

9 9  
IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
CUTTACK BENCH: CUTTACK.

Original application No.23 OF 1993

Date of decision: June 24, 1994

Madhusudan Behera

...

Applicant

Vs.

Union of India & Others

...

Respondents

(FOR INSTRUCTIONS)

1. Whether it be referred to the reporters or not? *yes*
2. Whether it be circulated to all the Benches of the *yes* Central Administrative Tribunals or not?

  
(H. RAJENDRA PRASAD)  
MEMBER (ADMINISTRATIVE)

24 JUN 94

  
key 24-6-94  
(K. P. ACHARYA)  
VICE-CHAIRMAN

(10)

CENTRAL ADMINISTRATIVE TRIBUNAL  
CUTTACK BENCH: CUTTACK.

Original Application No.23 of 1993

Date of decision : February 24, 1994.

Madhusudan Behera ... Applicant.

Versus

Union of India and others ... Respondents.

For the applicant ... M/s. Deepak Misra,  
A. Deo, B. S. Tripathy,  
Advocates.

For the Respondent No.1.. Mr. Akhyay Kumar Misra,  
Addl. Standing Counsel (Central)

For the respondents  
2 to 4 ... M/s. B. Routray, A. K. Mohanty,  
S. M. Biswal, Advocates.

C O R A M:

THE HON'BLE MR. K. P. ACHARYA, VICE-CHAIRMAN  
A N D

THE HON'BLE MR. H. RAJENDRA PRASAD, MEMBER (ADMN.)

ORDER

K. P. ACHARYA, V.C., Vide Annexure-1 dated 24.10.1989, the applicant Shri Madhusudan Behera was offered a post of Farm Manager (T-6) on temporary basis with certain terms and conditions. The terms and conditions having been accepted including the term that the applicant would remain on probation for a period of two years from the date of joining the post which may be extended at the discretion of the competent authority, the applicant accepted the offer and joined the post in question.

Vide order No. 98/Estt/90-91 dated 20th December, 1991

the probation period was extended by one year from 12.12.1991 to 12.11.1992. Vide order No. 46/Estt/89-90/954 dated 16.1.1993 contained in Annexure-3, the services of the applicant were terminated forthwith. Being aggrieved by this order contained in Annexure-3 terminating the services of the applicant this application has been filed with a prayer to quash the impugned order of termination contained in Annexure-3 and furthermore, it is prayed to direct the respondents to allow the applicant to continue in service with all consequential service benefits and to confirm and regularise the applicant in the said post as he has successfully completed the probation period.

2. In their counter, the respondents 2 to 4 maintained that the applicant had accepted the offer of appointment on the terms and conditions set forth in Annexure-1 and during the period of probation the applicant failed to render satisfactory services for which oral warning had been given to the applicant for his improvement in the discharge of hisduties and the applicant not having caused any improvement in his work, the competent authority on the recommendation of the Departmental Promotion Committee had no other option but to terminate the services of the applicant which is an order of termination simpliciter attaching no stigma to the impugned

order. Hence, the order of termination is perfectly legal and should not be disturbed or unsettled - rather it should be sustained.

3. An additional counter on behalf of the Respondents 2 to 4 has been filed stating certain illegal acts to have been committed by the applicant during his incumbency as the Farm Manager. The details stated in the additional counter will be dealt with at the appropriate stage.

4. We have heard Mr. Deepak Misra, learned counsel for the applicant and Mr. Akhyay Kumar Misra, learned Additional Standing Counsel (Central) appearing for the Central Government and we have also heard Mr. B. Routray, learned counsel appearing for Respondent No. 2 being privately engaged by the said respondent.

5. During the course of argument, advanced by Mr. Deepak Misra, it was submitted before us that a probationer has also a right of claiming protection under Article 311 of the Constitution and it was further submitted that though the impugned order of termination appears to be an innocuous order and termination simplicitor without attaching a stigma but on lifting the veil or peeping through the veil one would find that the termination order has been passed keeping in mind the alleged misconduct said to have been committed by the applicant. It was further submitted that in case, the Bench after peeping through

(12)

the veil or after lifting the veil comes to a conclusion that the concerned authority had taken a perverse view against the applicant that the applicant had misconducted himself in the due discharge of his official duties, the disciplinary authority was bound to attract the provisions contained under Article 311 of the Constitution rather than to adopt a short cut method of termination of services of the applicant and therefore, the impugned order of termination should necessarily be quashed. While repudiating this argument of Mr. Deepak Misra, both Mr. Akhyay Kumar Misra and Mr. B. Routray submitted that the question of lifting the veil would arise only when the concerned employee is not a probationer but the applicant in the present case being a probationer, he cannot claim protection under Article 311 of the Constitution especially keeping in view the terms of the contract between the employer and himself namely if the applicant fails to discharge his duties satisfactorily during the probation period, the competent authority would be perfectly justified in passing an order of termination simpliciter without assigning any reason and that having been done in the present case, the impugned order of termination is not liable to be quashed but it should be sustained.

