

State of Uttar Pradesh and Another

Vs

Kaushal Kishore Shukla

Civil Appeal (Civil) No. 137 of 1991

(K. N. Singh, N. D. Ojha, P. B. Sawant JJ)

11.01.1991

JUDGMENT

K. N. SINGH, J. –

1. Leave granted.

2. This appeal is directed against the judgment of the Allahabad High Court (Lucknow Bench) setting aside the order dated September 23, 1980 terminating the respondent's services.

3. The sole question which falls for consideration in this appeal is whether the order dated September 23, 1980 terminating the respondent's services, who was admittedly an ad-hoc and temporary employee is vitiated in law. The High Court has held that since juniors to the respondent were retained in service while the respondent's services were terminated, the order of termination was discriminatory in nature. It further held that since the order of termination was founded on an adverse entry awarded to the respondent in his character roll without giving him any opportunity on the ground that he was not suitable, the order "cannot be said to be a decision given in good faith". The High Court further observed : "Even if any punishment was to be awarded, it should have been proportionate to the alleged offence, if any." On these findings the High Court held that the order of termination suffered from apparent error of law; it accordingly allowed the respondent's writ petition and quashed the order of termination.

4. The factual matrix of the case is in a short compass. The respondent, was appointed on ad-hoc basis on February 18, 1977 as an Assistant Auditor under the Local Funds Audit Examiner of the State of Uttar Pradesh, for a fixed period ending on August 31, 1977. In December 1977 the respondent was again appointed on an ad-hoc basis for a period ending on February 28, 1978. Since the regular appointment could not be made in time, the respondent's services were extended from time to time. The last extension was granted on January 21, 1980 and the extended period of service was to expire on February 28, 1981. The terms and conditions of respondent's service as contained in the order of appointment stated that the appointment was ad-hoc, purely temporary for the term fixed in the order and his services were liable to be terminated at any time without assigning any reason. He was awarded an adverse entry in his character roll for the year 1977-78. The entry stated that the respondent's work was poor and he should work hard and take interest in the work. The respondent made representation against the entry but the same was rejected. The respondent and Rajendra Prasad Pandey another Sub-Auditor both were deputed to audit the accounts of Raja Raghubar Dayal Inter College, Sitapur for the year 1979-80. While carrying on the audit the respondent and Rajendra Prasad Pandey both are alleged to have acted in excess of their authority in auditing the "Boys Fund Accounts" of that college for the year 1978-79 on their own accord without any

authority in for the same. They issued audit note under their own signatures and also irregularly demanded a high amount of Rs. 13,250.70 as audit fee and collected an amount of Rs. 2000 as audit fee for which they issued receipts under their own signatures. On receipt of complaint a preliminary inquiry was held and it was found that the allegations against the respondent and Rajendra Prasad Pandey were correct and both of them had acted beyond their authority and collected a sum of Rs. 2000 as audit fee for the audit of the Boys Fund Accounts, although the Boys Fund of the institution did not fall within the purview of audit of the Local Funds Audit and no fee was chargeable for the audit of such Fund. After the preliminary inquiry report, the respondent was relieved from his duties from Sitapur and directed to join his duties at Allahabad, but the respondent proceeded on leave and did not join his duties at Allahabad. Ultimately, the respondent's services were terminated by the order dated September 23, 1980 and on the same day by another order, services of Rajendra Prasad Pandey were also terminated. Both the aggrieved persons filed writ petitions in the High Court at Lucknow Bench under Article 226 of the Constitution contending that their termination orders were illegal, having been passed in violation of Article 311 of the Constitution. The writ petition filed by Rajendra Prasad Pandey was dismissed but the respondent's writ petition was allowed by a Division Bench of the High Court on the ground as noted earlier.

