
(2007) 01 SHI CK 0016
In the High Court Of Himachal Pradesh

State of Himachal Pradesh and Others	Vs	APPELLANT
Ram Singh		RESPONDENT

Date of Decision : 09-01-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 311(2)

Citation : (2007) 1 ShimLC 224

Hon'ble Judges : Surinder Singh, J;Deepak Gupta, J

Bench : Division Bench

Judgement

Surinder Singh, J.—The petitioners have preferred this petition, under Articles 226 and 227 of the Constitution of India, challenging the order Annexure PA dated 31st December, 2004 passed by the learned H.P. Administrative Tribunal, in O.A. No. 717 of 2000 titled Ram Singh v. State of H.P. and Ors., with a prayer to quash the same and for issuing appropriate directions as deemed fit.

2. In brief, the facts giving rise to the present petition are that the respondent was initially appointed as Volunteer Teacher in the Government Primary School, Dharponoo (Talli) on 4.3.1992. Thereafter on rationalization of post of Volunteer Teachers in the year 1996 he was transferred to Government Primary School Jnahan. In 1997, he was further transferred to Government Primary School Chowai in Tehsil Theog, Deha Block of District Shimla. Since the year, 1992 to 1997, three FIRs were lodged against him under various Sections in terms of FIR No. 123/92 for misappropriation of the amount of the Deha Co-operative Society, FIR No. 95/97 lodged by one Modu Ram for allegedly outraging the modesty of his wife and FIR No. 4/98 showing himself to be present on duty on various dates whereas, the respondent had been attending the Court of learned Additional Chief Judicial Magistrate, Theog on such dates.

3. The respondent was a temporary employee, he was not regularized as JBT teacher like many other volunteer teachers in the department of Primary Education w.e.f. 1.8.1998, on account of the aforesaid allegation as contained in the third FIR referred above. However, an inquiry was ordered which was

conducted by the District Education Officer who found him guilty and based upon such findings a show cause notice was issued by the District Primary Education Officer Shimla on 15th September, 1999, which is follows:

No. Shiksha-Shimla (Pry) (1-3)B(2)I/99-8596-97 O/O the District Primary Education Officer Shimla, District Shimla 171002.

Dated: Shimla the 15th Sep.1999 To

SHOW CAUSE NOTICE

Whereas the inquiry against you regarding the allegations leveled against you has been completed by the undersigned and on inquiry it was found that the charges alleged in the complaint have been approved against you. Hence, your services are no more required in the department because, you have tempered with the official record viz. the attendance register of school. As on the same day and time you have marked your presence in the school, but as well as attended Court of Additional Chief Judicial Magistrate, Theog.

Now you are called upon to furnish your statement/comments as to why your service should not be terminated. Comments if any be furnished within a period of one month from the date of receipt of this notice, failing which ex parte decision will be taken against you.

Sd/- Distt. Primary Education Officer

Dated 14.9.1999 Shimla, Distt. Shimla 171002 Registered Sh. Ram Singh, VT GPS Chowai, Block Deha, Distt. Shimla, HP Endst.No. even Dated: Shimla-2 the Sept.1999

1. Copy forwarded to the Director of Primary Education, HP, Shimla-1 for favour of information please.

Sd/- Distt. Primary Education Officer Shimla, Distt. Shimla 171002.

4. Vide his reply dated 15.10.1999, the respondent had refuted all the allegations in detail, but vide Office order dated 20th January, 2000 the services of the respondent were terminated by issuing the following order:?

No. Shiksha-SML (Pry)(I-5)B(2)I/99-17124-26 District Primary Education Office District Shimla, Shimla-171002

Dated: Shimla-2 the 20th January

OFFICE ORDER

In pursuance of Sub-rule (1) 5 of the Central Civil Services (Temporary Services) Rules, 1965, I hereby give notice to Sh. Ram Singh, Volunteer Teacher, Government Primary School Chawai, (Block Deha) Tehsil Theog, District Shimla that his services shall stand terminated with effect from the date of expiry of a period of one month from the date on which this notice is served on him.