6. In order to substantiate his contention Mr. Deepak Misra relied upon certain judgments which would be discussed hereunder.

The observations of Their Lordships in the case of Samsher Singh Versus State of Punjab and another reported in AIR 1974 SC 2192 have been relied upon by the counsel for both sides. Therefore, it would be proper to discuss the law laid down by Their Lordships on this subject. Before the observations of Their Lordships are quoted, it is worthwhile to mention that services of two subordinate Judicial Officers who were on probation had been dispensed with by an order of termination simpliciter. The contention before the Hon'ble Supreme Court was on behalf of two judicial officers that though the order of termination was an order simpliciter, but such termination amounted to removal attracting the provisions contained in Article 311 of the Constitution as there were certain allegations of misconduct against them and therefore, the termination order is liable to be quashed. At paragraph 62 of the judgment, delivered by Hon'ble Chief Justice Mr. A.N. Ray, it was observed as follows :

"The position of a probationer was considered by this Court in Purushottam Lal Dhingra Vs. Union of India, 1958 SCR 828=(AIR 1958 SC 36) Das, C.J. speaking for the Court said that where a person is appointed to a permanent post in Government service on probation the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment because the Government servant so appointed has no right to continue to hold such a post any more than

a servant employed on probation by a ~~private~~ employer is entitled to do so. Such a termination does not operate as a forfeiture of any right of a servant to hold the post, for he has no such right. Obviously such a termination cannot be a dismissal, removal or reduction in rank by way of punishment. There are, however, two important observations of Das C.J., in Dhingra's case (supra). One is that if a right exists under a contract or service Rules to terminate the service the motive operating on the mind of the Government is wholly irrelevant. The other is that if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and violates Article 311 of the Constitution. The reasoning why motive is said to be irrelevant is that it inheres in the state of mind which is not discernible. On the other hand, if termination is founded on misconduct, it is objective and is manifest".

In paragraph 63 of the judgment, it was observed as follows :

" No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason, without a proper enquiry and without his getting a reasonable opportunity showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution".

KN

In Paragraph 67 of the judgment, it was observed as follows :

" An order terminating the services of a temporary servant or probationer under the Rules of Employment and without anything more will not attract Article 311. Where a Departmental enquiry is contemplated and if an enquiry is not in fact proceeded with Article 311 will not be attracted unless it can be shown that the order though unexceptionable in form is made following a report based on misconduct".

7. In the case of State of Bihar and others Vs. Shiva Bhikshuk Mishra reported in (1971)2 S.C.R. 191 Their Lordships were pleased to observe as follows :

"So far as we are aware no such rigid principle has ever been laid down by this Court that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government officer it must be held to have been made in ordinary course of administrative routine and the court is debarred from looking at all the attendant circumstances to discover whether order had been made by way of punishment. The form of the order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct. It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order. (emphasis is ours)."

8. In the case of Anoop Jaiswal Vs. Government of India and another reported in 1984(2) S.C.R.369 it would be found that the petitioner Anoop Jaiswal was a member of the Indian Police Service and was undergoing training as a probationer. On a particular day all the trainees arrived late at the place where PT/unarmed combat practice was to be conducted, although prior intimation was sent to them in this regard. This delay was considered as an incident which called for an enquiry. The appellant was considered to be one of the ring leaders who was responsible for the delay. Explanation was called for from all the probationers. The appellant in his explanation sincerely regretted the lapse while denying the charge of instigating others in reporting late. After receiving the explanation all the probationers including the appellant were individually interviewed in order to ascertain the facts. On the basis of the explanation and interview without holding any proper enquiry, the Director recommended to the Government of India that the appellant (Mr. Anoop Jaiswal) should be discharged from service. The Government accordingly passed an order of discharge of the appellant on the ground of unsuitability for being a member of the IPS. This order was challenged in the writ petition. Their Lordships were pleased to observe as follows:

(PAC)

"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 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 employees".

The order of discharge was held by Their Lordships to be bad in law on the ground of misconduct without affording reasonable opportunity <sup>that</sup> <sub>has not given by</sub> to the petitioner as provided under Article 311(2) of the Constitution.

