

K.C. Joshi vs Union Of India And Ors on 23 April, 1985

Equivalent citations: 1985 AIR 1046, 1985 SCR (3) 869, AIR 1985 SUPREME COURT 1046, 1985 LAB. I. C. 1032, (1987) 163 ITR 597, 1985 LAWYER 17 35.2, 1985 BLJR 464, 1985 (19) TAX LAW REV 31, 1985 SCC (L&S) 656, (1985) 2 LBLJ 416, (1985) 67 FJR 122, (1985) 51 FACLR 145, (1985) 2 LAB LN 247, 1985 (3) SCC 153, (1985) 2 SCWR 1

Author: D.A. Desai

Bench: D.A. Desai, Misra Rangnath

PETITIONER:

K.C. JOSHI

Vs.

RESPONDENT:

UNION OF INDIA AND ORS.

DATE OF JUDGMENT 23/04/1985

BENCH:

DESAI, D.A.

BENCH:

DESAI, D.A.

MISRA RANGNATH

CITATION:

1985 AIR 1046

1985 SCR (3) 869

1985 SCC (3) 153

1985 SCALE (1) 707

CITATOR INFO :

F 1987 SC1831 (3)

F 1987 SC1833 (3)

F 1991 SC1490 (6)

ACT:

Constitution of India 1950 Articles 12 14 16 310 and 311:
Oil and Natural Gas Commission-Whether an
instrumentality of the State -Whether amenable to writ
jurisdiction-Employees of corporation-Whether entitled to
protection of equality in Matters of public employment

Labour Law:

Employee employed on regular basis until further orders
-Services of employee-Whether could be terminated by one
month's notice.

Income Tax Act 1961 Section 89 and Income Tax Rules
21A:

Employee-Termination order set aside Awarded back wages and compensation In lieu of reinstatement-Relief of income tax-Entitlement of.

HEADNOTE:

The appellant was initially appointed in the Respondent-Public Sector Undertaking as an Assistant Store Keeper and later selected as a Store Keeper. The office order recited that the appellant had been appointed as Store Keeper till further orders, that his appointment was purely temporary, that he will be on probation for period of 6 months, and that the appointment may be terminated at any time by a month's notice. On successful completion of the probation period of six months, the appellant was informed that 'he was continued in service on a regular basis until further order.' The appellant was later transferred and the Transfer Order was challenged by him in a suit, and an interim order restraining the undertaking from implementing the transfer order.

The Employees' Union submitted a charter of demands and it was followed by a notice threatening direct action by the members of the Union. The appellant was an active worker of the union. The employees went on strike, and

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the Union submitted a list of workmen to the Corporation requesting the Corporation to give them the status of protected workmen as required by section 33(4) of the Industrial Disputes Act, 1947. The Appellant's name appeared at S.No 2 in the Letter. By an Office Order the services of the appellant were terminated with immediate effect in accordance with the terms and conditions of the service, and a cheque for one month's pay in lieu of notice accompanied the order.

The appellant challenged the legality and validity of the order terminating his service in a Writ Petition and a Division Bench of the High Court dismissed the Petition. It held that though on successful completion of the probation period, the appellant had been appointed on a regular basis as Store Keeper, he was non-the-less a temporary employee of the Corporation till the date on which his services were terminated. The Corporation was not an Industrial Establishment within the meaning of the expression in the Industrial Employment (Standing Orders) Act, 1946 and therefore the Model Standing Orders enacted under the Act were not applicable to the Corporation. The Order of termination of service was not violative of the Oil and Natural Gas Commission (Conduct, Discipline and Appeal) Regulations, 1964 as the service of the appellant was not dispensed with on the allegation of misconduct, but it was an order of termination of service simpliciter in accordance with Regulation 25. As the service of the appellant were

terminated not because of any personal bias of the officers of the Corporation, but because of his unsatisfactory work, the allegation of mala fides cannot be upheld.

Allowing the appeal to this Court,

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HELD: 1 The judgment or the High Court is quashed and set aside and the rule is made absolute in the writ petition. The Oil and Natural Gas Commission is directed to pay Rs.2 lakhs to the appellant in lieu of backwages and compensation in lieu of reinstatement within a period of four weeks. The appellant is entitled to relief under section 89, Income Tax Act, 1961 read with Rules 21 A of the Income Tax Rule, because the compensation awarded include salary which had been in arrears for 18 years as also the compensation in lieu of reinstatement [878H, 879A, E-G]

2. If the appellant was appointed on regular basis, his service cannot be terminated by one month's notice. If it was by way of punishment, as the High Court has found it to be so, termination is violative of the principles of natural justice in that no opportunity was given to the appellant to clear himself of the alleged misconduct which proved the real bans for making of the order of termination of service. 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 and cannot be picked arbitrarily. He had the protection of Article 16 which confers on him the fundamental right of equality and equal treatment in the matter of public employment.

