Sharda Prasad Srivastava vs Accountant General, Uttar Pradesh, ... on 23 February, 1955

Equivalent citations: AIR1955ALL496, (1957)ILLJ37ALL, AIR 1955 ALLAHABAD 496, 1957 1 LABLJ 37 ILR (1956) 2 ALL 627, ILR (1956) 2 ALL 627

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Bench: V. Bhargava

ORDER

V. Bhargava, J.

1. Sharda Prasad Srivastava has prayed for the issue of a writ of certiorari under Article 226 of the Constitution quashing the order dated 21-9-1954 removing the petitioner from service passed by the opposite party, the Accountant General, Uttar Pradesh, Allahabad.

2. The petitioner was appointed as a temporary upper division clerk in the office of the Accountant General, Uttar Pradesh, Allahabad in August 1950, he having applied for appointment to that post in response to an advertisement in the press inserted by the opposite party. According to the petitioner, the advertisement contained no condition that, after selection to the post and after working therein, the continuance of the petitioner's service was conditional on appearing and passing in a departmental examination.

Nor was any such condition incorporated in the letter of appointment or in the contract of service which the petitioner was required to sign. The petitioner goes on to state that some time about the middle of the year 1953 the form in which the advertisement used to be issued was changed and it was specifically mentioned therein that the passing of the departmental examination would be a condition for confirmation after recruitment. Rut this condition did not exist at the time when the petitioner applied for appointment and was given the appointment.

The petitioner claimed that from the date of his appointment he had been conscientiously and satisfactorily performing his duties and there had been absolutely no grievance against his work or conduct by the officers supervising his work and that the petitioner had also passed the Efficiency Test. Some time in the year 1950 departmental instructions were issued prescribing a departmental examination. But, according to the petitioner, the Comptroller and Auditor General of India while

on tour at Allahabad gave out to understand 'that the examination was merely nominal and optional and that it had been introduced purely for the purpose of increasing the initial pay from Rs. 85/- to Rs. 100/- in the prescribed scale.

The first departmental examination was held in January 1951, and in subsequent years it used to be held twice every year. The petitioner appeared in the examination in November 1951 and again in May, 1952, but was declared to have failed. On 21-9-1954 a notice was served on the petitioner under the signature of the opposite party informing him that, as he had failed to pass the Departmental Confirmatory Examination within the prescribed period, his services were being terminated.

The petitioner's case is that a large number of other temporary clerks who had also failed to pass the examination were retained in service and this discrimination was brought about by the opposite party in enforcing the terms of the contract of service. The petitioner further complains that he was not given any opportunity to show cause under Article 311 of the Constitution against his proposed removal.

He has also mentioned certain circumstances indicating that the departmental examination which used to be held was not fair and proper and there were possibilities of manipulation of the results. Another grievance made by the petitioner is that he was not allowed to apply for employment in other offices with the result that he became overage for service in any other government post and yet he was being removed from this service. On the basis of these facts the petitioner sought the relief mentioned above.

3. On behalf of the opposite party a counter affidavit was filed. But it does not appear to be necessary to give all the facts given in that affidavit Some of the facts mentioned will, however, be helpful. The counter affidavit gives a copy of the advertisement which was issued in September 1950 for recruitment of upper division clerks. Obviously this was not the advertisement in response to which the petitioner applied for a post and received the appointment. On behalf of the opposite party it has been suggested that the advertisement to which the petitioner responded was in similar terms, The petitioner has not produced the actual advertisement to which he had responded and consequently I have to proceed on the basis that that advertisement was similar in terms. After the advertisement, an actual offer of appointment was sent to the petitioner by a letter a copy of which has also been filed with the counter affidavit. This offer clearly mentioned that the post was temporary and was liable to be terminated with one month's notice on either side. Subsequently the petitioner was required to sign an agreement copy of which has also been filed. Under this agreement, the petitioner clearly stated that he had understood that his employment under the Government was temporary and that his services may be terminated after a notice for a period of not less than thirty days and without any reasons being assigned.

