

COMMODORE COMMANDING, SOUTHERN
NAVAL AREA, COCHIN

v.

V. K. RAJAN

March 10, 1981

[S. MURTAZA FAZAL ALI, A. VARADARAJAN AND A.N. SEN]

Service matter—Article 16—Service of a temporary government servant terminated by a termination order simpliciter—Article 16, if attracted.

The respondent, in the first instance, was appointed as a casual labourer for a month but was continued against an existing vacancy. He was later appointed as a labourer in a regular cadre in an existing vacancy. Sometime later he was promoted and appointed as Ammunition Repair Labourer, Grade II. Three years thereafter his services were terminated.

In a petition under Article 226 of the Constitution the respondent impugned the order of termination of his services on the ground that he was appointed permanently to the post of Ammunition Repair Labourer Grade II and that the termination of his services, when juniors were retained in service, was discriminatory and was in contravention of Article 16 of the Constitution.

The appellant contended before the High Court that the term “regular cadre” did not imply as in other instances in the employment of government a substantive post, but that the post in the regular cadre is a purely temporary one.

A single Judge of the High Court rejected the respondent’s claim that he was appointed permanently to the post but held that since persons junior to him had been retained in service, termination of his services without assigning any reason was discriminatory and, therefore, the order was bad in law.

Agreeing with the view of the single Judge a Division Bench of the High Court dismissed the appellant’s appeal.

Allowing the appeal

HELD : A perusal of the file relating to the termination of the services of the respondent shows that the decision to terminate his services had been taken at the highest level on the ground of his unsuitability in relation to the post held by him and that it was not by way of any punishment and no stigma was attached to the respondent by reason of the termination of his services. [172 G-H]

The well settled position in law in this regard is that (i) if the services of a temporary government servant are terminated in accordance with the conditions of his service on the ground of unsatisfactory conduct or his un-

A suitability for the job and/or for his work being unsatisfactory or for a like reason which marks him off in a class apart from other temporary servants who have been retained in service, there is no question of the applicability of Article 16; (ii) where the services of a temporary government servant or a probationer government servant are terminated by an order which does not *ex-facie* disclose any stigma or penal consequences against the government servant and is merely a termination order *simpliciter* there is no case ordinarily for assuming that it is anything but what it purports to be; (iii) before Article 16 is held to have been violated by some action there must be a clear demonstration of discrimination between one government servant and another similarly placed, which cannot be reasonably explained except on an assumption or demonstration of "malice in law" or "malice in fact". Acting on legally extraneous or obviously misconceived grounds of action would be a case of "malice in law"; (iv) it is open to the employer to terminate the services of a temporary employee on probation at any time before he was confirmed if the employer was satisfied that he was not suitable for being retained in service. [E 169 D; 170 C; 171 C; 172 B]

In the instant case the respondent was a temporary government servant. No stigma is attached to the termination of his services. His services had been terminated for unsuitability in relation to the post held by him. [171 F-G]

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1154 of 1970.

Appeal by special leave from the Judgment and Order dated 18.7.1969 of the Kerala High Court in Writ Appeal No. 620/69.

E *M.M. Abdul Khader, K.S. Gurumurthy and R.N. Podar* for the Appellant.

T.C. Raghavan and N. Sudhakaran for the Respondent.

F The Judgment of the Court was delivered by

G VARADARAJAN, J. This appeal by special leave is directed against the judgment of a Division Bench of the Kerala High Court in Writ Appeal No. 620 of 1969, which had been filed by the appellant against the judgment of the learned Single Judge of that High Court, allowing O. P. No. 672 of 1969. O.P. No. 672 of 1969 was filed under Article 226 of the Constitution challenging the termination of the service of the respondent by the appellant by the order dated 17-1-67. That order is to the effect that in accordance with the terms and conditions of his service the respondent stated to be a temporary Ammunition Repair Labourer Grade II, Naval Armaments Depot, Alwaye, is informed that his service is thereby terminated with effect from the date of service of that order on him. That order further states that respondent will be paid a sum equivalent to the

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amount of his pay plus allowances for the period of notice, due to him, that is, for one month in accordance with the provisions of the Navy Instruction 22/53, as amended and that the payment of allowances will, however be subject to conditions under which such allowances are admissible.

