

(1995) 02 AHC CK 0112
In the Allahabad High Court
Case No : C . M. W. P. No. 6520 of 1987

Lakhan Lal Vishwakarma

APPELLANT

Vs

Cantonment Board, Jhansi and Others

RESPONDENT

Date of Decision : 17-02-1995

Acts Referred:

Cantonments Fund Servants Rules, 1937 — Rule 6, 8
Constitution of India, 1950 — Article 311

Citation : (1995) 02 AHC CK 0112

Hon'ble Judges : P.K.Mukherjee, J

Final Decision : Allowed

Judgement

Paritosh K. Mnkherjee, J.—By means of this writ petition, Lakhan Lal Vishwakarma, the petitioner, seeks a writ, in the nature of writ of certiorari, quashing Resolution No. 33, dated 10th March, 1986, office order dated 441986 and order dated 2721987 passed by General Officer CommandinginChief Central Command (DE) Lucknow Cantt. respondent No. 4, contained in Annexure IV, V and VIII respectively to the writ petition. He has also sought a writ of mandamus commanding the respondents to reinstate him in service with full back wages and confirm him together with consequential benefits.

2 This writ petition was presented before a Division Bench of this Court on 26th March, 1987. Since notice was accepted by one Sri Sishir Kumar, Advocate on behalf of the respondents, therefore, the Bench consisting of Hon''ble Mr. Justice V. N. Khare and Hon''ble Mr. Justice O. P. Mehrotra had granted one month''s time for filing counter affidavit and office was directed to list the case immediately thereafter. However, we are in 1995 and the case hat come up before me only this day of February 17, 1995.

3 Sri R M Saggi, learned counsel for the petitioner and Sri S. K. Chaturvedi, learned counsel for the respondents are agreed that since the matter relates to employment of the petitioner, and the case is of 1987 origin, it would be in the fitness of things that the case be heard and disposed of finally, in accordance

with the provisions contained in High Court Rules. Accordingly, I am proceeding to dispose of this petition.

4. The petitioner, Lakhan Lal Vishwakarma, began his service career as Overseer (Civil) at Cantonment Board, Babina in the payscale of Rs. 515860 on being appointed on probation basis for a period of two years, with effect from November 7, 1983. After completion of aforesaid period of two years, another extension of six months was granted to the petitioner, and, thereafter, his services were terminated vide notice dated 4th April, 1986.

5. The petitioner has impleaded Sri P. V. Sathe, Executive Officer, Cantonment Board, Babina, Jhansi as respondent No. 3 and made personal allegations against him in various paragraphs of the writ petition. According to the petitioner, it is Sri P. V. Sathe, on account of whom, the services of the petitioner were terminated as Sri Sathe had been biased and prejudiced against the petitioner.

6. For the purpose of resolving controversy involved in the present case, without going into detailed facts of the case, suffice it to say that petitioner is aggrieved by composite order of charge sheet cum termination passed on April 4, 1986 by Sri P. V. Sathe, Cantonment Executive Officer, Babina. The relevant portion of aforesaid order, dated April 4, 1986, is being quoted, hereinbelow :

"Subject : Notice of termination of service

Reference :.....

(2) Vide above office order, your probation period was extended by 6 months beyond 6111985 and your performance was to be reviewed every three months.

(3) In pursuance of above decision your performance was referred to Board at its meeting held on 1031985. The Board thoroughly considered the report of Cantonment Executive Officer dated 131985 stating that

(i) The shed in Budh Bazar, getting the expert report of Garrison Engineer. This is pending for nearly one year.

(ii) Improvement to water supply. Obtaining expert advice of Garrison Engineer. This is also pending for one year.

(iii) Estimate for Hospital Compound wall has not yet been got vetted from the Garrison Engineer.

(iv) School building construction of 1st floor Estimate not yet been completed and put up to me.

(v) He was asked to check all the public group latrines and give a report to carry out repairs. This has not been done.

(vi) He was also asked to prepare estimate for completion of two rooms in Hospital. This has not been done and put up.

(vii) He was asked to copy out the details of M. R. S. Roads as one reference of higher Authorities is pending for considerable time. This has not been done.

He is absolutely slow in his work and does not have initiative.

He has given water connection to Smt. Sia Bai w/o Ram Prakash after obtaining orders from the office of Superintendent on 9121985. I was present in office. Orders should have been obtained from me. This action of his is mala fide,

He has given.....

A written complaint has been received from Sri Shrinandan Lal Jain, House No. 317 Tiwaryane Mohalla that he has taken money from him on 141984 but no official receipt has been given to him, Water supply agreements have not been prepared on unjudicial stamp papers. He has not checked the building plans which have been sanctioned from time to time, Deviations were noticed by me in some plans.

I personally feel he is unable to do the job expected of him Besides this, he is also indulging in doing irregularities and there is scope for suspecting that he is doing embezzlement. I recommend that his services should be terminated by the Board by giving one month's notice.

