

(2005) 10 AHC CK 0068

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 13526 of 1994

Katar Singh

APPELLANT

Vs

District Magistrate/Collector, Zila Sahayak Nibandhak
Sahakari Samitiya and A.D.O. Zila Sahayak Nibandak
Sahakari Samiti

RESPONDENT

Date of Decision : 07-10-2005

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Citation : (2006) 5 AWC 4370

Hon'ble Judges : Ashok Bhushan, J

Bench : Single Bench

Advocate : Ajai Kumar Srivastava, Prabha Kanta Mishra, Rati Kanta Mishra and Anupam Shukla, for the Appellant; H.R. Misra and K.M. Misra and S.C., for the Respondent

Final Decision : Allowed

Judgement

Ashok Bhushan, J.—Heard Sri Ajai Kumar Srivastava, learned counsel for the petitioner, standing counsel appearing for the respondent No.1 and Sri K. M. Misra appearing for the respondents No. 2 and 3. Counter and rejoinder affidavits have been exchanged between the parties. The writ petition is being finally disposed of with the consent of both the parties.

2. By this writ petition the petitioner has prayed for quashing the termination order dated 10.11.1993 Annexure-3 to the writ petition.

3. Brief facts necessary for deciding the writ petition are;____

4. The petitioner was selected for appointment as Cooperative Kurk Amin by the Collector, Saharanpur vide his order dated 1.6.1985. The District Assistant Registrar issued an order dated 10.6.1985 directing the petitioner to complete certain formalities within one week, the appointment order dated 25.6.1985 was issued by the District Assistant Registrar in pursuance of the selection of the

petitioner on commission basis as Kurk Amin. The appointment order stated that the petitioner's services are temporary. By an order dated 10.11.1993 issued by the Collector, Saharanpur petitioner's services were terminated with immediate effect. The petitioner submitted representation to the Collector protesting against his termination vide his representation dated 18.12.1993. It was stated by the petitioner in the representation that the termination has been affected without affording any opportunity of hearing to the applicant. The termination order dated 10.11.1993 terminating the services of the petitioner has been challenged by means of this writ petition.

5. A counter affidavit has been filed on behalf of the respondents No. 2 and 3 . In the Counter affidavit it has been stated in paragraph 4 that the petitioner was found guilty of embezzlement that is why his services were dispensed with by the impugned order. In paragraph 8 of the counter affidavit it has been stated that the Circle Officer, Collection was made Enquiry Officer and in the enquiry it was found that the petitioner is guilty of embezzlement of the amount to the tune of Rs.9000/- . On the basis of the aforesaid allegation of embezzlement it was decided to terminate the petitioner's services. It is relevant to note the allegation made in paragraph 8 of the counter affidavit for ascertaining the real cause of termination of petitioner's services. Following is the averment made in paragraph 8 of the counter affidavit.

"8.... Ultimately by the order dated 30.10.1992 the C.O./Collection was made enquiry officer who after holding the enquiry found that the petitioner is guilty of embezzlement of the amount to the tune of Rs, 9,000/- and consequently there upon the petitioner deposited a sum of Rs. 7800/-on 13.1.1993, a sum of Rs. 1200/- on "16.1.1993 and a sum of Rs. 280/- on 13.2.1993. Thus total Rs.8,980/- was deposited in the Bank. Thus, it is clear that the petitioner who was appointed on commission basis has embezzled the aforesaid amount and the same came into light after a gap of five years and when the enquiry was conducted the petitioner deposited the Same Thereafter it was decided by the respondent no. 1 not to retain the petitioner in service and consequently the impugned order dated 10. 11.1993 . was passed by which the petitioner's services were dispensed with."

6. In Paragraph 12 of the counter affidavit it was again stated that the petitioner was not only negligent in performing his duties but also found guilty of embezzlement and that is why his services have rightly been dispensed with.

