
(1996) 02 CAL CK 0003
In the Calcutta High Court
Case No : Civil Order No. 11915 (W) of 1991

Sanjay Wasudeorao Etankar

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 28-02-1996

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(2)
Railway Protection Force Rules, 1987 — Rule 146, 57, 57.2, 57.3

Citation : (1998) 1 ILR (Cal) 179

Hon'ble Judges : Arun Kumar Dutta, J

Bench : Single Bench

Advocate : Molay Basu and Achin Kr. Majumdar, for the Appellant; S. Sen, for the Respondent

Judgement

Arun Kumar Dutta, J.—By this writ application under Article 226 of the Constitution of India the writ Petitioner Sanjay Wasudeorao Etankar (hereinafter referred to as Petitioner) has prayed the Court for issue of a Writ of or in the nature of Mandamus "Commanding the Respondents and each of them to recall, rescind and/or to forbear from giving effect or further effect to the said impugned notice dated July 4, 1991 as contained in Annex. "A" herein," along with the other reliefs prayed for therein, for the reasons stated and on the grounds made out therein.

2. It is contended by the Petitioner that he had been appointed as a Probationer Constable with effect from March 10, 1990 after completion of his initial course of training, and had been working under Shalimar Division under the Administrative Control of the Assistant Security Commissioner, Railway Protection Force, South Eastern Railway, Shalimar. The probationary period of a Constable or every member of the Force on appointment to the Force according to Rule 57 of the Railway Protection Force Rules 1987 (hereinafter referred to as Rules) is for a period of two years. The Controlling Authority may, however, extend the period of probation in accordance with the instructions issued by the Central

Government from time to time. It is contended that the Petitioner had not completed his probationary period of two years. But he had suddenly received a purported notice dated July 31, 1991 of termination of service during his probationary period alleging therein that he had unauthorisedly absented himself from duty on four occasions which proves his indifferent attitude and serious misconduct, unbecoming of the Member of the Railway Protection Force, an Armed Force of the Union, being Annex. "A" to the writ application. In terms of the said notice he is thus sought to be terminated by putting a stigma against his conduct without giving him any opportunity of hearing, contrary to the principles of natural justice, which is not sustainable in law, and is accordingly liable to be set aside. Hence the instant writ application.

3. The Petitioner's writ application is resisted by the contending Respondents by filing affidavit-in-opposition wherein it is contended, inter alia, in para. 4 thereof that the Petitioner is most indisciplined, unbecoming of the member of the Disciplined Force, and his refusal to accept the notice further confirms his indifferent and adamant attitude and it has thus been considered that he is not a fit person to be retained in the Disciplined Force; and as such the Authority concerned in exercise of the powers conferred on him under Rule 57.3 of the Rules had issued the aforesaid impugned Memo, dated July 31, 1991 for termination of his service, which was served upon him (Petitioner) on August 24, 1991 on due acknowledgment, and his service as a Probationer Constable has been terminated, being discharged from service with effect from September 24, 1991 on the expiry of one month's notice. The writ application is, accordingly, liable to be rejected.

4. Rule 57 of the Rules provides that every member on appointment to the Force either by direct recruitment or by promotion shall be on probation for a period of two years, which may be extended in terms to the proviso thereof. Rule 57.2 prescribes that on successful completion of the period of probation or any extension thereof, a member of the Force shall be retained in his appointment on regular basis and be confirmed in due course against the available substantive vacancy. And, Rule 57.3 provides that if during the period of probation or any extension thereof, as the case may be, the appointing authority is of the opinion that the member of the Force is not fit for permanent appointment, the appointing authority may terminate the services of a direct recruit or revert the member of the Force to the post held by him prior to such appointment in terms thereof.

5. A look to the impugned notice dated July 31, 1991, being annex. "A" to the writ application, such as it is, would at once clearly indicate that it is not a case of termination of service simpliciter on the ground that the appointing authority is of opinion that the Petitioner is not fit for permanent appointment. It has been clearly indicated in the aforesaid impugned notice that during the period of his two year Probation it has been reported by the Assistant Security Commissioner, Railway Protection Force, Shalimar that he (Petitioner) had absented himself

from duty unauthorisedly on four occasions i.e. from April 23, 1990 to April 16, 1990 for 53 days, August 15, 1990 to August 24, 1990 for 10 days, September 16, 1990 to November 1, 1990 for 47 days, and from December 17, 1990 till date. A notice was also sent to the Petitioner by registered post at his home address advising him to resume duty within three days which was received back with the remarks by the Postal Department on the cover thereof on February 27, 1991 as "Refused".

6. It has been clearly stated in the aforesaid impugned notice that the Petitioner's repeated unauthorised absence without intimation and refusal to accept the official documents amply proves his indifferent attitude and serious misconduct, unbecoming of a member of the Railway Protection Force, an Armed Force of the Union. It was thus considered by the authority concerned that the Petitioner's retention in the service would be undesirable and detrimental to the interest of the Disciplined Force for which the former had decided to terminate the Petitioner. Hence the aforesaid impugned notice of termination of service of the Petitioner which was to take effect on the expiry of one month's notice in terms of Rule 57.3 of the aforesaid rules.