3. The several communications which include a letter of appreciation and

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a certificate eulogizing the services of the appellant, clearly show that the charge of unsuitability was either cooked up or conjured up for a collateral purpose of doing away with the service of an active trade-union worker who because of his activities became an eye-sore. The view taken by the High Court that the termination of service was legal, valid or justified is not therefore tenable.

[877H, 878C]

4. Ordinarily, where the order of termination of service is shown to be bad and illegal, the necessary declaration must follow that the employee continues to be in an uninterrupted serviced and he is entitled to full back wages. [878D]

In the instant case, the appellant was out of service from December 29, 1967. A period of nearly 18 years have rolled by and he would have to go back to some chagarined master. On enquiry, the appellant informed that substantial and adequate compensation would be more acceptable to him than reinstatement with backwages.

[878E]

Shri Sant Raj & Anr. v. Sh. O.P.Singla & Anr Civil

Appeal No. 650/82 dated April 9, 1985 referred to.

5. An unbiased Judge, and an opportunity to controvert the allegation and to clear oneself are the minimum principles of natural justice which must inform the drastic power of dismissal affecting the livelihood of an employee.

[876F]

6. The Oil and Natural Gas Commission is an instrumentality of the State and is comprehended in the expression 'other authority' in Art. 12, and any termination of service of the employee of the Corporation, if successfully questioned would permit the court to make a declaration that the employee continues to be in service. Even if the employees of the Corporation, which is an instrumentality of the State, cannot be said to be the members of a civil service of the Union or an All India Service, or hold any civil post under the Union, for the purpose of Articles 310 and 311 and therefore, not entitled to the protection of Art. 311, they would none-the-less be entitled to the protection of the fundamental rights enshrined in Articles 14 and 16 of the Constitution that is they would be entitled to the protection of equality in the matter of employment in public service and they cannot be dealt with in an arbitrary manner.

[874G; 875C]

Sukhdev Singh & Ors. v. Bhagatram Sardar Singh Raghuvanshi & Anr, [1975] 3 SCR 619 and A. L. Kalra v. Project and Equipment Corporation of India Ltd., [1984] 3 SCC 317 referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3187 of 1982 From the Judgment and Order dated 22.1.1974 of the Allahabad High Court in C.M.P. No. 1395 of 1968.

A.R. Gupta for the Appellant.

B. Datta, Rishi Kesh, Badri Prasad, Ajit Pudissary, Girish Chandra and Ms. A. Subhashini for the Respondents.

The Judgment of the Court was delivered by DESAI, J. Another unequal fight between a giant public sector undertaking: Oil and Natural Gas Commission (Corporation' for short) and a Store Keeper which has been brought to this Court by the ultra legalist stand taken by the Corporation which lacks equanimity and smacks of victimisation.

The appellant was appointed as Assistant Store Keeper in April, 1962 and was posted at Dehradun. Later on when the Corporation decided to recruit Store Keeper, the appellant was selected in open competition and was appointed on December 7, 1963 as such. He was posted at Cambay, Gujrat and later on December 24, 1963 sent back to Dehradun. The office order dated February 26, 1964 recites

that the appellant has been appointed as Store Keeper till further orders and the post is sanctioned for the period February 7, 1964 to February 29, 1964. In other words, a man selected in an open competition was offered the post which was to last for 22 days roughly. He was also told that his appointment was purely temporary and that other terms of service were those as set out in the letter dated December 7, 1963, one of which was that the appellant will be on probation for a period of six months from the date of the appointment and the same may be extended at the discretion of the appointing authority and that the appointment may be terminated at any time by a months' notice given by either side. On January 13, 1965, the appellant was informed in writing by the Memorandum No. PF/K-44-/64-ENT that the appellant on successful completion of the probation period of six months, is continued in service on regular basis until further orders. By office order dated April 6, 1967, the appellant who was described as Store keeper, Grade I Mech. Engg. Branch was transferred to Cambay-Nawagam project. This transfer order was challenged by the appellant on diverse grounds in a suit filed by him. He sought an interim in-

junction restraining the respondents from implementing the order of transfer. Interim injunction as prayed for was granted.

