
(1975) 10 BOM CK 0009

In the Bombay High Court

Case No : Spl. C.A. No's. 1039 and 1590 of 1971

Malti Dadaji Mahajan

APPELLANT

Vs

Chief Executive Officer, Zilla Parishad, Wardha

RESPONDENT

Date of Decision : 10-10-1975

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 311(2)

Citation : (1976) MhLj 109

Hon'ble Judges : B.A. Masodkar, J;A.R. Shimpi, J

Bench : Division Bench

Advocate : S.N. Kherdekar, for the Appellant; G.S. Kakday, for the Respondent

Final Decision : Allowed

Judgement

B.A. Masodkar, J.—Both these petitions can be disposed of by common judgment as the questions involved are identical.

2. Petitioner in Special Civil Application No. 1039 of 1971 was appointed temporarily until further orders as a midwife at the Primary Health Centre run by the respondent Zilla Parishad, Wardha. Conditions of service appended to the appointment order dated March 29, 1963 stated that the petitioner, namely, Malti Mahajan understood that her employment under the Zilla Parishad was purely temporary and that her services could be dispensed with at any time or without any notice being assigned and that on this basis she had accepted the employment. Petitioner in the companion petition (Special Civil Application No. 1590/71) namely, Vimal Moghe, came to be appointed on similar terms by an order of March 1, 1967, in the post of midwife. It appears, by 1967 the scale of the post had been revised from Rs. 75-5-100 to that of Rs. 135-3-145-6-175-EB-8-2I5. By an order dated July 21, 1971 the services of petitioner Malti Mahajan were terminated with effect from August 22, 1971 as no more required and the period from July 22, 1971 to August 22, 1971 was treated as notice period. Similar order was made in the case of petitioner Vimal Moghe on November 26, 1971 terminating her services from December 26 1971 treating

the period from November 26, 1971 to December 26, 1971 as notice period. These two orders are challenged in the respective petitions.

3. The challenge to these orders is mainly two-fold. It is urged by the learned counsel appearing for the petitioners that these orders are discriminatory and as such violative of Article 16 of the Constitution, because, in the case of Malti Mahajan, several midwives junior to her and appointed after her numbering nine have been retained in service. Initially this ground was based on the assumption that there is reduction of posts in the cadre of midwives. At the time of hearing of the petition, the learned counsel did not canvass that this was a case retrenchment. In the case of Vimal Moghe, it is urged that not less than three midwives junior to her are retained and thus there is similar discrimination that violates principle of equal treatment in the matters of employment. The second aspect is that these terminations are punitive being connected with the conduct of the petitioners. It is urged that procedure as contemplated by the Rules called, Maharashtra Zilla Parishad District Services (Discipline and Appeal) Rules, 1964, was not followed, though the orders in terms amount to removal or dismissal from service. Particular reliance is placed on the terms of rules 4 and 6 of these Rules. For making a submission that this in fact is a penalty meted out to each of the petitioners, reference is made to the return filed by the Zilla Parishad in each of these petitions wherein it is stated that the petitioner's conduct as alleged in the return was taken into account while making the order. It is contended that the Alligators and averments in the return along with the order would conclusively establish that these are connected matters and the petitioners were entitled to the protection of the Rules. The action of termination is questioned on the ground that it is in breach of the Rules and as such void.

4. As against this Mr. Kakday the learned counsel appearing for the Zilla Parishad urged that this is not a case in which Article 16 would at all be attracted. In fact there has not been any discrimination and mere fact that temporary junior servants in a cadre are retained is not enough to prove that any discrimination is being practised. It is submitted that the termination is simpliciter and is in terms provided for by the contract between the parties. Undoubtedly, before exercising the right to terminate under the contract, the Zilla Parishad has taken into account the past record of the petitioner in each case and having found that the work was not satisfactory, the Zilla Parishad has exercised its right under the contract to put an end to the service of the petitioner who admittedly was a temporary employee. According to the learned counsel, there is neither any question of penalty being imposed under the Rules nor there is any breach of fundamental right under Article 16 of the Constitution. The statements in the return, it is submitted, are in answer to the allegations in the petition and are made to explain the position of the past history of service of the petitioner. Termination is founded on contract and is not a matter connected with conduct of the petitioner and as such reliance on Rules is irrelevant and inappropriate, according to the submission of Mr. Kakday.

