Director, State Cmlaviation, U.P.and Another Vs Mohd.Rizwan Khan

Court: Allahabad High Court (Lucknow Bench)

Date of Decision: Feb. 17, 2009

Acts Referred: Constitution of India, 1950 â€" Article 311(2)
Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975 â€" Rule 3(1)

Hon'ble Judges: H.L.Gokhale, CJ and Shishir Kumar, J

Final Decision: Dismissed

Judgement

H.L. Gokhale, C.J.
This appeal seeks to challenge the judgment and order of a learned Single Judge dated 22.7.1992 allowing the writ

petition filed by the respondent herein.

2. Mr. D.K. Arora, learned Additional Advocate General and Mrs. Sangeeta Chandra, learned Additional Chief Standing Counsel have appeared

for the appellants. Mr. Sandeep Dixit has appeared for the respondent herein.

3. The short facts leading to this appeal are this wise. The respondent herein was appointed as a Daily Wage Cleaner under the Directorate of Civil

Aviation and was brought on pay scale in December, 1983. In June, 1984, he was promoted to the post of Junior Clerk since the person in that

post one S.M. AN was promoted to the post of Senior Clerk. The promotion order specifically stated that this was a temporary promotion. He

was further promoted to the post of Flight Clerk, which was also a temporary promotion though in the pay scale of Rs.430685 with effect from

1.2.1985. It is during this service as Flight Clerk that the respondent was issued warnings and notices with respect to his work on a few occasions.

Ultimately, his services were discontinued by an order of termination simplicitor dated 11.2.1986 by giving him one month"s pay in lieu of one

month"s notice.

4. Being aggrieved by this termination, he filed a writ petition bearing No. 1447 of 1986, which came to be allowed by a learned Single Judge,

vide judgment and order dated 22.7.1992. The learned Single Judge took the view that the successive notices and chargesheets issued to the

respondent amounted to a foundation for a misconduct and, therefore, a fullfledged enquiry was required within the meaning of Article 311 (2) of

the Constitution of India and in consonance with the principles of natural justice.

5. Being aggrieved by that judgment and order, this appeal has been filed. The appeal was allowed by a Division Bench of this Court by a short

order just referring to three judgments of the Apex Court in the cases of (j) MathewP. Thomas v. Kerala State Civil Supply Corporation Ltd.,

(2003) 3 SCC 263, (ii) Pavanenora Narayan Verma v. Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow, (2002) 1 SCC

520 and (iii) Dipti Prakash Banerjee v. S. N. Bose National Centre for Basic Sciences, Calcutta, (1999) 3 SCC 60. The respondent carried the

matter to the Apex Court. The Apex Court interfered with the order passed by the Division Bench of this Court for the reason that reasons were

not given in the judgment as to how the ratio of these judgments applied to the present case. The matter was sent down to this Court to decide it

afresh.

6. Mr. Arora, learned Counsel appearing for the appellants submitted that the status of the respondent at all material times was of a temporary

employee. In the post, which he occupied as a Flight Clerk, he was not in any permanent capacity. As per Annexure C1 to the counter affidavit

filed on behalf of the appellants before the learned Single Judge, the tenure of post on which the respondent was working was extended and was

available until 28.2.1986. Prior thereto he has been terminated from his service by the order dated 11.2.1986. He submitted that there was no

stigma attached in the termination of the respondent and that the termination was fully permissible under Rule 3 (1) of the D.P. Temporary

Government Servants (Terminationof Service) Rules, 1975 (hereinafter referred to as ''Rules, 1975''). For the sake of record, we reproduce the

Rule 3 of the aforesaid Rules, which is to the following effect:

3. Termination of service. (1) Notwithstanding anything to the contrary in any existing rules or orders on the subject, the services of a Government

servant in temporary service shall be liable to termination at any time by a notice in writing given either by the Government servant to the appointing

authority, or by the appointing authority to the Government servant.,

(2) The period of notice shall be one month:

Provided that the services of any such Government servant may be terminated forthwith, and on such termination the Government servant shall be

entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice or, as the case may be, for the period

by which such notice falls short of one month at the same rates at which he was drawing them immediately before the termination of his services:

Provided further that it shall be open to the appointing authority to relieve a Government servant without any notice or accept notice for a shorter

period, without requiring the Government servant to pay any penalty in lieu of notice:

Provided also that such notice given by the Government servant against whom a disciplinary proceeding is pending or contemplated shall be

effective only if it is accepted by the appointing authority, provided in the case of a contemplated disciplinary proceedings, the Government servant

is informed of the nonacceptance of his notice before the expiry of that notice.