It has been pointed out in the counter affidavit that under the contract of service of the petitioner the petitioner's services were liable to be terminated on one month's notice without giving any reasons at all and it was in exercise of this power that the opposite party terminated the services of the petitioner. The petitioner's contention that he was removed from service, is not correct. On the question of discrimination, it has been stated in the counter affidavit that the cases of the various

persons who were holding temporary posts were considered individually on merits by the Comptroller and Auditor General or by the Accountant General. In considering their cases, regard was had to the entries in their character rolls and the marks obtained by each employee in the examinations in the various subjects and in deserving cases services were retained and further chances were given. So far as permission to apply for appointment in other departments was concerned, it is stated that the question of forwarding such applications of temporary employees was regulated by departmental orders and policy. It was also denied in the counter affidavit that the departmental examination was held in such a manner that the results could be manipulated.

4. The petitioner filed a rejoinder affidavit contesting some of the facts given in the counter-affidavit, The main point brought out in this rejoinder affidavit which needs mention is that, according to the petitioner, he became a quasi-permanent government servant after having held a temporary post for a period of three years, so that his services could not be terminated by one month's notice under his contract of service and thereafter his conditions of service were to be regulated by the rules applicable to permanent civil servants employed in the Accountant General's Office. It was contended that a quasi permanent Government servant could not be removed from service by merely a month's notice.

In the rejoinder affidavit the petitioner further gave facts to strengthen his argument that there has been discrimination without any basis by the opposite party in terminating the services of some of the temporary upper division clerks while the services of others were not terminated under similar circumstances.

5. The principal point that has been argued by learned counsel for the petitioner is that the contract of service, by which the petitioner was appointed as a temporary upper division clerk on the condition that his services could be terminated on one month's notice without assigning any reason, was void as it tended to defeat the provisions of Article 311 of the Constitution. Firstly, it appears to me that no question at all arises of such a contract defeating the provisions of Article 311 of the Constitution.

Under Article 311 limitations were placed on the power of dismissal, removal and reduction in rank only. No limitation was placed on the power of termination of service which did not amount to dismissal or removal. Dismissal and removal are special types of termination and it is only if the authorities decide to take action for dismissing or removing a civil servant that it is necessary for them to comply with the requirements of Article 311 .

If services are sought to be terminated under such circumstances that there is no dismissal or removal brought about. Article 311 of the Constitution does not apply at all. In the present case the services of the petitioner were terminated after one month's notice in accordance with his terms of contract of service. Such termination of service does not amount to dismissal or removal. This view of name is in line with a decision of the Supreme Court in -- 'Satish Chandra v. Union of India', AIR 1953 SC 250 (A) and two division Bench decisions of this Court, viz., -- 'Jayanti Prasad v. State Uttar Pradesh', AIR 1951 All 793 (B) and --'M. R. Bakshi v. K. N. Saxena', AIR 1954 All 5 (C).

6. The next question whether the contract of service of a temporary employee under which the appointment can be terminated by one month's notice is a valid or void contract cannot be gone into by me in view of the decision of the Supreme Court in 'Satish Chandra Anand's case (A)' mentioned above. That was a case where a person was first employed on a contract for five years. Subsequently his employment was renewed on the condition that he agreed to be governed by the Central Civil Services (Temporary Service) Rules, 1949. That person accepted the appointment on this condition.

One of the rules which thus became applicable was Rule 5 under which the services of a temporary Government Servant, who was not in quasi permanent service, were liable to termination at any time by a notice given either by the Government servant to the appointing authority or by the appointing authority to the Government Servant, the period of such notice being one month unless otherwise agreed to by the Government and by the Government servant.