The Oil & Natural Gas Commission Employees Mazdoor Sabha (Union for short), Dehradun submitted a charter of demands on May 15, 1967 and it was followed by a notice threatening direct action by the members of the Union. It appears that the appellant was an active worker of the Union. The usual management response emerged be a secret letter dated September 1, 1967. Shri R.P. Sharma, Chief Engineer under whom the appellant was at the relevant time working was told that the appellant is the main trouble maker and that he is being given free hand by his immediate superiors and that the Chief Engineer did not keep strict vigilance over the activities of the appellant. The employees of the Corporation went on strike on September 12, 1967. It was called off on September 24, 1967. On September 28, 1967, the Union submitted a list of workmen to the Corporation requesting the Corporation to give them the status of protected workmen as required by Sec. 33 (4) of the Industrial Disputes Act, 1947. Appellant's name appears at S. No. 2 in this letter. On December 27, 1967 the Union complained of victimisation of the active union workers including the appellant- On December 29, 1967 Office Order No. M (Engg) 1 (1)/67 was issued by which the services of the appellant were terminated with immediate effect in accordance with the terms and conditions of his service. A cheque in the amount of Rs. 317 accompanied the order being one month's pay in lieu of notice. The appellant challenged in Writ Petition No. 1395/68 in the Allahabad High Court the legality and validity of the order terminating his services.

A Division Bench of the Allahabad High Court held that despite the order dated January 13, 1965 that on successful completion of the probation period, the appellant has been appointed on a regular basis as Store Keeper, he was none- the- less a temporary employee of the Corporation till the date on which his services were terminated. The High Court further held that the Corporation is not an industrial establishment within the meaning of the expression in Industrial Employment (Standing Orders) Act, 1946 and therefore the Model Standing Orders enacted under the Act were not applicable to the undertaking of the Corporation. However, the High Court examined an alternative contention that assuming that the Industrial Establishment (Standing Orders) Act, 1946 does apply to the undertaking of the Corporation, yet in view of the provisions contained in Sec. 13B of the Act,

no provisions of the Act would apply to the undertaking of the Corporation. The High Court repelled the contention of the appellant that the order of termination of service is violative of Oil and Natural Gas Commission (Conduct, Discipline and Appeal), Regulations, 1964 observing that as the service of the appellant was not dispensed with on the allegation of misconduct, but as it was an order of termination of service simpliciter in accordance with the Regulation 25, no other regulation is shown to have been contravened by the impugned order. The High Court rejected the submission on behalf of the appellant that as the Corporation is a State or at any rate instrumentality of the State' as contemplated by Art. 12 of the Constitution and therefore, the appellant is entitled to the protection of Art 14 and 16 observing that 'it is not the requirement of law that in order to dismiss one employee on the ground of unsuitability, the Government or the Corporation is required to dismiss all an observation which has left us guessing for its content and meaning. The Division Bench finally concluded that as the service of the appellant were terminated not because of any personal bias of the officers of the Corporation but because of his unsatisfactory work, the allegation of mala fides cannot be upheld. Accordingly, the writ petition was dismissed with no order as to costs. Hence this appeal by special leave.

Mr. B. Datta, learned counsel who appeared for the respondents did not press before us the contention that the Corporation is not an instrumentality of the State. In view of the numerous decisions of this Court and especially one in *Sukhdev Singh & Ors. v. Bhagatram Sardar Singh Raghuvanshi & Anr.*(1), a Constitution Bench of this Court in terms held that 'the Oil and Natural Gas Commission is an instrumentality of the State and is comprehended in the expression other authority' in Art. 12, and that any termination of service of the employee of the Corporation, if (1) [1975] 13 S.C.R. 619.

successfully questioned would permit the court to make a declaration that the employee continues to be in service.' Even if the employees of the Corporation, which is an instrumentality of the State, cannot be said to be the members of a civil service of the Union or an All-India service or hold any civil post under the Union, for the purpose of Art. 310 and 311 and therefore, not entitled to the protection of Art. 311, they would none-theless be entitled to the protection of the fundamental rights enshrined in Art. 14 and 16 of the Constitution. In other words, they would be entitled to the protection of equality in the matter of employment in public service and they cannot be dealt with in an arbitrary manner. (See *A.L. Kalra v. Project and Equipment Corporation of India Ltd.*)(1).

