

(1985) 02 DEL CK 0014

In the Delhi High Court

Case No : Civil Writ Petition Appeal No. 1372 of 1975

Richpal Singh

APPELLANT

Vs

Secretary (Labour) and Others

RESPONDENT

Date of Decision : 21-02-1985

Acts Referred:

Citation : (1985) 9 DRJ 118

Hon'ble Judges : Sultan Singh, J

Bench : Single Bench

Advocate : G.K. Sharma, Y.K. Sabharwal, S.N. Bhandari and Geeta Sharma, for the Appellant;

Judgement

Sultan Singh, J.

(1) Richpal Singh, petitioner by this writ petition under Articles 226 and 227 of the Constitution of India challenges (i) the order dated 8th April, 1974 ((Annexure)P-I) whereby his period of probation was extended without giving any reasons, (ii) order dated 26th April, 1974 (Annexure P-2) whereby his services were terminated (iii) order dated 6th February, 1975 (Annexure P-3) refusing to refer his disputes to the Industrial Tribunal/ Labour Court and (iv) Order dated 23rd September 1975 (Annexure P-4) refusing to re-consider and refer his grievances to the Industrial Tribunal Court. The petitioner has prayed for his reinstatement in service with retrospective effect and consequential benefits such as payment of salary and other allowances.

(2) Briefly the facts are that the petitioner was appointed as a Conductor with effect from 1st December, 1972 on probation for a period of one year under the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 (for short "the Regulations of 1952") by Delhi Transport Corporation (respondent No. 2). Respondent No. 2 through Asstt. Pe

(3) By order dated 6th February, 1975 (Annexure P-3) Under Secretary(Labor)Delhi Administration, Delhi (respondent No. 1) informed the

petitioner that the Lt. Governor of the Union Territory of Delhi did not consider the alleged dispute a fit one for reference to the Industrial Tribunal/ Labour Court, Delhi for adjudication. The petitioner made a further representation (Annexure P-9) along with statement of claim dated 21st July, 1975 (Annexure P-10) requesting the Conciliation Officer to re-consider the memorandum dated 6th February, 1975 refusing to refer his dispute submitting that the order of termination was by way of punishment, that the extension of probation period was in excess of authority. The petitioner also requested by letter dated 19th September, 1975 (Annexure P-II) to the Labour Commissioner, Delhi to afford a personal hearing. The Secretary(Labor)Delhi Administration, Delhi (Respondent No. 1) by letter dated 23rd September, 1975 (Annexure P-4) informed the petitioner that there were no grounds for review of the decision dated 6th February, 1975. On these allegations the petitioner has prayed for the issue of appropriate writ for quashing the aforesaid four orders.

(4) On 12th November, 1975 this court issued notice to the respondents returnable on 17th December, 1975 to show cause why the petition should not be admitted. No reply to show cause was filed. Rule was, Therefore, issued on 19th December, 1975. This petition came up for hearing in April, 1984 and it was submitted on behalf of respondents Nos. 2 and 3 that they be allowed to file a counter-affidavit. They accordingly filed a reply to the writ with affidavit dated 28th April, 1984. Respondent No I Secretary(Labor)Delhi Administration has not filed any reply to the writ.

(5) Respondents 2 and 3 in reply state that the Lt. Governor is a necessary party as the orders dated 6th February, 1975 and 23rd September, 1975 were passed by him, that the said orders were not passed by respondent No. I i.e. the Secretary(Labor)Delhi Administration, Delhi, and the said orders are administrative and not judicial or quasi-judicial in their scope and Therefore fall outside the purview of correction by the issue of writ of certiorari, that the Government has complied with the provisions of Section 12(5) of the Industrial Disputes Act, 1947 and Therefore rule nisi issued by this court was liable to be discharged, that the order dated 6th February, 1975 gives cogent reason for the refusal of reference and the order does not appear to be unjustified, that the services of the petitioner were terminated because of unsatisfactory work which is not a misconduct and as such no punishment was involved. On merits it is pleaded that in terms of Office Order dated 6th April, 1964 (Annexure P-I) the then General Manager (Transport) directed that the powers conferred on him u/s 92(I)(b) of the Delhi Municipal Corporation Act, 1957 shall, subject to his supervision, control and revision, be also exercised by the Officer on Special Duty (Personnel), that in terms of this order Officer on Special Duty (Personnel) had full powers in respect of Class Iii and Iv employees of the Delhi Transport Corporation to appoint, promote and re-appoint person and terminate the services of the employees who were engaged as probationer, that by memorandum dated 1st June, 1964 (Annexure R-2) the then General Manager in pursuance of Resolution No. 101 dated 28-4-1964 of the Municipal Corporation of

