
(1989) 06 BOM CK 0035
In the Bombay High Court
Case No : First Appeal No. 650 of 1979

Bal Gangadhar Shetty	Vs	APPELLANT
Employees State Insurance Corporation		RESPONDENT

Date of Decision : 05-06-1989

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309, 310

Citation : (1989) 3 BomCR 233

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : C. Nathan, S.M. Shetty and N.D. Vakharia, for the Appellant;
Mahendra Sethna, instructed by N.V. Jayakar and Co., for the Respondent

Judgement

Sharad Manohar, J.—The appellant in this case was the plaintiff who had filed Special Civil Suit No. 4595 of 1961 in the City Civil Court, Bombay, inter alia for the declaration that he continue to be in the services of the Employees State Insurance Corporation and that the order of termination of his service, dated 23rd January, 1958, was illegal and unconstitutional, for a decree for arrears of salary, etc. in the sum of Rs. 6,030/- being the amount then due to the plaintiff and for other ancillary reliefs.

The respondent's contention (which contention has been strenuously repeated in this Court by Mr. Sethna, the learned Counsel for the respondent) was that, after the completion of the plaintiff's probation period, he was only a temporary employee whose services could be terminated by an appropriate notice which was duly given by defendant No. 2 to the plaintiff. Defendant No. 2, therefore, contended that the plaintiff had no cause of action to file the suit.

Defendant No. 2's plea has been accepted by the trial Court and the plaintiff's suit has been dismissed by its decree dated 20th October, 1978. Hence, the present appeal by the original plaintiff.

2. Facts out of which the suit arose.---Certain undisputed or indisputable facts

may be stated at this stage. By the suit, the plaintiff challenged the validity of the order of termination of his services, dated 23rd January, 1958, which order arose out of the facts which may be stated as follows:

(a) The plaintiff was originally in the services of the Government of Bombay as a Clerk, from March 1943 to August, 1954.

From September to October 1954, he was in the services of the Collectorate of Bombay. From November 1954 to October 1955, he worked as a clerk in the Central Railway's Provident Fund Department and it was on 10th October 1955 that he was employed by the Employees State Insurance Corporation as an Upper Division Clerk. There is no dispute that his original appointment was on probation. The order of appointment is Exhibit "A". Clause (i) specifically states that the appointment will be on a temporary basis for the present. By clause (iii) of the order of appointment, he was put on probation for one year. The clause provides that, in the first month of his probation, his services were liable to be terminated without any notice or by payment of one month's salary in lieu of the notice, without assigning of any reasons for the same. The clause further proceeds to state that:

"thereafter during probation or during temporary tenure of appointment on one month's notice in writing or pay in lieu of the notice and thereafter on three months' notice in writing or pay in lieu of the notice".

Clause 8 of the same provides that during the probation, he (the plaintiff) will be required to pass the prescribed typing test, failing which he will be liable to be discharged from service without any notice.

The other terms of the appointment will be mentioned, if necessary, at the appropriate place in this judgment

(b) On 25th October, 1955, the plaintiff joined the services with the Corporation. The Character Certificate was filed by him on 27th October, 1955,

On 12th November, 1956, the respondent Corporation sent a letter, Ex. "D", to the plaintiff extending the period of probation by 6 months.

(c) In August 1957 the plaintiff was elected as the General Secretary of the E.S.I.C. Employees Union.

(d) On 1st October, 1957, the plaintiff made an application for being exempted from the typing test.

On 14th November, 1957, he received a show cause notice from the respondent calling upon him to show cause why his services should not be terminated on the ground of unsatisfactory conduct and unsatisfactory work. A reply-cum-explanation was given by the plaintiff on 24th November, 1957. However, that application was rejected by the Corporation.

The plaintiff once again applied for the exemption from the typing test. On 7th

December, 1957, a letter was written by the Regional Director of the E.S.I.C. to the Director General of the Corporation making serious allegations of misconduct against the plaintiff. This letter is exhibited in Ex. "E" (colly.) at serial No. 44 and, on the heels of this letter, an order dated 23rd January, 1958, which otherwise appears to be an innocuous order of termination simpliciter, was passed by the Corporation terminating the plaintiff's services. By a stroke of the pen, identical order was passed by the Regional Director and the same was communicated by him to the Director General on 24th January, 1958.

