Om Prakash Goel

Vs

Himachal Pradesh Tourism Development Corporation Ltd., Shimla and another

S.L.P. (Civil) No. 13560 of 1983

(S. R. Pandian, K. Jayachandra Reddy JJ)

06.05.1991

JUDGEMENT

K. JAYACHANDRA REDDY, J.:-

1.The petitioner was directly appointed as an Accountant in the Himachal Pradesh Tourism Development Corporation Ltd. ('Corporation' for short) on 28-8-78. He was on probation in the Transport Wing of the Corporation. After training he was transferred to the Office of the Area Manager, Simla and was posted as an Accountant. His conditions of service were governed by the Regulations made by the Board of Directors of the Corporation. The petitioner detected certain irregularities in the Transport Wing and wrote a letter dated 19-6-1980 to the Transport Officer pointing out the financial irregularities and embezzlements committed by the then Cashier. The employees' Union took up the matter and demanded the Management to take necessary action and also made some demands on behalf of the Union. The petitioner was the General Secretary of the Union. In April 1980, the respondent No. 2 was posted as the new Managing Director. According to the petitioner he was annoyed with the petitioner because of his union activities. It is stated that the petitioner actively participated in highlighting the demands. On 13-5-1981 an order transferring the petitioner, to Dalhousie was passed, even though the petitioner had been earlier granted permission on 23-7-1979 to do his 3 years Law course as an evening student. The petitioner made a representation for cancellation of the transfer on the ground that he was already half way through his legal study and that the transfer was mala fide. Respondent No. 2 got more annoyed. The petitioner submitted a study leave application for one year. But he was granted only 90 days leave in the first instance with full pay and allowances and later on half pay and subsequently without pay he was granted extraordinary leave. Meanwhile, a charge-sheet was issued on 21st August, 1981 framing certain charges. The gravamen of the charges is that while working in the Transport Wing of the Corporation the petitioner facilitated and abetted the embezzlement of Rs. 100/by not ensuring that the amount found was in excess and that he failed to serve the Corporation honestly and faithfully. The other charge is that he made some fictitious entries in the Cash Book and the fourth charge is that he made certain information public without the permission of the Managing Director. To this the petitioner submitted a reply stating that all the charges are fake and false. It is stated that the petitioner's leave was cancelled and the petitioner challenged the same in the High Court of Himachal Pradesh but the case was adjourned. Meanwhile the petitioner's services were terminated with effect from 8th January, 1982 stating that they are no longer required and one month's pay in lieu of notice would be paid in terms and conditions of his appointment letter and provisions of Staff Regulations of the Corporation. The petitioner challenged the same before the High Court, but the writ petition was dismissed in limine. In this Court it is urged that the termination is only a camouflage and that though the petitioner was still a temporary servant yet the termination amounted to punishment because of the manner in which it was passed and the

background behind it.

2. It is not in dispute that the Corporation has power to terminate the services by giving one month's notice or pay in lieu thereof, in the case of a temporary employee who have completed one month's service. Regulation 19(3)(b) reads thus:

Termination of service by notice

> "19(3) TheCorporation may terminate the services of any employee by giving him:
>
> (a) xx xx xx xx
>
> (b) One month's notice, or pay in lieu thereof, in the case of temporary employees who have completed one month's service and one day's notice or pay in lieu thereof in the case of temporary employees in the first month of their services."

Regulation 39 prescribes various penalties that can be awarded and termination of service is one of them. Now the only question that arises for consideration in this case is whether the termination of the petitioner's services is simply one as per the Regulation 19(3) or in the nature of a camouflage and, therefore, amounts to punishment as contended by the petitioner.

3. In Anoop Jaiswal v. Govt. of India, (1984) 2 SCR 453 : (AIR 1984 SC 636) it is held as under:

> "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."

In Nepal Singh v. State of U. P., (1985) 2 SCR 1 : (AIR 1985 SC 84), it is held as under:

> "Where allegations of misconduct are levelled against a Government servant, and it is a case where the provisions of Art. 311(2) of the Constitution should be applied, it is not open to the competent authority to take the view that holding the enquiry contemplated by the clause would be a bother or a nuisance and that therefore it is entitled to avoid the mandate of that provision and resort to the guise of an ex facie innocuous termination order. The Court will view with great disfavour any attempt to circumvent the constitutional provision of Art. 311(2) in a case where that provision comes into play."

