

Sanjay Bhanubhai Makwana vs State Of Gujarat on 7 May, 2019

Author: N.V.Anjaria

Bench: N.V.Anjaria

C/SCA/15773/2018

CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 15773 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE N.V.ANJARIA

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | No |
| 2 | To be referred to the Reporter or not ? | No |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | No |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | No |

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SANJAY BHANUBHAI MAKWANA

Versus

STATE OF GUJARAT

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Appearance:

MR YATIN OZA, SR. ADVOCATE WITH MR JIT P PATEL(6994) for the
Petitioner(s) No. 1

MR KRUTIK PARIKH, AGP for the Respondent(s) No. 1, 2
RULE SERVED BY DS(65) for the Respondent(s) No. 1,2

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CORAM: HONOURABLE MR.JUSTICE N.V.ANJARIA

Date : 07/05/2019

CAV JUDGMENT

Heard learned senior advocate Mr.Yatin Oza with learned advocate Mr.Jit Patel for the petitioner and learned Assistant Government Pleader Mr.Krutik Parikh for the respondents.

2. The challenge in this petition, filed under Article 226 of the Constitution, is directed against order dated 30th March, 2015 passed by respondent No.2

- Commissioner of Transport terminating the services of the petitioner. It is prayed to set aside the said order and to further direct the respondents to reinstate the petitioner on his post with all consequential benefits.

2.1 Another prayer was inserted by way of amendment seeking directions against the respondents to treat the appointment of the petitioner to the post of Assistant Vehicle Inspector, Class-III as regular appointment from the inception and further to direct the respondents to treat the selection of the petitioner on the post in question as a regular selection.

2.2 Learned advocate for the petitioner, at the outset, stated that he would not press the prayer as inserted by way of amendment and that the petitioner may be allowed to agitate on merits the said prayer in separate appropriate proceedings. Accordingly, reserving such liberty, without expressing any opinion on merits for the petitioner, the present petition is confined to the challenge to the aforesaid impugned order dated 30th March, 2015 only.

3. Looking at the impugned order, it mentioned about the F.I.R. having been filed against the petitioner under the provisions of the Prevention of Corruption Act, 1988 at Crime Register No.I-03 of 2014 before ACB Police Station at Valsad. It was alleged that petitioner, along with other persons, was caught while accepting the amount of bribe and that the petitioner was arrested. Thereafter mentioned were condition No.11 in the order of appointment. Condition Nos.11 and 12 of the order of appointment to state that petitioner was liable to be terminated during the fixed period if he was found to have committed serious misconduct or financial irregularity. It was thereafter mentioned that the Gujarat Civil Services (Conduct) Rules, 1971 would not straightway apply to the employee as he was a fixed term employee.

3.1 After detailing the facts of the alleged incident wherein bribe was allegedly accepted by the petitioner, the respondent No.2 authority concluded that the petitioner had committed a misconduct in view of filing of the F.I.R. It was stated that the incident described in the complaint had taken place and that the misconduct committed by the petitioner was serious. According to the respondents, the petitioner was issued notice but he could not convince the authorities about his innocence and no documents were produced which proved innocence. Consequently, the services of the petitioner was terminated. Thus, the termination of services of the petitioner was on the footing that the petitioner had committed a misconduct.

4. Learned senior advocate for the petitioner submitted that the order was stigmatic in the nature. It was submitted that though apparently condition Nos.11 and 12 in the order of appointment were as referred to as the basis of termination of service of the petitioner, it was in fact a punitive measure based on the recording the finding of misconduct which again was only on the ground that F.I.R.

was registered. By relying on various decisions, learned senior advocate submitted that such an order could not have been passed without holding a valid inquiry and without complying with the principles of natural justice.

5. The question arises is whether the order was punitive and amounted to stigma which ought to have preceded by a regular inquiry against the petitioner in respect of the allegations levelled against the petitioner employee eventhough petitioner was appointed for a fixed term of five years.

