Commodore Commanding, Southern Naval Area, Cochin

Vs

V. N. Rajan

Civil Appeal No. 1154(N) of 1970

(Syed M. Fazal Ali, A. Varadarajan, A.N. Sen JJ)

10.03.1981

JUDGMENT

VARADARAJAN, J. -

1. This appeal by special leave is directed against the judgment of a Division Bench of the Kerala High Court in Writ Appeal 620 of 1969, which had been filed by the appellant against the judgment of the learned single Judge of that High Court, allowing O. P. No. 672 of 1969. O. P. No. 672 of 1969 was filed under Article 226 of the Constitution challenging the termination of the service of the respondent by the appellant by the order dated January 17, 1967. That order is to the effect that in accordance with the terms and conditions of his service the respondent stated to be a temporary Ammunition Repair Labourers Grade II, Naval Armaments Depot, Alwaye, is informed that his service is thereby terminated with effect from the date of service of that order on him. That order further states that respondent will be paid a sum equivalent to the amount of his pay plus allowances for the period of notice, due to him, that is, for one month in accordance with the provisions of the Navy Instruction 22/53, as amended and that the payment of allowance will, however be subject to conditions under which such allowance are admissible.

2. The respondent having been recommended by the Employment Exchange was appointed by the appellant by Ex. P-1 as labourers on casual basis in lieu of Sailor in the Installation Team (I. N. S. Venduruthy) on pay of Rs. 70 a. m. plus allowance as admissible from time to time for the period of one month in the first instance with effect from the forenoon of the December 18, 1961. The appellant continued the respondents employment as labourer in lieu of Sailor in B. R. O. (Installation) Departments Cochin against some existing vacancy with effect from the forenoon of January 18, 1962 by Ex. P-2. When he was casual labourer in the B. R. S. (Installation) Department he was transfer by the appellant to the Naval Armaments Depot. Alwaye and appointed as labourer in the regular cadre in the scale mentioned therein plus allowances as admissible from time to time in an existing vacancy with effect from November 15, 1962. Subsequently, when the respondent was working as a labourer in the Naval Armaments Depot at Alwaye the appellant promoted him and appointed him as A. R. L. Grade II in the Naval Armaments Depot, Alwaye in the scale mentioned therein plus allowances as admissible from time to time in an existing vacancy with effect from the forenoon of March 2, 1964. Therefore his services were terminated by order dated January 17, 1967 (Ex. P-8) as mentioned above.

3. In the writ petition the respondent attacked the order (Ex. P-8) on two grounds, namely, (1) that he was appointed permanently to the post of A. R. L. Grade II by the Order (Ex. P-4) and (2) that persons junior to the respondent have been retained in service and, therefore the termination of the services of the respondent without any reason whatsoever, is discriminatory and contravenes Article

16 of the constitution. In the counter affidavit filed in the writ petition the appellant contended that the phraseology "regular cadre" does not imply as it may in some other instance in the employment of government a substantive post, that the post in the "regulate cadre" is also a purely temporary one and that the post of Naval Armaments Depot, Alwaye Ammunition Repair Labourers Grade II to which the respondent was promoted and appointed, was also on a temporary basis. The appellant denied that there was any discrimination in the termination of the services of the respondent. The learned single Judge repelled the contention that the respondent had been permanently appointed to the post of A. R. L. Grade II by the order (Ex. P-4) on the ground that there is nothing in the order to show that the respondent had been appointed permanently to the post. Regarding the second ground urged by the respondent the learned single Judge held, relying upon this Court's decision in Champaklal Chimanlal Shah v. Union of India and two other decisions of the Mysore and Andhra Pradesh High Court in Doddaiah v. State and Janikiraman v. State of A. P. respectively that Article 16 of the Constitution applies even to temporary Government servant. The learned Judge observed that there is no denial of the fact that persons junior to the respondent have been retained in service and that there in nothing in the order, Ex. P-8 or in the counter affidavit filed by the respondent in the writ appeal to show that the respondents was guilty of any misconduct or was otherwise unfit to hold the post. The learned Judge further observed that in paragraph 8 of the counter affidavit it has only been stated that the fact that other person who are junior to the respondent are retained in service would not confer any right on the respondent to continue in service. In this view the learned Judge held that the termination of the respondents services under Ex. P-8 without assigning any reason was discriminatory and he accordingly allowed the writ petition without costs. In the writ appeal filed under Section 5 of the Kerala High Court Act the Division Bench followed the aforesaid decision of the court in Champaklal Chimanlal Shah v. Union of India and agreed with the learned single Judge that the appellants action in terminating respondents services under Ex. P-8 is violative of Article 16 of the Constitution. The learned Judges observed in their judgment that no reason at all the was either alleged or proved as to why appellant chose to terminate the respondent services under Rule 5 of the Central Service (Temporary Service) Rules, 1965 such as that it was administratively convenient to do so or that the respondent work or conduct as unsatisfactory or that it was a case of retrenchment and the respondent was chosen as the junior most person. The learned Judges accordingly dismissed the writ appeal.

