

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.2149/2002

New Delhi this the 3rd day of April, 2003.

HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

Anil Kaim,
S/o Sri Ganesh Lal Kaim,
R/o S-10/A, Pandav Nagar,
Patparganj Road, Delhi-110 092. -Applicant

(By Advocates Shri K.C. Mittal with Sh. Harvir Singh)

-versus-

1. Union of India,
through Secretary,
Ministry of Defence,
Govt. of India, South Block,
New Delhi.
2. Chief of Army Staff,
Army Headquarters,
New Delhi-110011.
3. Dy. Chief of Army Staff,
G.S. Branch MT-15 (a), Army HQs,
DHQ, PO,
New Delhi-110011.
4. Sh. T.S. Panwar,
Principal (Retd),
Military School, Chail,
Shimla Hills (HP)-173 217. -Respondents

(By Advocate Shri Rajinder Nischal)

O R D E R (ORAL)

By Mr. Shanker Raju, Member (J):

Applicant impugns termination notice dated 12.3.2001, termination order dated 12.4.2001 as well as order on representation dated 26.4.2002. He has sought quashment of these orders with direction to re-instate applicant with all consequential benefits.

2. Applicant in pursuance of a notice applied for the post of Assistant Master-Manual Training (Handicraft), which was reserved for candidates belonging to SC category. He was offered, on the recommendations of Selection Board, Group "C" post of Assistant Master in the

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subject of Manual Training (Handicraft) on probation for two years. As per letter dated 7.3.2000 applicant joined the post on 14.8.2000. When applicant applied for the post in his application he has apprised the respondents about his studying in the 2nd year (final year) of Master of Fine Arts (post graduation degree course) from the College of Arts, University of Delhi.

3. Final year study and examinations of Post Graduation in Fine Arts was to complete by first week of May, 2001. Accordingly applicant has sought permission to grant study leave from 17.12.2000 to 25.2.2001, which was accordingly granted to applicant and this period was regularised as per leave certificate dated 16.12.2000. Applicant was told by the Principal of College of Arts that if he desires to complete his final year of post graduation degree, he has to complete minimum required regular attendance in the college, as such he further requested for grant of study leave for preparation and examination for the period from 8.3.2001 to 6.5.2001 vide his application dated 7.3.2001. Aforesaid request was turned down on 7.3.2001 on the ground that as applicant has not applied for higher education through the competent authority of the School and in the exigency of service the same cannot be acceded to.

4. Applicant through his another application applied for the leave for at least 15 days, which was not responded to and finding no response and assuming it to be implied sanction he came to Delhi and made an application on 14.3.2001 by registered post. By an order dated 12.3.2001 applicant was issued one month's notice for

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termination on the ground that as the leave applied has not been granted applicant has left the station without prior permission of competent authority.

5. Applicant approached this court in OA-788/2001 where the stay was granted, which was vacated on 11.4.2001. Accordingly services of applicants were dispensed with on 12.4.2001.

6. On representation of applicant and direction of court dated 19.2.2002 appeal of applicant was considered but was rejected on the ground that applicant took 79 days leave out of 205 days of service and left the headquarters without informing the authorities. Having failed to report for duty his services have been dispensed with. One of the reasons to maintain the termination was that applicant as per Rule 50 (1) and (2) of Leave Rules, 1972 was not eligible for study leave. Hence the present OA.

7. Learned counsel of applicant Sh. K.C. Mittal, contended that termination is in the guise and garb of a punitive order is founded on misconduct of applicant of leaving the station without permission. Before resorting to termination no reasonable opportunity to show cause was afforded to applicant, which is in violation of Article 311 (2) of the Constitution of India.

8. By referring to the following decisions, it is contended that the test whether a misconduct is foundation or motive is when if the findings of misconduct are arrived at in an enquiry as to misconduct behind the back of an officer or the same are arrived at without

holding a regular DE the simple order of termination is to be treated as founded on allegation and will be bad. In this backdrop it is stated that performance of applicant had remained above Board and satisfactory during the period of probation. In the notice of termination the only reason to dispense with the services is an act of applicant leaving the station without proper permission of the competent authority, which amounts to misconduct, requiring a reasonable opportunity to show cause or holding a regular DE:

i) Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Others, (1993) 3 SCC 60.

ii) Anoop Jaiswal v. Govt. of India, AIR 1984 SC 636.

iii) Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and Another, (2002) 1 SCC 520.

