

(2017) 03 AHC CK 0203
In the Allahabad High Court
Case No : 8238 (SS) of 2008

Mukesh Kumar Upadhyay

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 27-03-2017

Acts Referred:

Constitution of India, Article 311(2) -
Dismissal, removal or reduction in rank of persons employed in civil capacities under
the Union or a State
Government of India Act, 1935, Section
240(3) -
Uttar Pradesh Group D Employees Service Rules, 1985, Rule 11

Citation : (2017) 03 AHC CK 0203

Hon'ble Judges : Devendra Kumar Arora

Bench : Single Bench

Judgement

1. Affidavit of service and rejoinder affidavit filed today are taken on record.
2. Vide order dated 13.7.2015, the present writ petition was dismissed for want of prosecution. Thereafter, application for recall of the order dated 13.7.2015 (C.M. Application No. 81108 of 2015) has been filed by the petitioner.
3. Learned Additional Chief Standing Counsel has no objection if C.M. Application No. 81108 of 2015 be allowed and the writ petition be heard finally.
4. On due consideration, C.M. Application No. 81108 of 2015 is allowed. The order dated 13.7.2015 is recalled. The writ petition is restored to its original number.
5. Heard Mr. Hemant Kumar Misra, learned Counsel for the petitioner and Mr. Ajay Kumar Shukla, learned Additional Chief Standing Counsel.
6. Learned Additional Chief Standing Counsel has no objection to the prayer of the learned Counsel for the petitioner.
7. The petitioner has approached this Court, challenging the order dated

6.11.2008 passed by the opposite party No.3-the Principal Deen Dayal Upadhyay Rajkiya Snatakottar Mahavidyalaya, District Sitapur (hereinafter referred to as "Institution"), whereby his services has been terminated from the post of Lab Technician.

8. Submission of the learned Counsel for the petitioner is that the petitioner is an ex-serviceman, retired from the service of Indian Army after rendering 17 years of service. The petitioner was appointed on the post of Lab Assistant in the pay-scale of Rs.2550-3200 vide order dated 1.7.1999 issued by the Principal of the Institution in pursuance to the order dated 30.6.1999 issued by the Director, Higher Education, U.P., Allahabad. His appointment was made in terms of the provisions contained in Section 11 of the Group "D" Employees Service Rules, 1985 (hereinafter referred to as "1985 Rules") from the names requisitioned from the Ex-servicemen Welfare Corporation, U.P. However, vide order dated 1.10.1999, the Principal of the Institution had made certain modification in the terms of the appointment order by mentioning the appointment of the petitioner "contractual". The petitioner, feeling aggrieved against the action of the opposite parties in changing the nature of appointment of the petitioner from "substantive" to "contractual" as well as non-payment of increments as admissible to the regular employees, had filed writ petition No. 2530 (SS) of 2003, which was finally disposed of vide order dated 9.5.2003 with the direction to the opposite parties to dispose of the representation of the petitioner.

9. Further submission of the learned Counsel for the petitioner is that representation of the petitioner with regard to yearly increments and other benefits as admissible to the regular employees was rejected vide order dated 22.11.2003 by the Director, Higher Education, Allahabad, therefore, the petitioner had challenged the order dated 22.11.2003 by filing another writ petition No. 7719 (SS) of 2003 and the same is pending. It is also submitted that on account of raising grievance for regular appointments as well as filing aforesaid two writ petitions, opposite parties started harassing and making wild allegations against him. Subsequently, without giving any opportunity and calling any explanation, by means of the impugned order dated 6.11.2008, the petitioner's services were terminated with immediate effect.

10. Submission of the learned Counsel for the petitioner is that from perusal of the impugned order which runs in twenty pages, it is evident that various allegations with regard to conduct of the petitioner has been made and stigmatic order has been passed against him, which is not sustainable in the eyes of law as the petitioner though working initially on contractual basis, is entitled for effective and fair opportunity if any order has been passed levelling allegations of work and conduct against the petitioner. In support of his submission, he has relied upon the judgment of the Apex Court rendered in Jagdish Mitter v. Union of India, 1964 AIR (SC) 449, wherein the Apex Court has held that when an authority wants to terminate the services of a temporary servant, it can pass a simple order of discharge without casting any aspersion against the temporary

servant or attaching any stigma to his character. As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it would be idle to suggest that the order is a simple order of discharge. The test in such cases must be : Does the order cast aspersion or attach stigma to the officer when it purports to discharge him? If the answer to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance, to amount to dismissal. That being so, we are satisfied that the High Court was in error in coming to the conclusion that the appellant had not been dismissed, but had been merely discharged. It is conceded that if the impugned order is construed as one of dismissal the appellant has been denied the protection guaranteed to temporary servants under Section 240(3) of the Government of India Act, 1935 or Article 311(2) of the Constitution, and so, the order cannot be sustained.

