
(1996) 08 GAU CK 0033
In the Gauhati High Court
Case No : C.R. No. 4857 of 1991

Mazid Ansari

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 26-08-1996

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Citation : (1997) 2 LLJ 329

Hon'ble Judges : D.N. Baruah, J

Bench : Single Bench

Advocate : A.K. Bhattacharyya and K. Agarwal, for the Appellant; B. Kalita, for the Respondent

Judgement

D.N. Baruah, J.—In this Civil Rule the petitioner has challenged Annexure - VIII termination notice dated May 24, 1991 issued by the 3rd Respondent and also the Annexure-XI discharge certificate dated June 28, 1991 and prayed for issuance of a writ in the nature of Mandamus or any other writ of like nature or direction for setting aside the impugned notice of termination and the discharge certificate.

2. Facts of this Civil Rule are as under:

Petitioner is a trained motor vehicle driver having valid heavy motor vehicle licence. In the year 1986 he applied for the post of MT/Driver in General Reserve Engineering Force, for short "GREF". He was thereafter, appointed MT/Driver in the "GREF" on May 25, 1987 and was posted at 755 Border Road Task Force. Pursuant to the order of appointment the petitioner joined service on June 16, 1987. He was posted in Unit 718 Medical Staging Section, GREF, In the month of June 1988 the petitioner was served with Annexure-I show cause notice dated June 23, 1988 issued by the Respondent No. 4 alleging that he was seen by one official of Task Force carrying civilian passengers in ambulance vehicle and also seen him calling passengers to go to Taliamura. When the said official, who was in Civil dress approached the petitioner and disclosed his identity, he did not pay

any heed to it and left the place with the vehicle. On receipt of the said show cause notice the petitioner replied to the show cause notice giving full explanation about the incident by Annexure-II. However, in June 1988 the petitioner was served with a recordable warning issued by the 4th Respondent. By the aforesaid recordable warning, the petitioner was warned and directed to obey good order, behave properly and maintain discipline. In August 1988 petitioner was issued with yet another warning by 4th Respondent vide Annexure-IV Memo dated August 4, 1988. Yet another notice was also issued to the petitioner by the 4th Respondent on August 13, 1990 alleging that the authority came to know through police source that on August 11, 1990 he gave lift to civilians and realised fare from them. Similar reports had also been received thereafter by the authority. By Annexure-V Memo dated August 13, 1990 the petitioner was again asked to submit clarification. He submitted his clarification denying the allegations levelled against him by Annexure-VI reply. Thereafter, on March 15, 1991, the petitioner was served with an extract of adverse remarks made in his ACR of 1990 by the 4th Respondent. In his said ACR the Initiating and Reviewing Officers made remarks about his quality of performance as "Below Average". On May 29, 1991 the petitioner was served with a notice of termination by Annexure-VIII notice dated May 24, 1991.

3. On receipt of Annexure-VIII termination notice the petitioner submitted Annexure-IX representation to the 3rd Respondent requesting him to release his salary and other dues which he was entitled to so that he could proceed to home. The petitioner also by Annexure-X representation dated June 26, 1991 requested the 3rd Respondent to reconsider the order of termination and to retain him in service by withdrawing the notice of termination. It is not known to the petitioner how and in what manner the representation was disposed of. But thereafter, on June 28, 1991 Annexure-XI discharge certificate was issued. Hence the present petition.

4. Respondents have filed Affidavit-in-opposition. In the said affidavit the respondents have controverted the averments and allegations made in the writ petition. According to them the order of termination was just and, proper and in the facts and circumstances of the case termination was necessary. In the affidavit-in-opposition it has also been mentioned that the petitioner could not discharge his duties properly inspite of repeated warnings. The respondents have also stated that in the facts and circumstances of the case, the petitioner being a temporary servant was not entitled to get any protection or benefit under the Article 311 of the Constitution of India.

5. I heard both sides.

Mr. A.K. Bhattacharyya, learned counsel appearing for the petitioner submitted that the notice of termination was illegal, without jurisdiction and contrary to the provisions of Constitution. The petitioner having held a Civil post, his termination without affording any opportunity of hearing was contrary to the Constitutional provisions and violative of the principles of natural justice. Mr. Bhattacharyya

seriously contended that the notice of termination and discharge certificate clearly showed that the termination was by way of punishment. He further submitted that the adverse remarks and the allegations made against the petitioner prior to his removal would indicate that actually the petitioner was removed by way of punishment and that too with a stigma.

