

RAM CHANDRA TRIPATHI

v.

U.P. PUBLIC SERVICES TRIBUNAL IV AND ORS.

FEBRUARY 25, 1994

[K. JAYACHANDRA REDDY AND G.N. RAY, JJ.]

Service Law—Temporary employee—Confirmation in violation of Court's order—Deconfirmation—Employee deconfirmed whether entitled to opportunity of hearing—Termination simpliciter of deconfirmed employee on account of unsatisfactory service record including remarks in character roll—Validity of.

The appellant was appointed as Junior Engineer in the Local Self-Government Engineering Department of U.P. (LSGED) on October 8, 1964. By an order dated 31st August, 1975 he was confirmed with effect from April 1, 1974. Subsequent to the establishment of U.P. Jal Nigam, he was transferred from LSGED to U.P. Jal Nigam on the same terms and conditions under which he was working in LSGED. Later, when it was detected that he was confirmed contrary to an order passed by the High Court, an order of deconfirmation was passed without affording him opportunity of hearing. However, by an order dated April 15, 1981 his services were terminated on payment of one month's salary in lieu of notice.

The appellant challenged the termination order before the U.P. Services Tribunal contending that (1) he was a permanent employee and having rendered 16 years service, his deconfirmation, without affording him opportunity, was invalid; (2) the termination order was passed *mala fide* for victimising him for his Trade Union activities; and (3) the termination order, based on stale and uncommunicated adverse remarks was in essence a punitive order which was passed without following the prescribed procedure.

The U.P. Jal Nigam contested the case contending that since the appellant's confirmation of the temporary service was in disregard of the High Court's order the mistake was rectified by passing de-confirmation order for which no hearing was necessary; the appellant's temporary service was terminated under the service rules by giving him one month's

- A salary in lieu of notice as his services were found not at all satisfactory, and therefore, the termination order was not punitive.

B The Tribunal rejected the appellant's claim holding that (i) the appellant was holding a temporary service and the confirmation given to him by mistake was rectified; (ii) the order of termination was not passed *mala fide* or by way of punishment but the same was passed after assessing his service records which were found to be not satisfactory and (3) since the impugned order was passed by giving one month's salary in lieu of one month's notice as per the conditions of service and without any stigma attached to the order of termination, the same was valid. The High Court C upheld the order of Tribunal.

In appeal to this Court it was contended on behalf of the appellant (1) that although no stigma was attached in the impugned order of termination yet, in effect, it was a punitive order intended to get rid of the D appellant because of his union activities; (2) that the appellant had rendered service for a total period of 16 years in LSGED and U.P. Jal Nigam and the bogey of unsatisfactory service was far from truth but a device to get rid of the appellant by relying on stale service record for the year 1965-66 and an adverse entry made in the year 1978-79; (3) even if it is assumed that adverse entries of 1978-79 had been taken into considera- E tion after communicating the same to the appellant and rejecting his representation, the fact remains that barring the said adverse entry of 1978-79, the appellant did not suffer any adverse entry in the service record in the recent past and the rating of the appellant as 'average' did not constitute any adverse remark; (4) if, with such rating as 'average' the F appellant was allowed to continue in service for a number of years, there was no reason, far less a fair reason, to hold the appellant unsuitable for retention in service at a later stage; (5) that other temporary Junior Engineers, who were similarly circumstanced as the appellant had been made permanent but he was singled out for being terminated from service without any just and fair reason; and (6) that the termination order at an G advanced stage of the appellant's career created a serious prejudice to him thereby practically depriving him of any chance to get a suitable job elsewhere at the late stage of life.

H For the respondent it was contended (1) that the Tribunal had come to a categorical finding that the termination order was not made as a

punitive measure but was passed after assessing the appellant's service records; (2) although 33 Junior Engineers were made permanent but since the appellant's service was found to be unsatisfactory it was decided not to retain him; (3) the appellant was given chance to improve his service over a long span of time, but unfortunately, he suffered adverse entries on two occasions and on other occasions also the assessment of his service record was not at all satisfactory and he was given a poor rating as 'average'; (4) the temporary service was terminated according to the service rules by giving one month's salary in lieu of one month's notice without attaching any stigma in the order of termination; (5) no stale record was taken into consideration and (6) even if the service record of 1965-66 was left out of consideration, the adverse entry of 1978-79 could not be held to be stale entry for the purpose of considering the suitability of the appellant in 1981.