The respondent having been recommended by the Employment Exchange, was appointed by the appellant by Ex. P-1 as labourer on casual basis in lieu of Sailor in the Installation Team (I.N.S. Vendurthy) on pay of Rs. 70/- p.m. plus allowances as admissible from time to time for the period of one month in the first instance with effect from the forenoon of 18.12.61. The appellant continued the respondent's employment as labourer in lieu of Sailor in B.R.O. (Installation) Department, Cochin against some existing vacancy with effect from the forenoon of 18.1.62 by Ex. P-2. When he was casual labourer in the B.R.O. (Installation) Department he was transferred by the appellant to the Naval Armament Depot, Alwaye and appointed as labourer in the regular cadre in the scale mentioned therein plus allowances as admissible from time to time in an existing vacancy with effect from 15.11.62. Subsequently, when the respondent was working as a labourer in the Naval Armament Depot at Alwaye the appellant promoted him and appointed him as A.R.L. Grade II in the Naval Armaments Depot, Alwaye in the scale mentioned therein plus allowances as admissible from time to time in an existing vacancy with effect from the forenoon of 2.3.64. Thereafter, his services were terminated by Order dated 17-1-67 (Ex. P-8) as mentioned above.

In the the Writ Petition the respondent attacked the order— Ex. P-8 on two grounds, namely, (1) that he was appointed permanently to the post of A.R.L. Grade II by the Order (Ex. P-4) and (2) that persons junior to the respondent have been retained in service and, therefore, the termination of the services of the respondent without any reason whatsoever, is discriminatory and contravenes Article 16 of the Constitution. In the counter-affidavit filed in the Writ Petition the appellant contended that the phraseology "regular cadre" does not imply as it may in some other instances in the employment of government, a substantive post, that the post in the "regular cadre" is also a purely temporary one and that the post of Ammunition Repair Labourer Grade II to which the respondent was promoted and appointed, was also on a temporary basis. The appellant denied that there was any discrimination in the termination of the services of the respondent. The learned

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A Single Judge repelled the contention that the respondent had been permanently appointed to the post of ARL Grade II by the Order Ex. P-4 on the ground that there is nothing in the order to show that the respondent had been appointed permanently to the post. Regarding the second ground urged by the respondent the learned Single Judge held, relying upon this **B** Court's decision in *Champaklal Chimantal Shah v. The Union of India*⁽¹⁾ and two other decisions of the Mysore and Andhra Pradesh High Court in *Diddaiah v. State*⁽²⁾ and *Jankiraman v. State of Andhra Pradesh*⁽³⁾ respectively that Article 16 of the Constitution applies even to temporary government servants. The learned Judge **C** observed that there is no denial of the fact that persons junior to the respondent have been retained in service and that there is nothing in the order, Ex. P-8 or in the counter affidavit filed by the respondent in the Writ Appeal to show that the respondent was guilty of any misconduct or was otherwise unfit to hold the post. The learned Judge further observed that in paragraph 8 of the **D** counter affidavit it has only been stated that the fact other persons who are junior to the respondent are retained in service, would not confer any right on the respondent to continue in service. In this view the learned Judge held that the termination of the respondent's services under Ex. P-8 without assigning any reason was discriminatory and he accordingly allowed the Writ Petition without costs. **E** In the Writ Appeal filed under s. 5 of the Kerala High Court Act the Division Bench followed the aforesaid decision of this Court in *Champaklal Chimantal Shah v. The Union of India* (supra) and agreed with the learned Single Judge that the appellant's action in terminating respondent's services under Ex. P-8 is violative of Article 16 of the Constitution. The learned Judges observed in their judgment that no reason at all was either alleged or proved as to why appellant chose to terminate the respondent's services under rule 5 of the **F** Central Services (Temporary Services) Rules 1965 such as that it was administratively convenient to do so or that the respondent's work or conduct was unsatisfactory or that it was a case of retrenchment and the respondent was chosen as the junior-most person. **G** The learned Judges accordingly dismissed the Writ Appeal.