In Jarnail Singh v. State of Punjab, (1986) 2 SCR 1022 : (AIR 1986 SC 1626) it is held thus :

> "When an allegation is made by the employee assailing the order of termination as one based on misconduct though couched in innocuous terms, it is incumbent on the Court to lift the veil and to see the real circumstances as well as the basis and foundation of the order complained of. In other words, the Court in such a case, will lift the veil and will see whether the order was made on the ground of misconduct, inefficiency or not."

4. From the above decisions it can be seen that it is well settled that in a case of an order of termination even that of a temporary employee the Court has to see whether the order was made on the ground of misconduct if such a complaint was made and in that process the Court would examine the real circumstances as well as the basis and foundation of the order complained of and if the Court is satisfied that the termination of services is not so innocuous as claimed to be and if the circumstances further disclose that it is only a camouflage with a view to avoid an enquiry as warranted by Art. 311(2) of the Constitution, then such a termination is liable to be quashed. In the abovementioned decisions, the impugned termination order was accordingly quashed.

5. It is not in dispute that a regular charge-sheet was served on the petitioner, as mentioned above, on 21st August, 1981 and to the said charge-sheet a list of documents also was appended on the basis of which the articles of charges were framed. The petitioner replied to these charges on 7th September, 1981. Without reference to any of the charges or the reply the order of termination was passed on 8th January, 1982 as already mentioned. In the counter-affidavit at more than one place it is admitted about the framing of the charges etc. regarding the new,; item which refers to the information given out by the petitioner. It is stated in the counter affidavit that services of the petitioner were terminated as a probationer and not on the basis of the enquiry report which came after the services of the petitioner had been terminated. It can therefore be seen that an enquiry, in fact, was contemplated and was held but the report came into light after termination of the services of the petitioner. It is also submitted on behalf of the petitioner that the audit report would show many irregularities as pointed out by the petitioner and that the petitioner acted honestly in pointing out the irregularities. It is not necessary for us to go into this question. Having gone through the various records and also the, admissions made in the counter-affidavit, we are satisfied that the termination order, though appears to be innocuous, was only intended to punish the petitioner for the misconduct, in respect of the allegations which are mentioned in the charges that were served on him. After serving the charge-sheet, as a matter of fact, the enquiry was conducted. But before the conclusion of the enquiry the termination order was passed. Therefore it is not difficult to see that the form of the termination order is only a cloak for an order of punishment.

6. In this context, the learned counsel also questioned the termination order from another angle. In that order it is mentioned that the services of the petitioner are no longer required, therefore, they are terminated. But from the record it is clear that juniors to the petitioner are retained and they are continuing in service. In the affidavit it is clearly mentioned that juniors whose names are given there are retained in service in violation of Arts. 14 and 16 of the Constitution. In the counter-affidavit only a vague reply is given simply stating that the averments made by the petitioner are not correct. In K. C. Joshi v. Union of India, (1985) 3 SCR 869: (AIR 1985 SC 1046) it is observed that if it is discharged simpliciter, it would be violative of Art. 16, bec'ause a number of store-keepers junior to the appellant are shown to have been retained in the service". Likewise in Jarnail Singh's case (AIR 1986 SC 1626) it was observed as under (at p. 1635):

> "In the instant case, ad hoc services of the appellants have been arbitrarily terminated as no longer required while the respondents have retained other Surveyors who are juniors to the appellants. Therefore, on this ground also, the impugned order of termination the services of the appellants are illegal and paid being in contravention of the fundamental rights guaranteed under Arts. 14 and 16 of the Constitution of India."

After a careful perusal of the record we are satisfied that the juniors to the petitioner are retained. Therefore on this ground also the termination order is liable to be quashed.

