OM PRAKASH GOEL

v.

HIMACHAL PRADESH TOURISM DEVELOPMENT CORPORATION LTD. SHIMLA AND ANR.

MAY 6, 1991

[S. RATNAVEL PANDIAN AND K. JAYACHANDRA REDDY, JJ.]

Civil Services:

Constitution of India, 1950: Articles 311(2), 14 and 16—Termination of service by simple notice after conducting enquiry—Whether in the nature of camouflage and by way of punishment—Juniors retained in service but senior's service terminated—Whether arbitrary and discriminatory.

Himachal Pradesh Tourism Development Corporation Staff Regulations: Regulations 19(3)(b) and 39—Termination of service—Allegations of misconduct—Enquiry conducted—Order terminating service by simple notice passed—Whether valid—Whether in the nature of camouflage and by way of punishment—Senior's service terminated while retaining juniors in service—Whether arbitrary and discriminatory—Employee practising as lawyer since termination—Whether entitled to backwages on reinstatement.

A charge sheet was issued to the petitioner, a directly recruited Accountant in the respondent Corporation alleging that while working in the Transport Wing of the Corporation, he facilitated and abetted the embezzlement of Rs. 100 by not ensuring that the amount found was in excess, and thus he failed to serve the Corporation honestly and faithfully, that he made some fictitious entries in the Cash Book and that he made certain information public without the permission of the Managing Director. The petitioner replied that all the charges were fake and false. The leave sanctioned to the petitioner earlier for prosecuting legal study was cancelled and the petitioner challenged the same in the High Court but the case was adjourned. Meanwhile, the petitioner's services were terminated on the ground that he was no longer required and that one month's pay in lieu of notice would be paid in terms and conditions of his appointment letter and provisions of Staff Regulations of the Corporation. The petitioner challenged the same before the High Court, but the Writ Petition was dismissed *in limine*.

A In the appeal before this Court it was contended that the termination was only a camouflage and that though the petitioner was still a temporary servant, yet the termination amounted to punishment, because of the manner in which it was passed and the background behind it. It was also contended that though the termination order stated that the petitioner's services were no longer required, his juniors B were retained and were continuing in service, in violation of Articles 14 and 16 of the Constitution.

Disposing of the Special Leave Petition, this Court

HELD: 1.1 In a case of an order of termination, even that of a C temporary employee, the Court has to see whether the order was made on the ground of misconduct if such a complaint was made and in that process the Court would examine the real circumstances, as well as the basis and foundation of the order complained of and if the Court is satisfied that the termination of services is not so innocuous as claimed to be and if the circumstances further disclose that it is only a D camouflage with a view to avoid an enquiry as warranted by Article 311(2) of the Constitution, then such a termination is liable to be quashed. [706E-F]

Annop Jaiswal v. *Government of India & Anr.*, [1984] 2 SCR 453; *Nepal Singh* v. *State of U.P. & Ors.*, [1985] 2 SCR 1 and *Jarnail* E *Singh & Ors. etc.* v. *State of Punjab & Ors.*, [1986] 2 SCR 1022, relied on.

1.2 In the instant case, the termination order, though appears to be innocuous was only intended to punish the petitioner for the misconduct, in respect of the allegations which are mentioned in the charges F that were served on him. As a matter of fact, the enquiry was conducted, but before the conclusion of the enquiry, the termination order was passed. Therefore, it is not difficult to see that the form of the termination order is only a cloak for an order of punishment. [707C-D]

1.3 Besides, the termination is also liable to be quashed on the G ground that it is violative of Articles 14 and 16 of the Constitution, as it is clear from the records that while the petitioner's juniors are retained in service, the petitioner's services are terminated as no longer required. [708F, 709A-B]

Jarnail Singh & Ors. etc. v. *State of Punjab & Ors.*, [1986] 2 SCR H 1022 and *K.C. Joshi* v. *Union of India and Ors.*, [1985] 3 SCR 869, relied on.

