
(1978) 12 AHC CK 0060
In the Allahabad High Court
Case No : Writ Petition No. 2169 of 1976

Shyama Charan Srivastava

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 14-12-1978

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 311, 311(2)

Limitation Act, 1963 — Section 12, 29

Uttar Pradesh Public Services (Tribunal) Act, 1976 — Section 1(3), 12(2), 4, 5, 5(1)

Citation : (1979) AWC 289

Hon'ble Judges : S.C. Mathur, J; Prem Prakash, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Prem Prakash, J.—In this petition under Article 226 of the Constitution brought to quash the order of the U.P. Public Services Tribunal created by the U.P. Public Services (Tribunals) Act, 1976 (to be hereinafter referred as the Act) setting aside the decree obtained by the Petitioner from the court of 1st Additional District Judge, Faizabad dated 11-11-1975, confirming in appeal the judgment of Munsif Faizabad, declaring that the termination of the services of the Petitioner by the Joint Development Commissioner was illegal and void, two points arise for determination; First, whether the order of termination of service was in violation of the constitutional right of the Petitioner, guaranteed under Article 311(2) of the Constitution, and second, whether the reference of claim made by the employer u/s 5 of the Act had been filed beyond the period prescribed by the Act and Rules made thereunder.

2. The material facts are not in dispute. The Petitioner was appointed by the Deputy Development Commissioner, Faizabad, as Lower Division Assistant on a temporary post liable to termination at any time without notice. He was, however, placed on probation for a period of six months from the date of joining the duty. If his work were found to be unsatisfactory he was to be reverted to his

original post forthwith. His post of Lower Division Assistant was made permanent with effect from 1-4-1964 by the Government order, dated 31-8-1975 (Annexure 2), but the Petitioner was neither substantively appointed to that post nor was he confirmed on that post. On October 16, 1969 the Deputy Development Commissioner, Faizabad, called for the explanation of the Petitioner in respect of several irregularities specified therein which had come to his notice and the Petitioner on 24-11-1969 made a submission in writing, it being Annexure 4. The alleged irregularities were: the Petitioner, it was said, had removed two pages from his personal file; the file relating to the appointment to the post of Assistant Boring Mechanic had been retained by him so that the letters sent by the District Planning Officer, Sultanpur, may not be disposed off. On 16-12-1969 the Joint Development Commissioner- passed the order terminating the services of the Petitioner, without casting any aspersion on his work or stigma on his integrity. Thereafter, he filed a declaratory suit in the court of the Munsif which was decreed and the decree was affirmed in appeal on 11-11-1975. The Act came into force on November 24, 1975. The reference of claim was made by the Joint Development Commissioner on 13-2-1976 u/s 4 read with the proviso to Clause (b) of Sub-section (1) of Section 5.

3. The contention of the employer was that misconduct was not the basis of the impugned order and that the services of the Petitioner, who had been appointed on a purely temporary basis although, were terminated not by way of punishment. He was not therefore, entitled to the protection of Article 311(2) of the Constitution. On the second point, it was held that since the copies of the judgment and the decree could not be obtained before 3-1-1976 the said period is to be excluded in computing the period of limitation prescribed for filing the reference, u/s 29 read with Section 12 of the Indian Limitation Act, 1963. Having taken that view that the order did not visit the Petitioner with any evil consequences and that it had had no basis in misconduct, the claim was accepted.

4. Counsel for the Petitioner has strenuously contended that having regard to the circumstances preceding the impugned order coupled with the fact that the Deputy Development Commissioner had set out the lapses on the part of the Petitioner, it was amply made out that the Petitioner's services were terminated for misconduct. Chief Standing Counsel has on the other hand maintained that the order does not cast any aspersion or stigma upon the Petitioner and that the Petitioner being a temporary servant, and there being no intention indicated to punish him, his services could be terminated on the ground of unsatisfactory work. We have, therefore, to see whether the impugned order is in the nature of punishment so as to fall within the mischief of Article 311 of the Constitution. Even though the order does not bear an impress of penalty, the officer prejudiced by the making of the order is entitled to prove that he has been denied the protection of the guarantee under Article 311 of the Constitution. The matter has to be viewed as one of substance taking into consideration the entirety of circumstances preceding or attending the impugned order.

5. In dealing with this question the Supreme Court formulated five propositions in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, Proposition No. 3 is relevant for our present purpose:

If instead of terminating such a person's service without any 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 the protection of Article 311(2) of the Constitution.

6. The above dictum has been pressed into service by the learned Counsel for the Petitioner contending that since the Deputy Development Commissioner had held an enquiry into the alleged misconduct of the Petitioner the termination of service in the background in which it was made was by way of punishment. Support for this contention has been sought from the opinion of the Supreme Court in *The State of Bihar and Others Vs. Shiva Bhikshuk Mishra*, and from the law laid down by the Supreme Court in *Samsher Singh Vs. State of Punjab and Another*, .

