
(1993) 01 OHC CK 0001
In the Orissa High Court
Case No : O.J.C. No. 1905 of 1990

Sardool Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 20-01-1993

Acts Referred:

Central Industrial Security Force Rules, 1969 — Rule 15, 19

Citation : (1993) 2 LLJ 292 : (1993) 2 LLJ 291 : (1993) 1 OLR 402

Hon'ble Judges : B.L. Hansaria, C.J.;S.K. Mohanty, J

Bench : Division Bench

Advocate : Palit, Pattnayak and Mohanty, for the Appellant; A.B. Misra, Standing Counsel (Central Govt.), for the Respondent

Judgement

B.L. Hansaria, C.J.—The petitioner was a fire fighter and a Head Constable under the Central Industrial Security Force. He had been so appointed on August 2, 1988 temporarily vide Annexure 2 with the stipulation that he would be on probation for a period of two years, but in the event of his being found unsuitable for retention in the post at any time, either during the period of initial training or in the period of probation, his service would be terminated in accordance with the provisions of Rule 19 of the Central Industrial Security Force Rules, 1969 (for short, "the Rules") and paragraph 2 of the Agreement executed with the President of India. On June 8, 1989, an accident took place and in Memo dated 15/16 June, 1989 (Annexure-3) it was stated that the petitioner while driving the fire-fighting vehicle, lost control over the same due to high speed and careless driving, as a result of which the vehicle overturned on the road causing extensive damage to the same as well as injuries to the fire crews. He was asked by that memo to explain as to why disciplinary action shall not be taken against him. The petitioner submitted his explanation stating inter alia, that near the spot of the accident he heard a sound (Dhaka Dhaka) from the backside of the vehicle and when he tried to stop the same, the right hand back wheel touched the foot-path and the vehicle immediately turned down. So, the defence was that it was a sort of mechanical failure which caused the accident. The impugned order of

termination as at Annexure-5 dated March 5, 1990 thereafter followed stating that the same was being done under Clause 2(a) of the Agreement executed by the petitioner under Rule 15 read with Rule 19 of the Rules. This order has been assailed by the petitioner on the assertion that this was not a case of termination simpliciter but an act of punishment which had been imposed without complying with the principles of natural justice, and so, the order is bad in the eye of law.

2. As the termination order had come to be passed during the probationary period of the petitioner, it is contended by Shri Misra appearing for the opposite parties that as the impugned order has cast no stigma on the face of it and as the Rules as well as the contract of service permitted the employer to terminate the service of the petitioner, the same cannot at all be regarded as an act of punishment, because of which principles of natural justice were not required to be complied with, or, for that matter, the provisions contained in the Rules relating to imposition of penalty. The learned counsel submits that the facts of the case as they are do not permit us to lift the veil to find out what has really prompted the authorities to pass the impugned order, specially when there is no allegation of mala fide.

3. As to when termination of service, of a probationer amounts to punishment has been a vexed question of law. Right from *Parshotam Lal Dhingra Vs. Union of India (UOI)*, which is regarded as Magna Carta for service holders, it is, however, an accepted position that the service of a temporary employee (which would apply equally to a probationer) can be spensed with in pursuance of the terms of the contract or the rules holding the field; the termination of the service of a temporary employee may also be inflicted as a punishment. This will depend upon the facts and circumstances of each case.

4. As the case at hand relates to a probationer, it would be enough to bring home the above position in law to refer to a seven Judge Bench decision in *Samsher Singh Vs. State of Punjab and Another*, . What Ray, C.J. stated in this connection in paragraph 62 brings home this aspect of the matter in a few words (p. 479):

"No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge, it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution."

It was then stated in paragraph 64 that (pp. 479-480):

".....In the absence of any Rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No

punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection."

It was further stated in paragraph 65 that holding of an enquiry is not always conclusive. What is decisive is whether the order is really by way of punishment.

5. The aforesaid proposition of law is not in dispute. Let us, therefore, see what had transpired before the petitioner's service came to be terminated. From the counter affidavit filed by the opposite parties, it appears that a Court of Enquiry examined as to how the aforesaid accident took place. The minutes of this enquiry are at Annexure A/2. In that enquiry, a number of witnesses were examined (who had not been tendered for cross-examination) and the petitioner was also questioned. The Court of enquiry came to the conclusion that the accident was "purely due to the sheer negligence" of the petitioner. The cost of repair of the fire-tender was assessed at Rs. 52,500/-. The report of enquiry was submitted on July 7, 1989 and it is after this that the impugned order was passed on March 5, 1990.

