R.N.R.

Before M.M. Kumar & Ritu Bahri, JJ.

UNION TERRITORY OF CHANDIGARH AND OTHERS,—*Petitioner*

versus

CENTRAL ADMINISTRATIVE TRIBUNAL, CHANDIGARH BENCH, CHANDIGARH AND ANOTHER.,—*Respondents*

CWP No. 10844/CAT of 2008

12th October, 2010

Constitution of India, 1950—Art. 226—Allegations of sexual harassment against a contractual employee—Preliminary enquiry—Termination of services—Order of termination debarring from future employment not based on terms of appointment—Stigmatic in nature—Order of Tribunal quashing termination order upheld while granting liberty to petitioner to pass a fresh order in accordance with law.

Held, that the impugned order is based on preliminary enquiry report alleging that respondent No. 2 is guilty of sexual harassment of a female student and debars him from future employment. Once a contractual employee has been working on the basis of terms and conditions of contract

then those terms and conditions can be invoked to terminate his services. The petitioner could have adopted the mode as stipulated in order of appointment issued to respondent No. 2. However, the petitioner adopted an erroneous mode of passing an order which makes the order as stigmatic because of allegations of sexual harassment and debarring of respondent No. 2 from future employment.

(Paras 9, 11 & 12)

Rajesh Garg, Advocate, *for the petitioners.*

B.S. Walia, Advocate, *for respondent No. 2.*

M.M. KUMAR, J.

(1) The Chandigarh Administration has approached this Court by challenging judgement dated 1st February, 2008 passed by the Central Administrative Tribunal, Chandigarh Bench, Chandigarh (for brevity 'the Tribunal') holding that services of respondent No. 2 Shri Vinod Kumar, Physical Education Instructor, who was working on contract, were terminated illegally and the order of his termination dated 22nd November, 2006 (P.4) passed by the District Education Officer, Chandigarh was stigmatic. The Tribunal further held that respondent No. 2 be taken back in service without any salary for the interregnum period. However, the gap period is to be counted for all other service benefits.

(2) Brief facts of the case may first be noticed. Shri Vinod Kumar, respondent No. 2 was appointed as Physical Training Instructor in the Government Senior Secondary School, Sector 16, Chandigarh on contract basis for a fixed salary of Rs. 2,000 per month,—*vide* appointment order dated 8th July, 2002 (P.1). The appointment was made in pursuance of circular dated 28th November, 1997 issued by the Education Department to cope with shortage of teachers/masters and thereby the heads of the institutions were authorised to appoint the teachers on contract basis. His salary was eventually increased to Rs. 7,450 per month till the date of his termination on 22nd November, 2006,—*vide* order of even date issued by the District Education Officer (P.4).

(3) In the year 2003 a girl with the name of Ms. Anupika levelled serious allegations of sexual harassment by Shri Vinod Kumar and as a consequence he was transferred to junior wing of the school. After some

times he was shifted again and in September, 2006 the same girl complained of similar harassment by Shri Vinod Kumar, respondent No. 2. A preliminary enquiry was conducted to verify the allegations levelled in the complaint (P.1A). On the basis of the preliminary enquiry a show cause notice was issued to Shri Vinod Kumar, respondent No. 2 on 20th November, 2006 (P.2). He was afforded opportunity to submit his defence in writing within two days and was also afforded opportunity of personal hearing. He did not file any reply to the show cause notice nor he appeared before the District Education Officer. He infact proceeded on casual leave without getting it sanctioned as per the requirement of rules. Keeping in view the serious lapse on the part of Vinod Kumar, respondent No. 2 and the fact that on an earlier occasion complaint of similar nature had been received against him, his contract of the service was terminated. It was also found that his continuation in service would have been against the interest of the students. Respondent No. 2 alleges that he sent a representation. The receipt of the so called representation claimed to have been submitted by Shri Vinod Kumar for the supply of documents has been denied by the petitioner. As a result his services were terminated,—*vide* order dated 22nd November, 2006 (P.4).

