

(1981) 06 KAR CK 0027
In the Karnataka High Court
Case No : WP 10494/79

Gadekar N.G.

APPELLANT

Vs

Ksrtc and Another

RESPONDENT

Date of Decision : 24-06-1981

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Citation : (1981) 2 KarLJ 401

Hon'ble Judges : M. Rama Jois, J

Judgement

1. The petitioner who was a conductor on the establishment of the Karnataka State Road Transport Corporation (hereinafter referred to as the Corporation) has questioned the legality of an order by which he was discharged from service.

2. The petitioner was working as a badli conductor since April 1975. He was absorbed in the service of the Corporation on regular basis with effect from 10-5-78. By an order dated 25.4.79 he was discharged from service. The order reads as follows:

"To

Shri M.G. Gadekar,

Conductor, No. 401,

KSRTC, Kumta Depot.

KUMTA.

Ref: (1) D.E.O. No. (A) 203 of 78 issued under No. KST: NK: EST: E1: 874. dt. 30.5.78 (2) D.E.O. No. 57 of 79 issued under No. KST NK: EST: E1: 2124 dated: 8.2.1979.

You were appointed as a conductor on probation for a period of 6 months with effect from 12.5.78 B.N. Vide D.E.O. cited above at Sl. No. 1 and subsequently the period of probation was extended by further period of 6 months with effect

from 12.11.78 B.N. vide E.E.O. cited above at Sr. No. 2.

You were cautioned and given chance to show improvement in your work but as you have not been able to show adequate improvement, I am sorry to inform you that I have found you not suitable for the job for which you were appointed.

You may be suitable for some other job but you have not been found suitable for the above post to which you were employed on probation.

Hence you are hereby Discharged from service with immediate effect."

In the petition the petitioner has alleged that the impugned order of discharge was in the nature of imposition of penalty for misconduct without holding any inquiry as required by the Service Regulations and, therefore, it is liable to be quashed.

3. In the statement of objections filed on behalf of the respondents in paragraph 7 it is stated that the petitioner was involved in a number of default cases during the period of probation. The original office order pursuant to which the impugned discharge order was issued indicates the following facts. On 5.2.79 there was a complaint against the petitioner that he had collected a sum of Rs. 3.85 from the passengers but he had not issued the tickets. Below the said complaint the competent authority made an order which reads as follows:

"We are repeatedly cautioning the conductor to show improvement in his work. Again and again he is pilfering the Karnataka State Road Transport's revenue. This clearly shows that he is not in a position to show any improvement in his work inspite of cautioning him. He is unsuitable for the post he is selected. He is discharged from service as per rules." (Underlined by me)

This order was made on 19.2.79. Pursuant to the said order the impugned discharge order has been issued to the petitioner.

4. Sri G.B. Raikar learned Counsel appearing for the petitioner contends that as indicated by the original order pursuant to which the discharge order was served on the petitioner the impugned order was really in the nature of imposition of penalty of removal from service on the basis of alleged misconduct without holding an enquiry as required by the rules. Therefore he submitted that the impugned order is liable to be quashed, following the earlier decision of this Court in K.S. Raghuramaiah v. Deputy General Manager and Divisional Controller, K.S.R.T.C., ILR 1979 Kar. 1480 and the decision in Ismail v. K.S.R.T.C., WP 8590/79 dt. 15.1.81.

5. Sri H.G. Balakrishna, learned counsel appearing for the respondent-Corporation strenuously contended that in view of the recent judgments of the Supreme Court in State of Maharashtra v. Veerappa R. Saboji, AIR 1980 SC 42 and Oil and Natural Commission v. Dr. Md. S. Iskander Ali, AIR 1980 SC 1212, the impugned order was not liable to be set aside as the contents of the order communicated to the petitioner did not attach any stigma to the character and

conduct of the petitioner and it was not open for this Court to delve into the files of the K.S.R.T.C. to come to the conclusion as to whether an order which on the face of it appears to be an order of discharge, was in reality an order in the nature of imposition of penalty. The relevant portion of the judgment in Saboji's case, AIR 1980 SC 42 on which the learned Counsel relied reads-

"Ordinarily and generally the rule laid down in most of the cases by this Court is that you have to look to the order on the face of it and find whether it casts any stigma on the Government servant. In such a case there is no presumption that the order is arbitrary or malafide unless a very strong case is made out and proved by the Government servant Who challenges such an order."

