Allahabad High Court
Rajbir Singh vs State Of U.P. And Ors. on 28 September, 1997
Equivalent citations: (1997) 3 UPLBEC 2079
Author: O Garg
Bench: O Garg
JUDGMENT O.P. Garg, J.

1. By means of this writ petition, the petitioner-Rajbir Singh has prayed that the orders dated 17-11-1988, terminating his services, 27-2-1989, dismissing his appeal, 20-1-1993 passed by U. P. Public Services Tribunal (for short 'Tribunal'), dismissing his claim petition and 18-7-1994 passed by the Tribunal dismissing the review petition be quashed and the respondents be directed to reinstate him in service with ail consequential benefits.

2. Counter and rejoinder affidavits have been exchanged. Heard learned counsel for the parties.

3. Put briefly, the facts of the case are that the petitioner was appointed as a Constable in U. P. Police and joined at Farrukhabad on 1-9-1981. He continued to serve the Department upto 17-11-1988 on which date his services were abruptly terminated by serving him a notice under the provisions of U. P. Aasthai Sevak (Seva Sampati) Niyamawali, 1975 (hereinafter referred to as 'Rules 1975'). The case of the petitioner is that since he had worked continuously for a period more than 3 years, he would have been regularised and in any case, after completion of three years service, he ceased to be a temporary employee. According to the petitioner, no departmental enquiry or proceedings were taken against him and consequently, the termination order is bad in law as some constables, who are junior to him have been retained in service. The petitioner filed an appeal against the order of termination dated 17-11-1988. This appeal was dismissed by Sri R. C. Agarwal, the then Deputy Inspector General of Police, Kanpur Range on 27-2-1989. The petitioner preferred a claim petition before the Tribunal. His claim petition was dismissed on 20-1-1893. He then moved an application before the Tribunal for reviewing the order dated 20-1-1993 but the same was also dismissed by order dated 18-7-1994.

4. It is an indubitable fact that the petitioner was appointed on 1-9-1981 in a temporary capacity and in pursuance of the order of appointment he joined at Farrukhabad on the same day. He continued to work as a Constable in U. P. Civil Police right upto 17-11-1888 on which date, the termination order, Annexure 1, was passed by the Sr. Superintendent of Police, Fatehgarh. It was mentioned in the termination order that the petitioner was a temporary employee and since his services are no more required, they are terminated and in lieu of one month's notice, he was entitled to receive salary along with allowances for a period of one month. The termination order was prefaced by the provisions of U.P. Temporary Services (Termination of Service) Rule, 1975. In the counter affidavit filed by Sri Satya Pal Singh, Circle Officer, Kannauj, the only stand taken is that the petitioner was appointed on temporary post and since his performance was not found to be satisfactory and he failed to mend his ways, in spite of repeated oral warnings, his services were terminated in term of the order of temporary appointment. It has been averred that the services of the petitioner were never regularised in view of the Government order dated 22-3-1994, on which the petitioner has placed reliance. A detailed rejoinder affidavit has been filed by the petitioner.

5. At the outset, it may be mentioned that the regularisation in service is not supposed to be automatic. In order to qualify for regularization of service, a temporary employee has to fulfil the eligibility qualifications and the requirement of satisfactory service. A selection committes is constituted for the purpose under the rules and after processing the cases, thoroughly, an employee appointed on ad hoc basis is taken on regular employment. In this connection a reference may be made to the decision of this court reported in (1992) 2 UPLBEC 892 Ram Khelawan v. State of U.P. and Anr. in which reference was made to the decision of the Supreme Court reported in AIR 1990 SC 371 (Bhagwati's case) and 1991 (4) SULR (Labour) 163 State of Punjab v. Surendra Kumar. Therefore, the plea taken by the petitioner that he became permanent on the expiry of the period of three years of service in view of the Government order dated 22-3-1994 cannot be accepted for one simple reason that no formal order was ever passed to regularise the services of the petitioner. The case, therefore, has to be proceeded on the premise that the petitioner was appointed on temporary basis and he continued to remain as such till 17-11-1988 when his services were terminated.

