

Ram Asray Vs. District Judge

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Court : Allahabad

Decided On : Mar-11-2004

Reported in : (2004)2UPLBEC2070

Judge : B.S. Chauhan and ;Ghanshyam Dass, JJ.

Acts : Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975 - Rule 3; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 61, Rule 27; [Constitution of India](#) - Article 226

Appeal No. : Special Appeal No. 198 of 2004

Appellant : Ram Asray

Respondent : District Judge

Advocate for Def. : K.R. Sirohi, Adv.

Advocate for Pet/Ap. : R.G. Padia and ;Prakash Padia, Adv.

Disposition : Appeal dismissed

Judgement :

B.S. Chauhan, J.

1. This special appeal has been filed against the judgment and order of the learned Single Judge dated 23.9.2003, by which the writ petition of the petitioner-

appellant against the order of termination of his services dated 22.11.2000 has been dismissed.

2. Facts and circumstances giving rise to this case are that the petitioner-appellant has been appointed as the Driver by the learned District Judge, Bijnor on Ad hoc basis vide appointment letter dated 1.11.1991. A post of Jeep Driver was created vide order dated 1st May, 1999 and appellant was appointed on temporary basis. His services stood terminated vide order dated 22.11.2000 by the learned District Judge, Bijnor under Rule 3 of U.P. Temporary Government Servants (Termination of Service) Rules, 1975 (hereinafter referred to as Rules, 1975) by giving one month's notice. Petitioner-appellant challenged the validity thereof. However, the petition stood dismissed. Hence this appeal.

3. Dr. R.G. Padia, learned Senior Counsel appearing for the petitioner-appellant has submitted that as the appellant had been working for a long time and even after termination of his services vide order dated 22.11.2000, he continued to hold the post under the interim order of this Court dated 15.12.2000 and in the meanwhile the U.P. Government promulgated the Rules for regularisation of the services of those employees who had been working for 3 years within the dates mentioned therein, petitioner-appellant was entitled to be considered for regularisation. More so, while the appellant was working under the interim order of the Court, he had been served the charge-sheet and after holding the enquiry, 5 annual grade increments had been withheld, meaning thereby the subsequent order of imposing the punishment vide order dated 23.6.2001 had superseded the earlier order of termination. Therefore, the judgment and order of the learned Single Judge is liable to be set aside. Petitioner-appellant has also filed an application under Order XLI, Rule 27 CPC. For taking the documents on record, particularly, regarding holding the enquiry and imposing the punishment vide order dated 23.6.2001. The said application be allowed and appeal of the petitioner-appellant deserves to be allowed and the judgment and order of the learned Single Judge is liable to be set aside.

4. On the contrary, Shri K.R. Sirohi, learned Counsel appearing for the respondent has submitted that the writ petition itself was not maintainable against the District

Judge and as no one-else has been impleaded as a respondent by the appellant. The District Judge is not amenable to writ jurisdiction. The Charge-sheet was on a misconduct committed by the petitioner-appellant subsequent to joining under the interim order of the Court. Therefore, subsequent order imposing the punishment does not supersede the earlier order of termination; as interim order merges into the final order, petitioner-appellant cannot take the benefit of the continuation in service under the interim order of this Court as his writ petition has been dismissed; it will operate w.e.f. the date of the filing of the writ petition or getting the interim order from this Court. A person whose service stood terminated, cannot seek regularisation unless the termination order is set aside. Petitioner-appellant was holding the post on temporary basis, thus, he cannot claim a right to hold the post; provisions of Order XLI, Rule 27, CPC are not applicable in special appeal. The appeal as well as the application under Order XLI, Rule 27, CPC is liable to be rejected.

5. We have considered the rival submissions made by the learned Counsel for the parties and perused the record.

EVIDENCE AT APPELLATE STAGE :

6. As to whether provisions of Order XLI, Rule 27, CPC are applicable in special appeal was considered by the Division Bench of the Delhi High Court in *Union of India v. Angrup Thakur* : AIR1969 Delhi279 , and after examining the issue at length it was held to be applicable. As the special appeal stands on equal footing, we are of the view that the application is maintainable.

