

(1976) 12 CAL CK 0007
In the Calcutta High Court
Case No : Civil Rule No. 127 (W) of 1973

Dasarath Lal Sharma

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-12-1976

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 15
Central Civil Services (Conduct) Rules, 1955 — Rule 12, 5(1)
Central Civil Services (Temporary Service) Rules, 1965 — Rule 5, 5(1)
Constitution of India, 1950 — Article 226, 311, 311(2)

Citation : (1977) 2 ILR (Cal) 484

Hon'ble Judges : S.K. Mukherjea, J

Bench : Single Bench

Advocate : D.P. Chowdhury and Manoj Kumar Mookerjee, for the Appellant; D.N. Das and S.N. Banerjee, for the Respondent

Final Decision : Allowed

Judgement

S.K. Mukherjea, J.—This Rule is directed against an order dated December 15, 1972, by which the Petitioner's services as Deputy Coal Superintendent in the office of the Coal Controller, Calcutta, was terminated in pursuance of the proviso to sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Services) Rules, 1965. The facts of the case disclosed by the petition may be briefly indicated.

2. On being selected by the Union Public Service Commission, the President, by an order dated August 27, 1960, was pleased to appoint the Petitioner to officiate as Deputy Coal Superintendent in the Coal Controller's office with effect from August 11, 1960, until further orders. The said post, at the time when the Petitioner was appointed, was a temporary post which was subsequently converted into a permanent post. The Petitioner was appointed on probation.

But by a letter dated March 5, 1963, the probationary period of his services was extended by one year.

3. By a memorandum dated September 21, 1904, issued by the Jt. Secretary, Government of India, Department of Mines and Metals, the Petitioner was informed that it was proposed to hold an enquiry against him under Rule 15 of the Central Civil Services (Classification, Control and Appeal) Rules, 1957, into certain charges framed against him, the charges being that the Petitioner while functioning as Deputy Coal Superintendent, Ranigunj Division, engaged himself in private trade during the period between May 1962 and June 1963 in the name of his wife Sm. Puspa Rani Sharma as a partner of M/s Akashbani at Chirkunda, dealers in radio sets and that as proprietor of M/s Puspa Investment Corporation, he invested money to the extent of Rs. 65,200 without previous sanction of his departmental authority and thereby contravened Rule 12 of the Central Civil Services (Conduct) Rules, 1955.

4. Thereafter, there was a departmental enquiry conducted by an Enquiry Officer. In the said enquiry depositions of witnesses were taken and arguments were heard. The Petitioner submitted a written defence and argument. The said enquiry was conducted and completed in accordance with the Central Civil Services (Classification, Control and Appeal) Rules, 1957, but no report was made by the Enquiry Officer. Meanwhile the Petitioner's service as a probationer was extended till August 10, 1965.

5. By an order dated February 17, 1967, the charges against the Petitioner were withdrawn for technical reasons. By another order made simultaneously on the same date, a fresh charge-sheet was issued against the Petitioner. The old charges were repeated. Soon thereafter, the Petitioner moved this Court under Article 226 of the Constitution and obtained a Rule nisi and an ad interim injunction restraining the Respondents from taking any action on the basis of the second charge-sheet. The said Rule was numbered as C.R. 363(W) of 1967. On or about June 12, 1971, the Petitioner, on legal advice, withdrew the application. After withdrawal of the said application, the Respondents neither proceeded with the enquiry relating to the second charge-sheet nor took any other steps. Thereafter, by an order dated October 12, 1972, the charges framed against the Petitioner were withdrawn. Thereafter, on December 15, 1972, the order for termination of the Petitioner's services, to which I have already alluded, was passed under the signature of Mr. P.K. Lahiri, Deputy Secretary. Ministry of Steel and Mines.

