

Kesho Singh Vs. State of U.P. and Another

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Court : Allahabad

Decided On : Mar-09-1999

Reported in : 1999(2)AWC1380

Judge : D.K. Seth, J.

Acts : [Constitution of India](#) - Articles 311 and 311 (2); Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975

Appeal No. : C.M.W.P. No. 2222 of 1993

Appellant : Kesho Singh

Respondent : State of U.P. and Another

Advocate for Def. : K.R. Singh, S.C.

Advocate for Pet/Ap. : Amit Bose and ;Ashok Bhushan, Advs.

Judgement :

D. K. Seth, J.

1. Petitioner's service was terminated by an order dated December 11, 1992. being Annexure-1, to the writ petition. In the said order, it was indicated that the service of the petitioner was no more required and. therefore, his service was terminated with notice pay. Mr. Amit Bose, learned counsel for the petitioner

contends that though the order of termination was an order simpliciter passed in exercise of the power conferred by U. P. Temporary Government Servant (Termination of Service) Rules, 1975, but in effect it was a penalty in disguise. According to him, in view of the case made out in the counter-affidavit, there are sufficient reasons to come to a conclusion that it was not a termination simpliciter, but a penalty in disguise requiring lifting of the veil. According to him. In exercise of the writ jurisdiction, the High Court is entitled to pierce the curtain and find out the real position. He further contends that the case made out in the counter-affidavit is that the petitioner had produced a false certificate giving his age in order to obtain the appointment, which was found on enquiry and on the basis thereof, a First information Report has been lodged. Thus, the said allegations formed the foundation of the order of termination. It was not a motive not to retain the petitioner but it was a foundation for terminating services. Therefore, according to him, Article 311(2) of the [Constitution of India](#) is attracted in the case of the petitioner since the order of termination has been passed without any enquiry or without giving him a reasonable opportunity in respect thereof. In support of his contentions, he relies on the decision in the case of Union of India and others u. Joya Kumar Parida, 1966 (1) SCC 441 : Director General of Police and others v. Mritunfay Sarkar, 1996 (8) SCC 280 ; R. S. Gupta v. U. P. State Agro Industries Corporation Limited, JT 1998 (8) SC 585.

2. Mr. K. R. Singh, learned standing counsel on the other hand contends that the order of termination is an order of termination simpliciter without casting any stigma on the petitioner. He seeks to distinguish the statement made in the counter-affidavit as motive and not a foundation. He then relies on the 1975 Rules and points out that in case of temporary Government servant, service can be terminated without giving opportunity as contemplated in Article 311(2), upon giving a notice or notice pay in lieu of notice. Relying on the decisions in the case of Madhya Pradesh Hasta Shilpa Vikas Limited v. Devendra Kumar Jain, 1995 (1) SCC 638 and the State of V. P. v. Kamla Devi, 1996 (4) SCC 485. he contends that Article 311(2), has no manner of application in respect of a temporary employee. The petitioner was purely a temporary employee. Therefore, in view of the said decisions, Article 311, cannot be attracted. On these reasoning, he sought to distinguish the three decisions cited by Mr. Bose referred to above.

3. Mr. Bose, on the other hand, contended that the proposition of Article 311, in case of a temporary employee is not absolute proposition. According to him, even if Article 311 is not applicable as such but the principle in the form of natural justice and equity would be applicable wherefor the termination being based on foundation as has been held in the three decisions cited by him. Is liable to be quashed.

4. I have heard both the learned counsel at length.

5. Admittedly, the petitioner's service was terminated by an order dated December 11, 1992 without giving any opportunity of being heard under the provisions of the 1975 Rules with notice pay in lieu of notice. From the order, it does not appear that there was a stigma cast upon the petitioner. Now only on the basis of the counter-affidavit Mr. Bose is claiming that there was a foundation and not a motive behind passing the said order. According to him, each case has to be determined on the basis of the facts involved. There is no doubt about the said proposition. In the present case, it is apparent that a First information Report was also lodged, which is Annexure-3, to the writ petition on the self-same allegation that the petitioner had produced a forged document in order to secure the employment. This report was lodged on December 11, 1992, namely, on the same date when the order of termination was issued. Therefore, it cannot be said that the respondent had any doubt and driven by such doubt, the petitioner was not retained. Had it been a doubt without ascertaining the truth, in that event the same could have been described to be a motive but when a concrete step has been taken in the form of lodging a F.I.R. supported by the statement made in the counter-affidavit, it does not remain in the domain of motive. In fact, in the counter-affidavit, it has been pointed out that on enquiry, it was found that the petitioner had passed High School twice and he had used the subsequent document where his date of birth was recorded as in June, 1972. whereas in the earlier certificate, the age was recorded some times in 1966. Thus, this statement travels in the realm of foundation on the basis whereof the order of termination was issued. In view of the decisions in the case of Madhya Pradesh Hasta Shilpa Vikas Limited (supra) and Smt. Kamla Devi (supra) cited by Mr. K. R. Singh, Article 311(2), of the [Constitution of India](#) as such may not be applied in case of the petitioner who is

admittedly, a temporary Government servant. The application of 1975 Rules for the purpose of termination of service of a temporary Government employee can also not be questioned in the Court when it is a termination simpliciter without casting any stigma. But as soon it casts a stigma, even though Article 311 may not apply, the principle of natural justice and equity requires giving of an opportunity.