Dismissing the appeal, this Court

HELD : 1. Since the order of confirmation of the appellant was made in violation of the injunction order, the mistake committed in passing the order of confirmation was corrected; in such circumstances, the appellant was not required to be given any opportunity of being heard for correcting such mistake because there was no occasion to take one view or the other in the matter of correction of the said mistake on the basis of the representation to be made by the appellant. [147-E]

2. The finding of the Tribunal that the impugned order of termination was passed without any stigma and not as a punitive measure has been upheld by the High Court and there is no justification in taking a contrary view simply because the appellant was a President of local union. There are no materials warranting a finding that he was picked up for incurring displeasure of the higher authorities and the service was sought to be terminated *mala fide* on some pretext. [147-F-G]

3. Although the appellant had remained in service for 16 years but the service record of the appellant was not at all convincing even within a span of five years prior to the date of consideration of his suitability to be retained in temporary service. He suffered an adverse entry and despite opportunity to make representation, such entries were maintained. The assessment of other years of service in the recent past was also not assuring and the appellant was rated as average. If on consideration of

- A** such service records, the appropriate committee did not find the appellant suitable to be confirmed in service and the concerned authorities on consideration of poor service record of the appellant had come to the finding that he was not suitable to be retained in service and the impugned order was passed without any stigma and in accordance with the service rules, the same cannot be held illegal or invalid. Therefore, there is no justification to set aside the impugned order of termination.

[147-H, 148-A-C]

- B** *The Manager, Government Branch Press and Anr. v. D.B. Balliappa*, [1979] 1 S.C.C. 4779; *Brij Mohan Singh Chopra v. State of Punjab*, [1987] 2 S.C.C. 188 and *State of Uttar Pradesh and Anr. v. Kaushal Kishore Shukla*, [1991] 1 S.C.C. 691, cited.

- C** 4. Although the service record of the appellant was not good, the concerned authorities had allowed him to continue in service despite the poor rating and adverse entries. The appellant has advanced in age and it will be very difficult for him to get suitable employment opportunity at this advanced age. The U.P. Jal Nigam is, therefore, directed to pay a sum of Rs. 75,000 to the appellant. [148-D-F]

- D** *Triveni Shankar Saxena v. State of U.P. & Ors.*, [1992] Supp. 1 S.C.C. 524, referred to.

- E** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1238 of 1994.

From the Judgment and Order dated 9.5.91 of the Allahabad High Court in W.P. No. 5803 of 1984.

- F** Govind Mukhoty and S.C. Patel for the Appellant.

S.C. Maheshwari and Ms. Sandhya Goswami for the Respondents.

The Judgment of the Court was delivered by

- G** G.N. RAY, J. Leave granted. This appeal is directed against dismissal of the Writ Petition No. 5803 of 1984 passed on May 9, 1991 made by the appellant before the Allahabad High Court challenging the order of dismissal dated September 11, 1984 passed by the U.P. Public Services Tribunal in Claim No. 3 of 1988/f/IV/81. The aforesaid claim petition was moved by the appellant before the U.P. Public Services Tribunal against

the order of termination of service of the appellant dated April 15, 1981. The service of the appellant was sought to be terminated on payment of one month's salary in lieu of notice by giving effect to the termination of service from the date of service of the said order of termination. It may be stated here that such notice was served on the appellant on April 1, 1981.

The relevant facts concerning the above appeal may be stated as hereunder :—

The appellant was recommended for the post of Overseer in the Local Self Government Engineering Department of Uttar Pradesh (hereinafter referred to as LSGED) by a Selection Committee. On such recommendation of the Selection Committee, the appellant was appointed to the post of Overseer by the Chief Engineer, LSGED and the appellant joined his duties as an Overseer on October 8, 1964. The post of Overseer was later on re-designated as Junior Engineer. Accordingly, the appellant was treated as Junior Engineer. The appellant's service was made permanent by confirming him to the said post of Junior Engineer w.e.f. April 1, 1974 by an order dated August 31, 1975 passed by the Chief Engineer, LSGED. After the U.P. Jal Nigam was established by the Uttar Pradesh Water Supply Swerage Act, 1975, the service of the appellant was transferred from LSGED to Uttar Pradesh Jal Nigam a statutory body with the same terms and conditions under which the appellant was working in the LSGED. It appears that in a Writ Petition No. 103 of 1974 filed by one Shri Satya Virat Singh against State of Uttar Pradesh, the High Court of Allahabad passed an interim order restraining the respondent to confirm Junior Engineers. Despite such order of injunction which was in force, the aforesaid order dated August 31, 1975 was passed by the Additional Chief Engineer, LSGED confirming the appellant to the post of Junior Engineer w.e.f. April 1, 1974. After it was detected that the said order of confirmation was illegal and contrary to the interim order of injunction passed in the said Writ Petition, an order of de-confirmation was issued on February 8, 1978 by which the confirmation of the service of the appellant was recalled and the appellant was treated as holding a temporary post of Junior Engineer. It may be stated in this connection, that such order of rectification of the earlier order of confirmation was not made by informing the appellant and giving him opportunity of being heard. It appears that some orders of transfers were passed against the appellant but the appellant went on long leave on medical ground and continued to remain on

A leave and after medical leave was over, he joined his earlier place of posting at Kanpur and not at the place where he was scheduled to join on transfer. Thereafter, the appellant was served with the said order of termination with immediate effect by giving one month's salary in lieu of one month's notice.