5. There is no dispute that the respondent was an ad-hoc and temporary employee and the terms and conditions of his employment were regulated by the U.P. Temporary Government Servants (Termination of Services) Rules, 1975. The contract of service as contained in the appointment letter also stipulated the terms and conditions of the respondent's employment that his services were liable to be terminated at any time without assigning any reason or compensation. In the counter-affidavit filed before the High Court the order of termination was defended on the ground that the respondent's work and conduct were not satisfactory and he was unsuitable for the service, therefore his services were terminated. To support that contention the appellant placed reliance on the adverse entry awarded to the respondent in the year 1977-78 and also on the allegations made against him with regard to the audit of the Boys Fund of Raja Raghubar Dayal Inter College. The High Court held that since junior persons to the respondent in service were retained, the order of termination was rendered illegal. In our opinion, the principle of 'last come first go' is applicable to a case where on account of reduction of work or shrinkage of cadre retrenchment takes place and the services of employees are terminated on account of retrenchment. In the event of retrenchment the principle of 'last come first go' is applicable under which senior in service is retained while the junior's services are terminated. But this principle is not applicable to a case where the services of a temporary employee are terminated on the assessment of his work and suitability in accordance with terms and conditions of his service. If out of several temporary employees working in a department a senior is found unsuitable on account of his work and conduct, it is open to the competent authority to terminate his service and retain the service of juniors who may be found suitable for the service. Such a procedure does not violate principle of equality, enshrined under Articles 14 and 16 of the Constitution. If a junior employee is hardworking, efficient and honest his services could not be terminated with a view to accommodate the senior employee even though he is found unsuitable for the service. If this principle is not accepted there would be discrimination and the order of termination of a junior employee would be unreasonable and discriminatory. On the admitted set of facts, the order of termination in the instant case, could not be rendered illegal or unjustified on the ground of juniors being retained in services. The view taken by the High Court is not sustainable in law.

6. The High Court held that the termination of respondent's services on the basis of adverse entry in the character roll was not in good faith and the punishment imposed on him was disproportionate. It is unfortunate that the High Court has not recorded any reasons for this conclusion. The respondent

had earned an adverse entry and complaints were made against him with regard to the unauthorised audit of the Boys Fund in an educational institution, in respect of which a preliminary inquiry was held and thereupon, the competent authority was satisfied that the respondent was not suitable for the service. The adverse entry as well as the preliminary inquiry report with regard to the complain of unauthorised audit constituted adequate material to enable the competent authority to form the requisite opinion regarding the respondent's suitability for service. Under the service jurisprudence a temporary employee has no right to hold the post and his service are liable to be terminated in accordance with the relevant service rules and the terms of contract of service. If on the perusal of the character roll entries or on the basis of preliminary inquiry on the allegations made against an employee, the competent authority is satisfied that the employee is not suitable for the service whereupon the services of the temporary employee are terminated, no exception can be taken to such and order of termination.

7. A temporary government servant has no right to hold the post, his services are liable to be terminated by giving him one month's notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary government servants. A temporary government servant can, however, be dismissed from service by way of punishment. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If it decides to take punitive action it may hold a formal inquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article 311 of the Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant, very often, the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. It is now well settled that the form of the order is not conclusive and it is open to the court to determine the true nature of the order. In *Parshotam Lal Dhingra v. Union of India* (1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544), a Constitution Bench of this Court held that the mere use of expressions like 'terminate' or 'discharge' is not conclusive and in spite of the use of such expressions, the court may determine the true nature of the order to ascertain whether the action taken against the government servant is punitive in nature. The court further held that in determining the true nature of the order the court should apply two tests namely : (1) whether the temporary government servant had right to the post to 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 order of termination of a temporary government servant is by way of punishment. It must be borne in mind that a temporary government servant has no right to hold the post and termination of such a government servant does not visit him with any evil consequences. The evil consequences as held in *Parshotam Lal Dhingra* case (1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544) do not include the termination of services of a temporary government servant in accordance with the terms and conditions of service. The view taken by the Constitution Bench in *Dhingra* case (1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544) has been reiterated and affirmed by the Constitution Bench decisions of this Court in *State of Orissa v. Ram Narayan Dass* ((1961) 1 SCR 606 : AIR 1961 SC 177 : (1961) 1 LLJ 552); *R.C. Lacy v. State of Bihar* (C.A. No. 590/62 decided on October 23, 1963 (SC)); *Champaklal Chimanlal Shah v. Union of India* ((1964) 5 SCR 190 : AIR 1964 SC 1854 : (1964) 1 LLJ 752); *Jagdish Mitter v. Union of India* (AIR 1964 SC 449 : (1964) 1 LLJ 418 : 1964 Cur LJ (SC) 66); *A.G. Benjamin v. Union of*

