

(1990) 02 AHC CK 0011

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 2802 of 1985

Rajendra Prasad Gond

APPELLANT

Vs

The District Inspector of School and Others

RESPONDENT

Date of Decision : 06-02-1990

Acts Referred:

Constitution of India, 1950 — Article 226, 311
Specific Relief Act, 1963 — Section 38, 41

Citation : (1990) 1 AWC 456

Hon'ble Judges : Virendra Kumar, J;M.L. Bhat, J

Bench : Division Bench

Advocate : R.N. Singh and S.N. Singh, for the Appellant; Virendra Singh and S.C., for the Respondent

Final Decision : Allowed

Judgement

Virendra Kumar, J.—Petitioner is seeking the quashing of the order dated 3-10-1979 terminating his services as Peon of Swami Vivekanand Inter College, Mariyahuu, in District Jaunpur and for issue of Writ of Mandamus directing the Respondents to pay the salary due to the Petitioner "during the pendency of the writ petition."

2. Petitioner was appointed as a Peon (a Class IV employee) in the aforesaid College. His services were terminated by the order dated 3-10-1979 passed by the Principal of the College on the ground that the Petitioner remained absent from 20-5-1979 and did not join duty thereafter. The Petitioner had filed a Civil Suit on 29-7-1979 seeking declaration to this effect that he is continuing in service and for permanent injunction to restrain the Principal from interfering in the discharge of his duties. During the pendency of that suit the order dated 3-10-1979 for termination of his service was passed The Petitioner therefore amended the plaint of the suit to claim the setting aside of the order of termination of his services. A number of issues including that of maintainability, jurisdiction and bar of Section 38/41 of the Specific Relief Act were framed in the

suit. The issues were decided against the Petitioner. The suit was dismissed. The lower appellate Court upheld the judgment of the trial Court and dismissed the appeal on 12-12-1984. Instead of filing the second appeal the Petitioner was advised by his Counsel that remedy for the Petitioner lay in challenging the order by filing a writ petition and not by filing the suit which was rightly dismissed as being not maintainable. Hence the time spent by the Petitioner in prosecuting the suit and the appeal is sought, by the Petitioner, to be excluded for the matter of this writ petition filed on 26-2-1985.

3. According to the Petitioner he was appointed as a Peon in 1973 and was confirmed on the same post. The Principal was annoyed with him and had asked him not to come to the Institution. The order of termination is violative of principles of natural justice, inasmuch as no opportunity was afforded to the Petitioner for giving explanation or defence before terminating his services. He denies that any notice from the side of the Principal was served on him or was refused by him prior to the passing of the impugned order of termination. In the absence of any enquiry having been made prior to the termination of the Petitioner's service, the order of termination is invalid. Further a month's prior notice or in lieu of it one month's salary was not given to the Petitioner.

4. Counter affidavit has been filed from the side of the Principal of the College, the opposite party No. 2. It is set out in the counter affidavit that the Petitioner was a temporary employee and his services could validly be terminated by the impugned order of termination. The Petitioner remained absent from duty since 20-5-1979 without permission. His absence continued upto 3-10-1979. He was issued a notice dated 3-6-1979 by the Principal asking him to join duty. He was given another notice dated 20-7-1979 again asking him to join the duty, otherwise disciplinary proceedings could be started against him. Both the notices were refused by the Petitioner. Hence a registered letter dated 16-8-1979 was sent to the Petitioner asking him to explain within three days from the date of the receipt of the notice the cause of his absence and in case he failed, a new appointment would be made in his place. This notice was refused by the Petitioner. The Petitioner, despite the notices, did not join duty, nor submit any explanation. He was guilty of dereliction and negligence of duty and gross misconduct. Ultimately the order of termination of his services was passed on 3-10-1979. Thus, there has been no violation of the principles of natural justice Regulation 36(1) of the Regulations framed under U.P. Intermediate Education Act, 1921 no doubt provided for framing charges and making enquiry before the punishment of removal or discharge from service could be imposed, but the same provision did not apply in the case of the Petitioner because his case fell under the exception contained in Regulation 36(2) which provided that in case an employee was absconding, the provisions of Regulation 36(1) could be dispensed with. In the instant case the Petitioner was absconding since 20-5-1979. Further, as there has been undue delay and laches on the part of the Petitioner in presenting the writ petition, it is liable to fail on this score. Moreover, in view of the availability of alternative remedy of filing appeal as well as representation

against the order of termination, this writ petition deserves to be dismissed.

5. In his rejoinder affidavit the Petitioner further asserted that he was not paid salary since the month of June 1979. So he sent a letter dated 18-7-1979 to the Principal but got no reply. Hence he made representation dated 6-8-1979 to the Manager of the institution before the termination order was passed in which he had alleged that manipulations were being made for terminating his services. He filed representations dated 9-10-1979 and 13-10-1979 to the District Inspector of Schools in the matter. The learned Counsel for the Petitioner submitted that the representations have not been disposed of.