Mr. B. Kalita, learned Central Government Standing Counsel appearing on behalf of the respondents, on the other hand, supported the action of the respondents. According to him, the petitioner being a temporary employee under "GREF", his services having not found satisfactory, he was removed from service by Annexure- VIII order and accordingly discharge certificate was also issued by Annexure-XI. The notice of termination was innocuous and no fault could be found with the respondents authorities.

6. On the rival contentions of the parties it is to be seen whether the termination order can sustain in law.

It is an admitted fact that the petitioner was serving in the "GREF" and was holding a civil post under the said Department. Normally, he gets protection under Article 311 of the Constitution of India. As per provisions of Article 311(2) of the Constitution of India, no person who is holding a civil post either of the Union or of a State shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those , charges. However, this is subject to the proviso contained in the said Article. It is not always necessary to do so in case of a temporary servant. If it is a discharge simpliciter the employee does not get any protection under the said Article.

7. The Supreme Court in *Parshotam Lal Dhingrav. Union of India*, 1958 LLJ 544 held that Article 311 gives a two-fold protection to persons who come within the Article, namely, (1) against dismissal or removal by an authority subordinate to that by which they were appointed and (2) against dismissal or removal or reduction in rank without giving them a reasonable opportunity of showing cause against the action proposed to be taken in regard to them. It was further held that when a servant had right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the Rules governing the conditions of his service, the termination of the service of such a servant or his reduction to a lower post is by itself and prima facie a punishment, for it operated as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. But if the servant had no right to the post, as where he was appointed to a post, permanent or temporary either on probation or on an officiating basis and whose temporary service had not ripened into a quasi-permanent service as defined in the Temporary Service Rules, the termination of his employment would not deprive him of any right and could not, therefore, by itself be a punishment. But in case if the termination of a temporary worker was not a termination simpliciter but it was by way of punishment in that case the employee would be entitled to the protection.

8. Again in *Jagdish Miner v. Union of India*, 1964 LLJ 418 the Supreme Court had the occasion to consider the right of temporary servant. In that case, the Supreme Court observed that if the termination of a temporary worker was without stigma then the employee was not entitled to get protection under Article 311(2) of the Constitution. It was, however, required to be seen the nature and character of termination of the public servant temporary or permanent. While reiterating the view expressed in *Parshottam Lal Dhingra* (supra) the Supreme Court observed thus at p 422 :

"Having regard to the legislative history of the provisions contained in Article 311, the words "dismissed", "removed" and "reduced in rank" as used in Article 311(2), have attained the significance of terms of Article As has been observed by Das C.J. in *Parshottam Lal Dhingra v. The Union of India*, (supra) at P.559 "both at the date of the commencement of the 1935 Act and of our Constitution the words "dismissed", "removed" and "reduced in rank" as used in the service Rules, were well understood as signifying or denoting the three major punishments which could be inflicted on Government servants. The protection given by the Rules to the Government servants against dismissal, removal or reduction in rank, which could not be enforced by action, was incorporated in sub Sections (1) and (2) of Section 240 to give them a statutory protection by indicating a procedure which had to be followed before the punishments of dismissal, removal or reduction in rank could be imposed on them and which could be enforced in law. These protections have now been incorporated in Article 311 of our Constitution. "It is thus clear that every order terminating the services of a public servant who is either a temporary servant, or a probationer will not amount to dismissal or removal from service within the meaning of Article 311. It is only when the termination of the public servant's services can be shown to have been ordered by way of punishment that it can be characterised either as dismissal or removal from service."

In the said case it was also observed that protection under Article 311 could be invoked not only by permanent public servants, but also by public servants who were employed as temporary servants or probationers. The Apex Court further held that if a temporary public servant or a probationer was served with an order by which his services were terminated, and the order unambiguously indicated that the said termination was the result of punishment sought to be imposed on him, he could legitimately invoke the protection of Article 311 and challenge the validity of the said termination on the ground that the mandatory provisions of Article 311(2) had not been complied with.

9. Again in *Debesh Chandra Das Vs. Union of India (UOI)*, while dealing with a matter of reversion to lower rank the Apex Court held that reversion to a lower post by itself did not per se amount to a stigma. In case, however, there were evidence that the reversion was accompanied by stigma then the employee was entitled to get protection under Article 311(2) of the Constitution.

