
(1994) 04 GAU CK 0002
In the Gauhati High Court
Case No : Civil Rule No. 689 of 1989

Haren Chandra Deka

APPELLANT

Vs

Chairman, Assam State Electricity Board and Ors.

RESPONDENT

Date of Decision : 27-04-1994

Acts Referred:

Citation : (1994) 2 GLJ 9

Hon'ble Judges : J.N.Sarma, J

Bench : Single Bench

Advocate : N.N.Saikia , J.Chutia, A.Das Gupta, Advocates appearing for Parties

Judgement

1. This application under Article 226 of the Constitution of India has been filed against the order of termination of the service of the petitioner vide telegraphic order of the Secretary, Assam State Electricity Board dated 4.4.89 when the petitioner was under training in the Police Training College at Dergaon. The order in question was issued on 4th April, 1989 which is at Annexure 10 to the writ application. Annexure 10 the impugned order reads as follows :

"Sri Haren Chaodra Daka was appointed as SI (Vig.) in the Board vide order No. ASEB/CSO/Estt5/Pt/88/33. dated 26.3.88 and was put on a probation for a period of 1 (one) year wef 8.4.88 for undergoing training on Drill/Physical training etc. But during the said period of probation Shri Deka had been found to be very much irregular, remaining absent frequently on ground of ill health, totally undesirable/unsuitable to be a member of the ASEB Security Force Service.

On his failure to successfully complete the probationary period with such dismal performance rendering him unfit and unsuitable to be a t member of the Security Force and in terms of Regulation 9 (a) (ii) of, .ASEB Employee Service Regulation, 1960 and in consonance with clause 8(2) of the ASEB Security Force (Service) Regulation, 1975, the services of Shri Haren Chandra Deka, SI (Vig) on probation are hereby terminated with immediate effect."

2. The petitioner is a graduate and was selected for the post of Sub Inspector,

ASEB Security Force. Rejoined in the post on 8.4.88 by virtue of appointment letter dated 4.4.88. The petitioner was put on probation and was sent to Police Training College, Dergaon vide Annexure 4 to the writ application. From the record it appears as follows :

(i) That the petitioner was absent from training from 27.12.88 to 15.2.89 as intimated by the Principal, Police Training College, Dergaon. Later on he applied for leave for 51 days and the leave was granted without pay on 15.1.89 but this pay was paid earlier and the pay was to be deducted from his future salary.

(ii) On 21.6.88, the petitioner left the Police Training College and went home and thereafter on 27.6.88 he prayed for 3.0 days leave. During the period of training, no leave is admissible and he was asked to join the service by 3 (three) letters, ultimately he joined the training on 3.10.88. So, he was on leave for 105 days.

(iii) It further appears that the petitioner was on leave for the following period":

(a) Absent without permission on 23.5.88, 24.5.88 and was granted " " EOL for 2 days,

(b) He remained absent without leave or permission on 6.6.88 and was granted EOL for one day.

(c) He went on sick leave for 5 days with effect from 21.6.88 and left for home without permission.

(d) That command certificate was sent to the Psychology Deptt. of Guwahati Medical College Hospital and he got himself treated as out door patient from 3.1.89 to 15.2.89. The Psychology Deptt. opined that he was suffering from "Nervous disorder".

(e) Shri Deka complained of abdomen pain and the Doctor of the Police Training College, Dergaon reported that he was , malingering.

3. Taking all these things into account, the service of the petitioner was terminated during the period of probation.

4. I have heard Shri A. Dasgupta, learned counsel for the petitioner and Shri NN Saikia, learned counsel for the respondents.

5. Shri Dasgupta contends as follows :

(i) That in case of dismissal on specific misconduct of the petitioner a departmental enquiry is required to be conducted. , :

(ii) If the dismissal is not for specific misconduct, a preliminary enquiry is to be conducted.

6. Shri Dasgupta appearing for the petitioner relies on the following decisions :

(i) AIR 1984 SC 636 (Anoop Jaiswal vs. Government of India); (ii) AIR 1984 SC 1110 (Indta Pal Gupta vs. The Managiog Committee Model Inter JT College); (iii)

AIR 1974 SC 2192 (Samser Singh vs. State of Punjab).