6. The aforesaid does not lead to doubt that it was the conclusion of the Court of Enquiry that the accident was due to negligence of the petitioner which led to the passing of the impugned order. The question is whether in this background the termination can be regarded as an act of punishment, as is the contention of Shri Palit, or whether it was an act of termination simpliciter in exercise of the power conferred by the Rules as well as permitted by the terms of the contract, as is the submission of Shri Misra.

7. The law on this branch is rather hazy and has not laid down any settled principle or even a working formula. This was the view expressed by so eminent a Judge as Justice Krishna Iyer as a member of the seven-Judge Bench of Shamsher Singh (supra). The learned Judge, while dealing with this aspect of the matter, noted the difficulty of deciding such a case on the basis of "motive" versus "foundation" yardstick which has been evolved in this regard, by asking the simple question, "When does 'motive' trespass into 'foundation'? When do we lift the veil of 'form' to touch the 'substance'?". The learned Judge then made a very pertinent observation in paragraph 80 at p. 513 by stating that the need, in this branch of jurisprudence, is not so much to reach perfect justice but to lay down a plain test which the administrator and civil servant can understand without subtlety and apply without difficulty. After all, the learned Judge says, between "unsuitability" and "misconduct", "thin partitions do their bounds divide".

8. One thing, however, is indisputable that the mere fact of holding an enquiry is not conclusive either way. This is what was stated by Ray, C.J., in *Shamsher Singh*, as already noted, and would also follow from what has been stated by a Constitution Bench in *A.G. Benjamin v. Union of India* 1967 1 LLJ 718 according to which a preliminary enquiry is sometimes or usually held even to find out the suitability of the incumbent and such a preliminary enquiry has to be distinguished from a formal departmental enquiry. The further view taken in this regard is that in a preliminary enquiry, as distinguished from departmental enquiry, the requirements of natural justice, or for that matter, the provisions of Article 311(2) of the Constitution are not to be satisfied. Relying on this accepted position in law, Shri Misra contends that the mere fact that in the present case a Court of Enquiry was held would not be sufficient to state that the present was a case of infliction of punishment, as distinguished from invocation of the provisions contained in Rule 15 of the Rules, or, for that matter, the terms of contract as incorporated in Annexure A/1, which states, inter alia that during the period of probation, the service of an employee can be terminated on issue of one month's notice or one month's pay in lieu thereof. Shri Misra contends that this Annexure which is a form of Agreement is a statutory form being Appendix "A" of Rule 15 of the Rules. It is also urged by Shri Misra that unsuitability can definitely be a good ground to terminate the service of a probationer, because the very idea of putting an employee on probation is to test his suitability, and so, if an employee is found unsuitable, it would definitely be a valid exercise of powers, both contractual and statutory, to terminate the service of such an employee. The learned counsel further urges that Rule 31 of the Rules laying down the penalties to be awarded to the employees of the Force at hand states in Explanation (viii) (a) that termination of service of a probationer, during the period of probation in accordance with the terms of his appointment or the rules governing probation, shall not amount to a penalty. According to Shri Misra, the veil cannot be lifted in such cases and the fact of the order being innocuous having cast no stigma, that should be taken to be the end of the matter.

9. Shri Misra goes a step further and urges that even in a case where a regular departmental enquiry has been instituted, termination may not be held to be a punishment if the same is ordered after dropping the enquiry. This is what was stated by a Constitution Bench in *The State of Orissa and Another Vs. Ram Narayan Das*, . In this judgment the Constitution Bench first noted the decision in *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, and then to *Dhingra's case* wherein it was stated (p. 556 of *The State of Orissa and Another Vs. Ram Narayan Das*,

"In short, if the termination of service is founded on the right flowing from contract or the service rules, then prima facie the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal, or removal or reduction in

rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with....."

