
(2001) 06 CAL CK 0024
In the Calcutta High Court
Case No : W.P.C.T. No. 053 of 2001

Union of India and Others

APPELLANT

Vs

Shri Biswanath Dhar

RESPONDENT

Date of Decision : 21-06-2001

Acts Referred:

Central Civil Services (Temporary Service) Rules, 1965 — Rule 5, 5(1)
Constitution of India, 1950 — Article 227, 228, 311, 311(2)

Citation : (2001) 2 CALLT 481 : (2001) 91 FLR 442

Hon'ble Judges : Prabir Kumar Samanta, J; Dipak Prokash Kundu, J

Bench : Division Bench

Advocate : Mr. R.S. Saroop, for the Appellant; Ms. S. Ganguly, for the Respondent

Final Decision : Allowed

Judgement

D.P. Kundu, J.—In this proceeding, the petitioners have challenged the Judgment and Order dated 16th February, 2001 passed by the Central Administrative Tribunal, Calcutta Bench, Circuit at Port Blair in O.A. No. 54/AN/1998.

2. By the aforesaid Judgment and order dated 16.2.2001, the Central Administrative Tribunal, Calcutta Bench, Circuit at Port Blair (hereinafter referred to as the Tribunal), inter alia passed the following directions:

- (a) The termination order dated 29.8.97 is set aside being illegal,
- (b) The question of pay and allowances etc. as admissible to the applicant after setting aside of the termination order will be dealt with by the competent respondent authorities according to the existent rules,
- (c) The competent respondent authorities will be at liberty to initiate, justified disciplinary action against the applicant within the period of two weeks from the date of communication of the order in accordance with the provisions of CCS (CCA) Rules, 1965,

(d) The applicant will co-operate with the disciplinary proceeding if initiated against him and shall co-operate in completing the same within the stipulated period. He shall not give any occasion to the respondent authorities to delay the proceedings in any manner- in case the applicant adopts dilatory tactics or creates hurdles in the proceedings of the disciplinary case, the competent authority will be at liberty to proceed in the matter ex-parte, so as to dispose of the same within the stipulated period,

(e) In case the disciplinary proceeding is initiated, the hearing in the proceeding should be conducted on the continued basis except where minimum period of notice etc. Is provided in the CCS(CCA) Rules, and

(f) the entire disciplinary proceeding if decided to be initiated by the respondent authorities should be completed within the period of four months from the date of issue of chargesheet till final decision on the enquiry report by the competent disciplinary authority.

3. The Respondent in this proceeding Shri Biswanath Dhar, by virtue of an appointment order No.266/6/3 dated 30th August, 1994 issued by the petitioner No.4, was appointed as a Fire Engine Driver Gr. II on temporary basis and posted under petitioner No.5. Such appointment of the respondent was subject to the conditions of service as applicable to temporary civilian Government servant paid from defence services estimates in accordance with the order issued by the Government of India from time to time. It was further stipulated in the appointment order that the appointment might be terminated at any time in a month notice given by either side. It was further stipulated in the appointment order that the appointing authority however reserved the right to terminate the service of the respondent forthwith or before expiry of the stipulated period of notice by making payment of sum equivalent to pay and allowances for the period of notice of unexpired portion thereof as the case may be. It was further stipulated in the appointment order that the respondent would be on probation for two years in the first instance which is extendable at the discretion of the appointing authority and on satisfactory completion of which the respondent would be considered for employment on regular basis.

4. By virtue of an order dated May 13, 1997, the probation period of the respondent was extended by a period of one year with effect from August 31, 1996.

5. The relevant part of the aforesaid order extending the probation period is set out hereunder :-

1. "You were appointed as Fire Engine Driver Grade II on temporary basis against the vacancy of INS Utkrosh vide this Headquarters Appointment Order No. 226/6/3 dated 30 Aug. 94. As per the terms and conditions at Para 1(e) of the appointment order you were under probation for a period of 2 years from 31 Aug 94 which expired on 30 Aug 96. Your case has therefore come up for review by this Head quarters.

2. As per the report received from INS Utkrosh your services as Fire Engine Driver Grade II have been totally unsatisfactory. A brief account of your major omissions and commissions since your appointment are enumerated below: -

(a) Involved in an accident on 25 Dec '94 while driving the vehicle No. 87D74159-A. The subsequent inquiry revealed that the accident occurred as result of your driving the vehicle under the influence of liquor.

(b) Warned vide INS Utkrosh letter 269/1 dated 05 May 95 for having the vehicle un-attended during the course of duty on 31 Jan 95 under the influence of liquor.

