

HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

(DB : SHEEL NAGU & S.A.DHARMADHIKARI, JJ.)

W.A. No. 1166/2017

Malkhan Singh Malviya

Vs.

State of M.P.

For appellant

Shri S.K. Sharma, Advocate for the appellant.

For Respondent

Mrs. Ami Prabal, Dy. Advocate General for the respondent / State.

WHETHER REPORTABLE : Yes No

Law Laid Down:

(i) Even an employee not borne out of regular establishment is entitled to be afforded reasonable opportunity of being heard before a stigmatic order can be passed terminating his services. Mere issuance of show cause notice and calling of reply would not suffice without supply of adverse material used against the employee and affording him opportunity to adduce evidence in support of his defence.

Significant Paragraph Numbers: Paras :- 13 & 14

J U D G M E N T

(08 .03.2018)

Sheel Nagu, J.

1. The instant intra court appeal filed under Section 2(i) of M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhinyam,

2005 (hereinafter referred as "2005 Act") assails the final order dated 26.09.2017 passed in WP.1029 /2009 whereby the learned single judge while exercising the writ jurisdiction u/ Art. 226 of the Constitution of India has dismissed the petition filed by the petitioner / appellant seeking quashment of order dated 27.01.2010 (Annexure P-6) by which his contractual services as a Peon, under the Rajeev Gandhi Shiksha Mission, continuing since 1997, have been terminated.

2. Learned counsel for the rival parties are heard.

3. The writ Court while dismissing the petition in question found that a show cause notice dated 13.01.2009 (Annexure P-4) was issued asking the petitioner to respond to the allegation of misconduct alleged therein or else the service would stand terminated. Learned single Judge further found that FIR was also registered alleging offences punishable u/Ss. 406, 409, 420 of IPC on 12.01.2009 arising out of same incident which gave rise to the said alleged misconduct. The writ court after considering the submission of learned counsel for the petitioner / appellant that the petitioner had been acquitted subsequently of the criminal charge, upheld the termination by recording the finding that the termination was not solely based on the factum of registration of offence but the misconduct alleged in the show cause notice rendered the petitioner (a mere contractual employee) unsuitable for the job and therefore, petitioner had no right to continue for having lost the trust of the employer.

4. Undisputed facts are that the petitioner was initially appointed on 04.10.1997 vide Annexure P-1 on temporary basis under the Rajeev Gandhi Shiksha Mission. Service of the petitioner were continued uninterruptedly for the next more than 11 years when he received show cause notice Annexure P-4 dated 13.01.2009 asking him to show cause in regard to the misconduct

informed therein failing which the services would stand terminated. Petitioner filed his reply to the same vide Annexure P-5 denying the charges. The reply was found to be unsatisfactory leading to issuance of impugned order dated 27.01.2009 (Annexure P/6) on the ground of the said misconduct mentioned therein which primarily related to misappropriation of certain books on 01.01.2009 and 09.01.2009, based upon the preliminary enquiry conducted by District Project Coordinator, District Education Centre, Vidisha. The impugned order further referred to the criminal prosecution lodged against the petitioner by FIR dated 12.01.2009 u/Ss. 406, 409 and 420 IPC arising out of the same incident which gave rise to the said misconduct.

5. Aggrieved, the petitioner filed WP No. 1029/2009(s) which was responded to by primarily urging that the petitioner was purely a temporary employee engaged on contractual basis who had indulged in misconduct of serious nature in regard to which offence was also registered and therefore, by following the due process of law including affording of opportunity by way of show cause notice as aforesaid and considering his response, his services were terminated, which cannot be termed as unlawful.

6. Learned counsel for the petitioner has relied upon the decision of this Court in the case of **Rahul Tripathi Vs. Rajeev Gandhi Shiksha Mission, Bhopal and Ors.** reported in **ILR 2001 SC 1144** to contend that in circumstances similar to the one attending the instant case, this Court in the case of Rahul Tripathi, who was also a contractual employee working under the same Rajeev Gandhi Shiksha Mission, had set aside the termination by finding the same to be stigmatic and yet not preceded by any inquiry in accordance with law except a show cause notice. It is submitted that the Single bench in the said case of Rahul Tripathi placed reliance on the decisions of Apex Court in the case of

