Hardeep Singh

Vs

State of Haryana and Others

Writ Petition (Civil) No. 1615 of 1986

(A. P. Sen, B. C. Ray JJ)

13.08.1987

ORDER

B. C. RAY, J. –

1. The petitioner who was appointed as a constable in the Haryana Police Force on November 7, 1979 has challenged in this writ petition the order dated August 24, 1982 issued by the Commandant, 2nd Bn. Haryana Armed Police, Madhuban on the ground that the impugned order of removal from service was in effect a penal order and as such the same being made without complying with the requirements of Article 311(2) as well as the Rule 16.24(ix)(b) of the Punjab Police Rules, 1934 is wholly arbitrary, illegal and unwarranted and so the impugned order is liable to be quashed and set aside and the petitioner to be reinstated service. The facts of the case in a nutshell are that the petitioner was enrolled as a constable in the Haryana Police Service in November, 1979 and he had been discharging his duties attached to his office duly and properly. The petitioner was a member of an unregistered Haryana Police Association. The said association had been canvassing for improvement in the service conditions of the police personnel serving with the Haryana Police and on several occasions made representations for improvement of the service conditions of the members of the police service. As a part of its campaign for improvement in service conditions, the association in the month of July gave a call to all its members to participate in "a non-taking of food campaign" which was to take place on August 15, 1982. On that day the petitioner and other police personnel numbering about 16,000 consisting of constables and head constables of Haryana Police Force attended to their duties but they did not take their food in the Mess. The protest undertaken by the Haryana police constables/head constables was a symbolic and peaceful one and no incident whatsoever had occurred on that day. The respondents, however issued order of dismissal/removal against 425 policemen under Rule 12.21 of the said Rules without serving on them any charge-sheet and without giving them any opportunity of hearing against the charges, prior to the passing of the said order of dismissal/removal from service. About 154 of such policeman challenged the order of their dismissal/removal from service in Writ Petition Nos. 9345 to 9498 of 1983 before this Court and the Constitution Bench of this Court after hearing, set aside the said order of dismissal from service and directed reinstatement in service without any break in their service. (Ajit Singh v. State of Haryana, 1984 Supp SCC 708 : 1985 SCC (L&S) 370)

2. The petitioner because of his activities in the Association was served with the impugned order of removal from service without being given any opportunity of hearing and without being asked to show cause against the purported order of dismissal from service. The petitioner has challenged the validity of this impugned order in this writ petition. A return has been filed on behalf of the respondents sworn by one Raj K. Vashishta, IPS, Commandant 2nd Bn. Haryana Armed Police, Madhuban, District Karnal, Wherein in paragraph 2 it has been stated that the impugned order is not

an order of dismissal from service and in fact is an order of discharge made under Rule 12.21 of the Punjab Police Rules 1934 as applicable in Haryana. It has been further stated in paragraph 3 of the said affidavit that the petitioner deliberately suppressed the facts that :

> (i) For his absence from duty, without leave for more than 24 hours with effect from October 25, 1980 he had been awarded 5 days PD.
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> (ii) Again he had been warned for absence without leave for five hours on April 21, 1981.
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> (iii) Notwithstanding the warnings and punishments awarded for absence from duty in 1980, and again in 1981, the petitioner did not show any improvements in his performance and conduct and again absented from duty on August 15, 1982.

3. It has also been stated that a recruit constable who within a span of three years of his enrolment repeatedly absents from duty and does not improve himself in spite of warnings, is not likely to prove an efficient police officer.

4. It has further been averred in the said affidavit that the petitioner was discharged because the appointing authority (Superintendent of Police) was of considered opinion on due assessment of his conduct and performance that he was unlikely to prove an efficient police officer. These averments have been verified as correct according to the information derived from the official records and believed by the deponent to be true.

5. There is no dispute that the petitioner was enrolled as a constable with effect from November 7, 1979 and he was on probation which is for a period of three years. It is also well settled that a probationer has no right to the post and if he is found by the concerned authorities to be unsuitable for the post during the probation period his service may be done away with. But nonetheless such a probationer has a right to have an opportunity of hearing against the order of dismissal/removal from service if the same is made in effect by way of punishment or the same casts a stigma on the service career of the petitioner. In other words if the order of dismissal/removal from the service is not one simpliciter on the ground that his service is no longer required but in substance and in effect the same is made by way of punishment, the probationer like the petitioner who has no right to the post is to be given an opportunity of hearing. If such an order of dismissal/removal from service is made without following the procedure envisaged in Article 331(2) of the Constitution of India as well as Rule 16.24(ix)(b) of the Punjab Police Rules, 1934 the same will be illegal and bad and liable to be quashed. This position has been well settled by this Court in the case of P. L. Dhingra v. Union of India (AIR 1958 SC 36, 41, 48, 49 : (1958) 1 LLJ 544) wherein it has been observed as under :

