
(2002) 08 GUJ CK 0023

In the Gujarat High Court

Case No : Special Civil Application No. 7785 of 2002

Ajit Kumar Kachralal Raval

APPELLANT

Vs

Registrar, Gujarat University Service Tribunal and Another

RESPONDENT

Date of Decision : 19-08-2002

Acts Referred:

Constitution of India, 1950 — Article 226, 311

Citation : (2002) 22 GLH 609

Hon'ble Judges : M.S. Shah, J

Bench : Single Bench

Advocate : Mitul K. Shelat, for the Appellant;

Final Decision : Dismissed

Judgement

M.S. Shah, J.—What is challenged in this petition under Article 226 of the Constitution is the order dated 1-8-2002 terminating the petitioner's services from the post of Driver in the Gujarat Universities Services Tribunal (hereinafter referred to as "the Tribunal") on which post the petitioner was appointed on probation by order dated 30-5-2001. The petitioner was selected for the post of Driver pursuant to a driving test which was followed by an interview held by the Presiding Officer of the Tribunal. Pursuant to the said selection, the petitioner came to be appointed on the post of Driver on probation for a period of two years as per the appointment order dated 30-5-2001 which is produced at Annexure A to the petition. Condition No. 35 of the order specifically provided that the period of probation was two years which could be extended by one more year and that during this period if the petitioner's services were found to be satisfactory, the petitioner could be confirmed in service even before the completion of the period of probation. Condition No. 7 provided that the petitioner's services could be terminated during the period of probation or at the end of the period of probation without giving any notice or holding any inquiry. The appointment order also contains various other terms and conditions.

2. It appears from the various documents annexed to the petition that the

petitioner was served with several memos running into about 37 regarding the petitioner's conduct during the course of his employment as a Driver. Ultimately, the petitioner's services have been terminated by the impugned order dated 1-8-2002 at Annexure B to the petition.

3. Mr. Mitul K. Shelat, learned counsel for the petitioner has challenged the aforesaid order of termination on the following grounds :

(i) The petitioner was appointed on probation for a period of two years from 30-5-2001 and, therefore, the petitioner is entitled to continue as a Driver till 30-5-2003. The petitioner's services could not have been terminated before expiry of the said period. In support of the contention, reliance is placed on the decisions of the Apex Court in *The Management of the Express Newspapers (Private) Ltd. Madurai Vs. The Presiding Officer, Labour Court, Madurai and Another*, and an ad interim order dated 6-7-2000 of this Court in Special Civil Application No. 5004 of 2000 (Annexure C).

(ii) The impugned order recites that the petitioner's services are no more required after office hours of 1-8-2002 but the post in question is a permanent post and the petitioner's services are not required to be brought to an end because the learned Judge presiding over the Tribunal would require services of a Driver. Strong reliance is placed on the decision of the Apex Court in *Om Prakash Goel Vs. The Himachal Pradesh Tourism Development Corporation Ltd., Shimla and another*, .

(iii) Lastly it is submitted that although the termination order is couched in simple language, the Court should lift the veil and hold that the impugned order is by way of punishment as the respondent has already earlier issued several memos to the petitioner indicating that the petitioner had committed misconduct. It is submitted since the impugned order is passed without giving the petitioner any opportunity of being heard or without holding any departmental inquiry, the impugned order is illegal. Strong reliance is placed on the decision of the Apex Court in *Jarnail Singh and Others Vs. State of Punjab and Others*, and *Om Prakash Goel Vs. The Himachal Pradesh Tourism Development Corporation Ltd., Shimla and another*, .

Contention (i)

4. As regards the contention that the petitioner is entitled to continue in service as probationer till 30-5-2003 and that the petitioner's services could not have been terminated before the said period, it is required to be noted that Condition No. 7 in the order of appointment specifically provided that the petitioner's services could be terminated during the period of probation or at the end of the probation period without giving any notice or holding any inquiry. The petitioner, therefore, had no right to hold the post of the Driver for the entire period of two years.