5. The nature of the services of each of the petitioners is clearly referable to the terms of their appointment. In each case the appointment is temporary until further orders with a complete understanding that such services can be dispensed with any time, without any notice and without any reason being assigned. The order of termination in terms does put an end to the contract on the ground that the services were no longer required. On the face of it therefore the Respondent-Zila Parishad is entitled to submit that this is an exercise of an authority reserved expressly under the terms of appointment of each petitioner and that mere fact that juniors are retained would not result in discriminating against those who are chosen for termination.

6. Now, undoubtedly, to the services of Zilla Parishad the guarantee of Article 16 and its protection would be available, but certain basic facts for upholding that guarantee will have to be clearly established. The nature of temporary employment under the contract to which we have made a reference above, by its very nature in a given case may justify the action of the employer and it will be for the petitioner to establish that the action is still bad and violative of equal treatment because it involves hostile discrimination. Except putting before us the fact that there are certain junior midwives employed and retained in service, no material has been placed by the petitioner in each case so as to enable us to find out positively that they are subjected to any discrimination. The guarantee of Article 16 cannot be enforced unless there is material that will indicate to the satisfaction of the Court that the petitioner has been subjected to discrimination. There may be one and several reasons which would take the petitioner out of the general class of temporary employees and the employer may validly deal with him as a separate class by himself. If we look to the returns we find that in each case there had been report with the Zilla Parishad about the negligence in respect of absence from duty and being remiss in discharge thereof. Such persons whose work has been found unsatisfactory or who are found to be unsuitable could not possibly complain only on the ground that other juniors are being retained and they are being asked to go. On this aspect we may usefully refer to the observations of the Supreme Court in the case of Champaklal Chimanlal Shah Vs. The Union of India (UOI), . While considering the termination under rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, in the light of the guarantee of Article 16 where the termination itself was referable to the unsatisfactory work of the Government servant, the Court observed as under:

The present however is a case where the appellant's services were terminated because his work was found to be unsatisfactory. We shall deal with the question whether termination in this case is liable to be set aside on the ground that Article 311 (2) was not complied with later; but where termination of the service of a temporary Government servant takes place on the ground that his conduct is not satisfactory there can in our opinion be no question of any discrimination. It would be absurd to say that if the service of one temporary servant is terminated on the ground of unsatisfactory conduct the services of all similar employees must also be terminated along with him, irrespective of what their conduct is.

Therefore even though some of those mentioned in the plaint by the appellant were junior to him and did not have as good qualifications as he had and were retained in service, it does not follow that the action taken against the appellant terminating his services was discriminatory for that action was taken on the basis of his unsatisfactory conduct. A question of discrimination may arise in a case of retrenchment on account of abolition of one of several temporary posts of the same kind in one office but can in our opinion never arise in the case of dispensing with the services of a particular temporary employee on account of his conduct being unsatisfactory. We, therefore, reject the contention that the appellant was denied the protection of Article 16 and was treated in a discriminatory manner.

These observations clearly indicate that merely because juniors are retained, temporary Government servant whose service is put an end to because of unsatisfactory conduct is not entitled to succeed under Article 16 on the plea of hostile discrimination. This is not a case of retrenchment nor it was so canvassed at the time of hearing. There being, therefore, the right under the contract in favour of the Zilla Parishad to put an end to the temporary services of each of the petitioners at any time and that right was exercised after taking into account the history of each petitioner's service, the mere fact that juniors were retained or some persons were appointed after the termination would not render the impugned order as discriminatory and as such violative of Article 16 of the Constitution.