(4) Feeling aggrieved against order dated 22nd November, 2006 (P.4), Shri Vinod Kumar, respondent No. 2 filed OA No. 50 CH of 2007. After the completion of pleadings before the Tribunal, the order dated 22nd November, 2006 was quashed by the Tribunal holding that the order was stigmatic and the applicant was entitled to opportunity of hearing/regular departmental enquiry. The Tribunal rejected the version of the petitioner-Administration highlighting his conduct as well as the circumstances of not filing any reply to the show cause notice. On the aforesaid issue, the Tribunal held as under :

> "Heavy reliance is placed by the respondents about the circumstances that there was no reply to the show cause notice. Of course, applicant was required to submit reply to the show cause notice but we are of the view that even if he had not submitted a reply within the prescribed time, it could not have been treated equal to admission and acceptance of the charges alleged against him by the show cause notice. Silence, may be considered at times, equal to or as substitute to consent, but it cannot be equated to

admission of an allegation. If no explanations were forthcoming, respondents were obliged to hold an enquiry and it would have been sufficient to reply at least on minimum materials to show that the delinquent employee was indiscreet in his behaviour....."

(5) The Tribunal in para 11 of the order went to the extent of discarding possibility of referring the matter back to the petitioner for holding a proper inquiry to be held with opportunity to Shri Vinod Kumar, respondent No. 2. The reason for discarding the aforesaid course as disclosed in para 11 is that in any case, the case of sexual harassment was not made out. The view of the Tribunal on the aforesaid issue reads thus :

"..... the allegation against the applicant was about the conduct during supplementary examination held in September, 2006. He had stared on a girl student of 12th standard and given a crooked smile. It is suggested that she had wilted thereby and had to be hospitalized. According to us, it could not have been possibly considered as a sexual harassment even in its widest meaning. It may have been that the child was acting abnormally and in hysteria. We cannot rule out possibility of phobias of unexplained nature. She had been perhaps taken to the hospital and even to a Psychiatrist for observation. It is evident that respondents themselves were skeptic about the element of a sexual harassment and they have tagged an old incident which had taken place more than 3 years back, again of an unnamed indecent behaviour. No details have been supplied and although the applicant had been transferred at that time to a junior station, since no enquiry, charge sheet or definite finding was there, transfer cannot be treated as a penalty as is normally understood by the expression in general parlance."

(6) In the concluding para, the Tribunal took the view that fundamental rights as possessed by a citizen are his prime possession and he cannot be forced to surrender it ordinarily. The Tribunal held that the termination order issued to Shri Vinod Kumar, respondent No. 2 was illegal and he was ordered to be taken back in service from 1st February, 2008 with all other benefits except payment of salary etc.

(7) Mr. Rajesh Garg, learned counsel for the petitioner has argued that whenever an order terminating the services of *ad hoc* or probationer is issued there is bound to be some element of adverse comment with regard to his work and conduct. According to the learned counsel the expression that a probationer has not been found suitable for the post would not necessarily be regarded a stigmatic order. In support of his submission, learned counsel has placed reliance on judgements of Hon'ble the Supreme Court rendered in the cases of **Union of India** *versus* **P.S. Bhatt (1),** and **A.P. State Federation of Coop. Spinning Mills Ltd. and another** *versus* **P.V. Swaminathan (2).** He has argued that the impugned order challenged before the Tribunal has no other content except making adverse comment on the conduct of the petitioner. Another submission made by the learned counsel is that the Tribunal has committed grave error in law by playing the role of an enquiry officer inasmuch as it has been concluded that there was a case of sexual harassment. According to the learned counsel such a finding is absolutely without jurisdiction and the Tribunal ought to have referred the matter back to the petitioner for passing of a fresh order in accordance with law.

