

(2003) 12 BOM CK 0029

In the Bombay High Court

Case No : Writ Petition No. 1681 of 1996

Krushna Ganpat Duhijod

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 18-12-2003

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2004) 2 ALLMR 780 : (2004) 4 BomCR 177 : (2004) 101 FLR 479 : (2004) 2 MhLj 844

Hon'ble Judges : V.G. Palshikar, J; S.C. Dharmadhikari, J

Bench : Division Bench

Advocate : P.M. Pradhan and S.S. Patwardhan, for the Appellant; C.R. Sonawane, A.G.P. for R. No. 1 and Meena H. Doshi, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Dharmadhikari, J.—By this petition under Articles 226 and 227 of the Constitution petitioner challenges the order passed by respondent No. 2 dated 29-11-1995 (Exh. Q) terminating his services during probationary period.

2. The petitioner passed his Bachelor of Veterinary Science Examination in 1974. After having worked in several capacities with Indian Agro Industries Foundation, Animal Husbandry Department, Government of Maharashtra and with Co-operative Milk Producer's Society, he came to be appointed as Farm Manager by respondent No. 2 by order dated 9-3-1990. He joined the said post on 4th March, 1990 at Gokhale Nagar, Pune on basic salary of Rs. 600/- per month. It is his case that he was appointed on probation for a period of six months only commencing from the date of his joining the service of respondent No. 2.

3. Respondent No. 2 is undertaking of Government of Maharashtra under the control of respondent No. 1. It is a State Instrumentality, according to petitioner, it is amenable to writ jurisdiction of this court.

4. The further case of the petitioner is that he came to be posted at Tulzapur,

District Osmanabad as Farm Manager with effect from 4-10-1992. It is his case that while joining the services of respondent No. 2, he has submitted all the relevant certificates and documents. It is further case of the petitioner that he completed his probationary period on 3-10-1990 and at no point of time any order was issued and communicated extending the period of probation. The petitioner's contention is that he completed the period of five years of continuous service and is therefore, confirmed in the services of respondent No. 2. It is his case that he was granted two additional increments in the starting basic pay. He was also granted benefits of the 4th Pay Commission recommendations. It is his case that there was some grievance pertaining to the grant of increments and for which the petitioner made representations from time to time.

5. The petitioner contends that he was posted in 1990-92 at Sangali. Respondent No. 3 used to often visit the said place and demand official jeep for his private use. As the petitioner refused the said demand, respondent No. 3 developed animosity towards him. The petitioner was threatened by respondent No. 3, being administrative officer, of spoiling his service career. The petitioner submits that respondent No. 3 started harassing him and in pursuance of that respondent No. 2 called upon the petitioner by letter dated 14-10-1993 to submit copies of the school leaving certificate as proof of age certificate of qualifications and experience and fitness certificate. According to petitioner this letter was drafted deliberately by respondent No. 2 in collusion with respondent No. 3 with a view to harass him. Thereafter by order dated 21-4-1995 petitioner came to be relieved from Tulzapur and transferred in Solapur District. After the petitioner reported at new posting on 25-6-1995 on expiry of sick leave, he was informed by respondent No. 2 that his request for annual increment cannot be considered unless he submits copies of certificates as stipulated in Clause 5 of the appointment letter. According to petitioner he gave reply to this communication and pointed out that all the certificates were supplied by him prior to 21-10-1991.

6. Thereafter the petitioner was informed that his Annual Confidential Report for the year 1994-95 was average and petitioner gave his representation/ reply with regard to the same. It is the case of the petitioner that, Tulzapur, where he was posted as incharge, was listed at item No. 3 in the merit list of 10 farms. From this it can be inferred that the petitioner was more than average. However, the petitioner's representation with regard to the adverse remarks came to be forwarded to the competent authority.

7. The petitioner was served with letter dated 17-10-1995 signed by respondent No. 3 for and on behalf of respondent No. 2 informing the petitioner that his probation period stands extended upto 30-11-1995. Copy of the said letter is annexed as Exh. P to the petition. The petitioner was then served with an order dated 29-11-1995 purportedly informing him that his services were no longer required and came to an end. The petitioner appealed to the authorities against the order but representation in that behalf came to be rejected on 10-1-1996.

