

(2017) 12 GAU CK 0079
In the Gauhati High Court
Case No : 4686 of 2015

Mridul Deka

APPELLANT

Vs

The Union of India & Ors.

RESPONDENT

Date of Decision : 20-12-2017

Acts Referred:

Constitution of India, Article 226 -
Power of High Courts to Issue certain writs
Administrative Tribunals Act, 1985, Section 14
- Jurisdiction, Powers and Authority of the C

Citation : (2017) 12 GAU CK 0079

Hon'ble Judges : Nelson Sailo

Bench : SINGLE BENCH

Advocate : B Choudhury, MK Das, H Gupta

Judgement

1. Heard Ms. B Chouhdury, the learned counsel for the petitioner and Mr. MK Das, the learned counsel appearing for respondent Nos. 2 and 3. Also heard Mr. H Gupta, learned counsel for the respondent No.1.

2. The case of the petitioner in brief is that he was appointed as Data Entry Operator (DEO) by the respondent No.2 vide communication dated 21.09.2012 (Annexure-P/3 series) on a consolidated wage of Rs.10,000/- per month on contract basis for a period upto 31.07.2013 under the Food & Safety Standard Authority of India (FSSAI). The petitioner accordingly joined the post on 01.10.2012 as intimated by the respondent No.3 to the respondent No.2 vide communication dated 03.10.2012.

3. The appointment of the petitioner under the respondent organization is governed by the Memorandum of Agreement to be signed by each of the employee with the employer FSSAI. Accordingly, the petitioner also signed the Memorandum of Agreement. The appointment of the petitioner on expiry of the initial appointment was then renewed from time to time until the last renewal was made for 3 years w.e.f. 01.01.2015 vide Office Order dated 31.12.2014

(Annexure-P/2 series). The said Office Order also provided that the continuance of the contract appointment would be subject to evaluation of performance and conduct of the personnel on an annual basis. It also provided that the controlling officers must observe the need for continuous appraisal of their performance. Instruction for improvement wherever required may be issued by the controlling officer. In case of personnel indulging in misconduct and not performing as required, the controlling officer shall issue necessary cautionary note and a copy of such advise/displeasure note should be endorsed to the Establishment Division for records and appropriate action.

4. That pursuant to a certain incident which happened on 23.04.2015 between the petitioner and the incumbent holding the post of Deputy Director of the Organization, an Office Memo dated 23.04.2015 was issued to the petitioner (Annexure-P/8). The contents of the Office Memo may be reproduced as below:- "This has come to the notice of the concerned authority that Mr. Mridul Deka, who is working as a Data Entry Operator Contractual) in this office of Deputy Director, FSSAI, NER, Guwahati got indulged in misconduct with the Deputy Director, FSSAI, NER, Guwahati on the matter of leave today on 23rd April, 2015. Mr. Mridul Deka argued with the Deputy Director bringing some topics such as harassment of Assamese people in Nagpur which is quite irrelevant and disturbing. Hence, this memo has been issued against Mr. Mridul Deka who has been found to commit misconduct according to the section 11. Performance of Duties and Standards of Conduct of the Memorandum of Agreement signed between Mr. Mirdul Deka and FSSAI. Mr. Mridul Deka has also been asked to submit explanation to his conduct within two days through this Office Memo."

5. According to the petitioner, since the following two days i.e. 25th and 26th April , 2015 were weekends during which time office remained closed, he submitted his explanation immediately on reopening on 27.04.2015 (Annexure-P-9) to the respondent No.3. However, before accepting the explanation, the respondent No.3 asked the petitioner to rewrite his written explanation by substituting of few words in the explanation with the words that was actually uttered by him on 23.04.2015. Consequently, vide order dated 22.06.2015, the petitioner was terminated from service. Being highly aggrieved, the petitioner has filed the instant writ petition.

6. The writ petitioner was taken up for motion on 14.08.2015 wherein while issuing notice to the respondents, the impugned order of termination dated 22.06.2015 was stayed. Notwithstanding the stay order passed on 14.08.2015, petitioner continued to remain absent for about 16 months and returned to resume his duty only on 02.01.2017.

7. However, since an interim order was passed by this Court, the petitioner was allowed to resume his duty but at the same time, an Interlocutory Application was filed by the respondent Nos. 2 and 3 for vacating or modification of the order dated 14.08.2015. Considering the submission made by the learned counsel for the respondents that the petitioner behaved in an irresponsible manner, the

interim order dated 14.08.2015 was modified to the extent that the respondents were given the liberty not to act upon the joining report of the petitioner dated 02.01.2017. The order dated 27.02.2017 was passed in the main writ petition.

8. Against the order dated 27.02.2017, the petitioner preferred a writ appeal i.e. WA No.85 of 2017 and the appeal was taken up for consideration by a Division Bench of this Court on 24.03.2017. The Division Bench disposed the appeal by observing that as the petitioner had resumed duty on 02.01.2017 and worked upto 15.03.2017 and therefore, the attempt on the part of the employer to seek refund of the remuneration paid to the petitioner for the said period should not be insisted upon. It was further observed that since the writ petition had not been decided on merits coupled with the fact that the order dated 27.02.2017 was not passed in any interlocutory application, it was directed that the writ petition should now be heard on merits before the writ Court. Further, upon considering that the contract period of service of the petitioner is due to come to an end by December, 2017, the matter be listed in the first week of August 2017. That is how the writ petition is listed before this Court for consideration.

