
(1969) 11 OHC CK 0027
In the Orissa High Court
Case No : O.J.C. No. 741 of 1969

Devaraj Moharana

APPELLANT

Vs

Executive Engineer, General Electrical Division and Another

RESPONDENT

Date of Decision : 11-11-1969

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 309, 311, 311(2)
Orissa Service Code, 1939 — Rule 173, 2, 41

Citation : (1970) 36 CLT 559

Hon'ble Judges : G.K. Misra, C.J.; S.K. Ray, J

Bench : Division Bench

Advocate : Srinibas Misra, for the Appellant; A.G., for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—The Plaintiff was appointed as a Khalassi in the work-charged establishment on a pay of Rs. 45-1-55/- per month with usual dearness allowance as sanctioned from time to time by Government. The post is purely temporary and may be terminated at any time with or without notice. The terms would appear from Annexure 1 dated 22-6-1966, which is the office order issued from the office of the Executive Engineer, General Electrical Division No. 1, Bhubaneswar. On 7.9.1968 the Plaintiff was entrusted with the work of excavation of earthpit in one of the quarters at Bhubaneswar on electrical emergency duty. The Plaintiff left the site without any intimation. The Section officer went to the spot at 12.30 P.M. for supervision of the work and did not find the Plaintiff at the work spot. He reported the matter to the Executive Engineer (opposite party No. 1). An explanation was asked for. In Annexure 3 the Plaintiff gave a reply that it was not part of his duties to dig earth though in fact he did not disobey the order, that he had gone out to take tea when the Section officer came to the spot, and that the work could not be finished during the day despite the fact that he, with another Khalassi worked for the whole day. By Annexure A dated 12.9.1968 the Plaintiff was warned by the Section officer and was marked

absent for negligence of duty on 7.9-1968. After receipt of the explanation the Executive - Engineer passed the following order (marked Annexure B). office order

Sri Debraj Moharana, Khalassi of S.I. under Sub-Divisional officer No. 1, Electrical, R. & B Bhubaneswar, is here by discharged from service with immediate effect, due to indiscipline and negligence of Government duty.

He should be relieved immediately.

Sd/- Executive Engineer, General Electrical Divisional Bhubaneswar.

This writ application has been filed, under Articles 226 and 227 of the Constitution, against this order of discharge.

2. It is contended that the Plaintiff is a Government servant and when the discharge order casts a stigma on him his services could not have been terminated without a disciplinary proceeding being taken under Article 311(2) of the Constitution. It is further stated that once the Plaintiff had been warned and marked absent for negligence of duty on 7-9-1968, the subsequent order of discharge, in respect of the same transaction, amounts to double punishment and is contrary to law.

3. In the counter-affidavit filed on behalf of the opposite parties, it was admitted that after the explanation was submitted by the Plaintiff, opposite party No. 1 conducted a verbal enquiry at the spot and found that the Plaintiff was absent from work. This was done in consonance with the principle of natural justice though the Plaintiff was not entitled to any such enquiry as he was not a Government servant.

4. There is no dispute that there has been no enquiry under Article 311(2) of the Constitution. A verbal enquiry cannot be substituted for the enquiry as required under Article 311. Article 311(2) lays down:

No such person as referred to in Clause (1) shall be dismissed, removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such enquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making a representation on the penalty proposed, but only on the basis of evidence adduced during such enquiry.

The Article embodies a code of enquiry. Charges should first be framed and the explanation of the delinquent is to be obtained. If the charges are not admitted, there would be a regular enquiry, evidence should be gone into, the delinquent should be given full opportunity for cross-examination and to adduce evidence in his defence. On the evidence adduced in the case the enquiry officer is to hear arguments. That the aforesaid elements constitute the contents of Article 311(2), is well settled since the pronouncement of the Supreme Court in Parshotam Lal

Dhingra Vs. Union of India (UOI), . An oral enquiry would record no facts and would give no indication whether the aforesaid procedure was followed. The oral enquiry, therefore, is therefore no enquiry under Article 311(2).

5. The Plaintiff is certainly not a "member of the civil service of the union or an All India Service"; nor is he a "civil servant" of a State. The only question is whether he "holds a civil post" under a State.

6. Rule 2 of the Orissa Service Code runs thus:

This code shall apply to all persons, appointed to public services and posts in connection with the affairs of the State (hereinafter referred to as Government servants).

Rule 173 of the Code is as follows:

173. The following provisions apply to the establishment of the Public works Department charged to work or remunerated by daily wages:

(a) Leave may not be granted to a member of such establishment except after the production of a medical certificate signed by a medical practitioner with qualifications not less than those of a sub assistant surgeon. It must be certified therein that the Applicant is unfit for duty on account of ill health, and the period for which leave is recommended must be definitely stated.

