

(1997) 03 GAU CK 0026
In the Gauhati High Court
Case No : Civil Rule No. 41 of 1994

Rohmingthanga H.

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 27-03-1997

Acts Referred:

Central Civil Services (Temporary Service) Rules, 1965 — Rule 3, 5(1)
Constitution of India, 1950 — Article 309, 311, 311(2)

Citation : (1998) 79 FLR 841 : (1998) 1 LLJ 1007

Hon'ble Judges : H.K.K. Singh, J

Bench : Single Bench

Advocate : S. Sailo, for the Appellant; K.N. Madhusudhanan, A.G., for the Respondent

Final Decision : Dismissed

Judgement

H.K.K. Singh, J.—By this application under Article 226 of the Constitution of India, the petitioner has challenged the orders of the respondent Government by which his services were terminated.

2. The petitioner joined the service as Administrative Officer (non-gazetted) on March 16, 1973. Thereafter he was promoted to Administrative Officer (gazetted) vide order dated October 27, 1980 (Annexure-II). His promotion was on ad hoc basis and was subject to regularisation in accordance with the relevant Recruitment/Service Rules. And his services were terminated vide order dated November 8, 1982 (Annexure-III). The petitioner made a representation on January 27, 1983 (Annexure-IV) to the Secretary to the Government of Mizoram (Respondent No. 3). Again, he submitted an appeal petition on July 14, 1986 (Annexure-V) to the Chief Secretary, Government of Mizoram (Respondent No. 2) requesting for setting aside the impugned order of termination and for drawing of departmental proceeding under Article 311(2) of the Constitution. As no action was taken, the petitioner approached this Court by filing a Civil Rule No. 5/92 and this Court vide order dated January 19, 1994 (Annexure-VI) directed the

Chief Secretary (Respondent No. 2) to hear the petitioner and dispose of the appeal within a period of 2 (two) months. And finally the Respondent No. 2 by his order dated April 6, 1994 (Annexure-VIII), the representation of the petitioner was rejected. Now, the petitioner has come again to this Court challenging the aforesaid orders of the respondent Government terminating his services, by filing the present writ petition.

3. Mr.S.Sailo, the learned counsel for the petitioner has submitted that the petitioner joined the service on March 16, 1973 and after serving for more than 7 (seven) years he was promoted to a gazetted post of Administrative Officer w.e.f. October 27, 1980 thus, the petitioner shall be deemed to be a quasi-permanent employee. And thus, termination order is bad in law. Again, Mr. Sailo submits that in case the petitioner is taken to be still in temporary service, the order of termination which is purported to have been passed under Rule 5(1) of the Central Civil Services (Temporary Service) Rules, 1965 was a punishment and thus the order is bad for non-compliance of the provision of Article 311(2) of the Constitution.

4. The learned Assistant Advocate General on the other hand submits that the petitioner's service is still a temporary service and that the order of termination was a simple order of termination and not by way of punishment and thus the order of termination is quite legal and proper.

5. As regards the point whether the petitioner is still in temporary service, law is clear that unless a declaration is made by the appointing authority under Rule 3 of the Central Civil Services (Temporary Service) Rules, 1965 the service of the temporary Government servant continues to be temporary even though he might have been serving for more than 3 (three) years. In the present case, though the petitioner joined the service on March 16, 1973 and even it" he was promoted to a higher post on adhoc basis, in the absence of a declaration under Rule 3 of the Central Civil Services (Temporary Service) Rules, 1965 or any other order to show that the petitioner's service was confirmed either against the lower post of Administrative Officer (non-gazetted) or Administrative Officer (gazetted), I have no hesitation to come to the conclusion that the petitioner's service is a temporary one.