6. It is not in dispute that the Petitioner is a temporary employee or that the services of a temporary employee can be validly terminated under the proviso to sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Services) Rules, 1955, without anything more. However, it is contended on behalf of the Petitioner that the order of termination of his services was not made in the usual course under the aforesaid provisions of the relevant Service Rules but in reality was passed by way of disciplinary action taken against the Petitioner, or in other words, by way of penalty. It was further contended that having regard to the entire background of the order of termination of services and in the context of

successive disciplinary proceedings taken against the Petitioner, the impugned order contained an element of imputation of misconduct and attaches a stigma to his character and conduct. In these circumstances, it was submitted on behalf of the Petitioner that he was entitled to the protection of Article 311(2) of the Constitution and his services could not have been validly terminated in law without giving him an opportunity of exonerating himself in proper departmental, proceedings in compliance with the aforesaid provisions of the Constitution.

7. In the present case, a Rule in the nature of certiorari has been issued and the Respondents have been directed by the Court to produce all relevant records in connection with the order of the termination of Petitioner's services so that conscionable justice may be done. At the hearing of this case the relevant records were not produced. Mr. K.S. Rule Chari, Secretary to the Government of India, Ministry of Energy, Department of Coal, by an affidavit affirmed on November 1, 1976, stated that those records related to the affairs of the state and communications and notifications made in official confidence and that their disclosure would cause injury to the public interest. He claimed privilege for those documents. Having found the assertions and submissions made in the said affidavit, far too general and not a little vague, I gave liberty to the Respondents to use a further and better affidavit in support of their claim for privilege. Pursuant thereto, Mr. K.S. Rule Chari filed a further affidavit affirmed on November 16, 1976. The latter affidavit was no more illuminating than the former. Having read the affidavits I felt that I could not decide the claim for privilege without looking into the papers myself and therefore, I made an order as was made in *Amar Chand Butail Vs. Union of India (UOI) and Others*, , that is to say, I directed production of the documents for my satisfaction that the claim for privilege was justified. At my request, the file was produced in Court. I looked into the papers and satisfied myself that the claim for privilege in respect of a note by Mr. S. Butalingam, Under-Secretary, Ministry of Steel and Mines, dated December 1, 1971 and the notes by Mr. A.S. Deshpande dated November 27, 1972 and by Mr. P.K. Lahiri dated December 2, 1972, was not tenable. As regards other documents, it is not necessary for me to decide whether privilege may be legitimately claimed for them.

8. It was contended by Mr. Chowdhury, appearing on behalf of the Petitioner, that the order dated December 15, 1972, terminating the services of the Petitioner, though couched in innocuous language is intended to be and is in effect in the nature of punishment for the acts of commission charged against the Petitioner in disciplinary proceedings subsequently withdrawn on more than one occasion. Mr. Chowdhury claimed that here was a case where things were not what they seemed. He also contended that in the context of the completion of the disciplinary proceedings which were withdrawn by order dated February 17, 1967, the service of a fresh charge sheet on the same date and the subsequent withdrawal thereof on October 12, 1972, the order of termination of the Petitioner's services which followed the withdrawal thereof on October 12, 1972, the order of termination of the Petitioner's services which followed the

withdrawal of the charge-sheet, threw an imputation on the conduct of the Petitioner and was in the nature of punishment. He invited the Court to lift the veil, go behind the order of termination of service and look into the facts of the case. He submitted that here was an appropriate case where adoption of such a course was necessary. Mr. Chowdhury relied on the decision of the Supreme Court in *The State of Punjab Vs. Prakash Singh Cheema*, where A.C. Gupta J. speaking for the Court observed:

An order terminating the services of a temporary servant or a probationer, if it is by way of punishment will attract Article 311 of the Constitution. The form of the order is not conclusive, it is the substance of the matter that has to be looked into. Whether or not, an order of termination is by way of punishment would depend on the facts and circumstances of each case.

