

**CM Nos.8898-C and 3476-C of 2022 in/and
RSA No.3831 of 2008**

Neutral Citation No.2008:PHHC:020839

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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**CM Nos.8898-C and 3476-C of 2022 in/and
RSA No.3831 of 2008**

Date of Decision: 15.03.2023

Promila Arora

....Appellant

Versus

Municipal Corporation, Ambala City and others

....Respondents

CORAM : HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. Ashwani Talwar, Advocate for the appellant.

Harsimran Singh Sethi, J. (Oral)

CM No.8898-C of 2022

Application is allowed.

Documents are taken on record.

CM No.3476-C of 2022

The present application has been filed for fixing
RSA No.3831 of 2008 for an early actual date of hearing.

Keeping in view of the averments made in the application,
the same is allowed and RSA No.3831 of 2008 is taken up for hearing
today.

RSA No.3831 of 2008

In the present Regular Second Appeal, challenge is to the
judgment of the lower Appellate Court by which, the judgment and decree

of the trial Court dated 29.08.2006 has been set aside and the suit filed by the respondent-plaintiff was dismissed.

Certain facts needs to be mentioned for the appreciation of the controversy in correct perspective.

The appellant-plaintiff was appointed as Clerk on temporary basis in the Municipal Council, Shahbad on 19.12.1980. In 1985, the appellant-plaintiff was transferred to the Municipal Council, Ambala. While working on temporary basis, the appellant remained absent from duty on various occasions. It has come on record that out of the total approximately 04 years of service, the appellant remained absent for more than 410 days, which is more than one year.

Keeping in view the fact that the appellant was absent from duty, the appellant was charge-sheeted on 19.07.1988. Reply to the charge-sheet was filed by the appellant and as the said reply was not found to be satisfactory, an enquiry officer was appointed to hold the enquiry into the allegations alleged against the appellant. The enquiry officer conducted the enquiry and substantiated the allegations in the enquiry report, copy of which is already on record as Ex.P16 dated 05.07.1990. The enquiry report was submitted to the appellant for her comments and consequently, keeping in view the reply filed, the appellant was dismissed from service vide order dated 11.12.1990 by the Punishing Authority. The said order of dismissal was challenged by the appellant by filing Civil Suit, which Civil Suit was decreed by the trial Court on 29.08.2006 holding that one of the witnesses examined were not allowed to be cross-examined due to which whole of the enquiry proceedings were

vitiated and a direction was issued to reinstate the appellant with the benefit of ₹01 lac as monetary benefit for the period the appellant remained out of service.

Feeling aggrieved against the decision of the trial Court, the defendants filed an appeal, which appeal was allowed by the lower Appellate Court on 21.08.2008 holding that the testimony of one of the witnesses has wrongly been appreciated by the trial Court to come to the conclusion that the witnesses were not alleged to be cross-examined rather due opportunity was given to the appellant to present her case and after substantiating all the allegations of unauthorized absence, her services were terminated. It was further held by the lower Appellate Court that the Courts are not to sit in an appeal over the decision of the disciplinary authority. The judgment and decree of the trial Court dated 29.08.2006 was set aside and the suit filed by the appellant was dismissed. Hence, the present Regular Second Appeal.

Learned counsel appearing on behalf of the appellant argues that a well reasoned judgment of the trial Court has been upheld by the lower Appellate Court and that too, without appreciating the evidence on record. It is further argued that keeping in view the facts and circumstances of this case, the punishment of dismissal is disproportionate to the charges alleged and proved.

On being asked as to point out the perversity in the judgment of the lower Appellate Court, learned counsel for the appellant submitted that one Subhash Bhatia, who was Establishment Clerk, was not allowed to be cross-examined, which fact has not been appreciated by the lower

Appellate Court in correct perspective so as to set aside the well reasoned judgment and decree of the trial Court. The testimony of the said witness which is already on record clearly states that the appellant was allowed to cross-examine the said witness but only one question was put to the said witness. Once the witness was allowed to be cross-examined and it was appellant, who had only put one question to the said witness does not mean that opportunity to cross-examine the said witness was not afforded. The judgment of the lower Appellate Court is in consonance with the evidence on record rather the trial Court misread the evidence already on record.

Further, one fact which has not been appreciated by both the Courts is that up to the date of the dismissal, the appellant was not a confirmed employee. Nothing has come on record to show that temporary appointment of the appellant was ever confirmed upto the date of passing of the order terminating her services.

Learned counsel for the appellant very fairly concedes the factum that only fact which has come on record is qua the temporary appointment of the appellant and there is no evidence that appellant was a confirmed employee at the time of imposition of punishment.

The question of law whether a temporary employee is entitled of the protection of Article 311 of the Constitution of India has already been settled by the Hon'ble Supreme Court of India in CA No.1345 of 1970, titled as **Oil and Natural Gas Commission and Vs. Dr. Md. S. Iskander Ali.** wherein it has been held that the employer is

well within its right to take an action against the temporary employee even without holding regular enquiry.

The relevant para is reproduced as under:

“9. In these circumstances, therefore, it is obvious that as the respondent was merely a probationer, the appointing authority did not consider it necessary to continue the enquiry but decided to terminate the services of the respondent as he was not found suitable for the job. It is well settled by a long course of decisions of this Court that in the case of a probationer or a temporary employee, who has no right to the post, such a termination of his services is valid and does not attract the provisions of Article 311 of the Constitution. In the case of *Samsheer Singh v. State of Punjab*, (1975)1 SCR 814, the matter was considered in all its aspects by a Constitution Bench comprising seven Judges of this Court and the Court adumbrated the following propositions :-

"Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any Rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this.....The fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment.....A probationer whose terms of service provided that it could be terminated without any notice and without any cause being assigned could not claim the protection of Article 311(2).....

An order terminating the services of a temporary servant or probationer under the Rules of Employment and without anything more will not attract Article 311. Where a departmental enquiry is contemplated and if an enquiry is not in fact proceeded with Article 311 will not be attracted unless it can be shown that the order though unexceptionable in form is made following a report based on misconduct.”

In the present case, the employer went ahead to hold enquiry

and prove the allegation before the action was taken against the appellant.

Hence, the assertion of the appellant that rules of natural justice have not been followed while holding the enquiry so as to violate Article 311 of the Constitution of India, cannot be accepted.

With regard to the argument raised by learned counsel for the appellant that the punishment imposed is not commensurate to the allegation alleged, it may be noticed that out of total temporary service of four years, the appellant remained absent for more than 410 days. This fact shows that the appellant was not interested in performing the duties. The absence is to be evaluated in the facts and circumstances of each and every case. No valid justification had come on record to support the said absence. Hence, in the facts and circumstances of the case when the appellant was holding temporary appointment and remained absent for sufficient long period without authorization and did not join the service despite receiving various notices, it cannot be said that the punishment imposed by the employer in the facts and circumstances of the case is disproportionate to the charges alleged and proved.

Keeping in view the above, no ground is made out for interference of this Court in the present Regular Second Appeal and the same is accordingly dismissed.

March 15, 2023
jt

(HARSIMRAN SINGH SETHI)
JUDGE

Whether reasoned/speaking? *Yes/No*
Whether reportable? *Yes/No*