
(1965) 08 CAL CK 0027
In the Calcutta High Court
Case No : A.F.O.O. No. 287 of 1965

Union of India (UOI) and Others

APPELLANT

Vs

Rabindranath Mazumdar

RESPONDENT

Date of Decision : 18-08-1965

Acts Referred:

Central Civil Services (Temporary Service) Rules, 1949 — Rule 2, 3, 5
Constitution of India, 1950 — Article 226, 309, 311, 311(1), 311(2)

Citation : AIR 1967 Cal 326 : 70 CWN 1141 : (1968) 2 LLJ 610

Hon'ble Judges : H.K. Bose, C.J.; B.C. Mitra, J

Bench : Division Bench

Advocate : Prasanta Kumar Ghose, for the Appellant; Puspamoy Das Gupta, for the Respondent

Final Decision : Allowed

Judgement

Bose, C.J.—This is an appeal from an order of Mr. Justice Banerjee dated the 23rd April, 1965, making the Rule absolute and quashing certain orders of termination of service of the respondent.

2. In June, 1957, the respondent applied for the post of a Constable in the Department of Subsidiary Intelligence Bureau in the Ministry of Home Affairs, Government of India. By a memorandum dated 28th August, 1957, issued by the Deputy Director, Subsidiary Intelligence Bureau, the respondent was asked to join in the temporary post of a Constable on a salary of Rs. 40 in the scale of Rs. 40-2-60 plus dear-ness allowance and other allowances and he was asked to report for duty at the Office of said Department at 9/1, Gariahat Road, Ballygunge, Calcutta. On 7th September, 1957, the respondent received another memorandum issued by the said Deputy Director asking him to report for duty on or before 15th September, 1957, otherwise the memorandum dated 28th August, 1957, would be treated as cancelled. On 16th September, 1957, the respondent joined his post and there he worked for a few days and after that he was transferred to the Burrabazar Office at 9, Madan Chatterjee Lane, Calcutta.

There he worked up to December, 1960, and thereafter he was transferred to Cooch Behar. It is alleged that during the period the respondent worked at the Burrabazar Office and in Cooch Behar, he worked with credit and efficiency. Sometime In August 1961, the respondent was transferred to Siliguri and there he worked under the control and supervision of the Sub-Inspector, Subsidiary Intelligence Bureau one Shri Narayan Jha. It is alleged that while working there, he incurred the displeasure of that Officer although he was rendering efficient service for about four and a half years in that department On or about the 28th February, 1962, the Assistant Director, Subsidiary Intelligence Bureau, issued an order terminating the service of the respondent on the expiry of one month from the date of the said Office order. This order was purported to have been made under Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949. The said order runs as follows:--

"Under Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, Sri Rabindra Nath Majuradar is hereby given notice that his service is terminated with effect from the date of expiry of one calendar month from the date of the service of this order on him.

Sd/- (R.K. Mukharjee) Assistant Director S. I. B., Calcutta 28-2-62."

Thereafter the respondent received another order dated the 22nd March, 1962, issued by the Deputy Director, Subsidiary Intelligence Bureau, which purports to be an order of discharge which was to take effect from 7th April, 1962. This order was to the following effect:--

"Office Order No. 206/62.

In pursuance of this SIB Order No. C. 9/ East/58 dated 1-3-82 Const. Rabindra Nath Majumdar is discharged from service w. e. f. 7-4-62. F. N.

Dated,

Calcutta, Sd/- the 22nd March, for Deputy Director 1962. S. I. B. Calcutta."

After receipt of the letter of discharge, the respondent made an appeal to the Deputy Director, Subsidiary Intelligence Bureau for reconsideration of the order and he was granted an interview by the Deputy Director on 30th April, 1962. It is alleged that at that interview the respondent was told by the Deputy Director that Mr. Narayan Jha, the Sub-Inspector, Subsidiary Intelligence Bureau, had made certain confidential reports against the respondent alleging that the respondent was a habitual absentee and was negligent in his duties and was insubordinate and accordingly the Deputy Director had issued the letter of discharge on the basis of those confidential reports. But as the respondent did not get any redress of his grievances as a result of the interview, the respondent demanded justice challenging the validity of the order of termination of service and the order of discharge on the ground that the said orders were invalid as they were made in violation of Rule 5 (a) of the Central Civil Services (Temporary Service) Rules, 1949, as the Assistant Director, Subsidiary Intelligence Bureau,

was not the appointing authority of the respondent and also on the ground that it violated Rule 5 (b) of the laid Rules as the Office order dated the 22nd March, 1962, did not give clear one month's notice as required under the said Rule. The legality of the said orders was also challenged on the ground that they violated Article 311(2) of the Constitution of India inasmuch as the order of discharge was virtually an order of removal and as no opportunity had been given to the respondent to show cause against the action proposed to be taken and as no charge-sheet was issued and enquiry was held, the orders in question were in contravention of Article 311(2) of the Constitution.

