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Court : Kerala

Decided On : Oct-21-2015

Judge : K. Vinod Chandran

Appeal No. : WP(C) No. 10549 of 2012 (P)

Appellant : V. Arunkumar

Respondent : The Information Kerala Mission (IKM) (Under The Local Self Government) rep by its Executive Chairman and Director and Others

Judgement :

1. The petitioner is aggrieved with the termination ordered by Ext.P16 and confirmed in appeal by Ext.P44.

2. The petitioner initially was appointed on daily wage basis in the 1st respondent Information Kerala Mission (IKM), which was initially a mission-group drawn from Centre for Development of Imaging Technology (C-DIT) for implementation of a scheme titled Kerala Information Network for Local Bodies . The scheme or its working is not relevant for the above case.

3. The petitioner, admittedly, was initially employed on daily wage basis in IKM and had been continued from September 1999, as is indicated at Ext.P8. The petitioner then was appointed as GIS Draftsman on a consolidated salary, on

contract basis for a period of one year, as is evidenced from Ext.P10. The petitioner was, admittedly, continued in the 1st respondent; when he was terminated by the impugned order.

4. The actual status of employment of the petitioner is not revealed from the records. The petitioner has produced the Service Rules applicable to the C-DIT and takes a contention that he had been regularly appointed to such employment, which is regulated by the said Service Rules. However, Ext.P12, proceedings of the Executive Chairman and Director of the 1st respondent indicates otherwise. As was noticed earlier, the mission-group was initially constituted from the C-DIT, but, however, Ext.P12 reveals that the 1st respondent employed people of various categories including Resource persons, Consultants, Professionals etc on short term contract basis and such personnel were also positioned in Local Self Government Institutions (LSGI) for assisting Data Entry works and training. The salary of such persons were remitted by the concerned LSGI to the 1st respondent and disbursed by the 1st respondent. The remaining staff available in the 1st respondent was deployed division wise, as approved by the Government, in line with the Report of Centre for Management Development. This indicates that the employees of IMK were not employees of C-DIT and the Service regulations produced herein would only be applicable to the employees of C-DIT, some of whom also were deputed to the 1st respondent.

5. The petitioner was deployed, as is indicated at Ext.P12, as a Senior Technical Officer at the Head Quarters. But, for such deployment, the petitioner is not able to prove that he had been regularly appointed and the appointment order produced at Ext.P10 is only of a contract employment for one year, which obviously, was extended in the later periods also. That is the specific contention taken in the counter affidavit also. The petitioner refutes the contract employment in the reply affidavit, with reference to paragraphs 8, 9 and 10 of the writ petition. The writ petition, through the above paragraphs, produce Exts. P9 to P12; which do not establish the claim of permanent appointment.

6. The petitioner admittedly was appointed as a contract employee by Ext.P10, pursuant to Ext.P9 notification. Ext. P9 specifically calls for appointment to

temporary project positions. IKM is a project of the C-DIT and is not a permanent establishment, nor is there anything to show that the temporary project positions are converted to posts in the C-DIT. Ext.P11 addressed the grievances of such personnel in IKM and as a measure of rationalisation, classified the posts (temporary) into 13 categories with appropriate designations on the basis of service. Ext.P11 also has not been produced in its entirety. The designation conferred on the basis of the year of service does not confer a permanent status. The re-deployment of personnel made within the IKM by Ext.P12 also does not deviate from the contractual nature of the employment of personnel like the petitioner.

7. While so, the petitioner was issued with Ext.P13 memo of charges. The memo related to diversion of funds sanctioned for a project, the implementation of which was the responsibility of the petitioner. As is indicated at Ext.P13, the petitioner had been placed in charge of Survey and Resource Mapping of Muziris Heritage Project. The diversion of funds was effected by marking attendance of daily wage workers, even on the days when they were not employed. The complaint of the General Secretary of the Employees Union was also enclosed with Ext.P13 memo. The petitioner replied contending that such diversion of funds was only to motivate the workers by taking them on a tour with a sumptuous meal thrown in. The petitioner also has admitted that the expenses for the same, coming to about 1.25 lakhs, was adjusted by marking attendance even on days when the daily wage field trainees had not been present.

8. The petitioner's claim is that he had acted so in pursuance of a strategy to motivate the workers, which, in fact, benefited the project and saved the Government of additional expense, by way of completion of project long before the targeted date. Subsequently, an exquiry was ordered as per Ext.P15 dated 22.7.2011, but abruptly the petitioner's services were terminated by Ext.P16 on the basis of the allegations levelled in the memo. The termination was on account of the fact that the petitioner had, in fact, admitted the misconduct alleged. The petitioner subsequent to Ext.P16 remitted Rs.1,25,000/- to the 1st respondent, as is evident at Ext.P17, which is the admitted amount drawn by way of marking wrong entries in the attendance register and diverting such funds for extraneous

purposes.