The petitioner impugns the order extending his probation period, the order terminating the same and the order dismissing his appeal in this writ petition.

8. This petition was admitted by this court on 1-8-1997. Prior thereto on notice being served of the admission, respondent Nos. 2 and 3 filed reply of 31-7-1997. After hearing the parties, at the stage of admission, this court passed the following order :

"Rule returnable early.

It is reported by the respondents that the malpractices were committed by the petitioner during the 5 years of his probation. Accusations against the petitioner are serious and right from the inception in the employment the authorities have not taken appropriate steps. We, therefore, direct the Commissioner, Animal Husbandry Department, State Government to hold enquiry into the affairs and settle the accountability.

Report shall be submitted within three months from today to this Court".

9. It appears that pursuant to the order passed by this court, directing the Commissioner, Animal Husbandry Department to hold enquiry into affairs of respondent No. 2, the commissioner submitted a report dated 4-5-1999 which is on record. It is necessary to set out this fact because petitioner seeks to refer to and rely upon the same.

10. Before proceeding to set out rival contentions it will be worthwhile reproducing Clause 1 of the letter of Appointment of the petitioner dated 9-3-1990 of the petitioner, copy of which is annexed as Exh. A. The said clause reads thus :

"Your appointment will be on probation for the period of six months which may be extended, if deemed necessary. During the period of probation, your services are liable to be terminated by giving fourteen day's notice in writing or payment of fourteen day's salary in lieu of such notice on either side. After satisfactory completion of your probation period, you will be considered for confirmation for the post, by the Company. After confirmation your service are liable to be terminated by giving one month's notice in writing on either side or on payment of compensation equal to one months gross salary in lieu of such notice."

11. Now we set out the rival contentions. Mr. Pradhan, Learned counsel for the petitioner contended before us that the order dated 29-11-1995 cannot be termed as discharge or termination simpliciter of the probationer but the same is an order terminating service for misconduct. It is his submission that the petitioner cannot be said to be probationer. The petitioner joined services on 9-3-1990. He was on probation for a period of six months. The said period of probation came to an end on 3-10-1990. The petitioner was not served with any order extending his probationary period till 3-10-1995. Mr. Pradhan contended that no steps were taken with regard to extension of probationary period by the Authorities even during the initial period of six months of the petitioner's

appointment. By placing reliance upon Clause 1 of the said appointment letter, it is contended by Mr. Pradhan that the petitioner stood confirmed in the services on 4-10-1990. In the submission of Mr. Pradhan, the petitioner being permanent employee, he could not have been discharged from the services or his services otherwise terminated unless the Authorities hold enquiry into the misconduct, if any, against him. In substance, it is the contention of Mr. Pradhan that the order is not a discharge or termination simpliciter but order which is punitive in nature casting stigma on the petitioner's career. Further, it being issued at the instance of respondent No. 3, whole action is also mala fide and for all these reasons, this court should set aside the order and direct the respondents to reinstate the petitioner in their services with all benefits.

12. Mr. Pradhan sought to rely upon the contents of the report of the Commissioner forwarded to this court in pursuance of the order referred to above. Mr. Pradhan's submission is that from all these subsequent developments, it is clear that the affairs of respondent No. 2 corporation were not being carried out satisfactorily. There was mismanagement and mal-administration by respondent No. 3. In this backdrop, it is clear that the petitioner has been punished for misconduct without any enquiry. Mr. Pradhan wants to rely upon portions of the report wherein it is stated that the Authorities then incharge of the affairs of respondent No. 2 did not issue chargesheet to the petitioner although he has committed serious act of misconduct. In the submission of Mr. Pradhan, the contentions of the petitioner stand fully supported and corroborated by the contents of this report and on this count also, the petitioner is entitled to succeed in this petition.