9. In the aforesaid conspectus it is contended that respondents have granted him leave when the teaching was in its peak and have refused leave to him when required in his own interest for betterment of career when the teaching ended and the examinations are being held and at this stage there is no requirement of applicant or any administrative exigency for his presence on duty. This he contends on the basis of the documents annexed in the OA.

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10. Shri Mittal further stated that as per OM dated 6.2.1961 being a technical person Assistant Master-Manual Training (Handicraft) he should have been encouraged to complete his higher education as he belongs to SC community.

11. It is contended that representation against the termination has been rejected without any application of mind and contains no reasons. As applicant had already apprised respondents at the time of application about his appearing in the Post Graduate Education, stand of respondents that he has never informed them is unfounded.

12. On the other hand respondents' counsel strongly rebutted the contentions and stated that applicant's services as per the conditions of service contained in his appointment letter in para 3 (d) have been terminated through a simple order which is not based or founded on any misconduct of applicant. As applicant was consistently proceeding on leave due to exigency of service and welfare of students same was not sanctioned and as per Rule 50 (5) of the Leave Rules ibid only those who have completed satisfactorily the probation and rendered not less than five years regular service are entitled for grant of study leave. Request of applicant was rejected but yet he left the station without any permission of the competent authority. Termination does not require any enquiry and was in accordance with Rule 5 (a) of CCS (TS) Rules, 1965.

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13. I have carefully considered the rival contentions of the parties and perused the material on record. Apex Court in Anoop Jaiswal's case (supra) has held as follows:

"It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

14. In Dipti Prakash Banerjee's case (supra) following observations have been made:

"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."

15. In Bavanendra Narayan Verma's case (supra) the Apex Court has made the following observations:

"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 that 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."

16. If one has regard to the aforesaid decisions termination during probation period on unsatisfactory performance is always treated to be an order simpliciter in terms of conditions of service but where a finding as to misconduct is arrived without holding a departmental enquiry, order of termination is to be treated as founded on allegations. It is nobody's case that performance of applicant during the probation period had remained unsatisfactory. He has not been served upon with any show cause notice, memo or advisory note to establish the same. The only ground which respondents have taken in their reply and re-iterated in the notice is an act of misconduct of applicant of leaving the station without permission of the competent authority. This, in my considered view, is an imputation of misconduct. A stigmatic order is when the order apart from observing unsatisfactory performance is couched in a language which imputes over and above mere unsuitability for the job. In the instant case notice for termination which is a document referred to in the termination order clearly imputes something over and above mere unsuitability for the job which the respondents have not alleged. This imputation certainly casts a stigma upon applicant. In so far test for stigma is concerned, in

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Dipti Prakash Banerjee's case (supra) it has been held that stigma need not be contained in the order of termination but also be contained in an order or proceeding referred to in the order of termination. From the perusal of the notices for termination I am of the considered view that imputation alleged is stigmatic, making order of termination as stigmatic. The aforesaid notice of termination has been referred to in the order of termination dated 12.4.2001.

17. In so far as foundation is concerned, as a finding of misconduct of not seeking permission of the competent authority for leaving the station which constitutes misconduct has been arrived at behind the back of applicant without holding a regular departmental enquiry the termination is founded on these allegations as there exists no adverse material against applicant to point towards unsatisfactory performance of applicant during the probation period. Accordingly the order is founded on misconduct and by not following the process of law as per Article 311 (2) without holding the departmental enquiry, termination resorted to cannot be sustained.

18. In the result, for the foregoing reasons, OA is allowed. Impugned orders are quashed and set aside. Respondents are directed to re-instate applicant with all consequential benefits within a period of two months from the date of receipt of a copy of this order. However, this shall not preclude the respondents from proceeding further against applicant in accordance with law. No costs.

S. Raju
(SHANKER RAJU)
MEMBER (J)

Shankar Raju
/Sd/-
Shankar Raju