9. Subsequently, the petitioner had sought for the report of enquiry pursuant to Ext.P15 order, which was supplied to him by Ext.P18. The Enquiry Officer appointed to conduct an enquiry into the allegations, had found discrepancies, but had requested for a detailed enquiry with the participation of the Heads of Administration and Accounts. The termination of the petitioner was also approved by the Executive Committee of the 1st respondent on 27.09.2011, pursuant to which Ext.P16 termination order is said to have been issued.

10. The learned counsel for the petitioner would contend that the enquiry conducted was in total violation of the principles of natural justice and the termination was abrupt insofar as without conducting a proper domestic enquiry. The learned Government Pleader on the other hand would submit that in the context of the petitioner's admission that the petitioner had, in fact, diverted the funds to provide tour and feast to the daily wage workers; that was sufficient reason to order his termination. The petitioner having admitted the misconduct in his reply and also remitted the amounts so diverted cannot now seek for an enquiry which would be an unnecessary exercise. The petitioner's appeal also has been rejected and in any event, the petitioner was a contract employee and the Government could have terminated his services without any reason.

11. It is to be noticed that the termination order casts a stigma on the petitioner. There were some allegations levelled against the petitioner on the basis of a complaint received. The petitioner had also submitted a reply in which though there was an admission, there was an explanation put forth. However worthwhile it might be, the explanation was that the diversion was to motivate the workers, which eventually bore fruit insofar as wrapping up the project ahead of time. The complaint referred to drawing of paltry amounts, by marking the attendance of two daily wage workers, when they were not actually present for duty; the petitioner admitted to have expended a total amount of Rs.1.25 lakhs. An enquiry was also ordered as per Ext.P15, pursuant to which the Enquiry Officer sought for a more detailed enquiry with the Heads of the Administrative and Accounts, associated with such enquiry.

12. It was after the receipt of the enquiry report dated 3.9.2011 (Ext.P18) that the matter was placed before the Executive Committee of the 1st respondent and a decision taken to terminate the services of the petitioner. It is trite that a contract employee could be terminated on the terms of the contract in the event of his services being found to be surplus, in which event, the same would amount to only a termination simplicitor. However, when allegations are raised and on the basis of such allegations an employee; whether in the regular service or in contract employment is terminated from service on the foundation of such allegations, then necessarily there has to be a domestic enquiry held, in which the employer would have to give opportunity to the delinquent to defend himself. The said exercise also has to be carried on in a transparent manner with the participation of the delinquent employee with every opportunity given, to the delinquent employee, to defend his case by cross-examination of the witnesses and also producing sufficient evidence to refute the allegations. Ext.P16 cannot at all be said to be a termination simplicitor, as has been held in Jugdish Mitter v. Union of India - AIR 1964 SC 449.

13. Now the question assumes significance as to whether on the admission of the allegations could the petitioner have been terminated without such an enquiry.

13. The Central Bank of India Ltd. v. Karunamoy Banerjee - AIR 1968 SC 266 was a case in which the admission of the delinquent employee had led to his termination. Therein, at the instance of the initial show-cause notice and a charge sheet, the employee admitted his guilt, but, contended that it was a bona fide mistake. Though, the dereliction of duty was admitted, an enquiry was carried on in which the employee was examined first and then evidence was led on behalf of the management. Therein also, the employee admitted his guilt, but had an explanation with respect to the actions not being mala fide. The Labour Court interfered with the punishment on the ground of violation of principles of natural justice, relying on a Supreme Court judgment which held that the delinquent employee should not be examined at the first instance. On facts, the Hon'ble Supreme Court found that there could be no violation of principles of natural justice, alleged in the said case, since the employee had all along admitted his guilt and the examination of the delinquent at the first instance was only to see if

the employee stuck to his stand. The employee admitted his guilt even then, but the employer examined other witnesses on its behalf and allowed the delinquent employee's cross examination of such witnesses also. It was in such circumstance, that the admission of guilt was held to be sufficient to uphold the termination.

14. Dharmarathmakara Raibahadur Arcot Ramaswamy Mudaliar Educational Institution v. Educational Appellate Tribunal - (1999) 7 SCC 332 found that an opportunity to show cause was not necessary when there are undisputed facts and clear admission of guilt. There an employee sought leave of one year for doing M.Phil. and got herself admitted to Ph.D. She was, in fact, earlier denied leave of three years for doing Ph.D. Termination without enquiry was held to be proper. In Coal India Limited v. Mukul Kumar Choudhuri - (2009) 15 SCC 620 the delinquent admitted the misconduct of unauthorised absence before the enquiry officer. The Hon'ble Supreme Court held that it was not open to the High Court to differ from the findings so entered by the Enquiry Officer. However, the Court interfered with the punishment of dismissal on the ground of proportionality.