9. Last but not the least, we feel persuaded to refer to the judgment passed by Their Lordships of the Hon'ble Supreme Court in the case of Jarnail Singh and others Vs. State of Punjab and others reported in AIR 1986 (2) SC 193. In this case, the appellants were appointed on adhoc basis as Surveyors on various dates between December, 1976 to November, 1977, with a condition that their services would be dispensed with at any time without any notice or assigning any reasons. The services of the Petitioners were terminated by the order of the Chief Conservator of Soil, Punjab in which it was said that the posts are no longer required. Some of the petitioners had filed affidavits stating that

(19)

at one point of time one of the petitioner was accused of shortage of cash and at one point of time one of the petitioner was also accused of shortfall and a first Information Report had been lodged against them. Similarly shortage of cash was also alleged against some other petitioners. While discussing the law laid down in the case of Parasottam Lal Dhingra Vs. Union of India, State of Bihar and others Vs. Shiva Bhikshuk Misra etc. (Supra), Their Lordships finally came to the conclusion which runs thus:

"The position is now well settled on a conspectus of the decisions referred to herein before 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 an adhoc ~~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 order complained of (emphasis is ours). 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".

The Judgment of the Hon'ble Supreme Court relied upon by the learned counsel on behalf of Opposite Party Nos.

2 and 3 namely AIR 1980 SC 1242; 1978 SC 363; AIR 1976

*DN* SC 2457, AIR 1974 SC 2192 and several other decisions

have not made a departure from the view expressed in the cases mentioned above and therefore there is no necessity to discuss those cases in detail. The ratio decidendi of all the judgments relied upon on behalf of the Petitioner and on behalf of the Opposite Parties could be summarised as follows :-

- a) A probationer or an adhoc employee has no right to the post ;
- b) The employer is at liberty to pass an order of termination simpliciter dispensing with the services of the employee;
- c) If the order of termination is founded on the ground of misconduct or inefficiency or for similar reason then provisions contained under Article 311(2) is bound to be attracted;
- d) The court has a right and duty to lift the veil or peep through the veil to find out whether the impugned order is merely a cloak or camouflage for an order founded on misconduct.

Therefore, the courts have to find out whether the impugned order is based on misconduct which is a mere motive or is the very foundation of the order. If the probationer is discharged on the ground of misconduct

or inefficiency or for similar reason, in that case, it has to be held that noncompliance of the provisions contained under Article 311(2) of the Constitution is illegal. Now applying these principles to the case in hand one would find that the impugned order contained in Annexure-3 runs thus :

"In pursuance of the terms and condition No.6 of the offer of appointment vide this Office Order No.20 dated 24.10.1989, I Dr. S.R.B Singh, Project Director, Water Technology Centre for Eastern Region, Bhubaneswar, hereby terminate forthwith the services of Shri M.S.Behera T-6 (Farm Manager) who is on probation".

10. In paragraph 5 of the counter filed by the Opposite Parties it is stated as follows :

"It is submitted that departmental promotion Committee after taking all relevant facts has come to the conclusion for extending the period of probation of the applicant from 12.12.1991 to 11.12.1992 to bring about improvement over his inefficiencies. Accordingly an office order was issued to the applicant by Respondent No.2 wherein the applicant was advised to make special efforts in his own interest for improvement. xx xx."

11. In paragraph 7 of the counter, it is stated as follows :

"The DPC in which the respondent No.2 was not a member, assessed the work and conduct of the applicant for the purpose of determining his suitability and after careful consideration, the DPC was of the view that the applicant was not suitable to continue in service in the larger interest of the organisation-WTCER and ICAR".

12. In paragraph 10 of the counter, it is stated

as follows :-  
21

"It may be noted here that the respondent No 2 on a routine visit to W.T.C.E.R. Farm received complaints from the labourers at the farm that they are not getting their daily wages. After receipt of such complaints the Respondent No.2 with other officers viz, Shri B.K.James, Scientist (SG) and incharge Farm, Shri C.V.Joseph, Assistant Administrative Officer and Shri S.R. Khuntia, Assistant Finance and Accounts Officer visited the Farm on 29.9.1992 to ascertain the correctness of allegations received from the labourers. The above officers made a preliminary enquiry and prepared a report and on the basis of such report an explanation was called for asking the applicant to show cause as to why disciplinary action should not be taken against the applicant. On receipt of show cause notice the applicant has admitted some of his own faults as will be clear from Annexure-5 of the application and the applicant verbally apologised with the authorities and requested not to take any action against him. In fact the applicant in his explanation expressed his regret for such happenings and assured that he will take all care to avoid such type of problems in future. It may be clarified here that no action has been taken against the applicant pursuant to the show cause notice but the order of termination was issued as per clause 6 of his appointment letter and therefore, explanation whatsoever were called for from the applicant by the Respondent No.2 has nothing to do with the order of termination".

