IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

NEW DELHI

(1)

O.A. No. 422 of 1992
T.A. No. 199

DATE OF DECISION 30.03.1995

Shri Subash Chander — Petitioner

Shri Shanker Raju — Advocate for the Petitioner(s)

Versus

Lt. Governor of Delhi & Others — Respondent

Shri Rajendra Pandita — Advocate for the Respondent(s)

CORAM

The Hon'ble Mr.Justice S.C. Mathur, Chairman

The Hon'ble Mr.K. Muthukumar, Member

1. To be referred to the Reporter or not? yes to be reported

2. Whether it needs to be circulated to other Benches of the Tribunal? NO

(K. MUTHUKUMAR)
MEMBER (A)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

O.A. No.422 of 1992

(8)

New Delhi this the 30th day of March, 1995

Mr. Justice S.C. Mathur, Chairman
Mr. K. Muthukumar, Member (A)

Shri Subhash Chander
R/o RD-61 Ravidass Nagar,
Panna Udyan, Narela,
Delhi-40. ..Applicant

By Advocate Shri Shanker Raju

Versus

1. Lt. Governor of Delhi through
Chief Secretary,
Delhi Administration,
Delhi.

2. Commissioner of Police, Delhi,
Delhi Police Headquarters,
M.S.O. Building,
I.P. Estate,
New Delhi.

3. Deputy Commissioner of Police,
8th Btn. D.A.P.,
PTS Malviya Nagar,
New Delhi. ..Respondents

By Advocate Shri Rajendra Pandita

JUDGEMENT

Mr. K. Muthukumar, Member(A)

The applicant was a constable in Delhi Police and was undergoing his probationary period of service. By the impugned order of 27.05.1991, the respondents have terminated the services of the applicant under Rule 5 of the CCS (Temporary Service) Rules, 1965. This application is filed against this order and the applicant prays for quashing the impugned order and for a direction to the respondents to reinstate him in service with all consequential benefits. The applicant alleges that he has been removed from service under the garb of termination under Rule 5 of the CCS (Temporary Service) Rules, 1965 for his alleged misconduct of absence from duty for the period from 27.10.1990 to 19.03.1991 and from 21.03.1991 to 27.05.1991. The

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facts leading to the termination of service of the applicant were, as follows.

2. The applicant was posted in the 8th Battalion, Delhi Armed Police Training School, New Delhi. He proceeded on three days' casual leave duly sanctioned by the competent authority but could not resume duty as he fell ill. It is stated that he had informed the DCP of the 8th Battalion about his illness by Registered Post. He was served with an absentee notice by the third respondent directing him to resume duty as he absented himself since 27.10.1990 without any intimation, and in case he was sick, he was directed to appear before Civil Surgeon, Delhi, failing which, he was informed that it would be presumed that he was absenting wilfully and on flimsy grounds. This notice was dated 11.3.1991. On 20.03.1991, he intended to rejoin duty with effect from that date and he informed by his letter dated 20.03.1991 that he would produce medical certificate and fitness certificate. Apparently, no medical certificate was produced nor did he appear before the Civil Surgeon as directed in the absentee notice before he submitted his letter dated 20.03.1991. He alleges to have submitted medical certificate later on but this has been denied by the respondents. The applicant proceeded to his village again on 21.03.1991 on the ground of his wife's illness due to delivery complications, and had to stay away from duty as his wife was admitted in a hospital. The applicant claims to have informed the 8th Battalion about the illness of his wife. He did not resume duty thereafter and remained absent till the impugned order dated 27.05.1991 was issued by respondent No.3 terminating the services of the applicant under Rule 5 of the CCS (Temporary Service) Rules, 1965.