11. At the outset, learned Additional Chief Standing Counsel has submitted that in the counter affidavit, it has wrongly been mentioned that the petitioner was dismissed from services, whereas order of termination has been passed, therefore, in the counter affidavit wherever the word "dismissal" has been mentioned, the same shall be read as "termination".

12. Mr. A.K. Shukla, learned Additional Chief Standing Counsel, while opposing the writ petition, has submitted that regular appointment on Class-IV post in a Government College is made following the prescribed procedure as given in Samuh "Gha" Karmchari Seva Niyamavali, 1985 (hereinafter referred to as "1985 Niyamavali") as amended from time to time. However, vide order dated 22.6.1999, the State Government directed to fill up the post of Class-IV employees in the newly established Government Colleges on the basis of conditions given in the said order dated 22.6.1999 in Para-"D", it has been mentioned that in case the candidates belonging to the categories mentioned in paras "A", "B" and "C" are not available, then, a candidate from public sector undertakings or Ex-Soldiers Welfare Board may be given appointment on contractual basis. He has submitted that the petitioner, who was an ex-army man, submitted his undated application directly to the Director, Higher Education, U.P., Allahabad for appointment on the post of Class-IV in the Government Colleges. Vide an order dated 30.6.1999 along with which the undated application of the petitioner was also enclosed, the Director, Higher Education, instructed the Principal of Government College, Sitapur to issue appointment letter to the petitioner immediately and inform within three days.

13. Learned Additional Chief Standing Counsel has submitted that in pursuance of the aforesaid order of the Director Higher Education dated 30.6.1999, the Principal of the College concerned appointed the petitioner on the post of Laboratory Attendant/office attendant on 01.07.1999 without making mention as contractual appointment as given in the provisions of the aforesaid Government Order dated 22.6.1999 in the appointment letter issued to the petitioner. Subsequently, on realizing the mistake in his earlier order dated 30.6.1999

regarding appointment of the petitioner, the Director, Higher Education, issued another order dated 25.9.1999 in the light of the Government Order dated 22.6.1999 requiring the Principal of the College to change the nature of appointment of the petitioner as a contractual appointment. In pursuance of the order dated 25.9.1999, the Principal of the College issued modified letter of appointment to the petitioner on 1.10.1999, whereby the petitioner was given contractual appointment on the post of Class-IV employee. In the modified appointment letter dated 1.10.1999, it was clearly mentioned that the contractual appointment could be terminated at any time by the Principal by issuing one month notice or by giving one month salary in advance to the petitioner.

14. It is also submitted by the learned Additional Chief Standing Counsel that the petitioner agreed to the contractual appointment and continued to work on the same terms and conditions as given in the modified letter of appointment. Thereafter, the petitioner had approached this Court by filing writ petition No. 2530 (SS) of 2003, seeking a writ of mandamus commanding the opposite parties to allow him annual increments. This Court, vide order dated 9.5.2003, directed the Director, Higher Education to decide the representation of the petitioner dated 8.9.2002 in accordance with law. In compliance of the order dated 9.5.2003, the Director, Higher Education considered the representation of the petitioner dated 8.9.2002 and decided the same by a speaking order dated 22.11.2003, wherein it was held that the petitioner was not entitled to annual increments because of his contractual appointment. The order dated 22.11.2003 was assailed by the petitioner in writ petition No. 7719 (SS) of 2003, in which, pleadings have been exchanged and the same is pending.

15. Learned Additional Chief Standing Counsel has further submitted that the work and conduct of the petitioner was not satisfactory since the date of appointment as contractual employee as he always disobeyed the orders of the Principals, who were posted in the College from time to time and often used abusive and unparliamentary language against the College staff members. A report regarding indiscipline and misconduct of the petitioner was sent by the then Principal to the Director, Higher Education vide letter dated 12.5.2004. The petitioner had been continuously making false complaints to the Chief Secretary, Government of U.P., the District authorities and Lokvani against the Principal and staff members of the College from time to time and several inquiries were held following complaints of the petitioner but nothing was found against the Principal and the staff members. The petitioner had always been creating atmosphere of mistrust in the College during his service period, which was highly detrimental to the interest and healthy environment of the College. In these backgrounds, submission is that continuous disobedience, misconduct and utter neglect of duties by the petitioner rendered him unworthy of Government service, therefore, services of the petitioner were not required in the College and were to be dispensed with and as such, the Principal of the College, vide order dated 6.11.2008, terminated the petitioner from service in accordance with the

conditions of his contractual appointment.