5. The learned counsel has, however, placed strong reliance on the decision of

the Apex Court in *The Management of the Express Newspapers (Private) Ltd. Madurai Vs. The Presiding Officer, Labour Court, Madurai and Another*, and particularly relied on the following observations:

There can, in our opinion, be no doubt about the position in law that an employee appointed on probation of six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory.

6. Similarly, reliance is placed on the decision of the Apex Court in *Syed Azam Hussaini Vs. Andhra Bank Ltd.*, wherein the aforesaid observations of the Hon''ble Supreme Court were quoted in paragraph 9 of the judgment.

The learned counsel has also relied on the ad interim order passed by this Court in Special Civil Application No. 5004 of 2000.

As far as the order dated 6-7-2000 in Special Civil Application No. 5004 of 2000 is concerned, that was an ex parte ad interim order which order cannot be treated as declaration of law. Hence the Court is not required to deal with the said ad interim order.

As far as the decisions of the Apex Court in *Express Newspaper's case* and *Syed Azam Hussaini's case* (supra) are concerned, neither of them dealt with a case where the order of appointment or the relevant service rule provided that services of the employee could be terminated during the period of probation. Moreover, it is important to note that in paragraph 10 of the judgment in *Syed Azam Hussaini's case* the Apex Court has also referred to its decision in *Management Utkal Machinery Ltd. Vs. Workmen, Miss Shanti Patnaik*, wherein the Apex Court had proceeded on the basis that when the employee was appointed on probation, during the period of probation, the employee's services could be terminated without serving any notice. In *Syed Azam Hussaini's case*, the decision in *Utkal Machinery* was not treated as laying down erroneous law but the decision in *Utkal Machinery* was distinguished on the ground that in the *Utkal Machinery* case there was no evidence adduced on behalf of the management before the Labour Court to show that the work of the employee was unsatisfactory. Even in the said case of *Syed Azam Hussaini*, the Court held that the order of termination was illegal because the employee had asserted that during the period of his service, nobody pointed out any defect in his work and he did not receive any memo but the said averments were not denied by the respondent-employer. The respondent-employer did not produce any material to show that the performance of the employee was not satisfactory. Therefore, on

the ground that in the absence of any material evidence placed by the respondent-employer to show that the work of the employee was not satisfactory, the Labour Court was held to be justified in recording a finding that there was no reasonable cause for terminating services of the employee. The ratio of the decision in Syed Azam Hussaini's case must, therefore, be taken as - when the employer terminates the services of an employee during the period of probation and before expiry of such probation period, the employer must place material before the Court to show that the work of the employee was not satisfactory.

7. On the other hand, in the facts of the case at hand, the material showing that the petitioner's services were not found to be satisfactory has already come on record through a number of memos issued to the petitioner by the Registrar of the Tribunal. That aspect will be dealt with a little later. Suffice it to state that the view that the services of an employee can be terminated during the period of probation has recently been taken by the Apex Court in Chandra Prakash Shahi v. State of U.P. AIR 2000 SC 1706 wherein the Court has held that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question.

Following the aforesaid principle laid down by the Apex Court in its recent decision in Chandra Prakash Shahi (supra) and Condition No. 7 in the order of appointment that the petitioner's services were liable to be terminated during the period of probation or at the end of the period of probation, there is no substance in the first contention that the petitioner's services could not have been terminated before expiry of the period of probation.

Contention (ii)

8. As regards the contention that the order of termination states that the petitioner's services were no longer required and, therefore, his services cannot be said to have been terminated on the ground of unsuitability, the learned counsel has heavily relied on the decision of the Apex Court in Om Prakash Goel Vs. The Himachal Pradesh Tourism Development Corporation Ltd., Shimla and another, . It is submitted that if the petitioner's services were really terminated on the ground of unsuitability, the termination order would have said so but the very fact that the words used in the termination order are "that the services are no longer required " it implies that the petitioner's services were terminated on the ground of abolition of post or non-availability of work, neither of which was correct.

