State of U. P. and Another

Vs

Ram Krishna and Another

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Civil Appeals Nos. 4861-62 of 1999

(G. T. Nanavati, S. N. Phukan JJ)

31.08.1999

JUDGMENT

PHUKAN, J. –

1. Delay condoned. Leave granted.

2. Two appeals have been filed against the judgment and order dated 21-5-1997 of the High Court of Allahabad in Writ Petition (C) No. 7150 of 1993 as also against the order dated 27-2-1998 in review petition CMA No. 81970 of 1997. The High Court upheld the judgment and order dated 24-11-1992 passed by the U.P. Public Service Tribunal, Lucknow and the review petition filed by the present appellants was also dismissed by the High Court.

3. Respondent 1 Ram Krishna was appointed as Nalkoop Chalak w.e.f. 15-5-1977. As he was found absent from duty without obtaining leave a notice dated 26-7-1979 was given to him and then by an order dated 6-8-1979 his services were terminated with effect from 26-7-1979. His services were terminated by order dated 6-8-1979 w.e.f. 26-7-1979. The respondent filed a representation against the above order before the authority and on an assurance given by the respondent that he would not commit any mistake in future he was given a fresh appointment on 1-9-1979 for three months and again on 18-12-1979 for three months. As the respondent did not improve his work and again absented himself from duty without any application, his services were terminated by order dated 29-2-1980. He, therefore, approached the Tribunal and challenged both the orders of termination of his services. It was contended by the appellants before the Tribunal that the appointment of the respondent was purely on a temporary basis and his services were liable to be terminated at any time without notice. It was also contended before the Tribunal that the impugned order of termination did not cast any stigma and his services were not terminated by way of punishment but in accordance with the terms and conditions of the appointment.

4. The Tribunal took the view that the termination order dated 6-8-1979 was given back effect from 26-7-1979 i.e. it was passed with retrospective effect, therefore, the order was bad as it was not permissible in law. On this count the above termination order was set aside. The Tribunal, however, did not grant the relief that he continued in service after 6-8-1979. Regarding the second termination

order dated 29-2-1980 the Tribunal was of the view that it was not an order of termination simpliciter but it was stigmatic as it was passed on the ground that the respondent was an irresponsible employee and he was unauthorisedly absent. As no enquiry was held before passing the order, the second order of termination was held to be bad in law by the Tribunal and accordingly the Tribunal allowed the petition filed by the respondent and both the termination orders dated 6-8-1979 and 29-2-1980 were quashed.

5. The High Court was of the view that the appointment of the respondent w.e.f. 1-12-1979 on the post of Tubewell Operator was on a regular establishment. The High Court also recorded that the respondent according to the appellants did not make any improvement in his performance and being irresponsible, due to absence in work, his services were terminated. On these facts the High Court relying on the decision of this Court in D. K. Yadav v. J.M.A. Industries Ltd. ((1993) 3 SCC 259 : 1993 SCC (L&S) 723 : JT (1993) 3 SC 617) held that absence without leave is a misconduct and, therefore, as no opportunity was given to the respondent the termination was bad in law and accordingly the writ petition filed by the present appellants was dismissed.

6. We have heard Mr. A. K. Goel, learned Additional Advocate General of U.P. and Mr. R. B. Mehrotra, learned Senior Counsel for the parties.

7. The learned counsel for the respondent has drawn our attention to the letter dated 2-5-1977 and has urged that the respondent was appointed on a regular basis after being selected by the Selection Committee for the post of Tubewell Operator, therefore, it was a regular appointment and not temporary as contended by the appellants. On reading the same letter we find that the respondent was selected as "Training Tubewell Operator" and Condition 10 of the said letter clearly indicates that services of the respondent could be terminated at any time without notice. Therefore, the contention of the learned counsel that the respondent was appointed on a regular basis as a Tubewell Operator is not sustainable.

8. From the record we find that the second appointment dated 18-12-1979 is an office order issued by the Executive Engineer, Civil Division, Allahabad appointing the respondent as a Tubewell Operator purely on a temporary basis with the condition that his services could be terminated without any prior intimation. A copy of the letter was sent to the Assistant Engineer asking him to submit a progress report of the working capacity of the respondent to enable the Executive Engineer to take a decision regarding future course of action. In view of the above-expressed condition directing the Assistant Engineer to report regarding performance of the work of the respondent, we are of the opinion that it was not a regular appointment on a clear vacancy, but it was a temporary appointment for a period of three months and was made conditional upon his showing progress during that period. This appointment was to take effect from 1-9-1979 as the respondent was working from that date as a Tubewell Operator. In the second order of termination dated 29-2-1980 it was recorded that having made no improvement in work and being irresponsible the services of the respondent were not needed in the Department and, therefore, were terminated with immediate effect.