3. The applicant alleges that despite intimation to respondent No.3 about his illness in the first spell

and the illness of his wife in the second spell and despite his submission of the medical papers, the respondent No.2 had illegally terminated his services without ordering any departmental enquiry under Rule 16 of the Delhi Police (Punishment & Appeal) Rules, 1980 for the alleged misconduct of unauthorised absence. He also alleges that the termination of the services of the applicant without giving any reasonable opportunity of hearing is in violation of the principles of natural justice. The applicant further alleges that the impugned order is also discriminatory, as in similar cases and under similar circumstances, the other employees of the 8th Battalion even junior to the applicant were sanctioned leave for their absence on production of medical certificates by respondent No.3 whereas the applicant had been singled out for harsh treatment and his services had been terminated without providing him any opportunity of hearing. On these grounds, the applicant has approached this Tribunal with the prayer for quashing the impugned order as it is in violation of Article 311(2) of the Constitution.

4. In the counter-reply, the respondents have averred that the applicant during a short period of 2 years of service had absented himself without any reasonable cause very frequently and was not found suitable to be retained in Delhi Police Force and his services were, therefore, terminated under Rule 5. The respondents have also strongly denied that the termination order was issued in an arbitrary and motivated manner and without application of mind. The main plank of defence for the action taken by the respondents was that the applicant had absented himself without permission of senior officers and had not produced medical certificates even when he was asked to do so.

The leave rules provide that a Government servant while taking leave on medical grounds may not return to duty until he has produced the medical certificate of fitness. The respondents further averred that the applicant had been given absentee notices but did not bother to reply or to join duty and remained absent and, therefore, it was felt that there was no use in retaining him in Delhi Police. Disciplinary action under Rule 16 was not found necessary in this case and the action to terminate his services was taken under Rule 5 of the CCS (Temporary Service) Rules, 1965 which was not punitive in nature, as alleged by the applicant.

5. We have heard the learned counsel for the parties and perused the record placed before us. Learned counsel for the applicant argued on the pleadings and took us through various decisions of the Apex Court and this Tribunal in support of his contention that Rule 5 had been invoked as a camouflage to avoid punitive action. He cited the decision in Shamsher Singh VS. State of Punjab and Others decided by the 7-Judge Bench of the Apex Court, 1974 SCC (L&S) page 550. The Apex Court by a majority judgement had set aside the order of termination of the appellants who were members of the Punjab Civil Service (Judicial Branch). Their services were terminated under Rule 9 of the Punjab Civil Services (Punishment & Appeal) Rules, 1952. In the present case, however, the impugned order has been issued under CCS (Temporary Service) Rules, 1965 and we also find that the order of termination is an order simpliciter and, therefore, this case is not of any direct assistance to the applicant. It is, however, necessary to refer to the following observations of the learned judges in paragraph 64 of the judgment:-

> "64. In the absence of any rules governing a probationer, in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any tempermanetal or other object not involving moral turptitude

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> the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an enquiry. But in those cases the authority may not hold any inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If on the other hand, the probationer is faced with an enquiry on the charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection".

In the instant case, the authority has invoked Rule 5 of the CCS (Temporary Service) Rules, 1965 and no stigma is attached or implied in the aforesaid termination order.

6. Learned counsel for the applicant argued that even if an order of termination simpliciter is issued, such order must be examined in judicial adjudication by lifting the veil to see whether there is any stigma or the order is issued by way of punishment.

7. Admittedly, the applicant is governed by CCS (Temporary Service) Rules, 1965. Although it is well settled that the form of the termination order is not conclusive and it is open to the Court to determine the true nature of the order, we are not persuaded by the contention of the learned counsel. In judicial determination of the nature of the order issued under Rule 5 of the CCS (Temporary Service) Rules, 1965, lifting the veil is not a dull routine or a mechanical exercise cast upon the courts in every case. The executive power of the respondents under the aforesaid rules issued under Article 309 of the Constitution provides that an order can be issued under CCS (Temporary Service) Rules, 1965, under which the service of a temporary servant shall be liable for termination at any time by one month's notice with a proviso that the services may be terminated forthwith also in which case, the

Government servant shall be entitled to the pay and allowances for the period of notice at the same rate as he was drawing immediately before the termination of his service. The order of termination simpliciter has to be examined on the basis of the facts and back-ground of each case, according to the averments made in the application and those of the respondents and where on the basis of such averments and the facts and circumstances of the case, such an examination is warranted, then only there may be need for the courts to lift the veil as it were to probe the foundation or the motive behind the issue of such an order. It is not as though every order issued under Rule 5 shall be tested on the anvil of Article 311(2) of the Constitution even if the facts and circumstances of the case are explicit enough to exclude any suspicion on the motives and foundations for issue of such an order. It is not incumbent in every judicial adjudication to verify whether the order issued under Rule 5 is a camouflage or used as a subterfuge for not proceeding against the employee under the disciplinary rules unless, in the opinion of the court, such a verification is warranted in the facts and circumstances of the case. If it were not so, this will render the Rule 5 itself effete and nugatory.

