
(2012) 04 AHC CK 0015

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 730 of 2004

Dhirendra, Singh and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 03-04-2012

Acts Referred:

Citation : (2012) 11 ADJ 237

Hon'ble Judges : Devendra Kumar Upadhyaya, J

Bench : Single Bench

Advocate : Abdul Moin and Abhinav N. Trivedi, for the Appellant;

Final Decision : Allowed

Judgement

Hon"ble Devendra Kumar Upadhyaya, J.—Fate of the instant writ petition hinges on the issue as to whether the impugned orders terminating the services of the petitioners, though couched in innocuously worded language to make them appear to be order of termination simplicitor, are, in fact, the result of the employer accepting the allegations of some misconduct against the petitioners. Heard Sri. Abdul Moin and Sri. Abhinava N. Trivedi, learned counsels for the petitioners and learned Standing Counsel appearing for the State and perused the pleadings and material available on record.

2. To arrive at a conclusion as to whether the allegations of misconduct against the petitioners form "Foundation" or "Motive" for termination of their services, the facts of the case as culled from the pleadings on record need to be examined.

3. Having participated in a selection for the post of Constable, the petitioners were selected and accordingly petitioner No. 1, by means of order dated 19.4.2003, was required to report at 15th Battalion of Provincial Armed Constabulary (in short PAC), Agra. Similarly, petitioner No. 2 vide order dated 20.4.2003 was also directed to report at the Headquarters of 26th Battalion, PAC, Gorakhpur.

4. According to the petitioners, their appointments were on probation for a period of two years which included nine months training. The petitioners were undergoing training at 27th Battalion, PAC, Sitapur which started from 25/26.4.2003.

5. It appears that on 23.10.2003, some incident of mar-peet amongst trainees took place in the night of 23.10.2003 wherein both the petitioners are alleged to be involved. Accordingly, the Commandant, 27th Battalion, Sitapur, where the petitioners were undergoing training, directed the Assistant Commandant to conduct a preliminary enquiry into the incident by means of order dated 30.10.2003. Pursuant to the said order, the Assistant Commandant conducted an enquiry into the allegations of marpeet etc. which is alleged to have taken place in the said incident and recorded statements of various persons including the petitioners. The Assistant Commandant, PAC submitted his report of the preliminary enquiry on 30.11.2003 and concluded therein that the petitioners were found guilty of misconducting themselves and further that they had indulged in the acts of the indiscipline. The extracts of the said preliminary enquiry report dated 30.11.2003 is available on record (Annexure 8 to the petition). In the said report the recommendation made by the Assistant Commandant in respect of the petitioners is as under :

6. The petitioners were also placed under suspension by means of orders dated 30.10.2003 passed by the Commandants, 27th Battalion, PAC Sitapur which are on record (Annexures 7 and 7A to the writ petition). Thus, admittedly, before passing the order of termination of services of the petitioners, a preliminary inquiry was got conducted and detailed inquiry report running into at least 57 pages was submitted by the Inquiry Officer holding the petitioners guilty of misconduct and gross indiscipline. The recommendation by the Inquiry Officer was also made in respect of the petitioners that they may be removed from service.

7. For the purposes of deciding the issue involved in the instant writ petition, it is not necessary to go into the veracity or, truthfulness or otherwise of the incident or the charges or for that matter, into the allegations against the petitioners. However, the Court notices that in the incident of mar-peet a preliminary inquiry was conducted wherein the petitioners were found guilty. It is also noticed that the petitioners were placed under suspension and this incident ultimately resulted in passing of the impugned orders terminating the services of the petitioners which, though, is being portrayed as order of termination simplicitor. The question which needs to be considered is as to whether the allegations of misconduct or the findings of guilt recorded by the Inquiry Officer in the preliminary inquiry report dated 30.11.2003 form "Foundation" or "Motive" of passing of the impugned orders".

