

A.F.R.

Court No. - 6

Case :- WRIT - A No. - 31358 of 2021

Petitioner :- Dr. Prabhanshu Shrivastava

Respondent :- State Of U.P.Thru Prin.Secy.Medical Health
And Family And Ors.

Counsel for Petitioner :- Sachin Upadhyay, Shivendra S Singh
Rathore, Shivendra Shivam Singh Ra

Counsel for Respondent :- C.S.C., Ashok Shukla, Raj Kumar
Upadhyaya (R.K.Upadhyaya)

Hon'ble Alok Mathur, J.

1. Heard Sri Shivendra S Singh Rathore, Advocate, for the petitioner as well as the learned standing counsel for the opp. parties/State and R.K. Upadhyaya, Advocate, for the opp. party No. 4, and perused the records.

2. The petitioner being aggrieved by his order of termination dated 30.11.2021 has approached this court seeking a writ in the nature of Certiorari quashing the said order.

3. It has been submitted by the learned counsel for the petitioner that an advertisement was issued on 31.12.2017 for appointment on newly created 595 posts of Dental Surgeon under the Department of Medical Health and Child Welfare, U.P. The petitioner being eligible for the said selection applied in the said vacancy. He was successful in the recruitment process and vide order dated 04.10.2020 appointment letter was issued to him on permanent post against the substantial vacancy.

4. Prior to the said advertisement and selection, the petitioner had appeared for the MDS exam for post-graduate education in the Speciality of Pedodontics and Preventive Dentistry on 14.12.2018 and he was selected in the post-graduate course and had taken admission in the Government Dental College and Hospital, Nagpur, Maharashtra. The result of the recruitment for the post of Dental Surgeon under the Medical Health and Child Welfare, U.P., were not declared till the petitioner was admitted and joined in 2019 for the post-graduate course and it is only in 2020 that the results were declared and he was selected on the post of Dental Surgeon under the Medical Health and Child Welfare, U.P. It is in the aforesaid circumstances that the

petitioner made an application to the Department of Medical and Health for grant of study-leave. The respondent did not consider application for grant of study-leave, consequently, he was constrained to file a Writ Petition No. 13652 of 2020, Santoshni Samal & anr. v. State of U.P. & 2 ors., which was disposed of by this court with a direction to the opp. parties to pass appropriate order on the representation of the petitioner, by means of order dated 15.03.2021.

5. The respondents duly considered the representation of the petitioner and rejected the same on the ground that the petitioner was a Probationer and was not entitled for the study-leave. The petitioner being aggrieved by the order of rejection dated 22.07.2021 filed another writ petition before this court being Writ Petition No. 22235 of 2021(SS) titled as Dr. Prabhanshu Srivastava v. State of U.P., on which notices were issued and it is pending consideration before this court.

6. It is during pendency of the aforesaid writ petition that on 20.12.2021 the petitioner went to join his services at the place of posting on 30.12.2021, but he was informed that his services had already been terminated by means of the impugned order dated 30.11.2021, however, a perusal of the impugned order indicates that the petitioner had already joined on 10.10.2020 and from the very next date he had proceeded on leave and it is for his unauthorized absence that his services have been terminated under the Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975.

7. The learned counsel for the petitioner while assailing the order of termination dated 30.11.2021 has submitted that he was appointed on a substantial post according to the service rules by following the due procedure and accordingly submitted that he could not have been subjected to the provisions of Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975 as he did not fall into the category of temporary government servant. He further submitted that the definition of 'temporary service' has been provided under Rule -2, according to which 'temporary service' means officiating or substantial service on a temporary post or officiating service on a permanent post under the Uttar Pradesh Government. He submitted that he was regularly appointed on a substantial vacancy and consequently it cannot be said that he was on 'temporary service'. On the other hand, there is no dispute that the post on which the petitioner was appointed was not a temporary post and unless these two conditions are fulfilled, a person would not fall under the definition of 'temporary service', hence the provisions of Rules of 1975 would not be applicable on the services of the petitioner.

8. He further submits that apart from the above, the impugned order is stigmatic inasmuch as the reason for termination has been stated in the order itself, which is that the petitioner has absented himself from duties since 11.10.2020, due to which his services could not be availed by the Public at large and, consequently, his services are no longer required.

9. It is stated that imputation regarding his absence to be intentional and due to his non-absence, the public at large has been adversely effected, is a clearly stigma on the petitioner and submits that such an order could not have been passed without giving due opportunity of hearing to the petitioner. In support of his submissions he has relied upon the judgment of the supreme court in the case of ***Purshottam Lal Dhingra v. Union of India, AIR 1958 SC 36; Shamsher Singh v. State of Punjab, 1974 (2) SCC 831***, to canvass his submissions that in case the order casts stigma, the effect of such an order of termination may have on person's future prospects of employment, is a matter of relevant consideration and though it may have been open for the respondents to have passed an order simplicitor of termination, but such an order casting sigma on the petitioner would be bad, illegal, arbitrary and accordingly deserves to be set aside.

