
(1995) 10 MAD CK 0036
In the Madras High Court
Case No : W.A. No. 825 of 1991

Indian Bank

APPELLANT

Vs

C.V. Reddy

RESPONDENT

Date of Decision : 31-10-1995

Acts Referred:

Constitution of India, 1950 — Article 226, 311(2)
Indian Bank Officers Service Regulations, 1979 — Regulation 16(3)

Citation : (1995) 2 LLJ 1180

Hon'ble Judges : Srinivasan, J; S.S. Subramani, J

Bench : Division Bench

Advocate : G. Venkataraman, for Aiyar and Dolia, for the Appellant; D. Murugesan, for the Respondent

Final Decision : Allowed

Judgement

Srinivasan, J.—The appeal is against the order of learned single Judge dated June 17, 1991 allowing the writ petition filed by the respondent herein for the issue of a certiorarified mandamus quashing the order made by the first appellant in GM/PR/NL/13 dated February 26, 1988 and directing the first appellant to permit the respondent herein to continue his probation.

2. The relevant facts are shortly as follows: The first appellant issued an advertisement through Banking Service Recruitment Board in Advertisement No. 12/86 inviting applications for recruitment to the post of Chief Engineer for the first appellant bank. As regards the scale of pay and grade, the advertisement has mentioned that the selected candidate will be fixed on a proper scale so that the total salary would not exceed Rs. 4600/- per mensem at the current rate inclusive of pension if any as per Government directions in addition to provident fund and gratuity as per rules. The respondent herein applied for the post and he was selected. A communication was sent by the Recruitment Board in February, 1987 to the respondent that he was provisionally selected and allotted for appointment as Chief Engineer in the Indian Bank and that in due course he was

informed with regard to the terms and conditions of the appointment. The said communication also referred to the fact that the appointment was subject inter alia to the verification of his character and antecedents and other matters referred to therein. The Management Board in a meeting held on October 9, 1986 approved the reappointment of Lt Cl. P.Venugopala Menon, (retired), as consultant Engineer to the bank for a period of six months from October 3, 1986 on certain terms and conditions. It was mentioned in the note of the General Manager to the Board dated May 23, 1987 that the construction project at several places all over India apart from other regular work related to the Estate Department and it is desirable to ensure that there was a competent person to continuously oversee the progress in regard to these projects/jobs in process. On that basis, recommendations were made to the Board that the said Lt. Col. P. Venugopala Menon may be reap-pointed as Consultant Engineer for a period of six months with effect from May, 1987. The Board resolved accordingly.

3. The appointment letter was sent to the respondent on August 3, 1987. As regards his emoluments the basic pay of Rs. 2,850/ per mensem in the middle management grade scale III Rs. 2650/- 100- 3250/- was fixed." It was stated that he would be entitled to dearness allowance as may be sanctioned from time to time and at that time it was Rs. 1556.10. He was also entitled to City Compensatory Allowance and House Rent Allance as per rules depending on the place of posting. With reference to the period of probation, the letter said that he will be on probation for a period of one year from the date of his joining duty and during the said period he would be required to undergo training in any institution to which he will be deputed and the in-service training in the Bank. It was added. "The Bank may, however, at its discretion, curtail or extend or dispense with the period of probation in any individual case." It was made clear in the letter that he was bound by the Bank's rules and regulations governing the services of Officers in force from time to time. It was stated that a copy of the rules and regulations will be given to him at the time of his joining duty. A copy of the said appointment letter was forwarded to him with the request to specify his consent and acceptance and return the same to the Bank. Accordingly, the respondent made an endorsement, offer accepted " on August 11, 1987 in the copy of the letter and forwarded it to the bank. He was asked to report for duty on or before October 7, 1987. He made a representation that the basic pay should be revised and it was not accepted. He was informed by a letter dated October 2, 1987. Immediately thereafter, he sent a notice through his lawyer on January 24, 1988 to appellants 2 and 3 alleging that they had fixed the pay according to their convenience and decision without any jurisdiction contrary to the management Board's resolution and thereby caused wrongful loss to him. It was also alleged that the second addressee (third appellant herein) made a false note and suppressed vital information in the note)/dated May 22, 1987 which was placed before the Board. At the end of notice it was stated that the two addressees had committed offence of cheating under the provisions of the Indian Penal Code thereby subjecting themselves for punishment provided therein. They were called

upon to immediately explain within ten days of the receipt thereof as to why criminal prosecution should not be launched against both of them under the Indian Penal Code. A reply was sent on behalf of appellants 2 and 3 on February 11, 1988 setting out the factual position according to them and refuting the complaint made in the respondent's lawyer's notice.

