Kamalakar Shankar Kate Vs Principal, Training College for Men, Sangamner

Court: Bombay High Court

Date of Decision: Jan. 30, 1958

Acts Referred: Constitution of India, 1950 â€" Article 226, 227, 311, 311(2)

Citation: (1958) 60 BOMLR 624 : (1958) 2 LLJ 692

Hon'ble Judges: P.V. Dixit, J; H.L. Gokhale, J

Bench: Division Bench

Judgement

Dixit, J.
The petitioner in this case was in service of the Education Department of the Government of Bombay on or about 6 December

1948. According to the petitioner he was made permanent on the expiry of the probationary period. In about 1950 the petitioner was transferred

as a clerk in the office of the Educational Inspector, Ahmednagar, where he served for about a year. The petitioner was then retransferred to

Sangamner and at the latter place he worked in the office of the Principal, Training College for Men, for about three years. The petitioner was

again transferred to the office of the Educational Inspector, Ahmednagar, and the petitioner''s next assignment was that of a clerk in the

Government Girls School, Ahmednagar, where the petitioner worked for about seven or eight months. In April 1956 the petitioner was again

posted as a clerk in the office of the Principal, Training College for Men, at Sangamner.

2. It appears that while the petitioner was working at that place, the petitioner was alleged to have committed an offence of forgery. It would

appear that the explanation of the petitioner was then taken and the petitioner admitted his guilt. But the petitioner now disputes that he ever

admitted having committed the offence of forgery. On 27 May 1957, a notice of discharge was given to the petitioner and it is in the following

terms :

As per D. E. Poona''s instructions conveyed in his No. S. 26(d) -B of 3-5-1957 you are hereby given one month''s notice of discharge and

further informed that your services will be terminated with effect from 30 June 1957.

3. The petitioner worked in the office until 29 June 1957, when he was informed that he should suppose himself as discharged form the services

form 29 June 1957, after office hours. It is the correctness of the order made on the 27 May 1957, which is challenged on behalf of the petitioner

under Art. 226 of the Constitution and the contention taken on behalf of the petitioner is that the order of discharge dated 27 May 1957 amounts,

in effect, to an order of dismissal, and since in the case of an order of dismissal a Government servant cannot be dismissed without complying with

the provisions of Art. 311(2) of the Constitution, the order of discharge is invalid. Although the petitioner stated in his petition that he was make

permanent after the expiry of the probationary period, it is now conceded by Mr. Namjoshi appearing for the petitioner that the petitioner was not

permanent Government servant and we will proceed with the petition upon the footing that the petitioner was a temporary servant and not a

permanent one.

4. On behalf of the opponents, a preliminary objection has been raised by Mr. Chandrachud and his contention is that this petition must be

dismissed in limine on the ground that there has been gross delay in presenting this petition. The facts in that connexion are briefly these. The order

of discharge is dated 27 May 1957, and the petition was filed in this Court on 25 October 1957, i.e. after a period of five months. In the petition,

also originally filed, the petitioner had averred that the petitioner did not file this petition earlier, because he was lying ill, was confused and had no

sufficient funds to take legal advice and pursue the matter. He also averred that he was lying ill, suffering from ""flu"" which prevailed in virulent form.

But the delay which occurred in presenting the petition was explained by him in an affidavit filed by him on 16 November 1957. In that affidavit the

petitioner stated that after the order of discharge became effective, he made efforts to persuade the authorities to withdraw the order of discharge.