India ((1967) 1 LLJ 718); Shamsheer Singh v. State of Punjab ((1974) 2 SCC 831 : 1974 SCC (L & S) 550 : (1975) 1 SCR 814). These decisions have been discussed and followed by a three Judge Bench in State of Punjab v. Sukh Raj Bahadur ((1968) 3 SCR 234 : AIR 1968 SC 1089 : (1970) 1 LLJ 373 : 1968 Cri LJ 687).

8. Learned counsel for the respondent urged that the allegations made against the respondent in respect of the audit of Boys Fund of an educational institution were incorrect and he was not given any opportunity of defence during the inquiry which was held ex parte. Had he been given the opportunity, he would have placed correct facts before the inquiry officer. His services were terminated on allegation of misconduct founded on the basis of an ex parte enquiry report. He further referred to the allegations made against the respondent in the counter-affidavit filed before the High Court and urged that these facts demonstrate that the order of termination was in substance, an order of termination founded on the allegations of misconduct, and the ex parte enquiry report. In order to determine this question, it is necessary to consider the nature of the respondent's right to hold the post and to ascertain the nature and purpose of the inquiry held against him. As already observed, the respondent being a temporary government servant had no right to hold the post, and the competent authority terminated his services by an innocuous order of termination without casting any stigma on him. The termination order does not indict the respondent for any misconduct. The inquiry which was held against the respondent was preliminary in nature to ascertain the respondent's suitability and continuance in service. There was no element of punitive proceedings as no charges had been framed, no inquiry officer was appointed, no findings were recorded, instead a preliminary inquiry was held and on the report of the preliminary inquiry the competent authority terminated the respondent's services by an innocuous order in accordance with the terms and conditions of his service. Mere fact that prior to the issue of order of termination, an inquiry against the respondent in regard to the allegations of unauthorised audit of Boys Fund, was held does not change the nature of the order of termination into that of punishment as after the preliminary inquiry the competent authority took no steps to punish the respondent instead it exercised its power to terminate the respondent's services in accordance with the contract of service and the Rules.

9. In State of Orissa v. Ram Narain Dass ((1961) 1 SCR 606 : AIR 1961 SC 177 : (1961) 1 LLJ 552), a Constitution Bench of this Court considered the question and indicated "the fact of the holding of an inquiry is not decisive of the question. What is decisive is whether the order is by way of punishment, in the light of the tests laid down in Parshotam Lal Dhingra Case (1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544)".

10. In Jagdish Mitter case (AIR 1964 SC 449 : (1964) 1 LLJ 418 : 1964 Cur LJ (SC) 66) a Constitution Bench of this Court held that every order terminating the services of a temporary public servant does not amount to dismissal or removal from service merely because an inquiry was held before the order of termination was passed. The court observed that the appropriate authority has power to terminate a temporary public servant either by discharging him under the terms of contract or the relevant rules or by holding departmental disciplinary inquiry and dismissing him from service. Before passing order of termination the competent authority may hold inquiry in fairness to ascertain whether the temporary servant should be continued in service or not. While discussing the nature of preliminary inquiry the court observed as under : (AIR p. 453, para 11).

