

Sri Amitabh Sinha Vs The Union of India (UOI) and Others

Court: Calcutta High Court

Date of Decision: March 16, 2009

Acts Referred: Central Industrial Security Force Act, 1968 &" Section 5, 8
Constitution of India, 1950 &" Article 14, 16, 226, 311, 311(2)

Citation: (2009) 2 ILR (Cal) 229

Hon'ble Judges: Surinder Singh Nijjar, C.J; Biswanath Somadder, J

Bench: Division Bench

Advocate: S.K. Kundu, for the Appellant; L.R. Chatterjee and Aryak Dutta, for the Respondent

Final Decision: Dismissed

Judgement

Surinder Singh Nijjar, C.J.

This appeal has been filed against the judgment of the Learned Single Judge dated December 2, 2005 whereby

the writ petition filed by the writ Petitioner, Appellant herein, challenging the Order of termination dated February 7, 2000 has been dismissed.

2. Briefly stated the case of the writ Petitioner is that he applied for recruitment on the post of Assistant Sub-Inspector (Clerk) [hereinafter referred

to as "the ASI (Clerk)"] in the Central Industrial Security Forces (hereinafter referred to as "the CISF").

3. According to the Notifications for recruitment issued by the Director General of Police of CISF, the candidates were required to possess chest

measuring 81 centimeters (unexpanded) and 86 centimeters (expanded). The Appellant claims that he possessed the required chest measurements.

4. The Appellant was permitted to appeal" in the written test, " typing test, physical test and interview conducted by the Respondent No. 1 on May

17, 1999 at Rourkella. During the selection process, he filled up the questionnaire issued by the Respondent authority in which he stated that he

possessed chest measuring 81 centimeters (unexpanded) and 86 centimeters (expanded). According to the Appellant, the duly filled questionnaire

was certified by the member of the Selection Board. On October 12, 1998, the Appellant was issued an order intimating that he had been

provisionally selected for the post of ASI (Clerk) in CISF on temporary basis at an initial pay of Rs. 4000/- per month. The order clarified that the

Appellant would be on probation for a period of two years in the first instance subject to the provision that the Appointing Authority may extend

the period in a special case and accordingly, he was called upon to report for basic training on or before October 14, 1998.

5. The training was diligently attended by the Appellant and after a period of 4 months, he was declared qualified in the result published on

February 3, 1999. His name was mentioned at Sr. No. 60 in the list of the successful candidates.

6. Thereafter, the Appellant joined duty on February 21, 1999. He performed his duties diligently. He was even sent for computer training from

12.10.99 till 3.2.2000 organised by I.G./MES, C.I.S.F. NESH Qrs. at Calcutta. However, on 7th February, 2000, his services were ordered to

be abruptly terminated without any reason purportedly under Clause 2(a) of the Agreement form executed under Rule 15 of the CISF Rules, 1969

read with Rule 19 of the CISF Rules, 1969. It was directed that he shall be paid one month's pay in lieu of one month's notice.

7. Against this unjust order, the Appellant submitted a representation which was rejected by the letter dated 9th March, 2000. The aforesaid order

was challenged by the writ Petitioner/Appellant by filing the writ petition on various grounds.

8. The Respondents filed an Affidavit-in-Opposition to the writ petition. In the Affidavit-in-Opposition, the Respondents have stated that the offer

of appointment clearly stipulated that the writ Petitioner would be on probation for a period of two years, which could be extended, in special

cases. On joining, the Appellant had executed an agreement in which he clearly accepted that his services could be terminated by the Deputy

Inspector General of CISF at any time during the period of initial training or the period of probation.

9. It is also the case of the Respondents that under the instructions contained in the CISF Recruitment Manual, physical standards of all the

candidates reporting for basic training at NISA, Hyderabad were required to be verified. Accordingly, a Board was constituted at NISA which

found that the chest measurements of the Petitioner were 78-85 centimeters against the required standard of 81-86 centimeters.

10. The candidates were also informed that a report about any candidate found to be sub-standard will be sent to the Head Quarters, in the

prescribed pro-forma, with a copy to the DIG concerned from where the recruits have reported.

11. In view of the deficiency in the chest measurements, the Directorate decided that the Petitioner be got examined by the Board consisting of

three Chief Medical Officers including one from other Central Para Military Force. By that time, after completing the basic training, the Petitioner

had been posted on duty. The Petitioner was, therefore, directed to report to the Commandant, Lodhi Road, New Delhi on 14.9.99 alongwith five

others to be examined by the Medical Board at Saket on 17.9.99. The Medical Board found the chest measurements of the Petitioner as follows:

Unexpanded - 79 centimeters.