5.1 In judging whether termination is simpliciter or punitive, a trite distinction is made between motive of the order and foundation of the order. In Chandra Prakash Shahi v. State of U.P. [(2000) 5 SCC 152], the Supreme Court explained the concept of motive and foundation in respect of probationer as under:

"Motive is the moving power which impels action for a definite result, or to put it differently, motive is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the act would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were to be true in the preliminary inquiry." (para 29) (emphasis supplied) 5.2 The Supreme Court in Gujarat Steel Tubes Limited v. Gujarat Steel Tubes Mazdoor Sabha [(1980) 2 SCC 593] stated and observed thus, "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." (Emphasis supplied) (Para 9) 5.3 The principle stated was that even the form of the order may be merely a camouflage for order of dismissal actually passed on the basis of misconduct. In such circumstances, the Apex Court stated, it is always open

to the court before which the order is challenged, to go beyond the form and ascertain the true character of the order. The Supreme Court held, "If the court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground where the aggrieved officer is not afforded a reasonable opportunity to defend himself as provided in Article 311(2). It is wrong to assume that it is only when there is a full scale departmental enquiry any termination made thereafter will attract the operation of Article 311(2)." (Paras 11 and 13) 5.4 It is the foundation of the order which really matters. The Supreme Court in Anoop Jaiswal (supra) stated that if from the record and the attendant circumstances of the present case it becomes clear that the real foundation for the order of discharge of the appellant-probationer was the alleged act of misconduct, the impugned order would amount to termination of service by way of punishment and in absence of any enquiry held in accordance with Article 311(2), it was liable to be struck down. The Supreme Court thereafter directed reinstatement of the appellant of the said case in service with the same rank of seniority he was entitled to before the impugned order passed as if it had not been passed at all.

5.5 In Ratnesh Kumar Choudhary (supra) also the Supreme Court considered its own various decisions on the aspect and after referring to the decision in Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd. [(1999) 2 SCC 21] observed that the proposition of law operating two ways. In certain cases of temporary servants and probationers if the inquiry undertaken about the very conduct forms the motive of termination order, then the termination could not be said to be punitive merely because principles of natural justice have not been followed. In such circumstances, without becoming stigmatic, the employer can exercise its right to terminate service of the employee concerned. In the other line of decisions, the Supreme Court has ruled that if the facts revealed in the inquiry or from the narration of the order itself that the inquiry into the conduct was not the motive but it was a foundation and the allegation of misconduct considered against employee becomes foundation of termination of service of temporary servant or probationer, such action would become punitive and it would make the order legally unsound. The Supreme Court in Ratnesh Kumar Choudhary (supra) thereafter referred to the above quoted observations from Gujarat Still Tubes Limited (supra) terming them as instructive.

5.6 In Manishbhai Nayanbhai Mod v. Vadodara Municipal Corporation [2018(2) GLR 1636] the petitioner was Assistant Station Officer and was appointed for a fixed term. It was alleged against him that while serving in the Fire Brigade Branch of the Vadodara Municipal Corporation on the post of Assistant Station Officer, petitioner misbehaved with the Telephone Operator and tried to injured Telephone Operator physically. In the impugned order it was mentioned that while being on the sensitive post, petitioner acted with negligency and carelessness in discharge of duties. Show-cause notice was issued against the petitioner and his reply was solicited. Thereafter his services put to an end, this Court referred all the aforesaid decisions to come to the conclusion that the order was founded on the allegations of misconduct and that it was punitive in nature casting stigma. It was held that, "Such an action could not have been taken, eventhough the petitioner was a fixed period employee, without giving the petitioner a full-fledge opportunity to defend and thus by

holding a regular departmental inquiry.".

5.7 Decision in Manishbhai Nayanbhai Mod (supra) was challenged by way of Letters Patent Appeal No.189 of 2018, which came to be dismissed. The Division Bench, confirming the decision in Manishbhai Nayanbhai Mod (supra), observed as under.

