
(2004) 03 AHC CK 0090
In the Allahabad High Court
Case No : Writ Petition No. 4276 (S/S) of 2000

Mahendra Pal Singh Sodhi	Vs	APPELLANT
State of U.P. and Others		RESPONDENT

Date of Decision : 24-03-2004

Acts Referred:

Constitution of India, 1950 — Article 311(2)
Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975
— Rule 3

Citation : (2004) 3 AWC 2548

Hon'ble Judges : A.N. Varma, J

Bench : Single Bench

Advocate : U.N. Mishra, for the Appellant; C.S.C., for the Respondent

Final Decision : Allowed

Judgement

A.N. Varma, J.—Through the instant writ petition under Article 226 of the Constitution of India the petitioner has assailed the validity of the order dated 13.6.2000 passed by the Senior Superintendent of Police, Lucknow, whereby his services have been terminated in purported exercise of powers conferred u/s 3 of the U. P. Temporary Government Servants (Termination of Service) Rules, 1975 (to be hereinafter referred to as the Rules).

2. The petitioner after having qualified for the written test, physical test and medical test, was declared successful for being appointed on the post of Constable in the Police Department. Accordingly pursuant to his letter of appointment which has been filed as Annexure-S.C.A.-1 along with the Supplementary Affidavit, he joined the Department on 15.5.1995 at Police Lines, Kanpur. Upon being so appointed the petitioner was required to undergo Junior Training Course (J.T.C.) of one month. After completion of the said training he was further required to undergo nine months" training of Recruitment Training Course, which, Course he joined on 15.6.1995 at Lucknow. While undergoing the aforesaid training the petitioner on 12.4.1996 proceeded on casual leave for

three days and went to his native place at Bahraich where he fell ill. On 18.4.1996 he is said to have intimated the Superintendent of Police about his illness on telephone. According to the petitioner he all along remained indisposed and, after having recovered from his illness on 27.7.1996 he submitted his joining before the authority concerned but was not allowed to join. Thereafter he made several representations before the appropriate authorities, copies of which have been annexed along with the writ petition, as Annexures-10 to 14 but to no avail. Finally vide impugned order dated 13.6.2000, a copy of which has been annexed along with the writ petition as Annexure-1, the services of the petitioner were terminated in exercise of powers conferred under Rule 3 of the rules.

3. Learned counsel for the petitioner Shri U. N. Misra vehemently argued that though the order of termination is simpliciter but the same is punitive in nature inasmuch as the motive behind passing of the said order is his absence from duty which, in fact, was beyond his control. It was also argued that he intimated the authorities about his illness and also sent leave applications along with the medical certificate but the same were not considered and his services were dispensed with by a simple order of termination. According to him since the order impugned has been passed on the ground of alleged misconduct of the petitioner, for remaining absent from duty an opportunity of hearing was required to be given to him and without such an opportunity having been afforded, the impugned order is manifestly unjust, illegal and against the provisions of the U. P. Police Officers of the Subordinate Rank (Punishment and Appeal) Rules, 1991 (to be hereinafter referred to as 1991 Rules).

4. In opposition the learned standing counsel Shri Harshvardan, argued that the petitioner was only a temporary employee and was undergoing training. He had not even completed nine months Recruitment Training Course, therefore, he had no right to hold the post. His services have been terminated by giving him one month's notice. He further submitted that the order impugned is an order of termination simpliciter which has been passed in exercise of powers conferred under the Rules as such, it does not suffer from any illegality and infirmity. According to him since the order impugned has been passed in exercise of powers concerned under the rules, therefore, the same is not liable to be interfered with and the writ petition deserves to be dismissed. Learned standing counsel also drew the attention of this Court towards the guidelines known as "Aarakshi Nagrik Police Avam P.A.C. Ka Pathkaram Tatha Samanya Nirdesh" (to be hereinafter referred to as the guidelines), paragraph 16 (Da) of which contemplates that a trainee who is absent for more than 30 days for any reason during the course of training will be debarred from appearing in the final examination. It further provides that the said recruit trainee will be given an opportunity to appear in the Supplementary Examination after taking three months more training. In case any recruit trainee is found absent for more than 45 days the Head of the Training Institute will refer the case of such trainee to the Appointing Authority for terminating his services.