6. In the present case, on the lodging of the F.I.R. a stigma is definitely cast upon the petitioner. In order to secure future employment, the petitioner may be required to furnish information as to whether any criminal proceeding is pending against him or any F.I.R. has been lodged against him or not. If he discloses the lodging of the F.I.R., in that event, it will surely be a stigma. which may disentitle him from being considered for future appointment. If a case is started on the basis of F.I.R., that is also to be disclosed in order to secure future employment by the petitioner. Therefore, there is no doubt that in the fact and circumstances of the present case, there has been a case of casting stigma though it is not apparent on the order of termination. Thus it appears to be a case where the order is an order in disguise while casting stigma or in other words a penalty in disguise. As such, it is a case where the Court should lift the veil and pierce the curtain to arrive at the truth behind the order.

7. Now as discussed above, it is apparent that it was not a motive but a foundation on which the order of termination is based. In such circumstances, the facts and circumstances fits in the ratio laid down in the case of Joya Kumar Parida (supra), cited by Mr. Bose to the extent that there were some materials twice to the petitioner. namely, the production of forged certificate, which formed the foundation for the termination requiring observance of the principles of natural justice, namely giving of an opportunity. Had it been purely a motive, in that event, this Court need not interfere but as soon it appears that it was a foundation, it is necessary that the Court is required to interfere. The decision in the case of Mritunjoy Sarkar (supra), cited by Mr. Bose also lends support to the same proposition to the extent that when it becomes clear that the foundation for termination is proved by a forged certificate then it would bar future employment by reason of casting of a stigma requiring observance of the principle of natural justice of giving reasonable opportunity.

8. As observed earlier, in the present case, stigma having cast by reason of the lodging of the F.I.R., the said ratio is also attracted in the form of granting an opportunity following the principles of natural justice and equity even independent of Article 311. In the case of R.S. Gupta (supra), cited by Mr. Bose, the question was gone into by the Apex Court while considering various other decisions on the question. For our present purpose, paragraph 34 of the said judgment would be relevant and is quoted below :

'It will be noticed from the above decisions that the termination of the services of a temporary servant or one on , probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as the above facts are merely the motive and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the Officer, as stated by Shah, J. (as he then was) in Ram Narayan Das's case. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary inquiry is held because the purpose of a preliminary inquiry is to find out if there is prima facie evidence or material to initiate a regular departmental inquiry. It has been so decided in Champaklal's case. The purpose of the preliminary inquiry is not to find out misconduct on the part of the Officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental inquiry is started, a charge-memo issued, reply obtained, and an enquiry officer is appointed if at that point of time, the inquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. That is what is held in Sukh Raj Bahadur's case and in Benjamin's case. In the latter case, the departmental inquiry was stopped because the employer was not sure of establishing the guilt of the employee. In all these cases the allegations against the employee merely raised a cloud on his conduct and as pointed by Mr. Krishna Iyer, J., In Gujarat Steel Tubes case, the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer, by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the

employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found and were merely the motive.'

9. In the said observation, it was held that if the truth of the allegations are not ascertained by the employer and the employer appears to be dis-interested in ascertaining the truth and decides not to retain the employee, then it would be a motive and not a foundation. But as soon the employer proceeds to ascertain the truth, even by an enquiry preliminary or otherwise behind the back of the employee, then it would not be a motive but a foundation and would thus cast a stigma attached to the rest of the career of the employee. Since the termination becomes punitive and not a termination but a dismissal taking the same out of scope of the 1975 Rules. The ratio decided in the said case apparently appears to be attracted in the present case as well.

10. Thus, it appears that even though Article 311 may not apply in respect of a temporary employee when the order of termination is passed under 1975 Rules, yet the principle of natural justice and equity in the form of giving of an opportunity would arise if it is found that such termination is not a termination simpliciter but a penalty in disguise casting stigma on the employee, as in the present case by reason of the lodging of the F.I.R. The giving of opportunity following the principles of natural justice and equity would be necessary. The question that opportunity has to be given is a settled principle. But then when interfering in such cases, the High Court has its discretion to decide as to whether post-decisional hearing for opportunity would suffice and justify the decision. But such question is to be determined on a given facts and circumstances of a case only when the High Court is convinced in the peculiar facts and circumstances of the case that it is not necessary to set aside the order as such requiring post-decisional hearing for opportunity following principles of natural justice and equity. For that, High Court has to come to a conclusion as to whether such post-decisional hearing would suffice and in case the High Court is unable to come to a conclusion definitely to the extent of its exercising the jurisdiction, in that event, the High Court has no alternative but to set aside the order and direct the respondents to observe the

principles of natural justice and equity and give opportunity before terminating his services.

11. Now let us examine as to whether in the present case a post-decisional hearing would justify the situation or not. In the present case, the allegation is that the petitioner had appeared in the High School Examination twice and had produced the certificate which he obtained in the second examination. If a person had appeared in the examination twice as found on enquiry by the respondents, then though records are not before this Court, it would make out a case which would justify giving post-decisional hearing.

12. In that view of the matter, the order of termination impugned in this writ petition would be subject to the decision as might be arrived at by the respondents pursuant to the order of this Court and would be effective from its original date- If the respondents again take the same decision after giving an opportunity to the petitioner, the respondents shall give opportunity to the petitioner within a period of two months from the date of production of a copy of this order and decide the question according to their own discretion and only if it is proved that the petitioner had appeared twice in the same examination, then only such decision can be taken by the said respondents. In case the decision is in favour of the petitioner and if the petitioner is able to prove that he did not appear twice in the examination and he is not guilty of production of any forged document, in that event, he shall be taken back in service and be paid salary for the entire period since the date of his termination.

13. With these observations, the writ petition is allowed to the extent indicated above and is accordingly disposed of.