

(1991) 10 GUJ CK 0005

In the Gujarat High Court

Case No : Special Civil Application No. 325 of 1990

Dinaben Vinay Kumar Shah

APPELLANT

Vs

Surat Municipal Corporation

RESPONDENT

Date of Decision : 16-10-1991

Acts Referred:

Constitution of India, 1950 — Article 226, 311(2)

Citation : (1993) 2 GLR 1436

Hon'ble Judges : J.N. Bhatt, J

Bench : Single Bench

Judgement

Bhatt, J.—By this petition, the petitioner has questioned the termination order from the service passed by the Commissioner, Surat Municipal Corporation on 30-11-1989, as per Annexure "B" by invoking the aids of the provisions of Art. 226 of the Constitution of India.

2. A conspectus of the material facts leading to the rise of the present petition, may be narrated, so as to appreciate the merits of this petition and the challenge against it. The petitioner was selected for the post of Laboratory Technician by the respondent-Corporation. She was appointed on the said post by virtue of an order dated 8-3-1989, as Laboratory Technician, in the Malaria Department of the respondent-Corporation in the pay-scale of Rs. 500-900. She was appointed on a temporary basis on a permanent clear vacancy.

3. The respondent Corporation terminated the services of the petitioner, on 30-11-1989. The petitioner has inter alia contended that the impugned termination order is arbitrary, discriminatory, mala fide, null and void and illegal. It is also alleged that so many temporary employees working in the respondent Corporation since last more than five years are retained and her services are terminated so as to put some other person and favour him. It is further contended that the impugned order of termination is passed without following the procedure and it is bad in law.

4. The respondent-Corporation has traversed the allegations made in the petition. It is denied that the impugned order of termination was passed with any mala fide intention. It is denied that it is bad or illegal. The respondent-Corporation has further contended that the petitioner was not found fit for the work for which was appointed temporarily and therefore, her services came to be terminated and therefore, her services came to be terminated. It is also stated by the respondent-Corporation that the petitioner had not been working since the day she was appointed. In fact, the petitioner was instigating others not to work.

5. The petitioner has in affidavit-in-rejoinder further contended that the simple termination order is as such punitive and it cannot be passed without holding an inquiry. It is denied that the petitioner had refused to work.

6. The learned Counsel for the petitioner has contended that the impugned order of termination of services is not an order of termination simplicitor but is by way of punishment and since it is stigmatic, it cannot be passed without observing the principles of natural justice. Thus, it is contended that there is violation of Art. 311(2) of the Constitution of India. This contention is seriously opposed by the learned Counsel for the respondent-Corporation.

7. In order to appreciate the aforesaid contention, it would be necessary to refer the relevant material on record. The termination order at Annexure "B" prima facie appears to be an order of termination simplicitor. However, it is alleged that it is passed by way of punishment and the impugned order is stigmatic. It is contended that for deciding the exact nature of the order in question, the Court has to take into consideration the allegations and the averments made against the petitioner in the affidavit-in-reply. Attention of the Court is invited to para 5 (1) of the affidavit-in-reply. Relying on the same, it is contended that the impugned order of termination is punitive one. It would be expedient to refer the relevant averments made in para 5. 1 of the affidavit-in-reply. A material portion thereof reads as under :

"5. 1 I say that the petitioner has not been working since the day she was appointed. In fact the correspondence would show that at all times she has instigated others not to work. The petitioner was appointed as a Laboratory Technician to find out whether a particular slide containing blood shows positive or negative for Malaria, etc., or not. She refused to do the work and insisted that the microscope which is entrusted to her must first be got certified and it is only, thereafter, that she would start working. The petitioner was also given a memo for not working. The necessary correspondence in this behalf is annexed hereto and marked Annexure "R/4" (colly). Attempts were made to see that the petitioner do work, but she refused to work. It may be stated that the slide containing blood stains cannot be kept indefinitely. The very object of examination of blood slides immediately so that the preventive measures can be taken to prevent large scale breaking of epidemics was frustrated by the manner in which the petitioner refused to work. In the circumstances, the petitioner was found unsuitable for the work for which she was appointed temporarily."

It will be very clear from the aforesaid averments that there were allegations of misconduct and misbehaviour on the part of the petitioner. However, it is contended that the aforesaid averments cannot be said to be stigmatic but are the narrations to showing the unsuitability of the petitioner. This contention, prima facie, may appear to be subtle but not sustainable. Of course, the word "stigma" is not statutorily defined but stigma means harm or damage to the reputation or any aspersion, adversely affecting the behaviour or demeanour. It is specifically stated in the initial portion of para 5. 1 in the affidavit-in-reply that -"the petitioner has not been working since the day she was appointed". This averment does not say about the suitability of the petitioner qua the said work but pertains to her conduct and attitude. It means there was an allegation that she had not worked at all from the first day of her appointment. This is a serious allegation affecting her reputation adversely.

