
(2014) 01 AHC CK 0200

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 21381 of 1994

Nagar Palika Siyana and Others

APPELLANT

Vs

U.P.P.S. Tribunal and Others

RESPONDENT

Date of Decision : 17-01-2014

Acts Referred:

Constitution of India, 1950 — Article 311, 311(2)
Uttar Pradesh Public Services (Tribunal) Act, 1976 — Section 1, 1(4), 1(4)(e), 2, 2(s)

Citation : (2014) 2 ADJ 381 : (2014) 3 AWC 2781 : (2014) 2 ESC 930 : (2014) 140 FLR 1078 : (2014) 2 UPLBEC 1259

Hon'ble Judges : Rakesh Tiwari, J; Bharat Bhushan, J

Bench : Division Bench

Advocate : Sharfuddin Ahmad and M.A. Haseen, Advocate for the Appellant; Mahesh Gautam, S.C., Vijay Gautam and Vinod Sinha, Advocate for the Respondent

Judgement

Bharat Bhushan, J.—Nagar Palika, Siyana District Bulandshahr has filed this writ petition against judgment and order dated 17.2.1994 passed by U.P. Public Services Tribunal II, Lucknow (in short "Tribunal") in Claim Petition No. 137/II/88 filed by Sri Ram Prasad, respondent No. 2, setting aside termination order dated 27.2.1978 of respondent No. 2 with all consequential benefits of pay and allowances. Facts of the case are based on allegations that respondent No. 2, Ram Prasad was temporarily appointed on the post of Toll Muharrir on 5.10.1966 in Town Area, Siyana, District Bulandshahr, which was later on upgraded as Nagar Palika, Siyana. The Town Area was under the charge of Officer-in-charge Sub-Divisional Magistrate, Sadar in the year 1977 who made an inspection of Toll on 28.10.1977 where respondent No. 2 was working. During inspection, it was found that Ram Prasad, respondent No. 2, was found in possession of Rs. 70/- more-than the amount entered into Chungi Register maintained at Barrier. On being questioned by the Officer-in-charge, respondent No. 2 explained that extra amount was his personal cash money brought from home to meet the

requirement of small change for returning the excess money to the tax-payers. The statement of respondent No. 2 was recorded. Later on, a notice dated 23.11.1977 was issued seeking his explanation and to show-cause.

2. This time respondent No. 2 changed his version by stating that he brought Rs. 70/- from his home for purchasing food-grains from the market. The statement of respondent No. 2 dated 28.10.1977 and different version given pursuant to notice dated 23.11.1977 are available on record as Annexures-1 and 3 to the writ petition. Another opportunity was given to respondent No. 2 for explaining the discrepancies and in his third explanation dated 18.12.1977 (Annexure-5 to the writ petition). Respondent No. 2 again changed his version by saying that Rs. 70/- was his personal money required for making payment to the tax-payers as well as for purchasing food-grains for his personal consumption. It is pertinent to point-out that only Rs. 14.70P. were officially collected as Toll-tax by respondent No. 2 as per Chungi Register.

3. To cut the matter short, the temporary services of respondent No. 2 were terminated by Officer-in-charge on the ground of unsuitability. Respondent No. 2 filed an appeal before the District Magistrate, which was dismissed on 11.9.1985. Subsequently, respondent No. 2 filed further representation/appeal before the Commissioner, Meerut Division, Meerut, which was also dismissed on 13.11.1987. Thereafter, respondent No. 2 preferred a Claim Petition No. 137/11/1988. The Tribunal found order stigmatic termination and passed order without holding any domestic enquiry, therefore, it set-aside the termination order. Aggrieved Nagar Palika, Siyana, District Bulandshahr has filed the present writ petition against the impugned judgment and order dated 17.2.1994 passed by the Tribunal.

4. Learned counsel for the petitioner has submitted that services of respondent No. 2 was temporary, therefore, his services were terminable without any enquiry. He has argued that termination order is not stigmatic in the circumstances, hence, there was no requirement to hold full-fledged enquiry. Serious material was found against respondent No. 2 during inspection. Total tax collected was Rs. 14.70P. while excess amount of Rs. 70/- was found in possession of respondent No. 2. Three different explanations were given by respondent No. 2 for this excess amount which was not found to be satisfactory, therefore, the impugned termination order is justified as he was not found suitable to be continued in service.

