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Central Administrative Tribunal
Principal Bench, New Delhi

O.A.No.2077/93

New Delhi this the 19th Day of March,1997.

Hon'ble Dr Jose P. Verghese, Vice Chairman (J)
Hon'ble Shri S.P. Biswas, Member (A)

Ex. Constable Man Singh
R/o Village & P.O. Najnigo Dhera,
Jhun Jhunu, Rajasthan ...Applicant

By Advocate : Shri Sunil Malhotra)

VERSUS

Union of India, through

1. The Secretary,
Ministery of Home Affairs,
New Delhi

2. Commissioner of Police,
Police Headquarters
I.P. Estate, New Delhi.

3. Dy Commissioner of Police,
3rd Bn, DAP, Kingsway Camp,
Delhi. ...Respondents

(By Advocate : Sh. Vijay Pandita)

Order

(By Hon'ble Dr Jose P. Verghese, Vice Chairman (J))

The petitioner in this case was a Constable appointed on 04.01.82 but his services were terminated under the provision of sub rule (i) of rule 5 of the CCS(Temporary Service) Rules, 1965 by an order dated 13.2.1985. Admittedly the said order was without any notice to the petitioner. The petitioner filed an appeal against the said order and the same was rejected on 29.7.85 Thereafter, the petitioner filed a memorial to the President of India and the same was rejected on 4.8.1993. The respondents had raised a plea of limitation stating that the present OA is filed on 17th

Sept.,1993 eventhough the impugned order was issued on 21.2.1985, that is to say aftera bout 8 1/2 years from the issuance of the impugned order. The submission of the petitioner was that he filed a memorial to the President of India and that remedy being statutory and that the President has considered the said memorial and rejected the same on 4.8.93, his OA was well within the prescribed time limit. We do not hesitate to agree with the petitioner and we proceed to consider his case on meirts.

2. One of the main contentions of the learned counsel for the petitioner was that under rule 5(e) of Delhi Police (Appointment & Recruitment Rules, 1980, the period of probation is fixed as two years and it can be extended to not more than one year, indicating thereby that the maximum period of probation is only three years. Since the petitioner has been appointed on 4.1.1982 and for whatever be the reasons, he was not confirmed even after expiry of the mandatory period of three years and on the expiry of three years he should have been deemed to have been confirmed. The contention of the learned counsel appearing on behalf of the petitioner is that in the circumstances the petitioner is no more a temporary employee and an order issued under sub rule (i) of rule 5 of the Central Civil Services (Temporary Service) Rules, 1965 without notice, is illegal and violative of Article 311 of the Constitution of India. A confirmed employee has all the rights under Article 311 of the Constitution of India, atleast to a notice before he is removed from service. The counsel also relied upon the case of State of Punjab vs. Dharam Singh reported in AIR 1968 SC Page 1210, wherein it was held that " where the service

service rules fixed a certain period of time beyond which the probationers period cannot be extended and employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an expressed order of confirmation he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negatived by the service rules confirming the extension of the probationer period beyond the maximum period fixed by it. In such a case it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."

3. It was also stated that in view of the said decision the respondents had issued a Circular that orders under Rule 5 of CCS (Temporary Service) Rules 1965 , terminating the services of constables and other police personnel are being issued indiscriminately by Districts/Units. It was observed therein that under Rule 5(e) of Delhi Police (Appointment and Recruitment) Rules, 1980, police personnels enter in service on probation for a period of two years are required to be confirmed after the expiry of two years unless their probation period is extended for another year and in no circumstances it can be extended beyond a total period of three years. In case the probation period is not extended, he is deemed to have been confirmed on the expiry of two years. Orders for termination of service of such Police personnels who have completed two years of service , and whose probation period has not been

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extended, would be illegal and against the rules. The Circular further reproduced the above referred ratio of the case of State of Punjab V/s Dharmam Singh.

4. In view of these submissions we would have allowed the O.A. straight away but for the fact that in a very recent decision in the matter of Jai Kishan V/s Commissioner of Police reported in 1995 (Supppl.) 3 SCC 364 , the Hon'ble Supreme Court had an occasion to interpret this very rule namely Rule 5(e) of Delhi Police (Appointment & Recruitment) Rules 1980 and stated that the said rule does not contain an implied or automatic confirmation. We cannot sit in judgement on the ratio of this decision. And this case being later in time, directly interpreting the position contained in rule 5 (e) of Delhi Police (Appointment & Recruitment) Rules, 1980,we are disallowing the contention of the petitioner.

5. The second contention raised by the learned counsel for the petitioner is that the termination order even though on the face of it is innocuous and cast no stigma nor it contains any imputation or allegation on his conduct, in substance,the said order is nothing but a punishment order and such a punitive order cannot be issued without holding an enquiry as required under the provision of Article 311 of the Constitution of India. The submission of the petitioner is that the foundation of the termination order is a misconduct and as such the order being punitive, it casts stigma and removal of service by way of termination without holding an enquiry is against the principles of natural justice and as well as in violation of Article 311 of the Constitution of India. In support of his case, the learned counsel for

the petitioner cited the case of Jarnail Singh Vs State of Punjab reported in (1986) 3 SCC 277; in the said case the Honble Supreme Court has held