13. On the other hand Mrs. Doshi, learned counsel appearing for respondent No. 2 and 3 and learned A.G.P., appearing for respondent No. 1 contended before us that the order passed by the Authorities cannot be said to be punitive in nature and casting any stigma on petitioner. It is their case that the period of probation having been extended till 30-11-1995, it was open for them to discharge the petitioner simpliciter by putting an end to his probationary period and this is what is done by the impugned order. That being the situation, according to learned counsel, the facts and circumstances disclosed in the report and all other pleas set out in the petition, are not relevant for the purpose of deciding the controversy before us. Mrs. Doshi, contends that the petitioner is not disputing the fact that the respondent Nos. 2 and 3 were fully empowered to extend the probation period of the petitioner. She further points out that the petitioner does not dispute receipt of the letter dated 17-10-1995. She also submits that from bare reading of the order it is clear that the same does not caste any stigma on the petitioner. She submits that there being no provisions in the rules of any deemed confirmation nor there being any provisions in the Rules and Regulations about the outer limit of a probationary period, the action of the respondents cannot be faulted with and petition will have to be dismissed.

14. With the assistance of the learned counsel appearing for the parties we have

gone through the petition, annexures thereto, affidavit filed in reply and rejoinder so also some of the paragraphs of the report, submitted to this court in pursuance of its order dated 1-8-1997. In our view the report is submitted to this court in pursuance of the specific order of this court directing the Commissioner of Animal Husbandry Department, State of Maharashtra to enquire into the affairs of the respondent No. 2 Corporation. The said report can be of no assistance in deciding whether the action of terminating the petitioners' services taken prior thereto is either invalid or bad in law. The report is pursuant to enquiry into the whole affairs and management of respondent No. 2 corporation. It fixes responsibility and tries to settle accountability of the then Managing Director or other concerned officials incharge of the affairs of the respondent No. 2 Corporation. This report cannot be looked into for scrutinizing the legality of the order impugned in this petition. We have no manner of doubt that the respondent No. 1 State having notice of the affairs then prevailing will take cognizance of the said report and initiate appropriate action in pursuance thereof. Hence, as far as report is concerned, we direct that the copy of this report be forwarded to the Secretary, Department of Animal Husbandry, Mantralaya, Mumbai for necessary action.

15. As far as merits of the controversy are concerned, in our view the petitioner's services have been put an end to during the probationary period. The petitioner was specifically informed by a communication in writing that his probationary period stands extended upto 30-11-1995. This communication is referring to the prior correspondence on this issue and ending with the letter dated 16-9-1995 of the Head office of respondent No. 2. The petitioner is fully aware of the terms and conditions of his appointment. Clause 1 which we have reproduced above, very clearly states that the petitioner's appointment is on probation for a period of six months which maybe extended, if deemed necessary. The petitioner having accepted the appointment, with these terms and conditions, way back in March, 1990, cannot be now heard to complain that the order extending his probationary period at the end of five years of his appointment is illegal or arbitrary or violative of the mandate of Article 14 and 16 of the Constitution of India. Further, in the light of the appointment letter and the order extending probationary period, if the impugned letter is perused, it is clear that it merely refers to the extension of probationary period and communicates to the petitioner that his salary of the month of November, 1995 and 14 days notice pay is being forwarded to him and further he is directed to hand over charge to another farm Manager on 30-11-1995 A.N. From a perusal of this letter and the communication dated 10-1-1996, it becomes clear that the services of the petitioner have been terminated, during the probationary period. The letter does not caste any stigma nor can it be said that the order contained therein is punitive in nature. It appears that upon receipt of this letter, the petitioner started complaining that his services have been put to end to on account of some misconduct and at the instance of some officers in the respondent No. 2 Corporation. It is clear that even this complaint has not been

found to be of any substance and the representation made in that behalf has been considered and rejected by the order passed on 10-1-1996 by the Managing Director of respondent No. 2. In such cases, the law laid down by the Hon"ble Supreme Court in the case of Mathew P. Thomas Vs. Kerala State Civil Supply Corpn. Ltd. and Others, would squarely apply. Their Lordships have held as under :--

"11. An order of termination simpliciter passed during the period of probation has been generating undying debate. The recent two decisions of this Court in Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, and Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, , after survey of most of the earlier decisions touching the question observed as to when an order of termination can be treated as simpliciter and when it can be treated as punitive and when a stigma is said to be attached to an employee discharged during period of probation. The learned counsel on either side referred to and relied on these decisions either in support of their respective contentions or to distinguish them for the purpose of application of the principles stated therein to the facts of the present case. In the case of Deepti Prakash Banerjee (supra), after referring to various decisions indicated as to when a simple order of termination is to be treated as "founded" on the allegations of misconduct and when complaints could be only as motive for passing such a simple order of termination. In Para 21 of the said judgment a distinction is explained, thus :--

"21. If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

From long line of decisions, it appears to us whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service. If the form and language of the so called order of termination simpliciter of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the

details of the background and surrounding circumstances in testing whether the order of termination is simpliciter or punitive. In cases where the services of a probationer are terminated by an order of termination simpliciter and the language and form of it do not show that either it is punitive or stigmatic on the face of it but in some cases there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other words, the facade of the termination order may be simpliciter but the real face behind it is to get rid of services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simpliciter to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from service on the foundation of his misconduct."

