

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6157 of 2016

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Asin Mohammad, son of Jamadar Mian, resident of Village & P.O.- Dhanauti, P.S.- Pakridayal, District- East Champaran at Motihari (Bihar), at present Care of Md. Alamgir, near house of Md. Manauar Alam Grillwala, New Azimabad, Sandalpur, P.S.- Bahadurpur, P.O.- Mahendru, District- Patna (Bihar).

.... Petitioner/s

Versus

1. Bihar Education Project Council, Shiksha Bhawan, Rastrabhasa Parishad, Saidpur, Rajendra Nagar, Patna- 800004 (Bihar) through the State Project Director.
2. Development Commissioner -cum- Chairman, Executive Committee, Bihar State Project Council, Patna (Bihar).
3. The State Project Director, Bihar Education Council, Shiksha Bhawan, Rastrabhasa Parishad, Saidpur, Rajendra Nagar, Patna- 800004 (Bihar).

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Raju Giri, Adv.
Mr. Santosh Kumar Mishra, Adv.
For the Respondent/s : Mr. Girijish Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 04-09-2017

The petitioner prays for a writ in the nature of certiorari for quashing the order bearing Memo No.MGT/Appeal/282/14-5284 dated 9.8.2014 passed by the State Project Director, Bihar Education Council, whereby he has refused to interfere with the earlier order bearing Memo No.3778 dated 3.6.2013, whereby and whereunder the appointment of the petitioner as Assistant Programme Officer was terminated. Copies of the order dated 3.6.2013 and 9.8.2014 are impugned at Annexures 13 and 17 respectively.

The petitioner has also prayed for quashing of the order dated 7.10.2014 passed by the respondent Development



Commissioner –cum- Chairman, Executive Committee, Bihar State Project Council, whereby the appeal of the petitioner has been dismissed and the order of the State Project Director has been confirmed. Copy of such order is impugned at Annexure 19 to the writ petition.

The facts of the case briefly stated is that an advertisement was issued by the State of Bihar inviting application on the post of Assistant Resource Persons in the year 2006. The petitioner responded to the advertisement and was appointed against one such post vide order dated 10.1.2007 of the State Project Director, a copy of which is present at Annexure-1. The appointment was for a period of 3 years or until the completion of the project whichever was earlier. Before the expiry of the tenure of 3 years that the services of the petitioner was extended vide order bearing Memo No.964 dated 3.2.2010 of the State Project Director present at Annexure-4 for a further period of 3 years ending on 31.3.2012.

It is during such engagement of the petitioner that another advertisement was issued for recruitment on a number of posts by the Bihar Shiksha Pariyojna Parishad, a copy of which is present at Annexure-5. The recruitments were to be made on short term contract/short term deputation basis. The petitioner filed his application against the post of Assistant Programme Officer. The



petitioner qualified in the written examination and vide appointment letter dated 21.2.2011 present at Annexure-6 was appointed as Assistant Programme Officer. The petitioner joined the new post on 23.2.2011 at Saharsa after resigning from the post of Assistant Resource Person. The appointment of the petitioner was with effect from his date of joining on 23.2.2011 until 31.3.2012. The service contract allowed the employer to terminate the service contract if the service of the petitioner was not found satisfactory or his conduct was found adverse or he was found criminally involved in cases. Within one year of the posting of the petitioner at Saharsa vide Annexure-6 that he was transferred vide order of the State Project Director bearing Memo No.3982 dated 13.8.2012 from Saharsa to Arwal on account of deficient staff as well as for expediting the working of the centres. A copy of the order of transfer is placed at Annexure-7.

It is after the transfer of the petitioner from Saharsa to Arwal that an enquiry was held on 21st and 22nd of August, 2012 by the State Programme Officer, Bihar Madhyamik Shiksha Parishad and the Programme Officer, Bihar Pariyojna Parishad. The committee after examining the functioning of the centres in the district of Saharsa submitted its report on 5.9.2012. Several infirmities were reported by the committee into the functioning of



the centres. The reference of the petitioner comes in the concluding paragraph of the report in which it is mentioned that the petitioner was single handedly managing the centres in the district. The report also mentions that considering his competence and his busy schedule it cannot be expected that he would be guiding the centres on full-time basis.