7. Learned counsel for the petitioner challenging the termination order submitted that the termination of the petitioner-is in violation of protection given to petitioner under Article 311(2) of the Constitution of India, Learned counsel contended that the Kurk Amin appointed on commission basis is also a civil servant as held by the apex Court in State of U.P. and Others Vs. Chandra Prakash Pandey and Others Etc., hence the protection of Article 311(2) of the Constitution is fully applicable to the petitioner. It is further contended that the termination order was punitive in nature having been passed on the charge of

embezzlement and proper enquiry was necessary before passing the impugned order. Reliance has been placed by the counsel for the petitioner on the judgement of this Court reposed in Jagdish Prasad Vs. State of U.P. and others, . . Learned counsel appearing for the respondents No. 2 and 3 contended that the order of termination passed by the respondent is a termination simpliciter which did not require holding of any enquiry before passing the order. It is contended that the petitioner was a temporary employee and his services were liable to be terminated by simpliciter order without holding any enquiry. Learned standing counsel also adopted the arguments raised by the learned counsel appearing for the respondents No. 2 and 3.

8. I have considered the submissions and perused the record.

9. There is no dispute that the petitioner was appointed by the order of Collector as Kurk Amin on commission basis, A Division Bench of this Court in Writ Petition No. 738 of 1998 Ram Behari Misra v. District Assistant Registrar Cooperative Societies and Ors. by its judgment dated 16.11.1988 has already held that the Kurk Amins appointed on commission basis are civil servants and are entitled to be dealt with in accordance with law before terminating their services. The above Division bench judgement of this Court was approved by the apex Court in the case of State of Uttar Pradesh v. Chandra Prakash Pandey and Ors. (Supra).

10. The petitioner though was temporary government servant was fully entitled for the protection of Article 311(2) of the Constitution of India. The question raised in this writ petition is as to whether the termination of petitioner's services was simplicitor termination or the same is punitive in nature. It is well settled that for deciding the question as to whether the termination is simplicitor or punitive in nature the court can look into other attended circumstances and materials on record. The apex Court in State of Uttar Pradesh and Others Vs. Vijay Shanker Tripathi, had again considered the test to find out as to when the simple order of termination is founded on the allegation of misconduct or the complaint are only motive for passing simple order of termination.; The apex Court quoted with approval paragraph 21 of the apex Court judgement in Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, . It is relevant to quote paragraph 4 of the judgement of the apex Court in State of U.P. and Ors. v. Vijay Shanker Tripathi (supra) :-

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21. 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 circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.

From a long line of decisions it appears to us that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorise or classify strictly orders of termination simpliciter falling in one Or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service".

11. Applying the above test in the present case it is clear from the own averments of the respondents in the counter affidavit that the termination order was proceeded by enquiry in which charge of embezzlement was established against the petitioner in the writ petition has categorically stated that no opportunity or show cause was given to the petitioner before passing the order of termination. Thus the finding of guilt of the petitioner has been recorded in an ex parte enquiry and the finding of embezzlement is the foundation of the order of termination. The categorical assertions have been made in the counter affidavit that the services have been terminated after finding the petitioner guilty of embezzlement. The order of terminating the services of the petitioner is not a simpliciter termination but has been founded on the charge of misconduct. Taking into entire facts and circumstances of the present case as brought on record it is clear beyond any shadow of doubt that the termination order was passed on finding of guilt of embezzlement which is the foundation of the order. The termination order is not termination simpliciter but is punitive in nature.

12. In view of foregoing discussion the impugned order dated 10.11.1993 cannot be sustained and is hereby quashed. The petitioner shall be deemed to continue in service and shall be reinstated by the respondents within a period of one months from the date of production of a certified copy of this order. However, since the petitioner was appointed on commission basis there is no occasion to direct for payment of any arrears of salary. Other benefits of service as permissible including the continuity of service shall be admissible to the petitioner in accordance with relevant rules, government orders issued by the State Government from time to time.

13. The writ petition is allowed with the aforesaid directions. Parties shall bear their own costs.