5. Learned counsel for the petitioner has further claimed that since then, the State Government has abolished the toll-tax and at present, there is no post of Toll-tax Muharrir in existence, therefore, respondent No. 2 cannot be accommodated on his original post of Toll-tax Muharrir. He has also drawn the attention of this Court to U.P. Municipal Board Services (Enquiry, Punishment and Termination of Service) Rules, stating that Rule 11(i) provides that services of a temporary servant are liable to be terminated at any point of time by giving notice in writing either by the servant to the competent authority or by the

competent authority to the servant. It is also claimed that respondent No. 2, Ram Prasad, was the temporary employee (workman of the Municipal Board), his case could not have been entertained by the Tribunal in terms of Section 1(4)(e) of the U.P. Public Services (Tribunal) Act, 1976 (in short, the Act).

6. Per contra, learned counsel for respondent No. 2 has claimed that termination order is stigmatic and has been passed pursuant to certain allegations, therefore, he was entitled to defend himself during regular enquiry, which was not conducted. He has also claimed that mere abolition of Toll-tax would not deprive him of the opportunity to serve the Municipal Board in terms of impugned judgment and order of the Tribunal. Learned counsel for respondent No. 2 has also submitted that no plea was taken by the Municipal Board before the Tribunal regarding lack of jurisdiction. Therefore, this plea cannot be raised now before the writ Court.

7. Heard learned counsel for the petitioner as well as learned counsel for respondent No. 2.

8. It is apparent that respondent No. 2, was serving the petitioner as temporary employee. It is true that respondent No. 2 has denied this but there is nothing on record to show that the services of respondent No. 2 were ever confirmed or he was appointed on the post of Toll-tax Muharrir in accordance with rules in a proper recruitment process. The petitioner has claimed that service record of temporary employees are not available with them Respondent No. 2 not even been able to place any appointment letter on record which would show that his services were of permanent nature. Confirmation or regularisation orders are not available on record. Even the Tribunal has not recorded any finding that services of respondent No. 2 were of permanent nature. The temporary services are transient and terminable at any time. It is now well-settled that temporary employee has no right to the post and his services are liable to be terminated and not stigmatic in terms of his appointment otherwise found unsuitable or unsatisfactory; i.e. to say that no full fledged departmental enquiry is required if services of Government servant are not terminated by way of punishment. If the work and conduct of temporary employee are not satisfactory or his continuance in service is not in public interest on account of his unsuitability, his services can be terminated in accordance with terms and conditions of service or relevant rules.

9. The U.P. Municipal Board Services (Enquiry, Punishment, and Termination of services) Rules are unambiguous and clear. They entail that services of temporary servants can be terminated at any time by giving notice in writing either by the servant to the competent authority or by the competent authority to the servant. The period of notice is prescribed as one month. This period can be waived of in certain situations and payment can be made in lieu of that one month's period.

10. The Tribunal has found the termination order to be stigmatic on the ground

that certain allegations were made against respondent No. 2 in the preliminary enquiry held but no opportunity was provided to him by proving the same as no departmental enquiry was conducted into these allegations. The Tribunal held that termination order was, in fact, manifestation of preliminary enquiry due to certain allegations, therefore, it was incumbent upon the competent authority to provide opportunity to respondent No. 2 for defending himself.

11. We are afraid, this reasoning is not necessarily correct. The competent authority can determine the suitability of a temporary employee by holding a preliminary enquiry. The competent authority cannot take subjective decision without any material. If the authority concerned is determining the suitability of an employee, it can initiate the process of holding a fact finding preliminary enquiry to gather material to determine the suitability of an employee. However, where the order is based on serious allegations of misconduct, a departmental enquiry would be necessary. In the instant case, the respondent employee had failed to explain excess amount of Rs. 70/- with him to the satisfaction of the authorities; though he stated that it was brought by him from his home for his personal use, which the answer he failed to explain and was treated as shifting of stand.

12. A bench of the Apex Court in *State of Uttar Pradesh and Another Vs. Kaushal Kishore Shukla*, has held that every order terminating services of a temporary servant does not amount to dismissal from service merely because an enquiry was held before an order of termination was passed. The appropriate authority can hold departmental enquiry in order to ascertain suitability of an employee. It would be appropriate to reproduce the relevant portion of the judgment of the Apex Court in the case of *Kaushal Kishore Shukla* (Supra):

