(2008) 08 DEL CK 0206

Delhi High Court

Case No: Writ Petition (C) No. 1330 of 1988

Dr. A. Sonkar	APPELLANT
Vs	
New Delhi Municipal Committee	RESPONDENT

Date of Decision: Aug. 22, 2008

Acts Referred:

- Constitution of India, 1950 - Article 14, 16, 311, 311(2)
- Punjab Municipal Act, 1911 - Section 45, 45(1)

Hon'ble Judges: Madan B. Lokur, J; J.R. Midha, J

Bench: Division Bench

Advocate: K.L. Budhiraja and Paritosh Budhiraja, for the Appellant; Jyoti Singh and Amandeep Joshi, for the Respondent

Final Decision: Dismissed

Judgement

J.R. Midha, J.

The Petitioner was appointed as a Junior Anesthetist on contract basis for a period of three months on a consolidated salary of Rs. 2,730/- on 22nd September 1986. The contract period was extended by three months on 6th January 1987 and again on 6th April 1987. Vide office order dated 14th May 1987, the appointment of the Petitioner was regularized as a temporary employee. It was recorded in the said order that his services can be terminated at any time without any notice or reasons being assigned. It was further recorded that the confirmation would depend upon the existence of a permanent vacancy, position in seniority list, good report about his work and conduct after a year.

2. Vide office order dated 16th February 1988, Type-IV Government quarter was allotted to the Petitioner on out of turn basis in the exigency of services. The office order required the Petitioner to occupy the quarter within seven days. However, the Petitioner did not occupy the said quarter and continued to stay at Noida.

3. Vide letter dated 13th May 1988, the Respondent directed the Petitioner to occupy the flat within one week failing which action would be taken against him. It was recorded in the said letter that the Petitioner was on emergency duty and the allotment was done on his request. It was further recorded in the said letter that the Petitioner was required to be present in the hospital campus round the clock and due to his non availability, the hospital was unable to attend to extreme emergent cases at odd hours.

4. The Petitioner replied to the above letter on 27th May 1988 in which he flatly declined to shift to the allotted premises. He demanded Type-V accommodation. He further disputed that it was obligatory for him to stay in the campus round the clock. He also disputed that his post was residential. However, he offered to attend the emergency cases provided an ambulance sent to him or the taxi fare was given to him.

5. Vide notice dated 14th June 1988, the Respondent terminated the services of the Petitioner u/s 45 of the Punjab Municipal Act, 1911 with one month notice which is under challenge in this petition.

6. We have heard learned Counsel for the parties. The petitioner was a temporary employee of the Respondent and he had not been confirmed. We have perused the relevant eligibility conditions for allotment of Municipal accommodation to the staff and according to the pay-scale of the Petitioner, he was entitled to Type-IV accommodation which was allotted to him out of turn considering the requirement of the Petitioner to attend emergency cases at odd hours. The petitioners demand for Type V accommodation was unjustified. The Petitioner was specifically directed vide office order dated 13th May 1988 to occupy the office quarter within a week''s time which was flatly declined by the Petitioner. The hospital could not handle the emergency cases at odd hours due to the adamant attitude and conduct of the Petitioner. The Petitioner being a temporary employee, the Respondent chose to invoke Section 45(1) of the Punjab Municipal Act, 1911 to terminate the services of the Petitioner. The Respondent has stated that the termination was not by way of punishment but as discharge simplicitor.

7. The Petitioner has challenged the vires of Section 45(1) of the Punjab Municipal Act, 1911, which is reproduced hereunder:

Section 45 - Notice before discharge

(1) In the absence of a written contract to the contrary, every officer or servant employed by a committee shall be entitled to one month''s notice before discharge unless he is discharged during a period of probation or for misconduct or was engaged for a specified term and discharged at the end of it.

8. The petitioner has referred to and relied upon the judgment of the Hon''ble Supreme Court in the case of Central Inland Water Transport Corporation Limited

and Another Vs. Brojo Nath Ganguly and Another, . In that case, the Hon''ble Supreme Court held the provision which empowers an employer to dispense with the services of a permanent employee by giving notice of specified period or pay in lieu thereof to be unconstitutional. In the present case, we are dealing with the services of a temporary employee.

9. The vires of Section 45(1) of Punjab Municipal Act, 1911 were considered by the Hon''ble Punjab & Haryana High Court in the case of Roshan Lal v. State of Punjab (1996-1) 112 PLR 660 where it was held as under:

4. In my opinion, the aforesaid arguments of Shri Mittal cannot be accepted. No doubt, Section 45(1) does not expressly makes any distinction between a temporary and permanent employees, but, a close look at the provision shows that it deals with the employees who are on probation. If the employer wants to terminate the services of a probationer otherwise than by way of punishment, power u/s 45(1) can be used. This narrow interpretation of Section 45(1) is necessary to make it constitutionally valid. If I was to read Section 45(1) as governing the cases of permanent employees and I was to hold that the Municipal Committee can dispense with the service of a permanent employee by giving him one month notice or pay in lieu thereof, the provision would be open to attack on the ground of unconstitutionality, namely, violation of Article 14 and 16 of the Constitution of India.

5. In Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, their Lordships of the Supreme Court reaffirmed the principle of law laid down in some earlier decisions that a provision which empowers an employer to dispense with the services of a permanent employee by giving a notice of specified period or pay in lieu thereof, is unconstitutional.

