompetent. He next contends that the reason for termination is not motive, as has been sought to be advanced by Mr. Goswami but is a foundation to the extent that the petitioners did not express their regret nor had given any undertaking to work sincerely after the strike was over for which the petitioner had participated by reason of the fact that strike was declared illegal. He relies on the statement "made in paragraph 13 of the counter-affidavit where some of the participants of the strike were taken back in services on expressing regret and giving undertaking for working with sincerity. The petitioners did not express regret or gave any undertaking, and, therefore, despite the promise contained in Annexure-11 to the writ petition to take back all the participants of the strike on the condition that they would not be victimised, the petitioners have not been taken in. and such non-retention which was effected before the promise was entered into is in effect a case of victimisation. Therefore, according to him though dressed in a simple form, the order of termination is a penalty in disguise. which cannot be inflicted except after holding an enquiry.

3. I have heard learned counsel for the parties at length.

4. Rule 3 of the U. P. Municipal Servants Appeals Rules, 1967 provides as under :

"3. Appeals.--Subject to the provisions of the Act. appeal against an order of punishment be lie-

(1) to the President in a case in which the order of punishment is passed by a punishing authority other than the President u/s 76 :

(ii) to the Commissioner of the Division in a case in which the order of punishment is passed by the punishing authority u/s 74 or by the President u/s 76."

5. Thus, it appears that the appeal is provided against an order of punishment. Clause (i) of Rule 3 prescribes the forum of appeal as President in case where an order of punishment is passed by an officer other than the President u/s 76. Whereas clause (ii) of Rule 3 prescribes the forum of appeal to the Commissioner of the Division in case where an order of punishment is passed by the punishing authority u/s 74 or by the President u/s 76. Clauses (i) and (ii), therefore, make it clear that the appeal lies only against order of punishment passed either u/s 74 or u/s 76.

6. Sections 74 and 76 provide as follows :

"74. Appointment and dismissal of permanent superior staff.--Subject to the provisions of Sections 57 to 73, servants on posts in the non-centralised services, carrying scale of pay equal to or higher than the lowest scale of pay admissible to the clerical staff, shall be appointed and may be dismissed, removed or otherwise punished, or the services of a probationer may be

terminated, by the President, subject to the right of appeal, except in the case of the termination of the service of probationer, to such authority, within such time and in such manner as may be prescribed :

Provided that appointments on the posts of tax Superintendent, Assistant Tax Superintendents. Inspectors. Head Clerks. Sectional Head Clerks, Sectional Accountants. Doctors. Vaid, Hakim and Municipal Fire Station Officers, shall be subject to the approval of the Board."

"76. Punishment and dismissal of permanent inferior staff--Except as otherwise provided, the Executive Officer, and where is no Executive Officer, the President may dismiss, remove or otherwise punish servants of the board, or terminate the services of probationers, referred to in Section 75 subject to their right of appeal, except in the case of the termination of the service of a probationer, to such authority within such time and in such manner as may be prescribed."

7. The reading of Section 74 shows that the President may appoint, remove or otherwise punish a servant on posts in the noncentralised services carrying scale of payment equal to or higher than the lowest scale of pay admissible to the clerical staff. Section 76 empowers the Executive Officer or the President to dismiss, remove or otherwise punish the servants of the board. Thus both these sections empower the President or the Executive Officer, as the case may be, to dismiss, remove or otherwise punish a different categories of persons as mentioned in Section 74 and Section 76 respectively. In both cases, the order of punishment is subject to the right of appeal as indicated in these two sections. Now the right of appeal conferred under the Rule 3 of U. P. Municipal Servants' Appeal Rules confines the appeal only against order of punishment. If an order of dismissal or removal is passed u/s 74 or 76 other than by way of punishment, the same cannot be subjected to an appeal by reason of the specific provisions provided in Rule 3.

8. In the present case, the petitioners appear to have been dismissed which according to the stand taken by the Municipality, is a termination simpliciter since they have been removed without any stigma. Mr. Goswami, in his submission has clarified the stand taken by the Municipality to the extent that the order of termination was not by way of punishment but termination simpliciter which could be passed without holding any enquiry. However, though he had tried to justify the contention raised by him about the maintainability of the writ petition on the fact that the petitioner had filed an appeal and the same is pending and that the petitioners had accepted the said order as punishment which is indicated in the pleadings made out in the writ petition.

9. But such question is dependent on the view taken by the authority issuing the order. How it is accepted by the recipient is not the governing factor. When municipality takes a stand that it was not a punishment, even if the petitioners considered it to be a punishment, the Municipal Authority may dismiss the appeal on the ground that it is not maintainable since it was not passed by way of

punishment. What stand would be taken at that stage is a matter of guess. Now the stand taken by the learned counsel for respondent Sri Goswami is that it is not by way of punishment, though the petitioners might have accepted the same as by way of punishment. The Municipal Authority may decide to take . advantage of both end. In such circumstances. It is not wise to leave the matter at the hand of the Municipal Authority to take a stand, which might suit them best. Thus, it appears that in view of the specific provision contained in Rule 3 of 1966 Rules, (he petitioners were ill-advised to prefer the appeal since the appeal in such a case is incompetent, as rightly contended by Mr. Sahai and I do not find any reason to disagree with the contention raised by him. Respectfully, I am unable to persuade myself to agree with the contention of Mr. Goswami with regard to non-maintainability of the writ petition on the ground that an appeal lies and the petitioners had preferred such an appeal in view of the observation made above.