9. His Lordship relied on the case of *Samsher Singh Vs. State of Punjab and Another*, where on an elaborated review of an earlier judgment of the Court it was held that if in the facts and circumstances of a case it transpires that in substance, the order for termination of service is by way of punishment then a probationer is entitled to the protection of Article 311 of the Constitution. The substance of the order and not the form would be decisive.

10. In the case in which judgment was delivered by A.C. Gupta J. the Respondent was a temporary Tax Inspector in the Excise and Taxation Department. A charge was framed against him in which he was accused of dereliction of duty and gross negligence. A charge-sheet was served upon him. He was informed that action under Rule 7 of the Punjab Civil Service Rules, 1952, was proposed to be taken against him and he was asked to state in writing within three weeks from the receipt of the charge-sheet what explanation or defence, if any, he had to offer. The Respondent filed an explanation denying the charges. Thereafter, by a notice, the Excise and Taxation Commissioner terminated his service by giving him one month's notice. On receipt of this order the Respondent made a representation to the Chief Minister of the State. The Chief Minister called for a report and directed that, in the meantime, the Respondent should continue in service. Thereafter, the Chief Minister, after considering the report ordered that the Respondent did not deserve punishment of termination of service only on account of a few bad reports and that he should continue in service and his case should be reviewed after he had earned another report from the Excise and Taxation Commissioner for the year 1964-65. It transpired that the Excise and Taxation Commissioner without waiting for the report as advised by the Chief Minister made an order terminating the services of the Respondent. I might add that the order of termination of service did not disclose any reason for the action taken.

11. It appears from para. 3 of the judgment that the assurance given by the Chief Minister that the Respondent should continue in service until his case was reviewed on the basis of another report of the Excise and Taxation Commissioner had very little or nothing at all to do with the ratio of the decision. The principle

under-lying the decision appears to be that the Court may go behind an order of termination of service in an appropriate case to ascertain whether the order of termination has been made by way of punishment or not.

12. The counsel also relied on a decision of the Supreme Court in the case of Madan Mohan Prasad Vs. State of Bihar and Others, . In that case, the Petitioner was appointed as a temporary Munsif upon the term that his service was terminable at one month's notice on either side. The Petitioner remained in temporary service as a Munsif for a period of 15 years and became eligible for pension under the relevant Service Rules. It appears from para. 11 of the report that an order terminating the Petitioner's services was made on January 15, 1972.

13. Before the order of termination of the Petitioner's services was made, the Chief Minister, in answer to a question, made a statement in the Bihar Legislative Assembly with regard to the Petitioner's services. He said that it was true that having put in 15 years of temporary service the Munsif was entitled to pension but, on the other hand, since his service was not satisfactory he could be removed on one month's notice. He added that on reconsideration of the matter the Government felt that he should be served with show-cause notice and therefore, the Government was reconsidering the matter. Sikri C.J. in delivering the judgment of the Court said:

It seems to us that on the facts of this case the order of January 15, 1972, violates Article 311(2) of the Constitution. The Chief Minister's statement in the Assembly that his services were not satisfactory and that the Government was considering serving show-cause notice and the fact that his service was terminated without any enquiry being held would inevitably lead the public to believe that his services had been terminated on account of inefficiency or misconduct. This did cast a stigma on his character.

14. In the case of The State of Bihar and Others Vs. Shiva Bhikshuk Mishra, the Respondent, who was the Petitioner in the High Court, was officiating at the material time as a Subedar Major. He was reverted to his substantive rank of Sergeant and posted at Hazaribagh. Prior to the order for reversion, the Commandant of the Bihar Military Police made an enquiry into certain charges brought against the Petitioner and expressed the opinion that the Petitioner had actually committed the act of misconduct he was charged with. The Commandant recommended that no action need be taken, but in order to prevent any recurrence of misconduct, he suggested that the Petitioner be censured. The Deputy Inspector-General of Police in his note recommended reversion of the Petitioner to his substantive rank and the Inspector-General made an order as proposed by the Deputy Inspector-General. The Petitioner who was the Respondent before the Supreme Court challenged the order by which he was reverted to his substantive post and contended that the order was made by way of punishment and attached stigma to his character and conduct.