15. A contrary principle is discernible in Himachal Pradesh Road Transport Corporation v. Hukam Chand - (2009) 11 SCC 222, which however is on a totally different set of facts. The employee therein had declared a particular date-of-birth, which was found to be incorrect in view of the school records which were obtained by the employer. The prosecution was initiated against the petitioner for such false disclosure on affidavit to the employer. Though, the Magistrate's Court convicted the employee, the appellate Court acquitted him giving him the benefit of doubt. In the meanwhile, the petitioner was retired on the basis of the date-of-birth, as disclosed in the school records. The employee then approached the Administrative Tribunal contending that his retirement was premature and would amount to a termination. The Tribunal held that his date-of-birth could not have been changed without an enquiry, which was upheld by the High Court also. The Hon'ble Supreme Court, however, found that the retirement was not on the basis of the conviction in the criminal case alone. After the conviction, the employee himself had submitted his pension claims showing the correct date-of-birth and in accordance with that he was retired. On the basis of such categoric and voluntary

declaration and admission of his date-of-birth, in consonance with what is revealed in the school records, the Hon'ble Supreme Court found that there was no requirement for an enquiry, on the basis of the admission.

16. The question of whether a termination is one which is punitive or simplicitor has come up before the Hon'ble Supreme Court often. The test laid down in Parshotam Lal Dhingra v. Union of India - AIR 1958 SC 36 was reiterated in A. G. Benjamin v. Union of India - 1967 (1) L.L.J. 718 as:

It is also not disputed that the expressions like terminate or discharge is not conclusive and in spite of the use of such expressions, the Court has to apply the two tests mentioned in Parshotam Lal Dhingra case [1958-I L.L.J. 544], viz.,

(1) whether the temporary servant had a right to the post or the rank, or

(2) whether he has been visited with evil consequences; and if either of the tests is satisfied, it must be held that there was punishment of a temporary servant.

17. The evil consequences to be assessed was held to be in relation to the blemish on the delinquent's reputation, so as to render him unfit for employment elsewhere, and not in relation to the post occupied by him, from which he is terminated, in Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences - (2002) 1 SCC 520. Noticing the search for 'substance' of the order of the punishment as distinguished from the 'form' and the struggle with semantically indistinguishable concepts like 'motive' and 'foundation'; it was held so in para 21:

One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.

The above dictum was upheld by the Hon'ble Supreme Court in State of Punjab v. Balbir Singh - (2004) 11 SCC 743.

18. In the instant case there was an enquiry ordered into the incident. The delinquent was not participated in the same; which need not detain this Court, since the same could be relegated to the realm of a preliminary enquiry. The Enquiry Officer also found that a more detailed enquiry is required. The allegations levelled was of misconduct of misappropriation and the termination was founded on such allegations. Despite the fact that the employee admitted that he had diverted amounts for other purposes, the respondent employer had specifically issued a memo enclosing the complaint which raised allegations against him, by Ext.P13. A reply was also received as per Ext.P14. Even without a charge memo, an enquiry was ordered at Ext.P15, which, as has been stated above, can only be considered to be a preliminary enquiry. What followed was the termination order, without either putting the enquiry report to the delinquent or issuing a charge memo. Ext.P13 was a memo in which there was no specific charge alleged. But for levelling allegations of certain irregularities and communicating, the complaint, which raised the said allegations, Ext.P13 did nothing further and at best can be treated as a Show-Cause Notice. The enquiry, even though a preliminary enquiry, affirmed the instance of irregularities and sought for a detailed enquiry. The termination at Ext.P16, hence, was not preceded even by a charge sheet alleging the specific charges against the petitioner. The order of termination, however, was on specific allegations and irregularities, which definitely casts a stigma on the delinquent employee.

19. In such circumstance, this Court is of the opinion that the termination based on the allegations leveled against the petitioner, without issuing a charge memo and conducting a disciplinary enquiry to establish the charges, even in the teeth of the admission made by the petitioner, was improper. Exts.P16 and P44 would stand set aside. It is trite that when administrative orders are set aside for reason of procedural irregularity, then necessarily the same has to be remanded to the authority to resume the same from the point at which such procedural defect occurred. However, in the context of the petitioner being a contract employee, this Court is of the opinion that even if the matter is sent back, there could be no orders of reinstatement, since the contract period would definitely have expired as of now.

20. In such circumstance, this Court would direct the 1st respondent to pay an amount equivalent to three months' salary and allowances of the petitioner, he was entitled to at the time of his termination; as salary in lieu of notice and an equal amount as compensation, to the petitioner. The petitioner shall also be issued with a certificate of his service from the date of his initial appointment to the date of his termination without any stigma cast on the petitioner.

The writ petition would stand allowed, with the direction that the directions herein shall be complied, at any rate, within three months from the date of receipt of the certified copy of the judgment.

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