

(1999) 05 GAU CK 0052
In the Gauhati High Court
Case No : Writ Appeal No. 537 of 1997

Tabong Pasar

APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 19-05-1999

Acts Referred:

Central Civil Services (Temporary Service) Rules, 1965 — Rule 2, 5, 5(1), 9
Constitution of India, 1950 — Article 311(2)
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (1999) 3 GLT 90

Hon'ble Judges : Brijesh Kumar, C.J; D.N. Chowdhury, J

Bench : Division Bench

Advocate : C. Baruah and N.K. Baruah, for the Appellant; D.S. Bhattacharyya, for the Respondent

Final Decision : Allowed

Judgement

Brijesh Kumar, C.J.—This appeal has been preferred against the judgment of the learned Single Judge dated July 30, 1997 passed in Civil Rule No. 3446 of 1994 by which the said Civil Rule was dismissed. The Petitioner-Appellant had impugned the order of termination of his services in the above noted Civil Rule. Feeling aggrieved by the aforesaid judgment the present appeal has been preferred by the Petitioner-Appellant.

2. The facts which are not in dispute are that the Government of Arunachal Pradesh advertised for recruitment to the post of Sub-Inspector of Police in response thereof the Petitioner-Appellant offered himself as a candidate. A list of selected candidates was published, the Petitioner-Appellant being at serial No. 1 in the said list. On the basis of the selection the Petitioner-Appellant was given an appointment by order dated January 20, 1994, a copy of which has been filed as Annexure A to the Civil Rule. The said letter of appointment says that the Petitioner-Appellant and Ors. were being appointed in purely temporary capacity as Sub-inspector under the Arunachal Pradesh Police. The order further provides

that the appointees would be on probation for a period of 2 years only. The appointments were made subject to satisfactory verification of character and antecedents and successful completion of training. On the basis of the said order the Petitioner-Appellant along with Ors. was undergoing the training when the order terminating his services dated July 21, 1994 was passed under Sub-rule (1) of Rule 5 of the Central Civil Service (Temporary Service) Rules, 1965. The order has been issued from the office of the Inspector General of Police, Itanagar passed by Deputy Inspector General of Police Arunachal Pradesh.

3. The Petitioner-Appellant challenged the order of termination of his services on several grounds which did not find favour with the learned Single Judge and the petition was dismissed. So far as the question as to the competence of the Deputy Inspector General of Police passing the order of termination is concerned, the case of the Respondents was that during the period the impugned order of termination was passed by Inspector General of Police was on leave and the Deputy Inspector General of police was holding the current charge of the Inspector General of Police. The learned Counsel for the Respondents has drawn our attention to the averments made in the affidavit-in-opposition that during the relevant period the Deputy Inspector General of Police was officiating as the inspector General of Police as authorised by the Government of Arunachal Pradesh since the Inspector General of Police was on leave, hence he was quite competent to discharge the function of the Inspector General of Police in exercise whereof he passed the impugned order. He has also placed before us a copy of the order dated February 8, 1994 issued by the Government of Arunachal Pradesh, Home Department by which the Inspector General of Police was granted leave by the Governor and it was further provided that the Deputy Inspector General of Police (West), Arunachal Pradesh would hold the current charge of the Inspector General of Police during the period from 2.7.94 to 22.7.94 The order of termination of the service of the Petitioner-Appellant was passed during the above period. That being the position, in our view, the Deputy Inspector General of Police by holding the charge of the office of the Inspector General of Police was competent to issue the order of termination of the services of the Petitioner-Appellant.

4. The main contention which has been vehemently urged by the learned Counsel for the Appellant before us is that the services of the Petitioner-Appellant could not be terminated by a "bald" order of termination as the Petitioner-Appellant was undergoing the training under the relevant Rules as against the appointment on the substantive post of Sub Inspector of Police. Therefore, before passing an order of termination of his services on the ground on which the services of the Petitioner-Appellant has been terminated, it was incumbent upon the Respondents to give an opportunity of hearing to the Petitioner-Appellant to have his say. So far as the cause for which the services of the Petitioner-Appellant has been terminated has been indicated in paragraph 9 of the affidavit-in-opposition. It reads as under:

9. That with regard to the statements made in para 7 of the writ appeal, your deponent begs to state that services of the Appellant was terminated after the receipt of verification report. Wherein it was found that the Petitioner was involved in Kambang PS Case No. 01/91/302/34 IPC. This vital information was deliberately suppressed by the Petitioner at the time of filling the verification roll-attestation form by the Appellant, it is clearly stated on top of the form in block letters that suppression of factual information would be a disqualification for such appointment and the service would be liable to be terminated. The termination order was signed and issued by the Deputy Inspector General of Police in the officiating capacity of the Inspector General of Police who was on leave.

