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Date : 24/08/2025

O.M. Mathew Vs The Special Tahsildar, L.A. No. 1, Nedumkandom and Another

Court: High Court Of Kerala

Date of Decision: April 5, 1972

Citation: (1973) 1 LLJ 612

Hon'ble Judges: M.U. Issac, J

Bench: Single Bench

Advocate: T.M. Krishnan Nambiar, V. Sivaraman Nair, V.M. Nayanar, K.C. Sankaran and T.V. Ramakrishnan, for the Appellant;

Final Decision: Dismissed

Judgement

M.U. Isaac, J.
The petitioner was a village assistant, appointed temporarily as per proceedings Ext. P2 dated 23-8-67 of the District

Collector, Kottayam under R. 9(a)(1) of the Kerala State and Subordinate Services Rules, 1958. His services were terminated by the first

respondent, the Special Tahsildar, Nedumkar-darn with effect from 23-21970, as per his letter, Ext. P1 dated 23 21970-The petitioner contends

that Ext. P1 is really a dismissal from service, and that it is violative of the protection available under Art. 311 of the Constitution. He has,

therefore, filed this writ petition to quash Ext. P1 and for incidental reliefs. The circumstances under which the petitioner"s services were terminated

are clear from the counter-affidavit of the first respondent and the reply affidavit of the petitioner. The period of appointment of the petitioner and

other temporarily appointed village assistants was extended from time to time by the Government with the concurrence of the Kerala Public

Service Commission. That period was due to expire on 23 21970. It was further extended by the District Recruitment Board, Kottayam by its

letter Ext. P3 dated 2-3-70 till the end of August 1970 or till the nominees of the District Recruitment Board joined duty, whichever was earlier. In

the meanwhile it was detected that the petitioner omitted from a mahazar prepared by him for assignment of certain Government land, a few

valuable trees which were standing therein, and thereby caused heavy loss to the Government. The matter was reported to the second respondent,

the Sub Collector, Devicolam and also to the District Collector, Kottayam. The District Collector, by his letter Ext. RI dated 28 21970 directed

the first respondent to dispense with the services of the petitioner and also informed him that the Revenue Inspector, who accepted the mahazar,

was being put under suspension subject to enquiry. The second respondent also directed the first respondent by letter, Ext. P4 dated 19 21970,

that the petitioner''s service may be terminated immediately, with information to the Employment Exchange. Ext. P4 directed that the petitioner''s

pay and allowances need be disbursed to him, only after the enquiry regarding the preparation of the false mahazar was completed. It is clear from

the above facts that the petitioner''s services were terminated not because the extended period of his service ended, but because the appointing

authority did not want to continue the services of a person found to have committed a fraudulent act to deceive the Government. If that was a

punishment inflicted on him, there is no doubt that it would be invalid, as Art. 311 of the Constitution would be attracted, and the action taken

against him would offend the said provision. The petitioner was a person appointed under R. 9(a) (1) of the Kerala State and Subordinate Services

R. 1958; and the question for consideration is whether the termination of his services under the circumstances referred to above was a punishment.

2. A number of decisions were cited before me in support of the rival contentions. I shall first refer to the decision of the Supreme Court in

Parshotam Lal Dhingra Vs. Union of India (UOI), . In that case, the appellant, who was holding substantially a post in Class III service in Northern

Railway, and who had been appointed to officiate in a post in Class 11 service, was reverted to his original post consequent to on certain adverse

remarks against him in the confidential report of his superior officer. The question arose whether the case attracted Art. 311 (2) of the Constitution

There is a very learned discussion in the judgment of S. R. Das, C.J. who delivered the majority decision, about the constitutional history and the

scope of the protection available to a civil servant under Art. 311 of the Constitution. His Lordship has pointed out the three cases (vide page 48

of the judgment) where alone Art. 311(2) is attracted. They are:-

(i) A person appointed substantially to a permanent post;

(ii) A person appointed to a temporary post for a fixed term; and

(iii) A person appointed temporarily to a post, but who has acquired under the service rules quasi-permanent status.

Then the learned Chief Justice stated

Except in the three cases just mention, a Government Servant has no right to his post, and the termination of service of a Government servant does

not, except in those cases, amount to a dismissal or removal by way of punishment. Thus where a person is appointed to a permanent post in a

Government Service on probation, the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a

punishment, for the Government servant so appointed has no right to continue to hold such a post, any more than the servant employed on

probation by a private employer is entitled to do. Such a termination does not operate as a forfeiture of any right of the servant to bold the post; for

he has no such right and obviously cannot be a dismissal removal or reduction in rank by way of punishment.

