

State Of Gujarat vs Rahul Aydanbhai Vank on 15 April, 2019

Author: Anant S. Dave

Bench: Anant S. Dave, Biren Vaishnav

C/LPA/841/2019

ORDER

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/LETTERS PATENT APPEAL NO. 841 of 2019
In R/SPECIAL CIVIL APPLICATION NO. 889 of 2018
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2019
In R/LETTERS PATENT APPEAL NO. 841 of 2019

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STATE OF GUJARAT
Versus
RAHUL AYDANBHAI VANK

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Appearance:

MS AISHWARYA GUPTA, ASST GOVERNMENT PLEADER(1) for the
Appellant(s) No. 1,2,3
MR GAUTAM JOSHI, ADVOCATE WITH MR VYOM H SHAH(9387) for the
Respondent(s) No. 1

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE ANANT S. DAVE
and
HONOURABLE MR.JUSTICE BIREN VAISHNAV

Date : 15/04/2019

ORAL ORDER

(PER : HONOURABLE THE ACTING CHIEF JUSTICE ANANT S. DAVE)

1. This appeal is preferred under Clause 15 of the Letters Patent challenging oral order dated 05.09.2018 passed by the learned Single Judge whereby the writ petition filed by the petitioner challenged the order of termination dated 23.09.2016 passed by respondent being illegal, perverse and contrary to law and further to direct respondent authority to reinstate the petitioner on his original post with continuity of service and all consequential benefits flowing therefrom as if the order of termination was never passed.

2. Certain facts recorded by the learned Single Judge in paragraphs no. 3 & 3.1 are not in dispute and accordingly we reproduce the same hereinbelow:

"3. The petitioner was appointed as Forest Assistant on 08th August, 2013 at Meghraj Range, Sabarkantha Forest Division. His appointment was contractual in nature. Before the appointment to the said post could be fructified for the petitioner, he cleared physical examination as well as written test. The petitioner resumed his duties with effect from 15th August, 2013. The petitioner was also given training for six months from 26th August, 2013 to 28th February, 2014 subsequent to his appointment.

3.1 The impugned order dated 23rd September, 2016 came to be passed by the Chief Conservator of Forests, Gandhinagar, Forest Department, Gandhinagar, against the petitioner stating that the petitioner had shown dereliction in his duty ever since he joined duties, that he did not submit the necessary diaries. It was alleged that the petitioner was acted insubordination by not following the instructions of the superior. It was further stated that in the GFPD Scheme, the Assistant Conservator of Forests noticed certain irregularities. In respect of that also, the petitioner was responsible. Several instances are mentioned in the impugned order charging the petitioner with other insubordination, non-compliance of the instructions of the superiors and about having remained absent without any prior permission. The details of the allegations are not necessary to be mentioned to burden this order, however the instances of misconducts were alleged against the petitioner and it was provided in the order that in view of those instances, negligency in duties and unsatisfied work, his service was terminated."

3. Before the learned Single Judge, contentions were raised by learned advocate for the petitioner about stigma attached to the petitioner by passing the impugned order of termination which in extenso referred to various misconducts on the part of the petitioner which formed the basis rather foundation of passing the order of termination and by learned Assistant Government Pleader about unsatisfactory work on the part of the petitioner employee and terms and conditions of the contractual employment based on G.R. dated 06.10.2011 issued on 08.08.2013 which specifically mentioned about 5 years of fixed term appointment in a fixed salary and discretion was conferred upon the employer to terminate the services of the petitioner by issuing one month notice or in lieu thereof pay for such period. However, the learned Single Judge by referring to various decisions of the Apex Court, contents of misconduct referred to in order of termination and relying on the pleadings filed in the petition, concluded about order of termination attaching stigma and allowed the petition with reliefs prayed therein.

4. Being aggrieved and dissatisfied by the above order and direction of the learned Single Judge before us, Ms. Aishwarya Gupta, learned Assistant Government Pleader extensively contended that in a matter of contractual appointment for fixed term and salary for 5 years, condition no. 12 of the schedule attached to the order specifically provided that in case of a misconduct or for lack of efficiency, services of an employee would be put to an end by issuing one month notice or payment of fixed salary for a period of one month. She submitted that simply because reference was made in condition no. 8 about requirement of following procedure as per Gujarat Civil Services (Discipline and Appeal) Rules, 1971 ipso facto will not attract the provisions of Gujarat Civil Services (Discipline and Appeal) Rules, 1971 (hereinafter referred to as 'the Discipline Rules, 1971'). She submitted that in view of Rule 3 of the Discipline Rules, 1971 and further explanation to clause (8) of Rule 6 which is about (a) termination of service of a government servant appointed on probation during or at the

end of period of probation in accordance with the terms of his appointment or any rules and orders of Government in this behalf for the time being in force, or (b) of a temporary Government servant on purely administrative grounds or (c) of a Government servant employed under a contract in accordance with the terms of such contract, it would not amount to penalty and that no full fledged institution of departmental inquiry was necessitated even though repeated warnings were given and notices were issued to the petitioner for improvement of performance which he failed and as a result of observation of the conduct and performance of the petitioner as an employee, finally the order of termination was passed.

4.1 Ms. Gupta contended that the learned Single Judge accordingly fell into error by believing that the order of termination was stigmatic and therefore consequential order quashing and setting aside the termination order and direction of reinstating the petitioner in service deserves to be interfered with.