1.4 In the circumstances, the termination order is quashed and the petitioner is directed to be reinstated in service. However, it shall be open to the respondent-Corporation to proceed with the disciplinary enquiry if it so chooses. [709H]

1.5 As regards the backwages, admittedly the petitioner has been practising as a lawyer since his termination. But this Court has not refused to grant backwages on the simple ground that the employee has been practising as lawyer during the relevant period, but has taken into consideration the probable income that would have been earned him, while granting backwages. However, a roving enquiry cannot be made by this Court nor would it be possible for the respondent-Corporation to unearth the income which the petitioner would have derived as practising advocate. Undoubtedly, the petitioner would have been entitled to subsistence allowance till his reinstatement, even if the relevant period is treated as one of suspension pending enquiry. Therefore, the petitioner shall be entitled to the full back wages upto the date of his enrolment as a lawyer and from that date upto the date of reinstatement at the rate of half of the subsistence allowance per month. Out of the total income, the income admittedly earned by him as a practising lawyer shall be deducted and the balance paid to the petitioner. The amount so paid shall, for the purpose of income tax, be spread over as if derived during those financial years from the date of his dismissal till date of reinstatement. [708B, 709D-G, 710A-B]

S.M. Saiyad **v.** *Baroda Municipal Corporation,* **relied on.**

CIVIL APPELLATE JURISDICTION: Special Leave Petition No. 13560 of 1983.

From the Judgment and Order dated 27.6.1983 of the Himachal Pradesh High Court in C.W.P. No. 86 of 1983.

P.P. Rao and H.J. Zaveri for the Petitioner.

V.K. Kanth and C.P. Pandey for the Respondents.

The following Order of the Court was delivered by

K. JAYACHANDRA REDDY, J. The petitioner was directly appointed as an Accountant in the Himachal Pradesh Tourism Development Corporation Ltd. ('Corporation' for short) on 28.8.78. He was on probation in the Transport Wing of the Corporation. After

A training he was transferred to the Office of the Area Manager, Simla and was posted as an Accountant. His conditions of service were governed by the Regulations made by the Board of Directors of the Corporation. The petitioner detected certain irregularities in the Transport Wing and wrote a letter dated 19.6.1980 to the Transport Officer pointing out the financial irregularities and embezzlements B committed by the then Cashier. The employees' Union took up the matter and demanded the Management to take necessary action and also made some demands on behalf of the Union. The petitioner was the General Secretary of the Union. In April 1980, the respondent No. 2 was posted as the new Managing Director. According to the petitioner he was annoyed with the petitioner because of his union activities. It is stated that the petitioner actively participated in high- C lighting the demands. On 13.5.1981 an order transferring the petitioner to Dalhousie was passed, even though the petitioner had been earlier granted permission on 23.7.79 to do his 3 years Law course as an evening student. The petitioner made a representation for cancellation of the transfer on the ground that he was already half way through D his legal study and that the transfer was *mala fide*. Respondent No. 2 got more annoyed. The petitioner submitted a study leave application for one year. But he was granted only 90 days leave in the first instance with full pay and allowances and later on half pay and subsequently without pay he was granted extra ordinary leave. Meanwhile, a chargesheet was issued on 21st August, 1981 framing certain charges. E The gravamen of the charges is that while working in the Transport Wing of the Corporation the petitioner facilitated and abetted the embezzlment of Rs.100 by not ensuring that the amount found was in excess and that he failed to serve the Corporation honestly and faithfully. The other charge is that he made some fictitious entries in the Cash Book and the fourth charge is that he made certain information F public without the permission of the Managing Director. To this the petitioner submitted a reply stating that all the charges are fake and false. It is stated that the petitioner's leave was cancelled and the petitioner challenged the same in the High Court of Himachal Pradesh but.the case was adjourned. Meanwhile the petitioner's services were terminated with effect from 8th January, 1982 stating that they are no G longer required and one month's pay in lieu of notice would be paid in terms and conditions of his appointment letter and provisions of Staff Regulations of the Corporation. The petitioner challenged the same before the High Court, but the Writ Petition was dismissed in limine. In this Court it is urged that the termination is only a camouflage and that though the petitioner was still a temporary servant yet the termi- H nation amounted to punishment because of the manner in which it was

passed and the background behind it. A

It is not in dispute that the Corporation has power to terminate the services by giving one month's notice or pay in lieu thereof, in the case of a temporary employee who have completed one month's service. Regulation 19(3)(b) reads thus: B

Termination of service by notice

"19(3) The Corporation may terminate the services of any employee by giving him:

(a) xx xx xx C

(b) one month's notice, or pay in lieu thereof, in the case of temporary employees who have completed one months service and one day's notice or pay in lieu thereof in the case of temporary employees in the first month of their services." D