B The appellant challenged such order of termination before the U.P. Public Services Tribunal at Lucknow *inter alia* contending that he was a permanent employee having rendered total period of service for 16 years in LSGED and in U.P. Jal Nigam. The appellant contended that he was never informed of de-confirmation of his service and the order of termination was passed against him *mala fide* in view of the fact that he being the President of U.P. Jal Nigam Employees Union at Kanpur, incurred the displeasure of the higher authorities for raising voice of protest against improper action of U.P. Jal Nigam and seeking redressal of the grievances of the employees of the Jal Nigam. The appellant also contended that there was no valid reason for terminating the service of the appellant and he was singled out on the pretext that he had suffered adverse entries in the confidential character roll for the year 1965-66 and 1978-79. The appellant contended that entry for the year 1965-66 was a stale entry and could not have been taken into consideration for deciding the suitability of the appellant and the other adverse entry for the year 1978-79 could not also be taken into consideration as the same was not communicated to the appellant. The appellant contended that the said order of termination of service was in essence a punitive order without following the proper procedure for passing such order. The order, therefore, should be set aside.

F Such submission of the appellant was disputed by the U.P. Jal Nigam by contending that the order of confirmation of the appellant's temporary service was passed in total disregard of the impugned order of injunction passed by the High Court in the said Writ Petition and the mistake committed in passing such order was later on rectified. For such rectification, no hearing was required to be given to the appellant. It was also contended on behalf of the U.P. Jal Nigam that service of the appellant was not at all satisfactory. The adverse entries in the confidential character roll for the year 1978-79 was indicated to the appellant and the representation made by the appellant against such adverse remark was also rejected. That apart, for other years also the assessment of the appellant's

service was not at all satisfactory and the rating of the service of the appellant was only "average" for the other years. A Selection Committee took into consideration the cases of temporary Junior Engineers for confirmation and out of 43 Junior Engineers, 33 were made permanent on assessment of their works but appellant's service was not considered satisfactory for making him permanent. Accordingly, his service was terminated with immediate effect by giving one month's salary in lieu of one month's notice. It was contended by the U.P. Jal Nigam that the appellant's service was not terminated by way of punishment as sought to be contended by him but the temporary service of the appellant was terminated according to the service rules by giving one month's salary in lieu of one month's notice on proper assessment of his service records.

The U.P. Public Service Tribunal rejected the claim petition of the appellant by holding *inter alia* that the appellant was holding a temporary service and the confirmation given to the appellant through mistake was rectified. It was held by the Tribunal that the order of termination was not passed *mala fide* or by way of punishment but the same was passed after assessing the appellant's service records which was found to be not satisfactory. The Tribunal also held that since the impugned order of termination was passed by giving one month's salary in lieu of one month's notice as per the conditions of service and without any stigma attached to the order of termination, the same was quite valid and was not liable to be set aside.

As aforesaid, the appellant challenged the said order of U.P. Public Services Tribunal rejecting his claim petition by moving a Writ Petition before the Allahabad High Court but the High Court upheld the order of Tribunal and dismissed the Writ Petition holding *inter alia* that such order was passed on assessment of the service records of the appellant without attaching any stigma against the appellant and in conformity with the service rules by giving one month's salary in lieu of one month's notice.

At the hearing of this appeal, Mr. Mukhoty, learned senior counsel appearing for the appellant has very strongly contended that although no stigma was attached in the impugned order of termination of the service of the appellant, in effect the order was a punitive order intended to get rid of the appellant because of his union activities thereby incurring the displeasure of the higher authorities. Mr. Mukhoty has contended that the