7. The law of taking the additional evidence on record at an appellate stage has been reiterated by the Hon'ble Supreme Court from time to time. The provisions of Order XLI, Rule 27, of the Code have been considered elaborately in *Arjan Singh v. Kartar Singh and Ors.* : [1951]2SCR258 , wherein the Hon'ble Apex Court held that the said provisions are applicable when some inherent lacuna or defect becomes apparent while examining the case and are not applicable where a discovery is made out-side the Court of fresh evidence and application is made to import it. The true test to allow the application is as to whether the Appellate Court is able to pronounce judgment on the material before it without taking into

consideration the additional evidence sought to be adduced.

8. A five Judges Bench of the Hon'ble Supreme Court, in K. Venkataramiah v. A. Seetarama Reddy : [1964]2SCR35 , considering the said provisions, held as under:

'.....The Appellate Court has the power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for 'any other substantial cause.' There may well be cases where even though the Court finds that it is able to pronounce judgment on the set of the record as it is and so it cannot strictly say that it requires additional evidence to enable it to pronounce judgment', it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. It is easy to see that such requirement of the Court to enable it to pronounce judgment or for any other substantial cause is not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence. Thus, it made it clear that the object of the said provision is to ask a party to adduce additional evidence.'

9. The Court further made it clear that though the provisions provide for recording the reasons for accepting or rejecting the application under the provisions but it is not mandatory.

10. In Soonda Ram and Anr. v. Rameshwar Lal and Anr. : AIR 1975 SC479 , the Hon'ble Supreme Court considered the case under the said provisions of the Rajasthan Act, 1950 and held that if the issue can be decided on the basis of the evidence on record and there was no defect in the pleadings of such a nature that would enable the Court to obliterate and ignore the evidence adduced on the points involved, the application under Order XLI, Rule 27, should not be allowed.

11. In Natha Singh v. Financial Commissioner Taxation, Punjab : [1976]3SCR620 , the Hon'ble Apex Court held that unless additional evidence is necessary to pronounce the judgment, it should not be permitted to be adduced as the discretion given to the Appellate Court to receive and admit additional evidence, is not an arbitrary one but it is judicial one circumscribed by the limitation specified in

Order XLI, Rule 27 of the Code. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion and the additional evidence, so brought on record, has to be ignored.

12. Reiterating the same view in the *Land Acquisition Officer v. H. Narayanaiah etc.* : [1977]1SCR178 , the Apex Court further observed that for allowing the application, the Appellate Court must record reasons to show that it had considered the requirement of Order XLI, Rule 27 of the Code so that it may be examined as how the Appellate Court found the admission of such evidence to be necessary for some substantial reason and if it finds it necessary to admit it, an opportunity should be given to the other side to rebut any inference arising from its existence by leading other evidence.

13. In *Syed Abdul Khader v. Rami Reddy and Ors.*, : [1979]2SCR424 , the Hon'ble Supreme Court considered its large number of earlier judgments and held that the provisions of Order XLI, Rule 27 of the Code do not confer a right on the party too adduce additional evidence, but if the Court hearing the action requires any document so as to enable it to pronounce judgment, it has the jurisdiction to permit additional evidence to be adduced and in case the Appellate Court has given cogent reasons on such application and order has been passed in the interest of justice, it does not require any interference.

14. In *Smt. Pramod Kumari Bhatia v. Om Prakash Bhatia and Ors.* : [1980]2SCR53 , the Hon'ble Supreme Court held that there can be no justification to entertain the application under Order XLI. Rule 27 at a belated stage and it deserves to be rejected on this Court alone.

15. Similarly, in *MM. Quasim v. Manohar Lal Sharma*, : [1981]3SCR367 , the Hon'ble Supreme Court held that the said provisions are meant for adducing additional evidence 'inviting the Court's attention to a subsequent event of wide importance cutting at the root of the plaintiffs right to continue the action.'