(8) Mr. B.S. Walia, learned counsel for Mr. Vinod Kumar, respondent No. 2 has argued that the right of Mr. Vinod Kumar has been completely defeated because by order dated 22nd November, 2006 it has been disclosed that there was a *prima facie* case of sexual harassment of the student against him as the parents of a girl Ms. Anupika, d/o Shri Ved Parkash Sood have also filed a written complaint against Shri Vinod Kumar, respondent No. 2. The learned counsel has also pointed out that the Tribunal in the order dated 22nd November, 2006 has concluded that Shri Vinod Kumar has committed grave mis-conduct by out-raging the modesty of a student and that he was debarred from any future employment. The learned counsel has vehemently argued that in the absence of a regular departmental enquiry no such action could have been taken and the fundamental rights of the petitioner under Articles 14 and 16(1) of the Constitution have to be protected. He has further submitted that any government employee whether working on ad hoc or on contract basis could be shown the door

(1) (1981) 2 S.C.C. 761
(2) (2001) 10 S.C.C. 83

without holding a departmental enquiry as envisaged by Article 311(2) of the Constitution especially when the foundation of the order is mis-conduct bordering on the allegation of committing a criminal offence.

(9) Having heard the learned counsel at a considerable length and after perusing the record, we are of the considered view that the impugned order dated 22nd November, 2006 cannot be sustained in the eyes of law for more than one reason. The impugned order is based on preliminary enquiry report alleging that Shri Vinod Kumar, respondent No. 2 is guilty of sexual harassment of a female student and debars him from future employment. For the aforesaid proposition reliance may be placed on the judgement of a Constitution Bench of Hon'ble the Supreme Court in the case of **Samsher Singh** *versus* **State of Punjab (3).** In the aforesaid judgement the following observations made by Hon'ble the Supreme Court in the case of **Parshottam Lal Dhingra** *versus* **UOI (4),** were quoted with approval :

> "62. The position of a probationer was considered by this Court in **Purshottam Lal Dhingra** *versus* **Union of India, 1958 SCR 828 = (AIR 1958 SC 36).** Das, C.J. speaking for the Court said that where a person is appointed to a permanent post in Government service on probation the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment because the Government servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to do so. Such a termination does not operate as a forfeiture of any right of servant to hold the post, for he has no such right. Obviously such a termination cannot be a dismissal, removal or reduction in rank by way of punishment. There are, however, two important observations of Das, C.J., in Dhingra's case (supra). One is that if a right exists under a contract or service Rules to terminate the service the motive operating on the mind of the Government is wholly irrelevant. The other is that if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and violates Art., 311 of the Constitution. The reasoning why motive is said to be

(3) AIR 1974 S.C. 2192
(4) AIR 1958 S.C. 36

irrelevant is that it inheres in the state of mind which is not discernible. On the other hand if termination is founded on misconduct it is objective and is manifest." (emphasis added)

(10) A perusal of the aforesaid para would show that even in a case of contract of service if the termination is founded on a misconduct then it has to be regarded as a punishment because it is manifest in the order itself. The aforesaid judgement holds the field even today which is evident from the perusal of judgements of Hon'ble the Supreme Court in the cases of **State of U.P.** *versus* **Kaushal Kishore Shukla (5)** and **P.V. Swaminathan's case** (*supra*). However, in the aforesaid judgements it has been observed that a temporary government servant has no right to hold the post and whenever the competent authority is satisfied that work and conduct of a temporary government servant is not satisfactory or that his continuation in service is not in public interest on account of his inability, mis-conduct or inefficiency it may either terminate the service in accordance with the terms and conditions of service or the relevant rules or it may decide punitive action against the government servant. The observations made in para 7 of the judgement in the case of **Kaushal Kishore Shukla's case** (*supra*) reads thus :

"7. A temporary Government servant has no right to hold the post, his services are liable to be termiated 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. Since, a temporary Government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent Government servant, very often, the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. It is now well-settled that the form of the order is not conclusive and it is open to the Court to determine the true nature of the order. In **Parshotam Lal Dhingra** *versus* **Union of India AIR 1958 SC 36** a Constitution Bench of this Court held that the mere use of expressions like 'terminate' or 'discharge' is not conclusive and in spite of the use of such expressions, the Court may