3. As no action was taken on this letter demanding justice, the respondent moved this Court under Article 226 of the Constitution and a Rule nisi was issued on 16th August, 1962. In the petition under Article 226 of the Constitution the respondent alleged that the letter of discharge was a colourable one inasmuch as it was in fact an order of removal as contemplated in Article 311(2) of the Constitution and it was further alleged that the orders of termination and discharge were issued mala fide and were without jurisdiction. In answer to petition under Article 226 of the Constitution, the opposite parties Nos. 2, 3 and 4 have filed an affidavit-in-op-position and this affidavit was affirmed by one Ranjit Kumar Mukherjee, who was the Assistant Director of Subsidiary Intelligence Bureau at Calcutta and who is respondent No. 3 in the petition. In paragraph 4 of this affidavit it was stated that at the time the respondent was selected for the post of Constable, the Deputy Director, Subsidiary Intelligence Bureau, was the appointing authority for Government servants of Class IV cadre, to which category the respondent was appointed. But it is further stated in paragraph 10 of the affidavit that this power of the Deputy Director has since been transferred to and vested in the Assistant Director, Subsidiary Intelligence Bureau and this Assistant Director was at the relevant point of time, namely, at the time of the respondent's discharge from service, the appointing authority in regard to the Class IV employees to which the respondent belonged and consequently the Office order dated the 28th February, 1962, which was issued by the Assistant Director was a perfectly valid order. It is also stated in this paragraph that after this order was issued, another formal Office order discharging the respondent from his service was issued by the Deputy Director.

4. With a view to repel the charge of mala fide that has been levelled against the opposite parties in the petition, it was also made clear in paragraphs 7 to 12 of the said affidavit-in-opposition as to why steps had been taken to discharge the respondent from his service. It is stated in paragraph 7 that the allegation in the petition that the respondent worked with credit and efficiency is not correct but the respondent's conduct and performance of work during the period in question was most unsatisfactory and positively disappointing so much so that his immediate superior officer, the Assistant Central Intelligence Officer recommended to the Deputy Central Intelligence Officer of the unit at Murshidabad that the respondent should either be immediately removed from this department (at Cooh Behar) or be Severely punished for his unbecoming

conduct towards his superior officers and as a result of this complaint the respondent was transferred to the Siliguri Unit where his conduct and work were equally reprehensible. The Assistant Director, Subsidiary Intelligence Bureau, Kalimpong, Sri Gupta, expressed the view that he did not consider that it would be useful or advantageous in any way to allow the respondent to continue in their department and as a last resort he requested the superior Unit to transfer the respondent immediately, if not to dismiss him from service, In paragraph 12 of this affidavit it is stated that the respondent was granted by the Deputy Director an interview in consequence of his appeal made on 6th April, 1962, and after giving a very patient hearing and also due and proper consideration of the respondent's pleas and submissions, the Deputy Director saw no reason to reverse the order of discharge made against the respondent or to reinstate the respondent into service more specially in consideration of the adverse reports received against the respondent in respect of his performance and discharge of work, behaviour, demeanour, conduct and insubordination towards his official superiors,

5. The Rule finally came up for hearing before Banerjee, J. and three points were urged by the learned Advocate for the respondent. The first point that was urged was that the order of termination of service by the Assistant Director, Subsidiary Intelligence Bureau was bad as it was in violation of Rule 5 (1) of the Central Civil Services (Temporary Service) Rules, 1949, because he was not the appointing authority. The next point urged was that the notice was insufficient inasmuch as full one month's notice had not been given to the respondent as required under Rule 5 (b) of the said Rule, Lastly, it was contended that the order of termination was in substance an order of removal from service, and as such an order was made without giving any opportunity to the respondent to show cause why such an order should not be made against him, the order passed was in violation of the provisions of Article 311(2) of the Constitution and as such void. The learned Judge repelled the contentions on behalf of the respondent with regard to the first and second point urged before him but with regard to the third point, he held that the order of termination from service was in effect an order of removal or dismissal of the respondent on account of misconduct or blameworthy conduct and as such it was in contravention of Article 311(2) of the Constitution and as such void. On this ground he quashed the order terminating the service of the respondent, as also the appellate order affirming the same and made the Rule absolute.