A appellant had rendered service for a total period of 16 years in LSGED and U.P. Jal Nigam and the boggy of unsatisfactory service was far from truth but a device to get rid of the appellant. Mr. Mukhoty in this connection has referred to a decision of this Court in *The Manager Government Branch Press and another v. D.B. Belliappa*, [1979] 1 SCC 477. In the said decision, this Court has held that the protection of Articles 14 and 16 (1) is available to a temporary government servant if he has been arbitrarily discriminated against and singled out for harsh treatment. The employer has discretion under the conditions of service, but such discretion has to be exercised in accordance with reason and fair play and not capriciously. Arbitrary invocation or enforcement of a service condition terminating the service of a temporary employee may itself constitute denial of equal opportunity and offend the equality clause in Articles 14 and 16 (1) of the Constitution. Relying on the said decision, Mr. Mukhoty has contended that for the last 16 years the appellant was allowed to continue in service. No objection was raised that his service was unsatisfactory and he could not be retained in service or be confirmed. It is only when the appellant incurred displeasure by demanding certain concessions and raising voice of protest as the President of the Union, an excuse of unsuitable service was sought to be found out by relying on stale service record for the year 1965-66 and an adverse entry made in the year 1978-79. Mr. Mukhoty has contended that other temporary Junior Engineers who were similarly circumstanced with the appellant had been made permanent but he was singled out for being terminated from service without any just and fair reason. He has also contended that the very fact that such termination was sought to be effected after long service of 16 years, clearly demonstrates the unreasonableness and the *mala fide* attitude on the part of the respondents and on that score alone, the order of termination is to be set aside by holding that the said order was not just and fair but was actuated by *mala fide* and unreasonableness. Mr. Mukhoty has also relied on another decision of this Court in *Brij Mohan Singh Chopra v. State of Punjab*, [1987] 2 SCC 188. It has been held by this Court in the said decision that for retiring a government servant compulsorily, stale adverse entries of more than ten years back should not be taken into consideration. Only, the current service records could be taken into consideration for deciding a case of compulsory retirement provided adverse entries made in the service records had been communicated to the concerned government employees and reasonable opportunities to hear against such entries had been given

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to such employee. Mr. Mukhoty has submitted that the adverse entry of the year 1965-66 should not have been considered for the purpose of terminating the service of the appellant. He has also contended that even if it is assumed that adverse entries of 1978-79 had been taken into consideration after communicating the same to the appellant and rejecting his representation, the fact remains that barring the said adverse entry of 1978-79, the appellant did not suffer any adverse entry in the service record in the recent past and the rating of the appellant as 'average' does not constitute any adverse remark. He has contended that if with such rating as average the appellant was allowed to continue in service for a number of years, there was no reason, far less a fair reason, to hold the appellant unsuitable for retention in service at a late stage. Mr. Mukhoty has contended that the said order of termination at an advanced stage of the appellant's career created a serious prejudice to the appellant thereby practically depriving him of any chance to get a suitable job elsewhere at the late stage of life. He has submitted that the Court should take into consideration all the facts and circumstances of the case to come to a proper decision as to whether or not action of the Jal Nigam is fair and just. He has submitted that although the service of a temporary employee is liable to be terminated on the ground of unsuitability by giving one month's salary in lieu of one month's notice, the Court should not allow such termination of service if the same is passed unjustly by singling out a poor employee as unsuitable though the facts and circumstances clearly indicate that his service was not found unsuitable at any point of time. He has, therefore, submitted that the U.P. Public Services Tribunal and the Allahabad High Court failed to appreciate the lack of fairness in passing the said order of termination and had gone wrong in not setting aside the said unjust and improper order of termination. He has submitted that this Court should allow this appeal and set aside the impugned order of termination of service and direct the respondent to confirm the appellant from the date from which the other Junior Engineers were confirmed in service and to give all consequential benefits of such service of the appellant.

Such contention of Mr. Mukhoty was seriously disputed by the learned counsel appearing for the respondent. It has been contended by the learned counsel for the respondent that the U.P. Public Services Tribunal has come to a categorical finding that the order of termination of the appellant's service was not made as a punitive measure as sought to be

