

(2019) 06 GUJ CK 0017
In the Gujarat High Court

Case No : R/Special Civil Application No. 4439 Of 2017

Chetan Jayantilal Rajgor

APPELLANT

Vs

State Of Gujarat & 3 Other(S)

RESPONDENT

Date of Decision : 19-06-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 311(2)

Citation : (2019) 06 GUJ CK 0017

Hon'ble Judges : N.V.Anjaria, J

Bench : Single Bench

Advocate : Gaurav K Mehta

Final Decision : Allowed

Judgement

N.V.Anjaria, J

The present petition comes up on board upon note for speaking to minutes dated 13.06.2019 filed by learned advocate for the petitioner. The petition

was disposed of by order dated 08.05.2019. It is pointed out that in paragraph No.7 of the order the date is wrongly indicated as 30.03.2015 whereas

the correct date to be mentioned is 22.04.2015. It would be thereby noticed that there is error of transcription in the order.

In that view, the present note for speaking to minutes is allowed by directing that in paragraph No.7 of the order dated 08.05.2019 passed in Special

Civil Application No.4439 of 2017, the date 30.03.2015 shall be substituted by mentioning the date as 22.04.2015. The order shall be reissued as duly

corrected as above.

The note for speaking to minutes is allowed and it is disposed of.

1. In the facts and circumstances of the case and having regard to the request

and consent of the parties appearing through their respective learned advocates, the petition was taken up for final consideration today. Rule returnable forthwith. Learned Assistant Government Pleader Mr. Jayneel Parikh waives service of Rule for the respondent state and its authorities.

1.1 Heard learned senior advocate Mr. Yatin Oza with learned advocate Mr. Gaurav Mehta for the petitioner and learned Assistant Government Pleader.

2. This petition is directed against order dated 22.4.2015 and 4.6.2016 passed by the respondent No.2 and respondent No.1 respectively. By order dated 22.4.2015, the services of the petitioner was terminated, which order came to be confirmed by the Deputy Secretary which was the appellate authority rejecting the appeal of the petitioner.

2.1 The petitioner was appointed as per his case on a sanctioned post as regular employee by way of direct recruitment through Gujarat Public Service Commission on the post of Assistant Motor Vehicle Inspector, Class-III.

3. Looking at the impugned order dated 22.4.2015, it recorded about the incident at Amirghadh check post where the petitioner was posted on duty.

The First Information Report was filed against the petitioner in respect of the incident alleged to have been taken place under the Prevention of

Corruption Act, 1988 for the offences under the said law. The petitioner was alleged to have taken amount of bribe. The First Information Report

registered against the petitioner alongwith the other persons. The Commissioner of Transport taking a view that the notice issued to the petitioner was

not satisfactorily answered and that the petitioner had committed misconduct, passed order of termination. Thus, the order of termination mentioned

the filling of the First Information Report against the petitioner under the Prevention of Corruption Act, 1988, and thereafter concluded that the

petitioner was involved in serious misconduct and that the petitioner had not proved his innocence. On such footing of facts, the impugned order was

passed which was confirmed in the appeal.

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, even though 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 w]here

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.â??

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 22nd April, 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 â?? 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. Rule is made absolute accordingly.

Direct service is permitted.