
(1973) 09 DEL CK 0005

In the Delhi High Court

Case No : Civil Writ Appeal No. 497 of 1970

Ratna

APPELLANT

Vs

Indian Institute of Technology etc.

RESPONDENT

Date of Decision : 14-09-1973

Acts Referred:

Citation : (1974) ILR Delhi 68

Hon'ble Judges : Rajinder Sachar, J

Bench : Single Bench

Advocate : P.P. Rao, T.V.S.N. Chari, S. Sundaram, B. Dayal and R. Dayal, for the Appellant;

Judgement

Rajindar Sachar, J.

(1) This writ petition under Articles 226 and 227 of the Constitution of India challenges the order dated August 4, 1966, terminating the petitioner's service as telephone operator in the Indian Institute of Technology, New Delhi, passed by respondent No. 1 and the award dated March 25, 1970 by the Tribunal for arbitration respondent No. 2 appointed u/s 30 of the Institutes of Technology Act, 1963 (hereinafter called the Act).

(2) On May 20, 1964, the petitioner was offered appointment of the telephone operator in the institute on the terms and conditions mentioned in the appointment letter. She joined on June 23, 1964. The appointment was made on probation for one year. One of the terms was that during the period of probation her services were liable to termination by the institute any time and without assigning any cause. Clause 11 of the appointment letter provided that all other terms and conditions of service and rules of discipline and conduct as contained in the statutes and the rules framed there under shall be applicable. The petitioner joined duty on 23rd June, 1964. The institute is a body corporate u/s 4 of the Act. Section 26(g) authorises the making of statutes regarding terms and conditions of service of teachers and other staff of the institute. By Section 27

the first statutes were made with the previous approval of the visitor who is the President of India. u/s 25 of the Act all appointments of the staff except that of the director shall be made in accordance with the procedure laid down in the statutes Statute 13 lays down the terms and conditions of service of permanent employees. Statute 13(g) provides that subject to the provisions of the Act and the statutes all appointments to the posts under the institute shall ordinarily be made on probation for a period of one year after which period the appointee if confirmed shall continue to hold his office subject to the provisions of the Act and Statutes. Under Statute 13(3) the appointing authority shall have the power to extend the period of probation of any employee of the institute for such period as may be found necessary provided that if after the period of probation the official is not confirmed and his probation is also not formally extended, he shall be deemed to have continued on temporary basis and his services may then be terminable on a month's notice or payment of a month's salary in lieu thereof. Statute 13(5) provides that the appointing authority shall have the power to terminate the services of any member of the staff without notice and without assigning any cause during the period of probation- Statute 13(9) provides that no order imposing on any member of the staff penalties of removal from service or dismissal from service shall be passed by the authority except after an enquiry has been held and the member of the staff has been given reasonable opportunity of showing cause against action to be taken against him. Statute 13(10) gives a right to the members of the staff aggrieved by an order imposing a penalty to go in appeal to the Board of Governors of the institute. Statute 13(12) gives power to the Visitor to review any order made under the Statute. Statute 14 provides for the terms and conditions of service of temporary employees and provides that their services are liable to termination any time by notice in writing given by either party, period of such notice being one month. The other terms and conditions of service of such employees shall be such as may be specified by the appointing authority in the letter of appointment.

(3) The Petitioner completed one year of probation on June 23, 1965 but as no order of confirmation was passed nor her probation formally extended she would in terms of Statute 13(3) be deemed to have continued on a temporary basis and as such her services were liable to be terminated on a month's notice or on payment of one month's salary in lieu thereof. This position is admitted in the counter affidavit filed on behalf of respondent No. 1.

(4) On August 4, 1966, the impugned order was passed in the following terms:-

"MISSM. Ratna, Telephone Operator is hereby informed that her conduct and record of work having not been considered satisfactory during her service at the Institute, she has not been found suitable for permanent absorption at the Institute. She is hereby given three months notice of termination of her services during which period she is advised to find another job" somewhere else."

(5) The petitioner on August 20, 1966 represented to the Director against the termination of her service and took the plea that she had been throughout giving

satisfactory service and the impugned order has been issued on unconfirmed, unjustified ground and the allegations made therein do not stand to reason. She also referred to statute 13(9) and pointed out that if a prima facie case exists against her then the procedure laid down by statute 13(9) should be followed and that she should be given reasonable opportunity to defend her case. She was, however, informed by the Assistant Registrar of the Institute by letter dated September 3, 1966, that decision was taken after considering the facts of the case by the competent authority. Dissatisfied the petitioner filed an appeal to the Board under Statute 13(10) against the impugned order of August 4, 1966, in which she reiterated her complaint that the notice contained unsubstantial charges of unsatisfactory conduct and work and have been passed without due regard to the provisions of Statute 13(9) without holding an enquiry. She, Therefore, requested that the Institute may be directed to withdraw the notice of termination of her services or appoint a court of enquiry in accordance with Statute 13(9) in case a prima facie case was found to exist against her. The petitioner was given one month's extension by the Institute by order dated November 8, 1966, but was told that she would be relieved by December 3, 1966, she was actually relieved from service on that date.