15. Grover J. in delivering the judgment of the Court relied on the principles enunciated by Mitter J. in the case of State of Punjab and Another Vs. Shri Sukh Raj Bahadur, . Mitter J. on a review of a number of decisions on the point had observed:

The services of a temporary servant or a probationer can be terminated under the rules or his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

The circumstances preceding or attendant on the order of termination have to be examined in each case, the motive behind it being immaterial.

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.

An order of termination of service in unexceptionable form preceded by an enquiry launched 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.

If there be a full-scale departmental enquiry envisaged by Article 311 i.e. an Enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said Article.

16. Grover J. rejected the contention that so long as there are no express words of stigma attributed to the conduct of a Government servant in the impugned order, it cannot be held to have been made by way of punishment. The test as previously laid down and which was relied on was whether the misconduct or negligence was a mere motive for the order of reversion or whether it was the very foundation of that order. The learned Judge added:

So far as we are aware no such rigid principle has ever been laid down by this Court that one has only to look to the order and [if] it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government officer, it must be held to have been made in the ordinary course of administrative routine and the Court is debarred from looking at all into the attendant circumstances to discover whether the order had been made by way of punishment. The form of the order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct.

17. His Lordship referred to the case of S.R. Tewari Vs. District Board Agra and Another, .

18. In the case Shiva Bhikshuk Misra v. State of Bihar Supra the order of reversion was directly and proximately founded on what the commandant and

the Deputy Inspector-General had said relating to the Respondent's conduct. In that view of the matter, the Court held that the Respondent was entitled to the protection of Article 311(2) of the Constitution.

19. The learned Advocate appearing on behalf of the Petitioner also relied on a Bench decision of this Court in the case of Nirmal Kanti Kanjilal v. Senior Manager, Post and Telegraph Motor Service, Calcutta and Ors. (1974) C.L.J. 443. There the services of a temporary motor vehicle mechanic was terminated under Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Services) Rules, 1965. The mechanic, who was the Appellant before the appellate Court, made an application under Article 226 of the Constitution and obtained a Rule. The application was heard by Chittatosh Mookerjee J. His Lordship directed production of two papers from the Appellant's personal file-one of those was a report of the Deputy Manager of the Petitioner's department to the Senior Manager. Towards the concluding portion of the report the Deputy Manager stated:

Under the above circumstances we may come to the conclusion that these two officials for their records of bad character and conduct and for their involvement in such a series of offence of stealing the Government properties have rendered themselves unsuitable for further retention in service for the sake of maintaining the discipline in the organisation and may perhaps be weeded out from service as early as possible.

The above report was considered by the Senior Manager who in his finding remarked:

The past working conduct of these officials would indicate that they had been suspected of several other acts involving moral turpitude and the present act of thieving the deterrent action against them.... Inasmuch as these officials were made quasi-permanent, in view of their past unsatisfactory work and conduct, their services are ordered to be terminated under Rule 5 of C.C.S. (T.S.) Rules, 1965.

20. The Division Bench held that on the facts and circumstances of the case, the finding of the Senior Manager, which was arrived at without giving the Appellant an opportunity of being heard, was the principal ground of the order of termination of services. That being the position, the order was struck down.