Delhi re-designated the post of Officer on Special Duty (Administration) and Officer on Special Duty (Personnel) as Assistant Administrative Officer and Assistant Personnel Officer respectively. The Assistant Personnel Officer of the D.T.C. offered the petitioner a post as "Retainer Conductor" and by order dated 1st January, 1972 (Annexure R-4) the petitioner was appointed as Retainer Conductor. By order dated 29th December, 1972 (Annexure R-5) the petitioner was appointed as conductor on probation for a period of one year with effect from 1st December, 1972, that the powers of appointment and termination were delegated by the General Manager to the Assistant Personnel Officer in so far as Class Iii and Iv employees were concerned, that acting upon these powers, the Assistant Personnel Officer issued the said orders of appointment and termination of the petitioner, that the order of termination is not punitive and his services were (eliminated under Clause 9(a)(i) of the Regulations of 1952.

(6) Learned counsel for the petitioner submits that under Regulation No. 7 of the said Regulations of 1952 the General Manager is the appointing authority pertaining to Class Iii and Iv employees and Therefore he is deemed to have been appointed by the order of the General Manager. He submits that the order dated 8th April, 1974 (Annexure P-1) extending the period of probation and the order dated 26th April, 1974 (Annexure P-2) terminating his services were passed by the Assistant Personnel Officer and these orders were not passed by the appointing authority and as such they are invalid. From the memorandum dated 29th December, 1972 (Annexure R-5) it is apparent that the petitioner was appointed as conductor on probation w.e f. 1st December, 1972 by the Assistant Personnel Officer. This order further mentions that the period of probation can be extended if considered necessary, that other conditions of his appointment in service shall provisionally be those as embodied in the Regulations of 1952. In view of the appointment letter it is clear that the petitioner was not appointed by the General Manager but by the Assistant Personnel Officer. Orders (Annexures P-1 and P-2) were also issued by the Assistant Personnel Officer i.e. the appointing authority and as such there is no infirmity regarding the competency of the person issuing the said orders (Annexures P-1 and P-2).

(7) Learned counsel for the petitioner next submits that his initial appointment was for one year on probation and Regulation 7 requires that the period of probation can be extended by the appointing authority for reasons which should be recorded. He submits that the order dated 8th April, 1974 does not mention any reason for extension of his probationary period and the D.T.C. has not placed any material on record to show that any reasons were recorded or considered by it before the order extending the probationary period was passed. The D.T.C. has not placed before the court any record showing the reasons for extension of probationary period. Learned counsel however produced some papers relating to reference u/s 10 of the Industrial Disputes Act. A perusal of the order dated 8th April, 1974 (Annexure P-1) shows that the period of probation was extended till further orders and no reasons were disclosed therein and no record has been produced giving any reason. It appears D.T.C. did not record any reason and did

not communicate such reasons, it any to the petitioner. Regulation No. 7(1) reads as under :

"7(1) Probation :-All appointments shall be made on probation for a period of one year. The period of probation may be extended by the Appointing Authority in the case of a particular individual if the Appointing Authority considers it necessary for reasons which should be recorded provided that in no case shall the period of probation exceed two years."

This regulation is mandatory to the extent that the reasons for extension of probationary period are required to be mentioned. The reasons for extension may be recorded on the file or may be incorporated in the order extending the probationary period. In the instant case nothing has been placed before the court to show that any reason was considered or recorded by the D.T.C. In view of the mandatory nature of regulation No, 7 it must be held that the order dated 8th April, 1974 (Annexure P-1) extending the period of probation till further order is contrary to law and is liable to be quashed. The conclusion would be that the probationary period expired on 30th November, 1973.