9. The learned counsel for the parties have pointed out at the outset that the direction of the writ appellate Court was for the case to be listed for hearing in the month of August, 2017 but the matter has only been listed for admission today i.e. 16.12.2017. However, the learned counsels appearing for the rival parties considering that the appointment of the petitioner is due to come to an end on 31.12.2017, have no objection on the case being heard today though it is listed in the admission column.

10. Ms. B Choudhury, learned counsel appearing for the petitioner submits that the respondents upon being satisfied with the service rendered by the petitioner since his initial appointment on 21.09.2012 has been extending his service from time to time. The petitioner as per the memorandum of agreement is allowed 24 days of leave i.e. a calendar year but the respondents have on many occasions have refused to grant leave to the petitioner. By referring to Annexure-P/7 of the writ petition, she submits that as per the leave record of the petitioner, he availed of 9? days leave in the year 2013, 7 days in the year 2014 and only half a day in the year 2015. When the petitioner sought leave on 23.04.2015, the same was denied by the respondent No.3 and in that process, there was an outburst from the petitioner which resulted in the issuance of the Office Memo dated 23.04.2015 to him. Although the petitioner submitted his explanation on 27.04.2015, the respondent authorities without any further process terminated him from service vide the impugned order dated 22.06.2015.

11. Ms. B Choudhury submits that as per Office Order dated 31.12.2014, it has clearly been provided that in case of personnel indulging in misconduct and not performing as required, the controlling officer can issue cautionary note with a copy of advise/displeasure note endorsed to the Establishment Division for records and appropriate action. In the instant case, the Office Memo dated 23.04.2015 was issued to the petitioner alleging misconduct which attracted

section 11 of the Memorandum of Agreement signed by the petitioner and the organization. He was therefore asked to submit an explanation within a period of two days from the date of the Office Memo. She submits that section 11 of the Memorandum of Agreement speaks about performance of duties and standards of conduct and therefore, the same cannot be attracted to the case of the petitioner. Clause-9 of the Memorandum of Agreement pertains to termination. The said provision provides that on failure of the employee to fulfill his obligation under the agreement, the employee can be terminated after serving him one month's notice period or after payment of one month salary in lieu of the notice. Likewise the employee can also voluntarily seek termination from service by giving one month's notice to the employer. In addition, if the contractual employee is found to have committed misconduct, negligence, fraud or indulgence in any activity considered undesirable, the agreement would stand terminated without any further notice and without any financial benefits accruing from the agreement. She therefore submits that the order of termination amongst others provided that the petitioner was terminated from service based on the report submitted by the respondent No.3 against the petitioner was to the effect that the petitioner was found to have committed misconduct and misbehavior constituting an act of insubordination and breach of the terms of contract and therefore, a decision was taken to terminate him from service. Ms. B Choudhury therefore submits that the impugned order is illegal, in violation of the principles of natural justice and stigmatic in nature. The same cannot be sustained and should be quashed.

12. In support of her submission, Ms. B Choudhury places her reliance upon the following decisions:- i) (1993)4 SCC 727 (Managing Director, ECIL, Hyderabad & Ors. Vs. B Karunakar & Ors.)

ii) (1979)1 SCC 405 (Mohinder Singh Gill & Ors. Vs. The Chief Election Commissioner, New Delhi & Ors.)

iii) (2013)8 SCC 345 (Balmer Lawrie & Co. Ltd. Vs. Partha Sarathi Sen Roy

iv) (1979)2 SCC 80 (Hindustan Tin works Pvt. Ltd. Vs. Employees of M/S Hindustan Tin Works Pvt. Ltd.

v) (Mission Director RCH/NRHM Vs. Ranjit Jain & Anr.)

13. Appearing for the respondent Nos. 2 and 3, Mr. MK Das submits that there is nothing wrong with the termination of the petitioner. The appointment being a contract appointment, the service condition of the petitioner is governed by the Deed of Agreement which was executed by the petitioner himself and since the petitioner indulged himself in misbehavior with the respondent No.3, the Office Memo dated 23.04.2015 was issued to him asking him to explain his conduct. Although the petitioner submitted his explanation, the same was found to be unacceptable and respondent No.2 upon consideration of the conduct of the petitioner as well as the Memorandum of Agreement decided to terminate his contract service. Due opportunity was given to the petitioner and therefore, there

is nothing wrong with the order of termination.