8. The learned counsel for the applicant then referred to the decision in **Governing Council of Kidwai Memorial Institute of Oncology , Bangalore Vs. Dr. Pandurang Godwalkar and Another, 1993 SCC (L&S) 1**, contending that the order of dismissal had been passed in the garb of the order of termination. In the aforesaid

case, it was held as follows:-

> "The principle of tearing of the veil for finding out the real nature of the order shall be applicable only in the case where the court is satisfied that there is a direct nexus between the charge so levelled and the action taken. If the decision is taken to terminate the services of an employee during the period of probation after taking into account the overall performance and some action or inaction on the part of such employee then it cannot be said it amounts to removal from service.....Even if such an employee while questioning the validity of an order of termination simpliciter brings on record some preliminary enquiry or examination of some allegations had been made, that will not vitiate the order of termination".

In this case, it was further held that unless there is direct nexus between charge levelled and action taken, mere making of preliminary enquiry or examination of complaint against the probationer for assessment of his overall performance would not vitiate the simple order of termination on ground of being punitive. It is thus evident that this case is not of assistance to the contention of the learned counsel. On the other hand, the learned judge in the above case referred to the decision in **Oil and Natural Gas Commission VS. Dr. Mohd. S. Iskender Ali, 1980(3) SCC 428** wherein it was pointed out that a temporary employee appointed on a probation for a particular period "only in order to test whether his conduct is good and satisfactory so that he may be retained" and that even if misconduct, negligence, inefficiency may be the motive or the influencing factor which induced the employer to terminate the service of the employee which such employer admittedly had under the terms of appointment, such termination cannot be held to be penalty or punishment."

9. In determining the true nature of the order under this Rule, the Apex Court in Parshotam Lal Dhingra Vs. U.O.I. 1958 SLR page 828 held that the court should normally apply two tests, namely, (1) whether the temporary Government servant had a right to the post or the rank

or (b) whether he has been visited with evil consequences; and if either of these tests is satisfied, it could be held that the order of termination of the service of the Government servant is by way of punishment. The above view was also reiterated and affirmed by the Consitution Bench decision of the Apex Court in **R.C. Lacy Vs. The State of Bihar, CA No.590 of 1962 decided on 23.10.1963 and in Shamsher Singh Vs. State of Punjab, 1975 (1) SCR 814.** Citing reference to these decisions, the Apex Court in **State of U.P. Vs. K.K. Shukla, JT 1991 (1) SC 108** held that the evil consequences as held in Parshotam Lal Dhingra's case (Supra) do not include the termination of the temporary service of the Government servant in accordance with the terms and conditions of service.

10. The Constitution Bench of the Apex Court in Lacy's case (Supra) held that even if formal departmental enquiry is instituted aginst temporary servant, it is open to the competent authority to drop further proceedings in the departmental enquiry against the Government servant and to have recourse to rules applicable to temporary Government servant for terminating his services. The Court observed as under:-

> "If therefore the authority decides, for some reason to drop the formal departmental enquiry even though it had been initiated against the temporary Govt. servant, it is still open to the authority to make an order of discharge simpliciter in terms of the contract of service or the relevant statutory rule. In such cases the order of termination of services of the temporary Government servant which in form and in substance is no more than his discharge effected under the terms of contract or the relevant rules cannot, in law, be regarded as his dismissal, because the appointing authority was actuated by the motive that the said servant did not deserve to be continued in service for some alleged inefficiency or misconduct".