7. The decision relied upon of the Supreme Court in the case of State of U.P. and Others Vs. Sughar Singh, is clearly not attracted, for, there the facts by themselves indicated that out of 200 officers, most of whom were juniors to the petitioner Sughar Singh and who were similarly situated, only one of them was subjected to reversion and every other was retained in higher posts. Not only that it was found that the action was punitive, but on those facts, it was held that the action was also discriminatory and as such violative of Articles 14 and 16 of the Constitution. That decision cannot help the petitioner to make a submission that sheer fact that juniors are retained is enough to invalidate termination of the temporary employment.

8. The guarantee of equal treatment in the matter of public employment undoubtedly extends and takes in its contemplation determination of such employment or process of its termination along with all the stages of such employment. In all that basic and vital are the consideration of equal opportunity. Equal treatment to equals can be its simplified definition, shorn of complexities involved in each case. Holding it out as a real promise in the matters of civil rights regarding public employment, Constitution enshrines such opportunity and treatment as fundamental and makes it enforceable. However, cardinal or stainless may be its orientations and however dynamic its dimensions, it is a premise to be applied, appreciated and upheld in a more or less pragmatic field of public administration, which has in modern times unfolded

a potentiality to possess unending horizons of complex variables. Whenever a complaint is made about the violation of this right material offered by the parties should be sufficient to make out clear entitlement of the complainant to the right sought to be enforced. It would be primary and first onus of the petitioner to establish the class of equals entitled to equal treatment and further prove the unequal or arbitrary or hostile treatment spelling out discrimination. Public authority or State, of course, is bound always to put before the Court, when challenged, all the material that negates any such inference without standing on the technicality of the rule of onus of proof. In fact in a given case the initial onus would be discharged lightly and it would be for the State or Public authority to satisfy by placing material the conscience of the Court that equal opportunity clause or equal treatment guarantee has not been violated. Considerations in these regards may vary from complaint to complaint along with its determinates. Unless upon relevant data an arbitrary, pick-and-choose as well biased or discriminatory treatment or its possibility can be concluded, relief at the foot of Article 16 cannot possibly be given. Moreover, when the appointment is temporary to a public office and hostile discrimination is complained of, need to establish all these matters is more pronounced. (See *The Union of India (UOI) Vs. Pandurang Kashinath More*, and *Satish Chandra Anand Vs. The Union of India (UOI)*,).

9. The equal opportunity does extend and protect the temporary public servant and compel the public employer to follow the rule of equality in the matters of such employment, termination being included. If everything is equal amongst the class of temporary public servants, even with regard to termination the principle of equality would make it necessary to follow the rule of "last come first go" if the requirement of administration necessitates termination of employee. Easy example in this field would be retrenchment because of abolition of posts or paucity of work. This process of determination would be in keeping with equanimity implicit in such decision. However when the matter passes out to the more objective field involving judging the fitness or suitability of a temporary public servant for the continuance in a public employment, different considerations of necessity would arise. There the uptake of each individual, his personal adequacy or fitness to his job and his relative capacity to his tools would be the matters of immense considerations. Operative under these matters the individual temporary employee may be a class by himself and subject to the judged and tested objectively and bona fide by those in charge and having control of such employment and having entitlement to take a decision in the matter of his continuance in service. Everyone taking temporary employment subjects himself impliedly or expressly to such test for the purpose of continuity. Termination of temporary public employment after objective and bona fide assessment of his suitability and fitness is a process implicitly and equally applicable to everyone in the class. If the order of termination flows from or is based on such administrative considerations, the fact that the person is asked to go who is senior amongst the class of temporary servants is a fact of no

consequence and is irrelevant. By the very nature, a temporary employment is determinable by notice and the person holding it has no right to post as such and that he can only be continued subject to his suitability and fitness. Determination of temporary employment or discontinuance under such state and for such reason cannot be dubbed as discriminatory nor can be said to be violative of Article 16 of the Constitution.