14. Mr. MK Das also submits that the respondents organization being a statutory body constituted under the Ministry of Health and Welfare, alternative remedy is available to the petitioner i.e. the Central Administrative Tribunal. He submits that although the jurisdiction of the High Court cannot be said to be ousted, but considering Section 14 of the Administrative Tribunal Act, 1985, read with Appendix (VI) of the said Act, it can be seen that the subject matter is one to be considered by the Central Administrative Tribunal. Mr. MK Das in support of his submission, relies upon the following decisions:- i) (2012)4 SCC 407 (Ravi Yashwant Bhoir Vs. District Collector, Raigad & Ors.)

ii) AIR 1997 SC 1125 (1) (Chandra Kumar Vs. Union of India & Ors.)

iii) (2013)8 SCC 345 (Balmer Lawrie & Co.Ltd. Vs. Partha Sarathi Sen Roy

iv) (1979)2 SCC 80 (Hindustan Tin works Pvt. Ltd. Vs. Employees of M/s Hindustan Tin Works Pvt. Ltd.

15. Mr. H Gupta appearing for the respondent No. 1 supporting the submission of Mr. MK Das submits that the jurisdiction of a writ Court is very limited in so far as the power of judicial review is concerned. He submits that unless the decision taken by the authority concerned is so perverse, irrational and in outrage defiance of logic and that the person taking the decision can be said to have taken leave of his senses, a writ Court would normally not interfere. Placing the facts in the instant case, Mr. H Gupta submits that the order impugned by the petitioner did not fall under such exception thereby warranting judicial review. Therefore, the writ petition being without any merit should be dismissed. In support of his submission, Mr. H Gupta relies upon Gridco Limited Ltd. & Ors. Vs. Sadananda Doloi & Ors. (2011)15 SCC 16 and Ajoy Kumar Haloi Vs. State of Assam 2014 (3) GLT 420.

16. I have considered the submission advanced by the learned counsel for the parties and perused the materials available on record. As can be seen, the petitioner is a contract appointee under the respondent organization whose appointment was renewed from time to time and from the Office Order dated 31.12.2014, his appointment is to subsist only upto 31.12.2017. In terms of the said Office Order, a cautionary note under the given facts and circumstances was to be issued against the petitioner for his conduct and a copy of advise/displeasure note to be endorsed to the Establishment Division for records and appropriate action. Although the learned counsel for the respondent Nos. 2 and 3 submits that the Office Memo dated 23.04.2015 is a cautionary note given to the petitioner but however, on perusal of the same, it cannot be said that it is a cautionary note but in fact a notice calling explanation from the petitioner within a time frame of two days. Against the Office Memo, the petitioner submitted an explanation on 27.04.2015 whereby he explained the reason for his outburst and at the same time sought an apology for his behavior before the respondent No.3. If the Office Memo is to be presumed to be a cautionary note, the matter would

have ended there. However, vide the impugned Order dated 22.06.2015, the respondent No.2 purportedly acting upon the report submitted by respondent No.3, terminated the service of the petitioner. Besides mentioning the report submitted by respondent No.3, the impugned order of termination also provides that the petitioner was found to have committed misconduct and misbehavior and therefore, he violated the terms and conditions of the contract. Thus, from a perusal of the impugned Order dated 22.06.2015, it only appears to be stigmatic as the satisfaction of the authority who terminated the service of the petitioner that the petitioner was indeed guilty of the charge and allegation is apparent. Such finding or conclusion without due process or without affording an opportunity to the petitioner even in a contract appointment would only be arbitrary and unjust. Therefore, the impugned Order of termination considering the authorities relied upon by the learned counsel for the petitioner, more particularly, Managing Director, ECIL, Hyderabad & Ors (supra), the impugned order dated 22.06.2015 is found to be unsustainable and warrants interference. Having opined so, dwelling upon the other authorities relied upon by the learned counsel for the petitioner would not be required. As for the contention of the learned counsels appearing for the respondents on the question of alternative remedy available to the petitioner, I am of the considered opinion that in the given facts and circumstances, the jurisdiction of this Court under Article 226 of the Constitution of India cannot be said to be ousted and moreover, it may be noticed that the respondents have not raised the issue either in the writ appeal they had preferred nor during the subsistence of the proceedings except in their affidavit-in-opposition in the form of preliminary objection. As may be noticed, the writ petition was filed on 07.08.2015 and therefore, I am not inclined to reject the writ petition on account of availability of alternative remedy. In that view of above, the impugned Order dated 22.06.2015 is hereby set aside and quashed and the petitioner shall be reinstated forthwith.

17. However, considering the fact that the petitioner even after obtaining stay order from this Court on 14.08.2015 failed to join his duty for about 16 months and approached the respondent authority with a joining report only on 02.01.2017, therefore the petitioner will not be entitled to any backwages for the intervening period w.e.f. 14.08.2015 to 02.01.2017. However, considering the fact that his termination is found to be bad in law while the petitioner admittedly is again out of service since 16.03.2017, ends of justice would be seemed if he is given 50% of backwages w.e.f 17.03.2017.

18. It is also noticed that the contract appointment of the petitioner is only for 3 years w.e.f. 01.01.2015 and therefore, the same is due to come to an end on 31.12.2017. No doubt, further retention of the petitioner will be at the discretion of the respondent authority but however, such discretion should be exercised on sound principles governing employment and with an open mind.

19. With the above observation and direction, the writ petition stands disposed of. No cost.