7. The aforesaid impugned notice being, what it is, there could clearly be no mistaking that it was not a notice of termination simpliciter, as indicated above. The notice of termination had been issued on the ground:

- i) That the Petitioner had unauthorisedly absented himself from duty on four occasions, as indicated above,
- ii) His repeated unauthorised absence without intimation and refusal to accept the official documents, namely a notice sent to him by registered post advising him to resume duty within three days, amply proves his indifferent attitude,
- iii) Which amounts to serious misconduct, unbecoming of a member of the Railway Protection Force, an Armed Force.

8. As held by the Supreme Court in *Parshotam Lal Dhingra Vs. Union of India* (UOI), probationer has no right to continue to hold the post and therefore the termination of his service does not operate as forfeiture of any right and is to be distinguished from dismissal, removal or reduction in rank. It is punishment only when the termination is founded on misconduct, negligence or inefficiency and violates Article 311 of the Constitution, the motive being irrelevant. The aforesaid decision was relied on by the Supreme Court in *Samsher Singh v. State of Punjab and Anr.* 1974 S.C.C. (L. & S.) 550 wherein it had been added that the substance of the order and not the form would be decisive.

9. As already indicated above, the impugned notice dated July 31, 1991, as it is, would clearly indicate, both in substance and in form, that the termination of the Petitioner is founded on his alleged unauthorised absence on four occasions without intimation, refusal to accept official documents proving his indifferent attitude, amounting to serious misconduct, unbecoming of a member of the

Railway Protection Force. On the face of it, it was not a termination simpliciter, but punishment being founded on the aforesaid grounds.

10. According to Rule 146 of the Rules, absence without leave amounts to misconduct. It has been held by the Supreme Court in *Deokinandan Prasad Vs. The State of Bihar and Others*, thereof that no opportunity having been given to the Petitioner to show cause against the proposed order on the aforesaid ground is a clear violation of Article 311 of the Constitution of India.

11. It has similarly been held by the Supreme Court in *Oil & Natural Gas Commission v. Dr. Mohd. S. Iskender Ali S.L.J. II S.C. 473* that a probationer has no right to the post and termination of his services does not attract Article 311 of the Constitution unless it is shown that the impugned order of termination is passed by way of punishment. As already indicated above, the impugned order of termination was passed against the Petitioner by the impugned notice dated July 31, 1991 by way of punishment.

12. The Supreme Court in *Indra Pal Gupta v. Managing Committee, Model Inter College, Thora* 1984 S.C.C. L&S 555 has held that a punitive order passed without a proper enquiry is violative of Article 311 of the Constitution of India, and is liable to be set aside.

13. The Supreme Court in *Rajinder Kaur v. State of Punjab and Anr.* 1986 (3) S.L.R. 78 has further held that an order of termination of a temporary Lady Constable, though innocuous, was, in fact, based on the allegation of misconduct which is violative of Article 311 of the Constitution rendering the order of termination illegal.

14. In *Anoop Jaiswal v. Government of India and Anr.* 1984 S.C.C. L&S 256 the Supreme Court has held that where the order of termination was based upon Report/Recommendation of the concerned Authority indicating commission of alleged misconduct by the Probationer was punitive in nature, which in the absence of any proper enquiry amounted to violation of Article 311(2) of the Constitution of India for which the order is liable to be set aside and the Petitioner should be reinstated in service with full benefits.

15. A single Bench of this Court in *Biswajit Deb Roy v. Indian Overseas Bank and Ors.* 1986 (3) S.L.R. 53 has as well held that where an order of termination of service of probationer Bank employee, though innocuous, was, in fact, founded on the allegation of misconduct, the termination without observing the Rules of natural justice is illegal.

16. A Division Bench of Gauhati High Court in *Sri Ram Subal Nonia v. Union Territory of Mizoram and Ors.* 1983 (3) S.L.R. 537 has held that in the case of dismissal of temporary civil servant on the ground of habitual absence, as in the instant case, Article 311(2) of the Constitution would be attracted, rendering the order of termination in violation thereof illegal. So also held by a learned single Judge of Gujarat High Court in *N.M. Khan Nadiad v. State of Gujarat and Ors.*

1982 (1) S.L.R. 777 that termination of services of the Petitioner due to his irregular attendance and long spell of leave, as in the instant case, without affording him any opportunity of hearing, being penal, is violative of Article 311 of the Constitution of India for which the same cannot be sustained.

17. Having regard to the aforesaid series of decisions of the Supreme Court and different High Courts of the country the order of termination of service of the Petitioner by the impugned notice dated July 31, 1991, being annex. "A" to the writ application cannot but be held to be punitive, not being termination simpliciter, for the reasons amply and appallingly made clear above. It is clearly indicated in the aforesaid impugned notice that the Petitioner's repeated and unauthorised absence without intimation and refusal to accept the official documents amply proves his indifferent attitude and serious misconduct without offering the Petitioner any opportunity to disprove the same by giving him opportunity of being heard in the matter. The aforesaid impugned notice of termination being thus punitive in nature amounted to violation of Article 311(2) of the Constitution of India in the absence of any proper enquiry for which the same is liable to be set aside.

18. In view of the discussions above the writ application should clearly succeed. The impugned notice of termination of service of the Petitioner dated July 31, 1991, being annex. "A" to the writ application, is thus liable to be set aside. The Respondents be accordingly hereby directed by issue of a writ of mandamus to recall/rescind the said impugned notice. The Petitioner be reinstated in service with full benefits.

19. This order, however, shall not prevent the Respondents-authorities from taking any appropriate action against the Petitioner for any such alleged misconduct in future after proper enquiry on due observance of the rules of natural justice.