10. In the present case, the termination is a discontinuance of the temporary servant whose work was found to be unsatisfactory. Only because juniors who may be better suited are retained, no relief on the ground of violation of Article 16 can be afforded.

11. Coming to the second point, the matter will have to be appreciated on the basis of the rules framed u/s 248 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961 called the Maharashtra Zilla Parishads District Services (Discipline and Appeal) Rules, 1964, (hereinafter referred to as Discipline and Appeal Rules). Part III of the said Rules deals with "Discipline" and rule 4 provides for penalties which a Parishad may impose on its servant for good and sufficient reasons. That includes the penalty of removal from service as well dismissal from service in clauses (vi) and (vii). To this rule an explanation is added. That being relevant for the present premises may now be extracted:

Nature of penalties--Without prejudice to the provisions of any law for the time being in force, the following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a Parishad servant, namely:

** ** *

(vi) removal from service which shall not be a disqualification for future employment;

(vii) dismissal from service which shall ordinarily be a disqualification for future employment;

** ** *

Explanation.--The following shall not amount to a penalty within the meaning of this rule, namely:

** ** *

(vii) termination of services;

** ** *

(b) of a temporary Parishad servant on grounds unconnected with his conduct.

(Italics added)

Obviously the temporary Parishad servants can be subjected to the penalties mentioned in this rule and this position has not been disputed. Procedure for

imposing major penalties is provided for by rule 6 while rule 7 lays down procedure regarding minor penalties. "Reduction to a lower service", "compulsory retirement", "removal from service" and "dismissal" are all major penalties. Even a temporary servant to be subjected to these penalties would be entitled to complain that the procedure prescribed has not been followed.

12. Now the question is, what is the purport and connotation of the Explanation (supra), stating that the termination of services of the temporary Parishad servant on grounds unconnected with his conduct is not a penalty? It is well settled that Explanations are appended in legislative provisions to clarify what is contained in main part of the section so as to throw light on the intention of legislature. Sometime, generality of the main part also necessitates adding of Explanation which may act as an exception thereto. The present Explanation appears to have been added, firstly, to make it clear that a temporary Parishad servant can always be subjected to simple termination of service and, secondly that if that termination of service is not based on the grounds involving his conduct, then the same is not treated as penalty and procedure provided by rules shall not apply. Generality of the terms "dismissal" and "removal" which inheres the process of termination is thus clarified. By that an exception too is indicated, the conspectus of which will have to be spelt out.

13. The critical phrase that requires consideration as is enacted in the Explanation is obviously concerning the grounds "unconnected with conduct". If the termination of the Parishad servant is based on grounds connected with his conduct, then the effect would be that such termination would not be a simple termination within the meaning of the Rules and would be valid only if the procedure for imposing penalty preceded such termination. In other words, the termination based on the grounds of conduct has to be treated as punitive. The word "conduct" obviously means "behaviour" and will have to be distinguished from mere suitability or fitness of the person to his job. Behaviour has clear correlation to the employment and the employee and not to his adequacy to the service. So understood the grounds leading unto termination may involve the person subjected to termination to blemish or to stigma or to an accusation involving ethical affectations. To achieve such a result wherein behaviour of the employee has been the legal locus for exercising powers to terminate, the rules contemplate preceding follow up of procedure. Exercise of option to put an end to contract of service by the employer, having no connection with the conduct of the servant, is therefore outside the purview of the rule. Of course, here too the matter has to be adjudicated upon the material allegations and the proof available on record.

14. We may refer with advantage in this record to the decision of the Supreme Court rendered in the case of Samsher Singh Vs. State of Punjab and Another, , wherein the Court observed that the facts and circumstances of each case concerning the order of termination can be legitimately taken into account so as to find out whether the person subjected to the order of termination is being

penalised or not though on the face of it the order may indicate that it was mere termination.

