

Chaitanya Prakash & Anr vs H.Omkarappa on 12 January, 2010

Equivalent citations: 2010 AIR SCW 1224, 2010 (2) SCC 623, 2010 LAB. I. C. 1207, AIR 2010 SC (SUPP) 444, (2010) 2 ALLMR 1006 (SC), (2010) 4 ALL WC 4195, (2010) 3 KCCR 93, (2010) 3 MAD LJ 753, (2010) 1 SCALE 386, (2010) 2 LAB LN 4, (2010) 124 FACLR 503, (2010) 1 SCT 579, (2010) 4 MAD LW 799, (2011) 1 SERVLJ 354, (2010) 1 SERVLR 517, (2010) 1 CURLR 481

Author: Mukundakam Sharma

Bench: Mukundakam Sharma, V.S. Sirpurkar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2786 OF 2007

CHAITANYA PRAKASH & ANR.

..... Appellants

Versus

H. OMKARAPPA

..... Respondent

JUDGMENT

Dr. Mukundakam Sharma, J.

1. The issue that falls for consideration in this appeal is whether the impugned order passed by the appellants against the respondent terminating his service during the period of probation was an order of termination simpliciter due to unsatisfactory service or "stigmatic" due to misconduct.

2. The respondent herein was offered an appointment to the post of Executive Director [Marketing] by the Appellant No. 2, namely, M/s. Hindustan Photo Films Manufacturing Company Ltd. by issuing an offer of appointment dated 03.06.1998. The said offer of appointment was accompanied with terms and conditions of appointment, one of which was that the respondent was to undergo probation for a period of one year, which is extendable. Those terms and conditions mentioned in the said offer of appointment are relevant for the purpose of deciding the present case. Few

important passages from the aforesaid terms and conditions are extracted hereunder:

"i. You will be on probation in the above post for a period of one year from the date of joining the post.

ii. During the period of your employment in the Company, you will be governed by the Service Rules of Hindustan Photo Films Service Rules for Officers, which would be applicable to the officers of the company as may be in force from time to time."

Clause-3 of the Hindustan Photo Films Service Rules for Officers which came into effect on 1st March, 1974 deals with matter of probation. The relevant sub- clauses within clause-3, read as follows:

"3.1 An Officer appointed by direct recruitment or promotion shall be on probation for a period of one year from the date of joining the post.

3.2 The performance during the period of probation shall be reviewed by the Company and the Company may extend the period of probation or terminate the services of the probationer recruited from outside at any time during or at the time of the probation period.

3.3 The Management would try to communicate the orders of confirmation to the Officer concerned as early as possible after the end of the period of probation. However, any delay in such communication does not mean the automatic confirmation of the Officer.

.....

3.5 During the period of probation, an Officer directly recruited shall be liable to be discharged from the services of the company after being suitably advised about his unsatisfactory performance or other reasons, if any...."

3. Pursuant to the aforesaid offer of appointment, the respondent expressed his willingness to join on the said post and consequently joined as Executive Director [Marketing] on 03.09.1998. At the time of joining, the respondent gave a declaration that he would abide by all the rules and regulations of the appellant No. 2 - Company. It is the specific case of the appellants that as the performance of the respondent was not found to be satisfactory during the period of probation his service was not confirmed and his probation was extended by another three months, in terms of Clauses 3.2 and 3.3 of the Service Rules. The aforesaid letter intimating the respondent that his probation had been extended by three months also mentioned that during the extended period of probation of three months he was expected to show concrete results in his performance which had been intimated to him from time to time and that his performance would be reviewed again on 05.10.1999.

4. The respondent addressed a letter dated 05.10.1999 in reply to the letter issued by the company dated 20.09.1999, wherein he had stated that his performance during the period of probation was excellent as his service records did not carry any adverse remarks.

5. That there are several letters on record wherein the appellant no. 1 advised the respondent to improve his performance. The appellants prepared a detailed report dated 25.11.1999 regarding his performance which was in the nature of an assessment of the respondent during the period of probation and the same was placed before the Board of Directors of the appellant company in its 225th meeting, which was held on 27.11.1999. The Board of Directors considered the performance and suitability of the respondent on the basis of his entire service records including the Performance and Assessment Report prepared by the office and passed a resolution to the following effect:

".....RESOLVED THAT the services of Shri H. Omkarappa, Executive Director (Marketing) be terminated on or before 2nd December, 1999. RESOLVED FURTHER THAT the Chairman-cum-Managing Director be and is hereby authorized to take all necessary steps in the matter".

