
(2019) 07 GUJ CK 0004

In the Gujarat High Court

Case No : R/Special Civil Application No. 11154 Of 2019

Hareshkumar Becharbhai Chaudhary

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 31-07-2019

Acts Referred:

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

Citation : (2019) 07 GUJ CK 0004

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

Bench : Single Bench

Advocate : Gaurav K. Mehta, Krina Calla

Final Decision : Allowed

Judgement

N.V. Anjaria, J

1. Heard learned advocate Mr. Gaurav Mehta for the petitioner and learned Assistant Government Pleader Ms. Krina Calla for the respondent State and its authority.

2 . The challenge in this petition is directed against orders dated 22.4.2015 and 4.6.2016 passed by respondent No. 2-the Commissioner of Transport and respondent No. 1-the Secretary, Port and Transportation Department respectively. By the first order dated 22.4.2015, the services of the petitioner came to be terminated. The respondent No. 2 which is the appellate authority, confirmed the said order rejecting the appeal of the petitioner. The order of the appellate authority, though mentioned in the prayer, is not produced on record of the petition.

3. The case of the petitioner is that he came to be appointed on the post of Assistant Motor Vehicle Inspector, Class-III, pursuant to participation and success in the recruitment process. The recruitment process was undertaken by the Gujarat Public Service Commission. The appointment letter dated 20.6.2013 given to the petitioner showed that his appointment as Assistant Motor Vehicle

Inspector, Class-III was for a period of five years and on the fixed monthly pay of Rs. 10,000/-. The conditions of appointment were mentioned in the letter of appointment.

3.1. It appears that on 22.7.2014, the office of Commissioner of Transport issued show cause notice to the petitioner, in response to which the explanation was furnished by the petitioner on 3.9.2014. Thereafter, without any further inquiry held, followed the impugned order being officer order No. 305 of 2015 dated 22.4.2015. Thereby, it was ordered to dispense with the services of the petitioner.

3.2. Looking at the contents of the said order dated 22.4.2015, which is impugned in the petition, it was inter alia stated that on 11.6.2014, a trap was arranged at the Amirgadh check-post by the squad of Anti Corruption Bureau, where the petitioner was posted on duty. It was found by the squad that employees at the check post including the petitioner were involved in receiving the money by way of bribe from the trucks and vehicles passing through the check post to allow them to commit breach of traffic rules. The amounts were recovered, stated the impugned order from one of the employees as well as from the store room of the check post. Against the accused persons, whom included the petitioner, the offence was registered under the Prevention of Corruption Act, 1988.

3.3. The Commissioner of Transport taking a view that notice was not satisfactorily answered and that the petitioner had committed misconduct of accepting the bribe, passed the order of termination. It was mentioned in the termination order that the First Information Report was registered with ACB Police Station, Palanpur, bearing C.R. No. 3 of 2014. The order mentioned condition Nos. 11 and 12 in the letter of appointment. Thereafter, it was recited that because of act of accepting the bribe and on account of factum of FIR having been registered and since the petitioner failed to submit satisfactory reply and failed to submit any evidence to show is innocence, and ultimately on the ground of commission of misconduct the impugned order came to be passed, which was confirmed in appeal.

4 . Learned advocate for the petitioner submitted that the impugned order was manifestly stigmatic in nature. It was submitted that though apparently the condition Nos. 11 and 12 of the order of appointment were referred to as the basis of termination of the services of the petitioner, the termination was a punitive measure based on the findings of misconduct which action was founded only on the ground that FIR was registered against the petitioner for the offence under the Prevention of Corruption Act, 1988. Learned advocate for the petitioner relied on various decisions to submit that order of such nature could not have been passed without holding a full-fledged inquiry and without complying the principles of natural justice.