7. On other hand, Shri Saikia, appearing for the respondents relies on the following decisions : (i) AIR 1988 SC 338 (State of Gujarat vs. Sharadchandra Mnoohar Neve); (ii) AIR 1993 SC 292 (Governing Council of Kidwai Memorial Institute of Oncology vs. Dr. Pandurang Gowaikar).

8. AIR 1984 SC 636 was a case where the petitioner being selected for appointment in the Indian Police Service was undergoing training as a probationer at the Police Academy, Hyderabad. The petitioner along with others were late in attending the function by 22 minutes and this delay was considered as an incident which called for an enquiry. Explanation was called from all the probationers. The appellant was considered as one of the ring leader who was responsible for the delay. The appellant, gave his explanation to the Director of the Academy and the Director without holding an enquiry in the alleged misconduct recommended to the Government of India that the appellant should be discharged from the service. On the basis of the above report, the Government passed the discharge order and it was this discharge order which was challenged. In the facts and circumstances of that case the Supreme Court laid down the law as follows :

"It is, therefore, now well settled that where the form of the order is merely a comouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court, holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be. debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

In AIR 1984 SC 1110, the Supreme Court laid down the law as follows :

"In short, if the termination of service is founded on the right flowing from contract or the service rules then prima facie, the termination is not a punishment and carries with it no evil consequence and so Article 311 is not attracted. But even if the Government has, by contract or under the rule, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification then it is a punishment and the requirements of Article 311 must be complied with."

9. AIR 1974 SC 2192 is the famous case of Samser Singh, where the Supreme Court pointed out as follows ;

"No abstract proposition can be laid down that where the services of a probationer are terminated it can never amount to a punishment. 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 temperament 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 case 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 Article 311 (2) he can claim protection.

The fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to the protection of Article 311. The substance of the order and not the form would be decisive.'''

10. On the other hand, MR 1988 SC 338 points out that in case of the termination of services during or at the end of the probation period, there is no necessity to institute any proceeding.

11. In AIR 1993 SC 392 the Supreme Court pointed out as follows: "It an employee who is on probation or holding an appointment on temporary basis is removed from the service with stigma because of some specific charge, then a plea cannot be taken that as his service was temporary or his appointment was an probation, there: was no requirement of holding any enquiry, affording such an employee an opportunity to show that the charge levelled against him is either not true or it is without any basis. But whenever the service of an employee is terminated during the period of probation or while his appointment is on temporary basis by an order of termination simpliciter after some preliminary enquiry it cannot be held that as some enquiry had been made against him before issuance of order of termination it really amounted to his removal from service on a charge, as such penal in nature. The principle of tearing of veil for finding out real nature of the order shall be applicable only in a case where the Court is satisfied that there is a direct nexus between, the charge so levelled and action taken. If decision is taken, to terminate the service of an employee during period of probation, after taking into consideration overall performance and some action or inaction on the part of such employee then it cannot be said that it amounts to his removal from service as punishment. It need not be said that the appointing authority at stage of confirmation or while examining the question as to whether the service of such employee be terminated during the continuance of the period of probation, is entitled to look into any complaint made in respect of

such employed while discharging his duties for purpose of making assessment of the performance of such employee.

Thus in the present case the Governing Council examined different reports in respect of the probationer during period of probation and considered the question as to whether he should be allowed to continue in the service of the institute. The decision was taken by the Governing Council on the total and overall assessment of the performance of the probationer in terms of the condition of the appointment. It cannot therefore be said that the order of termination amounts to removal from service as a punishment."

12. In the instant case, it will appear from the records and affidavits in opposition filed by the respondents that the petitioner was discharged after examining the different materials in respect of the probationer during the period of probation and considering the question as to whether he should be allowed to continue in the service of ASEB. The decision was taken by the ASEB on the total and overall assessment of the performance of the probationer in terms of the condition of appointment. It cannot therefore be said that the order of termination amounts to removal from service as a punishment.

13. It is settled law that a temporary employee is appointed on probation for a particular period only in order to test whether his conduct is good and satisfactory so that he may be retained. Even if misconduct, negligence or inefficiency may be the motive or main factor which induces the employer to terminate the service of the employee which the employer admittedly had under the terms of appointment, such termination cannot be held to be penalty or punishment.

14. This being the position, there is no merit in this writ application and accordingly, the same is dismissed. I leave the parties to bear their own costs.