7. Mr. Dixit, learned Counsel appearing for the respondent," on the other hand, submitted that various notices and the documents, one of which is

even titled as chargesheet clearly indicated that the appellants wanted to terminate the services of the respondent for the misconducts, which were

enumerated therein. If that was so, it was necessary that appropriate opportunity ought to have been given to the respondent, which has been

denied. He submitted that even if the respondent was considered to be a temporary employee, a proper enquiry had to be conducted in view of

the provision of Article 311(2) of the Constitution of India for the reason that he was to be removed from service for the allegations contained fn

the chargesheet.

8. We have noted the submissions of both the learned Counsel. Before we deal with the submissions, it may be necessary to refer to some of

documents, which are on record. The case of the appellants is that the functioning and the conduct of the respondent in his post as Flight Clerk was

not satisfactory. He was given one warning on 19th March, 1985 that his work was not satisfactory and in the event there was further deterioration

in his performance, theappellants would consider to send him back to his lower position. It is the case of the appellants that no satisfactory

response was given. Another warning was given to the respondenton 25th May, 1985. Thereafter, a show cause notice for irresponsible behaviour

was given in June 1985. Third warning was issued to him on 18.7.1985 that his performance was unsatisfactory. Ultimately, a show cause notice

was issued to him on 19.7.1985, which was not replied. Finally, a chargesheet was given on 20th September, 1985, which recorded some of

these previous warnings. It further recorded that in July 1985, he was transferred to the Training Centre at Varanasi for a particular purpose, but

there also he did not show any interest in his work and he left the Station without obtaining the permission of the Chief Pilot Instructor. The

chargesheet mentioned that he had left the Station without permission to which the respondent had replied that since the Chief Pilot Instructor was

not available at the Head Office, there was no occasion to obtain his permission. It was also mentioned that the respondent stated in his reply that

the Chief Pilot Instructor had given oral permission. As against that, the Chief Pilot Instructor had denied"having given any such oral permission In

his reply. The chargesheet stated that if the Chief Pilot Instructor was not available, then the respondent ought to have obtained the permission from

other officer such as Shri R.C. Verma, Assistant Aircraft Maintenance Engineer. It was, therefore, alleged that the respondent was disinterested in

his work and if he did not give any satisfactory explanation, his service could be terminated.

9. The respondent replied the said chargesheet by pointing out that in fact his service was satisfactory and, therefore, he has been promoted from

time to time and that he had never shown any disinterest in his work nor had he made any false statement, as alleged. He further stated that he did

not have any experience of working in the position of a Flight Clerk, yet he had obtained trie expertise with the help of other staff. He stated that he

had discharged the duties of Flight Clerk such as maintaining chamber account register, arisation register, filling the dossiers etc.

10. The appellants were not satisfied with the explanation furnished by the respondent. They were not happy with the respondent trying to falsify a

superior officer and they alleged that he had resorted to falsehood. One more warning was issued to him on 7th December, 1985. Ultimately, he

was issued an order of termination on 11:2.1986 invoking the powers under Rule 3 (1) of the Rules 1975.

11. Mr. Arora, learned Counsel for the appellants took us once again through the three judgments, which were referred by the earlier Division

Bench, the first being Dipti Prakash Banerjee (supra). This judgment was, in fact, pressed into service by Mr. Dixit, counsel for the respondent

also. In this matter, the appellant before the Apex Court was an Office Superintendent. He was on probation, his work was not found satisfactory.

The probation period was extended from time time. Ultimately, the order of termination was passed. The Court went through the material and the

correspondence on record and observed that the order of termination in the instant case was not a simple order of termination but was a lengthy

punitive order. It not only stated that the appellant''s performance during the period of probation was unsatisfactory but also concluded that his

conduct, performance, ability and capacity during the whole period of probation was unsatisfactory and he was unsuitable for the post. In the facts

of the case, the Court held that it could not be said to be a case of a preliminary finding. The Court held that since the whole period of service was

considered in that order, the conclusion was inescapable and that it was not the case of mere motive. In the facts of that case, the Court,

therefore,interfered with the order of termination for not affording opportunity to the appellant.

12. The Court dealt with the case law on the concept of foundation to prove a misconduct and a motive to terminate the service simplicitor. In

paragraph 21 of the judgment, the Court laid down the law as follows:

21. If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple

order of termination is to be treated as ""founded"" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and

the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were

complaints, it would only be a case of motive and the order would not be bad; Similar is the position if the employer did not want to enquire into

the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a

circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.