The relevant portion of the judgment in Oil and Natural Gas Commission's case, AIR 1980 SC 1212, on which he relied, reads as follows:

"... We, therefore, agree with the submission made on behalf of the appellant that the High Court was in error in arriving at the finding that the impugned order was passed by way of punishment by probing into the departmental correspondence that passed between the superiors of the respondent overlooking the observations made by this Court in I.N. Saxena v. State of Madhya Pradesh AIR 1967 SC 1264. that when there are no express words in the impugned order itself which throw a stigma on the Government servant, the Court would not delve into secretariat files to discover whether some kind of stigma could be inferred on such research.

12. The facts of the present cases appears to be on all fours with those of the aforesaid decision. From the undisputed facts detailed by us in an earlier part of the judgment, it is manifest that even if misconduct, negligence, inefficiency may be the motive or the inducing factor which influences the employer to terminate the services of the employee, a power which the appellants undoubtedly possessed, even so as under the terms of appointment of the respondent such a power flowed from the contract of service it could not be termed as penalty or punishment."

The learned counsel submitted that when the impugned order of discharge did not attach any stigma to the character or conduct of the petitioner, it is not open for this Court to make a thorough search of the files of the Corporation and to hold that the order was in the nature of penalty for some alleged misconduct. He further submitted that even if the misconduct of the petitioner in pilfering the revenue of the Corporation was the motive for making the order of discharge, the Court cannot set aside the order in view of the law laid down by the Supreme Court in paragraph 12 of the judgment extracted above.

8. In my view the position which emerges after the above two decisions of the Supreme Court is not exactly as contended for the Corporation. The observations in Saboji's case to the effect that if a strong case is made out to show that an order which on the face of it appears to be an order of discharge, was in reality, in the nature of penalty, the Court could interfere, itself shows that the

discharged person, can take the plea that even an innocuously worded order was in truth in the nature of penalty. These observations are reiterated in Oil and Natural Gas Commission's case, AIR 1980 SC 1212. In Saboji's case itself, Pathak, J., in his concurring judgment has said-

"... There may still be another kind of case where although the termination of services is intended by way of punishment, the order is framed as a termination simpliciter. In such a case, if the Government servant is able to establish by material on the record that the order is in fact passed by way of punishment, the innocence of the language in which the order is framed will not protect it if the procedural safeguards contemplated by Art. 311(2) of the Constitution have not been satisfied. In a given case, the Government servant may succeed in making out a prima facie case that the order was by way of punishment but an attempt to rebut the case by the authorities may necessitate sending for the official records for the purpose of determining the truth. It is in such a case generally that the official records may be called for by the Court. It is not open to the Court to send for the official records on a mere allegation by the Government servant that the order is by way of punishment. For unless there is material on the record before the Court in support of that allegation, an attempt by the Court to find out from the record whether the termination of service is based on the unsuitability of the Government servant in relation to the post held by him or is in reality an order by way of punishment will in effect be an unwarranted attempt to delve into the official records for the purpose of determining the nature of the order on the basis of a mere allegation of the Government servant. On a sufficient case being made out on the merits before the Court by the Government servant it is open to the Court to resort to scrutiny of the official records for the purpose of verifying the truth. I am unable to see why the Court should decline to peruse the official records in an appropriate case." (underlined italics by me)

In the Oil and Natural Gas Commission's case also, the Supreme Court, at para 14 has stated thus-

"14..... The order does not in any way involve any evil consequences and is an order of discharge simpliciter of the respondent who was a probationer and had no right to the service. The respondent has not been able to make out any strong case for this Court to delve into the documents, materials in order to determine a case of victimization." (Underlining italics by me)

In a still later judgment in the case of Nepal Singh v. State of U.P., AIR 1980 SC 1459, the Supreme Court has observed-

"It is now settled law that an order terminating the service of a temporary Government servant and ex facie innocuous in that it does not cast any stigma on the Government servant or visits him with penal consequences must be regarded as effecting a termination simpliciter, but if it is discovered on the basis of material adduced, that although innocent in its terms the order was passed in fact with a view to punishing the Government servant, it is a punitive order

which can be passed only after complying with Article 311(2) of the Constitution." (Underlining italics by me)

As can be seen from paragraph 5 of the judgment in which the above observation is made, the Supreme Court has also referred to the enunciation of law on the point made in Saboji's case. Thus the ratio of the three decisions indicates that there is no bar at the threshold to entertain a writ petition against an order of discharge, the wording of which is innocuous, as contended for the Corporation, though, the scope for interference in such a case is undoubtedly very limited, and it may be summarised as follows:

(i) If the wording of an order by which a probationer is discharged, indicates that it is only a discharge simpliciter, ordinarily it must be accepted as correct and there is no scope for interfering with such an order.

