
(1987) 08 GUJ CK 0003
In the Gujarat High Court

Govindbhai Kanabhai Maru

APPELLANT

Vs

N.K. Desai, District Judge

RESPONDENT

Date of Decision : 31-08-1987

Acts Referred:

Constitution of India, 1950 — Article 226, 226
Industrial Disputes Act, 1947 — Section 25F, 25F

Citation : (1987) 2 GLR 1159

Hon'ble Judges : A.S. Qureshi, J

Bench : Single Bench

Judgement

A.S. Qureshi, J.—The petitioner herein challenges the order dated 2-1-1984 (Annexure-F) terminating his service on the ground that his work was not satisfactory. Mr. A.D. Padival, learned Counsel for the petitioner has urged that the impugned order is legally not sustainable, because according to him, the said order is based on several reports referred to in the affidavit-in-reply stating that the petitioner's work was not satisfactory. According to Mr. Padival, the termination was with a stigma and hence the petitioner should have been given an opportunity to be heard. It is not disputed that the petitioner was not given any show-cause notice or other opportunity to explain his conduct. Mr. Padival has further urged that although the petitioner was described as a part-time servant doing the work of sweeper, cleaning lavatory etc., but in fact, he was made to work for 5 to 6 hours a day and hence he should be treated as a full-time servant. In his submission, the impugned order deserves to be struck down as the same is violative of principles of natural justice.

2. Mr. H.B. Antani, learned A.G.P. has urged that the petitioner was in a part-time employment working for about couple of hours doing the sweeping and cleaning work in the Court of Civil Judge (J. D.) at Dhandhuka. According to Mr. Antani, the petitioner was employed purely on a temporary basis for a limited time everyday and that his wages were paid from the contingency funds. Hence, according to him, the petitioner was not entitled to be given any show-cause notice before termination of his service. Mr. Antani has relied on a single Judge

judgment in *Kartar Singh Jati Singh v. State of Patiala & East Punjab Staff Union and Anr.* AIR 1955 Pepsu 25, wherein it is held:

According to Pepsu Civil Services (Classification, Control and Appeal) Rules, 1952, Part-II, contingency staff is no part of any regularly constituted service in the State. That being so, it cannot be said that employees on the contingency staff are employed in any civil service.

3. The submission of Mr. Padival that the petitioner should be treated as fulltime servant, must be rejected for the reason that there is nothing on record to show that the petitioner was in fact made to work for 5 or 6 hours everyday. Even if there was such an averment, it is controverted by the other side. Hence, the same is a disputed question of fact, which this Court cannot decide in its special jurisdiction under Article 226 of the Constitution of India. If the petitioner wishes to establish that in fact he was rendering service for a whole day and that he should be treated as a full time servant, his remedy lies in the Civil Court where he can lead evidence and prove his contention. For the present, he is to be treated as a part-time sweeper.

4. The second contention of Mr. Padival that the termination of service on the ground of unsatisfactory work implies a stigma, is also not sustainable. The termination order based on unsatisfactory work, does not amount to a stigma. Although there are reports referred to in the affidavit-in-reply stating that the petitioner's behaviour was insolent and that when he was asked to do the required work, he used to remonstrate and that in general the petitioner's conduct was that of a strong-headed person unwilling to carry out his duties as required. These reports may have induced the termination order. But the order as is stands, does not cast any stigma on the conduct or behaviour of the petitioner. The dissatisfaction of service may be for several reasons. But so long as termination is based on merely unsatisfactory work, it cannot be regarded as a stigma on the conduct or character of the employee.

5. The next contention of Mr. Padival is that the petitioner had been in service even as a part-time sweeper for over 13 years, he should not be regarded as a temporary servant. According to Mr. Padival, it does not make any difference whether the petitioner is paid his wages from contingency funds or any other funds. A continuous service, according to him, for as many as 13 long years, entitles the petitioner to be treated in a less cavalier manner. This contention of Mr. Padival has considerable merit. If a person has been in service for a decade and more, surely he cannot be regarded as an ad-hoc appointee or a person employed on a contingency job. The submission of Mr. Antani that the petitioner's service could be terminated at any time at the will of the respondent is misplaced. His reliance on the aforesaid decision in AIR 1955 Pepsu 25, is also not proper. That case has no application to the facts and circumstances of this case. In the aforesaid judgment, the Court was construing the Pepsu Civil Services (Classification, Control and Appeal) Rules, 1952, where certain provisions were made. Mr. Antani has failed to appreciate that there is a

difference between a contingency employment and an employment where the wages are paid from contingency funds. A contingency employment contemplates a brief employment for a specific purpose. It does not contemplate a continuous service over decades although it may be only part-time. The contingency job comes to an end as soon as the contingency is over. The fact that the wages are paid from the contingency funds or any other funds, has no relevance while considering the nature of employment lasting for years. It is open to the employer to pay wages from whatever funds which may be available to him. That cannot determine the nature of employment whether it is contingent or permanent or semi-permanent. Other factors are also important in finding out the nature of employment. It is, therefore, held that although the petitioner was a part-time employee, in view of the fact that he had worked in that capacity for more than 13 years, he ought to have been given an opportunity of being heard. That opportunity not having been given, the impugned termination order is not sustainable, the same deserves to be quashed and set aside.