6. Consequent upon the said decision of the Board of Directors, the appellant no. 1 issued a letter dated 29.11.1999 to the respondent terminating his services as Executive Director [Marketing] with effect from 29.11.1999.

7. Immediately thereafter, the respondent herein preferred a writ petition in the Madras High Court praying for setting aside and quashing the order dated 29.11.1999 issued by the appellant. Notice having been issued in the said writ petition, the appellants filed a detailed counter affidavit. The Division Bench of the High Court heard the writ petition after completion of pleadings. In the said writ petition it was also brought to the notice of the court that subsequent to the order of termination, the respondent applied for the post of Managing Director of M/s. Spices Trading Corporation Ltd. but he was not called for interview held during the selection process in view of the letter dated 29.02.2000 sent by the appellants bringing to their notice the misconduct of the respondent. The said writ petition was heard by the Division Bench of the High Court of Madras and by the impugned Judgment and Order dated 11.04.2007, the High Court allowed the writ petition holding that the order of termination passed by the appellants against respondent was stigmatic, and therefore, the said order could not have been given effect to without giving an opportunity to the respondent. It was, therefore, directed that the respondent herein would be allowed to continue in his service.

8. Being aggrieved by the Judgment and Order dated 11.04.2007 passed by the Division Bench of the High Court, the present appeal was preferred by the appellants herein on which we have heard the learned counsel appearing for the respective parties.

9. Mr. E.R. Kumar, Advocate for the appellants has drawn our attention to the terms and conditions of the appointment, the Rules position with regard to the service conditions of the respondent and also to the communications between the appellant no. 1 and the respondent. The counsel appearing for the appellants submitted before us that the High Court was wrong and incorrect in holding that

the order terminating the services of the respondent was stigmatic. It was also submitted that it cannot be said that the appellant no. 1 was biased against the respondent in taking the decision to terminate his services as the Board of Directors was responsible for passing a resolution to the effect of termination of the services of the respondent after considering the entire records and Performance and Assessment Report of the respondent. The Counsel also relied upon the decision of the Supreme Court in *Abhijit Gupta v. S.N.B. National Centre, Basic Sciences* reported in (2006) 4 SCC 469 and also the decision of the Supreme Court in *Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd.*, reported in (2003) 3 SCC 263.

10.Mr. P. Vishwanatha Shetty, learned Senior Advocate appearing for the respondent, on the other hand, submitted that a bare perusal of the order of termination dated 29.11.1999 would indicate that the same was stigmatic, and therefore, the High Court was justified in setting aside the same as the same was issued without giving any opportunity to the respondent and without conducting any enquiry in that regard. It was also submitted that the decision of the Board of Directors to terminate the services of the respondent was the result of bias of appellant No. 1 and also influenced by him as he was very much present in the meeting of the Board of Directors in which the decision to terminate the services of the respondent was taken.

11.In light of the submissions made by the counsel appearing for the parties, we have perused the entire records. The respondent was appointed as Executive Director [Marketing] vide letter dated 03.06.1998 on specific terms and conditions, one of which was that he would be on probation in the aforesaid post for a period of one year from the date of joining the post. It was also stated in para 3 of the letter of appointment that if the aforesaid terms and conditions are acceptable to the respondent he may indicate the date of joining within 10 days. The respondent accepted the aforesaid offer of appointment along with terms and conditions appended thereto and also specifically accepted the position that he would be guided by the rules and regulations applicable to the appellant no. 2 - Company.

12.We have already extracted the rule position governing the service conditions of the respondent. The respondent was ordered to be on probation for a period of one year and as per clause 3.2 of Service Rules his performance during the period of probation was to be reviewed by the company and that the company could extend the period of probation or terminate the service of the respondent at any time during or at the time of probation period. On the other hand, clause 3.3 of Service Rules stated there has to be an order communicating the order of confirmation to the officers concerned after the end of the period of probation. In the present case, no such order of confirmation was passed by the appellant no. 2 confirming the service of the respondent. There is no dispute with regard to the fact that the respondent continued to be on probation, which was extended for a period of three months.