13. The next case, which was referred, was the case of Pavanendra Narayan Verma (supra). Hon''ble Ruma Pal, J. who wrote the judgment,

referred to the earlier judgments and in paragraph 19 expressed the dilemma before the Court in the following words:

19. Thus some Courts have upheld an order of termination of a probationer''s services on the ground that the enquiry held prior to the termination

was preliminary and yet other Courts have struck down as illegal a similarly worded termination order because an inquiry had been held. Courts

continue to struggle with semantically indistinguishable concepts like ""motive"" and ""foundation""; and terminations founded on a probationer''s

misconduct have been held to be illegal while terminations motivated by the probationer''s misconduct have been upheld. The decisions are legion

and it is an impossible task to find a clear path through the jungle of precedents.

The learned Judge also posed the question as to what language in an order of termination would amount to stigma and then observed in paragraph

29 as follows :

29.....Generally speaking when a probationer''s appointment is terminated it means that the probationer is unfit for the job, whether by reason of

misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the

termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a

probationer''s appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount

to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job.

14. The third judgment in the case of Mathew P. Thomas (supra) also went into the question of distinction between ''foundation'' and ''motive''.

Referring to the judgments in the cases of Dipti Prakash Banerjee and Pavanendra Narayan Verma (supra), the Court observed that whether an

order of termination is simplicitor or punitive has ultimately to be decided in the facts of each case. Thereafter, it observed as follows:

.....Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be

difficult either to categorize or classify strictly orders of termination simplicitor falling in one or the other category, based on misconduct as

foundation for passing the order of termination simplicitor or on motive on the ground of unsuitability to continue in service. If the form and

language of the socalled order of termination simplicitor of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may

not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simplicitor or

punitive. In cases where the services of a probationer are terminated by an order of termination simplicitor and the language and form of it do not

show that either it is punitive or stigmatic on the face of it but in some cases there may be a background and attending circumstances to show that

misconduct was the real basis and design to terminate the services of a probationer. In other words, the facade of the termination order may be

simplicitor, but the real face behind it is to get rid of the services of a probationer on the basis of misconduct. In such cases it becomes necessary

to travel beyond the order of termination simplicitor to find out what in reality is the background and what weighed with the employer to terminate

the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the

person to continue in service or he is in reality removed from service on the foundation of his misconduct.

15. All these judgments have referred to three earlier judgments of three different Constitution Benches of the Apex Court. The first one was

Parshotam LalDhingra v. Union of India, AIR 1958 SC 36. In this case, the Court was concerned with the reversion of a public servant. The

majority judgment held that if an officer holding an officiating post had no right under the Rules governing his service to coritinue in it and such

appointment under the general law is terminable at any time on ""reasonable notice, the reversion of a public servant did not operate as a forfeiture

of any right and that such an order did not visit him with an evil consequence and could not be regarded as reduction of rank so as to attract Article

311 (2) of the Constitution. After referring to the development of law in this behalf and the relevant Articles of the Constitution and the relevant

Rules, the Apex Court in paragraph 26 observed as follows:

26..... Shortly put, the principle is that when a servant has right toa 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 prime facie a punishment, or 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. But 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 quasipermanent 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 herein before mentioned, the termination of

his service will by itself be a punishment and he will be entitled to the protection of Article 311. In other words and broadly speaking, Article

311(2) will apply to those cases where the government servant, had he been employed by a private employer, will be entitled to maintain an action

for wrongful dismissal, removal or reduction in rank. To put it in another way, if the government has, by contract, express or implied, or, under the

rules, the right to terminate the employment at any time, then such termination in the manner provided by the contract or the rules is, prima facie

and perse, not a punishment and does not attract the provisions of Article 311.

16. In State of Biharv. Gopi Kishore Prasad, 1960 SC 689, the respondent who was a probationer was discharged from service mainly because

the government, on enquiry, came to the conclusion that he was unsuitable for the post that he held on probation. This was clearly by way of

punishment and, therefore, he was entitled to the protection of Article 311(2) of the Constitution. In the facts of that case, the Government chose

to brand him as a dishonest and incompetent officer in which case it was held that he was entitled to the protection of Article 311 (2) of the

Constitution of India.

17. The Court laid down four propositions on the termination of service or discharge of a probationer public servant to the following effect:

(1) Appointment to a post on probation gives to the person so appointed no right to the post and his service may be terminated, without taking

recourse to the proceedings laid down in the relevant rules for dismissing a public servant, or removing him from service,

(2) The termination of employment of a person holding a post on probation without any enquiry whatsoever cannot be said to deprive him of any

right to a post and is, therefore, no punishment.