There was a rejoinder by the respondent on February 22, 1988. It was addressed to the Chairman and the Managing Director of the Bank sent through proper channel. In that rejoinder, the respondent had sought permission to approach directly the Director of Public Grievances, New Delhi, to administer justice in his case and to bring to the notice of the Secretary in the Ministry of Finance - Banking, the irregularities and injustice done to him while taking appropriate action at his end.

4. Thereafter, a note was put up by the Managing Director to the Board. It reads as follows :

"I have gone through the note, his lawyer's notice and the various letters written by him beginning from October 13, 1987. He has also written directly to the Government, which is not expected from an officer. He has stated in his notice through lawyer that both myself and Executive Director have committed offence of cheating under the provisions of IPC subjecting ourselves to punishment there under and called upon me to explain as to why criminal proceedings should not be launched against me and ED for the offence of cheating. Considering all these facts, I am of the opinion that he is not a fit person to be confirmed in Bank's service and therefore his probation is terminated with immediate effect, as per clause 16.3 of the Indian Bank Officers' Service Regulation, 1979."

It was followed by a communication in GM/PRNL/13/88 dated February 26, 1988 issued by the General Manager (PPD) which reads.

"In exercise of the powers contained in Regulation 16(3) of the Indian Bank Officers' service Regulation 1979, please note that your services as a direct appointee chief Engineer, on probation in terms of the order of appointment dated August 3, 1987 is terminated with immediate effect by order of the competent Authority as the competent Authority is of the opinion that you are not fit for confirmation. We enclose herewith a sum of Rs. 4349/30 consisting of a month's emoluments in lieu of one month's notice. Your other claims will be settled separately."

5. It is the said communication which is challenged in the writ petition by the respondent herein. As already seen he has not only sought for quashing the said communication but, also for permission to continue him as probationer in the bank. The matter was contested and the learned single Judge has allowed the writ petition and granted the reliefs prayed for by the respondent by his order dated June 17, 1991. Learned Judge has taken the view that the termination of the petitioner is punitive in character and as there is no enquiry before passing the said termination order the same is invalid as it violates the principles of

natural justice. Learned Judge has also considered Regulation 16.3 of the Indian Bank (Officers") Service Regulation, 1979 and held that the termination under the said Regulation could be effected only on the expiry of the period of probation after an assessment of the merits of the concerned probationer.

6. Aggrieved by the said order, the appellants have preferred this appeal. We have been taken through the records. We are of the opinion that the two reasons given by the learned single Judge to quash the order of termination of probationer are unsustainable.

7. Regulation 16.3 of the Indian Bank (officers") Service Regulations, 1979 reads as follows.

"Where during the period of probation including the period of extension, if any, the competent authority is of the opinion that the officer is not fit for confirmation.

(a) in the case of a direct appointee, his services may be terminated by one month's notice or payment of one month's emoluments in lieu thereof; and

(b) in the case of a promotee from the Bank's services, he may be reverted to the grade or cadre from which he was promoted."

The language of the Regulation is very clear. The clause contains the words "where during the period of probation". That itself shows that the question whether the officer is not fit for con-formation could be considered during the period of probation and it is not necessary to wait till the expiry of the period of probation for deciding that question. If during the period of probation before the expiry of the period, the concerned authorities are able to form an opinion that the concerned officer is not fit for confirmation then it is open to them to exercise their powers under Regulation 16.3. It is also seen that in the communication sent to the respondent appointing him as Chief Engineer, Clause 2 which relates to the period of probation has expressly stated that the bank has a discretion to curtail or extend or dispense with the period of probation in any individual case. That shows that the bank can take a decision to curtail the period of probation and terminate the services of the person concerned even before the expiry of the period of probation. The respondent has agreed to such terms by making an endorsement, "offer accepted" on August 11, 1987. Hence, there can be no doubt whatever that the interpretation placed on Regulation 16.3 by the learned single Judge is erroneous. If that interpretation is accepted there cannot be any decision as to curtailment of dispensing with the period of probation in any case before the expiry of the period of probation. The very fact that the bank has a discretion to decide whether the period of probation should be curtailed or dispensed with shows that such discretion can be exercised at any time prior to the expiry of the period of probation.