10. The learned counsel for the applicant then referred to the judgment of the Allahabad Bench of the

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Tribunal in **Smt. Manorama Devi Vs. Union of India & Others, ATJ 1994 Vol.1 CAT page 576.** In this case, however, it was held that on the facts of the case it was found that the termination order was not an order of termination simpliciter but by way of punishment. In the present case, however, the facts and background of the case, go to show that the respondents had valid reasons for taking a decision under Rule 5 of the CCS (Temporary Service) Rules, 1965. The applicant being on probation initially, has no right to the post and by order simpliciter issued under Rule 5 of the CCS (Temporary Service) Rules, 1965, he has not been visited with evil consequences and the tests applied in P.L. Dhingra's case are not satisfied in this case particularly in the light of the observations of the Apex Court in Dhingra's case as well as in Shukla's case. We do not find any basis for the contention that the order was passed on any alleged mala fide motive of the respondents or as a camouflage of punishment. In this case, the applicant even during his probation when his services were on trial basis absented himself initially on casual leave for a few days and later on remained un-authorisedly absent and then when a notice was issued to him to appear before a medical examination in case he was sick or to rejoin duty, chose to rejoin duty and again absented himself within a few days thereafter without taking leave or prior permission of the competent authority and remained absent for months and, therefore, there was nothing wrong if the respondents had considered that it was not necessary for them to continue him in service. In view of this, we do not find it necessary to verify further the motive or foundation for such motive before the issue of order of termination.

11. The learned counsel for the applicant then referred to the decision in **Vijay Narain Singh Vs.**

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Superintendent of Police, Bijnore reported in 1994 SCC (L&S) 796, in support of his argument that the respondents had not produced anything on record or anything adverse against the applicant. He has also argued that the reference to the applicant's frequent absence has not been elaborated by the respondents. We find that in Vijay Narain Singh's case (Supra) the State Government failed to produce any record in support of its submission and, therefore, the termination order was declared invalid.

12. It is, however, necessary to point out that in the aforesaid case, the applicability of Regulation 541 of the U.P. Police Regulation was contested by the respondents and no material was produced by the State to indicate that the appellant's appointment was not covered by the aforesaid Regulation. The facts in this case are not parimateria with those of the present case.

13. The learned counsel for the applicant then referred to the question of non-consideration of the representation of the applicant to the competent authority and relied on the observations of the Apex Court in **S.N. Mukherjee Vs. U.O.I., 1991 SCC (L&S) page 242.** The aforesaid decision mainly deals with the question of recording of reasons and it was held that in the above case no reasons were required to be recorded under the provisions of Army Act and the provisions of the above Act also did not confer any right to make representation to the confirming authority before confirmation of the findings but where such a representation is made at the pre-confirmation stage, it was observed that the confirming authority was expected to consider the same. We find that this decision relates to entirely different set of facts and circumstances and are not applicable in the instant case where the rules under CCS (Temporary Service) Rules, 1965 have

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been invoked and non consideration of the representation against the order of termination cannot by itself invalidate the said order issued under statutory provision which vests the authority with the power to do so, so long as the order does not contain any stigma aginst the Government servant. The charge of discrimination is also not supported by any evidence.

14. We are also not impressed by the argument of the learned counsel for the applicant that the respondents should have proceeded against the applicant if they have come to the conclusion that there was a misconduct on the part of the applicant due to his unauthorised absence. We are of the opinion that this is entirely within the ambit and powers of the competent authority to take cognizance of a misconduct if it so considers and take such steps as may be required to proceed under disciplinary rules or may take such appropriate action which will include action under Rule 5 of the CCS (Temporary Service) Rules, 1965, and in this case, the competent authority adopted the latter course, as it was not considered necessary to take any disciplinary action. The applicant cannot possibly claim that he has a vested right to invite on himself only a disciplinary action and not action under the Rule 5 of the CCS (Temporary Service) Rules, 1965. Thus the order of the respondents under Rule 5 of the aforesaid rules cannot be assailed on this ground.

15. In the conspectus of the discussion above, we find that the application has no merit and it is accordingly dismissed. There shall be no order as to costs.

(K. MUTHUKUMAR)
MEMBER (A)

(S.C. MATHUR)
CHAIRMAN

RKS