
(2003) 06 AP CK 0049
In the Andhra Pradesh High Court
Case No : W.A. No. 285 of 2000

C.S.H.N. Murthy

APPELLANT

Vs

Government of Andhra Pradesh and Others

RESPONDENT

Date of Decision : 11-06-2003

Acts Referred:

Andhra Pradesh Education Act, 1982 — Section 79, 80

Citation : (2003) 6 ALD 22 : (2003) 4 ALT 687

Hon'ble Judges : C.V. Ramulu, J;B. Sudershan Reddy, J

Bench : Division Bench

Advocate : P. Sreerama Murthy, for the Appellant; Govt. Pleader and O. Manohar Reddy, for the Respondent

Final Decision : Dismissed

Judgement

1. The petitioner in W.P. No. 1375 of 1999 is the appellant before us in this writ appeal. The learned single Judge by order dated 17-12-1999 dismissed the said writ petition upholding G.O.Ms. No. 7 Education (PS.I) Department, dated 2-1-1999 whereunder the appeal preferred by the appellant herein before the first respondent has been dismissed confirming the order of termination of his services by the third respondent-school vide its order dated 9-4-1996.

2. In order to appreciate the submissions made by the learned counsel for the appellant and to consider as to whether the order under appeal suffers from any legal infirmities requiring our interference, it may be necessary to notice the relevant facts:

3. The appellant herein was appointed as Head Master by the third respondent-school on 2-6-1995 subject to various terms and conditions incorporated in the order itself. The order of appointment in specific terms reveals that the appellant herein has been appointed for a period of one year from 3-6-1995, but shall be extended further after the end of the academic year. Clause (9) of the order of appointment provides that if the work of the appellant is not found to be the

"expected level during the probationary period", his services are terminable without assigning any reason or whatsoever. After the confirmation, termination of service shall be with three month's notice on either side.

4. It is not necessary to notice the other terms and conditions incorporated in the order of appointment. The management of the third respondent-school vide its order dated 9-4-1996 terminated the services of the petitioner with effect from 30-4-1996. Since the whole controversy centers around the said order of termination, it would be apposite to notice the whole of the order, which is as follows:

Date: 9-4-1996. Mr. C.S.H.N. Murthy, Headmaster, N.S.K.K. High School.

Sir

The Management regrets very much to inform you that your service in this Organisation is terminated with effect from 30-4-1996 and we are thankful to you for rendering your service during this year.

You may settle your account by clearing all the dues, if any, to the Organisation. You are requested to handover all the charges to the Secretary.

Yours faithfully, For N.S.K.K. High School, Sd/-, Secretary & Correspondent.

5. That on 8-4-1996 the management of the third respondent-school issued a service certificate certifying that the appellant has worked in the institution as Head Master for the academic year 1995-96 and he left the institution for better prospects. During his service, his conduct and character are satisfactory.

6. Be that as it may, the petitioner filed W.P. No. 9169 of 1996 challenging the said order of termination and this Court by its order dated 20-9-1996 disposed of the said writ petition directing the appellant herein to avail the remedy of appeal provided u/s 80 of the Andhra Pradesh Education Act, 1982 (for short "the Act"). The Regional Joint Director of School Education allowed the appeal preferred by the appellant herein by his order dated 26-2-1997. The appellate authority took the view that the third respondent-school could not have terminated the services of the appellant without following the procedure prescribed u/s 79 of the Act. The said order was impugned by the third respondent-school before the Government and the Government by its order dated 9-12-1997 dismissed the appeal as barred by limitation. The third respondent-school preferred W.P. No. 33729 of 1997 challenging the order of the Government and this Court by its order dated 3-3-1997 allowed the said writ petition and remitted the appeal for fresh consideration on merits by the Government in accordance with law. The Government after hearing both the parties allowed the appeal by its order dated 2-1-1998 in G.O.Ms. No. 7. That order has been challenged by the appellant herein in W.P. No. 1375 of 1999. The learned single Judge after an elaborate consideration of the matter found no merit in the said writ petition and accordingly dismissed the same by order dated 17-12-1999. Hence this writ appeal.

7. We have once again heard the learned counsel appearing on either side. We have given our anxious consideration to the rival submissions.

8. Sri P. Sreerama Murthy, learned counsel for the appellant more or less reiterated the submissions made by him before the learned single Judge. It was contended that the impugned order of termination dated 9-4-1996 suffers from incurable legal infirmities. It was submitted that the impugned order of termination is ultra vires since the management of the third respondent-school did not obtain prior approval of the competent authority as is required u/s 79 of the Act. It is also contended that the foundation for termination of services of the appellant is based upon the alleged irregularities and misconduct on the part of the appellant, which as a matter of fact were found against the appellant behind his back without making the requisite enquiry in accordance with law. It was also contended that the impugned order of termination amounts to casting a stigma as against the appellant.