4.2 Reliance is placed on the decision of the Apex Court in the case of Chaitanya Prakash and Another vs. H. Omlarappa reported in (2010) 2 SCC 623 wherein termination of an employee was on the ground of unsatisfactory performance for which repeated notices were issued but the employee failed to improve upon and such act on the part of the employer was held to be not stigmatic. In the above decision, the Apex Court placed reliance on other decisions of the Apex Court including the decisions in the cases of Abhijit Gupta vs. S.N.B. National Centre, Basic Sciences [(2006) 4 SCC 469] and Pavanendra Narayan Verma vs. Sanjay Gandhi PGI of Medical Sciences [(2002) 1 SCC 520] wherein the Apex Court reiterated the principle to determine whether in substance an order of termination is punitive or not by ascertaining that whether prior to termination there was (a) full-scale formal inquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt and if all three factors as above are present, the termination is to be held as punitive irrespective of the termination order. Conversely, if any one of the three factors is missing, the termination is to be upheld. Therefore, according to learned Assistant Government Pleader, the order impugned passed by the learned Single Judge deserves to be quashed and set aside.

5. As against above, Mr. Gautam Joshi, learned advocate appearing for respondent - original petitioner would contend that the learned Single Judge threadbare addressed to the issues involved in the writ petition and upon assigning reasons, arrived at a finding of stigmatic nature of order of termination and that was found even without lifting the veil as the order of termination on the face of it was containing plethora of misconducts which formed the foundation for passing the order of termination. He submitted that the order passed by the learned Single Judge was supported by various decisions of the Apex Court and therefore warrants no interference. He submitted that accordingly the appeal deserves to be dismissed.

6. Having heard learned advocates appearing for the respective parties and having regard to the facts and circumstances of the case, upon appreciation of rival submissions viz-a-viz challenge to the order passed by the learned Single Judge whereby the order of termination came to be quashed and set aside and consequential directions of reinstatement etc is issued, we find that order dated 23.09.2016 passed by the Chief Conservator of Forest refer to following instances:

(I) As per condition no. 8 of the order of appointment dated 08.08.2013, the petitioner was required to maintain a diary of work performed by him but such diary was not presented from time to time for which repeated instructions were issued.

(II) About work pertaining to plantation in different forests earmarked for the year 2015-16, irregularities were found.

(III) Even in certain other forests, work of afforestation was found deficient.

(IV) At the time of monitoring by higher authorities, various ancillary duties to be discharged by the petitioner and to supervise, once again various irregularities were found and even after submitting sick report such leave was not approved.

(V) On different occasions, the superior authority tried to contact the petitioner at the time of field programme and to report at the office but again the petitioner had shown negligence in performance of duties and committed an act of indiscipline.

(VI) Even government record was destroyed.

6.1 Considering all such act of indiscipline and misconduct though the petitioner was expected to follow the discipline Rules, 1971 as stated in condition no. 8 of the appointment order, he failed to do so and therefore a decision was taken based on unsatisfactory work and gross negligence and indiscipline in performance of duties to put an end to his services.

7. In the above context, the learned Single Judge relied on the decision of this Court in the case of Manishbhai Nayanbhai Mod vs. Vadodara Municipal Corporation dated 30.11.2017 wherein this Court relied on the cases of Gujarat Steel Tubes Limited vs. Gujarat Steel Tubes Mazdoor Sabha [(1980) 2 SCC 593], Anoop Jaiswal vs. Government of India [(1984) 2 SCC 369, Radhey Shyam Gupta vs. U.P. State Agro Industries Corpn. Ltd [(1999) 2 SCC 21 and for ready reference we reproduce paragraph no. 5.2 of the order passed by the learned Single Judge as under:

"5.2 In Manishbhai Nayanbhai Mod (supra), the position of law was discussed, which is highlighted and reproduced as under.

"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 Having delineated the aforesaid principles, the Apex Court held that the order in the case before it could not be treated as a simple order of retrenchment and that it was an order passed by way of punishment. It was held that such order of dismissal which was passed without holding a regular departmental inquiry cannot be allowed to be sustained.

5.4 The above statement of law that if the order is punitive and stigmatic in nature, even if the employee concerned is a temporary employee or holding the post as on probation, his dismissal or removal would warrant a regular inquiry and full-fledge compliance of natural justice, emanated from the early decision of the Apex Court in Anoop Jaiswal v. Government of India [(1984) 2 SCC 369]. In that case, the Apex Court held that it is permissible for the Court to go behind the formal order of discharge so as to find out the real cause of action. In that case, the appellant was an IPS Officer, undergoing training as a probationer, arrived late by about 22 minutes at the place, even though prior intimation was sent about the time on which, the candidates were required to reach the venue. The incident of delayed reporting was considered to be one by the authorities calling for an inquiry and an explanation was sought for from the petitioner and all other probationer-trainees who had arrived late. On the basis of explanation, the Director recommended the Government for discharge of the appellant from service. The Government passed order of discharge on the basis of recommendation of the Director with whom, the only ground prevailing was that the appellant did not show any sign of repentance. The High Court dismissed the Writ Petition. However, the

Supreme Court allowed the Appeal and held that the order was punitive. The appellant was directed to be reinstated with full benefits.

5.5 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) 5.6 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.

5.7 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 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."

8. Even decision relied by learned Assistant Government Pleader in the case of Chaitanya Prakash and Another (supra) quotes decision in the case of Pavanendra Narayan Verma (supra) 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.

9. When the appointment of the petitioner had genesis in the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967, incorporation of certain terms and conditions contractual in nature pale into insignificance when the termination order is expressly stigmatic as rightly concluded by the learned Single Judge which required no lifting of veil and therefore the appeal is bereft of merit.

10. For the foregoing reasons, appeal is hereby dismissed. Civil Application also stands disposed of accordingly. No costs.

(ANANT S. DAVE, ACJ) (BIREN VAISHNAV, J) DIVYA