It is following the report at Annexure-9 that a show cause was served on the petitioner by the Programme Officer on 4.11.2012 who while reiterating the illegalities noticed by the committee in their report, has asked the petitioner to explain as to why he be not held responsible for the improper functioning of the centres which was a reflection of his lack of interest, inefficiency, incompetence and lack of foresight. The petitioner filed his reply on 1.12.2012, a copy of which is present at Annexure 10/A.

Besides the petitioner, even the District Education Officer, Saharsa was put on notice and whose reply to the allegation mentioned in the joint enquiry report, is annexed at Annexure-11, which was filed on 5.11.12 before the State Project Director. It is while this exercise was on, that the State Project Director vide order bearing Memo No.2126 dated 2.4.2013 extended the service of the petitioner until 31.3.2015. A copy of the order is present at Annexure-12 and it is within two months thereafter that the State



Project Director terminated the service of the petitioner on grounds that his service was found unsatisfactory vide order bearing Memo No.3778 dated 3.6.2013 impugned at Annexure-13.

The petitioner feeling aggrieved came before this Court in CWJC No.11750 of 2013. A coordinate Bench of this Court vide judgment and order passed on 15.1.2014 disposed of the writ petition with liberty to the petitioner to avail of the alternative remedy. A copy of the order of the Bench is enclosed at Annexure-15. The petitioner filed an appeal before the Development Commissioner, Bihar who vide order passed on 11.7.2014 present at Annexure-16 found substance in the appeal preferred by the petitioner and accordingly quashed the order of the State Project Director on grounds of having been passed in violation of principles of natural justice and remitted the matter before the State Project Director for its disposal afresh and in accordance with law. On remand the matter was considered by the State Project Director and who after giving opportunity to the petitioner has reiterated his earlier view to terminate the service of the petitioner vide order bearing Memo No.5284 dated 9.8.2014 impugned at Annexure-17 to the writ petition.

A criminal case was also instituted against the petitioner and others bearing Saharsa Sadar P.S. Case No.713 of 2012 in which



final form was submitted in favour of the petitioner present at running page 156 of the proceedings.

On the other hand it is feeling aggrieved by the order of the State Project Director impugned at Annexure 17 that the petitioner preferred appeal before the Development Commissioner and who has been pleased to dismiss the appeal and confirm the order of the State Project Director vide his order dated 7.10.2014 impugned at Annexure-19 to the writ petition and feeling aggrieved the petitioner is before this Court.

Mr. Raju Giri, learned counsel appearing for the petitioner while reiterating the sequence of events has basically argued on the issue that the act of the respondents in terminating the services of the petitioner is not only in violation of the principles of natural justice inasmuch as the petitioner has not been provided with reasonable opportunity to defend himself, rather the impugned order is discriminatory in view of the order present at Annexure-20 which is an order of the State Government dropping the proceeding against the District Programme Officer facing same charges.

Mr. Giri while accepting that the appointment of the petitioner was on contractual basis and also appreciating the limitations attached thereto, has submitted that even in such of the cases the hire and fire rule has not been appreciated by the Court



rather it has been held that due process of law should be followed in such cases also. He submits that although the order of termination as contained in Annexure-13 is innocuously worded and simply attributes the allegedly unsatisfactory work performance of the petitioner as the reason for his termination but the fact is otherwise inasmuch as the foundation of the termination is resting on the enquiry report present at Annexure-9 which was held behind back of the petitioner and even after his transfer from Saharsa to Arwal. It is submitted that even the enquiry report while commenting upon the functioning of the centres in the district of Saharsa, has accepted that it was not possible for the petitioner alone to manage the same. It is submitted that even while the enquiry was being conducted on the inefficient functioning of the centres in the district of Saharsa, the tenure of the petitioner was extended by the State Project Director until 31.3.2015 vide order passed on 2.4.2013 at Annexure-12. According to Mr. Giri, the extension obviously was granted by the Executive Committee on being satisfied with the past performance of the petitioner.

