Supreme Court of India
S.R. Tewari vs District Board Agra And Another on 15 April, 1963
Equivalent citations: 1964 AIR 1680, 1964 SCR (3) 55
Author: S C.
Bench: Shah, J.C.

PETITIONER:
S.R. TEWARI

Vs.

RESPONDENT:
DISTRICT BOARD AGRA AND ANOTHER

DATE OF JUDGMENT:
15/04/1963

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
SINHA, BHUVNESHWAR P.(CJ)
AYYANGAR, N. RAJAGOPALA

CITATION:
1964 AIR 1680 1964 SCR (3) 55
CITATOR INFO :

R	1968 SC 292	(4)
F	1970 SC1244	(22)
RF	1971 SC 836	(7)
R	1971 SC1011	(4)
RF	1971 SC1828	(10,11)
R	1972 SC1450	(8,13)
RF	1973 SC 855	(24,25,47)
R	1975 SC 641	(9)
E	1975 SC1331	(26,28,188,189)
R	1976 SC 888	(14,31)
R	1980 SC 16	(3)
RF	1987 SC1422	(10)
RF	1990 SC 415	(16)
RF	1991 SC1525	(10)
RF	1992 SC 786	(7)

ACT:
District Board--Engineer under the Board-Termination of service--Power of Board-Statutory Body--Disciplinary action--Writ Petition--High Court's power to interfere--U.P. District Boards Act, 1922 (U.P. X of 1922), ss. 82, 84--District Board Rules, r. 3A(iv)--Constitution of India, Art. 226.

HEADNOTE:

The appellant was an Engineer of the District Board. The Board resolved to terminate the services of the appellant after giving him salary for three months in lieu of notice and served a notice upon him. The appellant preferred an appeal to the State Government against the action of the Board but it was dismissed. He filed a writ petition before the High Court but it was also dismissed.

The appellant contended that the Board was not invested by the District Boards Act, 1922, with any power to determine the employment of a servant of the Board otherwise than by way of dismissal as punishment. The respondents contended that, the appellant not being a civil servant of the State, no petition was maintainable before the High Court for a declaration that his employment not lawfully terminated.

Held that the High Court has, in a writ petition under Art. 226 of the Constitution, power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute, even if by making the declaration the body is compelled to do something which it does not desire to do. The High Court had jurisdiction to declare that the employment of the appellant was not lawfully terminated, though it may be exercised only when the court is satisfied that departure is called for from the rule that a contract of service will not ordinarily be specifically enforced.

Municipal Board, Shahjahanpur v. Sardar Sukha Singh 1. L.R. (1937) All. 434, Ram Babu Rathaur v. Divisional
56
Manager, Life Insurance Corporation of India, A.I.R. (1961) All. 502, Dr. S.B. Dutt v. University of Delhi, [1959] S. C. R. 1236 and Vina v. National Dock Labour Board,L.R. [1957] A.C. 488, referred to.

Held further that s. 82 of the Act, which gave the Board power to appoint the Engineer also gave it the power to terminate the appointment. Power to appoint ordinarily carries with it the power to terminate the appointment. The procedure for termination of service was laid down by r. 3A(iv) of the District Board Rules. The employment was terminated by giving a notice in accordance with this rule and the authority competent to terminate it was the authority competent to appoint the successor of the servant concerned. The dismissal of a servant of the Board has to be in accordance with the rules made under s. 84 which provided for giving a reasonable opportunity and a show cause notice. This procedure is not applicable to termination of service.

Dismissal means determination of employment as a method of punishment for misconduct or other cause.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 304 of 1962.

Appeal from the judgment and decree dated December 1, 1958, of the Allahabad High Court in Civil Misc. Writ No. 270 of 1956.