10. He further submits that from bare perusal of the impugned order it would be evident that no notice or any opportunity of hearing was provided to the petitioner prior to passing of the said order and accordingly the said order is clearly illegal, arbitrary and violative of Articles 14 and 16 of the Constitution of India.

11. The learned Standing counsel, on the other hand, has opposed the writ petition. He has submitted that the petitioner had submitted his joining on 10.10.2020 and from the very next date, i.e., 11.10.2020 he absconded from his duties during the period of probation, without obtaining any permission/sanction and, accordingly, as per Rule-3 of the Rules of 1975 his services have been terminated by means of the impugned order dated 30.11.2021. Learned Standing Counsel further submitted that the issue pertaining to the grant of extraordinary leave/study leave is under consideration before this court in Writ Petition No. 22235 of 2021, Dr. Prabhanshu Srivastava v. State of U.P., but submits that the unauthorized absence of the petitioner is clearly an act of misconduct and there is no infirmity in passing the order of termination.

12. I have heard rival contentions of the parties and perused the record.

13. The facts are not in dispute inasmuch as the petitioner being a medical graduate had applied for the post of Dental Surgeon, which was advertised by the U.P. Public Service Commission on 30.12.2017 and he being eligible was duly appointed to the said post by means of order dated 04.10.2020. It is prior to declaration of the result for appointment as Dental Surgeon that the petitioner had appeared in the Master in Dental Surgeon (MDS) Examination and was successful and was pursuing his post-graduate course in the Government Dental College and Hospital, Nagpur, Maharashtra, when the appointment letter was issued. The petitioner moved the application for grant of study-leave, which was rejected and is presently the subject matter of Writ Petition No. 22235 of 2021. According to the petitioner, when he attempted to join his place of posting on 20.12.2021, he was informed that his services had already been terminated on 30.11.2021.

14. According to the impugned order dated 30.11.2021 passed by the Secretary, Department of Medical Health and Child Welfare, U.P., it is stated that the petitioner was in the cadre of Uttar Pradesh Dental Surgeon and was temporarily employed and that he had absconded from his workplace from 11.10.2020 due to which benefit of his services could not be availed by the Public at large and consequently his services are no longer required and according to the Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975 his services are dispensed with giving him one month's notice.

15. Considering the arguments of the petitioner that his services could not have been terminated invoking the provisions of Rules of 1975, it is noticed that it was necessary for the respondents to have considered as to whether the petitioner falls in the definition of 'temporary service'. To invoke the provisions of Section 2 of the rules of 1975, it was necessary that the services of the government servant should not have been 'officiating or substantive on temporary post' or 'officiating service on permanent post' under the Uttar Pradesh Government. There is no dispute that the petitioner was substantially appointed on a permanent post and, accordingly, his services were not on a temporary post and clearly he was not on officiating service on a permanent post. Basic ingredients of "temporary service" being absent with regard to the services of the petitioner he could not have been said to be in temporary service and, hence, Section 3 of Rules of 1975 would be inapplicable in the case of the petitioner. Rule-3 clearly provides that services of the government servant in temporary service are liable to be terminated at any time by notice in writing given either by the government servant to the appointing authority or by the appointing authority to the

government servant, hence, it is necessary that the services of such employee have to be 'temporary service'.

16. Accordingly, this court is of the considered view that services of the petitioner did not fall within the definition of 'temporary service' and, hence, the impugned order has been passed without jurisdiction, is illegal and arbitrary and liable to be set aside.

17. Apart from the above, it is further noticed that stigma has been cast upon the petitioner to the extent that he has been held to have absconded from service and due to his absence from service the Public at large has been deprived of his services. This adverse comment upon the petitioner amounts to stigma and accordingly any order passed by the respondents casting stigma on any employee, can be passed only after giving due opportunity of hearing.

18. Mere form of the order using expressions "terminate", 'discharge' etc, is not conclusive and despite the use of such innocuous expressions, the Court can examine the matter to find out the true nature of the order terminating the service of the petitioner. This has been the consistent view of the Supreme Court in several Constitution Bench decisions rendered in ***Parshottam Lal Dhingra vs. Union of India AIR 1958 SC 36, State of Bihar vs. Gopi Kishore Prashad AIR 1960 SC 689, Jagdish Mitter vs. Union of India and others 1964 SC 449, Shemsher Singh vs. State of Punjab and others 1974(2) SCC 831.***

19. Supreme Court in ***Dipti Prakash Banerjee vs. Saytendra Nath Bose National Centre for Basic Sciences, Calcutta and others, (1999) 3 SCC 60,*** observed as follows:-