(c) Missing from place of duty on 23 Apr. 95 and when returned you were found under the Influence of liquor and unable to perform duty. Did not reply to the show cause Notice issued to you vide INS Utkrosh letter No.269/2 dated 26 Apr.95, whereby admitting your offence.

(d) Absconding with the vehicle on completion of duty on 16 June 95 and returned the vehicle in a drunken state. Did not reply to the show cause Notice issued to you vide INS Utkrosh letter 269/2/BND dated 10 Jul 95 whereby admitting your offence.

(e) Missing from place of duty with the Maruti Gypsy during the course of duty on 07 Aug 95. Did not reply to the show cause Notice issued to you vide INS Utkrosh letter 269/2 dated 24 Aug 95 whereby admitting your offence.

(f) Leaving the vehicle at unauthorised place and sleeping on it under the influence of liquor on 27 Aug 95. Did not reply to the show cause Notice Issued to you vide INS Utkrosh letter 269/1/BND dated 05 Sep 95, whereby admitting your offence.

(g) Leaving duty place on 02 Feb 97 without permission. Did not reply to the show cause Notice issued to you vide INS Utkrosh letter 269/2 dated 11 Feb 97 whereby admitting your offence.

(h) On 07 Feb 97 you were found driving the vehicle under the influence of liquor.

(i) On 12 Feb 97 you had threatened to cause accident to the vehicle intentionally with a view to kill the crew. Also you did not reply to the show cause Notice issued to you vide INS Utkrosh letter No. 269/ 1/BND 26 Mar 97, whereby admitting your offence.

3. It has been observed from the above that you are :-

(a) negligent in driving i.e. your primary duty;

(b) lacking devotion to duty;

(c) not amenable to discipline;

(d) refusing to reply to the notices issued to you inspite of repeated reminders, whereby disobeying the just and reasonable orders of your superior.

4. Your above said acts indiscipline are unbecoming of a Government Servant. Although sufficient advise /warning/opportunities were given to you to reform, you did not heed to them and continue to behave indifferently and indulge in acts of indiscipline.

5. Without prejudice to the disciplinary action initiated against you by INS Utkrosh, you are advised to improve upon your shortcomings and do nothing that would be construed as an act unbecoming of a Government servant. You are further informed that your performance will be closely monitored henceforth and warned that in case of your failure to improve, your services will be terminated as per the terms and conditions laid down at Para 1(d) of the Appointment Order, ibid.

6. Your probation period is extended by a period of one year with effect from 31 Aug 96.

7. You are to acknowledge receipt of this letter."

6. Thereafter by virtue of an order dated August 29, '97 the services of the respondent was terminated forthwith in exercise of power conferred by Proviso to sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Services) Rule 1965. The relevant part of the order of termination is set out hereunder :-

"1. In pursuance of the Proviso to sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Services) Rules 1965, I, Commodore K.S. Rai (00613-T), Chief Staff Officer, Fortress Headquarters, Port Blair hereby terminate forthwith the services of Shri Biswanath Dhar, Fire Engine Driver Grade-II working in INS Utkrosh and direct that he shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of notice at the same rate at which he was drawing them immediately before the termination of his service as the case may be, for the period by which such notice falls short of one month."

7. The Tribunal held that alleged misconduct on the part of the applicant were the foundation for issuing the termination order taking refuge of the provisions of Rule 5 of CCS (Temporary Service) Rules, 1965 and the same has been elaborately and indirectly conceded by the respondents in their reply to the O.A.

8. Before initiating OA No. 54/AN/1998 before the Tribunal, the respondent initiated a writ proceeding being C.O. 108(W)/97. The said writ petition was rejected by Nure Alam Chowdhury, J. by an order dated March 9, '98 with liberty to the petitioner to file appropriate proceeding before the appropriate forum. If so advised, in accordance with law. Being aggrieved by and dissatisfied with the aforesaid order passed by Nure Alam Choudhury, J. the respondent preferred an appeal being F.M.A.T. No. 2/98. The Division Bench of this High Court by a judgment and order dated 20.7.98 disposed of the appeal, inter alia by the following order: -

"In such circumstances, we see no reason to interfere with the order of the learned single Judge, inasmuch as, we are of the view that initially the remedy of

the appellant lies before the Central Administrative Tribunal and not before the High Court by way of a writ application.

The appeal is thus disposed of. We make it clear that we have not gone into the merits of the application and the petitioner will be at liberty to move the Tribunal afresh on the same cause of action and will be entitled to urge all the points taken in the writ petition in such application, if filed before the learned Tribunal.