5. A detailed counter-affidavit has been filed on behalf of opposite parties along with which an extract of the said guideline has been filed as Annexure-C.A.-1. In Paragraph No. 5 of the said counter-affidavit, it has been averred that the petitioner on 24.10.1995 proceeded on leave for 15 days during the course of his training but did not return in time and he was unauthorizedly absent for four months seven days nine hours and forty minutes. Again on 12.4.1996 he went on casual leave to his home District and was again absent from training. According to the opposite parties he was unauthorizedly absent for one year eleven months nine hours and forty minutes which is a serious misconduct and unbecoming of a police official. Similar averments have been made in Paragraphs 6 and 8 of the counter-affidavit. In para 13 it has been stated that an enquiry in respect of unauthorized absence of the petitioner was made by the Assistant Superintendent of Police, Lucknow and on the basis of the said report the petitioner was discharged from service. According to the learned standing counsel the order of termination does not suffer from any illegality. As per his argument the power of termination flows out from the provisions of the aforesaid Guidelines and the same has rightly been exercised as the petitioner was absent from duty for more than 45 days in which eventuality his case could be recommended to the concerned authority for termination of his services. It was further submitted that since in an enquiry conducted by the Assistant Superintendent of Police, Lucknow, it was found that the petitioner was unauthorized absent, therefore, no further enquiry was required to be gone into and thus the order impugned is perfectly justified and is within the four corners of the powers conferred under the said Guideline. Thus, according to him the impugned order does not deserve to be interfered with,

6. The learned counsel for the petitioner in reply thereto submitted that in the enquiry which is said to have been conducted, the petitioner was not given any opportunity nor was he heard in the matter. His argument further was that the said enquiry is not an enquiry which is contemplated and is required to be gone into under the rules. He further submitted that the motive behind the order of terminating the services of the petitioner was his unauthorized absence from duty which impelled the employer to take such drastic action of termination of service by an order simpliciter. He strenuously argued that the act of the petitioner of being unauthorizedly absent from duty was the motive behind the passing of the impugned order of termination. According to him in such a situation he was required to be given an opportunity, for want of which the order impugned cannot be sustained. He further submitted that even if he overstayed his leave, the services could not be terminated unless the petitioner was afforded an opportunity of showing cause. This admittedly having not been done, the order terminating his services was not warranted.

7. In case in AIR 2000 1706 (SC) the Hon"ble Supreme Court laid down certain principles to determine with regard to order of termination being simpliciter or punitive. In this connection it also propounded the concept of motive and foundation which may lead to the passing of the order of termination simpliciter.

In paragraphs 28 and 29 of the said judgment the Apex Court observed as follows :

"28. The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against the employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

29. Motive is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry."

8. In *Jai Shanker Vs. State of Rajasthan*, , the services of an employee were terminated on the ground of overstaying leave. In the said case the relevant provisions under which action was taken, i.e., Regulation 13 was as follows :

"13. An individual who absents himself without permission or who remains absent without permission for one month or longer after the end of his leave should be considered to have sacrificed his appointment and may only be reinstated with the sanction of the competent authority."

9. In the said case, it was contended by the State that the Regulation operated automatically and no question of removal from service could arise because *Jai Shanker* must be considered to have sacrificed his appointment. The Apex Court held as follows :

"It is true that the Government may visit the punishment of discharge or removal from service on a person who has absented himself by overstaying his leave, but we do not think that Government can order a person to be discharged from service without at least telling him that they propose to remove him and giving

him an opportunity of showing cause why he should not be removed. If this is done the incumbent will be entitled to move against the punishment for, if his plea succeeds, he will not be removed and no question of reinstatement will arise. It may be convenient to describe him as seeking reinstatement but this is not tantamount to saying that because the person will only be reinstated by an appropriate authority that the removal is automatic and outside the protection of Article 311. A removal is removal and if it is punishment for overstaying one's leave an opportunity must be given to the person against whom such an order is proposed, no matter how the Regulation describes it. To give no opportunity is to go against Article 311 and this is what has happened here.

(7) In our judgment, Jai Shanker was entitled to an opportunity to show cause against the proposed removal from service on his overstaying his leave and as no such opportunity was given to him his removal from service was illegal."