(ii) (a) If however the person concerned asserts that the order though innocuously worded is really in the nature of penalty, and the Court considers that the averments are such that they cannot be rejected without verification of the records, the Court can call upon the authority who had made the order to produce the original order to verify whether that is different from the one communicated.

(b) If both. i.e., the order communicated and the original of it found in the file, are similar, the Court should not dig deep into the records to unearth some misconduct not disclosed in the original order also and hold that the order was based on misconduct and therefore it attached a stigma and then set aside the order on that ground. In other words, a stigma not attached by the order communicated to the concerned employee, or the original order, cannot be attached to it, by finding out some record of any charges levelled or framed against the person sometime earlier, even if it be in close proximity to the date of the discharge order in order to strike down the order. By doing so the Court would be going to the motive of the authority in passing the order. Such a course is impermissible, because it is extremely difficult, if not impossible, for the Court to hold that some misconduct was the cause for discharge, when the authority has the power to discharge the employee on the ground of unsuitability only without reference to the allegation of misconduct, if any, made against him and the authority has made the order in exercise of that power.

(c) If the original order made by the authority expressly refers to a misconduct, as one of the basis for discharge, though omitted to be incorporated in the order communicated, the order must be held to be bad and cannot be upheld on the ground that it was not set out in the communication. In other words, if the contents of the order communicated is at variance with its original on the file and the latter is found to be based on an allegation of misconduct of which the person had no opportunity to meet, the Court cannot still say that it is not based on misconduct.

(d) To put it in a nut-shell, the Court cannot hold that an impugned discharge

order (either the one which is communicated or its original on the file) attaches a stigma to the character and conduct of the discharged person though it attaches none or that it attaches none though it attaches one.

9. Coming to the facts of the case, a mere reading of the order communicated and its original on the file both of which are extracted earlier, indicates that their contents are at variance. While the order communicated makes no reference to any misconduct, the original order does, and this leaves a permanent bad record about the antecedents of the petitioner. Usually the antecedents of a person once discharged from service is ascertained by any employer, before deciding his suitability for employment. Therefore when a person discharged from service pleads that the discharge is in truth a penalty imposed for any alleged misconduct, which was neither admitted nor proved at any time during the period of probation, it is competent for this Court to look into the original order made on the file, and the looking into it, as indicated by me earlier, does not amount to delving, i.e., digging deep into the records. It is no doubt true that if in the office order passed on the file also the competent authority had made no reference to the charge of pilferage alleged against the petitioner, but had referred only to this record of service on which it formed the opinion that the petitioner was not suitable for the post, there would have been no record to the effect that any misconduct (not admitted or proved during the period of probation) constituted the basis for discharge and in that event this Court would not interfere with the order of discharge by making a probe into the records, even if the petitioner were to contend that some allegation made against him immediately prior to the passing of the order of discharge was the basis for the passing of the discharge order. An inquiry of that type by the Court would amount to the examining of the motive of the authority in passing the order and such an investigation cannot be undertaken by the Court. This is obviously for the reason that an allegation of misconduct made against a probationer does not have the effect of depriving the competent authority of its power to discharge the probationer, if on the basis of his record of service he is found unsuitable for confirmation. In the present case, it cannot be said that the charge of pilferage constituted a motive and not the basis as it is specifically adverted to in the order passed by the competent authority. After seeing the contents of the original order which expressly refers to a misconduct as a basis for the discharge order, I think that it is impermissible for me to say and I would not be right in saying that the order is not based on the misconduct just because it is not correctly communicated. Therefore, I find no substance in the contention urged for the Corporation.

12. For the reasons aforesaid, I make the following order:

- (i) Rule made absolute.
- (ii) The impugned order dt. 25.4.79 (Exhibit-D) is quashed.
- (iii) As regards consequential benefits the petitioner has to work out his remedies

under the Labour Laws in the light of the judgment of the Supreme Court in U.F. Warehousing Corporationv. Vijay Narayan, AIR 1980 SC 840.

(iv) No costs.