The next question is whether the service of the appellant was terminated in accordance with law or regulation or in a thoroughly arbitrary manner ? Factual matrix set out hereinbefore will affirmatively show that on successful completion of his probation period, the appellant was appointed on the regular establishment as Store Keeper. Thus effective from 13, 1965, the appellant was appointed on regular basis as Store Keeper. There is nothing to show in the order that on completion of the probation period, he was appointed as a temporary Store Keeper. The words used are:

'He is continued in service on a regular basis until further orders.' The expression 'until further orders' suggest an indefinite period. It is difficult to construe it as clothing him with the status of a temporary employee. It is even worst than being a

probationer because the apprehended further order may follow the very next day. Therefore, the expression 'until further order' being thoroughly irrelevant has to be ignored. It is even inconsistent with the appointment on regular basis as stated in that very order.

If the appellant was appointed on regular basis, his service cannot be terminated by one month's notice. If it is by way of punishment, as the High Court has found it to be so, it will be violative of the principles of natural justice in that no opportunity was given to the appellant to clear himself of the (1) 11984] 3 S.C.C. 317.

alleged misconduct which never found its expression on paper but which remained in the minds of those passing the order of termination of service. If it is discharge simpliciter, it would be violative of Art. 16 because a number of Store Keepers junior to the appellant are shown to have been retained in service and the appellant cannot be picked arbitrarily. He had the protection of Art. 16 which confers on him the fundamental right of equality and equal treatment in the matter of public employment.

Mr. Datta however, contended that the earlier order dated December 7, 1963 recites that the appointment could be terminated by either side by one month's notice and that was the power invoked in terminating the service of the appellant. The order dated December 7, 1963 was at the time when the appellant was appointed on probation. On successful completion of probation, the appellant became a member of the regular establishment. The contract of service, if any, has to be in tune with Art. 14 and 16 and such unilateral power of termination of service without giving reasons is so abhorrent that it smacks of discrimination and therefore, violative of Art. 14. The High Court brushed aside this aspect by merely observing that in order to dismiss one employee on the ground of unsuitability, the Government or the Corporation is not required to dismiss all'. If it is suggested that you can dismiss anyone without a semblance of an enquiry or without whisper of the principles of natural justice, then such an approach overlooks the well- established principle that where State action affects livelihood or attaches stigma, the punitive action can be taken after holding an enquiry according to the principles of natural justice. In other words, an unbiased Judge, and an opportunity to controvert the allegation and to clear oneself are the minimum principles of natural justice which must inform such drastic power of dismissal affecting livelihood of an employee. If the observation of the High Court was with reference to the contention of the order being violative of Art. 14 and 16, it overlooks the fact that the Corporation attempted to sustain its action on the ground that the services of the appellant were no more required which will certainly impel the court to enquire whether the post had been abolished or whether retaining the juniors, the inconvenient person was thrown out under the garb of being surplus. Therefore, the approach of the High Court in this behalf is not appreciable.

Accepting the finding of the High Court that the appellant was removed from service on the ground of his unsatisfactory work, the same could not have been done without an enquiry in accordance with principles of natural justice. At any rate the action appears to be thoroughly arbitrary. If the facts are properly viewed this public sector corporation has disclosed the typical private employer's unconcealed dislike and detestation of an active trade unionist. From the facts stated in the earlier

portion of the judgment, it appears that appellant was a protected workman. Add to this the fact that the secret letter of Mr. L J. Johnson dated September 6, 1967 reveals the inner working of the mind of the top brass of the Corporation when Mr. Johnson states that Mr. Joshi (appellant) ;5 the main trouble maker in the corporation. Earlier on March 29 1967, the Assistant Director wrote to the Director of Stores to transfer the appellant from Dehradun to Assam, the usual management response namely, to transfer the active trade union worker to weaken the trade union movement. Even a charge of victimisation qua the appellant was made in writing. The then Petroleum Minister Mr. Ashok Mehta wrote to Mr. Natwarlal Shah. ONG Employees Mazdoor Sabha wherein he assured that the Corporation would not be interested in victimising anyone and yet soon after within three months, the services of the appellant were terminated.