15. Keeping in contemplation all the rules and the principle stated above before us, we may proceed to examine the present controversy in the light of pleadings which are sworn statements of the respective parties. To find out whether the order of termination is a cloak or pretext to dispense with the need for enquiry, we are entitled to see what the parties have averred in their respective pleadings. In a writ proceeding these pleadings are admitted as basic evidence. These are statements on oath and can be acted upon as such. We have already made a reference to the order in each of these cases. The petitioner in each case averred that her record of service was good and inspite of that she was being subjected to termination. It is further stated that she was being subjected to dismissal. As against this, in each case, the return has been filed on behalf of the Zilla Parishad by the Chief Executive Officer, the competent authority. In the case of Malti Mahajan, the petitioner in the first petition, the return asserts that the petitioner had suppressed the material facts from the Court, in that her services were faultless. Then it goes on to state that on June 24, 1966 it was found from a report that the petitioner's work was unsatisfactory. In 1968 the petitioner disobeyed the orders and she was fined Rs. 15. Thereafter her work was inspected in 1969 and it was found out that she has been remiss in maintaining registers and therefore she was fined Rs. 20. Inspection was held in 1970 and the petitioner was found absent from duty without leave. It was reported against the petitioner that she had developed a habit of remaining absent from duty off and on without leave. The period was from December 4, 1970 to December 6, 1970. People because of her absence used to suffer. Eventually Revenue Officer Shri Khan upon these complaints was deputed to make an enquiry. He submitted his report and that indicated colossal want of sense of responsibility on the part of the petitioner. Then follow the assertions that the nature of the employment taken by the petitioner being purely temporary and under contract, the order of simple termination was justified. In the last paragraph, i.e. No. 14 of the return, again it is said:

However, just to ensure about the propriety of the order to be passed the respondent deputed the Revenue Officer as stated supra to go to the spot to make the local enquiry into the working of the petitioner. The said Revenue Officer has reported in his enquiry report in unequivocal terms that the petitioner has maintained the records falsely. In short he has found that the petitioner does nothing either in the field of maternity and child health or in Family Planning and on the other hand she gives false reports about her work. It is the submission of this respondent that inspite of the imposition of fines and further inspite of the reports of the Medical Officer the petitioner continued to be not only negligent in her duties but also went to the extent of making false reports and thus rendered herself to be unfit to be continued in service.

These statements contained in the return unmistakably indicate that the

termination of the petitioner Malti Mahajan was clearly founded on the grounds of her conduct. Reading all these paragraphs together leaves us in no doubt that the termination is based on conduct of the petitioner Malti Mahajan in the matter of her services involving her in charges of making false record and report as well being negligent. We have no hesitation in holding that the termination being so connected with the behaviour of the petitioner, the Parishad or the competent authority is not absolved from the obligation to follow the prescription of rule 6. Such a termination, in our view, would amount to removal or dismissal from service. To impose that penalty, the procedure required by rule 6 must of necessity be followed.

16. In the case of Vimal Moghe, the matter is similar and almost identical. The specific pleadings indicate that her termination too is closely connected with her conduct. In paragraph 10 it is stated:

In order to show that the action of the respondent in removing the petitioner from service is proper and not arbitrary, this respondent has to submit (hat throughout the whole tenure, the petitioner had acted irresponsibly and without any sense of duty.

Then there is a narration how the petitioner was remiss in her duties or disobedient to her officers and how arrogantly she used to behave even with her superiors. Reference is made to the matters which require calling for her explanation. She was absent from duty and instances are quoted in paragraph 11 along with the fact than even the minimum rule that a midwife must remain in the prescribed dress is said to have been breached by the petitioner. Similar instances that the petitioner is prone to give false explanations and neglected her duties are stated in paragraph 12. In paragraph 13 it is alleged that the petitioner was making false reports about the inoculation work in the villages In paragraph 14 the instances of her negligence and dereliction of duties are quoted and it is stated eventually that one Dr. Gulhane was asked to make an enquiry and he reported that it was absolutely necessary to remove the petitioner from service. The return states:

As a consequence of the previous reports and the official note as at Annexure A-4-, this respondent felt constrained to pass an order to terminate her services forthwith. The entire history of service is replete with utter negligence, disobedience of orders, absence from duty without any intimation, false reports, and above all, no work.