16. In *Shivajirao Nilangakar Patil v. Mahesh Mahadav Gosavi* : [1987]1SCR458 , the Apex Court held that if the application unnecessarily prolongs the disposal of

the case and not directly connected with the immediate issue, it deserves rejection. Party filing such an application has to establish that with the best efforts, such additional evidence could not have been adduced at the first instance. Secondly, the party affected by the admission of additional evidence should have an opportunity to rebut such evidence and thirdly, the additional evidence was relevant for determination of the issue.

17. In *Mahaveer Singh and Ors. v. Naresh Chandra and Anr.* AIR 2001 SC 134, the Apex Court considered the issue elaborately and observed as under :

'Principle to be observed ordinarily is that the Appellate Court should not travel outside evidence in appeal. However, Section 107(d) CPC is an exception to the general rule and an additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The Court is not bound under the circumstances mentioned under, the rule to permit additional evidence and the parties are not entitled, as a right, to the admission of such evidence and the matter is entirely in the discretion of the Court, which is of course, to be exercised judiciously and sparingly.'

18. While deciding the said case, the Hon'ble Supreme Court placed reliance upon large number of its earlier judgments, including the *Municipal Corporation of Greater Bombay v. Lala Pancham and Ors.* : [1965]1SCR542 , wherein it has been held that a mere defect in coming to a decision is not sufficient for admission of evidence under the rule.

19. In the case of *Mahaveer Singh (supra)*, by the time the Hon'ble Supreme Court decided the case, the additional evidence had been taken on record. The Court rejected the prayer that the evidence already taken on record may be considered by the Court below, while making the final decision as the provisions could become un-ending and additional evidence can be taken only in the circumstances prescribed under Order XLI, Rule 27 of the Code.

20. In *K. Kamalam (Dead) and Anr. v. Iyyasami and Anr.* : AIR 2001 SC2802 , the Hon'ble Supreme Court held as under:

'Needless to record that the Court shall have to be conscious and must always act with great circumspection in dealing with the claims for letting in additional evidence, particularly in the form of oral evidence at the appellate stage and that too, after a long lapse of time. In our view, a plain reading of Order XLI, Rule 27, would depict that rejection of the claim for production of additional evidence after a period of ten years from the date of filing of the appeal, as noticed above, cannot be permitted to be erroneous or an illegal exercise of discretion. The three limbs of Rule 27 do not stand attracted.'

21. In *Vasanth Viswanathan and Ors. v. V.K. Elayalwar and Ors.* : AIR 2001 SC3367 , the Hon'ble Supreme Court observed that while considering an application for additional evidence, the Court should keep in mind that the said evidence was not put to the other side while he was deposing as a witness in the suit, Therefore, the application under the said provisions should not be accepted in a routine manner.

22. In *P. Purushottam Reddy v. Pratap Steel Ltd.* : [2002]1SCR586 , the Apex Court examined a case wherein the High Court had remanded the case to the trial Court to take additional evidence and decide the case afresh. The Court came to the conclusion that such a view was not permissible in the fact situation of that case, thus, the order of remand was set-aside observing as under :

'.....Although the order of remand has been set-aside.....yet it should not be understood as depriving the High Court of its power to require any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, within the meaning of clause (b) of Sub-rule (1) of Rule 27 of Order XLI. That power inheres in the Court and the Court alone which is hearing the appeal. It is the requirement of the Court (and not of any of the parties) and the conscience of the Court feeling inhibits in satisfactory disposal of the Us which rule the exercise of this power.'

23. In *Muniyappa v. S. V. Ramakrishna*, AIR 1956 Mys 47, it has been held that the said provisions are exception to the general rule that the Appellate Court cannot go out of the record of the Court below.