7. Admittedly the petitioner has been practising as a lawyer eversince his services were terminated. In the rejoinder filed by him he merely stated that he was not earning much in that profession and that he has incurred debts. The learned counsel for the Corporation, however, submitted that since the petitioner was admittedly practising as a lawyer the question of granting him backwages in any event does not arise and that even otherwise there cannot be a roving enquiry to the earnings he has made as a lawyer at this distance of time. The petitioner, however, at this juncture filed a further affidavit that his total income from 1985 onwards up till now was only Rs. 15,550/- and that he has not received any other income during all these years. It is also submitted on his behalf that similar circumstances this Court awarde back wages even in a case of an employee who practised as a lawyer from the date of dismissal till his reinstatement. In S. M. Saiyad v. Baroda Municipal Corporation, (AIR 1984 SC 1829) the employee was directed to be reinstated in service by the labour Court. Then ultimately on the question of backwages it was urged before this Court that though the appellant was practising as a lawyer after. enrolment during that period still he was entitled for backwages. This Court accepted this plea and observed as under (at p. 1830):

> "The appellant seeks back wages for the period December 12, 1969 to October 26, 1976. This period according to the respondent has to be divided in two parts; (1) from December 12, 1969 to Jan., 20, 1972 when the appellant was enrolled as an advocate, and (2) for the period Jan. 21, 1976 to October'26, 1976 from which date he has already been awarded back wages, it was submitted on behalf of the respondent that the appellant himself has admitted that since his being enrolled as an advocate he was earning Rs. 1501- per month which aspect must be borne in mind while considering the submission of the appellant for the award of back wages.
>
> Partly accepting this plea this Court ultimately observed that the appellant therein must have at least started earning after a lapse of one year from the date on which he was enrolled as an advocate. Ultimately this Court directed that (at p. 183 l):
>
> "We, accordingly, allow this appeal and set aside the decision of the High Court refusing the back wages for the period December 12, 1969 to October 26, 1976 and directed that the appellant shall be entitled to back wages including salary and allowances and other benefits to which he would be entitled as if he had continued the service. While making the payment of back wages as per this order the respondent is entitled to deduct the amount of Rs. 150/- p.m. from January 20, 1973 to October 26, 1976 from the amount which becomes payable to the appellant. The respondent must compute the amount payable as herein directed and pay what becomes payable to the appellant within a period of two months from today."

It can therefore be seen that this Court did not refuse to grant back wages on the simple ground that the employee was a practising lawyer during the relevant period. But on the other hand it took into account the probable income and after deducting the same the balance of back wages was directed to be computed.

8. In the instant case in the affidavits filed by the petitioner it is stated that he was practising as an income-tax advocate ever since his enrolment in October, 1982. But, however, he asserted that he got his first brief in the year 1985. These averments are contradicted by the other side. Under these circumstances we cannot make a roving enquiry nor would it be possible for the Corporation to unearth the income which the petitioner would have derived as a practising advocate. There are many imponderables and conjectures too. Under these circumstances we asked both the counsel to

suggest a solution. We have heard both the sides on this aspect elaborately. Shri P. P. Rao, learned counsel for the petitioner submitted that even if the relevant period is to be treated as one of suspension pending enquiry the petitioner would have been entitled to the subsistence allowance till his reinstatement. That at least should be the criteria in granting the back wages in a situation like this. We think this is a reasonable and fair suggestion.

9. In the result the termination order is quashed and consequently the petitioner shall be reinstated in service. However, he shall be entitled to the full back wages up to the date of his enrolment as a lawyer which was in the month of October, 1982. From the date of his enrolment up to the date of reinstatement he shall be entitled to the back wages at the rate of half of the subsistence allowance per month and the total amount shall be computed on that basis. Out of that the income of Rs. 15,550/- admittedly earned by him as apractising lawyer shall be deducted and the balance amount shall be paid to the petitioner. The amount so paid to him shall, for the purpose of income-tax, be spread over as if derived during those financial years from the date of his dismissal till the date of reinstatement. However, we would like to make it clear that it is open to the Corporation to proceed with the disciplinary enquiry if it so chooses.

10. The special leave petition is accordingly disposed of. In the circumstances of the case there will be no order as to costs.

Order accordingly.

</html