(3) But, if instead of terminating such a person"s service without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct,

or inefficiency, or for some similar reason, the termination of service is by way of punishment, because it puts a stigma on his competence and thus

affects his future career. In such a case, he is entitled to the protection of Article 311(2) of the Constitution.

(4) In the last mentioned case, if the probationer is discharged on any one of those grounds without a proper enquiry and without his getting a

reasonable opportunity of showing cause against his discharge, it will amount to a removal from service within the meaning of Article 311(2) of the

Constitution and will, therefore, be liable to be struck down.

18. The third judgment, which has been referred in the subsequent judgments is the case of State of Orissa v. Ram Narayan Das, AIR 1961 SC

177. In this case, the respondent, who was a Subr Inspector on probation"in Orissa Police Service, was served with a show cause notice as to

why he should not be discharged from service for gross negligence of duties and unsatisfactory work. In the notice, ten specific instances of

negligence of duty and two instances of misconduct including acceptance of illegal gratification and fabrication of official records were set out. The

respondent explained his action and denied the charges relating to misconduct. He asked an opportunity to crossexamine the witnesses. His

explanation was considered by the Deputy Inspector General of Police. He came to the conclusion that there was no good reason for retaining him

further in service and passed an order of discharge. The matter was carried upto the Apex Gourt. After looking into the relevant service Rules, the

Court held that he had no right to the post held by him. Under the terms of his employment, he could be discharged in the manner provided under

the relevant rules and that mere termination of employment did not carry with it any evil consequences such as forfeiture of his pay and allowances

or future chances. The Court observed that if a confirmed public servant holding a substantive post is discharged, the order would amount to

dismissal or reduction from service but an order discharging a temporary public servant may or may not amount to dismissal. Then it observed

Whether it amounts to an order of dismissal depends upon the nature of enquiry, if any, the proceedings taken therein and the substance of the

final order passed on such enquiry."" The Court held that there was no inconsistency between the observations made in PL Dhingra (supra) and

GopiKishore Prasad (supra).

19. Having noted the law laid down by the three different Constitution Benches which have been referred to time and again subsequently, it is clear

that the nature of employment of the person concerned, the kind of enquiry held against him and the consequences that he will be made to suffer

thereby are factors to be considered. As noted earlier, whether the allegations against the employee are mere motive for terminating his service

simplicitor or are foundation requiring a detailed enquiry as required under Article 311(2) of the Constitution of India, will always depend upon the

analysis of the facts of each case on the above touchstone. In the instant case, the services of the respondent were clearly terminable by one

month''s notice. From the record, it is clear that he was on a temporary post. The post was continued from time to time and at the relevant time, it

was available until 28th February, 1986. It is no doubt.true that it could have been continued subsequently but as far as the respondent is

concerned, the documents clearly show that he was not in any permanent position to claim a right to the post. He had joined in the Department of

Aviation, State of U.P. in December 1983and was taken up as a Flight Clerk on 15th February, 1985. During the short tenure of his service, there

were good number of warnings issued to him for unsatisfactory work. He was also served with a chargesheet on 20th September 1985, though

ultimately his services were terminated on 11th February, 1986 after giving him one month''s notice. The factual narration shows that on one

occasion, the respondent left his Station of duty without informing the superior officer and his explanation was found to be false. The tenor of

various warnings issued from time to time shows that the appellants were not satisfied with the work of the respondent, which clearly shows that

they found him unsuitable for the post. It is not a case where it could be said that they had an ill motive and they were bent upon to dismiss him,

otherwise they would not have given him so many warnings and opportunities to improve. In this situation, in our view, if they resorted to invoke

their powers under the relevant Rules and terminated his services by one month''s notice, it cannot be said that they have violated the provisions of

Article 311(2) of the Constitution. Article 311(2) of the Constitution guarantees a reasonable opportunity of showing cause against dismissal,

removal or reduction in rank, to a public servant who has a claim over a particular post. That protection is to be afforded where the action on that

count will result into the evil consequence for the public servant as held by the earlier judgments. Where, however, the person concerned is not

having a claim over any permanent post and his services were terminable under the service Rules by an appropriate notice and without an enquiry,

such a resort would be available to the employer and the employer cannot be insisted to afford a fullfledged opportunity which is otherwise

available under Article 311(2) of the Constitution of India.

20. In the instant case, for the reasonsstated above, in our view, the termination of service of respondent was a termination simplicitor and it did

not require an opportunity as contemplated under Article 311 (2) of the Constitution. The termination of service of the respondent was a valid one

and we, therefore, allow this appeal and set aside the judgment and order dated 22.7.1992 passed by the learned Judge. The writ petition filed by

the respondent will stand dismissed, though without any order as to costs.