(8) Learned counsel for the petitioner next submits that the termination of his services was in violation of Regulation No. 15(2)(c) of the Regulations of 1952, that the impugned order dated 26th April, 1974 (Annexure P-2) terminating his services though innocuous in form is by way of punishment founded on the alleged unsatisfactory performances, that the order is punitive and mala fide, that he was never afforded any opportunity and no enquiry was held with respect to his alleged unsatisfactory performance. Learned counsel for the respondent D.T.C. submits that the petitioner was on probation and Therefore under Regulation No. 9(a)(i) no notice or reason for terminating his services was necessary. I have already held that extension of probationary period was contrary to law and as such he was not on probation. Regulation 15(2)(c) provides that no order of dismissal, removal or any other punishment except censure shall be imposed upon an employee of the D.T.C. unless he has been informed of the grounds on which it was proposed to take action and had been afforded adequate opportunity of rebutting them.

(9) The question however is whether the impugned order dated 26th April, 1974 (Annexure P-2) is by way of punishment and mala fide. Learned counsel submits that the order extending the probation was passed on 8th April, 1974 and his services were terminated on 26th April, 1974 and no adverse remark was ever communicated to him. He submits that no material has been placed on record to show what were the reasons for extending the period of probation on 8th April, 1974 and terminating his services on 26th April, 1974. He submits that the termination order was passed to victimise and penalise him and it was by way of punishment without affording him any opportunity of hearing. He submits that the termination order on the face of it does not give any reason but the respondents in their reply before the Conciliation Officer and in this court have admitted that the services were terminated on account of unsatisfactory

performance of the petitioner.

(10) In *Samsher Singh Vs. State of Punjab and Another*, a case decided by Seven Judges relating to a probationer it has been observed as under :

"THE form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of *Ishwar Chand Agarwal*. The order of termination is illegal and must be set aside".

(11) In *Anoop Jaiswal v. Government of India and another*, 1984 Lab & Ind C 343 (SC) which was also a case of a probationer, it has been observed by the Supreme Court that the form of order is not decisive as to whether the order is by way of punishment and that even an innocuously worded order terminating the service may in the facts and circumstances of the case establish no enquiry into allegations of serious and grave character of misconduct involving stigma has been made. In that case the order of discharge was held to be a camouflage for an order of dismissal for misconduct and the order was set aside as reasonable opportunity to defend was not given.

(12) In *India Tourism Development Corporation v. Presiding Officer and another*, 1981(42) Fac & L. R 372 a Division Bench of this court has observed that if termination was on account of unsatisfactory work and there was no evidence in regard thereto termination under those circumstances was not justified and that the action cannot be termed as a bona fide exercise of powers and the order could thus be considered as mala fide. unjustified and illegal. It has been further observed that discharge cannot be affected without holding a proper enquiry as it was tantamount to punishment for an alleged misconduct.

(13) In *Madan Mohan Prasad v. State of Bihar and others*, 1973(1) Slr 630 (SC) the petitioner was first holding a temporary post and then a permanent post. The Chief Minister made a statement in the Assembly that his services were not satisfactory and the Government was considering serving show-cause notice. His services were terminated without any enquiry. It was held by the Supreme Court that it casts a stigma and the order was hit by Article 311(2) of the Constitution.

(14) In *State of Uttar Pradesh and others v. Sughar Singh* 1974(1) Slr 435 (SC) an order of reversion was made in simple form but the counsel for the State made a statement in writ proceedings that the foundation for reversion was adverse entry in character roll of the officer. It was held that the order was penal in consequence.

(15) In the present case *D.T.C. (Respondent No. 2)* in reply to the writ petition as well as in reply to the statement of claim before the Conciliation Officer

submitted that "the reason for extension and termination of service was obviously due to unsatisfactory performance of the workman during the period of probation". Even if it is treated that the petitioner was on probation on 26th April, 1974 when his services were terminated on ground of unsatisfactory work it must, in view of judgments referred to above, be held that the order was by way of punishment and mala fide.

(16) Admittedly the petitioner was never informed in writing of the grounds on which it was proposed to take action and he was never afforded an opportunity to rebut those grounds which was a requirement of regulation 15(2)(c) of the Regulations of 1952. I am, Therefore, of the opinion that the order of termination dated 26th April, 1974 (Annexure P-2) is mala fide and by way of punishment passed without any enquiry and the same is liable to be quashed.

(17) Learned counsel for the petitioner submits that the petitioner is entitled to reinstatement and payment of all back wages and other allowances. As I have held that the termination order was illegal and void the petitioner is entitled to all arrears of salaries and allowances with consequential benefits from 27th April, 1974 (See : H.L. Mehra Vs. Union of India (UOI) and Others, and Harbhajan Singh Fitter & others v. Assistant Labour Commissioner (C) & others, 1976 Slwr 95).