Learned counsel for the respondent urged that the allegations made against the respondent in respect of the audit of Boys Fund of an educational institution were incorrect and he was not given any opportunity of defence during the inquiry which was held ex parte, had he been given the opportunity, he would have placed correct facts before the inquiry officer. His services were terminated on allegation of misconduct founded on the basis of an ex parte enquiry report. He further referred to the allegations made against the respondent in the counter-affidavit filed before the High Court and urged that these facts demonstrate that the order of termination was in substance, an order of termination founded on the allegations of misconduct, and the ex parte enquiry report. In order to determine this question, it is necessary to consider the nature of the respondent's right to hold the post and to ascertain the nature and purpose of the inquiry held against 36 him. As already observed, the respondent being a temporary Government servant had no right to hold the post, and the competent authority terminated his services by an innocuous order of termination without casting any stigma on him. The termination order does not indict the respondent for any misconduct. The inquiry which was held against the respondent was preliminary in nature to ascertain the respondent's suitability and continuance in

service. There was no element of punitive proceedings as no charges had been framed, no inquiry officer was appointed, no findings were recorded, instead a preliminary inquiry was held and on the report of the preliminary inquiry the competent authority terminated the respondent's services by an innocuous order in accordance with the terms and conditions of his service. Mere fact that prior to the issue of order of termination, an inquiry against the respondent in regard to the allegations of unauthorised audit of Boys Fund, was held does not change the nature of the order of termination into that of punishment as after the preliminary inquiry the competent authority took no steps to punish the respondent instead it exercised its power to terminate the respondent's services in accordance with the contract of service and the Rules.

In *The State of Orissa and Another Vs. Ram Narayan Das*, a Constitution Bench of this Court considered the question and indicated "the fact of the holding of an inquiry is not decisive of the question. What is decisive is whether the order is by way of punishment in the light of the tests laid down in *Purshottam Lal Dhingra's* case." In *Jagdish Mitter's* case (supra) a Constitution Bench of this Court held that every order terminating the services of a temporary public servant does not amount to dismissal or removal from service merely because an inquiry was held before the order of termination was passed. The Court observed that the appropriate authority has power to terminate a temporary public servant either by discharging him under the terms of contract or the relevant rules or by holding departmental disciplinary inquiry and dismissing him from service. Before passing order of termination the competent authority may hold inquiry in fairness to ascertain whether the temporary servant should be continued in service or not. While discussing the nature of preliminary inquiry the Court observed as under:

"There is no element of punitive proceedings in such an enquiry; the idea in holding such an enquiry is not to punish the temporary servant but just to decide whether he deserves to be continued in service or not. If as a result of such an enquiry, the authority comes to the conclusion that the temporary servant is not suitable to be continued, it may pass a simple order of discharge by virtue of the powers conferred on it by the contract or the relevant rule; in such a case, it would not be open to the temporary servant to invoke the protection of Article 311 for the simple reason that the enquiry which ultimately led to his discharge was held only for the purpose of deciding whether the power under the contract or the relevant rule should be exercised and the temporary servant discharged." In *Champaklal Chimanlal Shah's* case (supra) the appellant therein was a temporary employee of the Union Government.

His services were terminated without assigning any reasons and without affording him opportunity of showing-cause.

Before passing the order of termination the competent authority had issued a notice to *Champaklal Chimanlal Shah* calling upon him to explain certain irregularities and to show-cause why disciplinary action should not be taken

against him. In response to the notice, he submitted his explanation thereupon, certain preliminary enquiries were held, but he was not given opportunity to place his case during the preliminary enquiry. However, after the preliminary enquiry to regular departmental enquiry was held instead proceedings for departmental enquiry were dropped and the services of Chimanlal Shah were terminated in accordance with the terms and conditions of service of a temporary Government servant. The termination order was assailed on the ground that the order of termination was in substance an order of punishment. The Constitution Bench held that the order of termination was not an order of punishment and the appellant was not entitled to the protection of Article 311(2) of the Constitution. The Court emphasised that when a preliminary enquiry is held against a temporary Government employee, it must not be confused with the regular departmental inquiry which usually follows the preliminary inquiry, after the Government decides to frame charges and to get a departmental enquiry made, with a view to inflict one of the three major punishments on the Government servant. So far as the preliminary enquiry is concerned, there is no question of it being governed by Article 311(2) of the Constitution, as it is made for the purpose of collection of facts to enable to the competent authority to decide whether punitive action should be taken or action should be taken in terms and under the contract of service or the rules applicable to a temporary Government servant. A Government servant has no right to insist for affording him opportunity during such enquiry and such an ex parte enquiry is not initiated in law in view of the purpose and object of preliminary enquiry. On an elaborate discussion, the Court observed as under:

In short a preliminary enquiry is for the purpose of collection of facts in regard to the conduct and work of a Government servant in which he may not be associated so that the authority concerned may decide whether or not to subject the servant concerned to the enquiry necessary under Article 311 for inflicting one of the three major punishments mentioned therein. Such a preliminary enquiry may even be held ex parte for it is merely for the satisfaction of Government, though usually for the sake of fairness, explanation is taken from the servant concerned even at such an enquiry. But at that stage he has no right to be heard for the enquiry is merely for the satisfaction of the Government, and it is only when the Government decides to hold a regular departmental enquiry for the purposes of inflicting one of the three major punishments that the Government servant gets the protection of Article 311 and all the rights that protection implies as already indicated above.