(6) The petitioner had filed Cw 162/66 on December 2, 1966 in this court but the same was withdrawn on December 6, 1966. The counsel for the petitioner Mr. Rao states that this was done because the petitioner had not yet exhausted other remedies. The petitioner had also on November 9, 1966, represented to the Visitor under Statute 13(12) again reiterating the request that either a Board of Enquiry be appointed under Statute 13(9) or that the notice of termination of the service be withdrawn. It is a common case that no reply either to the appeal filed to the Board or to the representation made to the Visitor by the petitioner was replied by either of the authorities. The petitioner waiting for almost a year then addressed a letter on 26th March, 1968 to the Director of Institute that as dispute had arisen between the parties about the wrongful dismissal between her and the institute the matter be referred to an arbitrator u/s 30 of the Act. The institute in reply though objecting that dispute was not referable to arbitration nevertheless appointed an arbitrator and necessary action for the appointment of an umpire by the Visitor was also proceeded with.

(7) After the Tribunal was constituted the institute in reply to the claim of the petitioner took a preliminary objection that the Tribunal had no jurisdiction to determine the question of the wrongful termination of the petitioner's service. The Tribunal refrained from giving a decision straight away as it was pleaded on behalf of the institute that such a course might prejudice it and produce an impression that it was shutting out on technical ground an enquiry by an impartial body into an allegedly illegal termination of service and the case was. Therefore, heard on merits also.

(8) The Tribunal on the conclusion of the hearing gave its award dated March 25, 1970, wherein it took the view that the Tribunal is not the proper forum for

decision of a dispute between the petitioner and the institute. After so holding on question of jurisdiction and observing that a decision on merits would, strictly speaking be uncalled for, it nevertheless proceeded to give a decision on merits as it had heard the whole case. The Tribunal held that the petitioner was working on a temporary basis when her services were terminated and that the statutes do not make any distinction between a temporary employee and a permanent one in the matter of giving an opportunity to show cause against the action to be proposed to be taken and she would be entitled to an opportunity provided only the termination was brought about by way of punishment or if it entailed or amounted to a stigma on her conduct. But the Tribunal took the view that as there was no stigma and termination was not by way of punishment no opportunity was required to be given under the statute. It, Therefore, up-held the termination of the service of the petitioner. It was, Therefore, that the present writ petition was filed on April 25, 1970, in this court.

(9) The first objection taken by Mr. Bishambar Dayal, learned counsel for respondent No. 1, is that the writ petition is highly belated as it seeks to challenge the order passed on August 4, 1966. Now an appeal under Statue 13(10) to the Board was filed on October 14, 1966, and to the Visitor vide Statute 13(12) on November 9, 1966. Admittedly no reply was sent to her. In the return it is maintained that no appeal lay as no penalty had been imposed on the petitioner, yet it is common case that even this reply that the appeal was not maintainable was not sent. If in these circumstances the petitioner waited and did not pursue her earlier writ petition (which was withdrawn at the preliminary hearing) it cannot be said that she was unreasonable or lax in attitude that she adopted. She even asked for a reference to the arbitration u/s 30 of the Act. Though the respondent raised a preliminary objection yet it agreed to the setting up of the arbitration Tribunal and invited a decision on merits" The decision by the Tribunal of arbitration was given on March 25, 1970, and the present writ petition was filed within a month thereafter. It is apparent that once the matter was before the Tribunal, the petitioner could not be expected to file the writ petition till after a .decision had been given by the Tribunal of arbitration. It may be that ultimately the arbitration proceedings before the Tribunal have turned out to be "without jurisdiction and before a court not competent to entertain it. But that would not disentitle the petitioner to maintain the petition. To such a situation the analogy of Section 14 of the Indian Limitation Act, 1963 would be applicable and she would be entitled to plead that the period spent before the Tribunal should not be computed against her for the purpose of delay. Appeal and representation to the Board and to the Visitor remained unreplied. I, Therefore, cannot agree that the petition is in any way so belayed as to be thrown out on this ground alone.