6. Another contention of Mr. Padival is that the impugned order of termination of service is legally not sustainable as the same is in contravention of Section 25-F of the Industrial Disputes Act (hereafter "the Act"). Mr. Padival has urged that the term "workman" defined in Section 2(s) of the Act, is very wide and includes all persons who are employed in industry, including even an apprentice. He has also urged that even a part-time employee is covered by this definition of "workman". For this proposition, he relies on a Division Bench judgment of this Court in Special Civil Application No. 3063 of 1986 (Coram: P.R. Gokulakrishnan, C.J. & R.A. Mehta, J. decided on 18th June, 1986) Gujarat State Road Transport Corporation v. P.P. Joshipura. It has held as under:

It is clear from the facts of the case that the doctor who was doing part time job for over 18 years can be easily considered as a "workman" coming under the definition of "workman" under the Industrial Disputes Act. The honorarium paid, in our opinion, will squarely come under the definition "wages" u/s 2(rr) of the Industrial Disputes Act.

This Court is in respectful agreement with the said judgment of the Division Bench. The definition of "workman" in the Act is couched in sufficiently wide terms so as to include even the part-time employees who have been in service over a long period. Therefore, it is held that the present petitioner falls within the definition and he should be treated as workman under the Act.

7. In view of the fact that the petitioner was working as a sweeper in Civil Court at Dhandhuka, Mr. Antani submitted that the Court is not an "industry" and hence Section 25-F of the Act does not apply in this case. He has relied on another Division Bench judgment of this Court in Special Civil Application No. 3982 of 1984 (Coram: P.S. Poti, C.J. and R.C. Mankad, J. decided on 1-8-1984) H.H. Waghela v. B.P. Shah, wherein it is held as under:

The contention that she is entitled to the benefit of Section 25-F of the Industrial

Disputes Act does not call for examination here, for even assuming that there is violation of Section 25-F inasmuch as a regular appointee has now been appointed the petitioner's claim if at all can be only a monetary claim. That a person working in the Judicial Department is not entitled to claim the benefit of the Industrial Disputes Act has been held in a Full Bench decision of the Kerala High Court in *Umayammal v. State of Kerala* 1982 KLT 829 . In that case a detailed examination of the various Departments of Government which would fall within the scope of the term "industry" has been made. While various departments have been held to fall within "industry" very few exceptions have been found and one of them is the Judicial Department. Those departments which perform inalienable sovereign functions would not fall within the scope of the term "industry" and the Judicial Department is one such. The petitioner's Counsel argues that even so a class IV employees in the Judicial Department need not be treated as outside the protection of the Industrial Disputes Act. It is not easy to say that the Judicial Department could be considered in several tiers and some of them treated as outside the scope of operation of sovereign functions. Reference has been made by Counsel to the decision in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, . We do not think that it will support the position canvassed by the petitioner. We see no reason to entertain this petition or to permit the petitioner to continue in the face of a regular appointment made to her office. Suffice to say that we see no reason for interference under Article 226 of the Constitution of India. It is open to the petitioner to make a representation on this question where upon we expect that to be examined appropriately.

So far as the State's actions in exercise of its sovereign functions are concerned, they are distinct and stand on a different footing from the acts where the State engages itself in commercial activity. It is quite obvious that the ordinary commercial or similar other activity cannot be held to be within the exercise of the sovereign functions of the State. Administration of justice is quite clearly the exercise of the sovereign function of the State. The Division Bench has very rightly pointed out that this function cannot be divided or dissected into parts or pieces and some of them regarded as actions in exercise of sovereign function and others regarded as not in exercise of sovereign functions. Indeed, the very idea of commercial dealing or similar activity is anathema to the concept of administering justice between the contending parties. The Division Bench of this Court in the above decision and the Full Bench of Kerala High Court in *Umayammal v. State of Kerala* 1982 KLT 829 have examined this position clearly and held that Judicial Department is not an "industry" within the meaning of the Industrial Disputes Act. This Court is in respectful agreement with the aforesaid decisions, and therefore, it is held that Judicial Department is not an "industry" and hence Section 25-F has no application.

7.1. In the aforesaid judgment, the Division Bench has also held that even assuming that Section 25-F was applicable and that there was a violation of the provisions thereof, even so, the petitioner's claim, if at all, can only be a

monetary claim, for which a petition under Article 226 of the Constitution of India is not an appropriate remedy. This decision, it is respectfully submitted, is quite correct. The same is in any case binding on this Court. Hence, the contention raised by Mr. Padival on the ground of violation of Section 25-F of the Act, is rejected.

8. In the result, the petition is partly allowed. The impugned order of termination of service is struck down on the ground of violation of principles of natural justice in not giving the petitioner an opportunity to be heard. The petitioner is directed to be reinstated on or before 1-10-1987 in the same job as he was at the time when the impugned order of termination was passed. In view of the fact that the petitioner's services were terminated on account of his insolent and disobedient behaviour, the petitioner is not entitled to back wages. Ordering back wages would be tantamount to putting premium on misconduct. It must be stated that the petition is partly allowed and the petitioner is directed to be reinstated in service on account of a major lapse on the part of the officer who passed the termination order without giving the petitioner an opportunity to be heard. It is expected that atleast in Judicial Department, order should not be passed without giving a person an opportunity to clear himself of the allegation of not performing his duties properly. It is directed that after the reinstatement, the petitioner will be given a fair opportunity to render service properly and satisfactorily. If he continues to behave as before, action may be taken after hearing him. Order accordingly. In the circumstance of the case, there shall be no order as to costs.