6. The impugned order of termination at Annexure-III passed under Sub-rule (i) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965 is apparently an innocuous one. Law is settled that by lifting the veil, the reason or the ground for termination may be ascertained. Here, the respondent has clearly stated in the counter-affidavit that the petitioner was posted at Kawlbem village and he joined the place of posting on May 7, 1982 but left the said place of posting on May 11, 1982 without obtaining any permission from the authority concerned and did not return to the station for quite a long time. By then there was a severe famine in the area and the petitioner was posted at the concerned area for relief work but he was away from his place of posting, so the famine stricken people of Kawlbem village were facing a great hardship and complaint

was lodged by the President, Village Council against the petitioner. An enquiry was made by the Block Development Officer, Ngopa and it was found that the petitioner was absent from his Head Quarters for the period from May 11, 1992 to August 28, 1982 and report was submitted to the authority concerned and in view of the irresponsible behavior and gross negligence to his duties, the Lt. Governor (Administrator) of Mizoram was satisfied that the petitioner was not fit to be retained in the Government service and thus the services of the petitioner were terminated under Rule 5 (i) of the Central Civil Services (Temporary Service) Rules, 1965. Thus, according to the learned Assistant Advocate General it was a termination simpliciter, not punishment.

7. It is settled that a temporary Government servant has no right to the post, thus his service may be terminated as per term of contract of the appointment or the relevant Service Rules without any inquiry contemplated under Article 311 of the Constitution. But when the termination order, though apparently innocuous, by lifting the veil is found to be stigmatic, based on mis-conduct and was by way of punishment, then in such a case the provision of Article 311 is attracted.

8. In the case of *State of U.P. v. K.K. Shukla* reported in AIR 1991 SCW 793 after considering all the earlier decisions of the Supreme Court it has been held (Para 6 of AIR):

"It is now well settled that the form of the order is not conclusive and it is open to the Court to determine the true nature of the order. In *Purshotam Lal Dhingra v. Union of India* 1958 LLJ 544 a Constitution Bench of this Court held that the mere use of expressions like "terminate" or "discharge" is not conclusive and in spite of the use of such expressions, the Court may determine the true nature of the order to ascertain whether the action taken against the Government servant is punitive in nature. The Court further held that in determining the true nature of the order the Court should apply two tests namely : (1) Whether the temporary Government servant had a right to the post or the rank or (2) whether he has been visited with evil consequences; and if either of the tests is satisfied, it must be held that the order of termination of a temporary Government servant is by way of punishment. It must be borne in mind that a temporary Government servant has no right to hold the post and termination of such a Government servant does not visit him with any evil consequences. The evil consequences as held in *Parshotam Lal Dhingra* case (supra) do not include the termination of service of a temporary Government servant in accordance with the terms and conditions of service."

9. The dictum of the Constitution Bench in *Dhingra's* case (supra) has been reiterated and affirmed by the Supreme Court in its subsequent Constitution Bench decisions. Thus, applying the law declared by the Supreme Court as mentioned above, in case of an innocuous order the Court is to lift the veil to find the reason for the termination and if the ground for termination is found to be on the basis of an allegation of misconduct and if so, whether the misconduct is the foundation or motive of the concerned order of termination. If the misconduct is

the foundation to pass the order then an inquiry into the misconduct should be conducted and action according to law should follow. But if the misconduct is only a motive and not foundation then it is not incumbent upon the authority to have the inquiry conducted before the service of the temporary employee should be terminated.

10. In many other decisions the Courts after lifting the veil of such innocuous orders found put the motive or the foundation of the order and in such cases no strait-jacket formula has been evolved to determine as to whether the alleged misconduct is only a motive or the foundation for the action of termination. Thus, the Court has to decide each case considering the facts and circumstances of that case. Chief Justice R.N.Misra in the case of R.K.Misra v. U.P. State Handloom Corporation reported in 1987 Su SCC 739, after considering the earlier decisions of the Supreme Court held:

"To meet this position, the distinction between "motive" and "foundation" has been adopted by the Courts. As long as the adverse feature of the employee remains the motive and does not become transformed as the foundation of the order of termination it is unexceptionable. No strait-jacket test can be laid down to distinguish the two and whether "motive" has become the foundation has to be decided by the Court with reference ; to the facts of a given case. The two are certainly two points of one line-ordinarily apart but when they come together "motive" does not transform and merges into foundation."

11. The above principle of law has been followed by the Apex Court and also by the High Courts. Some of the latest decisions of the Apex Court are found in the case of State of U.P. v. Kumari Prem Lata Misra reported in 1995 LLJ 28 and the case of K.V. Krishnamani v. Lalit Kala Academy reported in 1996 LLJ 661

12. Now, the settled position of law is that the question as to whether the misconduct was the motive or the foundation of the order of termination is to be decided on the basis of the facts and circumstances of each case.