8. That is not all. It is further alleged that she had instigated others "not to work". This is also nothing but a serious aspersion and a stigma on the behaviour and conduct of the petitioner. To allege a person indulging in instigating the co-workers, by no stretch of imagination could be said to be a less serious stigmatic allegation. An attempt was made to convince this Court to escape out of the said aspersion that the said allegation in the affidavit-in-reply is mistakenly made unsupported by the relevant file which was shown to the Court. This is still worse. Even had there been a regular departmental inquiry on the aforesaid allegations, the petitioner would not have been and could not have been held guilty. What is required to be appreciated by the Court is whether the allegation as such is made or aspersion is levelled, or stigma is cast or not ? Whether it is right or wrong will be a matter of evidence in the departmental inquiry. What impression one would carry or what impression the prospective employer would have while considering the case of the person who is terminated on such allegation is the test to be borne in mind.

9. Could it be said even for a moment that the petitioner on the aforesaid allegations when considered by the prospective employer in future would think about it is required to be considered. Therefore, a mere statement at the Bar that such aspersion in the affidavit-in-reply is mistakenly made is nothing but an afterthought to escape the legal liability. The affidavit-in-reply is filed by no less responsible that the Dy. Commissioner of Health & Hospital of the respondent-Corporation. He has not filed further affidavit stating as to under what circumstances such a mistaken averment and allegation though very grave and serious against the representation of the petitioner came to be made in his affidavit-in-reply. No explanation is placed on record to show as to why further affidavit is not filed in this connection. Be it as it may. Apart from that, one thing is very certain that the aforesaid statement may be of fact, may be mistaken one, remains on record which is, ex-facie, stigmatic and punitive. Even while taking the entire tenor of the portion of reply in para 5. 1 of the affidavit-in-reply leaves no any manner of doubt that the basis or the intention for the termination order is the misconduct and misdemeanour alleged against the petitioner by the

respondent-Corporation. Therefore, the impugned termination order which is innocuous, ex-facie, is reality punitive and stigmatic. Serious technical objection is also raised on behalf of the respondent-Corporation that no specific contention is raised in the petition and mere such an allegation in affidavit-in-reply cannot form the basis for deciding the nature of the order in question. This contention is, totally, meritless. An affidavit-in-reply is a part of record. It is incumbent upon the Court to consider the affidavit-in-reply while deciding such a petition on merits. It cannot, be gainsaid even for a moment that the averments or the aspersions levelled in the affidavit-in-reply, cannot, form the basis for embarking upon the inquiry as to the true nature of the order in question. In *Anoopsinh Jatubha v. V. K. Gupta, D. S. P. Jamnagar & Ors.*, reported in 1986 GLH 136 : [1986 (2) GLR 753], this Court in Division Bench decision has clearly held that for the purpose of deciding true nature of termination order, the averments made in the affidavit-in-reply in the said decision that the petitioner had indulged in malpractices in the examination. It was also stated in the affidavit that the conduct of the petitioner in that case was gross misconduct and cannot be tolerated in discipline in a force like Police. Relying on the aforesaid averments, it was held in that case that though the order was simplicitor, it was stigmatic and the allegations formed the foundation for the said termination order. The said decision is, squarely, attracted and applicable to the facts of the present case.

10. The Division Bench decision of this Court was also followed by this Court again in *M. V. Makwana v. State*, reported in [1991 (1) XXXII (1) GLR 179]. Temporary Government servant working in the Police Department whose services were terminated had filed the aforesaid petition. It was the contention of the petitioner in that case that the termination order was not simplicitor one but it was by way of penalty. It was stated that the petitioner in that case was in habit of remaining absent. Considering the impugned termination order, as well as, the affidavit-in-reply in that case, this Court reached to the conclusion that the termination order was punitive.

11. In fact, what is required to be examined is the substance and not the form of order. If the Court finds that the intention of the impugned termination order was an allegation affecting the reputation of the petitioner or that there was a stigma, then in that case, the termination order is bad in law and is required to be quashed and set aside, as there will be violation of the provisions of Art. 311(2) of the Constitution of India.

12. In *Anoop Jaiswal Vs. Government of India and Another*, , it was held that 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 provisions of Art. 311(2). Where the form of the order is, merely, a camouflage for an 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.

Even though the order of discharge may be non-committal, it cannot stand alone. Though nothing in the file of the Government may be irrelevant, the clause for the order cannot be ignored. The recommendation which is the basis or foundation for the order should be read along with the order for the purpose of determining its character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for the incident it would not have been passed then it is inevitable that the order of discharge should fall on the ground if the servant has not been afforded reasonable opportunity to defend himself as provided in Art. 311(2) of the Constitution.