(10) The next objection of Mr. Bishambar Dayal was that as petitioner invoked Section 30 of the Act, she is estopped from challenging the award. I do not appreciate the argument. The Tribunal having held that it had no jurisdiction to determine the matter on merits any decision by it on merits is a nullity and of no

effect" I may note that Mr. Bishambar Dayal has not urged that the Tribunal's decision on question of jurisdiction was wrong. So it has to be accepted that the tribunal's decision was without jurisdiction. How in these circumstances can the petitioner be estopped, because admittedly even consent cannot confer jurisdiction. There is a well recognised distinction between inherent want of jurisdiction and irregular assumption of jurisdiction. As observed in Davinder Singh and another v. The Deputy Secretary-cum-Settlement Commissioner, Rural, Rehabilitation Department Jullundur and others 1964 P.L.R. 555.

" WANT of inherent or initial jurisdiction goes to the very root of the matter and neither consent nor acquiescence of a party can vest a Tribunal with jurisdiction where none exists. Nor can such consent or acquiescence confer validity upon the order of the Tribunal where the order in the very nature of things is a nullity having been made by a Tribunal without any jurisdiction in the matter."

(11) As observed by the Privy Council in Ledgard and Another V. Bull 13 LA. 134 (2).

" WHERE the Judge has no inherent jurisdiction over the subject matter of the suit, the parties cannot -by their mutual consent,convert it into a proper judicial process."

So that even if the petitioner had herself invoked Section 30 of the Act for appointment of the Tribunal of arbitration it will not estop the petitioner from urging that the order by the Tribunal is without jurisdiction (more so especially as the Tribunal itself has given a finding that it has no jurisdiction) and hence any decision given by it on merit can have no legal validity and cannot bind the petitioner. This objection by the respondent Therefore, fails.

(12) It will be seen that the main grievance of the petitioner is that the impugned order dated August 4, 1966, casts a stigma upon her and is by way of punishment and, Therefore, she was entitled to an opportunity under Statute 13(9) before the said order was passed and as the same has not been done the order is a nullity. Mr. Bishambar Dayal counsel for the respondent apart from urging that the impugned order dated August 4, 1966, did not in any manner cast a stigma nor was it by way of punishment also sought to urge that statute 13(9) was not applicable to the case of the petitioner, and, Therefore, even if her allegations that the impugned order had cast stigma on her was correct she could not get the benefit of the Statute. The argument was that statute 13 was applicable to permanent employees and as the petitioner was not a permanent employee, statute 13(9) was not applicable to her. I may mention that no such plea was taken in the counter affidavit filed by the respondent and this point was sought to be urged by Mr. Bishambar Dayal for the first time in arguments. I, however, find no merit in it.

(13) In this connection it is to be noted that this writ petition was directed to be heard with L.P.A. 13 of 1971 on a common question of law namely whether a breach of the statutes framed by the Institute would entitle an employee to

reinstatement. That L.P.A. (Which was heard by a full bench and has now been reported as Indian institute of Technology V. Mangat Singh 1973 2 S.L.R. 46 has decided that the statutory provisions are mandatory obligations. Referring specifically to the present case it was observed by the Bench:

"MISS Ratna was a temporary employee of the institute. She was not confirmed even after the period of her probation had expired. According to Statute 13(3), Therefore, she shall be deemed to have continued on a temporary basis and that her service may then be terminable on a month's notice." She had, Therefore, no right to her post. A simple termination of her service was in accordance with the contract of her service involving no breach of any mandatory statutory obligation. If, however, she is able to show that the termination of her service was with a view to impose a punishment on her (a question to be decided by the learned Single Judge hearing her writ petition) then and then only, the mandatory statutory obligation contained in Statute 13(9) would be contravened on the analogy of the principle underlying in Moti Ram Deka V. General Manager N.E.F. Railways 1964 5 S.C.R. 623(3-a).

The bench has thus clearly held that Statute 13(9) is applicable to the petitioner's case. In that view the objection of Mr. Bishambar Dayal on this score is without any merit and "must be rejected.

(14) The main question for determination, Therefore, is whether the impugned order dated August 4, 1966, is a simple order of termination of her service in accordance with her service condition or is an order which casts stigma on her and, thus entitles her to the benefit of statute 13(9). Under Statute 13(3) after the petitioner had been on probation for one year and so deemed to be continued on temporary basis her services could be terminated by giving a month's notice. In the original offer of appointment her services could have been terminated during the period of probation without notice and without assigning any reason. No objection to the impugned order is taken because it gives a longer period, than provided in the Statute of original offer of appointment. The objection is that the impugned order is not a simple order of termination but casts a stigma on her because it specifically says that her conduct and record of work have not been satisfactory during the service at the Institute. It is well settled that in each case it has to be seen whether the misconduct or negligence is a motive for an order of termination of service or whether is the very foundation of the order of termination of service of a temporary employee. Even if the order of termination does not contain words attaching stigma to the character or reputation of a Government officer still the court is not debarred from looking at all circumstances to discover whether the order has been made by way of punishment. The form of the order is not conclusive of its nature. Sec S.R. Tiwari V. The District Board, Agra now the Antarim Zila Parishad, Agra through its Secretary and another AIR 1964 S.C.K.