Regulation 39 prescribes various penalties that can be awarded and termination of service is one of them. Now the only question that arises for consideration in this case is whether the termination of the petitioner's services is simply one as per the Regulation 19(3) or in the nature of a camouflage and, therefore, amounts to punishment as contended by the petitioner. E

In *Anoop Jaiswal* v. *Government of India & Anr.*, [1984] 2 SCR 453, it is held as under:

"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 merely a determination of employment 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 employee." F G

In *Nepal Singh* v. *State of U.P. & Ors.*, [1985] 2 SCR 1 it is held as under: H

A "Where allegations of misconduct are levelled against a Government Servant, and it is a case where the provisions of Article 311(2) of the Constitution should be applied, it is not open to the competent authority to take the view that holding the enquiry contemplated by the clause would be a bother or a nuisance and that therefore it is entited to avoid B the mandate of that provision and resort to the guise of an *ex-facie* innocuous termination order. The Court will view with great disfavour any attempt to circumvent the constitutional provision of Article 311(2) in a case where that provision comes into play."

C In *Jarnail Singh & Ors. etc.* v. *State of Punjab & Ors.*, [1986] 2 SCR 1022 it is, held thus:

"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 D lift the veil and to see the real circumstances as well as the basis and foundation of the order complained of. In other words, the Court, in such a case, will lift the veil and will see whether the order was made on the ground of misconduct, inefficiency or not."

E From the above decisions it can be seen that it is well-settled that in a case of an order of termination even that of a temporary employee the Court has to see whether the order was made on the ground of misconduct if such a complaint was made and in that process the Court would examine the real circumstances as well as the basis and foundation of the order complained of and if the Court is satisfied that the F termination of services is not so innocuous as claimed to be and if the circumstances further disclose that it is only a camouflage with a view to avoid an enquiry as warranted by Article 311(2) of the Constitution, then such a termination is liable to be quashed. In the above mentioned decisions, the impugned termination order was accordingly quashed.

G

It is not in dispute that a regular chargesheet was served on the petitioner, as mentioned above, on 21st August, 1981 and to the said chargesheet a list of documents also was appended on the basis of which the articles of charge were framed. The petitioner replied to these charges on 7th September, 1981. Without reference to any of the H charges or the reply the order of termination was passed on 8th

January, 1982 as already mentioned. In the counter-affidavit at more than one place it is admitted about the framing of the charges etc. regarding the news item which refers to the information given out by the petitioner. It is stated in the counter-affidavit that services of the petitioner were terminated as a probationer and not on the basis of the enquiry report which came after the services of the petitioner had been terminated. It can therefore be seen that an enquiry, in fact, was contemplated and was held but the report came into light after termination of the services of the petitioner. It is also submitted on behalf of the petitioner that the audit report would show many irregularities as pointed out by the petitioner and that the petitioner acted honestly in pointing out the irregularities. It is not necessary for us to go into this question. Having gone through the various records and also the admissions made in the counter-affidavit, we are satisfied that the termination order, though appears to be innocuous, was only intended to punish the petitioner for the misconduct, in respect of the allegations which are mentioned in the charges that were served on him. After serving the chargesheet, as a matter of fact, the enquiry was conducted. But before the conclusion of the enquiry the termination order was passed. Therefore it is not difficult to see that the form of the termination order is only a cloak for an order of punishment.

In this context, the learned counsel also questioned the termination order from another angle. In that order it is mentioned that the services of the petitioner are no longer required, therefore they are terminated. But from the record it is clear that juniors to the petitioner are retained and they are continuing in service. In the affidavit it is clearly mentioned that juniors whose names are given there are retained in service in violation of Articles 14 and 16 of the Constitution. In the counter-affidavit only a vague reply is given simply stating that the averments made by the petitioner are not correct. In *K.C. Joshi* v. *Union of India and Ors.*, [1985] 3 SCR 869. It is observed that 'If it is discharge simpliciter, it would be violative of Article 16, because a number of store-keepers junior to the appellant are shown to have been retained in the service". Likewise in *Jarnail Singh's* case it was observed as under:

> "In the instant case, *ad hoc* services of the appellants have been arbitrarily terminated as no longer required while the respondents have retained other Surveyors who are juniors to the appellants. Therefore, on this ground also, the impugned order of termination of the services of the appellants are illegal and bad being in contravention of the

A fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India."