9. But as stated earlier, the Tribunal had not granted the relief that he continued in service even after 6-8-1979. The respondent had accepted his fresh appointment and, therefore, had to be treated as a fresh appointee. The Tribunal had also proceeded on that basis. Therefore, the nature of his earlier appointment and validity of the termination order need not be considered any further.

10. Now the question is whether the services of the respondent could be terminated as he did not

make any improvement in work and further he was found absent from work. From the appointment letter we find that the second appointment of the respondent was for a period of 3 months and this is also the finding of the High Court.

11. The High Court relied upon a decision in D. K. Yadav ((1993) 3 SCC 259 : 1993 SCC (L&S) 723 : JT (1993) 3 SC 617). That was a case of termination of services on the basis of standing orders in an industrial establishment. Therefore, in our opinion the ratio of that case is not applicable to the case of the respondent.

12. Our attention has been drawn to the five-Judge Bench decision of this Court in Jagdish Mitter v. Union of India (AIR 1964 SC 449 : (1964) 1 LLJ 418). The Bench reiterated the settled position of law that protection of Article 311 can be invoked not only by permanent public servants, but also by public servants who are employed as temporary servants, or probationers and so, if served with an order by which their services are terminated, and the order unambiguously indicates that the said termination is the result of punishment sought to be imposed upon them, they can invoke the protection of Article 311 claiming that the mandatory provisions of Article 311(2) have not been complied with. Regarding powers of the appropriate authority to terminate services of a temporary public servant it was held that it can either discharge him purporting to exercise its power under the terms of the contract or the relevant rule and in that case, it would be a straightforward and direct case of discharge and nothing more and, therefore, Article 311 does not get effected. The authority can also act under its power to dismiss a temporary servant and make an order of dismissal and in such an event Article 311 will apply and it would necessitate a formal departmental enquiry. In the opinion of the Bench while discharging a temporary government servant on probation sometimes enquiry may have to be made only to find out whether the temporary servant on probation should be continued in service or not, and in such an event such government servant will not be entitled to the protection of Article 311 as the enquiry was done only to find out the suitability of the person and there was no element of a punitive proceedings.

13. The learned counsel for the appellants has drawn our attention in State of U.P. v. Kaushal Kishore Shukla ((1991) 1 SCC 691 : 1991 SCC (L&S) 587 : (1991) 16 ATC 498). This Court, inter alia, held that a temporary government servant has no right to hold the post and where the competent authority is satisfied that the work and conduct of a temporary servant are not satisfactory or that his continuance in service is not in the 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. It is further held that if the services of a temporary government servant are terminated in accordance with the terms and conditions of services it will not visit him with any evil consequences. If on a perusal of the character roll entries or on the basis of a preliminary enquiry 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 an order of termination. If, however, the competent authority decides to take punitive action it may hold a formal enquiry by framing charge and giving opportunity to the government servant in accordance with Article 311(2) which is applicable to a temporary government servant.

14. The learned counsel for the respondent has drawn our attention to the case of Uptron India Ltd. v. Shammi Bhan ((1998) 6 SCC 538 : 1998 SCC (L & S) 1601). It was a case of unauthorised absence from duty and that too in case of an industrial establishment. Moreover the services of the employee were duly confirmed, Under the above facts this ratio is not applicable to the case in hand.

15. As we have already stated earlier, by the second appointment letter, the respondent was appointed only "for a period of three months purely on a temporary basis subject to termination without notice, therefore, we come to the conclusion that the respondent was not in regular government service. Moreover, his position w, as like that of a probationer. As during the period of service of the respondent the authority found that the services of the respondent were not satisfactory and accordingly terminated them, it cannot be said that the termination order was bad in law. This fact is sufficient us to hold that the impugned order was an order of termination simpliciter of a temporary, government, servant namely the respondent, therefore, the provisions of Article 311 would not be attracted.

16. Accordingly, the present appeals are allowed and the impugned orders of the High Court as well as of the Tribunal are set aside.

17. No order as to costs.