(b) Leave may be granted upto one month for each year of approved service under Government subject to a maximum of three months at any one time; provided that no leave may in any case be., granted unless the Applicant has rendered approved service under Government for at least three years continuously.

(c) Leave salary shall be equal to half the pay drawn at the time of taking leave; provided that in the case of a person to whom the Workmen's Compensation Act applies, the amount of leave salary payable under this clause shall be reduced by the amount of compensation payable u/s 4(1)(D) of the Act.

(d) Before returning to duty, the Government servant shall be required to produce a medical certificate, signed by a medical practitioner with qualifications not less than those of a sub-assistant surgeon stating that he is fit to return to duty.

Rule 173 thus makes clear provision for leave in respect of the establishment of Public Works Department charged to work or remunerated by daily wages.

Under the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962, "Khalassi" holds a Class IV post-see page 39, under Schedule B of the publication issued by the Government of Orissa.

7. Thus the Plaintiff holds a Class IV post in a work charged establishment. Reading the provisions of the Orissa Service Code and the Classification, Control and Appeal Rules, conclusion is irresistible that the Plaintiff is a "Government

servant".

8. The Orissa Public Works Department Code containing administrative instructions does not purport to have been made under Article 309 of the Constitution. It says, in the Introductory to Chapter-I, that the Rules in this Code are complementary to those laid down in other Codes, as for example, the Central Public Works Accounts Code, the Orissa Service Code, the Orissa Treasury Code etc. issued by the competent authorities. Rule 41 deals with employment of work-charged establishment. It runs thus:

41. Work-charged establishment will consist of two categories, i.e., one employed on actual execution of work and the other for general supervision of a specific work or of sub-works of a specific project or upon the subordinate supervision of departmental labour, stores and machinery in connection with such a work or sub-works. When employees borne on regular establishment are employed on work of this nature, their pay and allowances should be charged direct to the work. If the entertainment of work-charged establishment is contemplated for supervision in connection with any work, the cost should invariably be shown as a separate sub-head of the estimate for that work. Pay and allowances of those employed on the actual execution of work should be debited to the concerned item of work.

9. On an analysis of the aforesaid provisions, it would appear that the work charged establishment may be employed for a temporary period till the completion of the work. In other words, if a particular work is to be completed within, say, So period of three years, persons may be employed for that period under particular terms. They are not to be regarded as "casual labourers" in the sense that they can be procured and their services can be dispensed with immediately the need ends. To illustrate:

A funding project under the direct supervision of the department is to be completed within three years. A number of Khalassis may be appointed as is required, on a particular scale of pay for a period of three years. In the process of execution of work it may sometimes happen that on a particular day more Khalassis are necessary. Such Khalassis may be appointed for the particular day and their services could be dispensed with at the end of the day. Khalassis employed in this manner are purely casual labourers and do not hold any civil post. On the other band, Khalassis appointed for a temporary period of three years on a particular scale of pay hold Class IV posts. Doubtless their appointment is temporary and their services can be terminated at any time as they have no right to the posts. But their services cannot be terminated by an order casting a stigma on them. That would be hit by the principles laid down in *Dhingra's Case*.

10. There was some controversy as to the donation of the words "civil post" in Article 311. The matter is no longer in doubt after the pronouncement of the Supreme Court in *State of Assam and Others Vs. Shri Kanak Chandra Dutta*, .

Post denotes office. It is an employment. But every employment is not a post. A casual labourer is, therefore, not a holder of a post. A post under the State means a post under the administrative control of the State. The State may create or abolish a post and may regulate the conditions of service of persons appointed to the post. The word "Civil" has been used in contradiction to a post on the Defence side. In order to be a civil post under the administrative control of the State, it need not necessarily carry a definite rate of pay. A post outside the regularly constituted service may be a part-time employment.

11. On the aforesaid analysis, the Plaintiff who is a work-charged Khalassi is a holder of a civil post. The post doubtless exists for a temporary period and would expire on the completion of the work. The holder of the post is subject to the leave rules under the administrative control of opposite party No. 1. A scale of pay has also been provided for him. He would get annual increments, which means that ordinarily he would continue to serve until the completion of the work.

It was open to opposite party No. 1 to terminate the services of the Plaintiff without assigning any reasons as the Plaintiff has no right to the post. But in the impugned order opposite party No. 1 terminated his services saying he was guilty of indiscipline and negligence of Government duty. This definitely casts a stigma on the Plaintiff and such termination could have been made only after an enquiry under Article 311(2). The impugned order is therefore liable to be quashed.

12. In this view of the matter, the second contention need not be examined.

13. In the result, the writ application is allowed. A writ of certiorari be issued quashing the impugned order. The Plaintiff shall be deemed to be continuing in service. In the circumstances, there will be no order as to costs.

S.K. Ray, J.

14. I agree.