(e) On 3rd June, 1960, an order was passed by the Corporation (Ex. "P") confirming the probationers who had not passed any typing test as such.

(f) On 2nd June, 1960 (vide Ex. "Q") an order was passed by the Corporation virtually deciding not to insist upon the typing test in the cases of the other employees similarly circumstances.

It was in the conspectus of these facts that the suit dated 2nd August, 1961 was filed by the plaintiff for, inter alia, the relief mentioned above.

3. The Pleadings.--- (A) The substance of the averments made in the Plaint is the same as given above. As regards the other pleas, it may be stated that, according to the plaintiff, the order of termination of his services dated 23rd January, 1958 was just illegal, firstly because such an order could not be passed against the plaintiff who had ceased to be an employee on probation. In substance, the plaintiff's contention was and has been that the probation period which was originally over on 24th October, 1956 was extended by the Corporation by a further period of six months which period expired on 24th April, 1957. Not only this; on 27th October, 1955 the Character Certificate was issued by the Establishment Officer, Finance Department (Civil Supplies), Sachivalaya, in favour of the plaintiff, which is produced at Ex. "L". According to the plaintiff nothing was done by the Corporation indicative of further extension of the period of probation, assuming that it was in their power to make any further extension of such period, It is the further contention of the plaintiff that it was just not open to the Corporation to go on extending the period of probation According to the plaintiff, he was deemed to have been confirmed on the post with effect from 25th April, 1957 and, hence, the order of termination simpliciter passed by the Corporation dated 23rd January, 1958, after the lapse of period of full two years and three months, was just null and void and was not justified and legitimatised by any canon of interpretation of law relating to services of the State Employees. According to the plaintiff, this order of termination is, in fact, a punitive order passed upon the heels of letter written by the Regional Director to the Director General dated 7th December, 1957 (Ex. "E", serial No. 44) making serious allegations of misconduct against the plaintiff. The order of termination of service simpliciter passed without any inquiry being held against the plaintiff or without even any show cause notice being issued to the plaintiff and without any opportunity being given to him to resist the order of termination of the service was just not justified by provision of law. According to the plaintiff, the insistence

upon the typing test was just an eye-wash, because that condition was never insisted upon by the Corporation and, according to the plaintiff, even his juniors have been confirmed without their having passed any such typing test. This was, therefore, a case of plain picking and choosing of employees for the purpose of the termination of their services. It was the further case of the plaintiff that this was, in fact, a case of victimization because of the fact that the plaintiff had been carrying on trade union activities.

(B) The Written Statement of the 2nd defendant is delightful. It appears to revel in the fact that the original appointment of the plaintiff was in the capacity of a probationer. According to the Written Statement, the plaintiff was only a temporary Upper Division Clerk and that his appointment as such was to a temporary post and under the rules and conditions governing his services, his services were terminable on one month's notice or one month's salary in lieu of notice and without assigning any reason. The respondent claimed that the plaintiff's services were duly terminated by a month's notice and that was the end of the matter, with no further questions capable of being asked by the plaintiff. The other allegations of picking and choosing or of trade union activities or of penalisation were, of course, denied by the respondent.

4. This Court's view.---It is unnecessary to refer to the reasoning of the learned Judge, because the appeal is capable of being allowed on two short points (i) that on the 2nd defendant's own showing, the plaintiff had ceased to be on probation on the date of the impugned order. The chronology of events mentioned above (about which there exists no dispute) shows that the plaintiff was working as an Upper Division Clerk till 24th April, 1957. Question would be as to what was his legal status during the interregnum between 24th April, 1957 and 24th January, 1958. This difficulty is, however resolved by the 2nd defendant's own averment and contention in the very 2nd paragraph of its Written Statement where it is emphatically stated by the Corporation that the plaintiff was temporary Upper Division Clerk and that his appointment was to a temporary post. It is nowhere the plea of the defendant-Corporation that the plaintiff was on probation during the above period.