8. Learned counsels for the petitioners heavily relied on two judgments of the Hon"ble Supreme Court i.e. Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, and Union of India (UOI)

and Others Vs. Mahaveer C. Singhvi, and submitted that analysis of the facts of the present case and material available on record unambiguously establish that the allegations against the petitioners and the findings of misconduct form the foundation of impugned orders of termination of services of the petitioners and not the motive. Hence, the impugned orders cannot be said to be orders of termination simplicitor, rather the orders passed are stigmatic and punitive in nature. Hence, the same cannot be allowed to be sustained for the reason that no inquiry was held prior to passing of the impugned orders.

9. Learned counsels for the petitioners further submitted that though the orders under challenge are innocuously worded and do not contain anything which points out or indicates that they are founded on the allegations of misconduct and finding of guilt against the petitioners but the Court can pierce the veil and arrive at the correct conclusion that, in fact, the impugned orders are punitive in nature and not simplicitor.

10. Learned counsels for the petitioners argued that the stigma or the fact as to whether the impugned orders are punitive can be inferred from the documents and material available on record. The termination order may not contain a word pointing out that it is stigmatic but if on the basis of material available on record it can safely be concluded that the order of termination of services of the petitioners are founded on the findings of misconduct, the Court can quash the orders as being punitive in nature.

11. Learned counsels for the petitioners in this regard refer to para 21 of the judgment rendered by Hon'ble Supreme Court in case of Dipti Prakash Banerjee (supra) which runs as follows :

If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.

12. It has also been argued on behalf of the petitioners that in the instant case the stigma against the petitioners can be gathered from two documents i.e. the preliminary inquiry report dated 30.11.2003 submitted by the Assistant Commandant, PAC, Sitapur wherein it has been recorded that the petitioners were found guilty of misconduct and gross indiscipline and also the letters dated 13.1.2004 (Annexures 9 and 9A to the writ petition) whereby petitioners were required to make their deposition in a regular departmental inquiry conducted

against certain individuals. Referring to the aforesaid inquiry report dated 30.11.2003, learned counsels for the petitioners submitted that the said inquiry report clearly records a finding about the petitioners being guilty of misconduct and indiscipline. The reference has been emphatically made to the letters dated 13.1.2004 wherein it has clearly been indicated that the services of the petitioners were terminated on account of the fact that they were found guilty in the preliminary inquiry conducted into the incident of marpeet which occurred on 23.10.2003.

13. Learned counsels for the petitioners vehemently argued further that the impugned orders terminating the services of the petitioners are punitive in nature and are stigmatic which is unambiguously evident from a bare reading of the letters dated 13.1.2004 which contain clear indication that services of the petitioners were terminated for the reason that they were found guilty in the preliminary inquiry report. Letter dated 13.1.2004 (Annexure 9 to the writ petition) is reproduced here-in-below :

14. The other letter dated 13.1.2004 written in respect of the petitioner No. 2 (Annexure 9A to the writ petition) is identically worded and is a verbatim copy of Annexure 9 to the writ petition.

15. Reliance has also been placed by the learned counsel for the petitioners in the case of Union of India and others v. Mahaveer C. Singhvi (supra) wherein it has been held that if findings of misconduct against a probationer is arrived at behind his back on the basis of an inquiry conducted into certain allegations and if the same forms foundation of the order of discharge simplicitor, the same would be bad and liable to be set aside.

16. Learned counsels for the petitioners have also drawn the attention of the Court to para 46 of the judgment in the case of Union of India and others v. Mahaveer C. Singhvi (supra), which is quoted here under:

As has also been held in some of the cases cited before us, if a finding against a probationer is arrived at behind his back on the basis of the enquiry conducted into the allegations made against him/her and if the same formed the foundation of the order of discharge, the same would be bad and liable to be set aside. On the other hand, if no enquiry was held or contemplated and the allegations were merely a motive for the passing of an order of discharge of a probationer without giving him a hearing, the same would be valid. However, the latter view is not attracted to the facts of this case.

17. Yet another decision of a Division Bench of this Court dated 28.2.2005 rendered in Special Appeal No. 126 (S/B) of 2005, Kailash Bharti v. State of U.P. and others, has been relied on behalf of the petitioners. In the said case, referring to various judgments of the Hon"ble Supreme Court, the Division Bench evolved the following principles :

(i) That an order of termination simpliciter which does not contain any stigma in

its language, does not by itself debar the Writ Court from looking behind the order for ascertainment of the true motive and foundation of it.