"There is no element of punitive proceedings in such an enquiry; the idea in holding such an enquiry is not to punish the temporary servant but just to decide whether he deserves to be continued in service or not. If as a result of such an enquiry, the

authority comes to the conclusion that the temporary servant is not suitable to be continued, it may pass a simple order of discharge by virtue of the powers conferred on it by the contract or the relevant rule; in such a case, it would not be open to the temporary servant to invoke the protection of Article 311 for the simple reason that the enquiry which ultimately led to his discharge was held only for the purpose of deciding whether the power under the contract or the relevant rule should be exercised and the temporary servant discharged."

In Champaklal Chimanlal Shah case ((1964) 5 SCR 190 : AIR 1964 SC 1854 : (1964) 1 LLJ 752) the appellant therein was a temporary employee of the Union Government. His services were terminated without assigning any reasons and without affording him opportunity of showing cause. Before passing the order of termination the competent authority had issued a notice to Champaklal Chimanlal Shah calling upon him to explain certain irregularities and to show cause why disciplinary action should not be taken against him. In response to the notice, he submitted his explanation thereupon, certain preliminary enquiries were held, but he was not given opportunity to place his case during the preliminary enquiry. However, after the preliminary enquiry no regular departmental enquiry was held instead proceedings for departmental enquiry were dropped and the services of Chimanlal Shah were terminated in accordance with the terms and conditions of service of a temporary government servant. The termination order was assailed on the ground that the order of termination was in substance an order of punishment. The Constitution Bench held that the order of termination was not an order of punishment and the appellant was not entitled to the protection of Article 311(2) of the Constitution. The court emphasised that when a preliminary enquiry is held against a temporary government employee, it must not be confused with the regular departmental inquiry which usually follows the preliminary inquiry, after the government decides to frame charges and to get a departmental enquiry made, with a view to inflict one of the three major punishments on the government servant. So far as the preliminary enquiry is concerned, there is no question of it being governed by Article 311(2) of the Constitution, as it is made for the purpose of collection of facts to enable the competent authority to decide whether punitive action should be taken or action should be taken in terms and under the contract of service or the rules applicable to a temporary government servant. A government servant has no right to insist for affording him opportunity during such enquiry and such an ex-parte enquiry is not vitiated in law in view of the purpose and object of preliminary enquiry. On an elaborate discussion, the court observed as under : (SCR pp. 206-07)

"In short a preliminary enquiry is for the purpose of collection of facts in regard to the conduct and work of a government servant in which he may or may not be associated so that the authority concerned may decide whether or not to subject the servant concerned to the enquiry necessary under Article 311 for inflicting one of the three major punishments mentioned therein. Such a preliminary enquiry may even be held ex-parte, for it is merely for the satisfaction of government, though usually for the sake of fairness, explanation is taken from the servant concerned even at such an enquiry. But at that stage he has no right to be heard for the enquiry is merely for the satisfaction of the government, and it is only when the government decides to hold a regular departmental enquiry for the purposes of inflicting one of the three major punishments that the government servant gets the protection of Article 311 and all the rights that protection implies as already indicated above. There must therefore be no confusion between the two enquiries and it is only when the government proceeds to hold a departmental enquiry for the purpose of inflicting on the government servant one of the three major punishments indicate in Article 311 that the

government servant is entitled to the protection of that article. That is why this Court emphasised in Parshotam Lal Dhingra case (1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544) and in Shyam Lal v. State of Uttar Pradesh ((1955) 1 SCR 26 : AIR 1954 SC 369) that 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 rule is irrelevant."

The above principles were reiterated by another Constitution Bench of this Court in the case of R.C. Lacy Case (C.A. No. 590/62 decided on October 23, 1963 (SC)) dealing with the case of reversion of a permanent government servant officiating on a higher post. The bench observed that the government might find it necessary to terminate the services of a temporary employee if it is not satisfied with the conduct or work of an employee and the same reasoning applies to a public servant who is reverted from a higher post to his substantive lower post, if the higher post was held in a temporary nature. Before terminating the services of a temporary servant or reverting the person officiating in a higher post to his substantive post, the government may hold a preliminary enquiry to form the requisite satisfaction for the continuance of the officiating government servant. Such an inquiry does not change the nature of the order of the termination or reversion.