6. Learned Standing counsel urged that a temporary Government servant has no right to hold the post and his services are liable to be terminated by giving him one month's notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary Government servants. It was further made clear that a temporary Government servant can, however, be dismissed from service by way of punishment. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary Government servant. If it decides to take punitive action it may held a formal inquiry by framing charges and giving opportunity to the Government servant in accordance with the provisions of Article 311 of the Constitution of India. To fortify the above submission, the learned Standing counsel placed reliance of State of U.P. and Anr. v. Kaushal Kishore Shukla, (1991) 1 UPLBEC 152.

7. The submission of the learned counsel for the petitioner in short was that the employer cannot take the shelter to the stale plea that the services of temporary employee were terminated as they were no longer required giving him one months pay in lieu of notice and that the by termination order does not cast any aspersion or stigma on the future career of the employee. It was urged that now, it is well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court 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 from of the order, in giving effect to the rights conferred by law upon the employee, A reference was made to Anoop Jaiswal v. Government of India and Anr., AIR 1984 SC : 636) in which it was observed as follows :

".....Even though the order of discharge may be non-committal, it cannot stand alone. Though the noting in the file of the Government may be irrelevant the cause for the order cannot be ignored. The recommendation of the Director which is the basis or foundation for the order should be read

along with the order for the purpose of determining its true character If on reading the two together the court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fail to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Article 311(2) of the Constitution." The learned counsel for the petitioner also made a reference to the decision of this court reported in 1995 (3) UPLBEC 1410 ; Satya Deo Misra v. State of U.P. and Anr. in which Hon'ble M. Katju, J. observed as follows :

"In my opinion the concept that a temporary employee has no right to the post to be modified in the light of the new interpretation of Article 14 of the Constitution given by the Supreme Court in Maneka Gandhi's case, AIR 1978 SC 597 which is a 7 Judges Constitutional Bench decision followed by several subsequent decisions of the Supreme Court. The concept that a temporary employee has no right to the post cannot be treated as an absolute concept. It has to be treated as subject to Article 14 of the Constitution. The Constitution is the Supreme Law of the land. If the Supreme Court gives a new interpretation to a constitutional provision then it is necessary to revise the earlier concepts in the light of the new interpretation given by the Supreme Court. To tell a person who has put in 18 years of service that his service is no longer required, in my opinion is wholly arbitrary and unreasonable. When a person is appointed then within two or three years the authority must confirm him if his work is satisfactory, or if the work is net satisfactory his service may be terminated, if he was appointed temporarily. But it is wholly arbitrary and unreasonable to keep a democles sword handing over the head of the employee and not to confirm him for a long period of time. No one can work properly if he does not get job security. In my opinion, the decision cited by the learned standing counsel are distinguishable. In our country after a person gets a job he ordinarily gets married, has children, and he has to support his family. He settles down in life with a reasonable expectation that he will continue till the time of retirement, and he becomes overage for seeking other service after a few years. As such after a person has put in 18 years of service to tell him that his service is being terminated on the ground that it is no longer required is in my opinion wholly unreasonable and arbitrary."

There are two other elaborate decisions of this court reported in 1997 All LJ 1230, K.C. Saxena v. Rohailkhand University Bareilly and 1997 (2) ESC 1135 (All) Smt. Prem Sharma v. U.P. Public Services Tribunal and Ors.

8. In the back drop of the various decisions of the Supreme Court as well as this court, two propositions of law are well established (i) where the services of the temporary employee are terminated by an order simpliciter on the ground that he is not found suitable to be retained in service on account of his unsatisfactory work and conduct no exception can be taken to such an order of termination and such an action will not be violative of Articles 14 and 16 of the Constitution even if junior employees who are hard working and efficient, are retained in service In such case, the principle of 'last come first go' will apply : and (ii) where if an order of termination is challenged as arbitrary and mala fide on the ground that person junior to the petitioner has been retained in service, though the work and conduct of the petitioner has been blemishless, in that situation, it is incumbent upon the employee to satisfy the court that the order of termination was founded on clear and definable material and the assessment of unsuitability was made objectively on the basis of

relevant material. Mere allegation regarding unsuitability is not enough. The assessment of unsuitability must be shown to have been made on relevant and existent material and if it is shown to be based on no material, it is open to judicial review.