Shamsher Singh Vs. State of Punjab reported in **AIR 1974 SC 423**, **State of U.P. Vs. Ramchandra Trivedi**; **AIR 1976 SC 2547**, **Dipti Prakash Banerjee Vs. Satvendra Nath Bose National Centre for Basic Sciences, Calcutta & ors.**; **AIR 1999 SC 983**, **Radheshyam Gupta Vs. U.P. Industries Agro**; **(1999) 2 SCC 21** & **Chandra Prakash Shahi Vs. State of U.P. & Ors**; **(2000) 5 SCC 152**, where from the standpoint of a stigmatic order, distinction between motive and foundation was explained. The single bench of this Court in **Rahul Tripathi (supra)** truncated the order of termination assailed therein. Reliance is further placed by petitioner on recent decision of Division Bench of this Court in **WA. 528/2015 (Paramjeet Singh & Anr. Vs. The State of M.P. & Ors)** rendered on 13th June, 2016 where similar view has been taken by following the decision in the case of **Rahul Tripathi (supra)**.

7. It is seen from the pleadings in WP No. 1029/2009 (s) that petitioner had categorically raised the ground of termination being stigmatic not preceded by inquiry following the principle of natural justice where reasonable opportunity to defend the charges of misconduct was afforded to him.

8. A bare perusal of the impugned order (Annexure P-6) dated 27.01.2009 reveals that misconduct about misappropriation of books alleged against the petitioner on 01.01.2009 and 09.01.2009, for which show cause notice was issued after conduction of preliminary inquiry, was found to be proved even before considering the reply (Annexure P-5), but without affording reasonable opportunity to the petitioner to rebut the charges of misconduct by adducing evidence, before the services of the petitioner were terminated.

9. To decipher the nature of order passed while terminating services of the petitioner, the same is being reproduced below :-

कार्यालय कलेक्टर (जिला शिक्षा केन्द्र) सर्व शिक्षा अभियान
जिला – विदिशा

क्रमांक/जि. शि.के./ स्थापना/2009/2468

विदिशा, दिनांक 27/02/09

आदेश

जिले में सर्व शिक्षा अभियान की कुछ पुस्तकें दिनांक 11.01.09 को कबाड़ी की दुकान में मेटाडोर में बिकने के लिये पाये जाने पर जिला परियोजना समन्वयक जिला शिक्षा केन्द्र विदिशा द्वारा की गई जांच में पाया गया कि श्री मलखान सिंह मालवीय, संविदा भृत्य, जिला शिक्षा केन्द्र विदिशा द्वारा बिना कार्यालय प्रमुख की अनुमति के ही जनपद शिक्षा केन्द्र, बासौदा के बी.ए.सी से दिनांक 01.01.09 तथा 09.01.09 को पुस्तकें प्राप्त की तथा पावती दी। जिस पर श्री मलखान सिंह, संविदा भृत्य को कार्यालयीन पत्र क्र./स्था/ 2279 दिनांक 13.01.09 द्वारा कारण बताओ सूचना पत्र जारी किया जाकर सात दिवस में जवाब चाहा गया कि संबंधित का कृत्य मिशन के संविदा कर्मचारियों की सामान्य सेवा शर्तों तथा निष्ठा के विपरीत पाये जाने के कारण क्यों न संविदा समाप्त कर दी जाये ? उक्त नोटिस संबंधित के निवास पर गवाहियों के समक्ष चर्चा किया गया तथा रजिस्टर्ड डाक से भी भेजा गया। संबंधित का जवाब समयावधि समाप्त हो जाने के बावजूद अप्राप्त है। संबंधित के कार्यालय प्रमुख द्वारा थाना सिटी कोतवाली विदिशा में 12.01.2009 को प्रथम सूचना रिपोर्ट भी दर्ज कराई गई। जिस पर कोतवाली में धारा 406, 409, 420 ता.हि. का प्रकरण भी संबंधित के विरुद्ध दर्ज किया गया है। और संबंधितजन कार्यालय से बिना सूचना दिये फरार है। निर्धारित समयावधि बाद प्राप्त संबंधीजन का जवाब परीक्षण में पूर्णतः असंतोषजनक पाया गया। श्री मलखान सिंह मालवीय संविदा भृत्य के उपरोक्त कृत्यों के कारण सर्व शिक्षा अभियान (राजीव गांधी शिक्षा मिशन) के संविदा कर्मचारियों की सामान्य सेवा शर्तों के नियमों के तहत एतद् द्वारा श्री मालवीय की संविदा तत्काल प्रभाव से समाप्त कर सेवा से पृथक किया जाता है।