Moreover, I may state here that it was the specific and unequivocal contention of Mr. Sethna appearing before me on all the earlier dates of hearing that, on the date of the impugned order, the plaintiff was a temporary employee of the Corporation. This rules out the plaintiff being a probationer on that date. The rule about the competence of the statutory, Corporation to effect termination of the employee's services by an innocuous one month's notice of termination to the probationer, therefore, does not apply to the case of the plaintiff at all. Mr. Nathan, the learned Counsel for the appellant-plaintiff appearing before me, invited my attention to the copy of the memo dated 12th April, 1957 issued by the Regional Office of the Employees State Insurance Corporation and which was forwarded for information and guidance to the various authorities and officers of the Corporation. Clauses (v) and (vi) of the same run as follows:---

"v) Where it is necessary to extend the period of probation on the report of the Section/Branch Officer, the employee should be apprised in writing of the specific faults and defects noticed and to show improvement failing which his services will be terminated. This should be particularly examined on receipt of the report after nine months. It will be the responsibility of the Section/Branch Officer in such cases to keep a special watch and submit periodical reports at intervals of three months each reporting on the conduct and work of the probationer.

"vi) Where it is proposed to terminate the employment of a probationer whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer should be apprised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the employment."

It cannot be disputed that none of these directives has been complied with by the Corporation. Moreover, once it is accepted that the plaintiff was no longer on probation, two inferences become possible :

(a) that he stood automatically confirmed; or

(b) that he continued to be at least a temporary employee.

But it is unnecessary to enter into this controversy because, as is well known, even a temporary employee is entitled to get a suitable showcause notice as to why his services should not be terminated. Moreover, in the case of temporary employees, the rule of termination by one month's notice simpliciter does not apply. My attention was not invited by the respondent on any of the previous dates of hearing to any provision of the service rules on the basis of which a temporary employee's services could be terminated by a month's notice simpliciter without assigning any reason. This is nothing but picking and choosing. Even assuming that the plaintiff was a temporary employee and his services had to be terminated for some legitimate reasons, such as the absence of necessity of such employee, the usual rule of "last come, first go" will apply. In the instant case, it is not at all disputed that employees much junior to the plaintiff who have not passed any typing test have been confirmed and have continued in service and have received promotions and have occupied positions of responsibility.

5. The 2nd ground : the judgment of the Supreme Court in the case of O.P. Bhandari v/s. Indian Tourism Development Corpn. Ltd. & Ors.---But there arises another point in favour of the plaintiff which is no longer res integra. In the judgment in the case of O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others, , it has been held by the Supreme Court that a rule which provides for termination of the services of the employees of the Corporation simply by giving 90 days notice or by payment of salary for the notice period in lieu of such notice is violative of Articles 14 and 16 of the Constitution.

In the present case, the facts are even more serious. In this case, the notice was itself invalid. It is no-body's case that the plaintiff was a probationer on the date of the impugned order. He was a temporary employee (at the worst) entitled to 3 months' notice. This was a clear case of picking and choosing, because the plaintiff's juniors were very much retained in service and were given promotions and the plaintiff was left high and dry.

I may mention here that the respondent's Counsel took several adjournments for considering their position after the above-mentioned judgment of the Supreme Court reported in O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others, was brought to his notice. But, beyond taking adjournment, mighty little has been done either by the Counsel for the respondent or by the respondent itself. Today, both the Counsel as well as the Advocate on record, have chosen not to remain present even to explain as to what were the instructions they had received from the Corporation.

6. The appeal, therefore, succeeds. The order dismissing the suit passed by the trial Court is hereby set aside and the plaintiff's suit is decreed with costs throughout.

The respondent is directed to calculate the emoluments and other benefits that are payable to the plaintiff, after deducting therefrom a sum of Rs. 1,99,615.27 p. which is the amount admittedly received by the plaintiff by virtue of his services with the Life Insurance Corporation of India during his period of unemployment pending this litigation. A statement is submitted by Mr. Nathan giving the computation of the nett amount receivable by the plaintiff from the respondent-Corporation. The Corporation is directed to verify the correctness or otherwise of the said statement and is directed to inform to the plaintiff the nett amount payable by the Corporation to the plaintiff on the basis that the plaintiff's services have been wrongfully terminated by the Corporation by its impugned order dated 23rd January, 1958 and upon the assumption that he continued to be in service and had become entitled to all the promotions to which he would have been entitled under the Service Rules and by virtue of the entire pay-scale available to him as per the Service Rules read with the Awards of the various Pay Commissions. The Corporation is ordered to compel and pay the said amount to the plaintiff within two months from today. If any default is made by the Corporation in this connection, the plaintiff has the liberty to make the appropriate application to the High Court for suitable relief in that behalf.