The learned Chief Justice again stated:

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 Art. 311. In other words and broadly speaking,

Art. 311 (2) will apply to those cases where the Government servant, bad 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 away, 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 per se not a punishment and does not attract the provisions of Art. 311

The learned Chief Justice also added that it did not follow from what is stated above that termination of service cannot in any circumstance amount

to a dismissal or removal from service by way of punishment except in the three cases mentioned above. He stated:-

But the Government may take the view that a simple termination of service is not enough, and that the conduct of the servant has been such that he

deserves a punishment entailing penal consequences. In such a case, the Government may choose to proceed against the servant on the basis of his

misconduct, negligence, inefficiency or the like and inflict on him the punishment of dismissal, removal or reduction carrying with it the penal

consequences. In such a case, the servant will be entitled to the protection of Art. 311 (2)

His Lordship stated that the two tests to find out whether the action taken against a Government servant amounts to a punishment are (1) whether

the servant had, a right to the post or the rank, and (2) whether he has been visited with civil consequences, and that, if the case satisfies either of

the two tests, it is a case of punishment. Applying the above principles, the court held that the appellant was appointed only to officiate in the post

from which he was reverted, that he had no right to continue in that post, that his reduction did not entail the forfeiture of his chances for future

promotion or affect his seniority in his substantive post, and that it did not, therefore, amount to a punishment.

3. Counsel for the petitioner referred me to the decision of the Supreme Court in The State of Bihar Vs. Gopi Kishore Prasad, . The respondent in

that case was holding a substantive post on probation in Bihar State Service. He was served with a notice to show cause why his services should

not be terminated forthwith for alleged corruption and inefficiency. After considering his explanation, the respondent was discharged from service

on the above grounds, details of which were stated in the order of discharge. The Court held that, applying the principles laid down in Bhingra''s

case, the discharge of the respondent from service was punishment, and it offended Art. 311 of the Constitution. Dealing with the argument that

Art. 311 of the Constitution had no application to the discharge of a probationer from service, the court said;

It would thus appear that in the instant case, though the respondent was only a probationer, he was discharged from service really because the

Government had, on enquiry come to the conclusion; rightly of wrongly, that he was unsuitable for the post he held on probation. This was clearly

by way of punishment and, therefore, he was entitled to the protection of Art. 311 (2) of the Constitution. It was argued on behalf of the appellant

that the respondent, being a mere probationer, could be discharged without any enquiry into his conduct being made and his discharge could not

mean any punishment to him. because he had no right to a post. It is true, that, if the Government came to the conclusion that the respondent was

not a fit and proper person to hold a post in the public service of the State, it could discharge him without holding any enquiry into his alleged

misconduct. If the Government proceeded against him in that direct way, without casting any aspersions on his honesty or competence, his

discharge would not in law have the effect of a removal from service by way of punishment and he would, therefore have no grievance to ventilate

in any court. Instead of taking that easy course, the Government chose the more difficult one of starting proceedings against him and of branding

him as a dishonest and an incompetent officer. He had the right, in those circumstances, to insist upon the protection of Art. 311(2) of the

Constitution. That protection not having been given to him, he bad the right to seek his redress in court. It must, therefore, be held that the

respondent had been wrongly deprived of the protection afforded by Art. 311(2) of the Constitution. His removal from the service, therefore, was

tot in accordance with the requirements of the Constitution.

4. Reliance was then made to the decision of the Supreme Court in Jagdish Mitter Vs. The Union of India (UOI), , That case arose out of a suit

instituted by a clerk, who was appointed temporarily in the Post and Telegraph Department and discharged from service on the finding that it was

undesirable to retain him in service, for a declaration that the termination of his service was illegal. Gajendragadkar, J. delivering the judgment of

the Court has reviewed the correct legal position of a temporary Government servant under Art. 311 of the Constitution. The learned judge stated,

It is true that the tenure held by a temporary public servant or a probationer is of a precarious character. His services can be terminated by one

month"s notice without assigning any reason either under the terms of contract which expressly provide for such termination or under the relevant

statutory rules governing temporary appointment or appointments of probationers Such a temporary servant can also be dismissed in a punitive

way; that means that the appropriate authority passes two powers to terminate the services of a temporary public servant; it can either discharge

him purporting to exercise its power under the terms of contract or the relevant rule, and in that case, it would be a straight forward and direct case

of discharge and nothing more in such a case. Art. 311 will not apply. The authority can also act under its power to dismiss a temporary servant

and make an order of dismissal in a straight forward way; in such a case, Art. 311 will apply.