There must therefore be no confusion between the two enquiries and it is only when the Government proceeds to hold a departmental enquiry for the purpose of inflicting on the Government servant one of the three major punishments, indicated in Article 311 that the Government servant is entitled to the protection of that Article. That is why this Court emphasised in *Purshotam Lal Dhingra's* case (supra) and in *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, that the motive or the inducing factor which influences the

Government to take action under the terms of the contract of employment or the specific service rule is irrelevant." The above principles were reiterated by another Constitution Bench of this Court in R.C. Lacy's case (supra) dealing with the case of reversion of a permanent Government servant officiating on a higher post. The Bench observed that the Government might find it necessary to terminate the services of a temporary employee if it is not satisfied with the conduct or work of an employee and the same reasoning applies to a public servant who is reverted from a higher post to his substantive lower post, if the higher post was held in a temporary nature. Before terminating the services of a temporary servant or reverting the person 39 officiating in a higher post to his substantive post, the Government may hold a preliminary enquiry to form the requisite satisfaction for the continuance of the officiating Government servant. Such an inquiry does not change the nature of the order of the termination or reversion.

13. We are of the view the Tribunal misdirected itself by placing unnecessary emphasis on facts finding enquiry held prior to termination order and that if competent authority decides to hold a preliminary enquiry on the allegations made against an employee whereafter it is prima facie satisfied that employee is not suitable for service and terminate the services of such an employee, then, such termination order cannot be questioned merely because a fact finding departmental enquiry was not conducted prior to passing termination simpliciter.

14. As stated earlier, petitioner's counsel has also submitted that Tribunal did not have jurisdiction to entertain claim petition. We are not impressed by the argument of the learned counsel for respondent No. 2 that this point cannot be raised now as it was not raised before the Tribunal. The question of jurisdiction goes to very root of the dispute. A decision without jurisdiction is not decision on merits of the dispute in the eyes of law. Therefore, the question of jurisdiction can be decided even at this stage. In *Municipal Board, Jahangirabad, Bulandshahr and another v. State of U.P. and others*, 1987 UPLBEC 296, this Court held that employees of Municipal Board are workmen as defined under U.P. Industrial Disputes Act, 1947 and Municipal Board is an "Industry" within the meaning of the same Act therefore Industrial Tribunal has jurisdiction to adjudicate the dispute between the workman and Municipal Board. This Court has also held that under clause (c) of Section 1(4) of the U.P. Public Services (Tribunals) Act, 1976, the provisions of the Act shall not apply to the workman as defined by the Industrial Disputes Act, 1947 or U.P. Industrial Disputes Act, 1947. This judgment of the Court is based on the judgment of the Apex Court in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, . The Court held as under:

5. Each of us is likely to have a subjective notion about "industry". For objectivity, we have to look first to the, words used in the statutory provision defining industry in an attempt to find the meaning. If that meaning is clear, we need proceed no further. But, the trouble here is that the words found there do

not yield a meaning so readily. They refer to what employers or workers may do as parts of their ordinary avocation or business in life. When we turn to the meaning given of the term "worker" in Section 2(s) of the Act, we are once more driven back to find it in the bosom of "industry", for the term "worker" is defined as one:

employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

The definition, however, excludes specifically those who are subject to the Army Act 1950 or the Air Force Act 1950, or the Navy Discipline Act 1934, as well as those who are employed in the Police Service or Officers and other employees of a Prison, or employed in mainly managerial or administrative capacities or who, being employed in supervisory capacity, draw wages exceeding Rs. 500/- per mensem.

6. Thus, in order to draw the "circle of industry", to use the expression of my learned brother Iyer, we do not find even the term "workman" illuminating. The definition only enables us to see that certain classes of persons employed in the service of the State are excluded from the purview of industrial dispute which the Act seeks to provide for in the interests of industrial peace and harmony between the employers and employees so that the welfare of the nation is secured. The result is that we have then to turn to the preamble to find the object of the Act itself, to the legislative history of the Act, and to the socio-economic ethos and aspirations and needs of the times in which the Act was passed.