(15) A reference to the order shows that it is not a simple case of termination of service by giving three month's notice. The order specifically states the reason

for terminating her service as due to the fact her conduct and record of work have not been found satisfactory during her service in the Institute and she has not been found suitable for permanent absorption at the Institute. Mr. Bishambar Dayal maintains that inspire of the language of the impugned order it was a simple case of termination of service in accordance with the service conditions and Therefore, statute 10(9) will not be applicable to the case of the petitioner. He placed great reliance on The State of Orissa and another V. Ram Narayan Das 1961 DS.C.R. 606 In that case a sub inspector on probation had been served with a notice under Rule 55B of the Civil Services (Classification, Control and Appeal) Rules why he should not be discharged from service for gross neglect of duties and unsatisfactory work and conduct and his Explanation having been found unsatisfactory a formal order discharging him from service was passed, namely "Probationary S. 1. Ram Narayan of Cuttack District is discharged from service for unsatisfactory work and conduct with effect from the date the order is served on him The Supreme Court held that the order discharging the official from service did not amount to dismissal so as to attract article 311(2) and, Therefore, no enquiry was necessary.- This case is clearly distinguishable. In the present case there is no provision like Rule 55B Civil Service (Classification, Control and Appeal) Rules for holding an enquiry under the Rules whether to confirm an employee or not and no necessity to use the words in the order. The Supreme Court itself distinguished this case in a later case in Jagdish Mitter Vs. The Union of India (UOI), . In that case the order of discharge which was challenged was as follows:-

"SHRI Jagdish Mitter, a temporary 2nd Division Clerk of this office having been found undesirable to be retained in Government Service is hereby served with a month"s notice of discharge w.e.f. November 1, 1949."

(16) The court held that when this order refers to the fact that the appellant was found undesirable to be retained in the Government service it expressly casts a stigma on the official concerned and in that sense must be held to be an order of dismissal and not a mere order of discharge. The Union of India had relied on The State of Orissa and Another Vs. Ram Narayan Das, but the court distinguished it and observed:

It is true that the impugned order of discharge did refer to the adverse comments made against "the probationer"s conduct and did say that it was, therefore ,no good retaining him further in service and that, prima facie, would amount to attaching a stigma to the probationer who was discharged ; nevertheless, the order was construed by this court to be an order of discharge simplicities and no more, because Rule 55 (b) of the Civil Service (Classification, Control and Appeal) Rules required that before the services of a probationer were terminated an enquiry had to be held about his competence after giving him an opportunity to show cause against the grounds alleged against him; and it was because such an enquiry had to be held and that the result of the enquiry was to be communicated to the probationer when he was discharged. In other words the

statements in the order of discharge on which the probation had relied for the purpose of showing that the said order amounted to dismissal had to be made in the order as a result of requirements of Rule 55(b), and so this Court came to the conclusion that merely on the strength of the said statements, the impugned order could not be characterised as an order of dismissal.

The court also further observed that:

" WHEN an authority wants to terminate the services of a temporary servant, it can pass a simple order of discharge without lasting 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.

(17) In The State of Uttar Pradesh Vs. Madan Mohan Nagar, , the order of compulsory retirement which contained the words that official had "outlived his utility" was held to amount to removal so as to attract Article 311(2) of the Constitution. It was observed by the court :

IN the present case there is not only no question of implication but a clear statement appears on the face of the order that the respondent had outlived his utility, in other words, it is stated that he was incapacitated from holding the post of Director, State Museum, Lucknow. The order clearly attaches a stigma to him and any person who reads the order would immediately consider that there is something wrong with him or his capacity to work."

(18) In State of Punjab V. Darshan Singh 1968 S.L.R. 734 (8) the order of termination of service which was worded as "since your work and conduct, during the period you have worked as Shop Inspector in the Department, have not been found satisfactory, your services are hereby terminated in accordance with the terms and conditions of your employment....." was held to amount to dismissal. Ram Narain Doss's case was distinguished and after referring to Jagdish Mitter's case the bench observed:

" NOW anybody reading this order of termination of the service of the respondent would reach the immediate conclusion that the respondent is not a person who is entitled to employment, because not only his work but his conduct also was not found satisfactory. This attaches a stigma to him and casts an aspersion against his capacity for work as also against his conduct."