9. The learned Government Pleader for School Education supported the order of termination as confirmed in the appeal by the Government. It is the submission of the learned Government Pleader for School Education that Section 79 of the Act has no application to the cases of termination of probation as in the present case.

10. Sri O. Manohar Reddy, learned counsel appearing on behalf of the third respondent-school contended that the impugned order of termination is nothing but termination of probation on the ground of unsatisfactory service and the same does not amount to either removal, dismissal or reduction in rank and therefore no prior approval of the competent authority is required to be obtained as provided for u/s 79 of the Act. The impugned order of termination is not based upon any alleged irregularities or misconduct on the part of the appellant. The impugned order of termination speaks for itself and it is nothing but a simple termination of probation.

11. We shall first take up the formidable legal contentions urged by the learned counsel for the appellant relating to the applicability of Section 79 of the Act and proceed to consider whether the impugned order of termination is ultra vires.

12. Section 79 of the Act reads:

79. Dismissal, removal or reduction in rank or suspension, etc., of employees of private institutions:- (1) No teacher or member of the non-teaching staff employed in any private institution (hereinafter in this Chapter referred to as "the employee") shall be dismissed, removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that no order of dismissal, removal or reduction in rank shall be passed under this sub-section against an employee other than an employee of a minority educational institution without the prior approval of such authority or Officer as

may be prescribed for different classes of private institutions;

Provided further that the management may prefer an appeal against any order of the Officer or authority refusing approval under this sub-section to such authority or officer and within such period as may be prescribed.

(2) An inquiry under sub-section (1) shall be completed within a period of two months from the date of communication of charges against the employee.

(3) (a) No employee shall be placed under suspension except when an inquiry into the gross misconduct of such employee is contemplated.

(b) No such suspension shall remain in force for more than a period of two months from the date of suspension and if such inquiry is not started and completed within that period, such employee shall, without prejudice to the inquiry, be deemed to have been restored as employee:

Provided that the competent authority may, for reasons to be recorded in writing, extend the said period of two months for a further period not exceeding two months, if in the opinion of such competent authority the inquiry could not be completed within the said period of two months for reasons directly attributable to such employee.

(4) Every such employee as is placed under suspension under sub-section (3) shall be paid subsistence allowance at such rates as may be prescribed during the period of his suspension.

(5) Before imposing any penalty, other than the penalties specified in sub-section (1), an employee shall be informed in writing of the allegations on which action is proposed to be taken and be given an opportunity of making a representation, but it shall not be necessary to hold an oral inquiry into such allegations.

13. A plain reading of Section 79 of the Act makes it abundantly clear that no teacher employed in any private institution shall be dismissed, removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. It is true that no order of dismissal, removal or reduction in rank shall be passed against a teacher employed in any private institution without the prior approval of the competent authority.

14. Section 83 of the Act provides for retrenchment of employees. It says that where retrenchment of any employee is rendered necessary by the management or competent authority consequent on any change relating to education or course of instruction or to any other matter, such retrenchment may be, effected with the prior approval of the competent authority or the next higher authority, as the case may be.

15. It is thus clear that even in case of retrenchment of any employee, prior approval of the competent authority or the next higher authority, as the case may be, is required to be obtained. The learned counsel for the appellant,

however, contended that even in case of simple termination of probation, the prior permission of the competent authority u/s 79 of the Act is required. Whatever may be the nature of termination, the prior approval of the competent authority is must, was the submission made by the learned counsel for the appellant. Reliance is sought to be placed in this regard on a Division Bench decision of this Court in Vasavi College of Engineering Vs. A. Suryanarayana and Others, This Court took the view that "if the service of a teacher or other employee of a private educational institution is sought to be terminated by dismissal or removal, it shall be preceded by any inquiry as provided in Section 79 and such removal shall be effected only with the prior approval of the competent authority. Like-wise, in the case of any termination of service other than those covered by Section 79 of the Act, prior approval of such competent authority or the next higher authority is made a condition precedent for any other termination of service u/s 83 of the Act." It is further observed, "in either case where the termination penal or non-penal, it is obligatory to obtain prior approval of competent or higher authority, as a condition precedent for any such action which the employer may take against the teaching or non-teaching employees of institutions covered by the Act."