10. It is not disputed that the petitioners were participants of the strike in which some other scavenger had participated. The petitioners' services were terminated by the impugned order dated 23.12.1998. contained in Annexures-1 and 2. It is an admitted position that the petitioners who are scavengers were on strike since before 23.12.1998, this position has not been disputed to his usual fairness by Mr. Goswami. Therefore, the order of termination or removal, as the case may be, has to be considered in the background of the facts and circumstances in which the said order was brought into being. From Annexure-11 to the writ petition, it appears that the settlement was arrived at between the striking scavengers and the Municipality. It is mentioned in the said settlement that on 4.1.1999, there was a settlement between the leaders of the scavengers and the Municipality and it was decided that the striking scavengers would withdraw the strike and Join their duties, by reason of the settlement arrived at between the parties, on the terms and conditions mentioned in the said settlement which are five in number. The first condition was that the scavengers would Join their service on 5.1.1999 and shall withdraw the strike. There were other conditions, which are not necessary for our present purpose. The fifth condition was that none of the workers would be victimised.

11. Since admittedly the petitioners were also participants in the strike, as soon the settlement was arrived at. there could not be any reason to resist the petitioners from joining their duty after the strike is withdrawn. In paragraph 13 of the counter-affidavit, it is admitted that some of striking employees were taken back on their expression of regret and giving of an undertaking for sincere work. At the bar, it was contended by Goswami that the conduct of the petitioners were so bad they did not even express regret nor they had given any undertaking for participating in the illegal strike. Admittedly the strike was declared illegal and the petitioners had participated to the illegal strike. Thus according to the stand taken by the Municipality, the petitioners were not retained because they did not express their regret and execute an undertaking. Therefore, the non-withdrawal of the termination of the service is in effect a

consequence of non-expression of regret and non-execution of undertaking by the petitioner. Thus on account of such conduct, the petitioners were not taken back and the order of termination was sought to be maintained, on the basis of the settlement arrived at between the parties which indicates that it was in effect a punishment or penalty inflicted on the petitioner. Admittedly, the petitioners are scavengers and had participated in the strike.

12. In the settlement, it is not mentioned that particular persons. viz.. petitioners would not be taken back as one of the condition of settlement with the group of workers and with whom the settlement was arrived at. Therefore, the settlement had been equally applicable in the case of the petitioners as well. After having arrived at a settlement on 4.1.1999 allowing all the workers to Join on 5.1.1999, the attempt to maintain the order of termination appears to be a penalty in disguise on account of the petitioners" participation in the strike. If the respondents want to penalise the petitioners, it was open for them to take steps for inflicting punishment in accordance with, the relevant rules on account of participation in the illegal strike. If it is proposed to pass punishment, then the respondents are required to undergo the entire process of disciplinary proceeding or otherwise, as would be required in law to be observed for punishing the person participating in an illegal strike."

13. In the facts and circumstances as discussed above, the order of termination does not appear to be a termination simpliciter as has been sought to be argued by Shri Goswami. It is in effect a penalty in disguise. In exercise of writ jurisdiction, this Court has to look into the substance and pierce the curtain in appropriate cases and find out the character of the order in order to do justice to the persons who are at the receiving end on account of their position which is incompatible with the permeable power of the employer. It is for the Court to lift the veil and find out as to whether the mightier employer has inflicted a punishment or a weaker worker is victimised though dressed in a simple form so as to avoid the whole procedure of holding enquiry to inflict punishment.

14. In the present case as it appears from the discussion above. It is a case of victimisation by maintaining the order of termination even after the settlement was arrived at on condition of non-victimisation and not a termination simpliciter,

15. In that view of the matter, the writ petition succeeds and the impugned order shall be treated as non-est in view of the settlement arrived at between the parties as contained in Annexure-11 and is hereby declared as such. In case the other employees had expressed regret and had given undertaking as stated in. paragraph 13 of the counter-affidavit, the petitioners shall also express their regret and give undertaking in writing before their joining. If such an expression of regret is expressed and an undertaking is given, in that event the petitioners shall be allowed to Join and be given all such benefits as has been given to other employees. However, the expression and undertaking given by the petitioners shall not be used for the purpose of victimising the petitioners by entering the same in the service record of the petitioners.

16. With this observation this writ petition stands allowed to the extent as indicated above.

17. The other contention raised by Shri Sahai is that the petitioners being confirmed employees, their services could not have been terminated without assigning any reason in the manner as has been sought to be done, This contention is disputed by Shri Goswami. However, in view of the discussion made above, it is not necessary to go into the said question for the purpose of the present writ petition.

18. However, there will be no order as to cost.