It is submitted that following the order passed by this Court in the previous round of litigation, the petitioner filed appeal before the Development Commissioner which was allowed vide order passed on 11.7.2014 at Annexure-16 and the matter was



remitted to the State Project Director for passing an order afresh. He submits that on remand the State Project Director has passed an exhaustive order commenting upon the conduct of the petitioner. According to Mr. Giri, the moment the State Project Director has commented on the conduct of the petitioner it required a determination in a regular constituted proceeding and not on merely a show cause.

Mr. Giri has relied upon a Constitution Bench judgment of the Supreme Court reported in **AIR 1958 SC 36 (P.L. Dhingra vs. Union of India)** and with a particular reference to paragraph 28 of the judgment he submits that the right of a contractual employee to the protection guaranteed under Article 311(2) of the Constitution of India where a termination is based on allegation of misconduct has been recognized. According to Mr. Giri, the action complained of, does not satisfy the requirements of Article 311 of the Constitution of India.

Learned counsel has next relied upon a judgment of the Supreme Court reported in **(2012)6 SCC 502 (Brij Mohan Lal Vs. Union of India)** and with reference to paragraph 163 of the judgment it is submitted that the legal position so settled in the judgment of **P.L. Dhingra** (supra) continues to bind the authorities.

Learned counsel has also relied upon the judgment of the



Supreme Court reported in **AIR 1986 SC page 1571 (Central Inland Water Transport Corporation Limited Vs. Brojo Nath Ganguly)** to submit in reference to paragraph 105 of the judgment that the State's action has to be in conformity with Article 14 of the Constitution of India and not discriminatory. He submits that though the District Programme Officer has been exonerated of the charges simply on submission of final form, even though similar situation exists in the case of the petitioner but it does not satisfy the State Project Director.

Mr. Giri has next referred to a Constitution Bench judgment of the Supreme Court reported in **AIR 1960 SC 689 (The State of Bihar vs. Gopi Kishore Prasad)** and in reference to the opinion expressed by the Constitution Bench at paragraph 5(3) he submits that the protection of a probationer under Article 311(2) of the Constitution of India has been upheld where a termination was resting on stigma. According to Mr. Giri, the sequence of events itself would confirm that although wild the allegations were made against the petitioner but the opinion to terminate has simply proceeded by upholding the allegation without proving the same in a duly constituted enquiry.

Besides questioning the impugned order on grounds that it is violative of Article 311(2) of the Constitution of India inasmuch



as no duly constituted proceedings were held, the order has also been questioned on grounds that it has gone beyond the charge as well is discriminatory because while the District Programme Officer has been exonerated of the same allegations, the petitioner has been meted a discriminatory treatment.

The argument of Mr. Giri, learned counsel appearing for the petitioner has been contested by Mr. Girijish Kumar who has referred to the opinion of the Bench in the previous round litigation present at Annexure-15 and in particular reference to the submission of learned senior counsel appearing for the petitioner in the said case, as found at running page 142 of the proceedings, he submits that the limitation of a contractual employee as against the procedure provided under Article 311 of the Constitution of India has been accepted when the learned senior counsel appearing for the petitioner has submitted that the petitioner is not seeking relief to question the termination under Article 311 of the Constitution of India rather is complaining against the denial of opportunity to the petitioner before the order of termination impugned at Annexure-13 was passed. He submits that the petitioner having accepted before this Court that the benefit of Article 311(2) of the Constitution of India was not available to a contractual employee, he cannot be permitted to take a turn around and rely on the same provision for



questioning the impugned order.

According to Mr. Girijish Kumar, on a remand by this Court vide judgment and order present at Annexure-15, the appeal so filed by the petitioner was considered by the appellate authority i.e. the Development Commissioner and who found substance in the plea taken by the petitioner to remand the matter to the State Project Director for disposal of the matter afresh and in accordance with the principles of natural justice.

It is stated that the second order upholding the termination impugned at Annexure-17 was passed after giving due opportunity to the petitioner and after supplying him with the materials on which reliance was placed for passing the order. He submits that since the petitioner himself has accepted that the protection under Article 311(2) of the Constitution of India was not available to him, the order of the State Project Director impugned at Annexure-17 having been passed after giving opportunity to the petitioner to defend himself against the allegation, is in conformity with the principles of natural justice.

