

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 12186/2016

Reserved on: 16.01.2018

Date of decision: 13.02.2018

IN THE MATTER OF:

RAVINDER KAUSHIK

..... Petitioner

Through: Mr. C.S. Panda with Mr. Sanjiv Kumar,
Advocates

versus

UNION OF INDIA AND ANR.

..... Respondents

Through: Mrs. Bharathi Raju, CGSC

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE REKHA PALLI

HIMA KOHLI, J.

1. The present petition has been filed by the petitioner, who was working on the post of a Driver with the ECHS Polyclinic, Base Hospital, Delhi Cantt., for declaring the order dated 03.11.2016, terminating his services, as void *ab-initio* and treating him as in continuous service with retrospective effect alongwith all consequential benefits.

2. The undisputed facts of the present case are that the petitioner, an ex-serviceman, was issued an appointment letter offering him appointment on the post of a Driver at the ECHS Polyclinic, Base Hospital, Delhi Cantt. on a contractual basis for a period of twelve months w.e.f. 01.04.2016 to 31.03.2017, with the consolidated salary of Rs.15,500/- per month. On his accepting the letter of appointment, a Service Agreement dated 04.04.2016 was executed between the petitioner and the respondent No.2/ECHS Polyclinic through Office Incharge.

3. In less than six months from the date of his appointment, the Station Headquarters received a complaint against the petitioner, which was forwarded to the respondent No.2 for a feedback (Annexure P-2 and P-3). Under cover of letter dated 17.09.2016, a copy of the aforesaid complaint was forwarded by the respondent No.2 to the petitioner and he was called upon to furnish his reply by 19.09.2016. The petitioner furnished a reply vide letter dated 20.09.2016, denying all the allegations levelled against him in the said complaint. Not satisfied with his reply, a notice to show cause was issued to the petitioner on 23.09.2016, to which he had submitted a reply on 23.10.2016. In the meantime, further acts indiscipline were committed by the petitioner, as were pointed out by the respondent No.2 in his letter dated 08.10.2016 and the notices to show cause dated 14.10.2016 and 28.10.2016. The petitioner was directed to furnish his reply, which he did. The respondents thereafter issued the impugned order dated 03.11.2016, terminating the services of the petitioner w.e.f. 05.11.2016, by invoking para 11(b) of the Service Agreement governing the parties.

4. We may note that the petitioner has not filed a copy of the Service Agreement dated 04.04.2016 and nor did the respondents do so when filing their counter affidavit. The said document was handed over to us in the course of arguments addressed on 16.01.2018 and taken on record.

5. Mr. Panda, learned counsel for the petitioner submitted that the impugned order of termination is illegal and liable to be set aside for the reason that the contractual services of the petitioner have been terminated prematurely against the terms and conditions of the Service Agreement; that contrary to the established principles of service jurisprudence the termination order has been passed without holding a departmental inquiry;

that the petitioner has been victimised as the order of termination is disproportionate to the offence; that principles of natural justice have been violated by the respondents and the petitioner has been condemned unheard. To fortify his submission that principles of natural justice demand that an enquiry be conducted against an employee and he be given an opportunity to set up his defence and lead evidence before an order is passed against him resulting in civil consequence, learned counsel has relied on the decisions of the Supreme Court in State of Orissa vs. Dr. (Miss) Binapani Dei and Ors. reported as **AIR 1967 SC 1269** and A.K. Kraipak and Ors. vs. UOI and Ors. reported as **AIR 1970 SC 150**.

6. Ms. Raju, learned counsel for the respondents countered the submissions made by the other side and stated that the appointment of the petitioner was purely contractual in nature and has been terminated in accordance with para 11(b) of the Service Agreement dated 04.04.2016, which the petitioner is deliberately withholding from the Court. She pointed out that in the short period of six months that the petitioner had served in the ECHS Polyclinic, his performance was not upto the mark, he had been discharging his duties very casually and that he did not pay any heed to the repeated verbal warnings given to him to improve his work and conduct at office. She submitted that the Office Incharge of the respondent No.2/ECHS Polyclinic had noticed that the work of the petitioner was unsatisfactory, he was casual, did not obey orders and repeatedly committed several mistakes. She drew the attention of the Court to the letter dated 23.10.2016 written by the petitioner in his own hand, admitting inter alia that he had been committing mistakes and had requested that he be given another opportunity to improve himself. Learned counsel stated that as the petitioner was not a

regular employee of the respondents, there was no need to initiate any disciplinary proceedings against him by holding a full-fledged enquiry before passing the termination order.