It will be interesting to refer to the decision of the Apex Court of the Nation reported in, *Samsher Singh Vs. State of Punjab and Another*, . It was held in the said decision that :

"Again, could it be that if you summarily pack off a probationer, the order is judicially unscrutable and immune ! If you conscientiously seek to satisfy yourself about allegations by some sort of enquiry you get caught in the coils of law, however harmlessly the order may be phrased. And, so this sphinx-complex has had to give way in later cases. In some cases the rule of guidance has been stated to be "the substance" of the order. When does "motive" trespass into "foundation" ? When do we lift the veil of form to touch the "substance" ? When the Court says so. These "Freudian" frontiers obviously fail in work-a-day world and Dr. Tripathi's observations in this context are not without force. He says :

"As already explained, in a situation where the order of termination purports to be a mere order of discharge without stating the stigmatizing results of the departmental enquiry a search for the motive (real, unrevealed object) of the order. Failure to appreciate this relationship between motive (real, but unrevealed object) and from (the apparent, or officially revealed object) in the present context has led to an unreal interplay of words and phrases wherein symbols like "motive", "substance", "from" or "direct" parade in different combinations without communicating precise situations or entries in the world of facts."

13. The main anxiety of the Court should be to find out as to what was the basis and foundation of the termination order. Was it a camouflage or whether the respondent-employer resorted to a short-circuit by passing an order of termination simplicitor though there were serious allegations or misconduct against the petitioner ? Simply because the person is working temporarily, his services cannot be terminated unceremoniously by resorting to short-circuit of passing the simple termination order though the management is permitted and

aided the alleged misconduct or misbehaviour or malpractices on the part of the employees concerned. At times, the employers may be tempted to take such a short route so that without undergoing the exercise of holding enquiry and bypassing the provisions of Art. 311(2), the employee could be sent back home. Such a tactics, strategy or manipulation can never be allowed, and can never be encouraged, when the matter is tested on judicial scrutiny.

14. In fact, the relationship of master and servant commands and demands higher degree of faith, trust and obligation. Even in case of a probationer, or even in case of any ad hoc appointee for stipulated period, termination under the guise of simple termination order though on account of misconduct and misdemeanour without holding inquiry under Art. 311(2) of the Constitution is illegal and impermissible. Any person who is likely to be visited with civil or evil consequences must be heard. If the Court finds that a Government employee is unceremoniously terminated on account of misconduct or misdemeanour under the guise of termination simplicitor, then in that case, it becomes obligatory for the Court to quash the order of termination of service. In fact, the Highest Court of the land has observed in case of Dr. Mrs. Sumati P. Shere Vs. Union of India (UOI) and Others, that before the termination of an ad hoc employee, communication in advance about the defect, deficiency, indifference or indiscretion should be given. It would be interesting to reproduce the relevant portion of the judgment.

"We must emphasize that in the relationship of master and servant, there is a moral obligation to act fairly. An informal, if no formal, give-and-take, on the assessment of work of the employee should be there. The employee should be made aware of the defect in his work and deficiency in his performance. Defects or deficiencies, indifference or indiscretion may be with the employee by inadvertance and not by incapacity to work. Timely communication of the assessment of work in such cases may put them on the right track. Without any such communication, in our opinion, it would be arbitrary to give a movement order to the employee on the ground of unsuitability."

15. In the present case, the petitioner was not communicated any such defect or deficiency or any action amounting to unsuitability. The petitioner worked with the respondent-Corporation right from 8-3-1989 till 30-11-1989 (for a period of more than seven months). No any such communication was ever given about the lapses alleged to have been made or deficiencies levelled against her in the affidavit-in-reply. Of course, in affidavit-in-reply, it was stated that some memos were given to the petitioner. However, when specifically this question was put to the learned Advocate for the respondent-Corporation, he fairly stated that the relevant files does not contain such memos or copies thereof. In fact, it is found from the facts of this case that no such memos or intimation were ever given to the petitioner. Therefore, the contention that the termination of service is vitiated is full of substance.

16. Learned Advocates for the respondent-Corporation vehemently contended

that the petitioner is not entitled to the equitable relief as she has refused to work and she is unsuitable for the work in question for the said post. This contention cannot be entertained or accepted in the facts of the present case. One cannot remain indifferent to the case law as aforesaid. The moment the Court finds that the order of termination simplicitor in reality was punitive and stigmatic, the order is required to be quashed and set aside as it would be in violation of the provisions of Art. 311(2) of the Constitution.

17. Next the question will arise as to what appropriate relief the petitioner is found entitled to. Since this Court finds that the impugned order of termination is illegal, the petitioner would be entitled to be reinstated with full back wages. The termination order is required to be quashed.

18. In the result, the petition succeeds. The impugned order of termination dated 30-11-1989, is quashed and set aside. Consequently, the petitioner shall be reinstated in service within the period of two weeks with continuity as if the termination order at Annexure "B" had not been passed at all. The petitioner shall be entitled to full back wages. The respondent-Corporation shall pay full back wages to the petitioner within the period of eight weeks from today. Rule made absolute to the aforesaid extent.

19. Learned Advocate for the respondent-Corporation at this stage requested this Court to stay the operation of the order of this Court. In the facts of the present case, this prayer is rejected.