After a careful perusal of the record we are satisfied that the juniors to the petitioner are retained. Therefore on this ground also the termination order is liable to be quashed.

B

Admittedly the petitioner has been practising as a lawyer ever since his services were terminated. In the rejoinder filed by him he merely stated that he was not earning much in that profession and that he has incurred debts. The learned counsel for the Corporation, however, submitted that since the petitioner was admittedly practising as a lawyer the question of granting him back wages in any event does C not arise and that even otherwise there cannot be a roving enquiry to the earnings he has made as a lawyer at this distance of time. The petitioner, however, at this juncture filed a further affidavit that his total income from 1985 onwards uptilnow was only Rs. 15,550 and that he has not received any other income during all these years. It is also D submitted on his behalf that in similar circumstances this Court awarded back wages even in a case of an employee who practised as a lawyer from the date of dismissal till his reinstatement. In *S.M. Saiyad* v. *Baroda Municipal Corporation*, the employee was directed to be reinstated in service by the labour court. Then ultimately on the question of back wages it was urged before this Court that though the E appellant was practising as a lawyer after enrolment during that period still he was entitled for back wages. This Court accepted this plea and observed as under:

> "The appellant seeks back wages for the period December 12, 1969 to October 26, 1976. This period according to the F respondent has to be divided in two parts; (1) from December 12, 1969 to Jan. 20, 1972 when the appellant was enrolled as an advocate, and (2) for the period Jan. 21, 1976 to October 26, 1976 from which date he has already been awarded back wages, it was submitted on behalf of the respondent that the appellant himself has admitted that G since his being enrolled as an advocate he was earning Rs. 150 per month which aspect must be borne in mind while considering the submission of the appellant for the award of back wages."

Partly accepting this plea this Court ultimately observed that the H appellant therein must have atleast started earning after a lapse of one

year from the date on which he was enrolled as an advocate. Ultimately this court directed that: A

> "We, accordingly, allow this appeal and set aside the decision of the High Court refusing the back wages for the period December 12, 1969 to October 26, 1976 and directed that the appellant shall be entitled to back wages B including salary and allowances and other benefits to which he would be entitled as if he had continued the service. While making the payment of back wages as per this order the respondent is entitled to deduct the amount of Rs. 150 p.m. from January 20, 1973 to October 26, 1976 from the amount which becomes payable to the appellant. The C respondent must compute the amount payable as herein directed and pay what becomes payable to the appellant within a period of two months from today."

It can therefore be seen that this Court did not refuse to grant back wages on the simple ground that the employee was a practising lawyer D during the relevant period. But on the other hand it took into account the probable income and after deducting the same the balance of back wages was directed to be computed.

In the instant case in the affidavit filed by the petitioner it is stated that he was practising as an income-tax advocate ever since his E enrolment in October, 1982. But, however, he asserted that he got his first brief in the year 1985. These averments are contradicted by the other side. Under these circumstances we cannot make a roving enquiry nor would it be possible for the Corporation to unearth the income which the petitioner would have derived as a practising advocate. There are many imponderables and conjectures too. Under these F circumstances we asked both the counsels to suggest a solution. We have heard both the sides on this aspect elaborately. Shri P.P. Rao, learned counsel for the petitioner submitted that even if the relevant period is to be treated as one of suspension pending enquiry the petitioner would have been entitled to the subsistence allowance till his reinstatement. That atleast should be the criteria in granting the G back wages in a situation like this. We think this is a reasonable and fair suggestion.

In the result the termination order is quashed and consequently the petitioner shall be reinstated in service. However, he shall be entitled to the full back wages upto the date of his enrolment as a H

A lawyer which was in the month of October, 1982. From the date of his enrolment upto the date of reinstatement he shall be entitled to the back wages at the rate of half of the subsistence allowance per month and the total amount shall be computed on that basis. Out of that the income of Rs.15,550 admittedly earned by him as a practising lawyer shall be deducted and the balance amount shall be paid to the
B petitioner. The amount so paid to him shall for the purpose of income tax, be spread over as if derived during those financial years from the date of his dismissal till the date of reinstatement. However, we would like to make it clear that it is open to the Corporation to proceed with the disciplinary enquiry if it so chooses.

C The special leave petition is accordingly disposed of. In the circumstances of the case there will be no order as to costs.

N.P.V. SLP disposed of.