6. It is against this order that the present appeal has been preferred and the principal point which has been urged on behalf of the appellant Union of India is that the learned trial Judge had failed to consider that the appellants had under the provisions of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, every right to terminate the services of the respondent under the terms of the contract of his employment and/or the service Rules applicable to him and as such the said termination and the order of discharge were perfectly valid orders and could not be interfered with in an application under Article 226 of the

Constitution. It was submitted that the orders in question are not orders of removal or dismissal from service but were orders of termination of employment simpliciter. Reliance has been placed on behalf of the appellants on the decision of the Supreme Court reported in *Champaklal Chimanlal Shah Vs. The Union of India (UOI)*, . In this case it has been pointed out that temporary servants are also entitled to the protection of Article 311(2) in the same manner as permanent Government servants, if the Government takes action against them by meting out one of the three punishments, that is, dismissal, removal or reduction in rank. But this protection is only available where discharge, removal or reduction in rank is sought to be inflicted by way of punishment and not otherwise. The mere use of expressions like "terminate or "discharge" is not conclusive and in spite of the use of such innocuous expressions the Court has to apply the two tests mentioned, namely, (1) whether the servant had a right to the post or the rank or (2) whether he has been visited with evil consequences; and if either of the tests is satisfied, it must be held that the servant had been punished. Further even though misconduct, negligence, inefficiency or other disqualification may be the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rules, nevertheless, if right exists, under the contract or the rules, to terminate the service, the motive operating on the mind of the Government is wholly irrelevant. It has further been observed in this case that the mere fact that some kind of preliminary enquiry is held against a temporary servant and following that enquiry the services are dispensed with in accordance with the contract or the specific service rules (as for example, Rule 5 in this case) would not mean that the termination of service amounted to infliction of punishment of dismissal or removal within the meaning of Article 311(2).

7. The next case on which reliance is placed is another decision of the Supreme Court reported in AIR 1964 SC 149 *Jagadish Mitter v. Union of India* which is earlier in point of time than the decision just now referred to. In this case at page 453" the Supreme Court made certain observations which are very pertinent to the point under consideration and which are to the following effect :--

"Take a case where a temporary servant attacks the validity of his discharge on the ground of mala fides on the part of the authority. If in resisting the plea of mala fides, the authority refers to certain facts justifying the order of discharge and these facts relate to the misconduct, negligence or inefficiency of the said servant, it cannot logically be said that in view of the plea thus made by the authority long after the order of discharge. It should be held that the order of discharge was the result of the considerations set out in the said plea. What the Court will have to examine in each case would be, having regard to the material facts existing up to the time of discharge, is the order of discharge in substance one of dismissal? If the answer is that notwithstanding the form which the order took, the appointing authority, in substance, really dismissed the temporary public servant. Article 311 would be attracted." (Paragraph 13 of the Judgment).

It appears that in this case the order terminating the employment of the appellant referred to the fact that the appellant was found undesirable to be retained in Government service and because of this it was held that it was in substance an order of dismissal and not a mere order of discharge inasmuch as such an order expressly casts a stigma on the employee. The Supreme Court thought that anyone reading the order in a reasonable way will naturally conclude that the servant was found to be undesirable and that must necessarily import an element of punishment which was the basis of the order and was its integral part. But if simple order of discharge had been passed without casting any aspersion against the temporary servant or attaching any stigma to his character, then such an order would not be open to challenge. It may be pointed out that in the case before us the opposite parties have set out certain facts in the affidavit in opposition to which I have already made reference and which led them to take the impugned action against the respondent, in order to repel the charge of mala fide that had been levelled against them in the petition. The order terminating the employment which was issued by the Assistant Director and the order of discharge issued by the Deputy Director following the order of termination of employment were simple orders of discharge and they did not cast any aspersion against the respondent, nor had they the effect of attaching any stigma to his character. The learned Advocate appearing for the respondent placed reliance on three decisions of the Supreme Court reported in *The State of Bihar Vs. Gopi Kishore Prasad*, ; *Sukhbans Singh Vs. State of Punjab*, and *Madan Gopal Vs. State of Punjab*, , in support of his contention that the order of discharge was in reality and in substance an order of dismissal or removal and such orders being in contravention of Article 311 of the Constitution were illegal and void. These three cases have been dealt with in some detail and distinguished in the case of *Jagdish Mitter Vs. The Union of India (UOI)*, of the judgment at pages 454 and 455. The distinguishing features in those cases have been very clearly brought out by the Supreme Court and it is, therefore, not necessary to deal with those cases in this judgment. It is sufficient to state that these decisions are of no assistance to the respondent in the facts and circumstances of this case.