A contended but such order was passed after assessing the service records of the appellant. It has been contended that a proper committee looked into the service records of various employees including the appellant and although 33 Junior Engineers were made permanent, the appellant's service was found to be unsatisfactory and it was decided not to retain the appellant because he was found unsatisfactory. It has been contended by the learned counsel that the appellant was given chance to improve his service over a long span of time, but unfortunately, he suffered adverse entries on two occasions and on other occasions also the assessment of his service record was not at all satisfactory and he was given a poor rating as 'average'. As the appellant failed to improve his capabilities, on assessment of the service records he was found unsuitable to be retained in the service and the temporary service was terminated according to the service rules by giving one month's salary in lieu of one month's notice without attaching any stigma in the order of termination. The learned counsel for the respondent has relied on a decision of this Court in *Triveni Shankar Saxena v. State of U.P. and others*, [1992] Supp. 1 SCC 524. It was held in the said decision that when an employee was not shown in substantive capacity on permanent basis, the employee could not claim his lieu in the post of Lekhpal. It was also held that if termination of service simplicitor of a temporary employee was effected as per rule on account of his unsuitability on the basis of service records including remarks in the character roll, such termination could not be held as punitive and the termination of such service must be held as legal and valid. The learned counsel has submitted that in the said case even after 18 years of temporary service, the employment of the temporary government servant was terminated on assessment of the service records by finding him as unsuitable to be retained in service and this Court did not set aside such order of termination on the score that such order has been passed after allowing the concerned employee to remain in temporary service for 18 years. The learned counsel for the respondent has also relied on a decision of this Court in *State of Uttar Pradesh and another v. Kaushal Kishore Shukla*, [1991] 1 SCC 691. It has been held in the said decision of this Court that termination of service of *ad hoc* or temporary government servant in terms of the contract of service and rules by passing an order of termination simplicitor on assessment of suitability after consideration of adverse entry must be held as valid and not punitive. The learned counsel for the respondent has, therefore, submitted that the service Tribunal and High Court were justified in holding

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that the impugned order of termination was validly passed on assessment of service record of the appellant. The learned counsel has contended that in the instant case no stale record was taken into consideration. Even if the service record of 1965-66 is left out of consideration, the adverse entry made in the service record of the appellant in 1978-79 cannot be held to be stale entry for the purpose of considering the suitability of the appellant in 1981. The learned counsel has contended that the appellant failed to get any superior rating over a long span of years. Accordingly, there is ample justification to hold him unsuitable and the impugned order was, therefore, properly made. The learned counsel for the respondent has, therefore, submitted that no interference is called for and the same should be dismissed.

After giving our anxious consideration to the facts and circumstances of the case and submissions made by the learned counsel for the parties, it appears to us that the appellant was not made permanent in the post of Junior Engineer. Although he was made permanent, as indicated hereinbefore, such order was passed in complete violation of the interim order of injunction passed by the High Court in the Writ Proceedings which debarred the respondents from confirming any Junior Engineer. Since the order of confirmation of the appellant was made in violation of the injunction order, the mistake committed in passing the order of confirmation was corrected. In our view, in such circumstances, the appellant was not required to be given any opportunity of being heard for correcting such mistake because there was no occasion to take one view or the other in the matter of correction of the said mistake on the basis of the representation to be made by the appellant. The order of confirmation was *per se* illegal and in violation of the order of injunction passed by the High Court and the same being invalid was got to be corrected, in any event. The finding of the Tribunal that the impugned order of termination was passed without any stigma and not as a punitive measure has been upheld by the High Court and we find no justification in taking a contrary view simply because the appellant was a President of local union at Kanpur, and according to him, he had raised demands on behalf of the employees. There are no materials warranting a finding that he was picked up for incurring displeasure of the higher authorities and the service was sought to be terminated *mala fide* on some pretext. It appears that although the appellant had remained in service for 16 years but the service record of the appellant was not at all convincing even within a span of five years prior to the date

- A of consideration of his suitability to be retained in temporary service. He suffered an adverse entry and despite opportunity to make representation, such entries were maintained. The assessment of other years of service in the recent past was also not assuring and the appellant was rated as average. if on consideration of such service records, the appropriate committee did not find the appellant suitable to be confirmed in service and the concerned authorities on consideration of poor service record of the appellant had come to the finding that he was not suitable to be retained in service and the impugned order was passed without any stigma and in accordance with the service rules, the same cannot be held illegal or invalid. We, therefore, find no justification to set aside the impugned order of termination of service.

- D It, however, appears to us that the appellant had in fact rendered 16 years of service in LSGED and thereafter in U.P. Jal Nigam. Although the service record of the appellant was not good, the concerned authorities had allowed him to continue in service despite the poor rating and adverse entries. The appellant has advanced in age and there is force in the contention of Mr. Mukhoty that it will be very difficult for the appellant to get suitable employment opportunity at this advanced age. In *Triveni Shanker's* case (supra), a similar circumstance was taken into consideration by this Court and it was held that inspite of poor service record, the termination was not affected at the earlier point of time thereby depriving the appellant to secure some other employment. This Court, therefore, though upheld the termination of service, directed the State Government to pay a sum of Rs. 50,000 as *ex gratia* within four months. The facts and circumstances of this case also similar and for the same reason, although we have not interfered with the termination of the service of the appellant, we direct the U.P. Jal Nigam to pay a sum of Rs. 75,000 to the appellant within a period of three months from today. Although appeal is dismissed, in the facts and circumstances of the case, there will be no order as to cost.

T.N.A.

Appeal dismissed.