6. It is not made out that the Petitioner was a confirmed employee of the College though he was in service as a Peon since 1973, The contention of the learned Counsel for the Petitioner is that since the Petitioner was a temporary employee, his service could validly be terminated by passing the impugned order dated 3-10-1979 which is innocuous. The services of a temporary employee could be terminated just by passing an order of termination under Regulation 25 by giving him one month's notice or one month's pay in lieu of notice. The termination order clearly shows that on account of the absence of the Petitioner from duty since 20-5-1979, his services were going to be terminated. Further, the opposite party No. 2 in the counter affidavit has set out that this act of absconding by the Petitioner was dereliction and negligence in discharge of duty by him and it was an act of misconduct. It is thus obvious that the order of termination is stigmatic and is not innocuous. In other words the order of termination is punitive in nature having been imposed by way of punishment for the unauthorised absence and consequently negligence and dereliction in duty on the part of the Petitioner. In the case of *Ramvallabh Tibrewalla Vs. Dwarkadas and Co.,* , their Lordships have held that removal or discharge from service on account of overstaying leave without giving opportunity to show cause to the delinquent government servant who was absenting himself by overstaying his leave was punishment which is violative of Article 311 of the Constitution.

7. Before passing an order of removal or discharge from service by way of punishment, what steps were to be taken and procedure was to be adopted by the Principal is prescribed by the Regulations under the heading "Punishment, Enquiry and Suspension". Regulation 31 provides that by way of punishment of a Class IV employee, orders can be passed for dismissal, removal or discharge, reduction in rank or diminution in emoluments. Regulation 32 provides for dismissal of an employee, on the grounds of gross insubordination, deliberate or serious neglect to duty, gross misconduct etc. Regulation 36 provides for framing charges and making enquiry before passing the order of punitive nature. It has been referred to from both the sides and is reproduced below ;

36(1) The grounds on which it is proposed to take action shall be reduced in the form of a definite charge or charges which shall be communicated to the employee charged and which shall be so clear and precise as to give sufficient indication to the charged employee of the facts and circumstances against him.

He shall be required within three weeks of the receipt of the chargesheet to put in a written statement of his defence and to state whether he desired to be heard in person. If he or the inquiring authority so desires, an oral enquiry shall be held in respect of such of the allegations as are not admitted. At that enquiry such oral evidence will be heard as that inquiring authority considers necessary. The person charged shall be entitled to cross-examine the witnesses, to give evidence in person, and to have such witnesses called as he may wish; provided that the enquiring authority conducting the enquiry may for sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the grounds thereof. The inquiring authority conducting the enquiry may also, separately from these proceedings, make his own recommendation regarding the punishment to be imposed on the employee.

(2) Clause (1) shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him.

(3) All or any of the provisions of Clause (1) may for sufficient reasons to be recorded in writing be waived where there is difficulty in observing exactly the requirements thereof and those requirements can in the opinion of the inquiring authority be waived without injustice to the person charged.

8. There is no dispute on the point that Regulation 100 has made applicable the aforesaid Regulation 36 (and also Regulations Nos. 32, 37 etc.) to Class IV employees also of Intermediate Colleges.

9. There is no dispute on the point that neither charges were framed, nor enquiry was held as required under Regulation 36(1). According to the learned Counsel for the opposite parties, as the Petitioner has absconded since 20-5-1979 till the date of passing the impugned order on 3-10-1979, the compliance of the provisions of Regulation 36(1) could legally be dispensed with by virtue of Regulation 36(2). This is vehemently challenged from the side of the Petitioner. "Absconding" referred to under Regulation 36(2) is not the same thing as absence from duty. The initial case of the opposite parties has been that the Petitioner absented from duty since 20-3-1979 despite the notices were sent to him asking upon him to join duty. The case of the opposite party No. 2 is that the Petitioner has refused to take he notices dated 3-6-1979 and 20-7-1979 when they were taken for delivery to him. Further in the counter affidavit filed from the side of the opposite party No. 2 it has also been set out that the service of the notice dated 16-8-1979 was effected by registered post and the same was served on the Petitioner. Thus, even according to the averments of the opposite party No. 2 it is obvious that the Petitioner was not hiding or concealing himself and on the other hand he was duly served with all the three notices, inasmuch as he refused to take the earlier two notices and took delivery of the third notice sent by registered post. Despite that he did not join duty and continued to remain on unauthorised absence and it was deliberate. These facts and circumstances go counter to the case of the contesting opposite party that the

Petitioner was absconding and in no case warrant to give rise to such inference. The meaning of the word "abscond" given in the Chambers 20th Century Dictionary, 1987 Edition given at page 4 is "to hide or get out of the way, esp. to escape a legal process". Such were not the circumstances in the instant case. As it was not a case of "absconding" by the Petitioner, so it was not permissible to dispense with requirements of Regulation 36(I) which made it obligatory to frame charges and make enquiry. Neither charges were framed, nor enquiry was made before terminating the Petitioner's services. In view of the violation of these mandatory provisions of Regulation 36(1) the order of termination of the service of the Petitioner is held to be invalid and illegal.