*"25. In the matter of `stigma', this Court has held that the effect which an order of termination may have on a person's future prospects of employment is a matter of relevant consideration. In the seven Judge case in ***Samsher Singh vs. State of Punjab [1974 (2) SCC 831], Ray, CJ*** observed that if a simple order of termination was passed, that would enable the officer to "make good in other walks of life without a stigma. "It was also stated in ***Bishan Lal Gupta vs. State of Haryana [1978 (1) SCC 202]*** that if the order contained a stigma, the termination would be bad for "the individual concerned must suffer a substantial loss of reputation which may affect his future prospects".*

20. In ***Kamal Kishore Lakshman vs. Pan American World Airways, 1987 (1) SCC 146,*** Supreme Court explained the meaning of 'stigma' and what amounts to 'stigma' as follows(p150):

"According to Webster's New World Dictionary, it (stigma) is something

that detracts from the character or reputation of a person, a mark, sign etc., indicating that something is not considered normal or standard. The *Legal Thesuras* by Burton gives the meaning of the word to be blemish, defect, disgrace, disrepute, imputation, mark of disgrace or shame. The *Webster's Third New International Dictionary* gives the meaning as a **mark or label indicating a deviation from a norm.** According to yet another dictionary 'stigma' is a matter for moral reproach."

21. A three Judge Bench decision in ***Indra Pal Gupta vs. Managing Committee, Model Inter College (1984) 3 SCC 384***, is a clear authority for the proposition that the material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its Annexures. Obviously, such a document could be asked for or called for by any future employer of the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular inquiry was conducted.

22. Supreme Court in ***Union of India and others vs. Mahaveer C. Singhvi AIR, 2010 SC 3493***, observed as follows:-

"15. The High Court also referred to the Special Bench decision of this Court is ***Shamsher Singh v. State of Punjab and Anr. MANU/SC/0073/1974: AIR SC 2192: MANU/SC/0073/1974:1974(2) SCC 831*** which was a decision rendered by a Bench of seven judges, holding that **the decisive factor in the context of the discharge of a probationer from service is the substance of the order and not the form in determining whether the order of discharge is stigmatic or not or whether the same formed the motive for foundation of the order.**

31.....Not only is it clear from the materials on record, but even in their pleadings the petitioners have themselves admitted that the order of 13th June, 2002, had been issued on account of the Respondent's misconduct and that misconduct was the very basis of the said order. That being so, **having regard to the consistent view taken by this Court that if an order of discharge of a probationer is passed as a punitive measure, without giving him an opportunity of defending himself, the same would be invalid and liable to be quashed**, and the same finding would be also apply to the Respondent's case. As has also been held in some of the cases cited before us, **if a findings against a probationer is arrived at behind his back on the basis of the enquiry conducted into the allegations made against him/her and if the same formed the foundation of the order of discharge, the same would be bad and liable to be set aside.** On the other hand, if no enquiry was held or contemplated and the allegations were merely a motive for the passing of an order of discharge of a probationer without giving him a hearing, the same would be valid. However, the latter view is not attracted/to the facts of this case.....This case, in our view, is not covered by the decision of this Court in *Dipti Prakash Banerjee's case (supra)*".

23. In what circumstances, an order of termination of a probationer can be said to be punitive depends upon whether certain allegations which are the cause of the termination or the

motive of the foundation of the order.

24. In **Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tubes Mazdoor Sabha**, (1980) 2 SCC 593, Supreme Court explained 'foundation' as follows:-

*"A termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. **Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal. even if full benefits as on simple termination, are given and non-injurious terminology is used.***

*On the contrary, even **if there is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or punitive pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge.***

25. The distinction between "foundation" and "motive" was explained in **Dipti Prakash Banerjee (supra)**:

*"If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as **"founded" on the allegations and will be bad.** But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position **if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.***

26. Accordingly applying the tests and laid down the Supreme Court in the aforesaid judgements, the order stating that the petitioner had "absconded" from service, due to which the services could not be available the public at large, clearly casts stigma upon the petitioner. Any person who is said to have "absconded" meaning thereby he has deliberately fled from his duty without obtaining proper action, reflects adversely on the conduct of any comment servant and hence casting an implication that the petitioner has absconded his cast stigma, and such an importation could not have been levelled without

giving him proper opportunity of hearing. In the present case no show cause notice nor any opportunity was given to the petitioner, and accordingly such an order casting stigma on him could not have been passed and hence the same is illegal and arbitrary and libel to be set aside.

In the light of the above, the writ petition is **allowed**. Order dated 30.11.2021 is hereby **quashed**. The petitioner is directed to be reinstated with all consequential benefits from the date of his appointment.

(Alok Mathur, J.)

Order Date :- 14.11.2024

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