This simple position is sometimes complicated by the fact that even while exercising its power to terminate the services of a temporary servant

under the contract or the relevant rule, the authority may in fairness enquire whether the temporary servant should be continued in service or not. It

is obvious that temporary servants or probationers are generally discharged, because they are not found to be competent or suitable for the post

they bold. In other words, if a temporary servant or a probationer is found to be satisfactory in his work, efficient, and otherwise eligible, it is

unlikely that his services would be terminated and so, before discharging a temporary servant, the authority may have to examine the question

about the suitability of the said servant to be continued and acting bona fide in that behalf, the authority may also give a chance to the servant to

explain, if any complaints are made against him, or his competence or suitability is disputed on same grounds arising from the discharge of his

work, but such an enquiry would be held only for the purpose of deciding whether the temporary servant would be continued or not. There is no

element of punitive proceeding 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 Art. 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.

His Lordship has made it clear that the motive operating in the mind of the authority in terminating the service of a temporary servant, or the fact

that he conducted a preliminary enquiry before taking impugned action is irrelevant, and that what the court will have to examine in each case

would be having regard to the material facts existing up to the time of discharge, is the order of discharge in substance one of dismissal? The

learned judge stated:-

When an authority wants to terminate the services of a temporary servant, it can pass a simple order of discharge without casting any aspersion

against the temporary servant or attaching any stigma to his character. As soon as it is shown that the order purports to cast an aspersion on the

temporary servant, it would be idle to suggest that the order is a simple order of discharge. The test in such cases must be: does the order cast

aspersion or attach stigma to the officer, when it purports to discharge him. If the answer to this question is in the affirmative, then notwithstanding

the form of the order, the termination of service must be held, in substance, to amount to dismissal.

The Court held that on a proper construction, of the order of discharge in that case, it was really one of dismissal.

5. Another decision which may be referred to in this context is that of the Supreme Court is Ram Gopal Chaturvedi Vs. State of Madhya Pradesh,

. The appellant in that case was a temporary Civil Judge, whose services were terminated by the Government without stating any ground. There

were complaints of misconduct against him. The Chief Justice made some confidential enquiries about the matter, and made a note that the officer

was a disreputable person for the reasons stated therein. On the basis of that note, the High Court passed a resolution that the Government should

terminate his services; and the impugned order was passed pursuant to the said resolution. It is clear on the facts of the case that the appellant''s

services were terminated, as he was found to be highly undesirable person to be retained in the judicial service. Yet the contention that it amounted

to dismissal from service was rejected by the Supreme Court; and it stated:-

It was immaterial that the order was preceded by an informal enquiry into the appellant''s conduct with a view to ascertain whether he should be

retained in service. As was pointed out in the State of Punjab and Another Vs. Shri Sukh Raj Bahadur,

An order of termination of service in unexceptional form proceeded by an. enquiry launched by the superior authority only to ascertain whether the

public servant should be retained in service does not attract the operation of Art. 311 of the Constitution

6. The question whether the termination of the petitioner''s services amounts to a punishment may now be examined in the light of the principles laid

down in the above decisions. Ext. P1, the impugned order reads:

No. A. 240/70

Office of the Special Tahsildar

No. 1. Nedumkandom,

dated 23 -2-1970.

From

The Special Tahsildar,

L.A. No. 1, Nedumkandom.

To

Sri. O.M. Mathew,

Special Village Assistant,

Kalkoontal Village.

Sir,

Sub; L.A. Work preparation of Mahazar irregularity noticed - service terminated regarding;

Ref: No. M. 1850/70 dated 19 21970 of the Sub-Collector, Devicolam.

In pursuance of the orders cited, I write to inform you that your services as Special Village Assistant in this Office, are terminated with effect from

the afternoon of 23 21970. Your pay and allowances for the period from 121970 to 23 21970 will be drawn and disbursed after the enquiry is

completed.

Yours faithfully

Sd/

Special Tahsildar No. I

Admittedly no enquiry was conducted against the petitioner, nor was one contemplated. The enquiry referred to in Ext. P1 is the enquiry proposed

to be conducted against the Revenue Inspector, who accepted the mahazar prepared by the petitioner. The petitioner was holding only a

temporary appointment under R. 9 of the Kerala State and Subordinate Services Rules, 1958; and that appointment did not confer on him any

right to hold the post. It was liable to be terminated at any time. The extended period of his appointment ended on 23-2-1970 though the Public

Service Commission had accorded sanction for its further extension. It was, therefore, open to the appointing authority to further extend his period

or terminate it. The appointing authority chose to terminate his services; and the order of termination does not amount to a punishment, as it does

not attach any stigma, though the motive or reason for terminating his service was that he was found to be undesirable to be continued in service.

This is a case, wherein the appointing authority did not want to take any disciplinary action against the petitioner, but availed of its right to terminate

his services without such an enquiry by virtue of the fact that be was only holding the post temporarily.