And now reasons for the termination of service of the appellant may be examined. The appellant is considered unsuitable for the job as found by the High Court. How he became unsuitable is an aspect not even examined by the High Court. On the contrary one has to refer to several communications eulogizing the services of the appellant which have been placed on record. One Ganga Ram, Personnel Officer, ONGC, Tel Bhavan, Dehradun has certified on August 26, 1964 that Shri Joshi was found to be 'very sincere, conscientious dependable and hard working official and he is very much loyal to his duties as Store Keeper and he has done exceedingly well' He also states that Mr. Joshi knows his job thoroughly well'. On April 15, 1965, the Controller of Stores and Purchase, the immediate superior of the appellant writes that 'Mr. Joshi knows his work very well and he is very conversant with the purchase work, accounting and maintenance of stores. He is a very bright young man of blameless character and would do very well in any position of responsibility'. This letter of appreciation was sent when the officer was relinquishing his charge of the post of Controller of Stores and Purchase. On January 16, 1968, the Chief Engineer Shri R P. Sharma has issued a certificate in which it is stated that he found Mr. Joshi sincere, intelligent and hard working young man fully trust-worthy and dependable for any confidence that may be reposed in him'. This will clearly show that the charge of unsuitability was either cooked up or conjured up for a collateral purpose of doing away with the service of an active trade-union worker who because of his activities became an eye sore.

Accordingly we are unable to agree with the view taken by the High Court that the termination of service was legal, valid or justified. This appeal will accordingly succeed. The question then is: what relief we must grant ?

Ordinarily, where the order of termination of service is shown to be bad and illegal, the necessary declaration must follow that the employee continues to be in an uninterrupted service and he is entitled to full backwages. We would have been perfectly justified in giving the declaration and making that order. However, the appellant is out of service from December 29, 1967 till today. A period of nearly 18 years have rolled by and he will have to go back to some chagarined master. We therefore, enquired from the learned counsel appearing for the appellant whether substantial and adequate compensation would be more acceptable to him or reinstatement with backwages. The appellant opted for the latter and Mr. B. Datta learned counsel for the commission conceded that the Corporation would willingly pay Rs. 2 lakhs as and by way of backwages and compensation in lieu of reinstatement.

This matter was adjourned to enable learned counsel for the appellant to work out the spread over of backwages. Mr. A.K. Gupta, learned counsel for the appellant has submitted the calculations of backwages. The figures therein set out are not disputed. We accept the same and treat it as part of the judgment. A copy of it shall always be annexed to the copy of this judgment.

Accordingly this appeal is allowed and the judgment of the High Court is quashed and set aside and the rule is made absolute in the writ petition. The Oil and Natural Gas Commission is directed to pay Rs. 2 lakhs to the appellant on the basis of the calculations herein submitted in lieu of backwages and compensation in lieu of reinstatement within a period of four weeks from today.

In view of the computation made in respect of backwages and compensation from year and year, we must make it abundantly clear whether the Commission would be entitled to deduct income-tax while making the payment. In this connection we would follow the decision of this Court in *Shri Sant Raj & Anr. v. O.P. Singla & Anr.*(1) In tune with that decision we give the following decision.

Now that the amount is being paid in one lump sum, it is likely that the employer may take recourse to Sec. 192 of the Income Tax Act, 1961 which provides that when any person responsible for paying any income chargeable under the head 'Salaries' shall, at the time of payment deduct income tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year. If therefore the employer proceeds to deduct the income-tax as provided by Sec. 192, we would like to make it abundantly clear that each appellant would be entitled to the relief under Sec. 89 of the Income Tax Act which provides that where, by reason of any portion of assessee's salary being paid in arrears or in advance or by reason of his having received in any one financial year salary for more than 12 months or a payment which under the provisions of clause (3) of Section 17 is a profit in lieu of salary, his income is assessed at a rate higher than that it would otherwise have been assessed, the Income Tax Officer shall on an application made to him in this behalf grant such relief as may be prescribed. The prescribed relief is set out in Rule 21A of the Income-tax Rules. The appellant is entitled to relief under Sec. 89 because compensation herein awarded includes salary which has been in arrear for 18 years as also the compensation in lieu of reinstatement and the relief should be given as provided by Sec. 89 of the Income-tax Act (1) [1985] 3 S.C.R: R 623 read with Rule " IA of the Income Tax Rules. The appellant indisputably is entitled to the same. If any application is necessary to be made, the appellant may submit the same to the competent authority and the Commission shall assist the appellant for obtaining the relief.

The appeal is allowed as herein indicated, with no order as to costs.

N.V.K.

Appeal allowed.