(5) 1991 (1) S.C.C. 691

determine the true nature of the order to ascertain whether the action taken against the Government servant is punitive in nature. The Court further held that in determining the true nature of the order the Court should apply two tests namely : (1) whether the temporary Government servant had a right to the post or the rank or (2) whether he has been visited with evil consequences ; and if either of the tests is satisfied, it must be held that the order of termination of a temporary Government servant is by way of punishment. It must be borne in mind that a temporary Government servant has no right to hold that post and termination of such a Government servant does not visit him with any evil consequences. The evil consequences as held in **Parshotam Lal Dhingra's case** (*supra*) do not include the termination of services of a temporary Government servant in accordance with the terms and conditions of service. The view taken by the Constitution Bench in Dhingra's case has been reiterated and affirmed by the Constitution Bench decisions of this Court in **The State of Orissa and Anr.** *versus* **Ram Narayan Das** AIR 1961 SC 177 ; **R.C. Lacy** *versus* **The State of Bihar and Ors.** C.A. No. 590/62 decided on 23rd October, 1963 ; **Champaklal Chimanlal Shah** *versus* **The Union of India** AIR 1964 SC 1854 ; **Jagdish Miner** *versus* **The Union of India** AIR 1964 SC 449 ; **A.G. Benjamin** *versus* **Union of India** C.A. No. 1341/66 decided on 13th December, 1966 and **Shamsher Singh and Anr.** *versus* **State of Punjab (1974) 2 SCC 831,** These decisions have been discussed and followed by a three Judge Bench in **State of Punjab and Anr.** *versus* **Shri Sukh Raj Bahadur** AIR 1968 SC 1089".

(11) Once a contractual employee has been working on the basis of terms and conditions of contract than those terms and conditions can be invoked to terminate his service. In the present case, the order of appointment issued to respondent No. 2 on 8th February, 2002 (P.1) made specific stipulation in clauses 1,2,5 and 7 which reads thus :

"1. That he/she will not be entitled to the benefits as are admissible to the regular/*ad hoc* employees.

2. That he/she will has no claim for *ad hoc*/regular appointment available in the institution.

5. Initially this contract is for six months. If his/her work and conduct is found satisfactory then he/she can continue on contract for one year.

7. That he/she can be relieved at any time if his/her work and conduct is found unsatisfactory."

(12) The petitioner could have adopted the mode as stipulated in clauses 5 and 7. However, the petitioner adopted an erroneous mode of passing an order which makes the order as stigmatic because of allegations of sexual harassment and debarring of Shri Vinod Kumar, respondent No. 2 from future employment. In the case of **Sher Singh** *versus* **Punjab Mandi Board (6),** two employees have approached this Court. One of them was given promotion on a higher post of Assistant Engineer on probation but after six months he was reverted to his substantive post of Head Draftsman. The basis of the order reverting him to his substantive post was that he was found under the influence of liquor alongwith another probationer who was also reverted. Both of them filed CWP Nos. 15283 and 15621 of 1991 which were allowed by this Court as *ex-facie* the order of reversion was in the nature of penalty for mis-conduct. The Division Bench quashed the order. Thereafter fresh orders simpliciter were passed reverting them to their substantive post with the observation that their services were on longer required in the higher post. The aforesaid order was upheld in the case of **Sher Singh** (*supra*). In para 6 the Division Bench has placed reliance on various judgements of Hon'ble the Supreme Court and other High Courts. Therefore, quashing of order of termination dated 22nd November, 2006 (P-4) does not necessarily debar petitioner from passing a fresh order in accordance with law.

(13) As a sequel to the aforesaid discussion, the writ petition fails and the same is dismissed with liberty to the petitioner to pass a fresh order in accordance with law. We further hold that by virtue of quashing the order, Shri Vinod Kumar, respondent No. 2 shall not be entitled to any back wages although he will be entitled to wages from today till the date of passing of any other order by the petitioner.

(14) The petition stands disposed of in the above terms.

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(6) 1992 (4) S.L.R. 713