11. In A.G. Benjamin Case ((1967) 1 LLJ 718) the appellant was temporarily employed as a Store Officer in the Central Tractor Organisation, his services were terminated under the Central Civil Service (Temporary Service) Rules, 1949 by granting him one month's salary in lieu of notice. A.G. Benjamin contended that the order of termination was in fact an order of punishment, which had been passed without affording him the protection under Article 311(2) of the Constitution. In that case before the issue of termination order, a notice had been issued to Benjamin for showing cause as to why disciplinary action should not be taken on the allegations made against him in respect of which the charges had been framed and an enquiry officer had been appointed. After the charges were framed and the explanation of Benjamin was obtained, the Chairman of the Central Tractor Organisation submitted a note to the government that the departmental proceedings may take much longer time and he was not sure that after going through all the formalities of departmental enquiry Benjamin will be dealt in the way he deserved, therefore, he suggested that action should be taken under Rule 5 of the Central Civil Service (Temporary Service) Rules, 1949 for terminating his services by giving him one month's salary in lieu of notice as he was a temporary government servant. The Minister concerned accepted the recommendations, whereupon, order of termination was issued terminating the service of Benjamin. While assailing the order of termination, it was seriously contended before this Court that in view of the charges being framed and the enquiry officer having been appointed the order of termination in substance was an order of punishment and the recourse to the temporary service rules had been taken only to circumvent Article 311 of the Constitution. The Constitution Bench repelled the contention and held that the preliminary enquiry held against the government servant must not be taken to mean that the government had taken decision to inflict major punishment on Benjamin. The court held that no temporary government servant is entitled to opportunity in the preliminary inquiry as "there is no element of punitive proceedings in such an inquiry; the idea in holding such an inquiry is not to punish the temporary Government servant but just to decide whether he deserves to be continued in service or not." (Supra note 6 at p. 722). Further the Constitution Bench held that even if formal departmental inquiry is initiated against the temporary government servant, it is open to the competent authority to drop further proceedings in the departmental enquiry against the temporary government servant and to have recourse to rules applicable to a temporary government servant for terminating his services. The court observed as under : (LLJ p. 722)

"If therefore, the authority decides, for some reason, to drop the formal departmental enquiry even though it had been initiated against the temporary Government servant, it is still open to the authority to make an order of discharge simpliciter in terms of the contract of service or the relevant statutory rule. In such cases the order of termination of services of the temporary Government servant which in form and in substance is no more than his discharge effected under the terms of contract or the relevant rule, cannot, in law, be regarded as his dismissal, because the appointing authority was actuated by the motive that the said servant did not deserve to be continued in service for some alleged inefficiency or misconduct."

We have referred to the above decisions in detail to dispel any doubt about the correct position of law. It is erroneous to hold that where a preliminary enquiry into allegations against a temporary government servant is held or where a disciplinary enquiry is held but dropped or abandoned before the issue of order of termination, such order is necessarily punitive in nature.