16. In order to ascertain the true and correct legal principle laid down by the Court in the said decision, it is just and necessary to notice the relevant facts in the said case. The management of the Engineering College appointed the petitioner therein as an Assistant Professor by order dated 28-12-1983. It was a temporary appointment. In the order of appointment itself it is stated that he should appear before a Selection Committee for regular appointment. The College issued a notification inviting applications for appointment as Professor. The petitioner therein applied for the said post and appeared before the duly constituted selection committee. He was found unfit for appointment as Professor. A condition was attached in the advertisement that if a candidate was found not suitable to the post of Professor, he might be considered for appointment in the lower post. The selection committee did not consider the petitioner therein for regular appointment as Assistant Professor, but continued him in employment. By order dated 10-5-1985 the College informed the petitioner therein that he was relieved with immediate effect from his temporary appointment, "evidently as a measure of retrenchment". It is under those circumstances, the petitioner therein invoked the jurisdiction of this Court and this Court found that it was a clear case of retrenchment. In the said decision, it is observed that "the learned single Judge was right in allowing W.P. No. 7133/85 and in setting aside the order dated 10-5-1985 retrenching the petitioner from service". Such a view was taken by the Court for the reason that in spite of the petitioner's non-selection on earlier occasion i.e. on 28-7-1984, he was continued in service till 10-5-1985, and that itself indicates that non-selection of the petitioner for regular appointment shall not mean to result in automatic termination of temporary appointment of the petitioner.

17. As has been observed in the preceding paragraph even in case of

retrenchment within the meaning of Section 83 of the Act, prior approval of the competent authority or the next higher authority, as the case may be, is required to be obtained. It is thus clear that either in case of dismissal, removal or reduction in rank as well as retrenchment; obtaining of prior approval of the competent authority is the requirement in law.

18. But in the instant case, a plain reading of the impugned order of termination itself suggests that it is neither a case of retrenchment nor a case of dismissal, removal or reduction in rank. In such view of the matter, we are of the considered opinion that no prior approval was required to be obtained by the management of the third respondent-school before the impugned order of termination has been passed. The contingencies provided either in Section 79 or in Section 83 of the Act are not attracted in the present case.

19. However, it is sought to be contended by the learned counsel for the appellant that the order of termination of probation in a given case may amount to dismissal of an employee from the service. The learned single Judge having placed reliance upon the decision of the Supreme Court in *M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another*, and *Life Insurance Corporation of India and Another Vs. Raghavendra Seshagiri Rao Kulkarni*, rightly came to the conclusion that the termination of services of the employee during the period of probation in terms of the order of appointment does not amount to retrenchment. The learned single Judge rightly relied upon the judgment of the Supreme Court in *Governing Council of Kidwai Memorial Institute of Oncology, Bangalore Vs. Dr. Pandurang Godwalkar and another*, and rightly came to the conclusion that the services of a probationer can be terminated after making overall assessment of his performance during the period of probation and no notice is required to be given before terminating the services. We are in complete agreement with the view taken by the learned single Judge that the termination simpliciter of probation does not amount to dismissal, removal or reduction in rank within the meaning of Section 79 of the Act, nor does it amount to retrenchment within the meaning of Section 83 of the Act.

20. The next question that falls for consideration is as to whether the impugned order of termination was founded on the allegations of irregularities and misconduct?

21. The learned counsel for the appellant invited our attention to certain observations made in the appellate order passed by the Government wherein it is observed that the Secretary of the school has explained the details of misbehaviour of the appellant with lady staff members, students and parents. The Secretary is stated to have shown a good number of examples of the mental inability of the appellant. These observations, according to the learned counsel for the appellant, indicate that the impugned order of termination is not a termination simpliciter of probation. The learned counsel also invited our attention to the averments made in the counter affidavit filed by the

management of the third respondent-school in W.P. No. 9164 of 1996 filed by the appellant herein in the earlier round of litigation, wherein it is stated that "a number of complaints about the harsh treatment of the students by the petitioner like severe beating of the students resulting in fracture of bones of some of the students as well as his inability to get along with teachers were received and the petitioner was orally asked to mend his ways and behave properly. Two of the students were beaten so badly by the petitioner and that they were hospitalised with fractures and bleeding injuries." In the said counter affidavit it is further stated that "as there was no improvement as expected by the management and in view of incessant complaints from the senior members of the teaching staff as well as complaints with regard to the ill-treatment meted out by the petitioner towards the students, the management had to issue the impugned order of termination".