Learned Counsel for the Respondents has submitted before us that since the Petitioner-Appellant had suppressed the material information while entering into the services, he was disqualified for services. Hence his services have been rightly terminated as temporary employee in consonance with the terms and conditions as indicated in the letter of appointment. Learned Counsel for both the parties have made submissions on the point as to whether the appointment of the Petitioner-Appellant was a temporary appointment or an appointment on regular basis not liable to be terminated applying Rule 5 of the Central Civil Services (Temporary Services) Rules, 1965. In this connection it would be appropriate to consider the Rules under which the recruitment exercise was undertaken by the Respondents. Learned Counsel for the Respondents as well as learned Counsel for the Appellant has placed reliance upon the Arunachal Pradesh Police Service Rules, 1986 for the purpose of recruitment process involved in the present case. They do not dispute that the services of the Sub-Inspector of Police fall in Grade-II of the services covered under the said Rules. A "member of the service" has been defined in Clause (d) of Rule 2 of the Rules which reads as under:

(d) member of the Service means a person appointed in a substantive capacity to either grade of the Service and includes a person appointed on probation to Grade II of the Service,

Clause (g) defines "Service" saying-

Service" means the Arunachal Pradesh Police Service.

The method of recruitment is, thereafter, given in Part III and Part IV of the Rules. Rule 9 provides that the Selection Board shall forward a list of qualified candidates in order of merit to the Administrator. Rule 11 provides that inclusion in the list does not confer any right to appointment, whereas Rule 12 provides that subject to the provisions of the Rules, a candidate included in the list prepared under Rule 9 shall be appointed to the service in the order of merit. Rule 18 provides that every officer on appointment to Grade II of the Service shall be on probation for a period of two years which may be reduced or extended. Sub-rule (2) of Rule 18 also provides for discharge of the probationer in case it is found that he was not fit for permanent appointment Rule 20 of the

Rules provides that a person who is declared to have satisfactorily completed the period of probation will be confirmed in the service. The Rules referred to above clearly indicate that the appointment made under the Rules are against substantive vacant posts for permanent appointment. Successful performance of "Probationer" necessarily culminates into confirmation, whereas unsuccessful performance or performance below the expected standard may result in reversion or discharge of the probationer. In the background of the Rules governing the services, we hardly find any substance in the submission that the appointment of the Petitioner-Appellant was a temporary appointment.

5. In a decision reported in Union of India (UOI) and Others Vs. Arun Kumar Roy, The Apex Court has held that where the statutory rules are in force, the terms of the services would be governed by such statutory rules and not by any condition of service which may be incorporated in the letter of appointment. Therefore, merely saying in the order that the appointment was temporary will not make it temporary since no such appointment is envisaged under the Rules. The Rules envisage substantive appointment against the posts in the cadre and on successful completion of probationary period as statutorily provided, the incumbent has to become a confirmation employee on the post indicated. In that view of the matter, it was not open to the Respondents to take resort to the Central Civil Service (Temporary Service) Rules, 1965. Once a person was duly selected under the Rules and had been placed on probation, there would be only two possibilities. Firstly, that in case his performance during the period of probation there would be only two possibilities. Firstly, that in case his performance during the period of probation is not satisfactory, he is liable to be discharged. The other consequence is that on successful completion of the period of probation it has to culminate into confirmed employment in the cadre. In case, therefore, the services of a person have to be dispensed with on any other ground of misconduct, it would only be possible by going through the process as provided for in the condition of employment. In that view of the matter, in our view, the question that the Petitioner-Appellant was a temporary employee or otherwise also loses importance as it is the settled position under the law that even a temporary employee will be entitled to hearing before infliction of any punishment. The form of the order is not material, rather it is to be seen in substance as to whether it is an order which is punitive or an order of termination simpliciter. The position prevails right from the decision of the Apex Court in the case reported in Parshotam Lal Dhingra Vs. Union of India (UOI), . In context with the facts of the present case we may now proceed to consider some of the decisions which have been relied upon by the parties.

6. In the case of Anoop Jaiswal Vs. Government of India and Another, , the Petitioner was an IPS probationer. His services were dispensed with on the ground that he was unsuitable for being a member of the Indian Police Service. The Hon'ble Supreme Court held that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the court to ascertain the true character of the order and in case it is based on an alleged

misconduct, an opportunity will have to be given as provided under Article 311(2) of the Constitution. The Petitioner in that case having been selected for appointment in the Indian Police Service was undergoing training as a probationer along with Ors. . On a particular day he was late in attending drill practice along with other probationers. He was considered as one of the ringleaders who was responsible for the delay. It was recommended that his services be dispensed with as he was not found repentent. Though he had sincerely regretted lapse on his part, but had denied the charge of instigating Ors. . The authority wanted to set an example for Ors. . In the above circumstances the order was held to be punitive in nature. There it was held that it was necessary to hold an enquiry into the matter in accordance with the provisions of Article 311(2) of the Constitution.

