

(2001) 08 GUJ CK 0097
In the Gujarat High Court

Case No : Special Civil Application No. 2608 of 1997

Anil Mahadev Mane

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 02-08-2001

Acts Referred:

Citation : (2002) 22 GLH 138

Hon'ble Judges : Kundan Singh, J

Bench : Single Bench

Advocate : I.S. Supehia, in Special Civil application No. 2608 of 1997, for the Appellant; K.M.Parikh, Asstt. Government Pleader in Special Civil Application No. 2608 of 1997, for the Respondent

Final Decision : Allowed

Judgement

Kundan Singh, J.—This petition has been filed for quashing and setting aside the order dated 18.3.97 passed by the respondent no. 2 and for a direction to the respondents to reinstate him in service with all consequential benefits including back wages with interest at the rate of 12% per annum.

2. The petitioner was appointed as a police constable by an order dated 12.2.97 on temporary basis in the city of Ahmedabad and was discharged from service on 18.3.1997 on the ground that his services were no longer required, when the petitioner was under training period in the Training Institute at Baroda.

3. The contention of the learned counsel for the petitioners is that Rule 89(3)(a) of Police Manual requires a temporary Government servant who has not been appointed for a definite period, should, if necessary be discharged from service in strict order of juniority and no person should be arbitrarily discharged without regard to his seniority. The contention of the learned counsel for the petitioner is that the petitioner has been discharged from service though his juniors are still continued in service. As such, the discharge order of the petitioner is in violation of Rule 89(3)(a) of the Gujarat Police Manual.

4. On the other hand, the learned Assistant Government Pleader contended that the petitioner has not been discharged from service on the basis of juniority or seniority and the question of strict order of juniority does not arise in the present case on the basis of the principle of "last come first go" . In the present case, there are certain allegations against the petitioner while he was under training, he appeared in the Higher secondary examination in the name of Sanjiv Shantaram Kadam and was caught red handed on the spot. An FIR being FIR No. 40 of 1997 under sections 463, 465, 468, 471 and 177 of the Indian Penal Code came to be lodged on 15.3.97 against the petitioner at Vadi Police station, Vadodara. The petitioner has been found to have indulged in criminal activities, but he has been discharged on the basis of the terms and conditions of his appointment. Under term no.2 of the appointment letter dated 12.2.97, the petitioner was required to execute an undertaking in the nature of a guarantee bond on a stamp paper of Rs.10/- to the effect that if a candidate commits any misconduct during the period of three years, he shall be discharged from service or if a candidate resigns, as per the terms, then the candidate will have to pay the amount mentioned in the guarantee bond to the Government. This condition is also applicable to the guarantor. Under condition no. 5, it is stated that during the character verification, if the candidate is found to have indulged in any offence, he shall be discharged from the department. As the petitioner was appointed on 12.2.1997, the guarantee bond was executed on 13.2.1997 and the petitioner was found involved in the criminal case for the offences punishable under sections 463, 465, 468, 471 and 177 of the Indian Penal Code on 15.3.1997. Hence, the order of discharge was passed by the respondent on 18.3.1997. As such, the order has not been passed under Rule 89(3)(a) of the Gujarat Police Manual and the said Rule would not be applicable where there are allegations of misconduct against the person concerned.

5. I have carefully considered the contentions of the learned counsel for the parties. Rule 89(3)(a) of the Gujarat Police Manual appears to be applicable where retrenchment is made requiring certain employees to be terminated or discharged and that for that purpose, strict order of juniority is required to be maintained. The person should not be arbitrarily discharged without regard to his seniority if a temporary Government servant has not been appointed for a definite period. In the present case, it is true that the petitioner was appointed on temporary basis not for a definite period. The petitioner's discharge order is based on the allegation of misconduct against him. That is not based on retrenchment. Hence, the provisions of Rule 89(3)(a) of the Police Manual are not applicable in the present case.