7. We have heard the arguments advanced by learned counsels for the parties, examined the records and the case law cited before us.

8. It is considered necessary to first reproduce the relevant paras of the Service Agreement dated 4.04.2016 governing the parties that are as follows:-

*“(B) The ECHS intends to hire services of **Driver** (designation of nature of work) for its polyclinic at Delhi Cantt-10 (Place) on contractual basis for a period of **04 Apr 16 To 31 Mar 17** and ECHS has found **NK Ravinder Kaushik (Retd)** suitable for performing duties of **Driver** (designation of the work).*

11. The ECHS shall have the right to terminate this agreement by giving one month's notice to the Engaged Person at one month's consideration as compensation in lieu thereof without prejudice to the generality of the right of termination may be on any of the following grounds for which an opportunity to show cause will be afforded to him/her:

- (a) Unsatisfactory performance of duty.*
- (b) Arrest or conviction by a court of law for any offence.*
- (c) Any acts prejudicial to security or interest of the Organization (ECHS).*
- (d) Inadequate work load.*
- (e) Breach/Violation of any provision of this agreement by the Engaged Person.*
- (f) Any other ground warranting his/her immediate removal from the contractual agreement.*

11(A). Without prejudice to the generality of the aforesaid right of termination of this contractual engagement by the ECHS, engaged person's service may also be termination at the discretion of the Station Commander after affording an opportunity to him/her to show cause, on any of the following

grounds. It is clarified that one month's notice as mentioned in the preceding clause, would not be necessary for termination of the contractual engagement under this clause:-

- (a) Professional incompetence or misconduct including an act of moral turpitude.*
- (b) Any act prejudicial to security or interest of the organization (ECHS).*
- (c) Absence of leave beyond 7 days without prior approval.*
- (d) Habitual of repeated absence from duty without prior permission of competent authority and prolonged absence due to medical fitness.*

12. The engaged person will also have the right to terminate this agreement before the expiry of tenure of contractual appointment by giving one month's notice or by foregoing one month's contractual amount as considered for engagement of service."

9. On a perusal of the aforesaid clauses of the Service Agreement, it is clear that the petitioner was appointed at the ECHS Polyclinic as a Driver for a period of one year on a purely contractual basis. Para 11 of the Agreement empowers the respondents to terminate the said Agreement by giving one month's notice to the petitioner, subject to an opportunity to show cause being afforded to him. The services of the petitioner have been terminated under para 11 of the Service Agreement, which states in so many words that the respondents are entitled to terminate his contractual engagement after affording him an opportunity to show cause. It is also an undisputed position that an opportunity of putting forth his stand in reply to the show cause notice was afforded to the petitioner before the impugned termination order came to be passed. From the terms and conditions of the contract, it is apparent that both the parties had the right to terminate the contract. The Service Agreement equally provides an option to the petitioner

to terminate the Agreement before the expiry of the tenure of the contract, by giving one month's notice or by forgoing one month's contractual amount.

10. In the present case, noticing that the petitioner was not sincere at work and lacked diligence, a notice to show cause was issued to him by the respondents. Finally, not satisfied with his reply, the respondents proceeded to terminate his services in accordance with para 11 of the Service Agreement.

11. We do not find any substance in the submission made by learned counsel for the petitioner that principles of natural justice have been violated in the present case and that a full-fledged enquiry ought to have been conducted before taking any action against the petitioner. We may note that the two decision cited by learned counsel for the petitioner are based on a different fact situation. In the case of Binapani Dei (supra), the respondent was working on a regular post in a Government Hospital in the Orissa Medical Service and her terms of employment were governed by Article 311 of the Constitution of India. Similarly, in the case of A.K. Kraipak (supra), the aggrieved petitioners were Gazetted Officers serving in the Forest Department of the State of Jammu & Kashmir. Neither of the cases deals with employees appointed on a purely contractual basis like the petitioner herein, for him to claim parity with them.