16. It may be true that there was some correspondence by the Management with petitioner on the issue of non-furnishing and non-supply of the certificates and necessary documents to him. It is equally true that there is correspondence on the issue of withholding of some increments. However, admittedly this aspect has nothing in it to hold that respondents wanted to punish the petitioner. These are routine matters and cannot be linked with the assessment of the petitioner's work during probationary period. Further it is admitted that there is appraisal of the petitioners performance which has been found as average and communication in that behalf has been addressed to him. However, by merely relying on this and other material pertaining to some complaints made by the petitioner, it cannot be said that the action of putting an end to his services during the probationary period is punitive in nature and casts stigma on his career. The petitioner having not disputed power to extend the probationary period conferred by the terms and conditions of his letter of appointment and the petitioner further not disputing receipt of the letter extending his probationary period, cannot be heard to complain that his termination is on account of misconduct. Merely because the order extending the Probationary period is made on 17-10-1995 will not assist the petitioner. From this alone, we cannot come to a conclusion that the order terminating the petitioner's services cast a stigma or is founded on misconduct. More so, when the allegations of mala fides are vague. The linking of the order extending probation and the date of termination will also not assist the petitioner. It will be too far fetched a conclusion that only because the respondent No. 2 wanted to oust the petitioner that the Probation was extended. Admittedly, no proceedings are initiated for any alleged misconduct and the order of this Court passed subsequently cannot vitiate the impugned order. The foundation is not misconduct.

17. We find much substance in the contention of the respondents that during the probationary period petitioner's performance was not satisfactory and therefore, his services were continued as probationer. The extension of probationary period

was vide letter dated 17-10-1995. Further, it is pointed out by the respondents to us that the rules do not provide for automatic confirmation upon the expiry of the probationary period in the case of employee who is appointed on probation but the same provide that the employee continues as probationer until confirmed specifically by the corporation. The respondents have also invited our attention to the averments and submissions made in affidavit in reply. In paragraph (e) at Page 70, to which respondents invited our attention, a reference is made to Resolution dated 21-4-1995 whereby on account of unsatisfactory services of the petitioner, respondent No. 2 authorised Managing Director to terminate his services. The respondents have also pointed out to us that there were some complaints about the working of the petitioner and preliminary enquiry was made in that behalf. It was also pointed out to us that in pursuance of the preliminary investigation, no action was taken on account of the fact that the Board of Directors could not meet. Merely because some preliminary investigation was made the foundation or basis of the impugned order cannot be misconduct Mrs. Neera Mathur Vs. Life Insurance Corporation of India and another, . It was also pointed out to us that on account of the work of earthquake rehabilitation, officials were busy from October, 1993 to March, 1996 and during this period, the Board of Directors could not meet. The services of the petitioner were being appraised and reviewed from time to time and it was decided that he should be placed on probation till the end of November, 1995. The respondents never confirmed him in their services and it was open to them to terminate the services of the petitioner, he being probationer, admittedly. We do not find any substance in the allegations of mala fides made in the petition against respondent No. 3 which have been specifically denied. The incident pertaining to respondent No. 3 has been specifically dealt with by the respondents and denied in the affidavit filed before us. In this view of the matter, it is a clear case where the petitioner has been terminated during the probationary period and this is nothing but termination simpliciter during the probationary period of a probationer for unsatisfactory performance. Neither motive nor foundation thereof being misconduct, there is no question of the same casting any stigma on the petitioner. The observations of the Supreme Court in the above mentioned decision would squarely apply to this case. The action of the respondents being neither illegal or otherwise vitiated, this is not a fit case where we should exercise our writ jurisdiction.

18. In the result, petition fails. Rule discharged. No order as to costs.