7. In *Samsher Singh's (supra)* case the Supreme Court said: "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."

8. Counsel for the State referred us to the decision of the Supreme Court in *Jagdish Mitter Vs. The Union of India (UOI)*, . At page 454 we have the following observations which were followed with approval in *A.G. Benjamin v. Union of India 1967 SLR 185*:

We do not think that the court intended to lay down a broad and unqualified proposition that wherever any kind of enquiry is held by the authority before terminating the services of a probationer, the subsequent termination of such a probationer's services in whatever form it is couched, must always be deemed to amount to his dismissal. As we have already indicated, almost in every case where the question of continuing the probationer or a temporary servant falls to be decided by the authority, the authority has necessarily to enquire whether the said probationer or temporary servant deserves to be continued and that may sometimes lead to an enquiry. In fact, it would be an act of fairness on the part of the authority to make such an enquiry and give a chance to the servant concerned to explain his conduct before the authority reaches a conclusion in the matter. Such an enquiry is actuated solely by the desire to decide the simple question as to whether the temporary servant or the probationer should be

continued or not, and is undertaken for that purpose alone without any desire to attach any stigma to him. An enquiry of this character must be distinguished from the formal departmental enquiry where charges are served on the servant and which is undertaken for the purpose of punishing him.

9. The making of the enquiry is thus not decisive of the question. The distinction has to be drawn between a preliminary enquiry made by the appointing authority to determine the suitability or otherwise of the servant concerned and a departmental enquiry initiated to visit the servant with penal consequences, on proof of misconduct or inefficiency. Likewise, the termination of employment by a notice of discharge on account of unsatisfactory work has to be distinguished from a termination based on misconduct. To the latter the protection of Article 311(2) is attracted but to the former Article 311(2) is not applicable. That is why in dealing with temporary servants against whom formal departmental enquiries may have been commenced but were not pursued to the end, the principle that the motive operating in the mind of the authority is immaterial, has to be borne in mind. In other words, whether the impugned order is a simple order of discharge of the services or whether it was a punitive action amounting to removal or dismissal has to depend not only upon the nature of the enquiry but the course of the proceedings taken therein and the conclusions, if any, arrived at by the enquiry officer. As observed by the Supreme Court in *Champaklal Chimanlal Shah Vs. The Union of India (UOI)*, "the courts are not to go by the particular name given by a party to a certain proceedings but are concerned with the spirit and substance of it in the light of what preceded and succeeded it."

10. Reviewing their earlier decisions the Supreme Court in *Bishan Lal Gupta Vs. The State of Haryana and Others*, made these observations:

If, however, after going through particular facts and circumstances of the case the court finds that the enquiry conducted and notices given were intended only to arrive at a finding on the desirability of continuing a person in service and more serious action was not contemplated, it means that no stigma was intended to be caused.... It is impossible to lay down propositions which are so clear cut as to cover every conceivable case. Only an attempt to do so may make the law too rigid.... It is only if patent facts disclose a serious enough infringement of law as is alleged as well as indubitably damaging and undeserved consequences upon a Petitioner that the court's conscience could be so moved as to induce it to interfere under Article 136 of the Constitution.

11. In the present case neither any disciplinary action was contemplated nor was it initiated against the Petitioner. Some irregularities in the conduct of the Petitioner had come to the notice of the Deputy Development Commissioner, and an explanation of the Petitioner was called for. Being a temporary Government servant, it was open to the appointing authority to terminate the services if the Petitioner was found unsuitable. The motive is not relevant, while determining the nature or the background of the order. Upon the evidence the Tribunal has taken the view that misconduct was not the basis of the order and having regard

to the background, in which the order was passed, it cannot be said that the finding of the Tribunal is either unreasonable or has been improperly arrived at. It does not suffer from an error apparent on the face of the record. We are, therefore, satisfied that it is in the eye of law not a case of punishment but of termination of service simpliciter.

12. Equally untenable is the second branch of the argument and that brings me to the proviso to Sub-section(1)(b) of Section 5 of the Act. U.P. Act No. 17 of 1976 was enacted in the wake of Ordinance No. 23 of 1975 and the reenacting Ordinance No. 8 of 1976. The second Ordinance was published on 16-2-1976. Sub-section (3) of Section 1 of that Ordinance provided that the Ordinance would be deemed to have come into force on 24-11-1975. The proviso to Sub-section (1)(b) of the Ordinance provided for the making of claims against certain decrees and orders and laid down the period of limitation therefore. It stated that where any court subordinate to the High Court has, before the appointed date, passed a decree in respect of any matter mentioned in Section 4 or passed an order dismissing a suit or appeal for non-prosecution and that decree or order has not become final, any public servant or his employer aggrieved by the decision of such court may make a reference to the Tribunal within 60 days from the appointed date and the Tribunal may affirm, modify or set aside such decree and such decision of the Tribunal shall be final. In the present, the appeal was decided on 11-11-1975 and the claim was made before the Tribunal on 13-2-1976. It would thus appear that the claim against the decree was placed before the Tribunal when the Ordinance No. 23 of 1975 was in force. In the Ordinance of 1975 the appointed date was 24-11-1975 and the language of the proviso to Sub-section(1)(b) was identical. We have, therefore, got to determine two questions in deciding the plea of limitation namely, whether the decree had become final, and second, whether the reference to the Tribunal was made by the State Government within 60 days from the appointed date. There is no dispute on the point that the decree in appeal was passed in the present on 11-11-1975, and the reference before the Tribunal was made on 13-2-1976.