The condition laid down in Rule 5 of the Central Civil Service (Temporary Service) Rules, 1949 is exactly similar to the conditions of the agreement which was entered into by the petitioner when he accepted this appointment as an upper division clerk in the office of the opposite party. The validity of the contract under which such a rule became enforceable against that person was considered by the Supreme Court in the following words:

> "His grievance, when analysed, is not one of personal differentiation but is against an offer of temporary employment on special terms as opposed to permanent employment. But of course the State can enter into contracts of temporary employment and impose special terras in each case, provided they are not inconsistent with the Constitution, and those who chose to accept those terms and enter into the contract are bound by them, even as the state is bound.
>
> When the employment is permanent, there are certain statutory guarantees but in the absence of any such limitations Government is, subject to the qualification mentioned above as free to make contracts of service with temporary employees, engaged in works of a temporary nature, as any other, employers."

With these remarks the contract of service was held to be valid. The Supreme Court has thus laid down a principle of law that the Government is free to make special contracts of service with temporary employees provided that such conditions of service are not inconsistent with the Constitution. The principal condition which came up for consideration in that case was the one entitling the Government to terminate the service after one month's notice without any reasons. That case was, therefore, very similar to the case before me. The decision given by the Supreme Court is clearly a declaration of law applicable to such cases and is consequently binding on me under Article 141 of the Constitution.

It is, therefore, not open to me to examine the question whether this contract was or was not void as tending to bypass the constitutional protection given to the civil servants by Article 311 of the Constitution.

Learned counsel had also further contended that a condition permitting the appointing authority to terminate the service after one month's notice in the case of a number of temporary employees could be enforced arbitrarily and without any limitations so as to bring about discrimination between various employees and on this ground also such a condition in the contract of service must be held void. Firstly I do not consider that the power of an employer to terminate the services of an employee after one month's notice is a power that needs to be regulated by any definite principles.

Such a power does inherently vest in an employer, and the employee accepts to be governed by it when he voluntarily accepts the employment. Secondly, once the Supreme Court has declared that such a contract of service is vaild, it is not open to me to examine the validity of that contract even on any ground which may not have been considered by the Supreme Court. The law declared by the Supreme Court is binding whether the declaration is made after discussing all possible aspects or without doing so. The contract of service of the petitioner must, therefore, be held to be a valid contract by which he is bound.

Learned counsel for the petitioner tried to distinguish the decision of the Supreme Court in 'Satish Chandra Anand's case (A)' (supra) on the ground that in that case the employee was to be governed by Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, whereas in the present case the opposite party relies on the special condition in the contract of service signed by the petitioner. No such distinction exists. Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, in that case was not held to be applicable as a rule governing that Government servant on the ground that, in the contract of service, the Government servant had himself voluntarily agreed to be governed by such a condition. It was thus treated as one of the conditions of service in the contract which is also the 'position in the case before me. In the case of -- 'Shyamlal v. State of Uttar Pradesh', AIR 1954 SC 369 (D) the Supreme Court had occasion to refer to its previous decision in the case of 'Satish Chandra Anand, (A), (Supra)," and said that:

> "Our recent decsion in 'Satish Chandra Anand v. Union of India (A)' fully supports the conclusion that Article 311 does not apply to all cases of termination of service.
>
> That was a case oF a contract for temporary service being terminated by notice under one of the clauses of the Contract itself....."

These remarks bring out the fact that the case of 'Satish Chandra Anand (A)' was decided by the Supreme Court on the basis that the termination of service by notice was permissible under one of the clauses of the contract itself. That case is, therefore fully applicable to the case before me and the contract of service entered into by the petitioner is therefore enforceable as between him and the opposite party.

7. The next contention that in enforcing the contract the opposite party brought about discrimination and consequently the order of termination of the service of the petitioner is void, cannot be accepted on two grounds. Firstly, I am not at all satisfied that the petition makes out any case at all that there has really been any discrimination between the petitioner and others who were governed by a similar contract of service.

The petitioner has alleged that other persons who were also appointed as temporary Upper Division Clerks like him in the years 1948, 1949 and 1950 have been retained in service even though they failed in the departmental examination which was held as a necessary qualification for eligibility to receive a permanent appointment. In the counter affidavit it has been clearly stated that the case of each individual was considered on merits and additional chances were given in deserving cases after a consideration of the character roll and the marks obtained in the examination in the various subjects.