13. An additional counter affidavit was filed on behalf of the Opposite Party Nos 2, 3 and 4. In paragraph 3 of the affidavit it is stated as follows :

"It undoubtedly proves that the applicant Shri M.S.Behera (i) does not possess adequate knowledge of the requirement of the job of Farm Manager, (ii) is not dependable, (iii) lacks thoroughness and sense of responsibility".

14. In paragraph 5 of the additional counter affidavit it is stated as follows :

"It may be mentioned here that the applicant Shri M.S.Behera, T-6 (FARM Manager) is the key functionary on the farm to manage all the inputs and the produce of the farm. Such a low income is only possible due to (i) professional incompetence and (ii) doubtful integrity on the part of the applicant".

15. In paragraph 6 of the additional affidavit it is stated as follows :

"The exact amount drawn during each month is given in Annexure-J. With this meagre amount of take-home-salary, Mr. M.S.Behera has maintained Royal Enfield Bullet Motorcycle (Bearing registration No. ORY 6274) and bought and maintained one Ambassador Car".

16. In paragraph 7 of the said additional affidavit it is stated as follows :

"In respondents view such a standard of living is not possible with only meagre take home salary and applicant Shri M.S.Behera, T-6 (Farm Manager) has lived and purchased property by diverting farm input and produce".

17. In paragraph 12 of the additional counter-affidavit it is stated as follows :

"Hence the second DPC while considering all these facts recommended that he is not useful either for WTCER, Bhubaneswar or for ICAR. The competent authority accepted the decision/recommendation of the DPC and on the basis of such recommendation of DPC issued necessary instructions of termination of service in terms of his appointment letter".

Keeping in view the above quoted averments finding place in the counter, one would find from the order bearing No.1/vig/92-93/197 dated 12th October, 1992 that certain allegations of corruption misconduct and unsatisfactory service were alleged against the petitioner and the petitioner was called upon to submit his explanation for his unbecoming conduct/behaviour/action and to show cause as to why disciplinary action should not be taken against him. The petitioner submitted his explanation in respect of each of the allegations vide his letter dated 14.10.1992

contained in Annexure-5 addressed to the Project Director.

18. The averments finding place in the counter quoted above also indicates that all these allegations were taken into consideration by the DPC before the impugned order of termination was passed. At this stage at the cost of repetition we would say for the purpose of emphasis that the facts of this case are similar to the facts of the cases mentioned above, especially the case of Anoop Jaiswal and Jarnail Singh(supra). In the case of Anoop Jaiswal, allegations were made against Anoop that he was a ring leader in regard to the indiscipline pervading in the Academy for which an explanation had been called for and he had been interviewed along with others. Anoop had partly admitted the allegations and expressed regret and assured the authorities that such misconduct will not be repeated. In the case of Jarnail Singh there were allegations of misconduct etc and their Lordships came to the conclusion that the order of termination was not an order simpliciter and was founded upon misconduct. Applying such principles to the facts of the present case, we would hold that there is no escape from the conclusion that the petitioner was discharged on the ground of misconduct and inefficiency though the impugned order of termination  
*bn*

is an innocuous one or in other words is a camouflage in styling it as the termination order is simpliciter. We would further hold that in the present case, nonapplication of the provisions contained under Article 311(2) of the Constitution completely vitiates the impugned order of termination and therefore, it is hereby quashed and it is directed that the petitioner should be reinstated into service forthwith but he would not be entitled to any back wages.

19. In certain judgments, the Hon'ble Supreme Court has ruled that if a particular officer has not kept himself out from duty on his own volition, he is entitled to back wages. In the present case, we have refused to grant back wages in favour of the petitioner on the principle of 'no work no pay' because we have quashed the impugned order of termination on a technical ground namely the impugned order of discharge was not according to law and therefore, we would repeat to say that the petitioner is not entitled to any back wages.

20. Thus, the application is accordingly disposed of leaving the parties to bear their own costs.

.....  
T. S. Mohanty  
.....  
MEMBER (ADMINISTRATIVE)  
24 JUN 94

.....  
L. S. Mohanty  
24.6.94  
.....  
VICE-CHAIRMAN

Central Administrative Tribunal,  
Cuttack Bench, Cuttack/K. Mohanty/