8. It is vehemently argued that the order of termination is punitive in character and it is evident from the note sent by the Managing Director to the General

Manager. According to learned counsel for the respondent, the only circumstance taken into account for the purpose of terminating the services is issue of lawyer's notice by the respondent and the allegations made therein against appellants 2 and 3. There is no substance in this contention. No doubt, it is a note sent by the Managing Director to the General Manager. But, the order of termination, which is communicated to the respondent, merely shows that in the opinion of the competent authority he is not a fit person. The order by itself does not cause any stigma on the respondent. Hence, it cannot be considered as punitive in nature. Learned counsel submits that it is open to the Court to go behind the order and decide the real nature of the order, even though the order does not indicate that it is punitive in nature. Before considering that contention, we would like to point out that in this case even assuming that the note prepared by the Managing Director contains relevant reason for terminating the probation of the respondent herein, it is not punitive in character. It should not be forgotten that the respondent joined the services in October, 1987 and within a short time raised a dispute as regards his basic pay and also started making serious allegations against appellant 2 and 3. He did not stop with that. He sent a lawyer's notice calling upon them to explain as to why a prosecution should not be launched against them. In such a situation it is very clear that the management of the bank could not be in a position to continue him in service. They had two courses open before them; either to initiate disciplinary proceedings against the respondent or to terminate his probation. They chose the latter course as they found his temperament so incompatible as to get along with. Hence, the decision to terminate the probation cannot be considered to be punitive in character.

9. His pointed out by a Division Bench of this Court that the motive which led to the exercise of a function had to be carefully distinguished from the nature of the act in *Ramiah (V.) Vs. State Bank of India*, . The law has been stated by the Division Bench of this Court as follows at pages 436-437

"In our view, an analysis of the order, in the setting in which it was made, and on a fair interpretation of its purpose and tenor, can lead only to the conclusion that it is really what it ex facie claims to be, an invocation of the power derived from contract to terminate the services of the appellant. As the learned Judge (Veeraswami, J.) rightly observed, if we may say so with respect, the occasion for the exercise of the power is one thing, and the basis for the act of termination is quite another. Certainly, without the prior facts of the charges and the enquiry, and the ultimate conviction of the relevant authority that the charges had been established, the act of termination under the contract is not explicable. But, in our view, the motive which led to the exercise of a Junction, has to be carefully distinguished from the nature of the act. It is very important to note as the learned judge has stressed that the local board, in exercising this power of termination, does not state that it agrees with the findings of the enquiry officer. The learned Advocate-General has strenuously contended that the basis of the order is the enquiry and the findings of misconduct. Therefore,

according to him, though the order purports to terminate the services under contract, it is really a punishment. We think that this line of reasoning conceals a fallacy. Any employer, even a statutory body, may initiate a proceeding, hold an enquiry, and come to certain conclusions. But, at that stage, it may be faced with the choice of two alternatives. It may choose to punish the employee on a finding of misconduct, or it may choose, for what may seem to the authority to be valid reasons, to terminate the employment under contract, instead.

We are unable to see how this choice, of one of two alternatives, can be possibly denied. If the organisation chooses the alternative of terminating the employment under contract, how can it be contended that it meant something else, unless, indeed; there is some mala fide exercise of power. We do not think that an argument is sustainable that, wherever the termination, under contract, is motivated by some prior enquiry or some investigation, it is not bona fide. This will lead to the absurd consequence that the power to terminate an employment under contract, is taken away, the moment the employer thinks that the employee is undesirable. From all that we can gather from the record, it may be perfectly true that the employer-organisation thought of both the alternatives, and decided on the alternative of terminating the employment under the power of contract, instead of imposing a punishment, as more merciful, and justified by the prior unblemished record. It may even be that on legal advice obtained by the bank authorities, the alternative of exercising the power under the contract was chosen. We have nothing to do with the motive; we have only to see whether the order is what it claims to be, or is merely a semblance, making some ulterior objective."