Learned counsel has relied upon a Constitution Bench judgment of the Supreme Court reported in **AIR 1961 SC 177 (State of Orissa vs. Ram Narayan Das)** and with reference to the issue in contest discussed at paragraph 2 of the judgment as well as the



opinion expressed at paragraphs 8 to 12 it is submitted that the distinction between a termination simpliciter resting on a report and a termination with stigma has been discussed to hold that where an enquiry report becomes a motive for termination then the provisions of Article 311 of the Constitution of India is not attracted but where the enquiry report casts a stigma on the person which becomes a foundation for his termination then it would attract the procedure provided under Article 311(2) of the Constitution of India.

Learned counsel on the same proposition has made reference to a judgment of the Supreme Court reported in **(1976)4 SCC 52 (State of Uttar Pradesh Vs. Ram Chandra Trivedi)** and in reference to paragraphs 16 and 23 to 25 he submits that the principles so laid down have been reiterated. According to Mr. Girijish Kumar, whatsoever be the complaint of the petitioner regarding denial of reasonable opportunity, the remand of the matter under the order of the appellate authority at Annexure-16 has resulted in curing of the effect whatsoever when the petitioner was given full opportunity to defend himself against the allegation. He submits that if the explanation of the petitioner did not satisfy the State Project Director, it does not require any interference on mere second opinion.

I have heard learned counsel for the parties and I have



perused the records.

Although exhaustive arguments have been advanced by learned counsel appearing for the contesting parties who have also relied upon separate set of judgments but the ratio laid down in each of the judgment is the same and which is that where the enquiry against a contractual employee is a motive for termination of service then it does not require a recourse to the procedure provided under Article 311(2) of the Constitution of India but where the allegation in an enquiry report charges the delinquent of misconduct which affects his future career then definitely the provisions of Article 311(2) of the Constitution of India would be attracted.

In fact the judgments relied upon by Mr. Giri and Mr. Girijish Kumar stands noted in a recent judgment of the Supreme Court rendered in the case of **Ratnesh Kumar Choudhary vs. IGIMS reported in 2016(1) PLJR (SC) 135** and I am tempted to reproduce the relevant extract of the opinion expressed by the Supreme Court in paragraph 18 of the judgment.

“18. This Court noticed that there are two lines of authorities. In certain cases of temporary servants and probationers, it had taken the view that if the ex-parte enquiry or report is the motive for termination order, then the termination is not to be called punitive merely because the principles of natural justice have not been followed; and in the other line of decisions, this Court has ruled that if the facts revealed in the enquiry are not the motive but the foundation for the termination of services of the temporary servant or probationer, it



would be punitive and principles of natural justice are bound to be followed and failure to do so would make the order legally unsound. The Court referred to the judgments rendered in **Samsher Singh (supra)**, **Parshotam Lal Dhingra vs. Union of India**⁶, **State of Bihar vs. Gopi Kishore Prasad**⁷ and **State of Orissa vs. Ram Narayan Das**⁸ and, eventually, opined that that if there was any difficulty as to what was “motive” or “foundation” even after the **Samsher Singh’s case** the said doubts were removed in **Gujarat Steel Tubes Ltd. Vs. Gujarat Steel Tubes Mazdoor Sabha**⁹. The clarification given by the Constitution Bench in the said case, being instructive, the two-Judge Bench reproduced the same, which we think we should do:-

“53. Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinised, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, 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.

54. On the contrary, even if there is a 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. We need not chase other hypothetical situations here.”

Similar is the expression of the Supreme Court in the case of **Ram Chandra Trivedi** (supra) as found at paragraph 16 thereof. The question thus which requires an adjudication is whether the termination of service of the petitioner is founded on a misconduct or the findings recorded in the enquiry have become a motive for his termination.

Both the parties do agree that it is the enquiry report at Annexure 9 which is the foundation for the impugned action and the committee while expressing its opinion on the functioning of the centres, had in the concluded portion recorded that the petitioner was managing the programme at the district level and although the role of a Block Education Extension Officer was well defined but considering his busy schedule and competence it was not expected that he would be able to give full time attention to the centres.