8. On behalf of the appellants the attention of the Court was also drawn to another decision of the Supreme Court reported in (1963) Supp (1) SCR 266 *Union Territory of Tripura, Agartala v. Gopal Chander*. In this case the respondent was appointed as a Constable in the Tripura Police Force. The employment was temporary. In accordance with Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, his services were terminated by giving one month's notice. The respondent appealed. The Appellate authority wrote to him that as he was an exconvict for theft, nothing could be done for him. The respondent filed a writ petition challenging the order of termination. The Judicial Commissioner held that the order was one of dismissal as punishment on the ground that the respondent was an ex-convict, and as no reasonable opportunity was given to the respondent to show cause, the protection of Article 311 was not afforded to him

and the order terminating the respondent's employment was invalid. It was held by the Supreme Court that the respondent had not been dismissed by way of punishment and there was no violation of Article 311(2). The order in terms merely terminated the service of the respondent; there was nothing in it to suggest that the termination was on account of the respondent being an ex-convict. It could not be, in the circumstances of this case, inferred that an order of dismissal was camouflaged as an order of termination and it could not be assumed that an order, ex-facie one of termination, was intended to be one of dismissal. The onus to prove such intention lay upon the employee.

9. In this state of the authorities, we think that it must be held that the order of termination of employment cannot be declared as illegal and invalid on the ground that it was made in contravention of Article 311(2) of the Constitution of India. The learned trial Judge was not right, in our view, in coming to the conclusion that he did with regard to this point and quashing the impugned orders on this ground.

10. Another point which was argued on behalf of the respondent was that as the respondent was in continuous Government service for about four and a half years, he is to be deemed as being in quasi-permanent service within the meaning of Rule 2(b) of the Central Civil Services (Temporary Service) Rules, 1949, and therefore, he had a right to the post and in view of the decision in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, the order of termination which was passed against the respondent is bad inasmuch as no opportunity was given to him to show cause against the action proposed to be taken against him before such order of termination had been passed. Reliance is placed on Rule 6 of the Central Civil Services (Temporary Service) Rules, 1949, which says that the service of a Government servant in quasi-permanent service shall be liable to termination in the same circumstances and in the same manner as a Government servant in permanent service. It was also submitted that In any event even if he was not a quasi-permanent employee within the meaning of the said Rule, he had a right to be in quasi-permanent service and as such he had a right to the post and consequently the order of termination bad inasmuch as it was made in contravention of Article 311(2) of the Constitution. It may be pointed out that this argument is without any substance. Under Rule 3 of the Central Civil Services (Temporary Service) Rules, 1949, before an employee can be deemed to be in quasi-permanent service, it is incumbent on him to show that not only he has been in continuous Government service for more than three years but also that the appointing authority had issued a declaration as contemplated in Rule 3 (ii) of the said Rules. Otherwise, the requirement as to the declaration as contained, in the definition in Rule 2 (b) becomes nugatory and the definition becomes contradictory to Rule 3 itself. In other words, two ingredients are necessary to make an employee quasi-permanent, (1) three years" continuous Government service and (2) a declaration made in regard to him as indicated in Rule 3(ii). If both these factors exist, then his service cannot be terminated except in the manner provided in the relevant rules and in the

relevant provision of the Constitution for termination of service of permanent employees on the grounds of indiscipline, inefficiency or the like. The interpretation that I have put on the definition in Rule 2(b) read with Rule 3 of the Central Civil Services (Temporary Service) Rules, 1949, receives support from the decision of the Supreme Court in *Champaklal Chimanlal Shah Vs. The Union of India (UOI)*, , already referred to. In this case the Supreme Court pointed out that Rule 3 must be read with Rule 2(b) which defines quasi-permanent service. The context of Rule 3 itself requires that the Rule must be read in harmony with the definition of quasi-permanent service in Rule 2(b) for it could not possibly be the intention of the Rule-making authority to create disharmony between the definition in Rule 2(b) and the provisions in Rule 3. Under Rule 2 (b) quasi-permanent service begins from the date on which a declaration is issued under Rule 3 and it follows, therefore, that before a Government servant can be deemed to be in quasi-permanent service, a declaration must be issued under the second sub-clause of Rule 3, for that is the sine qua non for the commencement of quasi permanent service. Without such a declaration, quasi-permanent service cannot begin.