He also stated that the authorities were not persuaded to withdraw the order of discharge, as a result of which he received a shock and was in a

confused state of mind for some two or three weeks. He then stated that he had an attack of ""flu"" which made him bedridden and this continued till

August of 1957. He then stated that his wife was in bed and since he had to nurse, her during her illness, he had no peace of mind. He then went

on to state that his wife gave birth to a son on or about 20 September 1957, but to his misfortune, the child died, as a result of which his wife got a

shock and was confined to bed and continued to be in a serious condition until the middle of October, 1957. He says that as a result of these

incidents there was complete disruption in his family life, and when he went to Bombay, he was told that the Courts were closed and the petition

could not be filed and further that the petition could be filed only after the reopening of the Court, and it is in that way that the petition was filed on

25 October 1957. Mr. Chandrachud''s contention is that it was open to the petitioner to file the petition as expeditiously as possible and there is no

good ground to show that the petitioner was prevented from filing the petition earlier. Now in all petitions - whether under Art. 226 or 227 - it is a

settled principle that a petitioner wanting to invoke the Court''s jurisdiction under Art. 226 or 227 must come up for relief as quickly as possible,

and looking to the long lapse of time which has taken place between the date of the order of discharge and the date of the filing of the petition, it

cannot be said reasonably that the petitioner has come up with this petition as expeditiously as possible. But in this case there are some peculiar

circumstances. That the petitioner had a shook as a result of the order of discharge is understandable. But if that had been the only reason for the

delay, there was not excuse whatever why the petitioner did not file the petition before 25 October 1957. But the petitioner had to face a number

of misfortunes. He himself was taken ill. His wife, too, became ill, but this was not all. He lost his newly born child. It is possible that on account of

the various incidents, which I have mentioned above, the petitioner was not mentally at peace with himself and that is why there was delay in filing

this petition. Now, there is no particular period before which petition ought to be filed, and having regard to the circumstances disclosed in the

affidavit of 16 November 1957, we are prepared to say, on the facts of this case, that there is not such a gross delay on the part of the petitioner

that we should dismiss this petition solely on the ground of delay. We have, therefore, decided to deal with the petition on its merits.

Article 311 of the Constitution, so far as material, provides :

(1) No person who is member of a civil service of the Union or an all-India service or a civil service of State or holds a civil post under the Union

or State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismisses or remove or reduce in rank until he has been given a reasonable opportunity of showing cause

against the action proposed to be taken in regard to him.

5. Article 311, therefore, gives protection to a servant holding a civil post against an arbitrary dismissal or removal or reduction in rank and before

a person holding a civil post is dismissed, removed or reduced in rank, he is to be given a reasonable opportunity of showing cause against the

action proposed to be taken in regard to him. Article 311 does not, in terms, refer to person holding a civil post as being either of a permanent or

of a temporary nature. As one reads Art. 311, it would seem to apply to the case of a permanent employee, but it is now an accepted principle

that Art. 311 would also apply to the case of a temporary servant if his services ar terminated by way of punishment. So that if a temporary servant

is dismissed, then it amount to a punishment and in that case he must be given a reasonable opportunity which is proposed to be made in regard to

him.

6. Now the argument which has been urged by Mr. Namjoshi in support of the petition is that looking to the language of the order of discharge, the

order of discharge is nothing else but an order of dismissal. It is not disputed by Mr. Namjoshi that it would be open to the authority to discharge

the petitioner, but he says that since the order of discharge is accompanied by punishment, the order made against him is invalid. The question,

therefore, is whether the contention of Mr. Namjoshi is well founded. Now, there is a sound principle as to why in the case of a temporary servant

the provision of Art. 311 are attracted when the services of the temporary employee are terminated by way of punishment : The reason is that

where the termination of services is accompanied by punishment, it constitutes a stigma upon the character of the employee concerned and the

future of the employee is, so to say, in jeopardy. It would not be possible for him to obtain employment elsewhere, because the punishment which

has been meted out to him will constitute an obstacle in the way of his being able to obtain another employment and the real question is whether on

the language of the notice of discharge, it is reasonably clear that the notice of discharge is accompanied by punishment. According to Mr.