(4) The Cantonment Board, therefore, vide its Resolution No. 33 dated 1031986 has resolved as under :

"33. Confirmation of Sri Lakhan Lal Yiskwakarama, Overseer. ReferenceCantonment Board Resolution No. 14, dated 18101985.

To consider the report of Cantonment Executive Officer on the performance of Sri Lakhan Lal Vishwakarma, Overseer, Cantonment Board, Jhansi.

Resolution.the report of Cantonment Executive Officer read and thoroughly considered.....Resolved that the service of Sri Lakhan Lal Vishwakarma be terminated by giving one month's salary in lieu of one month's notice as his retention will lead to further complications. Sri R. K. Jain.....

(5) Your services are, therefore, hereby terminated vide this notice as per Board's decision above.

7. Learned counsel for the petitioner, placing reliance on Rule 6 of The Cantonment Fund Servants Rules, 1937" (hereinafter referred to as "the Rules of 1937") contended that since the petitioner had successfully completed probation period of two years, he was entitled to be confirmed. Enhancement of probation period for another six mouths in the present case is against the provisions contained in Rule 6. His next submission is that the order of termination dated April 4, 1986 is bad in law in view of the fact that it has been passed without affording opportunity of bearing of the petitioner and in clear violation of provisions laid down in Rule 8 of the Rules of 1937. Rule 8 provides that the Board or the officer appointing a servant may discharge his service during or at

the end of his period of probation. Learned counsel for the petitioner drew my attention to the proviso of Rule 8(2), which reads as under:

"Provided that before a servant is discharged under clause (a) of the said subrule, he shall be apprised of the grounds on which it is proposed to discharge him and given an opportunity of showing cause against it."

And, vehemently contended that though the aforesaid Rules came into force with effect from 1937, prior to framing of Constitution of India, but those Rules contained the elementary principle of audi alterant partem. The respondent authorities have committed manifest error of law by issuing a composite ordercumcharge sheet to the petitioner.

8. On the other hand, learned counsel for the respondents defended the action by contending that the question of compliance of Article 311(2) of the Constitution does not arise, on the facts and in the circumstances of the present case, as the matter relates to termination of services of a probationer whose services have been terminated "during the period of probation", and the petitioner has no right to claim reliefs, as have been sought in the present writ petition. In support of his contention, he placed reliance in *Governing Council of Kidwai Memorial Institute of Oncology Bangalore v. Dr. Panduranj Godwalkar*, (1992) 4 SCC 719.

9. I have carefully gone through the facts stated in the writ petition, counter affidavit and rejoinder affidavit. I have also given patient hearing to learned counsel for both the parties. At the very outset, it would be proper to examine case law cited by learned counsel for the respondents. In *Kidwai Memorial Institute of Oncology (supra)*, a Division Bench, consisting of Hon'ble Mr. Justice S. Ranganathan and N. P. Singh, JJ. has held as under ;

"(6) Generally in connection with an order of termination, question is raised before the court as to what is the motive behind the termination of the service of the employee concerned whether the reason mentioned in the order of termination has to be accepted on its face value of the background in which such order of termination simpliciter has been passed should be examined to find out as to whether an officer on probation or holding a temporary appointment has been, initiating any departmental enquiry. If 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 on 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 the issuance of order of termination it really amounted to his removal from service on a charge as such

penal in nature.

(7) When an appointment is made on probation it presupposes that the conduct, performance, ability and the capacity of the employee concerned have to be watched and examined during the period of probation. He is to be confirmed after the expiry of probation only when his service during the period of probation is found to be satisfactory and he is considered suitable for the post against which he has been appointed.

If the decision is taken, to terminate the service of an employee during the period of probation, after taking into consideration the over all 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 the 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 employee while discharging his duties for purpose of making assessment of the performance of such employee."

10. Relying on the aforesaid observation of Hon"ble Supreme Court, learned counsel for the respondents strongly put emphasis on the resolution of the Cantonment Board and urged that admittedly the petitioner was probationer, and, therefore, his termination was justified and had been done in the exigency of administration.

11. This court cannot shut its eyes to the facts and circumstances of present case. The petitioner has made specific allegations of mala fide against Sri P. V. Sathe, Executive Officer, Cantonment Board, Babina and impleaded him as respondent No. 3. Instead of controverting the allegations by filing separate counteraffidavit, the counter affidavit filed by respondents is swornin by a Steno Typist, namely, Sri Sbadi Lal Chaturvedi. The case of the petitioner is that he was not afforded opportunity of defending himself. On my quarry to this aspect of the case, Sri Chaturvedi, learned counsel for the respondents drew my attention to paragraph 3 of the counter affidavit, wherein, it has boon stated that.....the petitioner was only asked to give his version on the complaint and the matter was closed. The Board consists of elected members and high officials and the members were not amenable to the influence of the then Cantonment Executive Officer."