21. Mr. D.N. Das appearing on behalf of the Respondents relied on a decision of the Supreme Court in the case of Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI), . That was a decision on the validity of an order for compulsory retirement. S.R. Das J. pointed out that compulsory retirement did not carry any stigma or implication of misbehaviour or incapacity. His Lordship said:

it is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be

the real cause for taking the action but what is important to note is that the directions in the last sentence in Note 1 to Article 465A make it abundantly clear that an imputation or charge is not in terms made a condition for the exercise of the power. Mr. Das also relied on a decision in the case of R.S. Sial Vs. The State of U.P. and Others, . The Appellant was officiating as General Manager. He was reverted to his substantive post of Assistant General Manager. His representation against the order of reversion was dismissed. He filed a writ petition which was dismissed by a Full Bench of the High Court. From the order of dismissal he preferred an appeal to the Supreme Court by special leave. The Appellant contended that the order of reversion was made by way of punishment and that being so, the same was liable to be quashed having been made without complying with the requirement of Article 311 of the Constitution. Khanna J. in delivering the judgment of the Court relied on the propositions enunciated in the case of State of Punjab v. Sukhraj Bahadur Supra and held that the order of reversion of the Appellant was not by way of punishment. The order did not cast on the Appellant any aspersion nor did any stigma attach to his name as a result of the order. It merely appeared from the materials placed before the Court that it was thought necessary not to permit him to officiate in a higher post pending the holding of open enquiry into charges of corruption against him. The Court observed:

All that can be said is that the contemplated enquiry into the charges of corruption against the Appellant provided the motive for the reversion of the Appellant. The existence of such a motive cannot, in our opinion, vitiate the order for the reversion of the Appellant. It may be taken to be well-settled that even though misconduct, negligence, inefficiency or other disqualifications may be the motive or the inducing factor which influences the Government to take action under the express or implied terms of the contract of employment or under the statutory rule, nevertheless if a right exists, under the contract or the rules to terminate the services, the motive operating on the Government is wholly immaterial.

22. Mr. Das also relied on the case of The State of U.P. Vs. Sri Shyam Lal Sharma, where Ray J. on a consideration of earlier decisions extracted certain tests for ascertaining whether the order of compulsory retirement was by way of punishment or not. The first test is whether in the order of compulsory retirement there was any element of charge or stigma or imputation or any implication of misbehaviour or incapacity of the officer concerned. The Court found that the order, on the face of it, did not contain any stigma and reversed the order of the High Court which had gone behind the order of retirement and had read a document in a manner which was not justified. Mr. Das also relied on a recent Division Bench decision of this Court in the case of State of West Bengal v. Somendra Nath Lahiri where the Court refused to interfere with the order of discharge of a temporary Police officer who was described in the order as "unsuitable" as the Court felt that the use of the word "unsuitable" did not cast any aspersion on the Respondent or make any imputation on his character or

conduct.

23. On a consideration of the cases to which reference has been made, it is clear that the Court can go behind an order of termination of the service of a temporary employee even though the language of the order is unexceptionable. The form of the order is not conclusive and it is the substance of the order which should to be looked into. At the same time, the Court must carefully consider whether allegations which may very well furnish the basis of disciplinary proceedings under Article 311(2) of the Constitution of India merely constitute a motive for the order of termination or they constitute the foundation of the order. If it is merely a case of motive then the presence of the motive in making the order for termination will be immaterial. But if it goes to the root of the matter and is the causa causans of the order, the order will be struck down as having been made in contravention of Article 311(2) of the Constitution.

24. In the present case the following statements appear in the note of S. Bhutalingam, Under-Secretary to the Ministry of Mines and Steel, dated December 11, 1971:

Shri Sharma is purely temporary and is supposed to be governed by C.C.S.(T.S.) Rules, 1965. Hence, Rule 5 seems to be applicable in his case.... This Department felt that action might be taken against him under Rule 5 of the C.C.S. (T.S.) Rules, 1965, as the charges against him had already been proved beyond doubt and no further enquiry was needed. If, however, the order of termination of his services under Rule 5 is challenged by Shri Sharma in the Court of law as pointed out by the Ministry of Law in their note dated 10-6-65, the Government may accept the challenge at the appropriate time.