Chandrachud, the petitioner is guilty of an offence of forgery, and in this connexion he relies upon and admission made by the petitioner before the

authorities when he stated that he was responsible for the commission of an an offence of forgery, Mr. Namjoshi says that the so-called admission

was obtained as a result of inducement shown to him. It is also said that the petitioner was threatened by the Educational Inspector who stated that

unless the petitioner admitted the guilt, he would forthwith dismiss the petitioner from service. In other words, the contention of the petitioner seems

to be that he would not have made the admission, were it not for the fact that the admission was obtained as a result of threat or inducement given

to to him. Now, upon this writ petition, it is not possible to go into disputed questions of fact. It is not possible for us to find as to whether any

threat was given to the petitioner or any inducement was offered to the petitioner, and if the petitioner has any grievance in that connexion, this

contention is certainly not within the scope of the petition which is made under Art. 226 of Constitution. Mr. Namjoshi relies upon the contents of

an affidavit put in on behalf of the opponents. In the affidavit made by the Educational Inspector a reference is made to the admissions of the

petitioner, but the allegations made by the petitioner in the petition about the inducement and threat have been dented it is also stated in the affidavit

that the order of discharge is not an order of dismissal. What is stated is that :

The Government has not stopped at discharging him only. He is being prosecuted for the criminal offences of forgery and misappropriation of

Government and non-Government money in the Court of law.

Then further it is stated :

The contention made in Para. 11 that he was not given any chargesheet, nor was he given any opportunity to be heard before passing the order of

so-called discharge. Which in fact and in reality, is an order of dismissal, is not correct. The serious offences were established by documentary

evidence and hence it was decided to discharge and prosecute him for the criminal offences. As it was decided to discharge him and then

prosecute him for the criminal offences, the usual procedure laid down before dismissing a servant was not followed.

The affidavit then proceeds :

Moreover, the petitioner was a temporary servant and hence it was also not incumbent to follow the prescribed procedure of chargesheeting, etc.,

before discharging him from service.

7. There can be no doubt, having regard to the language of the notice of discharge, that the authorities wanted to terminate, and did terminate, the

petitioner''s services upon discharge and the order of discharge was made pursuant to instructions receive from the Director of Education, Poona.

At that point of time two courses were open to the authorities. It was open to the authorities firstly, to discharge the petitioner by giving him a

month''s notice and thus to terminate his services. It was also open to the authorities to discharge the petitioner for his misconduct. In the latter

case, of course, the petitioner would have been entitled to the protection afforded by Art. 311. it cannot, I think, be reasonably suggested, having

regard to the language of the notice of discharge, that the authorities terminated the services of the petitioner by giving him a notice of discharge for

his misconduct, because if that was the intention, the authorities would made an order of dismissal. But Mr. Namjoshi argues that in order to avoid

the procedure of giving the petitioner a reasonable opportunity of showing cause against the action proposed to be taken against him, the

authorities have terminated his services by way of discharge which really amounts to an order of dismissal. The authorities may have a hundred and

one reasons as to why an employee should be discharged the and his services terminated. But if the authorities are right in discharging the services

of a temporary employee by merely terminating temporary employee by merely terminating his services, there is nothing to prevent them from doing

so. It is only if the authorities choose to discharge an employee by way of punishment that the employee is given the protection afforded by Art.

311 of the Constitution. It is true that the particular language employed in an order is not conclusion but in such a case it is necessary to examine

the language of the order and to find out whether the order of discharge is really one of dismissal, an as far as I have been able to read and re-read

the notice of discharge, I am not satisfied that the order of discharge was intended to be an order of dismissal, because if that was the idea, at the

back of the mind of the authorities, they would have given the petitioner an opportunity of showing cause against the action which they proposed to

take against him. What they did was that since the petitioner was a temporary employee, they gave him a month''s notice in order terminate his

services. If the petitioner was guilty of misconduct, it was quite open to the authorities to prosecute him for the offence alleged to have been

committed by him. But merely because the authorities would want to prosecute the employee for the offence alleged to have been committed by

him the authorities would not make an order or discharge to terminate his services. The authorities may come to the conclusion that it was for them

to terminate the services of an employee by an order of discharge without saying anything more. It would be open to the authorities also to

discharge the services of a temporary employee by way of punishment, but in that event the procedure laid down in Art. 311 would have to be

followed. But in judging of the question whether or not an order of discharge is accompanied by punishment, one mist look to the language of the

order of discharge and to find out whether on the face of it the order of discharge is made by way of punishment. Now all that the notice of

discharge says is that the services of the petitioner have been terminated with effect from 30 June 1957, in accordance with instructions form the