9. From the above two conclusions, which have been culled out on the basis of the various decisions on the point, one thing is crystal clear that where the order of termination is passed on the ground of unsuitability of the petitioner and if the ground is not found to be based on relevant material, the retention of the juniors to the petitioner would lead to an inference of arbitrary action which cannot be countenanced.

10. In the instant case, the learned counsel for the petitioner pointed put that the order of termination of the services of the petitioner in the simplest form, in which it has been expressed, is nothing but a cloak to camouflage the order of punishment. If was urged that in the counter affidavit filed before the Tribunal, the respondents have taken the plea that the services of the petitioners were not terminated on the ground that he was junior most but his work and conduct was found to be unsatisfactory and it was on account of this reason that his services were terminated. It was also urged that the oral warnings had fallen flat on the ears of the petitioner as he never took his job seriously and with an element of responsibility. In the counter affidavit filed in the present writ petition also, the above pleas have been reiterated. There fore, while terminating the services of the petitioner the appointing authority had in his mind that the work and conduct of the petitioner was not satisfactory and that he was incorrigible type of person.

11. Learned counsel for the petitioner criticised the stand taken by the respondents in the counter affidavit. In the supplementary affidavit dated 15-2-1995 filed before this court, the petitioner has reproduced, in paragraph 2 thereof, the entries made in his character roll for the years 1983 to 1987. These entries, it was stated were noted down by his counsel Sri S. P. Singh from the documents filed before the Tribunal. The entries of the years 1983, 1984, 1985 and 1986 record that the work and conduct of the petitioner has been good/ satisfactory and his integrity has been certified. In the entry of 1987, it is mentioned that there was one lapse (on the part of the petitioner) during the year. Otherwise, his work and conduct remained good and integrity was certified. From this uncontroverted entries made in the character roll of the petitioner it, is clear that the performance of the petitioner was satisfactory/good. There is no record worth the name to indicate that the work and conduct of the petitioner was unsatisfactory or that he failed to mend his ways in spite of oral warnings. It is not known when, where and by whom the oral warnings were administered. The assertions made in the counter affidavit do not find support from any material, whatsoever. Mere bald assertions without reference any concrete and substantial material cannot be accepted. The ipsi dixit inference about the unsuitability of the petitioner in service is based on no material. On the other hand, the averments made by the respondents in their counter affidavit are belied by the entries made in his character roll. There appears to be much force in the submission of the learned counsel for the petitioner that the services of the petitioner were terminated for certain extraneous considerations and oblique motives and he has been discriminated in the matter of service with other colleagues who were appointed with or after the petitioners appointment. There is no attempt on the part of the respondents to dispel the petitioner's charge that his services were terminated by way of punishment and in violation of the provisions of Articles 14 and 16 of the Constitution of

India, meaning thereby, a hostile discrimination came to be made in terminating the services of the petitioner.

12. The petitioner has served the department for a continuous period of more than 1 years. His record of services has remained unblamesworthy. It is not the case of the respondents that the post, which the petitioner was holding has ceased or that there was no post on which the petitioner could be accommodated. To terminate an employee who had put in more than 7 years long service at a stage when he has become over aged in nothing but an arbitrary exercise of power in brute manner. I have no hesitation in recording the finding that the termination order of the petitioner, though couched in a language which give an impression that it is termination simpliciter, according to the terms and conditions of the appointment, is in fact, and reality an order by which the petitioner has been punished without undertaking the exercise of initiating disciplinary proceedings and fulfilling the mandatory requirements of the provisions of Article 311(2) of the Constitution of India. The Tribunal has failed to approach the case in true perspective and has applied the rule of thumb that since the services of the petitioner were temporary they were liable to be terminated at one month's notice. This conclusion of the Tribunal turns out to be faulty in view of the above discussions?

13. In the result, the writ petition succeeds and is allowed. The impugned order dated 17-11-1988, Annexure 1 to the writ petition, terminating the services of the petitioner, is hereby quashed. The petitioner shall be deemed to have remained in service throughout and he shall be paid the arrears of salary and other allowances, treating to be in service throughout, provided he files an affidavit to the effect that from the date, en which his services were terminated and till date, he has not engaged himself in any other employment or earned money.