13.A letter dated 20.09.1999 was issued to the respondent communicating to him that his probation period has been extended by another three months and that during the aforesaid period of probation he is expected to show concrete results in his performance which was being communicated to him from time to time and that his performance would be viewed during the period of probation and the said fact was communicated to him. There are communications on the

record communicating to the respondent that the appellants were not satisfied with the performance of the respondent. It was communicated to him in one of such communications that it was very disheartening to note that the respondent did not improve his deficiencies and show any improvement in his conduct and behaviour. The appellant no. 1 in his communications dated 20.09.1999, 04.11.1999 and 08.11.1999 apprised the respondent about his deficiencies. He was advised that if a significant improvement was not shown, the appellants would be constrained to initiate further action, as per Company Rules in that regard.

14. After making a total appraisal of his performance, a report was submitted to the Board of Directors by appellant No. 1. The record also discloses that the Board of Directors held a meeting and in that meeting they not only considered the Performance Assessment Report prepared by the appellant no. 1 but also perused the entire service record of the respondent, and thereafter took a conscious and considered decision of terminating his service due to unsatisfactory work. The aforesaid decision of the Board of Directors of appellant no. 2 was communicated to the respondent under the impugned order dated 29.11.1999. The respondent was not confirmed in the post of Executive Director (Marketing) and he continued to be on probation during which period his service could be terminated for unsatisfactory work and for doing so it was not necessary for the appellants to institute departmental proceedings or to give an opportunity of hearing to the respondent. But the fact remains that a number of communications were issued to the respondent by the appellant no. 1 bringing to his notice his dismal performance and unsatisfactory work with an advise to improve his performance.

15. Our attention was also drawn to a letter written by the respondent to the appellant no. 1, who was the Managing Director of the company. If a subordinate officer like the respondent is in the habit of using an intemperate language against his superior like the appellant No. 1 the decision taken by the appellant company cannot be said to be in any manner vitiated. Letter dated 13.11.1999 written by the respondent to the appellant no. 1 would support the said position and would speak volume about his behaviour and conduct. The relevant paragraphs of the said letter are extracted hereunder:

".....

I acknowledge the receipt of the above letters. I have also gone through the contents of the letters carefully. I respectfully submit to the respected CMD, that you have spent enough of your intellectual faculty to bring out a picture of non- performance by me, for which I must appreciate your efforts. However, I feel sad that you have wasted your energy in manipulating the facts through figures. As my Senior Officer & elderly person, I must also thank you for numerous advices given to me in the letter, which I must consider on their merits"

.....

"Sir, I must refer here that unlike my above explained case, yourself and Director Finance have joined this company only to enjoy better benefits which include status, good pay, perquisites and other facilities."

.....

"Alas, I am unable to comprehend from the fact that from the beginning of my career in HPF, I found that I have been restrained to perform with my full capacity by CMD and DF, by their non congenial attitude and acts, which gradually concentrated to the extent of suffocating me, affecting my efficiency to a great extent. Sir, it is not out of pen to mention here that under various acts of commissions and omissions of CMD and DF, I have been totally restricted from functioning as EDM, with even small part of my capacity. I give below some of them for your kind knowledge and perusal, even though you are quite aware of them."

.....

"Thus, it is not EDM's inefficiency/non performance that has affected the efficiency of Marketing Division, but the callous act of CMD/DF which prevented EDM from functioning normally and also affected his efficiency and credibility."

16. It is no longer *res integra* that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In this connection, we make a reference to the decision of the Supreme Court in *Abhijit Gupta v. S.N.B. National Centre, Basic Sciences* (supra), wherein also a similar letter was issued to the concerned employee intimating him that his performance was unsatisfactory and, therefore, he is not suitable for confirmation. We have considered the ratio in light of the facts of the said case and we are of the considered opinion that the basic facts of the said case are almost similar to the one in hand. There also, letters were issued to the concerned employee to improve his performance in the areas of his duties and that despite such communications the service was found to be unsatisfactory. In the result, a letter was issued to him pointing out that his service was found to be unsatisfactory and that he was not suitable for confirmation, and, therefore, his probation period was not extended and his service was terminated, which was challenged on the ground that the same was stigmatic for alleged misconduct. The Supreme Court negated the said contention and upheld the order of termination.