There will be no order as to costs."

9. Thus the order dated March 9, 1998 passed by Nure Alam Chowdhury, J. In C.O. 108/97 merged with the judgment and order dated 20.7.98 passed by the Division Bench of this High Court in F.M.A.T. No. 2/98.

10. In C.O. 108(W)/97, the respondent in that writ proceeding filed Affidavit-in-opposition affirmed by Commander Mahavratayajula Chiranjeeva Rao on 23rd February, 1998. In paragraph-9 of the aforesaid affidavit-in-opposition, the respondent stated as follows :

"9. With reference to para 5, the averments made therein are vehemently disputed. It is submitted that the applicant had never been employed on irregular duties. Eleven show cause notices were served upon petitioner for his mis-conduct/mis-behaviour Since his appointment and out of which the petitioner had replied to only one show cause notices are attached and marked annexure R-2 collectively. Replies to the remaining show cause notices have not been given by the petitioner from which it is evident that the petitioner had admitted the charges made against him. While on duty the petitioner had been medically examined three times, and it was found that he had consumed liquor while on duty. Copies of medical report are attached and marked as annexure-R-3, R-4 & R-5. At one stage, the petitioner himself had admitted that he had consumed liquor while on duty. Copy of written statement dated 29.8.87 submitted by the petitioner is attached and marked as annexure-R-6."

11. Thus the respondent in C.O. 108(W)/97 admitted that there were allegations of mis-conduct against the respondent in the present proceeding. Nothing more had been admitted. Nothing has been stated in the above paragraph to indicate that the alleged misconducts of the petitioners are the foundation of the order of termination. On the other hand the fact is that inspite of allegations of misconducts against the respondent his probationary period was extended for a period of one year.

12. Mr. Saroop appearing for the petitioners in the present proceeding, argued that the respondent was appointed on temporary basis and as a probationer and his work had never been satisfactory and he was not found suitable for being retained in the service and that was why though no disciplinary enquiry was started against the respondent, yet his service was terminated, and this termination of service is nothing but a termination simplicitor and does not amount to a penalty. Mr. Saroop argued that if appointing authority considered it

expedient to terminate the service of the probationer, it could not be said that the order of termination attracted the provisions of Article 311 of the Constitution when the Appointing authority have the right to terminate the service without assigning any reason. Mr. Saroop further argued that in such a case even if misconduct, negligence, inefficiency might be the motive or the inducing factor which influenced the employer to terminate the service of the employee the power which the Employer undoubtedly possessed, even so as under terms of appointing of the employee, such a power flowed from the contract of service, termination of service could not be termed as penalty or punishment.

13. It is well settled by a long course of decisions of our Supreme Court that in the case of a probationer or in the case of a temporary employee who has no right to the post, such termination of his service is valid and does not attract the provisions of Article 311 of the Constitution. In the case of *Samsher Singh Vs. State of Punjab* and *Another*, the matter was considered in all its aspect by a Constitutional Bench comprising 7 Judges of our Supreme Court and the Court adumbrated the following propositions:

"Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any Rules governing a probationer in this respect the authority may come to the conclusion that on account of adequacy for the job or for any temperamental or other object not involving general turpitude the probationer is unsuitable for the job and hence must be discharged. No. punishment is involved in this ... The fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment A probationer whose terms of service provided that it could be terminated without any notice and without any cause being assigned he could not claim the protection of Article 311(2) ... An order terminating the services of a temporary servant of probationer under the Rules of Employment and without anything more will not attract Article 311. Where a departmental enquiry is not in fact proceeded with Article 311 will not be attracted unless it can be shown that the order though unexceptionable in form is made following a report based on Misconduct."

(See *Oil and Natural Gas Commission and Others Vs. Dr. Md. S. Iskender Ali*,

14. The respondent in this proceeding was a temporary hand and he was on probation and had no right to the post. It is also not denied that both under the contract of service and the service Rules governing the respondent, the petitioners herein had the right to terminate his service by giving him one month notice. The termination order to which exception is taken is *ex-facie* an order of termination of service simplicitor. A plain reading of the said order of termination shows that it does not cast any stigma on the respondent nor does it visit him with any evil consequences nor is it founded on misconduct.

15. In the circumstances, the respondent cannot invite the Court to go into the

motive behind the order and claim the protection of Article 311(2) of the Constitution.