24. In *Radha Kishun v. Khurshed Hossein and Ors.*, AIR 1920 PC 81; *Parsotim Thakur and Ors. v. Lal Mohar Thakur and Ors.* ; *Keshowji Issur v. GPP Rly.*, (1907) 34 Ind App. 115; *Mohammad Said Khan v. Mangal Prasad Dube* : AIR1934 All175 and *Deputy Registrar, Co-operative Societies, U.P., Lucknow v. Chaudhari Sarfaraz-un-Zaman and Anr.* : AIR1972 All515 , the Court emphasized that such an application should be allowed only in exceptional circumstances, to meet the ends of justice.

25. But we are of the candid view that unless the applicant satisfies the Court as why the evidence in his possession could not be adduced before the Court below, there is no obligation on the part of the Court to entertain such an application for the reason that no person can be permitted to take benefit of his own mistake [Vide *G.S. Lamba and Ors. v. Union of India and Ors.* : (1985)ILLJ282SC ; *Narender Chadha and Ors. v. Union of India and Ors.* : [1986]1SCR211 ; *Jose v. Alice and Anr.*, (1966) 6 SCC 342 and *T. Srinivasan v. T. Varalakshmi (Mrs.)* : AIR 1999 SC595 .

26. In the instant case the services of the petitioner-appellant had been terminated w.e.f. 22.11.2000. He had been working under the interim order of this Court dated 15.12.2000. The charge-sheet dated 4.5.2001 is in respect of a misconduct, i.e., remaining absent from duty from 30.10.2000 to 8.11.2000, 9.11.2000 to 23.11.2000, 24.11.2000 to 23.12.2000. Thus it cannot be held that the entire period of absence was related to prior to the date of termination.

27. The learned Counsel for the appellant is not in a position to satisfy us as under what circumstances the said factual position i.e., holding enquiry etc. has not been brought to the notice of the learned Single Judge.

28. It is not a case where petitioner-appellant could say that he was not aware of the additional evidence or it was not in his possession. Petitioner-appellant has not been diligent enough to prosecute his case before the learned Single Judge. Thus, he is not entitled to move an application for taking additional Evidence on record and application is liable to be rejected.

29. If the petitioner-appellant was so aggrieved, he could have moved an application for review satisfying the learned Single Judge that he could not bring the said evidence on record in spite of the prosecution of the case with due diligence and if petitioner could not maintain the review application on these grounds, we fail to understand how he can be permitted to file an application under Order XLI, Rule 27 CPC. He cannot be permitted to achieve a goal indirectly which he cannot seek directly.

STATUS AND REMOVAL OF A TEMPORARY EMPLOYEE :

30. The issue involved herein is no more res-integra. In *State of U.P. and Ors. v. Kaushal Kishore Shukla* : [1991]1SCR29 , the Apex Court has categorically held as under :

'Under the service jurisprudence a temporary employee has not right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service.'

31. In a case like the instant the Court has to be satisfied as what is the legally justiciable right of the petitioner which has been infringed and for which the petitioner can resort to the discretionary relief under Article 226 of the [Constitution of India](#). The Supreme Court in *Purshotam Lal Dingra v. Union of India* : (1958)ILLJ544SC . has held that 'A, person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier' and further held that 'a Government servant holding a post temporarily does not have any right to hold the said post'. In *UK. Mishra v. U.P. State Handloom Corporation* : (1988)ILLJ73SC , the Apex Court has taken the same view.

32. A temporary employee has no right to hold the post and his services are liable to be terminated without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary servants. Similarly, in *Triveni Shanker Saxena v. State of U.P. and Ors.* : (1992)ILLJ23SC ; *Commissioner of Food and Supply v. Prakash Chandra Saxena* : [1994]3SCR930 ; *Ram Chandra*

Tripathi v. U.P. Public Service Tribunal and others : [1994]2SCR137 ; Madhya Pradesh Hasth Shilp Vikas Nigam Ltd. v. Devendra Kumar Jain and Anr. : (1995)1SCC638 and Kaushal Kishore Shukla (supra), the Apex Court has categorically held that incumbent to a post who has been given appointment on temporary basis, terminable without notice, has no right to hold the post and he is not entitled for any opportunity of hearing before his services are dispensed with as his termination does not amount, to forfeiture of any legal right.