13. Mr.Sailo has relied upon the case of Anoop Jaiswal v. Govt. of India reported in 1984 LLJ 337 In that case the order of termination of the service of the petitioner who was an I.P.S. probationer was quashed by the Apex Court holding that the misconduct alleged against the petitioner was the foundation for the action thus, the order was bad for non-compliance of the provision of Article 311(2) of the Constitution. The Apex Court in that case came to the conclusion considering the entire facts and circumstances of the case.

14. In the present case the petitioner was posted at the famine stricken area and his duty was particularly to supervise the relief work but instead of performing his duty, he even left his Head Quarters without obtaining any permission from the competent authority. As the villagers of that area suffered much they made a complaint to the authority and a senior officer made an inquiry into the matter by going to the area and submitted the report of long absence (more than 100 days) of the petitioner. The said report was considered by the higher authorities

and after considering the facts and circumstances of the case the authority was satisfied that the petitioner was not fit to be retained in the service and thus, instead of drawing of a departmental proceeding, passed the order of termination without attaching any stigma and also without visiting the petitioner with any civil consequence. On the basis of the report and also considering the entire facts and circumstances including the suitability of the petitioner the authority had an option either to draw departmental proceedings for punishing the petitioner or just to pass an order of termination simpliciter. And the authority terminated the services of the petitioner under the relevant Service law i.e. Central Civil Services (Temporary Service) Rules, 1965.

15. It is true that at the time of preliminary inquiry, it is just and proper that the Government servant is informed and given a chance to be heard. In the present case it appears that no chance of hearing was given to the petitioner when the Block Development Officer made the inquiry. Affording of right of hearing is the rule of natural justice. But in this case whether any prejudice has been caused to the petitioner. The petitioner, nowhere has taken the plea that he was prejudiced by the inquiry of the Block Development Officer. He never denied that he was absent from the place of his posting for such considerable length of time when his presence was very much necessary and required for the relief work there at the village. His only contention has been that inquiry under Article 311 should have been drawn. The Inquiry made by the Block Development Officer was not an inquiry under Article 311(1) of the Constitution for the purpose of imposing punishment to the petitioner. The same was only an inquiry to ascertain the facts situation and ground realities at spot particularly to see and assess the work of the petitioner with regard to the relief measure for the famine stricken people of that area. Again, even if it is taken that no chance of hearing was given to the petitioner at the time of the inquiry, the petitioner himself was personally heard by the Respondent No.2 at the time of consideration of his representation. Thus, this post decisional hearing will be deemed to have cured the lapse if any, on the part of the Department for not giving right of hearing to the petitioner at the time of the preliminary inquiry made by the Block Development Officer. It is evident from the order of the Respondent No. 2 (Annexure-VIII) that the petitioner only prayed for mercy and for reinstatement into the service.

16. Considering the entire facts and circumstances of the case and on the basis of the law decided by the Apex Court my considered view is that the allegation of misconduct, if any, against the petitioner was only a motive, not foundation of the order thus, the impugned order of termination was an order of termination passed under Rule 5(1) of Central Civil Services (Temporary Service) Rules, 1965 and Article 311(2) was not attracted.

17. The termination order was passed on November 8, 1982 and the petitioner approached this Court for the first time after a lapse of about 10(ten) years. In the meantime, he applied for and obtained the copies of his Service Book (Annexure-I to the counter-affidavit), terminal gratuity (Annexure-II to the

counter- affidavit) and also cash equivalent to leave salary (Annexure-III to the counter-affidavit). The cumulative effect of the conduct of the petitioner only leads to the conclusion that the petitioner voluntarily accepted the order of termination thus, he availed the benefit for quitting the service. Thus, the present application has to be rejected also on the ground of waiver, acquiescence and inordinate delay. The fact that the petitioner made representations to the authorities will not help him in this regard.

18. From the above, I find no ground to interfere with the order of termination of the services of the petitioner, thus, the writ petition is to be rejected.

19. Accordingly, the petition is dismissed. No costs.