7. Counsel for the petitioner referred me to the decision of the Supreme Court in The State of Bihar and Others Vs. Shiva Bhikshuk Mishra, . The

respondent in that case was holding the substantive post of a sergeant in the Police force in the State of Bihar. While he was temporarily holding

the post of a Subedar-Major, he was involved in a charge of physically assaulting his orderly. A disciplinary action was already pending against him

for other charges. On the report of the Commandant of the Bihar Military Police that the alleged assault on the orderly was true, the Inspector

General of Police made an order reverting the respondent to his substantive post. Shortly after that, the Board of Enquiry found him guilty of the

charges; and on the basis of that finding, the respondent was also dismissed from service by the Deputy Inspector-General. The respondent,

thereupon, filed a suit for a declaration that his demotion and subsequent dismissal from service were illegal and that he bad all along remained a

Subedar-Major. The High Court held that the reversion was not in the usual course or for administrative reasons, but it was by way of punishment,

and that it was, therefore, bad under law. It also held that in so far as the reversion was illegal, the dismissal was also bad under law, as it was

done by an authority not competent to impose that punishment as an officer holding the post of a Subedar-Major. The Supreme Court upheld the

above decision; and in doing so, it stated:-

The form of the order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct (see

S.R. Tewari Vs. District Board Agra and Another,). It may be that an order which is innocuous on the face and does not contain any imputation

of misconduct is a circumstance or piece of evidence for finding whether it was made by way of punishment or administrative routine. But the

entirety of circumstances preceding or attendant on the impugned order must be examined and the over-riding test will always be whether the

misconduct is a mere motive or is the very foundation of the order.

The court held that the reversion of the respondent in the case before it was directly and proximately founded on what the Commandant and the

Deputy Inspector General said relating to the respondent''s conduct generally, and in particular with reference to the incident of assault by him on

his orderly; and it was, therefore, a punishment, The same test has been laid down by the Supreme Court in R.K. Bhatt v. Union of India and

Others (1971 Unreported Judgments 4), wherein the case was remanded to the High Court to reconsider the entire matter in the light of the said

tests, with the observation that the High Court did not fully go into ""all the circumstances and matters which required determination and

investigation for finding whether termination of services of the appellant had been ordered in the ordinary course because his services were no

longest required or whether it was by way of punishment that the action was taken.

8. There is a real distinction between the motive for taking an action, and the foundation or the basis of that action. But when the action is

provoked by the misconduct of the Government servant, it is very difficult to say whether the misconduct was the motive for taking the action or it

was the foundation of the action. The distinction becomes too nice. If I may say so with respect, one has again to look to the form of the order and

the attendant circumstances. I have examined the said aspect of the matter, and held that the misconduct of the petitioner was the motive or

occasion to terminate his services.

9. Reference was also made by the petitioner''s counsel to a decision of the Supreme Court in Jagdish Prasad Shastri Vs. State of U.P. and

Others, . That was a case where a Government servant officiating in a promotion post was reverted to bis substantive post with the direction that

his name ""be struck off from the list of Panchayat Secretaries maintained for appointment of Officiating Panchayat Inspectors"". The order was

passed as a result of an enquiry conducted against him without giving him any opportunity to explain his conduct. It was clearly a case of

punishment, satisfying the tests laid down by the Supreme Court in the cases of Dhingra and Jagdish Mitter Therefore, the above decision does not

help the petitioner.

10. Counsel for the petitioner referred me to the decision of a learned Single Judge of this Court in Govindan (T.C.) Vs. Inspector of Post Offices

and Others, . In that case, the services of the petitioner, who was an Extra Departmental Delivery Agent was terminated with immediate effect

without stating any ground by a notice under R. 6 of the Posts and Telegraph Extra-Departmental Agents (Conduct and Service) Rules, 1959. The

said rule reads:

The services of an employee shall be liable for termination by the appointing authority at any time without notice for generally unsatisfactory work

within three years from the date of appointment or any administrative ground unconnected with his conduct.

Relying on the decisions of the Supreme Court in Madan Gopal Vs. State of Punjab, and Jagdish Mitter Vs. The Union of India (UOI), (already

cited) and Champaklal Chimanlal Shah Vs. The Union of India (UOI), , the learned judge held that the form of the order by which the services

were terminated or the words used in the order are not conclusive and the real substance must be ascertained. The petitioner"s services in that

case were terminated as a result of an enquiry conducted on the basis of a complaint against him in which it was found that he was guilty of

misconduct, and the complainant had been informed that suitable action would be taken against him. The learned judge, on the facts and

circumstances of the case, found that, though the order of termination was itself innocent, it attached a stigma to the petitioner when read in the light

of the communication sent to the complainant, and the action taken against the petitioner was, therefore, a punishment. The question whether the

said finding can be justified in the light of the principles laid down in the decision of the Supreme Court herein referred to does not arise before me.

For the reasons stated above I hold that the termination of the petitioner"s services was not a punishment, and the contention that it offended Art.

311(2) of the Constitution cannot succeed. This writ petition is accordingly dismissed. There will be no order as to costs.