Sd/- Distt. Primary Education Officer Shimla, District Shimla-171002

Endst. No. even Dated: Shimla-2 the Sept. 1999 Copy forwarded to:

1. The Director of Primary Education, H.P. Shimla-1 w.r.t this letter No. EDN-H(Pry)(II)6/98 (Comp) dated 9.9.99 for information.
2. The Block Primary Education Officer, Deha, with the direction that the salary of Sh. Ram Singh, V.T. up to date of service rendered by the said teacher may be released and paid to him accordingly.
3. Sh. Ram Singh, V T GPD Chowai, through Block Primary Education Officer, Deha.
4. Guard file.

Sd/- Distt. Primary Education Officer, Shimla, District Shimla-171002.

5. Against his termination, the respondent had made a representation dated 1.2.2000 to the Secretary Education but of no use. Ultimately, the respondent filed the O.A. No. 717/2000 before the learned Administrative Tribunal. In reply, the petitioners herein, vide paras 6(5) and 6(7)(C) submitted before the Tribunal that the services of the respondent Ram Singh were dispensed with after conducting the detailed inquiry by the District Education Primary Officer. The learned Tribunal vide impugned order dated 31st December, 2004 (Annexure PA) has observed that serious misconduct was attributed to the respondent and an inquiry was held with which he was never associated, the order dated 20.1.2000 terminating his services was a cloak and the respondent was thrown out of job on the basis of alleged misconduct. Thus the learned Tribunal allowed the O.A. and directed to reinstate the respondent with consequential benefits and also to consider him for regularization w.e.f. 1.8.1998.

6. The petitioners assailed the impugned order on law and facts by filing the writ of certiorari, to which the respondent has resisted and contested. In reply by the respondent it is contended that there was no illegality in the order impugned and the directions given by the learned Administrative Tribunal, granting consequential relief from the date of his termination, till his reinstatement are legally correct as his termination was absolutely illegal. Therefore, prayed for the dismissal of the petition.

7. We have heard the learned Counsel for the parties.

8. It is argued by Mr. Chandel, learned Advocate General, that the respondent was temporary Government Servant and his services were rightly dispensed with under Rule 5(1) of the CCS (Temporary Service) Rules, 1965, even though a formal departmental inquiry was initiated against the respondent but his termination was because of his non-suitability based upon his service record. It is further ventilated that the authority while taking a view that stigma of the order of dismissal should be avoided, the services of the respondent were dispensed with, without any imputation which was quite legal. To buttress his arguments he

has cited a decision of the Constitution Bench of the Hon''ble Apex Court (consisting of five Hon''ble Judges), rendered in A.G. Benjamin v. Union of India 1967 S.L.R. 185 and Nepal Singh Vs. State of Uttar Pardesh and Others, and concluded that the termination of the respondent from the service was simpliciter and not punitive, therefore, impugned order of the learned Administrative Tribunal is unsustainable.

9. Contra, Shri Shrawan Dogra, learned Counsel for the respondent has vehemently argued that though order of terminating the services of the respondent looks ex-fade innocuous, however, it is not because of the unsuitability of the respondent, based upon service record, but the material of inquiry was used against the respondent, on the basis of which the authority concerned had acted upon, which constitutes the foundation and is not the motive of the order. It is also ventilated that this Court may discover the nature of the order by ascertaining what was actually the motivating consideration in the mind of the authority which prompted the order impugned, by lifting the veil. Thus the learned Counsel impressed upon us to examine the entire range of facts carefully and consider whether in the light of those facts the superior authority intended simply to punish the Government servant or, having regard to his conduct and suitability in relation to the post held by him, notice was issued simply to terminate his services.

10. We have given our thoughtful consideration to the respective claims. To come to a rightful conclusion and to the truth of the matter we have also judicially examined the record.