Expanded - 82 centimeters.

12. These findings were brought to the, notice of the DIG, CISF, Burnpur being the head of the Unit where the Petitioner was serving. Since the

Petitioner did not possess the requisite chest measurements, his services were terminated by the DIG, CISF by an Order dated 7.2.2000.

13. It was stated that the representation submitted by the Petitioner was dismissed. He could not be permitted to continue in service since his

recruitment was contrary to the Recruitment Rules.

14. The Order of Termination has been challenged in the writ petition on a number of grounds.

15. The Appellant also filed an Affidavit-in-Reply as also a supplementary affidavit. In the Affidavit-in-Reply, the Appellant has stated that no

termination order was served on the other five persons who were physically examined along with the Petitioner even though these persons were

also found to be suffering from serious defects.

16. The Petitioner also claimed that the measurement rule has been relaxed in the case of one Sri Anjan Kumar Biswas, but no relaxation was

granted to the Petitioner. The Petitioner had also filed a supplementary affidavit in which it is stated that those five persons suffering from defects

have been permitted to continue in service whereas service of the Petitioner has been whimsically terminated. It is also pointed out that four out of

five candidates, viz., Arup Kumar, B.B. Pandey, Jivan Lal and Shivasish Singh suffer from the defect of "knock knee" and "flat feet" whereas the

defect in the case of M. Venugopal is; "unable to close left eye".

17. It is also stated that the Respondents have allowed the relaxation for the height and chest measurements to a large number of persons but the

same discretion has not been exercised in the case of the Petitioner. The Respondents have submitted an affidavit-in-opposition to the

supplementary affidavit. The allegations in the affidavit-in-reply have been denied. With regard to the five candidates, it is stated that all of them

were departmental candidates. They had been initially appointed in the post of Constable, which is a Group-C post and they were not subjected to

medical examination on their appointment to the post of ASI (Clerk) which is also a Group-C post. It is, therefore, stated that the action of the

Respondents is neither whimsical nor arbitrary.

18. The Learned Single Judge noticed the background of the entire case and thereafter, the Learned Single Judge noticed the ground on which the

Order of Termination had been challenged in the writ petition.

19. Thereafter, the Trial Court noticed the averments made in the Affidavit-in-Opposition as well as the Affidavit-in-Reply and the supplementary

affidavit filed by the writ Petitioner. The Trial Court notices that in the Affidavit-in-Opposition to the supplementary affidavit, it is stated that the

aforesaid Anjan Kumar Biswas was appointed as ASI (Clerk) when there were large number of vacancies and the number of selected candidates

were less. Accordingly, the competent authority exercised its discretion to grant relaxation in physical Measurement. The circumstances in the case

of the Appellant are not similar.

20. Upon assessment of the entire material the learned Single Judge has dismissed the writ petition.

21. Learned Counsel for the Petitioner has made a number of submissions before us, which can be summarized thus:

1) The services of the Petitioner have been terminated illegally as no show-cause notice was issued to the writ Petitioner.

2) After the Petitioner became a Member of the Force, his services could not have been terminated under Clause 2a of the agreement read with

Rule 19 of the CISF Rules, 1969. Even otherwise there was no material on the record to show that the Petitioner was unsuitable to be kept in

service. Reliance is placed on the judgment of the Supreme Court in the case of Central Inland Water Transport Corporation Limited and Another

Vs. Brojo Nath Ganguly and Another, in support of the submission that Clause 2a in the agreement is liable to be struck down on the ground that it

is an unfair and unreasonable clause in a contract entered into between the two parties who are not equal in bargaining power. The clause would

also be opposed to public policy.

3) Under Rule 19(2) of the CISF Rules, 1969 the service of the Petitioner/Appellant could only be terminated in case of the appointing authority

finds him unsuitable. Not only the Appellant was discharging the duties diligently but he had been rewarded for commendable service.

4) As soon as the Appellant became a member of the force by virtue of Section 5 of the CISF Act, 1968, he would be entitled to the protection of

Article 311(2) of the Constitution of India as provided in Section 8 of the CISF Act, 1968. In support of the submission the Counsel relies on the

judgment of the Supreme Court in the case AIR 2000 1706 (SC)

5) Since the Appellant has not been adjudged unsuitable for continuing in service, the impugned order would be vitiated as it has been made for

unauthorised reasons. The order suffers from the vice of malice in law as there is no reasonable or probable cause for the abrupt termination of the

services of the Petitioner/Appellant. Reliance is placed on the judgment of the Supreme Court in the case of Punjab State Electricity Board Ltd.