13. A decree becomes final when no appeal or revision is filed against it within the period of limitation prescribed by the Limitation Act. The appeal lay to the High Court. The period is 90 days vide entry at serial No. 116 in the Schedule to the Limitation Act. This being so, the decree had not become final before the coming into force of Ordinance 23 of 1975.

14. The second point that arises is whether the reference to the Tribunal was made by the State Government within 60 days from the appointed date. On surface, it would appear that the reference was made beyond the prescribed period of 60 days but in considering the question, we cannot overlook the fact that the application for copy of appellate judgment and decree was made on 20-11-1975 and copies were received on 3-1-1976. The Rules made under the Act do not provide the filing along with claim of the certified copy of the impugned judgment or the decree. Learned Counsel for the Petitioner has,

therefore, urged that since certified copy of the judgment or of the decree was not required in law to be filed, the time taken in obtaining the copy of the judgment and decree could not be excluded. The answer to this contention is found in *Jijiboy N. Surty v. T.S. Chettyar* AIR 1928 PC 103, where at page 105. the Judicial Committee applying the following to those cases where the rules did not require the filing of the certified copy of the decree and judgment, applied Section 12(2) with these observations:

The decree may be complicated, and it may be open to draw it up in two different ways, and the practitioner may well want to see its form before attacking it by his memorandum of appeal. Air to the judgment no doubt, when the case does not come from upcountry, the practitioner will have heard it delivered, but he may not carry all the points of a long judgment in his memory, and as Sir John Edge says, the legislature may not wish him to hurry to make a decision till he has well considered it.

Further at page 106 their Lordships went on to say:

The word "requisite" is a strong word; it may be regarded as meaning something more than the word required.

15. A similar point though in a different context came before the Supreme Court in *The Commissioner of Sales Tax, U.P. Vs. Madan Lal Das and Sons, Bareilly*, , where the Supreme Court, approving of the decision of the Judicial Committee, laid down the rule that though the Act may be special or local law, but if there is nothing in that Act expressly excluding the application of Section 12(2) of the Limitation Act even though it was not essential to file copy of the order along with revision petition, the revisionist could rely upon Section 12(2) of the Limitation Act, 1963. Time taken in obtaining the copy was thus excluded in computing the period of limitation for filing revision.

16. Applying the rule laid down by the Supreme Court in the above it would thus appear that even though under the Rules framed under the Act the certified copy of the impugned judgment or decree is not necessary to be filed along with the claim by State Government or the employee aggrieved from the order, yet on the general principles contained in Section 12(2) of the Limitation Act the application of which has not been excluded, the time requisite for obtaining the copy of the impugned judgment and decree shall be excluded in computing the period of sixty days.

17. Counsel for the Petitioner next contended that since the claim is not a reference u/s 4 of the Act, Section 5(1)(b) of the Act which applies the provisions of Limitation Act to the references u/s 4 will not be applicable. We are unable to agree with the submission. Section 4 specifies the nature of claims which a public servant may refer to the Tribunal. The claims may relate to any matter relating to his employment as such public servant. Section 5 of the Act laying down the powers and the procedure of the Tribunal states in the proviso to Clause (b) of Sub-section (1) that a public servant or his employer aggrieved by the decision

of a court subordinate to the High Court passed before the appointed date may make a "reference" to the Tribunal. The word "reference" has not been separately defined for the purpose of Section 5. It has therefore to be assigned the meaning which it bears in Section 4 of the Act. Sub-section (2) of Section 5 makes the position further clear by providing that the Tribunal shall decide every reference expeditiously and shall hold enquiry in the manner laid down in Sub-section (5). From a conjoint reading of Section 4 and Section 5(1)(b) and (2) of Section 5, the conclusion is inescapable that when a public servant or his employer assails the decree passed before the appointed date by a court subordinate to the High Court before the Tribunal, the claim is a reference falling within the ambit of Section 4 of the Act. This being the position we are unable to accede to the contention of the learned Counsel that the claim put forward by the State Government questioning the correctness of the decree passed by the appellate court, is not a reference within Section 4 of the Act.

18. For the discussion in the above, we find no force in the petition which is hereby dismissed. Cost shall be borne by the parties. The interim order, if any is vacated.