Passing on to Article 311 we find that it gives a twofold protection to persons who come within the article, namely, (1) against dismissal or removal by an authority subordinate to that by which they were appointer and (2) against dismissal or removal or reduction in rank without giving them a reasonable opportunity of showing cause against the action proposed to be taken in regard to them. Incidentally it will be noted that the word "removed" has been added after the word "dismissed" in both clauses (1) and (2) of Article 311. Upon Article 311 two question arise, namely, (a) who are entitled to the protection and (b) what are the ambit and scope of the protection ?

> .....Shortly put, the principle is that when a servant has right to a post or to a rank

> either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant or his reduction to a lower post is by itself and prima facie a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. Bur if the servant has no right to the post, as where he is appointed to a post, permanent or temporary either on probation or on an officiating basis and whose temporary service has not ripened into a quasi-permanent service as defined in the Temporary Service Rules, the termination of his employment does not deprive him of any right and cannot, therefore, by itself be a punishment. One test for determining whether the termination of the service of a government servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post. If he had a right to the post as in the three cases hereinbefore mentioned, the termination of his service will by itself be a punishment and he will be entitled to the protection of Article 311.
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> .....But even if the government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complies with.

6. In the case of Samsher Singh v. State of Punjab (AIR 1974 SC 2192 : (1974 2 SSC 831 : 1974 SCC (L&S) 550) it has been observed as under : (SCC p. 851, para 63)

No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution.

7. It has been further observed that the form of the order may be innocuous but if the order is really by way of punishment then the protection under Article 311(2) will come into play and the probationer will be entitled to have an opportunity of hearing before the impugned order of dismissal/removal from service is made. The substance of the order and not the form could be decisive.

8. In a later decision of this court i.e. Anoop Jaiswal v. Government of India (AIR 1984 SC 636 : (1984) 2 SCC 369 : 1984 SCC (L&S) 226) following the aforesaid two decisions this Court has observed that : (AIR headnote) (SCC pp. 378-79, paras 11 and 12)

The form of the order is not decisive as to whether the order is by way of punishment and that even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311(2). Where the form of the order

is merely a camouflage for an order of dismissal for misconduct 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 is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.

9. in the instant case it is clear and evident from the averments made in paragraph 3, sub-para (i) to (iii) and paragraph (v) of the counter-affidavit that the impugned order of removal/dismissal from service was in substance and in effect an order made by way of punishment after considering the service conduct of the petitioner. There is no doubt that the impugned order casts a stigma on the service career of the petitioner and the order being made by way of punishment, the petitioner is entitled to the protection afforded by the provisions of Article 311(2) of the Constitution as well as by the provisions of Rule 16.24(ix)(b) of the Punjab Police Rule, 1934. the petitioner has not been served with any charges of misconduct in discharge of his duties as a police constable nor has he ever been asked to show cause against the said charges. The order of removal from service was made because of his union activities namely participating in the call for expressing the protest of the association for improvement in service conditions by abstaining from taking meals in the Mess on August 15, 1982 although the petitioner like other members of the association perform his duties on that day and did not abstain from duty. It cannot be said in the facts and circumstances of the case that the impugned order is an order simpliciter of removal from service of a probationer in accordance with the terms and conditions of the service. The impugned order undoubtedly, tantamounts to dismissal from service by reason of misconduct of the petitioner in discharge of the official duties as police constable. This matter is fully covered by the decision dated October 17, 1984 of the Constitution Bench in Ajit Singh v. State of Haryana (Ajit Singh v. State of Haryana, 1984 Supp SCC 708 : 1985 SCC (L&S) 370) and we are bound to follow the same.

10. In the premises aforesaid the writ petition succeeds and is allowed, the impugned order of discharge of the petitioner from Haryana Police Force under Rule 12.21 of the Punjab Police Rules, 1934 passed by the Commandant, 2nd Bn., Haryana Armed Police is quashed and it is directed that he be reinstated in service with 50 per cent back wages from the date of termination of his service till the date of his reinstatement. He would, however, be entitled to his full salary and other allowances admissible with effect from the date of his reinstatement. It is further directed that there would be no break in continuity of service for purposes of seniority and pensionary benefits. No costs.

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