4. The principle that even temporary Government servants are entitled to the protection of Article 311(2) in the same manner as permanent Government servants if the government takes action against them by meeting out one of the three punishments of dismissal, removal or reduction in rank, in well settled. This court has held in Champaklal Chimanlal Shah v. Union of India 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 meeting out one of the three above punishment following the decision in Parshotam Lal Dhingra v. Union of India and that this protection is only available where the discharge removal or reduction in rank is sought to be inflicted by way of punishment and not otherwise. The same view has been reiterated by this Court in Manager, Govt. Branch Press v. D. B. Bellippa, where it has been observed thus : (SCC p. 485 : SCC (L & S) p. 47, paras 23 & 24)

> The principle that can be deduced from the above analysis is that if the services of a temporary Government servant are terminated in accordance with the conditions of his service on the ground of unsatisfactory conduct or his unsuitability for the job and/or for his work being unsatisfactory or for a like reason which marks him off in a class apart from other temporary servants who have been retained in service, there is no question of the applicability of Article 16.

Conversely, if the services of a temporary Government servant are terminated, arbitrarily and not on the ground of his unsuitability unsatisfactory conduct or the like which would put him in a class apart from his juniors in the same service question of unfair discrimination may arise, notwithstanding the fact that in terminating his service, the appointing authority was purporting to act in accordance with the terms of the employment. Where a charge of unfair discrimination is levelled with specificity, or improper motives are imputed to the authority making the impugned order of termination of the service, it is the duty of the authority to dispel that charge by disclosing to the court the reason or motive which impelled it to take the impugned action. Excepting perhaps in case, analogous to those covered by that Article 311(2), proviso (c) the authority cannot withhold such information from the court on the lame excuse that impugned order is purely administrative and not judicial having been passed in exercise of its administrative discretion under the rules governing the conditions of the service.

5. In the latest decision in State of Maharashtra v. Verrappa R. Saboji a similar observation has been made by Pathak, J. at Page 567 : (SCC pp. 478-79 : SCC (L & S) pp. 73-4, para 18)

> The law it seems to me, is that where the services of a temporary Government servant or a probationer Government servant are terminated by an order which does not ex facie disclose any stigma or penal consequences against he government servant and is merely a termination order simpliciter, there is no case ordinarily for assuming that it is anything but what it purports to be. Where however, the order discloses on the face of it that a stigma is cast on the Government servant or that it visits him with penal consequences, then plainly the case is one of punishment. There may still be another kind of case where although the termination of services is intended by way of punishment the order is framed as a termination simpliciter. In such a case, if the Government servant is able to establish by material on the record that the order is in fact passed by way of punishment, in innocence of the language in witch the order is framed will not protect it if the procedural safeguards contemplated by Article 311(20 of the Constitution have not been satisfied. In a given case, the Government servant may succeed in making out a prima facie case that the order as by way of punishment but an attempt to rebut the case by the authorities may necessitate sending for the official records for the purpose of determinating the truth. It is in such a case generally that the official records may be called for by the court. It is not open to the court to send for the official records on a mere allegation by the Government servant that the order is by way of punishment. For unless there is material on the record before the court in support of that allegation an attempt by the court to find out from the record whether the termination of service is based on the unsociability of the Government servant in relation to the post held by him or is in reality of order by way of punishment will in effect be an unwarranted attempt to delve into the official records for the purpose of determining the nature of the order on the basis of a mere allegation of the Government servant. On a sufficient case being made out on the merits before the Court by the Government servant it is open to the court to resort to scrutiny of the official records for the purpose of verifying the truth.