11. Before we conclude anything it is imperative on us to have a survey of law laid down by the Hon''ble Supreme Court on the point over a period of time regarding the services of a temporary employee or a probationer, who also stand on equal footings.

12. Since the case of Parshotam Lal Dhingra Vs. Union of India (UOI), which is said to be Magna Carta of the Indian civil servant, although it has spawned diverse judicial trends, difficult to be disciplined into one single, simple practical formula applicable to termination of probationer or freshers and of the services of temporary employees. Therefore, we are requested to examine the various judicial pronouncements, rendered by the Apex Court from time to time.

13. In S.R. Tewari Vs. District Board Agra and Another, , it was held by the Apex Court that the form of the order under which the employment of a servant is determined is not conclusive of the true nature of the order. The form may be merely to camouflage an order of dismissal for misconduct and it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form merely of determination of employment is in reality a cloak for an order of dismissal as a matter of punishment, the Court would not be debarred merely because of the form of the order in giving effect to the rights conferred

by statutory rules upon the employee.

14. In A.G. Benjamin's case 1967 S.L.R. 185 the Constitution Bench, consisting of five Hon"ble Judges, of the Supreme Court, cited by the learned Advocate General, had an occasion to examine the case of temporary employee where a notice was given to the employee to show cause why disciplinary action be not taken against him, though inquiry was initiated and completed and the employee was terminated, but his termination was upheld, as the preliminary inquiry in the opinion of the Hon"ble Court was conducted only to see if the departmental inquiry should be held to decide to take the punitive action.

15. Thereafter in Ram Saran v. The State of Punjab 1967 S.L.R. 771 another Constitution Bench, consisting of five Hon"ble Judges faced with the similar situation, concluded as follows:

that there can be no doubt that in such cases, the form in which the order has been passed cannot be regarded as decisive, if in the light of the evidence adduced before it, the Court is satisfied that notwithstanding the ostensible form in which the impugned order has been passed, in substance it amounts to the appellant's dismissal, then the Court may be driven to the conclusion that Article 311 applied to the case and non-compliance with the mandatory provisions of Article 311 (2) may render the order invalid.

16. In The State of Bihar and Others Vs. Shiva Bhikshuk Mishra, , the Apex Court also held that the form of the order is not conclusive of its true nature and it might merely be the cloak or camouflage for an order founded on misconduct. The entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order.

17. Further in Samsher Singh Vs. State of Punjab and Another, , the Constitution Bench of the Supreme Court consisting of seven Hon"ble Judges headed by Hon"ble the then Chief Justice A.N. Ray examined the matter while discussing various previous cases decided by the Hon"ble Court including Purshotam Lal Dhingra's case, held that the fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment. If there is an inquiry the facts and circumstances of the case will be looked into in order to find out whether the order is one of dismissal in substance. In other words, if the employer chooses to hold an inquiry into his alleged misconduct, or inefficiency or for some similar reasons, 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.

18. Yet in another case Nepal Singh Vs. State of Uttar Pradesh and Others, , cited by the learned Advocate General, it has been held that termination simpliciter with a view to weed out unsuitable Government servants is valid and not punitive but it further says that if an order terminating the services of a temporary Government servant and ex-facie innocuous in that it does not cast

any stigma on the Government servant or visits him with penal consequences, must be regarded as effecting a termination simpliciter which will not attract Article 311. An order is not punitive if the material against the Government servant on which the superior authority has acted constitutes the motive and not the foundation of the order. The function of the Court is to discover the nature of the order by attempting to ascertain what was the motivating consideration in the mind of the authority which prompted the order. The intent behind the order can be discovered and proved, like any other fact, from the evidence on the record. In each case it is necessary to examine the entire range of facts carefully and consider whether in the light of those facts the superior authority intended to punish the Government servant or, having regard to his character, conduct and suitability in relation to the post held by him it was intended simply to terminate his services.