12. Learned counsel for the respondent placed reliance on the decisions of this Court in *Nepal Singh v. State of U.P.* ((1985) 1 SCC 56 : 1985 SCC (L & S) 1) and *Ishwar Chand Jain v. High Court of Punjab & Haryana* ((1988) 3 SCC 370 : 1988 SCC (L & S) 797) in support of his contention that the termination order is punitive in nature. In *Nepal Singh* case ((1985) 1 SCC 56 : 1985 SCC (L & S) 1) a disciplinary inquiry was instituted against Nepal Singh who was a temporary Sub-Inspector of Police, on the charge of having contracted a second marriage during the lifetime of his first wife without prior permission of the government in violation of Rule 29 of the U.P. Government Servants' Conduct Rules, 1956. Before any finding could be rendered the inquiry was dropped for want of territorial jurisdiction of the concerned Superintendent of Police, and thereafter, his services were terminated in accordance with the rules applicable to the temporary government servants by giving him one month's pay in lieu of notice. Nepal Singh unsuccessfully challenged the order of termination before the High Court, but his appeal was allowed by a three Judge bench of this Court. This Court quashed the order of termination on three grounds. Firstly, it held that the order of termination was arbitrary, violative of Articles 14 and 16 of the Constitution as power of termination had not been exercised honestly, in good faith for valid considerations. Secondly, the grounds mentioned in the report of the Superintendent of Police on the basis of which the services of the Sub-Inspector had been terminated were mere allegations and there was no definite material for terminating his services. Thirdly, the court held that since the inquiry against Nepal Singh on the charges had been dropped for want of jurisdiction and since no attempt was made to institute a proper inquiry, instead his services were terminated on the allegation of misconduct the order of termination was violative of Article 311(2) of the Constitution. The court further held that the termination order had been passed to circumvent the constitutional provision of Article 311(2) of the Constitution. The facts and circumstances in *Nepal Singh* case ((1985) 1 SCC 56 : 1985 SCC (L & S) 1) were quite different than those in the instant case. However, *Nepal Singh* case ((1985) 1 SCC 56 : 1985 SCC (L & S) 1) is no authority for the proposition that the service of an ad-hoc and temporary employee cannot be terminated even if the competent authority on an assessment of the work and the conduct of the employee finds him unsuitable for the service. The court's observations in *Nepal Singh* case ((1985) 1 SCC 56 : 1985 SCC (L & S) 1) that since the enquiry against Nepal Singh on certain charges was dropped and his services were terminated under the rules applicable to the temporary government servant with a view of circumvent the protection of Article 311(2) of the Constitution and as such the order of termination was illegal, must be confined to the facts of that case. It appears that the decisions in the case of *Champaklal* ((1964) 5 SCR 190 : AIR 1964 SC 1854 : (1964) 1 LLJ 752) and *R.C. Lacy* (C.A. No. 590/62 decided on October 23, 1963 (SC)) and the principles laid down therein were not brought to the notice of the bench. Had those decisions

been placed before the court, the finding that the termination order had been passed to circumvent the provision of Article 311(2) merely because departmental inquiry was dripped and the termination order had been passed, may not have been made. The decision of Nepal Singh case ((1985) 1 SCC 56 : 1985 SCC (L & S) 1) in this regard is per incuriam. In Ishwar Chand Jain case ((1988) 3 SCC 370 : 1988 SCC (L & S) 797), the order of termination of Probationary Judicial Officer was set aside by this Court on the ground that no relevant material had been taken into consideration in assessing the satisfactory nature of the work and conduct of the officer on probation. The court held that some of the material which had been taken into account in adjudging the Judicial Officer's work and conduct as unsatisfactory was not relevant. The decision has no relevance to the instant case. We are, therefore, of the opinion that neither of the two cases relied upon by the respondent lend any support to his case. On the other hand our view is fully supported by the decision of three Judge bench of this Court in R.K. Misra v. U.P. State Handloom Corpn. Ltd. (1987 Supp SCC 739 : 1988 SCC (L & S) 361 : (1988) 1 SCR 501)

13. In the instant case the respondent was a temporary government servant and there was adverse report regarding his work which was reflected in the adverse remarks made for the year 1977-78. The competent authority held a preliminary inquiry in the allegations of improper conduct in carrying out unauthorised audit of Boys Fund of an educational institution, on result of the preliminary enquiry no charges were framed against the respondent, no officer was appointed for holding the departmental inquiry instead the competent authority close to terminate the respondent's service in exercise of its power under the terms of contract as well as under the relevant rules applicable to a temporary government servant. It never intended to dismiss the respondent from service. Holding of preliminary inquiry does not affect the nature of the termination order. The allegations made against the respondent contained in the counter-affidavit by way a defence filed on behalf of the appellants also do not change the nature and character of the order of termination. The High Court failed to consider the question in proper perspective and it interfered with the order of termination in a casual manner.

14. We, accordingly, allow the appeal and set aside the order of the High Court and dismiss the respondent's writ petition. There will be no order as to costs.

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