The principle that even temporary government servants are entitled to the protection of Article 311(2) in the same manner as

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(1) A.I.R. 1964 SC 1854. [1964] 5 S.C.R. 119.

(2) A.I.R. 1967 Mysore 223.

(3) A.I.R. 1959 A.P. 185.

permanent government servants if the government takes action against them by meting out one of the three punishments of dismissal, removal or reduction in rank, is well settled. This court has held in *Champaklal Chimanlal Shah v. The Union of India*⁽¹⁾ that temporary servants are also entitled to the protection of Article 311(2) in the same manner as permanent government servants if the government takes action against them by meting out one of the three above punishments following the decision in *Purshotam Lal Dhingra v. Union of India*⁽²⁾ and that this protection is only available where the discharge, removal or reduction in rank is sought to be inflicted by way of punishment and not otherwise. The same view has been reiterated by this Court in *Manager, Govt. Branch Press and Anr. v. D.B. Beliappa*,⁽³⁾ where it has been observed thus :

“The principle that can be deduced from the above analysis is that if the services of a temporary Government servant are terminated in accordance with the conditions of his service on the ground of unsatisfactory conduct or his unsuitability for the job and/or for his work being unsatisfactory, or for a like reason which marks him off in a class apart from other temporary servants who have been retained in service, there is no question of the applicability of Article 16.

Conversely, if the services of a temporary Government servant are terminated, arbitrarily, and not on the ground of his unsuitability, unsatisfactory conduct or the like which would put him in a class apart from his juniors in the same service, a question of unfair discrimination may arise, notwithstanding the fact that in terminating his service, the appointing authority was purporting to act in accordance with the terms of the employment. Where a charge of unfair discrimination is levelled with specificity, or improper motives are imputed to the authority making the impugned order of termination of the service, it is the duty of the authority to dispell that charge by disclosing to the Court the reason or motives which impelled it to take the impugned action. Excepting, perhaps, in cases analogous to those covered by Article 311(2), Proviso (c), the authority cannot withhold such information from the Court on the lame excuse, that impugned order is purely administrative and not judicial, having been passed in exercise of its adminis-

(1) [1964] 5 S.C.R- 119 at 203.

(2) [1958] S.C.R. 828.

(3) [1979] 2 S.C.R. 458 at 466-67.

A trative discretion under the rules governing the conditions of the service.”

In the latest decision in *State of Maharashtra v. Veerappa R. Saboji and Anr.*⁽¹⁾ a similar observation has been made by Pathak, J. at page 567 :

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“The law, it seems to me, is that where the services of a temporary Government servant or a probationer Government servant are terminated by an order which does not *ex facie* disclose any stigma or penal consequences against the Government servant and is merely a termination order simpliciter, there is no case ordinarily for assuming that it is anything but what it purports to be. Where, however, the order discloses on the face of it that a stigma is cast on the Government servant or that it visits him with penal consequences, then plainly the case is one of punishment. There may still be another kind of case where although the termination of service is intended by way of punishment, the order is framed as a termination simpliciter. In such a case, if the Government servant is able to establish by material on the record that the order is in fact passed by way of punishment, the innocence of the language in which the order is framed will not protect it if the procedural safeguards contemplated by Article 311(2) of the Constitution have not been satisfied. In a given case, the Government servant may succeed in making out *prima facie* case that the order was by way of punishment but an attempt to rebut the case by the authorities may necessitate sending for the official records for the purpose of determining the truth. It is in such a case generally that the official records may be called for by the Court. It is not open to the Court to send for the official records on a mere allegation by the Government servant that the order is by way of punishment. For unless there is material on the record before the Court in support of that allegation, an attempt by the Court to find out from the record whether the termination of service is based on the unsuitability of the Government servant in relation to the post held by him or is in reality an order by way of punishment will in effect be an unwarranted attempt to delve into the official records for the purpose of determining the nature of the order on the basis of a mere allegation of the Government

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(1) [1980] 1 S.C.R. 551.

servant. On a sufficient case being made out on the merits before the Court by the Government servant it is open to the Court to resort to scrutiny of the official records for the purpose verifying the truth".