10. Regulations 36 and 37 embody principles of natural justice of affording opportunity to an employee of the College before discharging him from service by way of punishment. The principles of natural justice have been violated, consequently invalidating the termination order.

11. It may be mentioned here that dispensation of the requirement of framing charges and making inquiry required under Regulation 36(1) is claimed by the opposite parties on no other ground except on the ground that the Petitioner was absconding.

12. Regulation 37 requires a show cause notice to the delinquent employee about the punishment proposed against him after receipt of the inquiry report under Regulation 36(1) and before imposition of punishment. The question of application of Regulation 37 does not arise in the instant case as no inquiry was made.

13. Learned Counsel for the opposite parties contended that the provisions of Regulation 36 will not apply to a temporary employee like the Petitioner, but despite the opportunity given to him he has failed to point out any other provision in the Act or the Regulations providing for punishment to temporary Class IV employees serving in Intermediate Colleges

14. Further Regulation under the heading "Punishment, Enquiry and Suspension" from 31 to 45 do not provide that Regulation 36 does not apply in the case of discharge of a temporary employee from his services. On the other hand Regulation 31 provides for punishment of discharge from service. The Petitioner has been discharged from service by virtue of the impugned termination order. Thus, the punishment provided under Regulation 31 having been imposed, Regulation 36 for departmental enquiry before imposing such punishment is undoubtedly applicable.

15. Learned Counsel for the opposite parties contended that on account of the laches and inordinate delay on the part of the Petitioner in filing this writ petition against the impugned order dated 3-10-1979, the writ petition is liable to be dismissed. The Petitioner has filed the suit for declaration that he is continuing in service and for injunction against the opposite party No 2 not to interfere in discharge of his duties as a Peon of the College on 29-7-1979 as he was

apprehending that the opposite party No. 2 would terminate his services on flimsy ground. The appeal in same case continued till 12-12-1984. Later on he was advised by his Counsel Sri. R.N. Singh that his remedy lay in not filing the suit or appeal but by filing a writ petition under Article 226 of the Constitution. Accordingly the Petitioner filed this writ petition on 26-2-1985. He has set out in the affidavit that he had also moved representations dated 9-10-79 and 13-10-79 in the matter to the District Inspector of Schools (after having represented to the Managing Committee of the College on 6-8-79). This had happened after the passing of the termination order dated 3-10-79. The copies of those representations are filed as Annexures RA-2 and RA-3 with the rejoinder affidavit of the Petitioner. In these representations the Petitioner has further complained that the Principal was not paying him salary since June 1979 and was harassing him. It is thus obvious that against the termination of his services the Petitioner was quite vigilant and agitating the same persistently. He has been carrying on bonafide civil litigation in the same connection right from the time of terminating his services. In fact he had filed the suit against the College through the Principal for declaration and permanent injunction on 29-7-79 that he is in service, even prior to the termination order on the apprehension of the termination of his services. On passing of the termination order he introduced the relief of setting aside the termination order in the same suit by way of amendment. It is thus obvious that there have been no laches on the part of the Petitioner in filing the writ petition. There were sufficient grounds and bonafide reasons for filing the writ petition in February 1985 after the decision in his Appeal on 12-12-1984.

16. The contentions of the learned Counsel for the opposite parties is that the writ petition is liable to fail for the reason that the Petitioner had not filed departmental appeal provided under the Regulations against the order of termination and had, thus, failed to avail of the alternative remedy. In the instant case it has been held above that the termination order in question is invalid and illegal. It violated the mandatory provisions of Regulation 36(1) as well as the principles of natural justice envisaged. Consequently the fact that the Petitioner did not avail of the alternative remedy of filing departmental appeal, shall not debar the Petitioner from filing this writ petition. In this connection reference can be made to the cases of *State of Uttar Pradesh v. Mohammad Nooh* AIR 1958 SC 86, *P. Bhima Reddy Vs. State of Mysore and Others*, and *Natthi Mai Ramsahai Mai v. The Vice-Chancellor Meerut University, Meerut* 1981 EC 41.

17. As regards the claim of his salary, the Petitioner has claimed salary due to him "during the period of the pendency of the writ petition" and not of earlier period.

18. In the result, the writ petition is allowed. The order of termination dated 3-10-1979 of the service of the Petitioner is quashed, and the writ of mandamus is issued directing the opposite parties to pay the Petitioner his salary for the period of the pendency of this writ petition as claimed by the Petitioner and for

subsequent period regularly so long as the Petitioner remains in service.