11. The next point which was urged on behalf of the respondent in support of the judgment of Banerjee, J., was that the order of termination of service which was passed on the 28th February, 1962, by the Assistant Director, Subsidiary Intelligence Bureau, was not a valid order inasmuch as he was not the appointing authority of the respondent but the Deputy Director was the appointing authority. But as pointed out already, it has been made quite clear in the affidavit-in-opposition that at the time the order of termination of service was passed against the respondent by the Assistant Director, the Assistant Director had been vested with the power of appointment of all Government Officers in Class IV service and in support of this statement in the affidavit a notification issued by the President had been produced before the learned trial Judge to show that the President had made certain Rules by which the power of appointment had been transferred to the Assistant Director. This notification is dated 28th February, 1957, and is set out at page 35 of the paperbook. In view of this notification, learned trial Judge has held that the point that the order of termination was made by an authority who was not the appointing authority must fail, because at the material time the Assistant Director was the appointing authority. We are in agreement with this finding of the learned trial Judge and we, therefore, hold that there is no substance in this contention of the respondent.

12. The other point which has been raised on behalf of the respondent is that the order of discharge dated the 22nd March, 1962, contravenes Rule 5(b) of the Central Civil Services (Temporary Service) Rules, 1949, inasmuch as the order did not give clear one month's notice as required under that Rule. The learned trial Judge has observed that the real order of termination of service had been passed by the Assistant Director, Subsidiary Intelligence Bureau, and the order of discharge by the, Deputy Director which followed the order of termination was a mere surplusage and as such it did not affect the validity of the termination of

the respondent's employment. It is quite clear from the order of termination which was passed by the Assistant Director dated 28th February, 1962, that it gave notice for the required period of one month as contemplated in Rule 5(b) of the Central Civil Services (Temporary Service) Rules, 1949. We are of the view that this finding of the learned trial Judge is also correct and is not open to challenge.

13. The last point which was argued on behalf of the respondent is that the Rule contained in the notification issued by the President on the 28th February, 1957, is ultra vires and is, therefore, of no effect and consequently the finding of the learned trial Judge based on this notification should not be upheld, inasmuch as the Rule contained in the President's notification is inconsistent with the provisions of Article 311(1) of the Constitution. It is well known that this notification of the President containing this Rule was issued in exercise of the powers contained in Article 309 of the Constitution which says that subject to the provisions of the Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union * " **to make rules regulating the recruitment and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act. It is, therefore, clear that the power conferred by Article 309 is subject to the opening words of the Articles, that is to say, subject to the provisions of the Constitution. So, if any Rule contravenes any provisions of the Constitution, as for example Article 311(1) or 311(2), the Rule will be void. But it may be pointed out that what the Rule purports to lay down is that certain persons therein specified will henceforward be the appointing authority in the place of other persons who had been previously vested with the power of appointment. The Rule does not lay down anything which is inconsistent with provisions of Article 311(1) of the Constitution. It does not purport to say that an employee can be dismissed or removed or reduced in rank by an authority subordinate to the appointing authority. Therefore, I fail to see how can it be said that the Rule contained in the President's notification is ultra vires being inconsistent with Article 311 of the Constitution. Moreover, we have held that the present case is not a case of dismissal or removal but it is case of termination of service simpliciter in exercise of the power contained in the contract of employment and in the specific service Rules by which the respondent was governed. Therefore, we are of the view that there is no substance in this contention of the learned Advocate for the respondent.

14. In the result, the appeal must be allowed. The judgment and order of the learned trial Judge are set aside and the orders terminating the employment of and discharging the respondent from service and the appellate order are upheld

and the Rule issued in this case must be discharged. Each party will pay and bear its own costs throughout.

B.C. Mitra, J.

15. I agree.