6. The next contention of the learned counsel for the petitioner is that the petitioner being a temporary servant of Gujarat State, a notice is required to be issued under Rule 33(1)(b) of the Bombay Civil Service Rules, 1989 for termination or discharge of the employee. Rule 33-B requires that where a temporary Government servant who has put in service for a period exceeding one year, the period of such notice shall be one month and where such

Government servant has put in service for one year or any period less than one year, the period of such notice shall be one week. The Government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice, at the same rates at which he has drawing pay and allowances immediately before the termination of his service, or as the case may be, for the period by which such notice falls short of the notice period. In this regard, he relied on the judgment of the Division Bench of this Court in the case of Anopsinh Jatubha vs. V.K.Gupta, District Police Officer, Jamnagar and others reported in 1986(2) GLR 753 wherein the petitioner was appointed in the month of November, 1983 and he was found indulging in unfair practice at the departmental examination on 20.2.84 and he was terminated by an order dated 2.3.84. The service of the petitioner was terminated on 2.3.84. That order of termination was challenged in this Court on two grounds i.e. (1) the termination is arbitrary and violative of Articles 14 and 16 of the Constitution because persons similarly situated and junior to the appellant were continued in service and the appellants were arbitrarily singled out for discriminatory and hostile treatment and (2) that the impugned orders of termination were penal because the foundation for that action was the alleged misconduct of copying and unfair practice at the departmental examination and the appellant had no opportunity to meet with that allegation and, therefore, the orders were violative of the principles of natural justice. This Court, after taking into consideration the decision of the Supreme Court came to the conclusion that it is clear that the respondents terminated the services of the appellant not because their work is not satisfactory but because of the fact they have indulged in unfair practice of copying. The facts have been considered and as a matter of fact, the affidavit-in-reply clearly states that the appellant's services were merely terminated so that they may not be debarred from service in any other Government Department, at most establishes the foundation for the termination is the malpractice adopted by the appellants. If that be so, the orders of termination, without affording any opportunity to the appellants must fail. The simple order of termination as if the petitioners are only probationers is merely a camouflage for an order of dismissal for misconduct and as such the same cannot be upheld inasmuch as the appellants never had an opportunity to meet such allegations levelled against them. Article 311(2) has been clearly violated in this case. The termination of the appellants only for malpractice and did not mention the same in order to give an opportunity to the appellants to seek some other Government employment without any stigma attached to them. As the order of termination has to fail since the procedure laid down under Article 311(2) has not been followed on the facts and circumstances of the case.

7. As against this, the learned Assistant Government Pleader contended that the respondents are not required to give any notice nor it was possible to give such notice to the petitioner as required under Rule 33(1)(b) of the Bombay Civil Service Rules and no reason is required to be assigned in the notice under the provisions of Rule 89 (3)(b) and (c) of the The Gujarat Police Manual. Rule 89(3)

(b) of The Gujarat Police Manual says that the order of termination is not required to contain any reason beyond stating that the services of the person concerned are no longer required. While Rule 89(3)(c) says that before terminating the services of a temporary government servant on the basis of juniority, as far as practicable, the required notice of one month or a week, as the case may be, should be given. If it is not possible to give such notice, there is no objection if services of such temporary persons are terminated instantaneously. The petitioner was found indulged in the offence on 15.3.97, and hence, his service was to be discharged instantaneously. Thus, no notice as contemplated is required to be given to the petitioner. Under the terms of the appointment letter, the petitioner was required to file an undertaking and he had also filed the undertaking before the authority concerned on 13th February, 1997 wherein it is stated that if he commits any misconduct, within three years, he shall be discharged from service and/or if the candidate resigns as per the condition, the amount mentioned in the guarantee bond will have to be paid to the government and that condition was also required to be made applicable to the guarantor.