7. In case of Governing Council of Kidwai Memorial Institute of Oncology, Bangalore Vs. Dr. Pandurang Godwalkar and another, which also related to the termination of services of a probationer it has been held that an order of termination could be passed after making an assessment of the performance of the probationer and the order would not be vitiated on the ground that no opportunity of hearing was given nor could it be considered to be punitive in nature. However, if there is a direct nexus between the charge made and action taken, it would be a different matter. On the basis of the facts of the case the court came to a finding that the decision to terminate the services of the Petitioner was taken after assessing his overall performance during the period of probation and in that connection the complaints which had been received were also taken into account. Since the action was based on the performance during probation, the order was upheld. The case of Anoop Jaiswal (Supra) was distinguished on the basis that the action against the Petitioner in that case was taken on the basis of alleged misconduct.

8. The next case relied upon is reported in M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another, , wherein it was held that under general law the service of a probationer could be terminated after making overall assessment of his performance during the period of probation and no notice was required to be given before terminating his service. Case of Governing Council of Kidwai Memorial Institute (Supra) has also been referred.

9. Yet Anr. decision which has been relied upon is reported in (1996) 1 SCC 560 (Satya Narayan Athya v. High Court of M.P. and Anr.). In the said case a Civil Judge on conclusion of period of probation was not considered to be fit to be confirmed in view his unsatisfactory nature of service. It was held that it was not necessary to give notice before termination of his service based on unsatisfactory service during the period of probation. From the above noted case also learned Counsel for the Respondents could not derive any advantage to advance his argument since the position under the law only stands reiterated that where the performance of the probationer has been unsatisfactory during the period of

probation his services can be terminated without any opportunity of hearing. There is no dispute about the said proposition.

10. The next decision which has been referred is reported in Dr Amritlal Dharshibhai Jhankharia Vs. State of Gujarat and Another, . The Petitioner in that case appears to have been initially appointed on temporary basis. After one year he was selected and was appointed on probation of 2 years. It was found that his performance during the period of probation was unsatisfactory. Hence his services were terminated. In this case the appeal was dismissed and the termination was upheld.

11. From the perusal of the decisions referred to above it clearly emerges out that in a case where the performance of a probationer is found to be not satisfactory during the period of probation, his services are liable to be dispensed with, without any legal obligation to provide him any opportunity of hearing. But in case the order terminating the services of a probationer is not based on his unsatisfactory performance during the period of probation, but on an alleged act of misconduct which has direct nexus with the action taken by the authorities, it would be punitive in nature which will require opportunity of hearing before passing of the order.

12. We may now consider the facts of the present case. The order of termination is undoubtedly based on the allegation that the Petitioner-Appellant deliberately suppressed the vital fact that a criminal case was pending against him and thus entered into the service. Had this fact been disclosed, the Petitioner-Appellant would not have been entitled for the appointment at all. From the above it is evident that the order of termination is not founded on unsatisfactory performance of the Petitioner-Appellant during the period of probation but is founded on alleged misconduct of having deliberately suppressed vital information while entering into service. At no stage of the case the Respondents have made any reference of the performance of the Petitioner-Appellant as a probationer. Only the charge of deliberate suppression of vital fact is pressed into service to justify the order of termination which, in our view, would obviously be an imputation of misconduct and any order founded on such charge could only be passed by affording an opportunity of hearing. At this juncture it would also be relevant to indicate that if such an opportunity had been provided to the Petitioner-Appellant, he could have explained the position as to whether at the time the information was required to be given the fact was within his knowledge or not. We also find that it is not there on the record as to what was the information which was sought to be disclosed by a candidate while filling in form as the said form has been placed on record along with the affidavit-in-opposition. There may be various possibilities of explaining the conduct It may or may not find favour with the authorities is a different matter, but that opportunity cannot be dispensed with. After the enquiry the Respondents could exonerate the Appellant or otherwise terminate his services or cancel the order of appointment depending upon the result of the enquiry.

13. In view of the discussions held above, we find that the order passed against the Petitioner-Appellant dated 21.7.1994 is not sustainable. The judgment of the learned Single Judge under appeal holding that it was not necessary to afford an opportunity of hearing is also not sustainable in view of the law and facts discussed above.

14. The appeal is allowed and the order of the learned Single Judge dated 30.7.1997 as well as the order of termination of the services of the Petitioner-Appellant dated 21.7.1994 are set aside. It is, however, observed that this order will not bar the Respondents from proceeding in the matter in accordance with law, if advised, on the basis of the alleged misconduct.