10. In *Deokinandan Prasad Vs. The State of Bihar and Others*, , on August 5, 1966 the Director of Public Construction passed an order that the petitioner "having not been on his duties for more than five years since March 11, 1960 has ceased to be in Government employment since March 12, 1965 under Rule 76 of the Bihar Service Code". The petitioner made representation against the said order but to no avail. Rule 76 of the Bihar Service Code reads as follows :

"Unless the State Government, in view of the special circumstances of the case shall otherwise determine, a Government servant after five years of continuous absence from duty, elsewhere than on foreign service in India, whether with or without leave, ceases to be in Government employment."

11. The Hon"ble Supreme Court after considering the matter at length held in paragraphs 23 and 25 of the Judgment as follows :

"23. A contention has been taken by the petitioner that the order dated August 5, 1966 is an order removing him from service and it has been passed in violation of Article 311 of the Constitution. According to the respondents there is no violation of Article 311. On the other hand, there is an automatic termination of the petitioner's employment under Rule 76 of the Service Code. It may not be necessary to investigate this aspect further because on facts we have found that Rule 76 of the Service Code has no application. Even if it is a question of automatic termination of service for being continuously absent for over a period of five years Article 311 applies to such cases as is laid down by this Court in *Jai Shanker Vs. State of Rajasthan*, ."

"25. In the case before us even according to the respondents a continuous absence from duty for over five years, apart from resulting in the forfeiture of the office also amounts to misconduct under Rule 46 of the Pension Rules disentitling the said officer to receive pension. It is admitted by the respondents that no opportunity was given to the petitioner to show cause against the order proposed. Hence there is a clear violation of Article 311. Therefore, it follows even on this ground the order has to be quashed."

12. The State of Assam and Others Vs. Akshaya Kumar Deb, , is a case wherein the services of permanent Government servant were terminated under Fundamental Rule 18 of Assam Fundamental and Subsidiary Rules on account of his continuous absence from duty for more than five years and no opportunity was given to him to show cause. The Apex Court in paragraph 13 held as follows :

"13. From a reading of F. R. 18, it is discernible that it regards continuous absence of an employee, whether with or without leave, for a period of five years or more, as conduct which must normally entail "cessation" or termination of his service. Although not in so many words, but by necessary intendment, the Rule regards such conduct of the employee as a fault or blameworthy behaviour which renders him unfit to be continued in service. In this context, the "cessation" of service pursuant to this rule would, in substance and effect, stand on the same footing as "his removal" from service within the contemplation of Article 311(2) of the Constitution, particularly when it is against the will of the employee who is willing to serve, or who had never lost the animus to rejoin duty on the expiry of his leave. Another reason for equating, "cessation" of service under this rule with "removal" within the meaning of Article 311(2), is that it proceeds on a ground personal to the employee involving an imputation which may conceivably be explained by him in the circumstances of a particularly case. Cases are not unknown where the absence of a Government servant, even for prolonged periods, has been due to circumstances beyond his control. The case of the Japanese soldier who remained cut off and stranded in the jungles of a remote Pacific island for three decades after the termination of World War II, is a recent instance of this kind."

13. Thus, what is discernible from the aforesaid decisions and the principle laid down by the Apex Court therein that though the Rule may prescribe automatic termination for continuous absence for long years, the order passed to that effect without any opportunity to the person concerned is violative of Article 311(2) of the Constitution of India.

14. In the case at hand also the guidelines may be to the effect that if a person is absent for a period specified therein, his case can be recommended for terminating his services, still an order of termination thereto cannot be resorted to unless the employee is afforded an opportunity to defend his case. Since no opportunity was afforded to the petitioner to show cause and his services were done away with by a simple order of termination, the action of the opposite parties is illegal and manifestly unjust which cannot be allowed to stand.

15. In view of the above, the writ petition succeeds and is allowed, The order dated 13.6.2000 passed by the Senior Superintendent of Police, opposite party No. 5, as contained in Annexure-1 to the writ petition, is hereby quashed. Petitioner shall be reinstated in service and shall be allowed to complete his training which was required to be undergone by him but, could not be completed on account of the fact that he absented himself consequent upon which his services were terminated.

16. Since the petitioner had not completed the requisite training, therefore, he would not be entitled for the salary and other benefits for the period he was out of job.