10. In *State of Maharashtra v. Veerappa R. Saboji*, 1979 LLJ 393 similar point

came up before the Apex Court. In the said case it was held thus at P 398:

".....Even in the case of a temporary or officiating Government servant his services cannot be terminated by way of punishment casting a stigma on him in violation of the requirement of Article 311(2). This principle is beyond any dispute but the difficulty comes in the application of the said principle from case to case. If a Government servant is compulsorily retired or one who is officiating in a higher post is reverted to his parent cadre, or when the services of an officiating temporary Government servant are dispensed with by an order of termination simpliciter, then problems arise in finding out whether it is by way of punishment. In different kinds of situations, different views have been expressed. Yet the underlying principle remains the same. One should not forget a practical and reasonable approach to the problem in such cases. Ordinarily and generally, and there may be a few exceptions, any of the three courses indicated above is taken a recourse to only if there are some valid reasons for taking the action against the Government servant. If a probe in the matter is allowed to be made in all such cases then curious results are likely to follow. In a given case there may be valid reasons, may be a serious kind, which led the authorities concerned to adopt one course or the other as the facts of a particular case demanded. If one were to say in all such cases that the action has been taken by way of punishment then the natural corollary to this would be that such action could be taken if there was no such reason in the background of the action. Then the argument advanced is that the action was wholly arbitrary, mala fide and capricious and, therefore, it was violative of Article 16 of the Constitution. Where to draw the line in such cases? Ordinarily and generally the Rule laid down in most of the cases by this Court is that you have to look to the order on the face of it and find whether it casts any stigma on the Government servant....."

11. In *Jarnail Singh and Ors. v. State of Punjab and Ors.*, 1986 LLJ 268 the Supreme Court once again reiterated the view expressed earlier. While deciding the said case the Supreme Court observed that at p.276 "When an allegation was made by an employee assailing the order of termination as one based on misconduct, though couched in innocuous terms, it was incumbent on the Court to lift the veil and to see the real circumstances as well as the basis and foundation of the order complained of. In other words, the Court, in such case will lift the veil and will see whether the order was made on the ground of misconduct/inefficiency or not."

12. From the decisions cited above, law regarding removal, dismissal or reduction in rank of a public servant is very well settled. Even in case of a temporary worker it is the duty of the Court to see the manner and the circumstances under which the order of termination was made and consider as to whether it is a case of termination simpliciter or by way of punishment or with a stigma. The order of termination or removal may be very innocuous on the face of it but it should be the endeavour, of the Court to look into the circumstances

under which the employee was removed from service. It can be found out from the relevant records or from other materials the actual nature of the order of termination. In the instant case there were allegations against the petitioner that he used to violate the service Rules by picking up civilian passengers and realising fare from them. Show cause notices had been issued against him. On one occasion, he admitted that he did it on humanitarian ground, but on other occasions the petitioner totally denied the allegation. Annexure-VII is the confidential adverse remarks recorded by the Initiating and Reviewing Officers. In the said report it was stated that the petitioner's driving skill was poor and prone to accidents. The petitioner was graded as "below average" by both the Officers. In the affidavit-in-opposition the Respondents have very categorically stated that it was found that there was no improvement in general behaviour of the petitioner as well as his driving skill. In paragraph 18 of the affidavit-in-opposition the Respondents have stated thus:

".... The petitioner was given a lot of chance to improve himself. He was also given personal hearing by the appointing authority on June 5, 1991 but he could not prove any merit in his plea."

13. Taking into consideration all the aspects of the matter, I find there are abundant evidence to show that the petitioner was removed from service because he did not discharge his duties as per Rules and could not improve his driving skill inspite of warnings and that he was found not suitable. From all these it can be said that the removal of the petitioner was with stigma as well as by way of punishment.

14. From the facts and in the circumstances of the case, it is abundantly clear, the termination of petitioner was not a termination simpliciter but a termination with stigma and also by way of punishment. Therefore, procedure prescribed under Article 311(2) must be followed. As this was not done, the notice of termination, Annexure-VIII, and the discharge certificate, Annexure-XI, cannot sustain in law. Accordingly, the Annexure-VII termination notice and Annexure-XI discharge certificate are set aside and quashed. The petitioner is deemed to be in service from the date of termination till he is allowed to join in service. He shall be entitled to get all the benefits as if he is in service.

With the above directions, the petition is disposed of. However, in the facts and circumstances of the case, I make no order as to costs.