10. The question of a probationer was then dealt with in p. 557 and it was stated that where under the rules an order terminating the probationer is to be preceded by a notice to show cause and the notice is issued, the order discharging him cannot be said to amount to dismissal involving punishment. But then, the Government may hold a formal enquiry against a probationer on charges of misconduct with a view to dismiss him from service and if an order of termination of employment is made in such an enquiry without giving him a reasonable opportunity to show cause, the order would undoubtedly be invalid. The decision in *The State of Bihar Vs. Gopi Kishore Prasad*, , was then dealt with in *The State of Bihar Vs. Gopi Kishore Prasad*, which case the learned Chief Justice had extracted five propositions from the authorities and particularly from *Dhingra*'s case, the third of which was as below:

"But if instead of terminating such a person's service without an enquiry, the employer chooses to hold an enquiry into his alleged misconduct, or inefficiency or for some similar reason, the termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career. In such a case, he is entitled to protection of Article 311(2) of the Constitution ."

11. Shri Misra, however, relies on what was stated in page 557, wherein it was observed that the aforesaid proposition does not derogate from the position in law that if an enquiry is held against an incumbent for ascertaining whether he is fit to be confirmed, the same would not render the termination as an act of punishment. The following observations made thereafter are pertinent (p. 557):

"An order discharging a public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification, may appropriately be regarded as one by way of punishment, but an order discharging a probationer following upon an enquiry to ascertain whether he should be confirmed, is not of that nature."

12. The last decision to be referred by Shri Misra is that of *The State of U.P. Vs. Ram Chandra Trivedi*, , in which it was stated that if an order of termination is passed against a temporary Government servant by the State having right in terms of contract and service rules and the order does not cast stigma, the Court cannot go behind the order to find out the motive in passing the order. As to this decision, it may be stated that what the Court sought to prohibit was delving into Secretariat files to discover whether some kind of stigma could be inferred on such research, as stated in paragraph 24. The present, however, is not a case of delving into any file, because the background of the case has been narrated in the counter affidavit of the opposite parties themselves.

13. From what has been stated above, it; cannot be concluded that the present

was not a case of punishment, because an enquiry into the conduct of the petitioner relating to his negligence had been made and the Court of Enquiry came to the conclusion that the accident was due to the sheer negligence of the petitioner, following which the impugned order had come to be passed. In such a case, even as per decision relied on by Shri Misra, termination of the service of a probationer may amount to punishment.

14. The question, however, is whether it can be positively stated that the present is a case of punishment. It is here that the dichotomy of motive versus foundation which comes into play, and as already stated, no uniformity of approach is discernible in this regard, as would appear from the cases decided on this touchstone. The cases had basically been decided on their own facts, which has perhaps to be so, without laying down any principle or test as to when misconduct would be regarded as a "motive" for termination and as to when it would be "foundation".

15. Two decisions, however, seem to provide a "plain test" about which Krishna Iyer J. had observed in *Shamsher Singh*. These decisions are : (1) *Anoop Jaiswal Vs. Government of India and Another*, . *Governing Council of Kidwai Memorial Institute of Oncology, Bangalore Vs. Dr. Pandurang Godwalkar and another*, We may first see what was stated in *Anoop Jaiswal*, which also dealt with the question of termination of service of a probationer. Therein, after referring to a number of earlier decisions starting from *Dhingra*, running through *Shamsher Singh* and other renderings, it was stated in paragraph 13 that *Anoop Jaiswal Vs. Government of India and Another*, :

"If...the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Article 311(2) of the Constitution".

So, the circumstance that but for the incident the impugned order would not have been passed, can be taken to be a "plain test" (may be called "working test" also) which the Administrator and civil servant can understand without subtlety and apply without difficulty, which would fulfil the desire of Krishna Iyer, J., as well expressed in *Shamsher Singh*.

16. The recent decision in *Pandurang* (*supra*) also dealt with the case of a probationer and speaks practically in the same language, because it has been observed that the principle of tearing of the veil for finding out the real nature of the order would apply only in a case where the Court is satisfied that there is a direct nexus between the charge levelled and the action taken. Now, there would be direct nexus only when it can be said that but for the incident the termination order would not have been passed.

17. Applying the aforesaid test to the facts of the present case, we fell no difficulty in saying that but for the act of negligence attributed to the petitioner

by the Court of Enquiry, the impugned order would not have been passed. We, therefore, hold that the present was a case of punishment inflicted without following the requirement of the rules and/or the principles of natural justice. So, the impugned order suffers from illegality and is set aside.

18. In the result, the petition is allowed by quashing Annexure 5. The opposite parties are directed to reinstate the petitioner, but in the facts and circumstances of the case without any arrear salary. This apart, on reinstatement, he would find himself in the position and status he was occupying on March 5, 1990, the date on which he was made to leave his service.

S.K. Mohanty, J.

19. I agree.