S. T. Desai and J.P. Goyal, for the appellant. G.B. Agarwala and G.P. Lag, for respondent No.1 K.S. Hajela and 0. P. Lag, for respondent 1963. April 15. The Judgment of the Court was delivered by SHAH J.--On October 18, 1954, the District Board, Agra resolved to terminate after giving salary for three months in lieu of notice, the employment of the appellant who held the office of Engineer under the Board, and intimation in that behalf was given to him. An appeal perferred by the appellant to the Government of U. P. against the order terminating his employment was dismissed on December 5, 1956. The appellant then submitted a petition to the High Court of Allahabad under Art. ?26 of the Constitution for a writ in the nature of certiorari quashing the resolution passed by the Board on October 18, 1954, and the order dated December 5, 1956, passed by the State of U.P. dismissing the appellant's appeal, and a writ in the nature of mandamus commanding the Board and the State of U.P. to treat the appellant as the lawfully appointed Engineer of the District Board and not to give effect to the resolution terminating the services of the appellant passed by the Board on October 18, 1954.

The appellant averred that he had as Engineer of the Board rendered "flawless service" but a member of the Board named Tota Ram felt 'annoyed with' him 'for reasons which had nothing to do with the proper discharge of his duties as an Engineer,, and the President of the District Board was not "very happy with the" appellant for "reasons best known to" the President, that "he had spent the best part of his life in the service of the District Board and even though he has been honest and faithfull in the discharge of his duties the District Board, has capriciously and without any justification terminated" his services, and therefore the resolution of the Board terminating his services was invalid.

On behalf of the Board an affidavit was filed stating that the appellant was guilty of "negligence, and unfaithfulness , and he was censured, his annual increments were stopped, and that he was once dismissed and thereafter the resolution of dismissal was rescinded. The affidavit catalogued serveral incidents in support of this case, and urged that the Board being competent had justifiably terminated the appellant's services, and the validity of the resolution terminating his services was not liable to be challenged. The State of U.P. submitted that the services of the appellant were terminated in accordance with rule 3 A(iv) of the District Board Manual, that no appeal lay against the. resolution terminating the services of the appellant under rule 3 A (iv) of the Rules regarding Officers and Servants of District Boards and that the order of the State Government rejecting the appeal was correct. The High Court dismissed the petition holding that under the fourth proviso to s. 82 of the District Boards Act, 1922, the Board had the power to appoint and to determine the employment of an Engineer of the Board and unless the determination was by way of punishment it could be made in the manner provided by rule 3A cl. (iv) after giving notice of three months or a sum equal to salary for three months in lieu of notice. The Court rejected the contention of the

appellant that the power to dismiss conferred by the fourth proviso to s.82, could only be exercised for punishing a delinquent servant of the Board and after following the procedure prescribed in that behalf, and that apart from the power to dismiss, there was no power vested under the Act to determine employment and consequently the provisions of rule 3 A cl. (iv) were ineffective. Against the order passed by the High Court this appeal is preferred with certificate granted by the High Court.

Counsel for the Board contended in limine that the appellant not being a member of the civil service of the State was not entitled to the protection of Art. 311 of the Constitution, and the relief claimed by him being in substance one for an order restoring him to the service of the Board, from which he was dismissed, the jurisdiction of the High Court even under Art. 226 of the Constitution was restricted by s. 21 (b) of the Specific Relief Act and that the relief claimed by him cannot in 'any event be given, the remedy, if any., of the appellant being to claim damages by suit for wrongful termination of employment and not a petition for a writ declaring the termination of employment unlawful, and a consequential order for restoration in service. Reliance was placed in support of this plea upon Municipal Board, Shahjahanpur v. Sardar Sukha Singh (1), Ram Babu Rathaur v. Divisional Manager. Life Insurance Corporation of India (2) and Dr. S.B. Dutt v. University of Delhi (3). In our judgment none of these cases can be used to support the view that the High Court has no power to declare ,the statutory obligations of a statutory body. Under the common law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well recognized exceptions. It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Art. 311 continues to remain in service, even though by so doing the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly under the industrial law, jurisdiction of the labour and industrial tribunals to compel the employer to employ a worker, whom he does not desire to employ, is recognized. The Courts are also invested with the power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute, even if by making the declaration the body is compelled to do something which it does not desire to do.