यह आदेश तत्काल प्रभाव से लागू होगा।

10. A bare perusal of the above termination order reveals that the same is stigmatic in nature inasmuch as blaming the petitioner for a serious misconduct of misappropriation of certain Government material without conducting any inquiry into the alleged charges. The only inquiry shown to be conducted as is evident from the recital of termination order is preliminary inquiry conducted behind the back of petitioner by District Project Coordinator, District Education Centre, Vidisha. Thereafter the competent authority has issued show cause notice dated 13.01.2009 and after taking into

account the reply (Annexure P-5) of the petitioner where he denied the charges in toto, the competent authority accepted the finding rendered in the preliminary inquiry of the misconduct being proved.

11. Undoubtedly, the termination order casts stigma / blemish on the future career prospects of the petitioner by finding him guilty of serious misconduct. The least that is required under the principle of natural justice is that a reasonable opportunity should be afforded before criticizing the character of an individual. The reasonable opportunity is by way of holding an inquiry where specific charges of misconduct are informed to the delinquent employee followed by a reasonable opportunity of filing reply, supply of all the adverse material proposed to be used against the delinquent employee, adducing of evidence in favour and against the charges in the presence of delinquent employee and thereafter to render a finding of misconduct or otherwise and the consequential order. It is needless to emphasize that further opportunity to the delinquent employee to have a say on the question of quantum of punishment would only rise if the delinquent employee holds the post on substantive basis or there are any enabling statutory provisions or executive instructions obliging the competent authority to do so. But since the petitioner was contractual / temporary employee no such further opportunity on the question of quantum of punishment is required to be given.

11.1 The Apex Court while deciding the case of **Khem Chand Vs. Union of India & ors.** reported in **AIR 1958 SC 300** though pertaining to Art. 311 (2) of Constitution of India, had an occasion to summarize the concept of reasonable opportunity as follows which is reproduced below to the extent it relates to the present case :-

(19) To summarize : the reasonable opportunity envisaged by the provision under consideration includes :-

(a) An opportunity to deny his guilt and establish his

innocence, which he can deny only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence;

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant."

12. The decision of the Apex Court in the case of Chandra Prakash Shahi (supra) is further worthy of reference and reproduction to the extent of para 28 & 29 to emphasize the concept of motive and foundation :-

"28. The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

29. "Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this decision? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary enquiry is held behind his back to

ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry.”

13. Reverting to the facts of the case, it is noticeable that before casting stigma on the petitioner by holding him guilty of misconduct, a mere preliminary inquiry report prepared behind the back of the petitioner and reply of petitioner to the show cause notice was considered by the competent authority before issuing order of termination of service. The misconduct as alleged in the show cause notice and the preliminary inquiry conducted behind the back of the petitioner were the foundation of the termination. The termination was not merely on the basis of finding the services of the petitioner to be no more required but because he was found guilty of the misconduct.

14. In view of the above, the order of termination of petitioner contained in Annexure P-6 is unsustainable in the eye of law being stigmatic and yet not preceded by affording of reasonable opportunity. Consequently, the impugned order passed in WP No. 1029/2009(s) dt. 26.09.2017 is set aside and the termination dated 27.01.2009 is quashed with liberty to the employer to proceed against the petitioner in accordance with law, if so advised.

15. Coming to the issue of consequential benefits arising from the present order, it is seen that the petitioner was contractual / temporary employee and had served more than 11 years before being terminated from service. Moreover the appointment was made under the Rajeev Gandhi Shiksha Mission which does not enjoy the character of permanency. It is further not evident from the record as to whether in this last 8 to 9 years the petitioner was gainfully employed or not and as to whether in the face of employment itself being temporary / contractual, whether it is any more required or not. Thus, this Court in the peculiar facts and

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circumstances attending the case, as mentioned above, denies full salary to the petitioner and merely directs that petitioner shall be entitled to 25% of the salary as would have otherwise become due if the order of termination had not been passed calculated from the date of termination till date provided the project continues to be functional.

16. With the aforesaid observation, present appeal stands disposed of.

(Sheel Nagu)
Judge
08 /03/2018

(S.A. Dharmadhikari)
Judge
08/03/2018