(See The State of U.P. Vs. Ram Chandra Trivedi,

16. Supreme Court in I.N. Saksena Vs. State of Madhya Pradesh, held that when there are no express words in the impugned order itself which throw a stigma on the Government Servant, the Court would not delve into Secretariat files to discover whether some kind of stigma could be inferred on such research.

17. In Oil & Natural Gas Commission v. Md. S. Iskander Ali (supra) it was held that even if misconduct, negligence, Inefficiency may be the motive or the inducing factor which influences the employer to terminate the services of the employee, a power which the employer undoubtedly possessed, even so as under the terms of appointment of the employee such a power flows from the contract of service it could not be termed as penalty or punishment.

18. In State of Maharashtra v. Veerappa R. Saboji, (reported in : (1979)IILLJ393SC) Untwalla, J. observed:

"Ordinarily and generally the rule laid down in most of the cases by this Court is that you have to look to the order on the fact of it and find whether it casts any stigma on the Government servant. In such a case there is no presumption that the order is arbitrary or mala fide unless a very strong case is made out and proved by the Government servant who challenges such an order."

19. Mr. Saroop referred to and relied upon a Supreme Court decision in AIR 2000 1706 (SC) wherein it was held by the Supreme Court that important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of probation on account of general unsuitability for the post in question. It was held that if for determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an enquiry is held and it on the basis of that inquiry that a decision is taken to terminate his services, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the enquiry was held to find out the truth of allegations of misconduct. In this situation the order would be founded on misconduct and it will not be a mere matter of "motive".

20. The learned Advocate for the respondent Ms. Shyamali Ganguly has drawn our attention to page 124 of the petition which contains details of disciplinary proceeding against the respondent in the present proceeding. Relying upon the decision of the Supreme Court in Samasher Singh v. State of Punjab (supra), it is 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. A probationer whose terms

of service provide that it can be terminated without any notice and without any cause being assigned, could not claim the protection of Article 311(2) of the Constitution.

21. In his application before the Tribunal in O.A. No. 54/1998, the respondent in the present proceeding stated that as a result of his protest about irregular duties assigned to him, he received several show cause notice/warning notices alleging that he drove the vehicle under influence of liquor about which no enquiry has ever been made. It was further stated in the said application that the petitioners in the present proceeding never held any enquiry against the respondent in respect of the aforesaid show cause notices. It was further stated that it is not known to the respondent in the present proceeding when he was found under Influence of liquor, against such allegation no such evidence was either enquired or proved.

22. Under the circumstances, it is difficult to hold that mis-conduct is the foundation of the order of termination. In *Chandra Prakash Shahi v. State of U.P. and Ors.* (supra) Supreme Court held that "motive" is the moving power which Impels action for a definite result, or to put it differently, "motive" is that which Incites or stimulates a person to do an act. It was held that an order terminating services of an employee is an act done by the employer. What is that factor which impelled the employer to take this decision? If it was the factor of general unsuitability of the employee for the post held by him, the action will be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary enquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary enquiry.

23. In the present case it is found that in the order of extension of the probationary period, it was clearly stated as follows :

"Without prejudice to the disciplinary action initiated against you by INS Utkrosh, you are advised to improve upon your shortcomings and do nothing that would be construed as an act unbecoming of a Government servant. You are further informed that your performance will be closely monitored henceforth and warned that in case of your failure to Improve, your services will be terminated as per the terms and conditions laid down at para 1(d) of the Appointment Order *ibid.*"

24. Thus, it is found that at the time when the probationary period was extended, some disciplinary actions were pending against the respondent employee which were Initiated by the employer. But no action had been taken against that employee in connection with the disciplinary proceeding. Following the *Oil & Natural Gas Commission case* (supra) it is held that though some sort of an enquiry was started, it was not proceeded with and no punishment was inflicted on the employee. The employer can certainly terminate the service of an employee who is a probationer by an order which does not cast an stigma on the

employee and which does not visit the employee with any evil consequences.

25. In view of the discussions here-in-above. It is held that the order of termination was not founded on misconduct. It is held that the order of termination is not punitive; it is legal and valid. The Tribunal wrongly held that the order of termination was founded upon the misconduct of the employee and therefore the order of termination is punitive in nature.

Accordingly, the judgment and order dated 16-2-01 passed by the Central Administrative Tribunal, Calcutta Bench, Circuit at Port Blair in O.A. No. 54/AN/1998 is set aside. The application is thus allowed. The Rule is made absolute.

There will be no order as to costs.

D.P. Sengupta, J.

26. I agree.

27. Application allowed