10. This principle has been upheld by the Supreme Court in *State of Uttar Pradesh and Anr. v. Kaushal Kishore Shukla* JT 1991(1) SC 103. The Court held that in determining the nature of the order of termination, the Court should apply two tests, viz., 1) whether the temporary Government servant has a right to the post or the rank or (2) whether he has been vested with evil consequences and if either of the tests is satisfied, it must be held that the order of termination is by way of punishment. The Court added that it must be borne in mind that a temporary Government servant has no right to hold the post and termination of such a Government servant does not visit him with any evil consequences. The Court referred to the earlier rulings of the Supreme Court and pointed out that the tests were discussed fully by a three Judge bench in *State of Punjab and Another Vs. Shri Sukh Raj Bahadur*, . With regard to the facts in that case, the Court observed as follows:

"In the instant case the respondent was a temporary Government servant and there was adverse report regarding his work which was reflected in the adverse remarks made for the year 1977-78. The competent authority held a preliminary inquiry in the allegations of improper conduct in carrying out unauthorised audit of Boys Fund of an educational institution; on result of the preliminary enquiry no charges were framed against the respondent, no officer was appointed for

holding the departmental inquiry; instead the competent authority chose to terminate the respondent's services in exercise of its powers under the terms of contract as well as under the relevant rules applicable to a temporary Govt. servant. It never intended to dismiss the respondent from service. Holding of preliminary inquiry does not affect the nature of the termination order. The allegations made against the respondent contained in the counter affidavit by way of a defence filed on behalf the appellants also do not change the nature and character of the order of termination. The High Court failed to consider the question in proper perspective and it interfered with the order of termination in a casual manner."

11. The principle is reiterated in *G. Council of KM.I. of Oncology v. Dr. P. Gadwalker and Ors.* 1993 I LU 308. The Court held that whenever the service of an employee is terminated during the period of probation or while his appointment is on temporary basis by an order of termination simpliciter after some preliminary enquiry it cannot be held that some enquiry has been made against him before the issuance of order of termination and it really amounted to his removal from service on a charge and as such termination is penal in nature. In *State of U.P. and another State of U.P. and another Vs. Km. Prem Lata Misra and others*, , the Supreme Court held that whenever the competent authority is satisfied that the work and conduct of a temporary Government Servant is not satisfactory or that his continuance in service is not in public interest on account his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service of the relevant rules or it may decide to take punitive action against the temporary Government servant. On the facts of that case, the Court held that the respondent therein was irregular in duties and there was insubordination and she left the office during office hours without permission and on consideration thereof, the competent authority found that the respondent was not fit to be continued in services as her work and conduct were unsatisfactory. In those circumstances, the termination was for unsuitability and unfitness and not by way of punishment as punitive measure and one in terms of the order of appointment and also the Rules. In this case as already found the termination is in terms of order of appointment and the service regulations.

12. Learned counsel for the respondent placed reliance on a judgment of the Supreme Court in *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, . In that case, the appointment itself was for six months in the first instance and that order fixed the period of probation as six months. The order said that if during the period he was found to be satisfactory and he found the job suitable, he will be confirmed. The question was whether at the expiry of the period of six months there was automatic termination of service. The Supreme Court held that there was no such automatic termination and he continued as a probationer even after the period of six months if at the end of the period his services had either not been terminated or confirmed. That ruling will not help the respondent in the present case.

13. Our attention is drawn to the judgment of the Supreme Court in *Samsher Singh Vs. State of Punjab and Another*, . Reliance is placed upon paragraphs 63 and 64 of the judgment at pages 479- 480. Relevant part reads as follows.

"No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in given case amount to removal from service within the meaning of Article 311(2) of the Constitution.

Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of probationer is satisfactory or whether he is suitable for the post. In the absence of any Rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved, in this."

14. Even the above passage shows that the contention of the respondent is not acceptable. The Court, has clearly laid down that if the termination is on account of temperamental objection it does not involve any punishment.

15. Reliance is placed on the judgment of the Supreme Court in *Anoop Jaiswal Vs. Government of India and Another*, . The Court 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 facts and circumstances of the case establish that an enquiry into allegation of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311(2) of the Constitution of India. In the present case, with reference to the facts found the order of termination is not a camouflage order of dismissal for misconduct. The ruling does not help the respondent in this case.

16. Learned counsel for the appellants submitted that in any event the order of the learned Judge directing continuation of probation is unsustainable as he ought to have taken the factum of incompatibility between the respondent and the appellants and he ought to have ordered compensation and in support of that contention learned counsel has placed reliance on the judgment of the Supreme Court in *O.P. Bhandari v. Indian Tourism Development Corporation Ltd. and Ors.* 1986 11 LLJ 509. As we have taken the view that the order of termination is not punitive in character and it cannot be assailed by the respondent herein, it is not necessary for us to consider whether the learned Judge ought to have ordered only compensation and not reinstatement. In our view, the entirety of the order of learned single Judge is unsustainable and it requires to be set aside.

17. In the result the appeal is allowed. The order in W.P.No. 2112 of 1988 dated June 17, 1991 is set aside and the writ petition is dismissed. No costs.