Vs. Zora Singh and Others, .

6) The justification given in the affidavit in opposition as well as other affidavits cannot be taken into consideration as the impugned order has to be

judged on the basis of the reasons stated therein. In support of the submission the counsel relies on the Judgments of the Supreme Court in the

case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, and in the case of Commissioner of

Police, Bombay Vs. Gordhandas Bhanji, .

7) The measurement of the Petitioner/Appellant having been duly certified at the time of selection could not be doubted subsequently and there was

no justification in the second medical examination.

8) Even otherwise the Respondents have failed to take into consideration the certificate dated February 22, 2008 given by Dr. M. Prasad, GDM

0-11, Kasturba Hospital, New Delhi which shows the measurement of the Appellant's chest as 90 cms.(unexpanded) and 96 cms. (expanded).

The certificate also includes a remark that ""so as per medical literature candidate's chest measurement variation within normal two standard

deviation limit and it is absolutely normal"". This certificate was attached by the Petitioner/Appellant with an affidavit affirmed in April, 2007 filed by

the Appellant in reply to the affidavit dated 27th March, 2007 filed by the Respondents.

9) Rule 21 of the C1SF Rules, 1969 enables the appointing authority to relax any of the qualifications or requirements under the Rules in the

interest of the formation and the due functioning of the Force. The action of the Respondents is discriminatory as the power of relaxation has been

exercised in favour of Anjan Kumar Biswas, and denied in case of the Petitioner.

10) Rule 13 of the CISF Rules, 1969 provides the minimum physical standards for appointment for the post of AS1 (Clerk/Typist). In this Rule it

is provided that the candidates should not have knock knees and flat feet. In spite of this five persons were recruited in the said post, even though it

is pointed out that one candidate has knock knee and flat feet, one candidate has flat feet and two candidates have knock knees and against the

name of one candidate M. Venugopal it is mentioned that ""one eye cannot close permanently"". Therefore, the action of the Respondents in

terminating the services of the Appellant on the ground of deficiency in chest measurements is discriminatory and violative of Article 14 and 16 of

the Constitution of India. Reliance is placed on the judgment of the Supreme Court in the case of Iron and Metal Traders Pvt. Ltd., Bombay Vs.

M.S. Haskiel and Another etc.,

22. Learned Counsel for the Respondents submits that it is a matter of record that the Appellant does not fulfill the condition with regard to the

chest measurements. It is also submitted that the services of the Appellant were liable to be terminated under the contract of service as also under

the CISF Rules, 1969 during the period of probation in case it was found that he was unsuitable to be a member of the Force.

23. Learned Counsel further submits that the provisions of Article 311(2) of the Constitution of India would not be applicable to the facts and

circumstances of this case as the services of the Appellant have not been terminated by way of punishment. He further submits that the power of

relaxation can only be exercised if it is found necessary and in the interest of the formation of and due functioning of the Force.

24. It is also submitted that the action of the Respondents is not discriminatory, as the case of Anjan Kumar Biswas is distinguishable. Anjan

Kumar Biswas was recruited at a time when many vacancies were available and he was the only selected candidate. The Appellant also cannot

make any grievance about the 5 candidates who have been retained in service in spite of suffering from the defects as pointed out. These

candidates were not direct recruits on the post of ASI. 6. Iron and Metal Traders Pvt. Ltd., Bombay Vs. M.S. Haskiel and Another etc., They

were being promoted from the post of Constable to the post of ASI. They were therefore, not required to undergo medical examination on

promotion to the post of ASI (Clerk).

25. It is further submitted that the judgments relied on by the counsel for the Appellant are not applicable in the facts and circumstances of this

case.

26. We have considered the submissions made by the learned Counsel for the parties and we have perused the materials on record.

27. Admittedly, the Petitioner was still on probation when his services were terminated. Rule 19 of the CISF Rules, 1969 provides as under:

19. Probation (1) All appointments by direct recruitment or promotion shall be on probation for two years subject to the provision that the

appointing authority may extend this period in special cases. (2) The appointing authority shall, on the expiry of the period of such probation or such

extended period, pass an order declaring that the probationer has completed the period of probation satisfactorily and is suitable for confirmation

in that rank. If he considers him unsuitable, the probationer shall be liable to be discharged in the case of a direct recruit or reverted to his

substantive post in the case of a promotee.