InShri Shashi Bhushan Paul formerly Executive Engineer V. title State of Punjab and another 1969 S.L.R. 221 an order of compulsory retirement on the ground that "his record of service was found to be unsatisfactory" was held to have cast a stigma which could not be passed without complying with Article 311(2) of the

Constitution." Proposition 3 as stated in State of Punjab and Another Vs. Shri Sukh Raj Bahadur, , is If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant."

(19) Reference was made by Mr. Bishambar Dayal to Union of India v. R.S. Dhaba . In that case the order stated that R. S. Dhaba officiating Income Tax officer having been found unsuitable after trial to hold the post of Income Tax Officer Class II is reverted as Income Tax Inspector. The Supreme Court held that Article 311(2) is not attracted because "the order of reversion does not contain any express words of stigma attributed to the conduct of the respondent and, Therefore, it cannot be held that the order of reversion was" made by way of punishment." This case is clearly distinguishable.

(20) Reference was then made to H.L. Rodhey and Others Vs. Delhi Administration and Others, . In my view that case has no relevance. The court held that as some officials who were reverted were merely officiating and thus had no right to the post, could not claim the protection of Article 311(2) of the Constitution. The bench held that the mere fact that assessment was made by the authorities to find out whether they should be confirmed or not did not cast any stigma on the career or character of the officials. The real distinction, however, as noticed by the bench was that "assessment is not contained in the orders of reversion communicated to the petitioners". It would thus be seen that emphasis is that the orders did not cast any aspersions on the officials. Such is not the position in the present case.

(21) Mr. Bishambar Dayal then referred to Dr. T.C. Pillai Vs. The Indian Institute of Technology, Guindy, Madras, . In that case the appellant had been appointed to post of Assistant Professor in the Institute on probation for a period of one year. After the expiry the Institute did not consider him suitable for confirmation and, Therefore, terminated his services by giving him one month's notice according to clause 2 of the appointment letter. This action was not considered by the Supreme Court as a penal action. I do not see how this case helps the respondent. It will be seen that the order was a simple order of termination and did not contain any stigma on the employee. No doubt it is true that a probationer or a temporary servant can be discharged if he is found not suitable for the post which he is holding and in such a case it may not be necessary to comply with the provisions of Article 311(2) of the Constitution or Statute 13 (9) as in the present case. But it is equally well settled that if the services of a probationer or a temporary servant are terminated by way of punishment or by casting stigma on him then the obligation of Article 311(2) of the Constitution or of Statute 13 (9) must be complied with.

(22) In the present case as the petitioner was continuing on temporary basis it was open to the authority concerned (if it found her unsuitable for the post) to terminate the services of the petitioner by giving her one month's notice. In

such a case the order would have been innocuous one unless the petitioner went further and was able to establish that looking at the entirety of circumstances preceding or attendant on the order of termination, the order of termination was a cloak for the order of dismissal. In the present case, however, the infirmity in the impugned order is in the body of the order itself. The order is not a simple order of termination of the petitioner's services. It goes much further and casts a stigma and aspersion on her by slating that her conduct and record of work have not been considered satisfactory. Thus reasons and grounds for termination the services are mentioned in the order itself. This undoubtedly casts an aspersion on her work and conduct and shows that the order of termination is founded on her alleged inefficiency. Such an order necessarily amounts to casting a stigma on her and reflects on her competence and on her conduct and thus will mar the chances of future employment. Thus the present is not a case where it can be urged by the respondent that the inefficiency of the petitioner was only the motive for terminating her services. On the other hand the present is a case where the reason and the foundation for terminating her services is her alleged unsatisfactory work and conduct. This amounts to casting an aspersion on the efficiency of the petitioner and thus casts stigma. This admittedly amounts to imposing a punishment on the petitioner. In view of my finding that the order of termination casts stigma and aspersion on her and this amounted to punishment she was entitled to have protection of the mandatory statutory obligation contained in Statute 13(9) as held in Mangat Singh's case. Admittedly the provisions of Statute 13(9) were not followed in the present case. - As the petitioner was entitled to be given an opportunity to show cause in accordance with Statute 13(9) the failure to follow that procedure will make the termination of her services invalid. I would consequently issue a writ quashing the impugned order dated August 4, 1966 of the respondent No. 1 and the award dated 25-3-1970 given by respondent "No. 2. The result is that the writ petition is allowed, but in the" circumstances of the case with no order as to costs.