9. In Om Prakash Goel v. Himachal Pradesh Tourism Corporation Ltd. (supra), the Apex Court was dealing with a case where the petitioner was appointed as an Accountant in the Himachal Pradesh Tourism Corporation Ltd. (hereinafter referred to as "the Corporation"). The petitioner detected certain irregularities in the Transport Wing and wrote a letter dated 19-6-1980 to the Transport Officer

pointing out the financial irregularities and embezzlements committed by the then Cashier. The Employees' Union took up the matter and demanded the Management to take necessary action. The petitioner was the General Secretary of the Union. According to the petitioner, the new Managing Director was annoyed with the petitioner because of his union activities. The petitioner was transferred to Dalhousie in the midst of his three-year Law course as an evening student for which the previous Managing Director had already granted the permission two years back. The petitioner submitted a study leave application for one year which was granted for only 90 days and in the meantime, a chargesheet was issued alleging that the petitioner had facilitated and abetted the embezzlement of Rs. 100/- by not ensuring that the amount found was in excess and that he failed to serve the Corporation honestly and faithfully and further he made certain fictitious entries in the Cash Book and that he made certain information public without the permission of the Managing Director. The petitioner in that case submitted reply and stated that all the charges were fake and false and he challenged the chargesheet in the High Court. During pendency of that petition, the petitioner's services were terminated stating that they were no longer required and one month's notice pay was also paid. The petitioner challenged that termination order in a petition before the High Court which was dismissed. Hence the petitioner challenged the order before the Supreme Court urging that the termination was only a camouflage and that the same amounted to punishment because of the manner in which it was passed and the background behind it.

10. It was in the background of the aforesaid facts that while examining the contention whether the termination order was an order of termination simpliciter or punitive termination that the Apex Court had an occasion to consider the language in which the order of termination was couched. The Court found that juniors to the petitioner were retained and, therefore, the statement that the petitioner's services were no longer required appeared to be a camouflage for passing what was really an order of punitive termination.

As per the settled legal position, the ratio of a decision is to be understood in the facts of that case and is not to be read like a statute (vide *Padmasundara Rao and Others Vs. State of Tamil Nadu and Others*,).

As far as the facts of the present case are concerned, several memos issued to the petitioner clearly indicate that the employer had found the petitioner's services to be unsatisfactory, and, therefore, in the facts of the present case, the observations made by the Hon'ble Supreme Court in paragraph 6 of the judgment in *Om Prakash Goel v. Himachal Pradesh Tourism Development Corporation Ltd.* (supra) are not applicable.

Contention (iii)

11. Coming to the last contention, Mr. Shelat has vehemently argued that the memos issued to the petitioner which are produced before this Court clearly

indicate that the impugned order was passed in order to punish the petitioner for the misconduct alleged against the petitioner without giving the petitioner any opportunity of hearing or without holding any departmental inquiry. Strong reliance has been placed on the decision of the Apex Court in the case of Anoop Jaiswal Vs. Government of India and Another, and particularly the following observations :

Where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.

Reliance has also been placed in Nepal Singh Vs. State of U.P. and Others, and in Jarnail Singh and Others Vs. State of Punjab and Others, which are all quoted with approval by the Apex Court in Om Prakash Goel v. Himachal Pradesh Tourism Development Corporation Ltd. (supra).

12. It is submitted by the learned counsel that the memos in the present case allege that the petitioner was guilty of the conduct which was unbecoming of a Driver but there was no allegation about the petitioner's competence as a Driver. It is submitted that the Registrar of the Tribunal went on finding faults with the petitioner on small issues indicating that the petitioner was being treated as a slave and, therefore, the impugned order cannot be sustained.