28. On perusal of the aforesaid Rule it appears that on expiry of the period of probation the appointing authority shall pass an order declaring that

the probationer has completed the period of probation satisfactorily. The Rule also provides that in case the probationer is found to be unsuitable,

he can be discharged. Admittedly, in the present case, the Petitioner joined for basic training on October 14, 1988 and his services were

terminated on February 7, 2000. From the pleadings it has emerged that the services of the Petitioner have been terminated as he did not have the

necessary chest measurements. Therefore, it is evident that the order of termination has not been issued by way of punishment nor can it be said

that the innocuous order of termination is stigmatic in nature. At the time of selection the Petitioner had himself given his chest measurements which

had been accepted by the Selection Board. The actual chest measurements of the Petitioner were taken at the time when he reported for basic

training. At that time his chest measurements were found to be 78-85 centimeters against the required standard of 81-86 centimeters. After

completion of the basic training the Petitioner was directed to appear before the Medical Board for medical examination at New Delhi along with

Five others. On September 17, 1999 the Medical Board found the chest measurements of the Petitioner as follows:

Unexpanded - 79 centimeters

Expanded - 82 centimeters

It was on the measurements being brought to the notice of the appointing authority, that the services of the Petitioner were terminated by an order

dated February 17, 2000.

29. In such circumstances, we are unable to hold that the services of the Petitioner have been terminated either illegally or arbitrarily. The learned

Counsel for the Petitioner has, however, made a submission that the other candidates having disability have been retained in service. Even this

charge has been duly answered by the Respondents on the ground that the individuals who have been retained in service were promotees and not

required to undergo any further medical examination. They were initially recruited to the post of constable and they were only being promoted as

A.S.I in accordance with the Rules. It is also pointed that the post of constable and A.S.I are both class "C" posts. In our opinion, it cannot be held

that the action of the Respondent is discriminatory.

30. Learned Counsel for the Petitioner has also submitted that the benefit of relaxation that had been given to Anjan Kumar Biswas has been

wrongly denied to the Petitioner. In our opinion, the case of Anjan Kumar Biswas is distinguishable from the case of the writ Petitioner, as he had

been recruited at the time of when there was a shortage of selected candidates. Therefore, the power of relaxation had been exercised by the

competent authority.

31. We may also notice that although the Petitioner has made allegations of discrimination, none of the candidates against whom the allegations

have been made are impleaded as parties. In our opinion, all these persons were necessary parties. In such circumstances, it would be wholly

inappropriate for this Court to examine the eligibility of those candidates who have not had an opportunity to defend themselves. In the case of

Udit Narain Singh Malpaharia v. Additional Member Board of Revenue, Bihar and Anr. AIR 1963 786 ; The Supreme Court has clearly stated

the accepted principles as to who would be necessary or proper parties in proceedings under Article 226 of the Constitution of India. It is held:

(7) To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law

on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a

proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the

question involved in the proceeding.

32. It is also clearly laid down:

(9) The next question is whether the parties whose rights are directly affected are the necessary parties to a writ petition to quash the order of a

tribunal.

...

Such a party, therefore, is a necessary party and a petition filed for the issue of a writ of certiorari without making him a party or without

impleading him subsequently, if allowed by the Court, would certainly be incompetent. A party whose interests are directly affected is, therefore, a

necessary party.

33. We are also of the considered opinion that the judgment of the Supreme Court in the case of Iron Metal Traders Pvt. Ltd. (supra) is not

applicable in the facts and circumstances of this case. In that case, the Supreme Court declined to interfere with the award of the Industrial Tribunal

in which the relief of reinstatement had been granted to three workmen and back wages for 7 other workmen who had been refused the relief of

reinstatement. The award of the Tribunal was upheld by the Supreme Court on the ground that the workmen had been able to prove before the

Tribunal that they had been discriminated against by the employer i.e. the Appellant. In these circumstances, it is held that the approach of the

Tribunal is fair, just and reasonable.

34. In this case, we are not satisfied that the Petitioner has established any clear cut case of discrimination. Rather the Respondents have stated

that the Petitioner/Appellant was ineligible to be recruited as he did not fulfill the minimum requirement of the chest measurements. It was also

pointed out that the five candidates had been initially appointed in the post of constable, which is a Group "C" post. They were not subject to

medical examination on their promotion to the post of A.S.I, which was also a Group "C" post. The Petitioner has also failed to establish that the

case of the Anjan Kumar Biswas was similar to the Petitioner/ Appellant. It has been clearly stated by the Respondents that at the time Biswas was

appointed as A.S.I. (Clerk) there were a large number of vacancies and the number of selected candidates were less. Therefore, it was absolutely

necessary to grant relaxation to Biswas so that the vacancy did not remain unfilled. Therefore, there appears to be a clear distinction between the

case of the Appellant and Biswas.