25. It is not a little strange that after the second charge-sheet was served on February 17, 1967, Mr. Bhutalingam found that the charges against him had already been proved beyond doubt and no further enquiry was needed. In any event, the finding was not of the Enquiry Officer who at that time was entrusted with the enquiry. Moreover, no progress appears to have been made in the enquiry proceedings. In the note of Mr. Bhutalingam it is said that--

The Ministry of Law and Social Justice were consulted again in the matter and they held the view that the first step was to drop the charges straightway and intimate him accordingly and after waiting about a month or two his services might be terminated under Rule 5 of the Temporary Services Rule after paying a month's salary in lieu of notice and relieve him forthwith.

26. It seems to me that the order for termination of services was in substance and reality a substitute for an order which might well have been made in disciplinary proceedings under Article 311(2) of the Constitution of India after the Petitioner had been found guilty of the charges of misconduct which were brought against him. The note of Mr. Bhutalingam, to which I have made reference, constitutes the basis and foundation of the order for termination of the Petitioner's services. It will appear from the note of Mr. A. Deshpande, the Under-

Secretary to the Department of Mines, dated November 27, 1972, that the recommendation of Mr. Bhutalingam, reinforced by the advice of the Ministry of Law, was wholly responsible for dropping the departmental proceedings and shortly thereafter, passing the order for termination of the Petitioner's service.

27. It is quite clear from the notes to which I have referred that the Petitioner's services were terminated by the order dated December 15, 1972, on the basis that the Petitioner had been found guilty beyond doubt, of the charges which were the subject-matter of two disciplinary proceedings which were withdrawn once on February 17, 1967 and again on October 12, 1972. The order of termination of service, innocuous though it might be on the face of it, having the semblance of being made in the usual course, was in reality a device to circumvent the departmental proceedings under Article 311(2) of the Constitution and a substitute for punishment which might have been imposed on the Petitioner in those proceedings. Having gone into the facts of this case I have no doubt here is a good instance of what is to be understood by "foundation" of an order as opposed to a mere motive for an order. The records indicate that the order was made because the Petitioner was found guilty of charges by a person who was not the Enquiry Officer at a time when the second round of disciplinary proceedings had just commenced. The charges were withdrawn on October 12, 1972, only with the object of terminating the Petitioner's services by the order dated December 15, 1972.

28. Apart from records, there is considerable force in the contention of the Petitioner that in the context of disciplinary proceedings the order of termination casts aspersion on his character and attaches stigma to his reputation. Disciplinary proceedings were initiated against the Petitioner on November 7, 1964. The charge was withdrawn on February 17, 1967. A fresh charge-sheet was served on the same date. The second charge-sheet was withdrawn after more than five years. During that period no progress appears to have been made in the enquiry. Two months after the charge-sheet had been withdrawn, the order of termination of the Petitioner's services was passed. From the sequence of events, one is reasonably entitled to draw the conclusion that the Petitioner's services were terminated on the ground of misconduct although the charges had been formally withdrawn. The interval of two months between the date of withdrawal of charge-sheet and the order of termination of services, which was deliberately allowed to elapse under departmental advice, does not, in my opinion, mitigate the impact of the order of termination on the Petitioner's character and reputation.

29. In my opinion, the fourth test prescribed by Mitter J. in *State of Punjab v. Sukhraj Bahadur Supra* has been satisfied in this case. The fact that disciplinary proceedings were formally withdrawn, to give the order of termination of services of the Petitioner the colour of having been made in the usual course under a statutory rule must be ignored as a futile attempt to bypass a valuable Constitutional provision.

30. Having regard to the view I have taken, the application succeeds and the Rule is made absolute. Needless to add, the Respondents will be at liberty to take such steps as are available to them in law, including initiation of fresh disciplinary proceedings, to terminate the Petitioner's services, if they are so advised.

31. There will, however, be no order for costs.

32. On the prayer of the learned Advocate appearing on behalf of the Union of India, I direct that there will be stay of operation of this order for a period of ten weeks from date.