(ii) On the basis of the materials on record including affidavits and documents brought before the Court, the Writ Court can, if the circumstances are appropriate, come to a finding of fact as to what was the reason and genesis of the order of termination. In doing that, it can and should judge, in all the facts and circumstances, whether in pith and substance the order of termination is a product of the employer accepting some allegation of misconduct or serious ineptitude against the writ petitioner. In case of such finding the order of termination would have to comply with the requirements of an ordinary inquiry and hearing.

(iii) If the Court finds that the inquiry for termination resulted only in some innocuous departmental finding against the writ-petitioner, even if it be reached behind his back, like redundancy or mere suitability for the job, the writ petitioner would have no case. The reason for this is that the redundant employer still has a chance of being employed elsewhere, since he has a good name left; and that an unsuitable employee in one Organization and one Department might still be suitable elsewhere. Ineptitude, negligence, drunkenness and misconduct are not of this nature, since those would render the employee unsuitable everywhere and for all purposes to a great degree.

18. On the other hand, learned Standing Counsel appearing for the State has relied upon the judgment of the Hon'ble Supreme Court in the case of Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, and has submitted that merely because a preliminary inquiry was held prior to passing of the impugned order of termination simplicitor, it cannot be said that the impugned orders are punitive in nature.

19. The competing arguments advanced by learned counsels for the respective parties have been considered. The Division Bench of this Court in the case of Kailash Bharti v. State of U.P. and others (supra) after analyzing various pronouncements of the Apex Court including the case of P.N. Verma v. SGPGI and another (supra), Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and others (supra) and in AIR 2000 1706 (SC) and various other judgments evolved the principles to be applied as test to determine as to under what circumstances the order of termination simplicitor can be said to be punitive and further as to the scope of judicial review in such matters. The Division Bench in the said case has clearly noted down that the writ Court can look behind the order to ascertain the true foundation or motive of the order of termination of service. In other words, even if the order of termination is worded innocuously not indicating or pointing out any allegation of misconduct, the Writ Court can clear the web and ascertain the true colour of the order and infer as to whether the allegation of misconduct is the motive or the foundation of order of termination.

20. As to the difference between the situation where the order can be said to be "founded" on the allegations of misconduct and the situation where the allegations can be said to be a case of "motive" for passing the order of termination, it must suffice to say that the simple order of termination will be treated as "founded" on the allegations if the findings were arrived at in an enquiry without a full fledged regular departmental enquiry whereas if the employer is not inclined to conduct an enquiry but simply wants to discontinue the services of the employee against whom certain allegations are there, it will be a case of "motive". In case the order of termination is founded on the allegations of misconduct then the same would be vitiated and not sustainable. However, if the allegations are not intended to be enquired into by the employer and the employer intends to discontinue the services of the employee against whom there are complaints, the same would be a case based on "motive" and the same would be an order of termination simplicitor.

21. Looking to the facts of the instant case, it is abundantly clear that though no full fledged regular departmental enquiry was conducted but nonetheless, the preliminary enquiry was held wherein the petitioners have been held guilty of misconduct and gross indiscipline. The basis of passing of the impugned orders terminating the services of the petitioners is the finding of misconduct and of gross indiscipline recorded by the Assistant Commandant in his enquiry report dated 30.11.2003. This fact is evident from the letters dated 13.1.2004 wherein it is clearly indicated that the services of the petitioners were terminated on account of the findings of guilt as recorded in the preliminary enquiry report. The Court on the basis of the finding of guilt recorded in the preliminary enquiry dated 30.11.2003 and the indications given by the letter dated 13.1.2004 comes to the definite conclusion that the services of the petitioners were terminated on account of the finding of guilt. Thus, impugned orders are not orders of termination simplicitor, rather they are "founded" on the allegations of misconduct and the finding of misconduct and gross indiscipline against the petitioners. The impugned orders, thus, are clearly casting stigma on the conduct of the petitioners and hence, in this situation, the impugned orders are not sustainable at all.