The show cause at Annexure-10 again comments upon the incompetence, inefficiency and the laid back attitude of the



petitioner in the management of the centres. In other words, it is the lack of efficiency of the petitioner to manage the centres which appears to be the foundation for the impugned action. In fact it is in this view of the matter that on receiving the explanation by the petitioner, the State Project Director proceeded to terminate the appointment of the petitioner in accordance with the provisions of the Bihar Education Project Council (Service Conditions) Rules, 2010 (hereinafter referred to as 'the Rules'). Since 'the Rules' provided for an alternative remedy of appeal that the challenge of the petitioner to the impugned order at Annexure-13 through CWJC No.11750 of 2013 resulted in a disposal with liberty to the petitioner to exhaust the alternative remedy so available vide order present at Annexure-15.

Following the order of this Court and in consideration of the appeal so filed by the petitioner, the appellate authority i.e. the Development Commissioner came of the opinion that the principles of natural justice had been violated by the State Project Director and the matter was remitted to him for disposal accordingly which has resulted in the termination order dated 9.8.2014 impugned at Annexure-17.

A plain reading of the order impugned passed by the State Project Director on remand would show that he has not found the



explanation given by the petitioner satisfactory on the inefficient functioning of the centres under his administrative control. Although for reasons entirely at the discretion of the State Project Director, he has referred to the earlier tenure of the petitioner as a Assistant Resource Person prior to his engagement as Assistant Programme Officer vide Annexure 6 but that is merely to demonstrate that even the previous tenure of the petitioner as an Assistant Resource Person was not satisfactory. The order, however, is not resting on the past conduct of the petitioner rather it is in consideration of the illegalities noted by the committee which commented on the inefficient functioning of the petitioner as an Assistant Programme Officer for the district of Saharsa and the response of the petitioner not being found sufficient enough to repel the allegation that the order has been passed.

Though final form has been submitted in favour of the petitioner in the criminal case, not finding the allegations proved and which has also been accepted by the Magistrate as submitted by learned counsel and which was the reason for dropping of the proceedings against the District Programme Officer vide Annexure-20 but in my opinion, the service condition of a permanent Government servant and that of a contract employee is vastly different. While an inefficient functioning of a permanent



Government servant may or may not invite a punishment, a similar situation in the case of a contract employee acts adverse to his future continuation.

There is nothing in the enquiry report or in the show cause at Annexures 9 and 10 respectively which would cast any stigma on the petitioner. On the contrary the discussions present therein simply comments upon the inefficiency of the petitioner and which in fact has persuaded the State Project Director, who himself has issued extension order for the petitioner vide Annexure-12 on the approval of the Executive Committee, to end the service contract of the petitioner.

The right vested in the State Project Director to take such decision is supported by the opinion expressed by the Supreme Court at paragraph 28 of the judgment rendered in the case of **GRIDCO Limited vs. Sri Sadananda Doloi** since reported in **2012(1) PLJR 321**.

“28. It is also evident that the renewal of the contract of employment depended upon the perception of management as to the usefulness of the respondent and the need for an incumbent in the position held by him. Both these aspects rested entirely in the discretion of the Corporation. The respondent was in the service of another employer before he chose to accept a contractual employment offered to him by the Corporation which was limited in tenure and terminable by three months’ notice on either side. In that view, therefore, there was no element of any unfair treatment on unequal bargaining power between the appellant and the respondent to call



for an over-sympathetic or protective approach towards the latter. We need to remind ourselves that in the modern commercial world, executives are engaged on account of their expertise in a particular field and those who are so employed are free to leave or be asked to leave by the employer. Contractual appointments work only if the same are mutually beneficial to both the contracting parties and not otherwise.”

Such being the opinion of the Court in respect of a contractual appointment, in absence of any stigma accompanying the enquiry report, the show cause or the order impugned rather where the impugned order terminating the contractual appointment is resting on the inefficient functioning of the petitioner which is the motive for such impugned action, I am not persuaded to interfere with the orders impugned.

In result, the writ petition is dismissed.

(Jyoti Saran, J)

SKPathak/-

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