Obviously, for the purpose of further retaining a temporary servant, the entries in the character roll and the marks obtained in different subjects in the examination were very relevant considerations and any action taken after having regard to these circumstances must be held to be a proper exercise of the discretion. It does not appear from the facts given in the various affidavits that the character roll of the petitioner was as good as, or better than, the character rolls of others whose services were retained.

Nor does it appear that the petitioner obtained marks equal to or higher than the marks obtained by those persons in different subjects in the examination. The petitioner and those other persons cannot be said to be similarly situated, and as between persons not similarly situated no question of discrimination can arise.

Secondly, it is to be noticed that the services of the petitioner were terminated in accordance with one of the conditions embodied in his contract of service which I have already said above was a valid contract. As long as action is taken in accordance with the terms of the contract and the contract is valid, it is not open to the petitioner to contend that the action taken is void on the ground of discrimination in enforcement of different contracts. Whenever there is a possibility of discrimination in any statute, rule or contract which is not permissible under Article 14 of the Constitution, that statute, rule or contract itself would became void and in a case like the present one where it is not open to me to hold that the contract was such a ground cannot therefore be taken into consideration. This ground also therefore fails.

8. The petitioner's contention that he had become a quasi permanent government servant is clearly not correct and learned counsel for the petitioner, when asked to show the rule under which a temporary Government servant becomes quasi permanent after three years, had to concede that the rule which was in contemplation had been wrongly interpreted by the petitioner, as the petitioner did not satisfy all the conditions required to give him the status of a quasi permanent Government servant.

9. One more point that has been argued by learned counsel for the petitioner in support of this petition is that in this case the order of termination of service was not in accordance with the conditions embodied in the contract of service. In the agreement signed by the petitioner the exact language used was:

> "I understand that my employment under Government is temporary and that my services may be terminated at any time after notice for a period of not less than thirty

days but without any reasons being assigned."

Learned counsel has urged that in this case the order of termination of service of the petitioner does assign a reason on account of which the order, that should have been passed, should have been an order of dismissal or removal. The termination of service can only be without assigning any reason whatsoever. I do not consider that this interpretation of the agreement can be accepted. The words "without any reason being assigned" were meant to lay down that, when terminating service after notice for a period of not less than thirty days, the authority giving the notice was not required to assign any reasons.

But it was not meant to be a limitation prohibiting his giving a reason. It is obvious that, whenever service has to be terminated under such a condition, the person giving notice of termination has to take a decision that he would terminate the service and some reason must exist for that course of action. The reasons in some cases have to be recorded in the notice itself where the contract or the law requires this to be done. Where there is no such requirement, the reasons need not be recorded. But the mere recording of reasons would not make the termination otherwise than in accordance with such a condition.

It is to be noticed that in this case the reason given is not one relating to any misconduct on the part of the petitioner. It could not be a ground for dismissal or removal. The Government desired that no one should be appointed to a permanent post unless he had passed the departmental examination, and it appears to be natural that a policy should have been laid down that no one was to be allowed to continue indefinitely as a temporary employee if he failed to pass the departmental examination within a reasonable period of time.

The petitioner failed to pass the examination during the four years when he held the temporary post and this appears to have been the reason which actuated action for termination of his service in accordance with the terms of the contract. Such action does not cast any reflection on the conduct of the person whose service is terminated. The termination of service was in exercise of the power conferred by the condition of service which in terms did not require any imputation or charge against the petitioner and such termination of service therefor involves no implication of misbehaviour or incapacity.

In this connection, reference may be made to the case of 'Shyamlal v. State of U. P. (D)' where the question of validity of compulsory retirement of a Government servant was considered by the Supreme Court. It was held that:

> "There can be no doubt that removal -- I am using the term synonymously with dismissal -- generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some - misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the levelling of some imputation or charge against the officer which may conceivably be

controverted or explained by the officer.

There is no such element of charge or imputation in the case of compulsory retirement. The two requirements for compulsory retirement are that the officer has completed twenty five years' service and that it is in the public interest to dispense with his further services. It is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be the real cause for taking the action, But what is important to note is that the directions in the last sentence in note 1 to Article 465A make it abundantly clear that an imputation of charge is not in terms made a condition for the exercise of the power. In other words, a compuslory retirement has no stigma or implication of misbehaviour or incapacity.