6. The same view has been expressed by a Constitution Bench of the Supreme Court in Delhi Transport Corporation v. D.T.C. Mazdoor Congress 1991(1) (Supp.) S.C.C. 600. By a majority of 4:1, the Supreme Court approved the ratio of the judgment in Central Inland Water Transport Corporation''s case (supra). If in the face of the law declared by the Supreme Court, Mr. Mittal''s argument is accepted, the provisions contained in Section 45(1) of the Act will be liable to be declared as unconstitutional. However, in my opinion, it is not necessary to construe the provisions in the manner suggested by Shri Mittal because it is one of the settled cannons of interpretation of statutory provisions that if more than one interpretation of a statutory provision is possible, then the Court should prefer the one which makes the provision constitutionally viable as against the one which renders it unconstitutional.

10. In the case of Kanshi Rum Verma Vs. Labour Court and Others, , the services of a temporary employee were terminated u/s 45(1) of Punjab Municipal Act, 1911. The termination was challenged by the employee before the Labour Court. The matter later came up before the High Court. The High Court held the termination to be

valid. Section 45(1) was interpreted by the High Court as under:

From a reading of the section it is clear that a person recruited on probation can be discharged during his period of probation. A temporary municipal servant is on the same footing. Even otherwise the services of a temporary servant can be dispensed with at any time. Therefore, the petitioner''s services could be terminated by the Committee even without serving one month''s notice.

11. Section 45(1) of the Punjab Municipal Act, 1911 has been held to be valid insofar as it applies to temporary employees and probationers as held by Punjab and Haryana High Court in Roshan Lal''s case (supra) and is constitutionally valid to that extent. We agree with the judgment of Punjab & Haryana High Court in Roshan Lal''s case.

12. It was next contended by the Petitioner that his termination was in the nature of punishment and, therefore, an enquiry was necessary before termination. However, the termination of the petitioner is in the nature of the discharge simplicitor and not punishment. The judgment of the Hon''ble Supreme Court in Ravindra Kumar Misra Vs. U.P. State Handloom Corpn. Ltd. and Another, is relevant in this regard. In that case, the Appellant was employed on temporary basis. He was given two promotions while he was still working on temporary status. His appointment letter contained a clause that his services were liable for termination with one month''s notice or one month''s pay in lieu of notice. On 22nd November, 1982, the Appellant was placed under suspension for misconduct. However, on 1st February, 1983, the order of suspension was revoked and the appellant was terminated by a notice which was challenged before the Allahabad High Court, which declined to interfere holding that the termination was not punitive. The Appellant came to the Hon''ble Supreme Court and the Hon''ble Supreme Court held as under:

The order of termination of service in this case is indeed innocuous. The appellant is not entitled to the protection of Article 311(2) of the Constitution not being a member of a civil service of the Union or a State nor holder of a civil post under the State but his own Service Rules provide under Rule 68 that if the punishment of discharge or dismissal is imposed, an enquiry commensurate with requirements of natural justice is a condition precedent. Admittedly no such enquiry has been held. The question that crops up here for determination, therefore, is whether the impugned order was an order of termination simpliciter or really amounted to an order of dismissal. In Parshotam Lal Dhingra Vs. Union of India (UOI), a Constitution Bench of this Court stated:

The use of expression ''terminate'' or ''discharge'' is not conclusive. In spite of the use of such innocuous expressions, the Court has to apply the two tests mentioned above, namely. (1) whether the servant had a right to the post or the rank or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to? If the case satisfied either of the two tests then it must be held that the

servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Article 311, which give protection to Government servant have not been complied with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant.

This view has been approved by another Constitution Bench of this Court in Champaklal Chimanlal Shah Vs. The Union of India (UOI),

11. Keeping in view the principles indicated above, it is difficult to accept the claim of the appellant. He was a temporary servant and had no right to the post. It has also not been denied that both under the contract of service as also the Service Rules governing him the employer had the right to terminate his services by giving him one month''s notice. The order to which exception is taken is expressly an order of termination in innocuous terms and does not cast any stigma on the appellant nor does it visit him with any evil consequences It is also not founded on misconduct. In the circumstances, the order is not open to challenge.

13. In Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, the Hon''ble Supreme Court observed that the concept of punishment implies deprivation of a right that an employee otherwise has. If an employee is on temporary employment, he has a right to seek a new employment on termination. Punishment it was held means evil consequence that jeopardizes future employment. The order of termination quoted above cannot be regarded as a punishment. Even use of the words "not upto the mark" or "unsuitable" it was held is not stigmatic. In paragraphs 28 to 30 of the said judgment it was observed as under:

28. Therefore, whenever a probationer challenges his termination the court''s first task will be to apply the test of stigma or the "form" test. If the order survives this examination the "substance" of the termination will have to be found out.

29. Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? 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.

30. As was noted in Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others,

At the outset, we may state that in several cases and in particular in The State of Orissa and Another Vs. Ram Narayan Das, it has been held that use of the word ''unsatisfactory work and conduct'' in the termination order will not amount to a stigma.

14. In the present case, the termination of the petitioner was in the nature of discharge simplicitor and it does not cast any stigma on the petitioner. Admittedly the Petitioner was a temporary employee and had no right to the post which is clear from the office order dated 14th May 1987 filed by the Petitioner himself. We do not find any infirmity in the termination of the petitioner u/s 45(1) of the Punjab Municipal Act, 1911. There is no merit in this writ petition. We, therefore, dismiss the same.