Director of Education, Poona. Reasonably read, it would mean that the Educational Inspector made an order terminating the services of the

petitioner in accordance with instruction received by him from a higher authority who is the Director of Education, Poona I am not prepared,

therefore to accept the contention of Mr. Namjoshi that the order of discharge amounts to an order of dismissal.

8. The matter can be looked at from another point of view. The question is; can it be said that the order of discharge in the terms in which it has

been made will visit the petitioner with any penal consequences ? Far from visiting the petitioner with any penal consequences, the order of

discharge merely says that that his services were terminated form 30 June 1957, and that in the meanwhile he would, during that month, continue in

service. There can, therefore, be no question of any penal consequences flowing form the notice of discharge.

9. The principles governing the rights of a civil servant have been recently considered by their lordships of the Supreme Court in the case of

Parshotam Lal Dhingra Vs. Union of India (UOI), . The principles as summed up in the headnote to that case are as follows :

An appointment to a temporary post for a certain specified period also gives the servant so appointed a right to hold the post for the entire period

unless he is, by way of punishment, dismissed or removed from the service.

10. In this case, Mr. Namjoshi has not suggested that there was any particular period for which the petitioner was appointed as a clear, and it is

clear that he was holding a temporary post. Then the principle is stated also in the following terms :

The net result, therefore, is that it is only in those cases where the Government intends to inflict those three forms of punishments that the

Government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. It follows,

therefore, that if the termination of service is sought to be brought about otherwise than by way of punishment then the Government servant whose

service is so terminated cannot claim the protection of Art. 311(2).

11. On the terms of notice to which I have referred above, it cannot be suggested for a moment that the termination of the services of the petitioner

has been brought about by way of punishment in any one of the three forms mentioned in Art. 311(2). Then again it is stated :

But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure

prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the

servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency, or other disqualification, then it is a

punishment and the requirements of Art. 311 must be complied with.

12. Again, on the language of the notice of discharge, it is nowhere suggested that the petitioner was being discharged either for misconduct,

negligence, inefficiency or any other disqualification, and so it cannot beheld that this order of discharge comes within one of the three forms of

punishment mentioned in Art. 311(2) of the Constitution. Then again their lordships say :

The real test for determining whether there reduction in such cases is or is not by way of punishment is to find out if the order of the reduction also

visits the servant with any penal consequences. The use of the expression "terminate" or "discharge" is not conclusive,

13. Now, on the language of the order of discharge no penal consequence is imposed upon the petitioner. On the contrary, the petitioner is

allowed to continue in service until 30 June 1957. In our view, therefore, it is not possible to accept the contention of Mr. Namjoshi that the notice

of discharge amounts to a notice of dismissal. It is true, as is stated in the affidavit made by the Educational Inspector, Ahmednagar, that

Government would wan to prosecute the petitioner for the offence of forgery. But if the petitioner has committed no offence, he would be in a

position to establish his innocence, and if a complaint is launched against him, the prosecution will have to prove that the petitioner has committed

the offence attributed to him, and as a matter of principle, I would say that so long as the authorities do not make an order of discharge, for

misconduct but merely exercise their right to terminate the services, it is not open to an employee to complain that the authorities cannot terminate

his services and that the termination is by way of punishment. For all these reasons, we are unable to accept the contention urged in support of this

application.

14. The result is this application fails and the rule will be discharged. The petitioner was temporary employee and was at the material time, facing a

number of misfortunes, big or small. In the circumstances, we think that the fair order to make would be that the parties will bear their own costs of

this petition.