19. In *Nepal Singh Vs. State of Uttar Pradesh and Others*, , while examining the case of a temporary employee, it was held that termination of the services of a temporary Government servant without complying with the provisions of Article 311 of the Constitution is unauthorized and liable to be declared as null and void where it is punitive discovered on the material adduced on record.

20. Further the Hon'ble Apex Court in *Mathew P. Thomas Vs. Kerala State Civil Supply Corpn. Ltd. and Others*, , had an occasion to examine various decisions of the Supreme Court and held that from a long line of decisions it appears that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service. If the form and language of the so-called order of termination simpliciter of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simpliciter or punitive. In cases where the services of a probationer are terminated by an order of termination simpliciter and the language and form of it, do not show that either it is punitive or stigmatic on the face of it but in some cases there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other words, the facade of the termination order may be simpliciter, but the real face behind it is to get rid of the services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simpliciter to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality

removed from service on the foundation of his misconduct.

21. After having a survey of the aforesaid decisions and development of law in this field, it has by now become well settled that the Courts have to perform a balance between denying a probationer or a temporary employee any right to continue in service while at the same time granting him the right to challenge the termination of his service when the termination is by way of punishment. The crux of the matter is that the law has developed along apparently well defined lines to determine whether the order of termination of a temporary appointee or a probationer amounts to punishment. In each case it is necessary to examine the entire range of facts carefully and consider whether in the light of those facts the superior authority intended to punish the Government servant or having regard to his character, conduct and suitability in relation to the post held by him it was intended simply to terminate his services. Therefore, it is imperative for us to discover the nature of the order by attempting to ascertain what was the motivating consideration in the mind of the authority which prompted the order by lifting the veil.

22. Having made the concept clear in our mind, after perusing the order, quoted above in the present case, looks ex-facie innocuous but on further examination we have found that based upon the alleged misconduct, referred to above, an inquiry was conducted against the respondent and on the conclusion of the inquiry the show cause notice dated 15th September, 1999, reproduced above, sent to the respondent makes the matter clear that what ultimately weighed in the mind of the authority concerned. The respondent had submitted his detailed reply to the show cause notice aforesaid and requested to drop the proceedings but it appears to have not found favour, consequently his services were terminated. To lift the veil we have gone further to look into the office record produced before us and after examining it we have to find what was the foundation of the order or the motive behind it. We did not find that the order of termination, referred to above, was based upon overall performance of service of the respondent but it was only founded on the findings arrived at by the superior authority based upon the inquiry against the respondent. This fact was also admitted by the present petitioners in paras 6(5) and 6(7) of their reply to the O.A. before the learned Tribunal. Therefore, in our considered view, the order of termination of the respondent was the result of inquiry regarding misconduct in which he was never associated, which in our opinion is punitive and was the foundation of the order. Hence, we are firmly of the view that the respondent was entitled to protection of Article 311(2) of the Constitution, as the impugned order though non-stigmatic on the face of it is founded and based on the assumption that the respondent is guilty of misconduct.

23. In conclusion, we are in total agreement with the findings arrived at by the learned Administrative Tribunal that the said order of termination was only a cloak and the respondent was thrown out of the job on the basis of the misconduct without any proper inquiry and in conformity with the principles of

natural justice. The direction issued by the learned Administrative Tribunal to reinstate the respondent from the date of his termination, is in accordance with law and upheld. However, the Petitioner-State shall be at liberty to take appropriate action in accordance with law against the respondent, on the basis of the charges leveled against him. Keeping in view the fact that respondent has not worked since the order of termination was passed and keeping in view the latest trend of law and detailed judgment passed by this Bench in CWP No. 844 of 2006 titled as State of H.P. v. Des Raj decided on 28th December, 2006, we restrict the consequential benefits to the respondent at 50% of the back wages. The respondent shall however, be entitled to continuity in service for the purposes of seniority and pension etc. etc. The writ petition stands disposed of accordingly.

CMP No. 1965 of 2005.

24. No orders in view of the order passed in the main writ petition. The application stands disposed of. Interim order dated 22nd November, 2005 is vacated.