22. It is no doubt true that a bare reading of those averments made in the counter affidavit may appear as if the impugned order of termination has been passed by the management of the third respondent-school based on some allegations of misconduct, but without any enquiry as to the truth or otherwise of those allegations. But a closure scrutiny of the entire material on record reveals that those statements and averments in the counter affidavit filed by the management of the school were made in their anxiety to support the order of termination. These subsequent averments and statements made in the counter affidavit, in our considered opinion, are of no consequence. There is nothing on record suggesting that the impugned order of termination itself has been passed basing upon those allegations of misconduct. We have already referred to the whole of the impugned order of termination, which does not disclose of making of any such allegations against the appellant.

23. What is required to be looked into is the substance of the order and not mere its form. It is true as contended by the learned counsel for the appellant that the Court in a given case is entitled to lift the veil and find out as to whether the order of termination is a simpliciter one or has been passed on the basis of any unsubstantiated allegations of irregularity or misconduct. In the impugned order of termination passed by the management of the school there is no reference to any other proceedings such as complaints received or of any preliminary enquiry. No enquiry as such was held against the appellant herein behind his back. There are no findings as such recorded against him by any authority. There is not even an observation in the impugned order of termination of any irregularity. The management expressed its regrets in terminating the services of the appellant herein with effect from 30-4-1996. This was followed by a service certificate issued by the very management, in which it is inter alia stated that the appellant has been leaving the institution for his better prospects and during his service his conduct and character are satisfactory.

24. An attempt has been made by the learned counsel for the appellant to contend that the impugned order dated 9-4-1996 is not an order of termination

of probation, but termination of service itself. We are unable to accept the submission made by the learned counsel for the appellant. The impugned order of termination is required to be read along with the terms and conditions incorporated in the very order of appointment, wherein it is clearly specified that if the work of the appellant is not found to be satisfactory during the probation period, his services are terminable without assigning any reason whatsoever. Therefore, the expression "terminated" used in the impugned order of termination cannot be torn out of the context, and it has to be understood in the context in which it was made. There cannot be any doubt whatsoever that the petitioner was on probation for a period of one year and the same was terminable without any notice whatsoever and without assigning any reasons if his work was found to be not up to the expected level during the probation. Therefore, we have no doubt in our mind that it is a clear case of termination of probation.

25. The learned counsel for the appellant placed reliance upon a Division Bench decision of this Court in *Gunavanti v. Vice-Chancellor, University of Hyderabad* 1996 (4) ALD 1128 (D.B.) in support of his submission that on piercing the veil if the true character of the order is revealed to be one of punishment and the same has been imposed without holding any enquiry, the same is liable to be set aside. There cannot be any doubt whatsoever with the broad proposition canvassed by the learned counsel for the appellant. In the said case, the order of termination of service was preceded by a memo alleging misconduct and calling upon the employee to explain. Soon after receiving her explanation, the order to terminate the service has been issued. The Court found that the impugned order of termination although couched in innocuous language, the order obviously is in the nature of an order imposing punishment for the alleged misconduct in respect of which a memo of charges had been served upon her. In the instant case no notice has ever been issued to the appellant even calling for his explanation with regard to any allegation of irregularity or misconduct. The ratio of the said judgment, in our considered opinion, is not applicable to the case on hand.

26. The Apex Court in *Radhey Shyam v. U.P. State Agro Industries Corporation Ltd.* 1999 (1) SLR 44 while considering the question as to in what situations allegations of misconduct will be the motive and in what cases they constitute to be the foundation observed:

"Termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as the above facts are merely the motive and not the foundation. The reason why they are the motive is that assessment is not done with the object of finding out any misconduct on the part of the Officer.....It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary inquiry is held because the purpose of a preliminary inquiry is to find

out if there is prima facie evidence or material to initiate a regular departmental inquiry..... The purpose of the preliminary inquiry is not to find out misconduct on the part of the Officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental inquiry is started, a charge-memo issued, reply obtained, and an Enquiry Officer is appointed - if at that point of time, the inquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the Enquiry Officer has not recorded evidence not given any findings on the charges."

27. In *Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others*, the Supreme Court once again reiterated the same principle and observed:

"If findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the inquiry was not held, no finding were arrived at and the employer was not inclined to conduct an inquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to inquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegation would be a motive and not the foundation and the simple order of termination would be valid." (Emphasis is of ours).

28. The Apex Court in the said decision addressed itself to the difficulties that usually arise in finding out whether in a given case where the order of termination is not a simple order of termination, the words used in the order can be said to contain a "stigma". The question that even if the words used in the order of termination are innocuous whether the Court can go into the words used or language employed in other orders or proceedings referred to by the employer in the order of termination had already been gone into by the Supreme Court. The Supreme Court observed:

"The material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its Annexures. Obviously such a document could be asked for or called for by any future employer of the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular inquiry was conducted."