33. In Ravi S. Naik v. Union of India : [1994]1SCR754 , the Hon'ble Apex Court has placed reliance on the observations made in Malloch v. Aberddden Corporation, 1971 (2) All ER 1278, wherein it has been observed as under:

'A breach of procedure, whether called a failure of natural justice or an essential administrative fault cannot give him a remedy in the Courts, unless behind it there is something of substance which has been lost by the failure. The Court does not act in vain.'

34. In Life Insurance Corporation of India v. Raguvendra Sheshgiri Rao Kulkarni, (1997) 8 SCC 460, the Apex Court explained the difference of a permanent employee and an employee holding the post on probation and held that the services of a probationer cannot be equated with that of a permanent employee who, on account of his status, is entitled to be retained in service and his services cannot be terminated abruptly without any notice or plausible cause. 'This is based on the principle that a substantive appointment to a permanent post in a public service confers substantive right to the post and the person appointed on that post becomes entitled to hold a lien on that post'. However, interpreting/ enforcing the terms of appointment, which provided for discharge of the said probationer from service at any time during the period of probation or extended period of probation, without any notice or without assigning any cause, the Court held that as his termination was in consonance with the terms and conditions of his appointment letter, he cannot be heard raising grievance.

35. In State of Punjab and Ors. v. Surindra Kumar and Ors. : [1992]194ITR434(SC) , the Apex Court has held that the Court must seek the adherence to the terms and conditions of the appointment and there is no reason

why terms and conditions of appointments cannot be enforced in a contract of service.

36. In *Hindustan Education Society and Anr. v. K.P. Kalim, S.K. Gulam Nabi* : (1997)ILLJ 1071 SC , the Apex Court has held that where the rules specifically provide for permanent appointment on probation for a specific period and an employee is appointed without stipulating any condition regarding probation, the inference is to be drawn that he was not appointed in substantive capacity. In *Avinash Nagra v. Sarvodaya Vidhyalaya Samiti and Ors.* : (1997)ILLJ640SC , the Apex Court has held that a society can terminate the services not only of a temporary employee but also of a permanent employee by giving him one month's notice or three months' pay and allowances in lieu thereof if the terms of appointment and rules so permit and such termination may be valid in a given cases even if the principles of natural justice have not been complied with.

37. In *Union of India v. Bihari Lal Sidhana* : [1997]3SCR364 , the termination of the services of the temporary employee as provided under the Rules was upheld by Hon'ble Apex Court in spite of the fact that he had been put under suspension for a mis-conduct and this factum had also been mentioned in termination order.

38. In *Chandradeo Gautam v. State of U.P. and Ors.* : (2001)9SCC401 , the Hon'ble Supreme Court held that the termination of services of temporary employee does not require interference on being removed on any ground as it does not cast any stigma or aspersion on his. In *Nazira Begum Laskar and Ors. v. State of Assam*, AIR 2001 SC 102, the Apex Court held that where appointment neither confers any right nor any equity in favour of the employee, as the appointment was purely temporary and could he terminated without notice, no grievance can be entertained by such employee. More so, he cannot claim any equitable relief from any Court.

39. In *Dhananjay v. Chief Executive Officer, Zila Parishad, Jalana*, 2003 AIR SCW 739, the Hon'ble Supreme Court upheld the termination order passed under Central Civil Service (Temporary Service) Rules, 1965 in spite of the fact that the employee had been prosecuted in the criminal case and acquitted and enquiry into the allegations was also directed but not held observing that order was not

stigmatic and termination was within the ambit of the statutory rule.

40. Thus, in view of the above, law can be summarised that a temporary employee does not have a right to hold the post and his service can be terminated under the statutory provisions.