8. I have carefully considered the contentions of the learned counsel for the parties and perused the relevant papers on record and papers produced by the learned Assistant Government Pleader. The Division Bench of this Court in the case of Anopsinh Jatubha vs. V.K.Gupta, District Police Officer, Jamnagar reported in 1986(2) G.L.R.753 has held that there is nothing in the termination order that such termination was made on the ground of unsuitability, unsatisfactory conduct or the like. If it is the question of misconduct, the authorities concerned ought to have followed the procedure set up under Article 311(2) or otherwise, they will be condemning a person without being heard. If it is for the purpose of simply terminating the services of a probationer, the order should have stated that he is not suitable to be continued in service. In the absence of any kind of these adjectives for terminating the services of the appellants, the learned Single Judge commits a mistake in observing that the appellants cannot succeed by creating a dilemma, i.e. if the respondents allege any charges against the appellants, the same will be hit by Article 311(2) and if no charges are levelled against the appellants, the termination will be hit by discrimination offending Article 14 of the Constitution of India. The foundation for the termination is the malpractice indulged in by the appellants in copying at the examination hall and the respondents terminated the services of the appellants only for the malpractices and they did not mention the same in order to give an opportunity to the appellants to seek some other government employment without any stigma attached to them. This order has been passed on the basis of the following observations of the Supreme Court in the case of Anoop Jaiswal Vs. Government of India and Another, .

"The form of the order is not decisive, as to whether the order is by way of punishment and that even an innocuously worded order terminating the service may in the fact and circumstances of the case establish that an enquiry into

allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311(2). 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."

The modern judicial system requires the principles of natural justice enunciated under Article 311(2) of the Constitution of India that no person should be penalised by way of dismissal, removal or reduction in rank unless he has been informed in respect of charges levelled against him in inquiry and has been given an opportunity of hearing. In some of the cases, the Supreme Court has extended the scope of this principle of natural justice, even to the persons who are appointed temporarily or on ad hoc basis or on probation for a specific period, more particularly their appointment is subject to termination, removal or discharge, with or without notice in accordance with service conditions under Rules or appointment conditions mentioned in the appointment letter. In case an appointment of a person is made on a post on purely temporary basis or ad hoc basis or on probation for a fixed period, such person joins the service pursuant to the appointment letter. The department finds on the next day of the joining that the person concerned was involved in criminal activities or even in heinous crimes, offence or he commits such act which amounts to misconduct. The department on the basis of the principle enunciated under Article 311(2) of the Constitution of India cannot terminate his service by giving a notice that his services are no longer required or discharged from service as his services are no longer required. The department cannot give reasons in the termination or discharge order. In case reasons are given in the termination or discharge order, the stigma would be attached. For that purpose, the department is required to hold departmental inquiry after giving an opportunity of being heard, appropriate orders can be passed. We all are aware of the fact that inquiry takes much more time, some time it takes four to five years. In case suspension order is passed, the department is under an obligation to give the delinquent person subsistence allowance, usually, firstly 50%, after some period 3/4th and after some more time, full amount of salary is required to be paid to him. If the termination order is passed by the department after domestic inquiry, which gives rise to judicial litigation upto the highest stage, which requires lot of wastage of public exchequer and valuable time of public authorities before inquiry officer, disciplinary authority and thereafter before judicial authorities from High Court in writ petition, LPA and before Apex Court in SLP, more particularly the provisions of Article 311(2) of the Constitution do not expressly extend the principle to the persons appointed temporarily or on ad hoc basis or probationers even not under any statutory provisions of Act or Rules which has been extended by our judicial

system. On the basis of the principles of natural justice, the courts are empowered to unveil the order of termination or discharge where it does not disclose reason though he joined the service, few days or few months prior to passing the order. If the department comes to know that the person concerned is involved in criminal activities or in crimes or acts amounting to misconduct, before handing over the appointment letter to the person concerned, the department would be certainly empowered to cancel the appointment letter, but after handing over the appointment letter to the person concerned or after joining the services for few days or few months, the department is incompetent to pass such orders of termination without assigning reasons. If any reason is mentioned in the order which cannot be passed without giving an opportunity of being heard in respect of charge in inquiry and the order being stigmatic would require judicial review or judicial scrutiny. If such order is passed without assigning reasons after unveiling the same, giving right to the person appointed temporarily for fixed period or extended time to time or purely on temporary or ad hoc basis, probation for fixed period or probation period extended to challenge the order of termination/discharge order without assigning the reasons for termination or discharge by interpreting the principles enshrined under Article 311(2) of the Constitution is very hazardous and injurious to our society as whenever any order of termination or discharge which does not disclose any reason therefore is passed, it always has reason for doing so. Such reasons might be his involvement in criminal activities or in offences or doing such acts amounting to misconduct. Such persons do not deserve for the continuance in service as involvement in criminal activities, offences or acts amounting to misconduct would always amount to unsuitability and unsatisfactory conduct or performance. The department by terminating or discharging from service without assigning any reason is fully justified in consonance of statutory provisions of Act or Rules and substantial justice also requires that undeserving employees should not continue in service. It is possible that the Supreme Court in the facts and circumstances of that case finding the services of temporary servant who had worked for a long time have been terminated or discharged without assigning any reason. Hence, the order of termination or discharge is in violation of the principles enunciated under Article 311(2) of the Constitution. But that principle cannot be applicable universally in every case even if in the case where the person concerned is appointed temporarily or purely on ad hoc basis or on probation for a fixed period and is found of undeserving, unsuitable or unsatisfactory conduct or performance having involved in criminal activities within few months of appointment, otherwise it will lead to scope of large scale litigation. The Government or employer should be at liberty to remove or terminate or discharge its employee without assigning any reasons, probationers or temporary servants having not less than five years" service if they are found unsuitable due to any reason, even though they are involved in criminal activities or offences or prima facie case of misconduct. The departmental inquiry should not be permitted for misconduct unless they are confirmed employees. Unsuitability and unsatisfactory conduct would include involvement of the person