22. In para 10 of the judgment in the case of Union of India and others v. Mahaveer C. Singhvi (supra), Hon'ble Supreme Court has clearly observed that if findings as to misconduct were arrived at even without a regular departmental enquiry, a simple order of termination is to be treated as founded on the allegations and would be bad.

23. In view of discussions made and reasons indicated above, the Court finds that the impugned orders dated 4.12.2003, terminating the services of the petitioners which are annexed as Annexures 1 and 2 to the writ petition respectively, are not sustainable being bad in law. Hence the same are hereby quashed.

24. Apart from challenging the impugned orders dated 4.12.2003 whereby the

services of the petitioners were terminated (Annexures 1 and 2 to the writ petition), the petitioners have also challenged the order dated 7.1.2005 wherein the Commandant, 27th Battalion, PAC, Sitapur has stated that in compliance of the interim order dated 9.2.2004 passed in the instant petition, the petitioners were allowed to complete the remainder period of their training but the decision regarding their reinstatement in service shall be taken after final judgment in the writ petition. The petitioners have also challenged an order again passed by the Commandant 27th Battalion, PAC Sitapur whereby the petitioners were ordered to be reinstated in compliance of the interim order dated 13.7.2006 passed in this writ petition with a simultaneous prayer to direct the opposite parties to pay salary and other allowances to the petitioners treating them in continuous services w.e.f. 7.1.2005.

25. As regards the prayer of the petitioners for payment of salary etc certain developments took place after filing of the writ petitions which have been noticed by the Court. While entertaining the writ petition this Court passed an interim order on 9.2.2004 directing therein that the petitioners shall be allowed to undergo and complete their training. Accordingly, in compliance of the said interim order dated 9.2.2004, the petitioners were allowed to undergo training and on 7.1.2005 an order was passed by the Commandant stating therein that final decision regarding the reinstatement of the petitioners shall be taken after final judgment of this Court in the present writ petition. The said order dated 7.1.2005 has been challenged by the petitioners by way of seeking amendment in the writ petition and this Court by means of order dated 13.1.2005 provided that till the next date of listing the operation of the order dated 7.1.2005 shall be remain stayed. However, it is noteworthy that the operation of the order of termination of services of the petitioners was never stayed. Though there was no stay, by this Court of the orders of termination of services of the petitioners, another order was passed by the Court on 13.7.2006 directing the opposite parties to ensure compliance of the Court's order dated 13.1.2005 and further that the petitioners may be given posting and assigned their duties. The Court notices that by the order dated 13.1.2005, only operation of the order dated 7.1.2005 was stayed which provided that decision regarding reinstatement of the petitioners shall be taken after final decision of the writ petition, however, the orders of termination of services were never stayed.

Notwithstanding the fact that the orders terminating the services of the petitioners were never stayed by the Court, it appears that in compliance of the order dated 13.7.2006, the order dated 25.1.2007 (Annexure 14 to the writ petition) was passed reinstating the petitioners in service. The reinstatement of the petitioners in service was made in compliance of the order dated 13.7.2006 of the Court whereby for the first time the opposite parties were directed by this Court that the petitioners may be given posting and assigned their duties. Prior to 13.7.2006, no order by the Court was passed either staying the operation of the orders of termination of services of the petitioners or issuing interim Mandamus for reinstatement of the petitioners.

26. In the light of above facts, the Court, while quashing the impugned orders of termination of services of the petitioners, allows the writ petition and further directs that the petitioners shall be entitled for salary and other admissible allowances w.e.f. the order dated 13.7.2006 passed by this Court, apart from payment of emoluments/allowances admissible to them during the training period. Accordingly, the opposite parties shall pay this amount within a period of eight weeks from the date of production of certified copy of this judgment.

27. On account of quashing of impugned orders terminating the services of the petitioners by this judgment, they shall be given the benefit of continuity of service throughout but would not be entitled to payment of salary and allowances for the period prior to 13.7.2006. In terms of the above observations/directions, the writ petition is allowed.