12. In the case of A.K. Kraipak (supra), the Supreme Court had specifically observed that what particular rule of natural justice should apply to a given case, would depend on the facts and circumstances of that case and the framework of the law under which the enquiry is held. Given the fact that in the present case, the petitioner was purely a contractual

employee, there was no requirement for the respondents to hold a full-fledged enquiry against him. We are of the opinion that principles of natural justice were complied with once a notice to show cause was issued to the petitioner pointing out the deficiencies in his service and calling upon him to respond. It was only after receiving and considering the petitioner's reply that the respondents had terminated his services strictly in accordance with the terms of his service agreement. Furthermore, the petitioner had himself admitted to his acts of indiscipline as recorded in his letter dated 23.10.2016 written by him in long hand and he had tendered an apology to the management with a request that he be given another opportunity to improve himself. The said document has not been disputed by the petitioner.

13. In Syndicate Bank vs. General Secretary, Syndicate Bank Staff Association and Anr. reported as (2000) 5 SCC 65, the Supreme Court had examined the case of an employee whose services had been terminated without holding any inquiry. After sending a notice to him to show cause for his continued absence, which notice was returned with the report that the employee had refused to receive the same, the bank had terminated the services of the employee, who had been on unauthorised leave for more than 90 days. Upholding the order of the bank terminating the services of the employee and setting aside the orders of the Tribunal and the High Court, the Supreme Court opined that the principles of natural justice were complied with by the Bank in the said case and observed as follows:-

“16. Now what are the requirements of principles of natural justice, which are required to be observed? These are: (1) a workman should know the nature of the complaint or accusation; (2) an opportunity to state his case; and (3) the management should act in good faith which means that the

action of the management should be fair, reasonable and just. All these three criteria have been fully met in the present case. Principles of natural justice are inbuilt in clause 16 of the Bipartite Settlement. When evidence was led before the Tribunal, the Bank produced the registered covers, which had been received back with the endorsement “refused” and the addressee “not found during delivery time”. Dayananda said that he never refused to receive the notice. In these circumstances the Tribunal thought it necessary to hold that notice was not served on Dayananda as the Bank did not examine the postman. The notice was sent on the correct address of Dayananda and it was received back with the postal endorsement “refused”. A clear presumption arose in favour of the Bank and against Dayananda. Yet the Tribunal held that no notice was given to Dayananda as the postman was not produced by the Bank. This appears to us to be rather an incongruous finding by the Tribunal. Unfortunately, the High Court did not go into this question at all. Considering the conduct of Dayananda all this period and after three years of his having voluntarily retired from the Bank in terms of clause 16 of the Bipartite Settlement his statement that he did not receive the notice was a sheer lie. His whole edifice was built on falsehood and yet the Tribunal was there to give him relief on the platter though at the same time criticised his conduct during his employment with the Bank.”

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19. This undue reliance on the principles of natural justice by the Tribunal and even by the High Court has certainly led to a miscarriage of justice as far as the Bank is concerned. The conduct of Dayananda as an employee of the Bank has been astounding. It was not a case where the Tribunal should have given any relief to Dayananda and yet the Bank was directed to reinstate him with continuity of service and mercifully the latter part of the relief the High Court struck down. There was no occasion for the Tribunal to direct that Dayananda be reinstated in service or for the High Court not to have exercised its jurisdiction under Article 226 of the Constitution to set aside the award.(emphasis added)

14. In the context of contractual employees, reference may be made to the observations of a Division Bench of this court in Neena Shad vs. MCD & Ors. reported as **(2010) 175 DLT 240**, wherein the court had considered whether the protection available to a government servant under Article 311 of the Constitution of India would be available to a contractual employee. We deem it appropriate to reproduce paragraph 68 of the aforesaid decision which reads as under:-

“68. Sometimes due to rush of work or other exigencies of service the government makes contractual appointments. Such appointments are made in respect of non-sanctioned posts and de-hors the recruitment rules. A person appointed on contractual basis does not enjoy the protection of Article 311(2) for the simple reason he is not member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State. (See the decision of Supreme Court reported as Union Public Service Commission v. Girish Javanti Lai Vaghela (2006) 2 SCC 482.” (emphasis added)

15. In view of the facts and circumstances of the case and the legal position highlighted above, we do not find any merit in the present petition, which is accordingly dismissed. The impugned order dated 03.11.2016 is upheld. The parties are left to bear their own costs.

HIMA KOHLI, J

REKHA PALLI, J

FEBRUARY 13, 2018

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