concerned in criminal activities, offences or acts amounting to misconduct.

9. I have carefully considered the contentions of the learned counsel for the parties. It appears that the petitioner joined the training on or after 13th February, 1997 and he was found involved in criminal activities for the offences punishable under sections 463, 465, 468, 471 and 177 of the Indian Penal Code on 15th March, 1997 and an FIR was also lodged on the same day at Vadi police station, Vadodara. In the case cited by the learned advocate for the petitioner, it is not mentioned anywhere that the petitioner of that case had filed any undertaking in compliance with the terms of the appointment letter. While, in the present case, the petitioner had filed the undertaking in terms of his appointment letter. Term no.2 of the appointment letter requires the petitioner to execute an undertaking in the nature of a guarantee bond on a stamp paper of Rs.10/- and if the petitioner commits any misconduct within three years, he shall be discharged from service or if a candidate resigns, he will be required to pay to the Government the amount mentioned in the guarantee bond and that condition was also equally applicable to the guarantor. Condition no. 5 of the appointment letter says that if during character verification, the candidate is found involved in any offence, he shall be discharged from the department. In the present case, the petitioner joined the service pursuant to the appointment letter dated 12.2.1997. The guarantee bond was executed on 13.2.1997 and he was found involved in the criminal activities of the offence on 15.3.1997 within a period of one month, while the petitioner was not in actual service, but he was under training. The petitioner was appointed on temporary basis, but within a period of one month, he was found involved in criminal activities and so the discharge order was passed, while he was undergoing training. Had he been appointed after training, the provisions of Bombay Civil Service Rules, 1959 and other statutory provisions were required to be made applicable for terminating the services of the petitioner. But having regard to the services of the petitioner, the order of discharge has been passed against the petitioner. So far as the reasons to be recorded in discharge order are concerned, no statute requires the employer to give the reasons for discharging the services of any employee, who has not come in actual service and during the course of training, he was found involved in criminal activities. As the department is not required or supposed to give any reasons, if such reasons are given for discharge of the petitioner or any other person, that would attach a stigma and that order would amount to penalty and that order should not be passed. In the present case, the order passed by the respondents discharging the petitioner is fully justified and legal one. However, in view of the decision of the Division Bench of this Court which has a binding effect on the Single Judge, the impugned order is required to be set aside since the discharge order dated 18.3.1997 does not disclose the reasons on the basis of which the order has been passed, nor the department has given any notice under Rule 33(1)(b) of Bombay Civil Service Rules, 1959.

10. In view of the above facts and circumstances, this petition requires to be allowed and is accordingly allowed. The impugned order dated 18.3.1997 passed

by the respondent no.2 is hereby quashed and set aside. The respondents are directed to reinstate the petitioner on his original post within two months from the date of receipt of writ from this Court. However, the petitioner is not entitled for back wages as he was a temporary government servant and had not worked during this period. The department is at liberty to take appropriate legal action against the petitioner, if so advised. Rule is made absolute accordingly with no order as to costs.