(18) Learned counsel further submits that the petitioner made a representation for reference of his disputes regarding illegal termination to the Industrial Court/Tribunal u/s 10 of the Industrial Disputes Act, 1947. But the Under Secretary(Labor)Delhi Administration by memorandum dated 6th February, 1975 (Annexure P-3) informed him that it was not a fit case for reference and the reasons given were that it did not appear to be unjustified in terms of the appointment letter. Learned counsel submits that the petitioner again requested for re-consideration but his request for re-consideration and personal hearing was also turned down by the Secretary(Labor)Delhi Administration by order dated 23rd September, 1975 (Annexure P-4). He submits that the order refusing reference does not mention any reason. Section 12(3) of the Industrial Disputes, Act 1947 requires that if the Government does not make a reference it shall refer and communicate its reasons. No material has been placed by the respondents to show on what grounds the reference was refused. The provisions of Section 12(5) of the Industrial Disputes Act, 1947 are mandatory. It, Therefore, appears that the order (Annexure P-3) dated 6th February, 1975 refusing to refer the dispute between the petitioner and the management D.T.C. u/s 10 of the Industrial Disputes Act is not in accordance with law. Further it is apparent that the Government while refusing to refer the dispute u/s 10 of the Industrial Disputes Act did not apply its mind to the facts and circumstances of the case. Failure to give reasons and apply mind in the facts and circumstances of the case is sufficient to quash these orders. (Annexures P-3 and P-4) (See : S. Sadasiva Rao v. The Government of Orissa and another, 1971 Lab. I.C. 1335 and Sureshwar Narain Srivastava v. Government of Bihar and another 1971 (23) Fact

& L.R 4 The Supreme Court in *Jai Bhagwan v. Ambala C. Co-op. Bank*, 1984 Raj. L R (NSC) 24 has observed that if the Tribunal decides a matter without applying mind, order may be set aside,

(19) Learned counsel for the respondents submits that the petitioner having availed of the remedy u/s 10 of the Industrial Disputes Act is not entitled to seek remedy under the extraordinary jurisdiction of this court under Article 226 of the Constitution of India. I do not agree. If a reference is refused u/s 10 of the Industrial Disputes Act the workman himself cannot directly approach the labour court or the Industrial Tribunal. Thus the remedy is not available to him as of right. The Industrial Disputes Act does not provide an alternative remedy. In any case the existence of an alternative remedy is merely a factor to be considered while granting relief under Article 226 of the Constitution of India and that it is not a bar to grant relief. As already observed show cause notice was issued to the respondents why the writ petition be not admitted. No reply to the show cause notice was filed. It was only during the course of hearing of the writ petition counter was filed on behalf of D.T.C. and no counter was filed on behalf of the Secretary(Labor)Delhi Administration, Delhi. At this stage the petitioner cannot be debarred from seeking relief under Article 226 of the Constitution. I have already held that the order extending the period of probation and the order terminating his services are invalid.

(20) Learned counsel for the respondents next submits Lt. Governor, Delhi is a necessary party. In *Orissa Road Transport Co. Ltd. Berhampur v. Lalmohan Majhi and another*, 1974(2) Lj 49 a division Bench of the High Court of Orissa held that the State Government was not a necessary party to certiorari proceedings to quash the award. I am, Therefore of the opinion that the Lt. Governor is not a necessary party. In any case I am of the opinion that as the order of termination is void and vocative of Regulations of 1952 it is not necessary to quash the orders (Annexures P-3 or P-4) refusing to refer the dispute to the Industrial Tribunal.

(21) I, Therefore, order that a writ be issued declaring the impugned orders dated 8th April 1974 (Annexure P-1) and dated 26th April, 1974 (Annexure P-2) issued by respondents 2 and 3 extending the period of probation without giving any reasons and then terminating his services on the ground of unsatisfactory performance are null and void and are hit by the provisions of Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 and the petitioner is deemed to be in continuous service entitled to receive all salary and allowances with consequential benefits from 27th April, 1974 onwards. Respondents 2 and 3 are directed to reinstate and pay all arrears of salary and other allowances etc. with consequential benefits from 27th April, 1974 to the petitioner within three months from today. Respondents 2 and 3 shall also pay costs to the petitioner. Counsel fee Rs. 300.00 . Writ petition against respondent No. 1 is dismissed with no order as to costs.