7. The method which has been followed, whether it be called interpretation or construction of a part of an organic whole in which the statute, its objectives, its past and its direction for the future, its constitutional setting are all parts of this whole with their correlated functions. Perhaps it is impossible, in adopting such a method of interpretation, which some may still consider unorthodox, a certain degree of subjectivity. But our attempt should be not to break with the well established principles of interpretation in doing so. Progressive rational and beneficial modes of interpretation import and fit into the body of the old what may be new. It is a process of adaptation for giving new vitality in keeping with the progress of thought in our times. All this, however, is not really novel, although we may try to say it in a new way.

8. If one keeps in mind what was laid down in Heydon's case (supra) referred to by my learned brother Iyer, the well known principle that a statute must be interpreted as a whole, in the context of all the provisions of the statute, its objects, the preamble, and the functions of various provisions, the true meaning

may emerge. It may not be strictly a dictionary meaning in such cases. Indeed, even in a modern statute the meaning of a term such as "Industry" may change with a rapidly changed social and economic structure. For this proposition I can do no better than to quote Subba Rao J. speaking for this Court in *The Senior Electric Inspector v. Laxmi Narayan Chopra* "The legal position may be summarized thus: The maxim *contemporanea exposition* as laid down by Coke was applied to construing ancient statutes but not to interpreting Acts which are comparatively modern. There is a good reason for this change in the mode of interpretation. The fundamental rule of construction is the same whether the Court is asked to construe a provision of an ancient statute or that of a modern one, namely, what is the expressed intention of the Legislature. It is perhaps difficult to attribute to a legislative body functioning in a static society that its intention was couched in terms of considerable breadth so as to take within its sweep the future developments comprehended by the phraseology used. It is more reasonable to confine its intention only to the circumstances obtaining at the time the law was made. But in a modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, for a modern Legislature making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them.

15. Similar dispute was raised before another bench of this Court in *Municipal Board Aonla District Bareilly v. U.P. Public Services Tribunal No. II, Lucknow*, in Civil Misc. Writ Petition No. 38299 of 1992, this Court held that U.P. Public Services Tribunal has no jurisdiction to take up the dispute between the Municipal Board and its workman. The relevant portion of the judgment of this Court is reproduced below:

The definition of the term "industry" as per the U.P. Industrial Disputes Act was also in the same line with that of the definition of term given in the original text of the Industrial Disputes Act, 1947. Thus, the finding of Hon^{ble} Mr. Justice A.N. Verma in the case reported in 1987 UPLBEC 296 is to be followed here to affirm that the Municipal Board was an industry and the industrial tribunal had the jurisdiction to adjudicate the dispute between the Municipal Board and its employees. In fact, the arguments advanced by the respondent did not dispute the question that the municipality was an industry and the employees were workmen. The order of the U.P. State Services Tribunal was sought to be defended on the ground that since the workman had also satisfied the test of a public servant, his relief u/s 4(1)(b) of the U.P. Public Services Tribunals Act could not be barred. Reference to the relevant Sections 1 and 4 of the Act had already been made in the initial paragraphs of this judgment. A careful reading of Section 4 indicates that every public servant has right to prefer a claim to the

Tribunal if the dispute relates to his employment. Section 1(4), however, speaks that barring Sections 2 and 6 of the Act, other provisions would not apply to a public servant who is also a workman as defined under the Industrial Disputes Act, 1947, or the U.P. Industrial Disputes Act. When these two sections are read together it becomes clear that the legislature intended that the dispute relating to a workman, even if he would satisfy the test of a public servant, shall be kept out of the ambit of the operation of the Act. Section 2 is the definition clause that would apply to the public servants who are also workmen. Section 6 speaks of bar of suits even at the instance of such persons for whom other provisions of the Act are not applicable. It is, therefore, difficult to accept the contention of the respondent that because his rights under the department statutes were violated and not those given under the industrial Disputes Act, he had a right to approach the U.P. Public Services Tribunal for relief.

It is accordingly held that the U.P. Public Services Tribunal had no jurisdiction to take up the dispute between the Municipal Board and its workman and the award of the Tribunal in claim Petition No. 144/II/1982 dated 3.10.1992 must be and is quashed.

16. It is, therefore, clear that the Tribunal had no jurisdiction to pass the impugned order. The impugned order passed by the Tribunal cannot be sustained on this ground alone. Considering all the facts and circumstances of the case, we hold that the impugned judgment and order passed by the Tribunal deserves to be quashed and is accordingly quashed. No orders as to costs. The writ petition is accordingly allowed.