The decision of the Allahabad High Court in Municipal Board, Shahjahanpur v. Sukha Singh (1), enunciates the law somewhat broadly when it states that the Court has no jurisdiction to force an (1) I.L.R.(1937) All. 334. (2) A.I.R (1961) All. 502 (3) [1959] S.C.R, 1236 employer to retain the services of a servant whom he no longer wishes to employee and every employer is entitled to discharge a servant for whose service he has no need. It must be pointed that the powers of a statutory body arc always subject to the statute which has constituted it, and must be exercised consistently with the statute, and the Courts have, in appropriate cases, the power to declare an action of the body illegal or ultra rites, even if the action relates to determination of employment of a servant. In Ram Babu Rathaur's case (1)the Court had to consider the question whether an employee of the Life Insurance Corporation whose employment was terminated could claim a writ of mandamus restoring him to the service of the Corporation, or a writ of certiorari quashing the proceeding of the Corporation. The Corporation is an autonomous body and is not a department of the State, and the relation between the Corporation and its employees is governed by contract, and no statutory obligation is imposed upon the Corporation in that behalf. The Court was therefore right in holding that the

relationship between the employee and the Corporation had to be determined, in the absence of any statutory provision or a special contract, by the general law of master and servant. In Dr. S.B. Dutt's case (2) this Court held that an award made by an arbitrator, declaring that the dismissal of an employee of the Delhi University was "ultra vires, mala fide, and has no effect on his status. He still continues to be a professor of the University" disclosed an error apparent on the fire of the award, because it sought to enforce a contract of personal service. That was again not a case in which the invalidity of an act done by the University on the ground that it infringed a statutory provision fell to be determined. The rights and obligations of the parties rested in contract, and the award of the arbitrator that the dismissal of the employee was "ultra vires" was a mere flourish of language, having no meaning (1) A,I,R, (1961) All, 502 (2) [1959] S.C.R, 1255.

in the context of the dispute between the parties. The award was therefore declared to be one contrary to the rule contained in s. 21 (b)of the Specific Relief Act and hence void.

The question whether the Court would be justified in granting a declaration about the invalidity of the action of a statutory body terminating the employment of a servant was raised before the House of Lords in Vina v. National Dock Labour Board (1). The plaintiff a dock worker in the reserved pool, under the scheme set up under the Dock-Workers (Regulation of Employment) Order 1947 failed to obey an order to report for work with a company of stevedores and the local board instructed their disciplinary committee to hear the case against the plaintiff. The committee terminated the employment of the plaintiff giving seven days' notice, and this decision was confirmed by the appellate board. The plaintiff then claimed in an action instituted by him a declaration that his purported dismissal was illegal, ultra vires and invalid and also damages for wrongful dismissal. The Trial Court granted the declaration, and also damages. The Court of Appeal set aside the declaration. The House of Lords restored the declaration, for in their view the purported dismissal was a nullity, since the local board had no power to delegate its disciplinary functions. Prims facie, jurisdiction of the Court in an appropriate case to declare an order passed by a statutory body, even if the order relates .to the termination of the employment of a servant of the body, may not be denied.

The contention raised by the counsel for the Board that a petition for a declaration that the employment of the appellant was not lawfully terminated. and on that account the Board be commanded to treat the appellant as lawfully in service cannot be maintained, must be rejected. (1) L. R. [1957] A.C. 488.

The jurisdiction to declare the decision of the Board as ultra vires exists, though it may be exercised only when the Court is satisfied that departure is called for from the rule that a contract of service will not ordinarily be specifically enforced.