This Court has observed in *Regional Manager and Anr. v. Pawan Kumar Dubey* (1) thus :

"We do not think that *Sughar Singh's* case, in any way, conflicts with what has been laid down by this Court previously on Article 311(2) of the Constitution or Article 16 of the Constitution. We would, however, like to emphasize that, before Article 16 is held to have been violated by some action there must be a clear demonstration of discrimination between one Government servant and another, similarly placed, which cannot be reasonably explained except on an assumption or demonstration of "malice in law" or "malice in fact". As we have explained, acting on a legally extraneous or obviously misconceived ground of action would be a case of "malice in law". Orders of reversion passed as a result of administrative exigencies, without any suggestion of malice in law or in fact, are unaffected by *Sughar Singh's* case (supra). They are not vitiated merely because some other Government servants juniors in the substantive rank, have not been reverted."

After examining the record in *Sughar Singh's* case (supra), the learned Judges have observed :

"What weighed with this Court was not only that there was a sufficient "element of punishment" in reverting Sughar Singh for a supposed wrong done, from which the order of reversion could not be divorced, so that Article 311 (2) had to be complied with, but, there was also enough of an impropriety and unreasonableness in the action taken against Sughar Singh, solely for a very stale reason, which had become logically quite disconnected to make out a case of "malice in law" even if it was not a case of "malice in fact"

The matter is also covered by a recent decision of this Court in *Oil and Natural Gas Commission and Ors. v. Dr. Mohd. S.*

(1) [1976] 3 S.C.R. 540 at 547.

A *Iskender Ali*⁽¹⁾ where one of us (Fazal Ali, J.) speaking for the Court observed as follows :

“As the respondent was a temporary employee on probation, it was open to the employer to terminate his services at any time before he was confirmed, if the employer was satisfied that he was not suitable for being retained in service.”

... ..

B “The learned counsel for the respondent submitted that the remarks made in the assessment roll went to show that the intention of the appointing authority was to proceed against the respondent by way of punishment. We are, however, unable to agree with this submission. It is obvious that a temporary employee is appointed on probation for a particular period only in order to test whether his conduct is good and satisfactory so that he may be retained. The remarks, in the assessment roll, merely indicate the nature of the performance put in by the officer for the limited purpose of determining whether or not his probation should be extended. These remarks were not intended to cast any stigma.”

C “In these circumstances, therefore, it is obvious that as the respondent was merely a probationer, the appointing authority did not consider it necessary to continue the enquiry but decided to terminate the services of the respondent as he was not found suitable for the job. It is well settled by a long course of decisions of this Court that in the case of a probationer or a temporary employee, who has no right to the post, such a termination of his service is valid and does not attract the provisions of Article 311 of the Constitution.”

D We agree with the learned Judges who constituted the Division Bench of the Kerala High Court that the respondent was only a temporary government servant and that even as a temporary government servant he is entitled to the protection of Art. 311 (2) of the Constitution where termination involves a stigma or amounts to punishment. We looked into the file relating to the respondent ending with order of termination of his service (Ex-P-8). We are satisfied that the decision to terminate the services of the respondent had been taken at the highest level on the ground of unsuitability of the respondent in relation to the post held by him and it is not by way of any punishment and no stigma is attached to the respondent

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(1) [1980] 3 S.C.R. 603.

by reason of the termination of his service. In these circumstances we allow this appeal and set aside the judgment of the High Court and confirm the appellant's order, Ex. P.B. terminating respondent's services. The appellant shall bear his own costs and pay respondent's costs.

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P.B.R.

Appeal allowed.

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