12. In my view, the aforesaid reply is absolutely vague on the face of record. Moreover, there are specific allegations against Sri P. V. Sathe respondent No. 3. The allegations are serious in nature. In paragraph 3 of the writ petition, it has been alleged that".... respondent No. 3 being personally biased against the petitioner as the petitioner could not fulfil the demand put by the respondent No. 3 for illegal consideration. ."Thereafter, in paragraph 4, the petitioner has alleged that ",..... .respondent No. 3 after procuring the two complaint from....." In paragraph 6, it has been averred that ".....in order to fulfil the vindictive desire

of respondent No. 3....." A perusal of writ petition reveals that the petitioner is aggrieved by action of respondent No. 3 and, therefore, he has levelled personal allegations against him. Proper course for Sri P. V. Sathe, Respondent No. 3 was to come forward and file a counter affidavit controverting allegations made against him. But this has not been done and an evasive reply has been given through counter affidavit sworn in by aforesaid Sri Shadi Lal, Steno Typist.

13. To the submission of learned counsel for the respondents that petitioner being a probationer and the impugned order being a notice of termination, this court is not entitled to interfere with the same as admittedly, the order does not cast any stigma, this court is not unmindful of the earlier decision of a Division Bench of Calcutta High Court in *State of West Bengal v. Somendra Nath Lahiri*, 1980 CWN 638, wherein, inter alia, it has been held that the probationer, who was a SubInspector of Police, having been discharged on the ground of unsuitability, in his case the provisions of Article 311 (2) of the Constitution need not be followed. The said decision, however, was based upon catena of decisions. Later on, the aforesaid point was considered by a Division Bench of Calcutta High Court in *Satyabrata Kar Mahendra v. State of West Bengal* CHN 1981 (2) 20, wherein it was held that a probationer has a right for invoking the provisions of Article 311(2) in case of termination of service from the post of Assistant Public Prosecutor. It had followed the judgment rendered by Hon'ble Supreme Court in *Manager Government Branch Press v. D. B. Bellienppa*, AIR 1979 SC 429.

14. While Judge of Calcutta High Court, sitting with Hon'ble Mr. Justice Altoma Kavir in a Division Bench, in *Debidas Ganguli v. Zoological Garden*, 1991 (2) CLT 353. We had held that a probationer has a right to invoke provisions of Article 311(2) of the Constitution. This Court, at the same time, is also not unmindful of latest decision of Hon'ble Supreme Court in *Unit Trust of India v. T. Bijaya Kumar* Judgment Today 1992 (6) SC 82. A Bench consisting of Hon'ble Mr. Justice A. M. Ahmadi (as His Lordship then was), Kuldeep Singh and N. Yeokatachala has held that provisions of Article 311(2) of the Constitution need not be observed in case of a probationer.

15. However, the facts and circumstances of the present case are peculiar. On the basis of aforesaid legal position, this court has to examine the facts of the present case. Admittedly, without entering into the controversy as to whether, during the probation period, a probationer is entitled to get protection of Article 311(2) of the Constitution or not, I am satisfied that the petitioner has been charged and punished by one and composite order, dated April 4, 1986, which has been quoted in the body of this judgment, and which is Annexure V to the writ petition on the question of invoking Article 311(2) by a probationer, there are different decisions of Hon'ble Supreme Court, from time to time, and other High Courts, but apart from that question this court is entitled to interfere with the composite order of termination dated April 4, 1986 on the solitary ground that the petitioner has been charged and punished by same, and, composite order, which is not permitted by any judicial norm.

16. Moreover, the allegations made by petitioner in paragraphs 3 and 4 of the writ petition against Sri P. V. Sathe, respondent No. 3 having not been denied, the allegations go uncontroverted.

17. This is not a case of "termination simpliciter, but by a composite charge sheet and final order of termination, the petitioner has been certainly charged for certain lapses and has not been afforded an opportunity to defend himself. The alleged complaints were relied upon behind the back of the petitioner, and, as such service of notice for termination of services violates elementary principle of natural justice. The services of the petitioner could have been terminated by one line order that "your services are no longer required". In that event, the action of the respondents could have been justified. But, as in the present case, the petitioner has been definitely charged and stigmatised, without there being any opportunity of defending himself, the impugned order certainly carries evil and civil consequences so as to petitioner may not get any employment in future in any other organization. Such an order is unsustainable in the eyes of law and is liable to be interfered with.

18. In the result, the writ petition succeeds and is allowed. Order, dated April 4, 1986, contained in Annexure V is hereby quashed. Petitioner is entitled to continue in service during the remaining probation period but this will not prevent the respondents to initiate any proceeding, after giving full opportunity to the petitioner, by supplying copies of the alleged complaints, if any, or by drawing proceedings in accordance with Rules of 1937.