4.1. Learned advocate for the petitioner in particular relied on the decision dated 8.5.2015 of this court in Chetan Jayantilal Rajgor vs. State of Gujarat being

Special Civil Application No. 4439 of 2017. In that case also, the petitioner was Assistant Motor Vehicle Inspector, whose services came to be terminated by passing similar order adjudging that the said petitioner had committed misconduct on the basis of filing of FIR for the alleged offences under the Prevention of Corruption Act, 1988 which was in respect of the very incident. The petitioner as well as the said Chetan Jayantilal Rajgor both were posted at Amirgadh check post and they were booked together in the FIR to later suffer the action of termination of their services. Since the aforesaid petition was allowed, it was submitted by learned advocate for the petitioner that present petition also deserves to be allowed fully.

5. The question which was considered Chetan Jayantilal Rajgor (*supra*) and the one arises in the present case is whether the order which was punitive and amounted to casting of stigma could have been passed without holding a regular inquiry against the petitioner who was a fixed termed employee appointed on a fixed salary.

5.1. It is well settled that if the termination is founded on the allegations of misconduct, it becomes a punitive order, ceasing to be termination simpliciter even though it is so projected in the order. 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 above statement of law that if the order is punitive and stigmatic in nature, even if the employee concerned is a temporary employee or holding the post as on probation, his dismissal or removal would warrant a regular inquiry and full-fledge compliance of natural justice, emanated from the early decision of the Apex Court in *Anoop Jaiswal v. Government of India* (1984) 2 SCC 369]. In that case, the Apex Court held that it is permissible for the Court to go behind the formal order of discharge so as to find out the real cause of action. In that case, the appellant was an IPS Officer, undergoing training as a probationer, arrived late by about 22 minutes at the place, even though prior intimation was

sent about the time on which, the candidates were required to reach the venue. The incident of delayed reporting was considered to be one by the authorities calling for an inquiry and an explanation was sought for from the petitioner and all other probationer-trainees who had arrived late. On the basis of explanation, the Director recommended the Government for discharge of the appellant from service. The Government passed order of discharge on the basis of recommendation of the Director with whom, the only ground prevailing was that the appellant did not show any sign of repentance. The High Court dismissed the Writ Petition. However, the Supreme Court allowed the Appeal and held that the order was punitive. The appellant was directed to be reinstated with full benefits.

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 that "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)."

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 *Ratneshkumar Chaudhari v. Indira Gandhi Institute of Medical Services* (2015) 15 SCC 151 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.

5.6. 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.

5.7. 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, eventhough 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".

5.8. 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.

"..... 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."

(para 4.1)

5.9. 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.

5.10. 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.

"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 where 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."

(Para-8)

6 . When the impugned order is considered in light of the above principles and the position of law emerging, 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 of services was effected. It was an order based 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 26th June,

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.

6.3. It may be stated at this stage, as already stated, that in case of similarly situated aforesaid Chetan Jayantilal Rajgor, who was also Assistant Motor Vehicle Inspector and who faced similar charges and in whose case identical order casting stigma was passed arising out of the very incident at the same Amirgadh check post, Special Civil Application No. 4439 of 2017 was decided on 08.05.2019 by this Court. The eye-catching difference is that the present petitioner has filed the present petition subsequently which is after a gap of four years. In this view, while the petitioner in the above-mentioned Special Civil Application was granted back-wages, the present petitioner is treated to be not entitled to receive any back-wages in view of long delay in filing the present petition to challenge the impugned order. No reasons for delay have been forthcoming except it appears that the petitioner wanted the benefits of the decision rendered in Chetan Jayantilal Rajgor (supra). While the decision in Chetan Jayantilal Rajgor (supra) would have to be applied for its principle in case of the present petitioner, in view of the factor of delay, the back-wages are denied.

7 . As a consequence of above discussion and reasons, the impugned orders dated 22.4.2015 passed by respondent No. 2-the Commissioner of Transport, is hereby set aside. The respondents are directed to reinstate the petitioner on original post of Assistant Motor Vehicle Inspector, Class-III with continuity of service but without payment of any back-wages. The reinstatement of the petitioner directed as above shall be for the period upto making up the total original period fixed for his employment as per order of appointment. The petitioner shall be reinstated within four weeks from the date of service of copy of this order which shall be on the above conditions.

8 . The respondents are not precluded from proceeding against the petitioner on accordance with law.

9. The petition is allowed in the aforesaid terms. Rule is made absolute accordingly. Direct service is permitted.