The question which then falls to be determined is whether under the District Boards Act, 1922 the Board is invested with the power to determine employment of a servant of the Board otherwise than by way of dismissal as punishment, and for that purpose certain provisions of the Act and the rules framed under the Act may usefully be referred. Chapter IV deals with officers and servants of the Board. 'Servant' of the Board is defined in s. 3 (ii) of the Act as meaning "a person in the pay and service of the Board." Section 72 enjoins upon the Board the duty to appoint in addition to the

Secretary and the Superintendent of Education such officers or servants as it is required to appoint by rules. By Ch. IX of the rules framed under the Act the Board must appoint a District Board Engineer possessing the qualifications specified therein. An Engineer is therefore an officer or servant whom the Board is bound to appoint. Section 82 confers administrative authority upon the President and the Secretary in respect of several matters relating to the servants of the Board specified therein. The section states:

> "Except in the cases provided for by sections 70, 71 and 72, the power to decide all questions arising in respect of the service, leave, pay, allowances and privileges of servants of the board, who are employed whether temporarily or permanently, on a monthly salary of more than Rs. 40 and the power to appoint, grant leave of absence to, punish, dismiss, transfer and control such servants of the board, shall vest in the President, and the said powers in the case of all other servants of the board shall vest in the secretary' :"

This clause is followed by four provisos, the last of which is material. It provides:

> "Provided fourthly, that the power to appoint and dismiss the engineer, the tax officer and the accountant of the board shall vest in the board, subject, in the case of dismissal, to a right of appeal to the State Government within one month of the order of dismissal."

By s. 84 the provisions of ss. 79., 73, 80 and 82 are subject to the provisions of:

(a) x x x

(b) any rule imposing any conditions on the appointment of persons to offices or to any particular office requiring professional skill and on the punishment or dismissal of persons so appointed, and on their liability to service under the orders of any Government on the occurrence of any emergency:

```
(c)            x        x         x
    (d)   any other rule relating to  servant,
of a board.
```

Section 172 empowers the State Government to make rules under the Act. By el. (?) the State Government may make rules consistent with the Act --

> (a) providing for any matter for which power to make provision is conferred, expressly or by implication, on the State Government by this or any other enactment in force at the commencement of this Act;and
>
> (b) generally for the guidance of a board or any Committee of a board or any Government officer in any matter connected with the carrying out of the provisions of this Act."

The scheme of ss. 72, 82, 84 and 172 read with the Rules in so far as it is material in the present case is that an Engineer of the Board shall be appointed by special resolution by the Board. The power to decide all questions arising in respect of the service, leave, pay, allowances and privileges and the power to grant leave of absence, and to punish, transfer the Engineer is vested in the President. But the power to appoint and to dismiss an Engineer vests in the Board subject to a right of appeal to the State Government against the order of dismissal. The powers of the President and the Board arc subject to the rules imposing conditions on the punishment or dismissal of the Engineer, and other rules relating to servants of the Board.

The State of U.P. has framed rules, in exercise of the powers under s. 172 (2), two of which are material. In Ch. III (of the Rules dealing with officers and servants of the Boards) there occurs rule 3A, which provides:

"The period of office of a permanent servant of the board other than a Government s ervant in its employ shall not determine until--

(i) his resignation has been accepted in writing by the authority competent to appoint his successor, or he ceases to be in service by the operation of the rules regulating the retirement of district boards servants, or

(ii) he has given such authority at least three months' notice where his pay exceeds Rs. 15 and in other cases at least one month's notice, or

(iii) he has paid or assigned to the board a sum equal to three months' pay where his pay exceeds Rs. 15 and in other cases a sum equal to one month's pay;

(iv) he has been given by the authority competent to appoint his successor not less than three month's notice or a sum equal to three months' pay in lieu of notice where his pay exceeds Rs. 15 and in other cases, not less than one month's notice or a sum equal to one month's pay in lieu of notice."

The other material rule framed by Notification issued by the Government of U.P. dated March 25, 1946, is headed "Regulation regarding dismissal, removal or reduction of officers and servants of District Boards". It provides:

> "No officer or servant shall be dismissed, removed or reduced without a reasonable opportunity being given to him of showing cause against the action proposed to be taken in regard to him. Any written defence tendered shall be recorded and a written order shall be passed thereon. Every order of dismissal, removal or reduction shall be in writing and shall specify the charge brought, the defence and reasons for the order."