13. Before dealing with the aforesaid contentions of the learned counsel for the petitioner, it would be useful to refer to the principles laid down by the Apex Court in Oil and Natural Gas Commission and Others Vs. Dr. Md. S. Iskender Ali, wherein the Apex Court held as under:

Where the short history of the service of the probationer appointed in a temporary post clearly showed that his work had never been satisfactory and he was not found suitable for being retained in service and that was why even though some sort of an enquiry was started, it was not proceeded with and no punishment was inflicted on him and in these circumstances, if the appointing authority considered it expedient to terminate the services of the probationer it could not be said that the order of termination attracted the provisions of Article 311, when the appointing authority had the right to terminate the service without assigning any reasons. In such a case even if misconduct, negligence, inefficiency might be the motive or the inducing factor which influenced the employer to terminate the services of the employee a power which the employer undoubtedly possessed, even so as under the terms of appointment of the employee such a power flowed from the contract of service, termination of service could not be termed as penalty or punishment. Further adverse remarks in the assessment roll and recommendation therein to extend the probationary

period could not be said to indicate that the intention of the appointing authority was to proceed against the employee by way of punishment.

(Emphasis supplied.)

Similarly, recently in *Chandra Prakash Shahi v. State of UP* AIR 2000 SC 1706, the Apex Court has held as under:

The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question, or for his further retention in service or for confirmation, an enquiry is held and it is on the basis of that enquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an enquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that enquiry, the order would be punitive in nature as the enquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive". "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 action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary enquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed therefore, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary enquiry.

(Emphasis supplied.)

14. Now applying the aforesaid principles to the facts of the present case, it is obvious from the series of memoranda that the petitioner was found to be generally unsuitable for the post in question. The petitioner was appointed as a Driver and attached to the learned Presiding Officer of the Gujarat Universities Services Tribunal. In view of the nature of the petitioner's duties it was of utmost importance that the petitioner was expected to maintain the dignity of the Presiding Officer of the Tribunal and to treat him with utmost respect and to ensure that least inconvenience was caused to the Presiding Officer of the Tribunal in discharge of his duties. Apart from the fact that on a couple of occasions, the petitioner had not carried the keys of the cupboard in which the Presiding Officer's black coat was kept which delayed the Presiding Officer of the

Tribunal ascending the dais for an hour in each occasion, the memoranda dated 9-11-2001 (Page 37), dated 15-10-2001 (Page 34) dated 8-7-2002 (Page 89) clearly show that in presence of the other staff members, the petitioner was referring to the Presiding Officer of the Tribunal in a disrespectful and derogatory manner. Even when the Presiding Officer of the Tribunal would caution the petitioner about the the manner in which the petitioner was driving, the petitioner treated it as an affront and took exception to the Presiding Officer of the Tribunal giving such cautions to the petitioner. Overall impression that any reasonable person would gather from the several memos issued by the Registrar on behalf of the Tribunal to the petitioner clearly indicate that no reasonable employer would find the petitioner's services as satisfactory and that the termination of the petitioner's services during the period of probation could not be treated as arbitrary or perverse.

15. The thrust of the submission of Mr. Shelat for the petitioner is to the effect that it was the Registrar of the Tribunal who was finding faults with the petitioner and not the Presiding Officer of the Tribunal. This cannot be accepted. Obviously, the Presiding Officer of the Tribunal would not himself issue the memos and it was for the Registrar to issue memos on behalf of the Presiding Officer. Several memos refer to the conduct of the petitioner while the Presiding Officer of the Tribunal was being driven to the Tribunal premises or back to the residence of the Presiding Officer. AH those acts of the petitioner would be noticed only by the Presiding Officer of the Tribunal and, therefore, the same were communicated to the petitioner on behalf of the Presiding Officer. It was the same learned Presiding Officer, who had selected the petitioner for the post of Driver, who took the ultimate decision to terminate the petitioner's services. No allegation of mala fides are made against the Presiding Officer of the Tribunal.

In this set of circumstances, the Court is not in a position to come to even a prima facie conclusion that the impugned order can be said to be an order of penalty.

16. In view of the aforesaid discussion, there is no merit in any of the contentions. The petition is therefore, summarily dismissed.