16. Learned Additional Chief Standing Counsel has further submitted that against the order of termination dated 6.11.2008, the petitioner, vide letter dated 19.11.2008, made a request to the Principal Secretary, Social Welfare in the State Government for intervention in the matter. The Principal Secretary, Social Welfare fixed 28.11.2008 for hearing on which date the Director of Higher Education and a representative of the District Magistrate of Sitapur were asked to be present in the meeting in furtherance of which the District Inspector of Schools, Sitapur, vide letter dated 27.11.2008, along with a copy of the communication of the Principal Secretary, Social Welfare dated 25.11.2008, informed the Principal of the College concerned to participate in the said hearing on 28.11.2008. Thereafter, the Principal Secretary, Social Welfare heard both the sides on 28.11.2008 and in view of their submissions, he did not grant any relief to the petitioner in the matter of his dismissal from service.

17. In these backgrounds, learned Additional Chief Standing Counsel has submitted that continuous disobedience, misconduct and utter neglect of duties by the petitioner rendered him quite unfit for Government service, therefore, his services were to be dispensed with and accordingly, vide order dated 6.11.2008, the Principal of the College terminated the petitioner from services in accordance with the conditions of his contractual appointment.

18. I have heard learned Counsel for the parties and perused the record.

19. From perusal of the impugned order, which runs in twenty pages, reveals that complaints of different Principal made to the higher authorities from time to time have been narrated. Apart from these details, narration about filing of the writ petition by the petitioner regarding his claim for his regular salary, disobedience, indiscipline and misbehavior has also been mentioned. Taking into account the aforesaid facts, the petitioner was terminated from service with immediate effect in view of the terms and conditions of his appointment order dated 1.10.1999 within the provision to make payment of one month salary in advance.

20. It is well settled that an order of termination simpliciter of a temporary employee or probationer or even a tenure employee, without casting any stigma may not be interfered with by court. But the Court is not debarred from looking to the attending circumstances. In the case of *Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta*, and others reported in (1999) 3 SCC page 60. Para 21 of the said decision is reproduced below, " If findings were arrived at in an inquiry to misconduct, behind the back of the officer or without a regular departmental inquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the inquiry was not held, no findings were arrived at and the employer was not inclined to conduct an inquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of

motive and the order would not be bad. Similarly is the position if the employer did not want to inquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing evidence. In such a circumstance, the allegation would be a motive and not the foundation and the simple order of termination would be valid."

21. A perusal of the above, clearly shows that if an inquiry was conducted as to misconduct, behind the back of the officer or without a regular departmental inquiry, the simple termination is to be treated as "founded" on the allegations and will be bad.

22. Similarly, in *Chandra Prakash Shahi v. State of U.P., and others* (2000) 5 SCC 152 the Hon"ble Supreme Court articulated that if for determination of suitability for the post 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 the services, the order will not be punitive in nature. But, if there are some allegations of misconduct and an inquiry is held to find out the truth of that misconduct and thereafter the order of termination is passed, the order would be punitive in nature.

23. In *V.P. Ahuja v. State of Punjab*, (2000) 3 SCC 239, the Apex Court reiterated that services of temporary servant and even of probationer cannot be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principles of natural justice as they are also entitled to certain protection.

24. It is well settled by several decisions of this Court that though the order is innocuous on the face of it, still the Court if necessary, for the ends of fair play and justice can lift the veil and find out the real nature of the order if it is found that the impugned order is penal in nature even though it is couched with the order of termination in accordance with the terms and conditions of the order of appointment, the order will be set aside. Now, it is also well settled that the temporary government servants or probationers are as much entitled to the protection of Article 311(2) of the Constitution as the permanent employees.

25. It is also relevant to clarify here that admittedly in compliance of the appointment order dated 1.7.1999, the petitioner resumed his duty and continued upto 6.11.2008. There is also no dispute to the fact that vide order dated 6.10.2002, a government accommodation was also provided to the petitioner in the campus.

26. Though the petitioner being a contractual employee as alleged by the respondents, his services could have been dispensed with by means of simpliciter order in terms of his appointment order dated 1.10.1999 but reason best known to the opposite party No.3, the petitioner's conduct and other events were discussed and finally, his services have been terminated in terms of the appointment order dated 1.10.1999 with a direction to pay one month salary in advance.

27. Taking the holistic view of the matter, I am of the definite opinion that the impugned order of termination is punitive and is stigmatic in nature, therefore, before passing the impugned order, the Principal of the College ought to have given the petitioner an opportunity to explain his conduct but the opposite party No.3 did not provide any opportunity and after describing the petitioner's past conduct passed the impugned order.

28. Accordingly, the impugned order of termination dated 6.11.2008 is quashed. The petitioner shall be reinstated in service and will be entitled for all the benefits, which has accrued during the interregnum. However, the petitioner shall be paid 50% of the wages from the date of termination to the date of reinstatement and this exercise shall be completed within a period of three months from the date of receipt of a certified copy of this order. Liberty is granted to the opposite parties to pass fresh order in accordance with law, if they so desire.