Even though this is designated a regulation it is conceded, and in our judgment rightly, by the Board and the State of U.P. that it is a rule framed in exercise of the powers conferred by s. 179,(2) and is

not a regulation made in exercise of powers under s. 173, for the Act does not confer any power upon the State Government under cl. (2) of s./73 to frame regulations regulating the exercise of the power of dismissal of officers or servants of the Board. Under the rules, therefore, dismissal, removal or reduction of an officer or servant may be effected only after affording him a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. But the services of even a permanent servant of the Board may be determined in the manner provided by rule 3A.

The Board by its resolution dated October 18, 1954, purported to exercise the power of determination in the manner and subject to conditions prescribed by rule 3A. The determination was by resolution of the Board and prima fade, that exercise of the power may be effective. Counsel for the appellant contended that in the absence of a specific power to determine employment conferred by the act itself, a rule which prescribed restrictions on the exercise of that power was wholly sterile. It was urged that the State Government has prescribed conditions under which the employment of a permanent servant of a Board may be determined, but the Legislature not having conferred upon the Board the power to determine employment otherwise than by way of dismissal as punishment the conditions under which the power could be exercised served no purpose. We are unable to agree with that contention. By s. 82 power of the Board to decide questions arising in respect of the service including the power to punish, dismiss, transfer and control servants of the Board is statutorily delegated to the President in case of servants drawing a salary exceeding Rs. 40 per mensem, and to the Secretary for other servants. But the exercise of the power is subject to the conditions prescribed in the provisos. Upon the exercise of the power under s. 82 vested in the Board, the President and the Secretary, there is yet another set of restrictions imposed by s. 84. The power is subject, among others, to the rules imposing conditions on the appointment of persons to offices or to particular office requiring professional skill and on the punishment or dismissal of persons so appointed, and to rules relating to servants of the Board. The rule providing for the procedure for termination of employment of servants of the Board is a rule relating to servants of the Board and may properly be made under s. 84(d) read with s. 172(2). Power to appoint ordinarily carries with it the power to terminate appointment, and a power to terminate may in the absence of restrictions express or implied be exercised, subject to the conditions prescribed in that behalf, by the authority competent to appoint. The power to terminate employment is therefore to be found in s. 82 and the method of its exercise is prescribed by the rules referred to in s. 84. The rules deal with the conditions under which an officer or servant maybe dismissed (the dismissal being by way of punishment and also under which determination of employment may take place.

It was urged that rule 3A does not indicate the authority by whom termination is to be effected. But el.

(iv) in terms provides that the period of office of a permanent servant of the Board shall not determine until he has been given by the authority competent to appoint his successor notice of the duration specified. It is the notice which terminates the employment and the authority competent to give the notice is the authority competent to appoint the successor of the servant concerned. We are however unable to agree with the High Court that the expression "dismissal" in the fourth proviso to s. 82 includes termination of employment simpliciter. In the law relating to master and servant the expression "dismissal" has acquired a limited meaning- determination of employment as a method