35. Learned Counsel has also submitted that after being selected the Petitioner was entitled to protection under Article 311(2) of the Constitution

of India. In our opinion, the provisions of Article 311 (2) of the Constitution of India would not be applicable in this case as the order of

termination of the services of the Petitioner has not been passed as a measure of punishment. In the case State of Punjab and Another Vs. Shri

Sukh Raj Bahadur, ; the Supreme Court has clearly laid down the principle as follows:

1. The services of a temporary servant, or a probationer can be terminated under the rules of his employment and such termination without

anything more would not attract the operation of Article 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being

immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to

be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an inquiry launched by the superior authorities only to ascertain whether

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

5. If there be a full-scale departmental enquiry envisaged by Article 311, i.e., an enquiry officer is appointed, a charge sheet submitted, explanation

called for and considered, any order of termination of service made thereafter will attract the operation of the said article.

36. In our opinion, the claim of the Petitioner does not fall in any of the principles stated above.

37. We are also of the considered opinion that the reliance by the learned Counsel for the Appellant on the case of Chandraprakash Shahi (supra)

is wholly misplaced. In that case the Supreme Court was dealing with the case where the order of termination had been preceded by an inquiry in

which the Appellant's involvement was found established. The termination was founded on the preliminary inquiry as the employer had not held the

preliminary inquiry to find out whether the Appellant was suitable for further retention in service. It was also a case where the Appellant had

already completed the period of probation quite a few years ago. It was also admitted by the Respondents that the performance of the Appellant

throughout was unblemished. Therefore, the Supreme Court concluded that the order was definitely punitive in character as it was founded on the

allegations of misconduct. There are no allegations in the present case of misconduct against the Appellant. His services had been terminated during

the period of probation. In such circumstances, in the same judgment the Supreme Court had held as follows:

20. Termination simpliciter of a temporary government servant on the ground of unsuitability does not attract the provisions of Article 16, nor is the

protection under Article 311(2) of the Constitution available to a temporary government servant unless the termination involved "stigma", was the

dictum laid down by this Court in *Commodore Commanding, Southern Naval Area, Cochin Vs. V.N. Rajan*,

38. We are also unable to accept the submission of the learned Counsel for the Appellant that the order of termination is vitiated by malice in law.

We may notice here that the Appellant/writ Petitioner has not cared to plead in the writ petition that the order is vitiated by malice. It would appear

that it was also not argued before the learned Single Judge. The point has been raised by the learned Counsel for the Appellant at the time of

submissions before us. The Respondents have given, the entire sequence of events leading to the passing of the orders of termination. We are of

the opinion that the Respondents have made a true and candid disclosure of the entire material. We fail to see any hidden malice in the action taken

by the Respondents.

39. We, therefore, find no merit in the submissions of the learned Counsel for the Appellant. We are also of the opinion that the judgment in the

case of *Punjab State Electricity (supra)* would not be applicable in the facts and circumstances of this case. Learned Counsel for the writ

Petitioner, thereafter, relied on the judgments in the cases of *Mohinder Singh Gill (supra)* and *Commissioner of Police, Bombay (supra)*. In support

of his submissions that the termination order could not be supported by the reasons given in the affidavits filed by the Respondent. Undoubtedly, in

the case of *Mohinder Singh Gill*⁴ (*supra*) as also in the case of *Commissioner of Police, Bombay (supra)* it has been held that the orders of

statutory functionaries cannot be justified or supplemented by fresh reason in the shape of affidavit or otherwise. In the present case, the

Respondents have merely rebutted the allegations made by the Petitioner. No effort has been made to give any fresh reasons. The impugned order

clearly states that the services of the Petitioner are terminated with immediate effect under Clause 2 (a) of the agreement executed by him under

Rule 15 of CISF Rules, 1969 read with Rule 19 of the said Rules. On the face of it, the order is innocuous. It does not cast any stigma on the

Petitioner. This apart, we are satisfied that the Petitioner has miserably failed to make out a case of discrimination or arbitrariness. We, therefore,

do not find any merit in this appeal and the same is dismissed.

40. There will, however, be no order as to costs.

Biswanath Somadder, J: I agree