Undoubtedly, at the end, the return asserts that termination is under the contract.

17. Taking into account these facts in the case of Vimal Moghe too, we have no hesitation in holding that, though she was a temporary Parishad servant, her present termination was founded on the grounds of her conduct and is referable to it. The plea that it was a simple termination based on contract is not sustainable.

18. Faced with these conclusions, the learned counsel Mr. Kakday relied on the fact that under the contract specific undertaking is given by each of the petitioners that their services are purely temporary and can be dispensed with at any time which would show that they have no right to complain in the regard, and in fact, according to the learned counsel, that operates as estoppel. It was also suggested that there being such a type of special contract followed by an undertaking given, the rigour of the rules should not be applied nor should be available to the petitioners.

19. All this submission clearly overlooks the provision of the rules which are applicable to these petitioners. Undertaking referred to above will operate subject to rule and not against it. In that there can be no question of estoppel for no party can be said to have contracted that even punitive action involving misbehaviour is a part of such undertaking. It is undoubtedly true that by the very nature of things it is the right of the competent authority with regard to the matters of public employment to dispense with temporary services on the grounds of unfitness as well as unsuitability. Termination of services on account of the inadequacy of the person for the job or a defect which renders the person unfit or unsuitable is a vital factor which can always be taken into account by the competent authority. Had the matter been that simple and not connected with the grounds mentioned above and disclosed in the return, we would have felt no hesitation in upholding what is contended for by the learned counsel for the Parishad. However, it is not possible to accept this broad submission that in these cases the termination is simpliciter. On the other hand, it appears to us that the process of this termination is clearly vitiated as it exposes the terminated servant to stigma without affording any opportunity to remove the same or explain matters connected with it. On the face of it, an ex parte judgment was reached in each case on the basis of a report said to have been called for regarding the conduct of the servant and considered without notice to her. There is no reason indicated in any of the cases as to why after obtaining such report containing serious findings regarding culpability of the petitioners in matters like making false documents, false entries and reports, the competent authority could not initiate proceedings as contemplated by rule 6. There is no ground disclosed in any of these returns why the prescribed procedure was not followed though the charges were so serious that involved each of the petitioners not merely being remiss in duty but also involving them in moral turpitude. We would expect that the authorities who have to judge the conduct of the persons and upon its basis from their opinion, however subjective it may be, should act in fairness and in consonance with the principles of natural justice. Even apart from the rules, it appears to us that this inheres as implicit when the process of judging is left to the competent authority and when the termination of a particular employee is grounded on the matters of individual conduct. For, such termination tantamounts to penalty. Undoubtedly, the Parishad had the right to put an end to the contract of temporary employment; but that right cannot be further augmented into making an order of termination which is based on the conduct of

the employee and which is required to be made under the Rules by following the procedure prescribed by rule 6. As we have stated earlier, though the order in each of these cases is that of termination on the face of it, it is based on the reports involving serious charges against each of the petitioners and not made on the ground of their suitability. That being the position of each of these orders, it has to be concluded that such order could only be made by following the procedure required to be followed by rule 6 of the Discipline and Appeal Rules and not otherwise. Both the impugned orders in the light of the returns filed in each case being founded upon the conduct of the petitioner, are violative of the Discipline and Appeal Rules to which we have made reference and as such we quash the same.

20 Though we set aside these orders, we make it clear that this does not debar the competent authority to institute proper enquiry if it so desires as postulate by the Rules or proceed to avail of its contractual right simpliciter under the contract to put an end to the contract of temporary service of each petitioner.

21. The petitions in the result are allowed. The impugned order in each case is set aside. We, however, make no order as to costs in any of these petitions.