of punishment for misconduct or other cause. That is the meaning in which the expression "dismissal" is used in the rule published by Notification dated March 25, 1946. By s. 84 the power of dismissal of a servant under s. 82 can only be exercised subject to the provision of this rule, and the expressions "dismiss" and "dismissal" must have the same connotation in the law which deal with the power and the procedure for exercise of that power. The view expressed by the High Court would lead to the result that even for mere termination of employment the procedure prescribed by the Notification may have to be followed. There is again inherent indication in s. 82, which supports the view that the expression has been used in a limited sense. The first proviso to s. 82 confers a right of appeal to servants of the Board, against orders of the President imposing a fine exceeding one month's salary, suspension for a period exceeding one month, reduction by way of punishment, or supersession of a servant in the matter of promotion, as well as against orders of dismissal. The orders imposing fine, suspension, reduction or supersession are ex facie orders of punishment, and there is no reason why the order of dismissal which occurs in the same clause, and which is subject to appeal is not an order of that nature. The fourth proviso also confers a similar right of appeal against the order of the Board dismissing certain superior servants, An appeal against an order of mere determination of employment, which may generally be made in the exigencies of the service may serve no useful purpose. Provision of a right of appeal ii indicative of the nature of the order. In our view it is competent under s. 84 read with s. 172 (2) to the State Government to make rules imposing conditions on the appointment and punishment of persons to offices or to any particular office requiring professional skill and to provide generally the conditions under which the servants of the Board are to serve, and in the exercise of the powers which are vested by s. 82, these rules have an overriding effect. An order of determination of employment which is not of the nature of an order of dismissal, has by virtue of the rules framed under cl. (d) of s. 84 to be exercised consistently with rule 3A, and an order of dismissal involving punishment must be exercised consistently with the rule or regulation framed under the Notification dated March 25, 1946 under s. 84 (b) & (d). We, therefore, hold that the Board had the power to determine the employment of the appellant and the Board purported to exercise that power. But counsel for the appellant contended that even though in form the power of determination of employment was exercised, in substance it was intended to exercise the power of dismissal and that the form of the resolution of the Board was merely to camouflage the real object of the Board. It is settled law that the form of the order under which the employment of a servant is determined is not conclusive of the true nature of the order. The form may be merely to camouflage an order of dismissal for misconduct, and it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form merely of determination of employment is in reality a cloak for an order of dismissal as a matter of punishment, the Court would not be debarred merely because of the form of the order in giving effect to the rights conferred by statutory rules upon the employee. Counsel for the appellant pointed out that in the affidavit filed on behalf of the Board, the entire service- sheet of the appellant since the year 1945 was set out. The affidavit refers to the censure administered to the appellant for neglect of duty on March 25, 1945, to the order of dismissal of the appellant 'from service on a finding by the Public Works Committee that he was guilty of negligence and unfaithfulness in 1946, to the comments made by the Chairman of the Board in 1947 that the appellant had not proved himself to be a loyal and faithful servant' and to stoppage of increments of the appellant by an order of the President of the Board in 1953 and 1954. Reliance is then placed upon paragraph-21 of the affidavit of the Board

in which it was stated that the plea of the appellant that he had honestly and faithfully discharged his duties but the District Board had capriciously and without any justification terminated the service of the appellant was untrue and it was asserted that the services of the appellant had been justifiably terminated. It must however be observed that in the petition the appellant challenged the validity of the order terminating his services on the ground firstly that the Board had no power to terminate his employment and secondly that it was not justified in terminating the employment. It was never contended that the order terminating the employment was one in reality of the nature of dismissal as punishment, and the form used in the resolution of the Board was merely to camouflage the real object of the Board. Averment in the petition that the Board had acted capriciously and without any justification does not amount to a plea that the order was intended to be one of dismissal though in form one of determination of employment. It also does not appear to have been argued before the Division Bench that the impugned resolution was in reality one of dismissal. Moothan, C.J., in delivering the judgment of the Court dealt with the only argument advanced before the Court, viz., that although the Board had the power to punish or dismiss the appellant it had no power otherwise to terminate his service in the absence of a special contract which did not exist in this case. If the appellant had in his petition pleaded the case that the order though in the form of determination of employment was intended to be one of dismissal as a matter of punishment and the form was adopted merely to conceal the true object of the Board, it would have given opportunity to the Board to meet that case and to produce all the evidence in that Connection in their possession. The question raised is one primarily of fact;and it was never raised, nor explored in the High Court on proper pleadings. It would be taking the Board by surprise to allow the appellant to make out this new case at this stage. We therefore refuse tO consider the question whether the order passed against the appellant pursuant to the resolution dated October 18, 1954 was for dismissal of the appellant from the service of the Board, as a punishment for misconduct.

The .appeal therefore fails and is dismissed. Having regard to the circumstances, there will be no order as to costs in this Court.

Appeal dismissed.