29. It is further observed that it always depends on the facts and circumstances of each case and the language or words employed in the order of termination of the probationer to judge whether the words employed amount to stigma or not.

30. In *Mathew P. Thomas v. Kerala State Civil Supply Corporation Ltd.* AIR 2003 SCW 1230 the Supreme Court observed that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts

and circumstances of each case. "Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service. If the form and language of the so called order of termination simpliciter of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simpliciter or punitive. In cases where the services of a probationer are terminated by an order of termination simpliciter and the language and form of it do not show that either it is punitive or stigmatic on the face of it but in some cases there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer.....In such cases it becomes necessary to travel beyond the order of termination simpliciter to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from service on the foundation of his misconduct."

31. With the said principle at the back of our mind we have critically examined the impugned order of termination. There is no reference to any allegation of irregularities or misconduct in the order of termination. No report as such has been placed before the management about any allegations of misconduct, which form the basis of foundation for passing the impugned order of termination. It is true that from the averments made in the counter affidavit it appears that certain allegations were levelled against the appellant herein and innumerable complaints have been received about his conduct. But the management of the school at no point of time thought it fit to make even a prima facie enquiry into those allegations. No Enquiry Officer has been appointed. The appellant was never asked to submit any explanation. Not even a memo was issued asking him to conduct properly and in dignified manner befitting the conduct of the Head Master of an institution. The complaints, if any, received by the management remained unattended by the management. Undoubtedly, those allegations may have formed the motive for passing the impugned order of termination of probation on overall assessment of performance of the appellant. Precisely for that reason, the management did not state anything against the appellant except terminating his services in the organisation with effect from 30-4-1996 while expressing its regrets for its inability to continue him in the service of the school. This has been followed by a service certificate in which nothing is alleged and stated against the appellant. In the circumstances, even if we go beyond the impugned order and take the complaints of irregularities and misconduct alleged against the appellant into consideration, we do not find any substance in the submission that the foundation for passing the impugned order of termination

has been the allegation of misconduct. At the most, the allegations could have formed the motive and the same may have triggered for expediting the action against the appellant for terminating his probation on the ground of unsatisfactory service during the period of probation. Those allegations were not the foundation for passing the order of termination.

32. Now, we shall advert to the contention of the learned counsel for the appellant that the averments and allegations made in the counter affidavit themselves reveal that the foundation for passing the impugned order is the allegation of misconduct. More or less similar question came up for consideration before the Supreme Court in *Union of India (UOI) and Others Vs. A.P. Bajpai and Others*, whereunder it is observed that "the grounds stated in the counter affidavit in answer to the challenge made by the respondent No. 1 were the factors to assess the suitability or otherwise of respondent No. 1 to continue in service. Having regard to all relevant aspects, the authorities reached a conclusion that respondent No. 1 was not suitable to continue in service. The order of termination of his services was simpliciter without attaching any stigma to the conduct of respondent No. 1." The Supreme Court found fault with the Tribunal for having taken the grounds stated in the counter affidavit filed by the employer in the O.A. before it into consideration in order to reach a conclusion to the effect that the impugned order of termination amounted to casting stigma as against the employee therein. The annexure attached to the counter affidavit was also taken into consideration by the Tribunal, which was a confidential letter written by the Assistant Director of the Department. It is in the background of those facts, the Supreme Court observed that "the Tribunal committed a serious error in law and on facts of the present case in concluding that the order of termination of services of the respondent No. 1 involved stigma attached to respondent No. 1." The Supreme Court came to the conclusion that even if those allegations made in the counter affidavit are taken into consideration the same form only the motive and the basis to assess the unsuitability of the employee therein to continue in the sensitive post for which he was appointed.

33. In likewise manner even if we take the allegations and averments made in the counter affidavit filed by the management in the earlier round of litigation and the observations made by the appellate authority in disposing of the appeal into consideration, the same cannot be considered to be stigmatic in their nature.

34. This situation is further explained and clarified by the management of the school itself in the counter affidavit filed in the present writ petition out of which this appeal arises.

35. We make it clear that the impugned order of termination of probation of the appellant in no manner casts any stigma or aspersion on the conduct of the appellant. The same shall not come in the way of the appellant in seeking reemployment in any other institution or establishment.

36. For all the aforesaid reasons, we do not find any merit in this writ appeal.

37. The writ appeal fails and shall accordingly stand dismissed. There shall be no order as to costs.