In the present case, there was no doubt some imputation against the appellant which he was call-ed upon to explain. But it was made perfectly clear by the letter of 4-1-1950 that the Government was not holding any formal enquiry under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules and that before taking action for his compulsory retirement the Government desired to give him an opportunity to show cause why that action should not be taken.

In other words, the enquiry was to help the Government to make up its mind as to whether it was in the public interest to dispense with his services. It follows, therefore, that one of the principal tests for determining whether a termination of service amounts to dismissal or removal is absent in the case of compulsory retirement."

On this view their Lordships of the Supreme Court decided that a termination of service by compulsory retirement did not amount to dismissal or removal, and that the enquiry, which was held, was for the purpose of helping the Government to make up its mind at to whether it was in the public interest to dispense with the services of the Government servant. The compulsory retirement which had been found to be in the public interest was held to be valid.

The existence of a reason for termination of the service does not, therefore, convert the termination of service into an order of dismissal or removal, and the termination remains a termination under the terms of the contract. In 'AIR 1951 All 793 (B)' the services of Jayanti Prasad were terminated after one month's notice in accordance with his conditions of service. His services were terminated due to his bad reputation in the Rationing and Supply Organisation. The Bench which decided the case held that termination of service after giving reasons, which had been given in the notice of termination of service, was in accordance with the conditions of service. In the case of 'AIR 1954 All 5 (C)' while overruling the contention that the termination of service by notice was a device adopted to avoid the necessity of proving misconduct to entitle dismissal it was held that "The other objection is that even if there was some suspicion against the applicant that his conduct had not been above board, it was open to the Regional Food Controller, Lucknow, to overlook it and the mere fact that the applicant's conduct was suspected did not mean that the Regional Food

Controller, Lucknow, was bound to have the charges established and then dismiss him and could not terminate his services which were no longer required." It is clear that the existence of reasons for termination of the service is no ground for holding that the services could not be, or were not, terminated in accordance with the conditions incorporated in the contract of service and the mere fact that these reasons happened to be incorporated can make no difference.

10. In the view that I have taken, it is not at all necessary to consider the other points which have been taken by the petitioner and which have been mentioned by me earlier. I may, however, take notice of the allegations made by the petitioner about the manner in which the departmental examination is held. In his affidavit, the petitioner stated that the papers used to be examined by local officers who had already "their liking or disliking about the individual candidates."

This clearly contains an insinuation that the officers examining the answers-books of the candidates are influenced by their personal likes or dislikes when giving marks instead of doing so on the basis of the quality of the answers given. This insinuation is strengthened further by alleging that roll numbers were not assigned to the candidates and the answer-books bore the names and sections oi the department of the candidates, the suggestion being that the officer could know which candidate's answer-book he was examining. A further suggestion was made that the answers were written on loose sheets of paper to which was tagged' the name of the examinee leaving every chance tor manipulation.

This allegation contains an insinuation that the answers written out by the candidates on loose sheets can be manipulated by those who handle them. The petitioner did not in plain words come forward with an allegation that any manipulation had been done in his case, or that the marks awarded to him had been influenced by personal likes or dislike of the examiners.

It does, however, appear that he put in these circumstances in the affidavit for the purpose of insinuating that there had been dishonesty in the examination and it also appears that this was done without any satisfactory material or sufficient cause. Even though the allegation was not directed against any particular officer such scandalous insinuations against the officers should not have been made in the affidavit without any justification and this by itself would be a ground for refusing to entertain this writ petition.

A person who comes to invoke the discretionary power under Article 226 of the Constitution must come with clean hands and must not try to throw mud on others without sufficient grounds and unless he is prepared to substantiate his allegations. If he does so he is not to be heard. This is one more ground on which this petition must fail.

11. The petition is, therefore, dismissed with costs which I fix at Rs. 200/-.