"4.1 The above act on part of the competent authority of appellant - Corporation was not only stigmatic, but contrary to law laid down by the Apex Court to which reference is made by learned Single Judge and distinguishing the facts of the present case it was found that termination was punitive. As a necessary corollary, when there is a breach of procedure of instituting full-fledged departmental inquiry, particularly, when termination order referred to following of Gujarat Civil Services [Discipline & Appeal] Rules, 1971, the issuance of show cause notice, receiving reply and then to take final decision to terminate services of an employee was unjust, unreasonable, arbitrary, in breach of the Rules, 1971, violative of principles of natural justice and Article 14 of the Constitution as it would not make any difference whether the employee was appointed temporarily for a fixed term on a fixed salary incorporating various conditions."

5.8 In another decision in Sandip Ajitsinh Vaghela v. State of Gujarat being Special Civil Application No.12071 of 2018 decided on 26th February, 2019 the same question had arisen where also the petitioner was Junior Clerk employed on temporary basis. In Rahul Aydanbhai Vank v. State of Gujarat being Special Civil Application No.889 of 2018 decided on 05th September, 2018, the petitioner was a contractual employee who was dismissed on the ground of insubordination. The order was found to have been passed on the allegation of misconduct. Same principles were applied and held that services could not have been terminated without undergoing the inquiry.

5.9 The aforesaid decision in Rahul Aydanbhai Vank (supra) was also confirmed in Letters Patent Appeal No.841 of 2019. In the following paragraph, the Letters Patent Bench referred to Manishbhai Nayanbhai Mod (supra) and other decisions to come to the following conclusion to clearly observe that full-scale formal inquiry was requirement of law before the services could have been terminated.

"8. Even decision relied by learned Assistant Government Pleader in the case of Chaitanya Prakash and Another v. H. Omlarappa reported in (2010) 2 SCC 623 quotes decision in the case of Pavanendra Narayan Verma vs. Sanjay Gandhi PGI of Medical Sciences [(2002) 1 SCC 520] where three tests are enumerated to determine whether in substance an order of termination is punitive or not. We find in the present case all above tests namely a full scale formal inquiry, allegation involving moral turpitude or misconduct and culminating into guilt stands satisfied and therefore we have no hesitation to hold that the learned Single Judge committed no error of fact or law or jurisdiction warranting interference in this appeal under Clause 15 of the Letters Patent."

6. When the impugned order is considered in light of the above principles and the position of law, it could be well discerned that the the event of filing of F.I.R. against the petitioner was treated as base and it was concluded readily by the respondents that the petitioner had committed misconduct for accepting the bribe. Upon this foundation, the termination was effected. It was on the ground of misconduct and therefore the stigmatic order, which could not have been passed without a full scale inquiry.

6.1 An attempt was made in vain by learned advocate for the respondents that there was compliance of natural justice as the notice was issued to the petitioner. A mere notice would not suffice. No inquiry was held, no charge was framed against the petitioner. Without issuing the charge and without putting the petitioner to knowledge of the allegation which he was to precisely answer, the principles of natural justice could not be said to be followed when the order was founded on misconduct. As held by the Division Bench of this Court in the judgment above, it necessitated a full scale inquiry against the petitioner after issuing show-cause notice and by framing appropriate charge, conducting it in accordance with the natural justice.

6.2 The petitioner was a fixed term employee who was appointed as Assistant Motor Vehicle Inspector, Class-III as per appointment order dated 17th May, 2013 for a period of five years. The impugned order came to be passed on 30th March, 2015. Therefore, the relief which would ensue for the petitioner shall be upto making up good the total period of five years of employment.

7. As a consequence of above discussion and reasons, the impugned order dated 30th March, 2015 passed by respondent No.2 - Commissioner of Transport is hereby set aside. Respondents are further directed to reinstate the petitioner on original post of Assistant Motor Vehicle Inspector, Class-III with continuity of service and with payment of salary/wages for the interregnum as well as the consequential benefits which may arise, as if the order of termination was never passed. The reinstatement of the petitioner directed as above shall be for the period upto making of the total original period fixed for his employment as per order of appointment. The resultant monetary benefits to be paid to the petitioner within a period of eight weeks from the date of receipt of the present order.

8. The respondents are not precluded from proceeding against the petitioner on accordance with law.

9. Petition is allowed in the aforesaid terms.

Direct service is permitted.

(N.V.ANJARIA, J) Anup