6. This Court has observed in Regional Manager v. Pawan Kumar Dubey thus : [SCC (L & S) p. 443, para 13]

> We do not think that Sughar Singh case in any way, conflicts with what has been laid

> down by this Court previously on article 311(2) of the Constitution or Article, 16 of the Constitution. We would, however, like to emphasize that, before Article 16 is held to have been violated by some action there must be a clear demonstration of discrimination between one Government servant and another, similarly placed, which cannot be reasonably explained except on an assumption or demonstration of "malice in law" or "malice in fact". As we have explained, acting on a legally extraneous or obviously misconceived ground of action would be a case of "malice in fact". Orders of reversion passed as a result of administrative exigencies, without any suggestion of malice in law or in fact, are unaffected by Sughar Singh case. They are not vitiated merely because some other Government servants, juniors in the substantive rank, have not been reverted.

7. After examining the record in Sughar Singh case, the learned Judges have observed : [SCC pp. 340-41 : SCC (L & S) p. 443, para 12]

> What weighed with this Court was not only that there was a sufficient "element of punishment" in reverting Sughar Singh for a supposed wrong done, from which the order of reversion could not be divorced, so that Article 31192) had to be complied with, but, there was also enough of an impropriety and unreasonableness in the action taken against Sughar Singh, solely for a very stale reason, which had become logically quite disconnected, to make out a case of "malice in law" even if it was not a case of "malice in fact".

8. The matter is also covered by a recent decision of this Court in Oil & Natural Gas Commission v. Dr. Mohd. S. Iskender Ali where one of us (Fazal Ali, J.) speaking for the court observed as follows : [SCC pp. 430, 431 & 432 : SCC (L & S) pp. 448, 449 & 450, paras 5, 7 & 9]

> As the respondent was temporary employee on probation, it was open to the employer to terminate his services at any time before he was confirmed, if the employer was satisfied that he was not suitable for being retained in service.

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The learned counsel for the respondent submitted that the remarks made in the assessment roll went to show that the intention of appointing authority was to proceed against the respondent by way of punishment. We are, however, unable too agree with this submission. It is obvious that a temporary employee is appointed on probation for a particular period only in order to test whether his conduct is good and satisfactory so that he may be retained. The remarks, in the assessment roll, merely indicate the nature of the performance put in by the officer for the limited purpose of determining whether or not his probation should be extended. These remarks were not intended to cast any stigma.

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In these circumstances, therefore, it is obvious that as the respondent was merely a probationer, the appointing authority did not consider it necessary to continue the enquiry but decided to terminate the services of the respondent as he was found suitable for the job. It is well settled by a long course of decisions of this Court that in the case of a probationer or a temporary employee, who has no right to the post, such a termination of his services is valid and does not attract the provisions of

Article 311 of the Constitution.

9. We agree with the learned Judges who constituted the Division Bench of the Kerala High Court that the respondent was only a temporary Government servant and that even as a temporary Government servant he is entitled to the protection of Article 311(2) of the Constitution where termination involves a stigma or amounts to punishment. We looked into the file relating to the respondent ending with the order of termination of his service (Ex. P-8). We are satisfied that the decision to terminate the services of the respondent had been taken at the highest level on the ground of unsuitability of the respondent in relation to the post held by him and it is not by way of any punishment and no stigma is attached to the respondent by reason of the termination of his services. In these circumstances we allow this appeal and set aside the judgment of the High Court and confirm the appellant's order, Ex. P-8, terminating respondent's services. The appellant shall bear his own costs and pay respondent's costs.

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