17. In *Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd.*, (supra) also the concerned employee was kept on probation for a period of two years. During the course of his employment he was also informed that despite being told to improve his performance time and again there is no such improvement. His shortfalls were brought to his notice and consequently by order dated 16.01.1997 his services were terminated, wherein also a reference was made to his unsatisfactory service. In the said decision, the Supreme Court has held that on the basis of long line of decisions it appears that whether an order of termination is *simpliciter* or punitive has ultimately to be decided having due regard to the facts and circumstances of each case.

18. In *Pavanendra Narayan verma v. Sanjay Gandhi PGI of Medical Sciences*, (2002) 1 SCC 520; this court had the occasion to determine as to whether the impugned order therein was a letter of termination of services *simpliciter* or stigmatic termination. After considering various earlier

decisions of this court in paragraph 21 of the aforesaid decision it was stated by this Court thus :-

"21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld."

19. In Abhijit Gupta (Supra.), this Court considered as to what will be the real test to be applied in a situation where an employee is removed by an innocuous order of termination i.e whether he is discharged as unsuitable or he is punished for his misconduct. In order to answer the said question, the Court relied and referred to the decision of this Court in Allahabad Bank Officers Assn. V. Allahabad Bank (1996) 4 SCC 504; where it is stated thus :-

"14.....As pointed out in this judgment, expressions like "want of application", "lack of potential" and "found not dependable" when made in relation to the work of the employee would not be sufficient to attract the charge that they are stigmatic and intended to dismiss the employee from service."

20. In our considered opinion, the ratio of the above-referred decisions are squarely applicable to the facts of the present case. The respondent was time and again informed during the probation period about his deficiencies and was given ample opportunities to improve them. Therefore, enough precautions were taken by the appellants to see that the respondent improved his performance and such an opportunity was provided to him. But such advices and opportunity were totally misplaced as the respondent considered the same as unnecessary encroachment and interference in his work and wrote back rudely in an intemperate language. Whether or not a person is suitable to be retained and confirmed in service could be considered and assessed by the Managing Director, namely, appellant no. 1, but he after making an appraisal submitted his report along with all other records of the respondent before the Board of Directors, who finally took the decision. The Board of Directors constituted of responsible persons and they while deciding the suitability of the respondent not only considered the Performance Assessment Report but also considered all other records, and thereafter they took a considered and conscious decision that the respondent was not suitable for confirmation and terminate his service. The said decision of the Board of Directors appears to be in parity with the ratio of the aforesaid decisions of this Court (supra). The reasons mentioned in the letter dated 29.11.1999 - terminating the services of the respondent cannot be said to be stigmatic. The appellant had time and again specifically brought to the notice of the respondent his short comings and no misconduct as such is alleged against the respondent by the appellant and therefore the present case is a case of termination simpliciter due to unsuitability of the respondent and not a case of punishment for misconduct.

21. It was brought to our notice during the course of argument by the counsel appearing for the respondent that the order of dismissal of the respondent dated 29.11.1999 was stigmatic is also

proved from the fact that subsequent to his termination, the respondent was called for interview for the post of Managing Director of M/s Spices Trading Corporation Ltd. and that when he reached the venue of interview, he was informed by the Selection Board that he was not required to attend the interview because the appellants informed the said company that the service of the respondent was terminated due to his unsatisfactory service performance. Referring to and relying on the same, it was submitted by the counsel appearing for the respondent that it indicated and fortified the vindictive attitude of the 1st appellant herein from issuance of the aforesaid letter. We have perused the relevant records and on the basis of the same we are of considered opinion that the appellants informed M/s Spices Trading Corporation Ltd. company on being specifically asked by the said company about the performance of the respondent and consequently it was informed that his service was terminated due to unsuitability, which is a fact. If, they would have not intimated the same to the company despite their specific query then they would have been suppressing the material fact. In our considered opinion the aforesaid aspect does not in any manner support the case of the respondent.

22.In view of the above, we hold that the impugned order is not stigmatic and as such the decision of the High Court is erroneous and vitiated. We accordingly, hereby set aside the same and restore the order dated 29.11.1999 passed by the appellant.

23.As a result, the appeal is allowed. There will be no orders as to costs.

.....J. [V.S. Sirpurkar]

.....J. [Dr. Mukundakam Sharma] New Delhi, January 12, 2010.