41. Thus, in view of the above, petitioner-appellant's services were liable to be terminated under the said Rule of Rules, 1975 and no fault can be found with the impugned judgment and order of the learned Single Judge on that account.

EFFECT OF THE INTERIM ORDER AFTER DISMISSAL OF THE CASE:

42. There can be no quarrel on the legal proposition that no party can suffer by the action of the Court and when the High Court is exercising its powers under Article 226 of the [Constitution of India](#), the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized. The institution of litigation by a party should not be permitted to confer an unfair advantage on the party responsible for it. [Vide *Grindlays Rank Limited v. Income Tax Officer and Ors.* : [1980]122ITR55(SC) ; *Ram Krishna Verma v. State of Uttar Pradesh* : [1992]2SCR378 ; *State of Madhya Pradesh v. M.V. Vyavsaya and Co.* : AIR 1997 SC993 and *Rampati Jayaswal and Ors. v. State of U.P. and Ors.* : AIR1997 All170 .

43. No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrong by getting interim order and thereafter blame the Court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim 'Actus Curie neminem grabavit' is applicable in such a case, which means that the act of the Court shall prejudice no-one. In such a situation the Court is under an obligation to undo the wrong done to a party unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized as institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the Court. [Vide *Dr. A. K. Sircar v. State of Uttar*

Pradesh and Ors. v. Board of Directors, Uttar Pradesh State Road Transport Corporation and Anr. 1995 Suppl (2) SCC 726; Kanoria Chemicals and Industries Ltd. v. U.P. State Electricity Board and Ors. : [1997]2SCR844 ; The Committee of Management, Arya Inter College v. Sree Kumar Tiwary : (1997)1ILLJ797SC and GTC. Industries Ltd. v. Union of India and Ors. : 1998(99)ELT17(SC) .

44. The same view has been taken by the Hon'ble Supreme Court in the case of N. Mohanan v. State of Kerala and Ors. : AIR 1997 SC1986 ; Bileshwar Khan Udyog Khedut Shahkari Mandali Ltd. v. Union of India and Ors. AIR 1999 SC 1198 and South Eastern Coal Fields Ltd. v. State of Madhya Pradesh and Ors. : AIR 2003 SC4482 , wherein it has been held that the appointment/continuation in service by interim order, does not create any legal right in favour of the appointee.

REGULARISATION AFTER TERMINATION:

45. So far as the issue of regularisation is concerned, the petitioner-appellant cannot claim that he was entitled to be considered for regularisation, for the reason that as he had been working under the interim order of the Court and his writ petition had been dismissal, he cannot take the benefit of continuation of service for that period and the Rules for regularisation are not applicable in his case as held by the Hon'ble Apex Court in HP Housing Board v. Om Pal and Ors., (1997) 1 SCC 183 and Ramchandra and Ors. v. Additional District Magistrate and Ors. : (1998)1ILLJ 1088 SC .

46. In State of U. P. and Ors, v. Raj Karan Singh : (1998)8SCC529 , the Hon'ble Apex Court has categorically held that interim order cannot disturb the position in law and if a person is in service by virtue of the interim order of the Court, he cannot agitate the issue that is continuation in service in such a condition has improved his claim to regularisation.

47. As the petitioner-appellant's service stood terminated and his writ petition has been dismissed and we find no fault with the impugned judgment and order of the learned Single Judge, the petitioner-appellant cannot claim any benefit of continuation in service under the interim order of this Court.

CONCLUSION

48. To sum up, petitioner-appellant was a temporary employee; his services were liable to be terminated under the Rules, 1975 and the writ petition has rightly been rejected by the learned Single Judge by a cogent and speaking order. Petitioner-appellant for the reason best known to him, has not prosecuted his case with due diligence before the learned Single Judge and did not adduce evidence, which was in his knowledge and possession, being a party to it. The application under Order XLI, Rule 27, CPC to take additional evidence on record at appellate stage is not worth acceptance.

49. Appeal is devoid of any merit, and accordingly, dismissed.

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