> "The position is now well settled on a conspectus of the decisions referred to hereinbefore that the mere form of the order is not sufficient to hold that the order of termination was innocuous and the order of termination of the services of a probationer or of an ad hoc appointee is a termination simpliciter in accordance with the terms of the appointment without attaching any stigma to the employee concerned. It is the substance of the order i.e. the attending circumstances as well as the basis of the order that have to be taken into consideration. In other words, when an allegation is made by the employee assailing the order of termination as one based on misconduct, though couched in innocuous terms, it is incumbent on the court to lift the veil and to see the real circumstances as well as the basis and foundation of the other complained of. In other words, the court in such case, will lift the veil and will see whether the order was made on the ground of misconduct, inefficiency, or not. In the instant case we have already referred to as well as quoted the relevant portions of the averments made on behalf of the State-respondent in their several affidavits alleging serious misconduct against the petitioners and also the adverse entries in the service records of these petitioner, which were taken into consideration by the Departmental Selection Committee without given them any opportunity of hearing and without following the procedure provided in Article 311(2) of the Constitution of India, while considering the fitness and suitability of the appellants for the purpose of regularising their services in accordance with the government circular made in October, 1980. Thus the impugned orders terminating the services of the appellants on the ground that "the posts are no longer required" are made by way of punishment."

6. The learned counsel for the petitioner also stated that the above referred circular thus makes a reference to this decision of the Hon'ble Supreme Court and it was observed that the services being terminated under CCS (Temporary Service) Rules 1965 for specific lapses or misconduct of a grave nature, is not a proper action. It was further stated therein that whenever

there is a mis-conduct, termination of services under CCS (Temporary Service) Rules, 1965 cannot be resorted to but a regular departmental action is necessary to be initiated against him and the delinquent police personnel may be given an opportunity to explain his conduct before imposing any penalty on him.

7. Relying on the above decision as well as Circular issued by the respondents themselves and based on the pleadings, the petitioner contends that the termination order, even though on the face of it is innocuous, is in fact, issued by way of punishment and the same is punitive in nature and in the absence of the departmental enquiry or in the absence of any opportunity given to the petitioner to explain his conduct, the same is in violation of the principles of natural justice and also in violation of Article 311 of the Constitution of India. The contention of the petitioner is that even though the motive behind the order is alleged unauthorised absence of the petitioner, the foundation of the order is wilful absence at the instance of the petitioner and the allegations of wilful and deliberate absence cannot but be a misconduct.

8. From the reply of the respondents it is obvious that the motive behind the order was that the petitioner remained absent for quite a number of days and the said absence was unauthorised. We have every reason to believe that the respondents were under the wrong impression that the petitioner was considered to be a habitual absentee unauthorisedly and wilfully for a large number of days and it is under this impression that the services of the petitioner have been terminated. Had

there been an enquiry or at least an opportunity given to the petitioner to explain the circumstances in which he is forced to be absent,and applications were made for leave and those applications have been considered and the leave admissible in accordance with his leave account have been granted the result would have been different. Ignoring all these facts which could have come out, but for any opportunity to the petitioner to explain, the respondents unilaterly proceeded to terminate the services of the petitioner with an impression that the petitioner is a habitual, unauthorised and wilful absentee.

9. In the circumstances we do not hesitate to quash the order of termination,with liberty to the respondents to hold an enquiry as to whether the petitioner was a habitual unauthorised absentee or not. Respondents shall also bear in mind while issuing the charge-sheet whether the period for which the leave of the kind admissible, granted to the petitioner, can be considered as period of absence for the purpose of holding an enquiry whether such absence is unauthorised and wilful or not.

10. It is further pertinent to mention that the absence may not be held unauthorised, for the reasons that the respondents have subsequently granted leave, of the kind permissible and available to the petitioner. Page 3 & 4 of the reply shows the instance when the petitioner was absent and against all the columns wherein any particular day or days the petitioner was absent, the "decision" column shows that he has been awarded 'casual

leave', 'earned leave', 'half pay leave' and 'leave without pay' and the same seems to be in accordance with the leave account of the petitioner. In view of these statements made by the respondents in their reply, the allegations that the petitioner is a habitual absentee, incorrigible type of person and that he is wilfully and deliberately remained absent may not stand. Once the leave is sanctioned, in the eye of law the absence is perhaps no more unauthorised and therefore, there is nothing remaining to be called as unauthorised, wilful absence, as such,that may not be a case for removal on that ground alone.

11. Next question that requires to be decided is whether the petitioner herein is entitled to payment of arrears. Normally once the termination order is quashed, the petitioner is entitled to the arrears as if he has been in service for the entire period. But it is also an undisputed fact that the petitioner has not been discharging the duties of a Constable and whether the fact that he has not been discharging the duties of the Constable because of his unwillingness, incapacity or because the respondents could not allow him to do so, are all a material facts to decide what shall be the extent of consequential benefits to be given to the petitioner.It is also pertinent to mention since our orders have granted liberty to the respondents to hold an enquiry, and the rule " of no pay for no work" cannot be blindly applied in the present case either, we are of the opinion that the services of the petitioner shall be treated as 'under suspension' till a deicision to issue

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chargesheet to the petitioner is taken. The petitioner will be entitled to subsistance allowance in accordance with rules from the date of termination order till the issuance of chargesheet and thereafter, the payment of arrears will be governed, by the appropriate orders to be passed by the respondents depending upon the nature of penalty imposed upon the petitioner, in accordance with rules.

12. In the event the respondents do not hold any enquiry, they shall pass appropriate orders treating the period of suspension uner the rules, and thereafter the petitioner will be entitled to all other consequential benefits such as seniority, promotions etc. But on the other hand, if the respondents decide to issue a chargehseet, further procedure will be governed by the relevant rules, applicable.

13. With these directions, the OA is disposed of with no order as to costs.

(S.P. Biswas)
Member (A)

(Dr Jose P. Verghese)
Vice Chairman (J)

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