

(2011) 10 SHI CK 0052
In the High Court Of Himachal Pradesh
Case No : CWP (T) No. 3070 of 2008

Malagar Singh

APPELLANT

Vs

Himachal Road Transport Corporation and others

RESPONDENT

Date of Decision : 24-10-2011

Acts Referred:

Citation : (2011) 10 SHI CK 0052

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Justice Rajiv Sharma, Judge

1. Petitioner was appointed as Conductor in respondent-corporation on 1.7.1994, vide Annexure A-2. He was put under probation for a period of 2 years, which was extendable upto 3 years. He joined his duties on 18.7.1994. He hit the bus against hill at place Jhalma and caused damage to the bus on 3.10.1994. He remained absent from duties with effect from 4.10.1994 to 17.11.1994. Memorandum was served upon the petitioner on 15.11.1994. He filed reply to the same. Thereafter, warning was administered to him on 26.11.1994. The period with effect from 4.10.1994 to 17.11.1994 was regularized by granting him the leave of kind due. Thereafter, petitioner again caused accident on 15.7.1995. He remained absent from duties with effect from 15.7.1995 to 29.9.1995. He was served with a memorandum on 11.10.1995, to which he filed reply on 7.11.1995. He was warned on 26.12.1995 and the period with effect from 15.7.1995 to 29.9.1995 was regularized by treating the same as extraordinary leave. He was served with another memo on 11.10.1995, vide Annexure A-9, to which he filed reply on 7.11.1995. Office memorandum was issued to the petitioner; vide Annexure A-12, to which he filed reply, vide Annexure A-13. Thereafter, petitioner has been removed on 1.2.1996, vide Annexure A-1.

2. Mr. Dilip Sharma has strenuously argued that it is not a case of simpliciter

removal of the petitioner but the order is punitive since services of his client have been removed on the basis of misconduct. He further argued that in case veil is lifted then it will become evident that foundation for the removal of the petitioner was misconduct. He finally argued that the regular inquiry was required to be held against the petitioner before the issuance of office order dated 1.2.1996.

3. Mr. Adarsh Sharma has vehemently argued that the petitioner was appointed on probation on 1.7.1994 and as per condition No. 4 of the appointment letter, he was put on probation for a period of two years, which could be extended for a period of three years and in case his work and conduct during the period of probation, in the opinion of the appointing authority, was not found satisfactory, his services were liable to be dispensed with without giving him any notice.

4. I have heard the learned counsel for the parties and have perused the pleadings carefully.

5. Petitioner was appointed as a Driver on 1.7.1994. Condition No. 4 of the appointment letter Annexure A-2 reads thus:

4. He will be on probation for a period of two years to start with and extendable upto three years and in case his work and conduct during the period of probation is in the opinion of appointing authority not satisfactory, his services shall be liable to be dispensed with without giving him any notice. Further, (sic)

probation period, the appointment may be terminated at any time by giving one month notice or pay in lieu thereof by the appointing authority.

6. Petitioner while on probation caused accident on 3.10.1994. Thereafter, he remained absent from duties with effect 4.10.1994 to 17.11.1994, though this period was regularized by granting leave of the kind due on 26.11.1994. He was involved in another accident on 15.7.1995. He remained absent from duties with effect from 15.7.1995 to 29.9.1995. His explanation was sought on 11.10.1995, to which he filed reply on 7.11.1995. He was warned on 26.12.1995, though the period with effect from 15.7.1995 to 29.9.1995 was treated as extraordinary leave. His explanation was again sought on 11.10.1995, to which he filed reply on 7.11.1995. It is in these circumstances that ultimately Annexure A-12 was issued to the petitioner seeking his reply why his services should not be terminated. He filed reply to the same on 17.1.1996. Thereafter office order Annexure A-1 dated 1.2.1996 has been issued.

7. Petitioner joined his duties on 18.7.1994. He caused first accident on 3.10.1994 and thereafter, he remained absent from duties with effect from 4.10.1994 to 17.11.1994. In close proximity of first accident, petitioner was involved in another accident on 15.7.1995. He again remained absent from duties with effect from 15.7.1995 to 29.9.1995. He has been warned from time to time to improve his driving skill. The management has been very kind to him by sanctioning the leave of kind due with effect from 4.10.1994 to 17.11.1994 and thereafter regularized the period with effect from 15.7.1995 to 29.9.1995 by

granting him extraordinary leave. Petitioner, besides, causing accidents on two occasions dated 3.10.1994 and 15.7.1995, has remained willfully absent and has not joined his duties. The probation period was for two years, which was extendable for three years. It was open to the employer to supervise the work and functioning of the petitioner as a Driver. Annexure A-1 dated 1.2.1996 is innocuous. In view of the facts and circumstances discussed hereinabove, Annexure A-1 cannot be said to be penal or punitive in nature. The conduct of the petitioner has not been found satisfactory during the probation period. It was open to the employer to dispense with the services of the petitioner. He has been administered warning and despite that he has not improved his working.

8. There is no merit in the contention of Mr. Dilip Sharma that regular inquiry was required to be initiated against the petitioner since the expression dismissal has been used in Annexure A-12. The expression 'dismissal' has been loosely written in Annexure A-12 though what was intended by the employer that his services could be terminated during the probation since his working was not found satisfactory. Order dated 1.2.1996 does not cause any stigma on the petitioner. His services have been terminated on account of unsatisfactory services during the probation period.

9. In the instant case, the termination is not due to misconduct but these are the instances, which have been taken into consideration by the management to assess the suitability of the petitioner on probation. Petitioner has been appointed as a Driver, he was supposed to be vigilant while driving the vehicle and he has caused two accidents during the period of probation. There is no connection between the misconduct and discharge of the petitioner. The case in hand is a case of termination simpliciter due to non-suitability of the petitioner

10. Their Lordships of the Hon^{ble} Supreme Court in Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, have held that generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason or misconduct or ineptitude, whatever the language used in the termination order may be. Their Lordships have further held that employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. Their Lordships have held as under:

29. Before considering the facts of the case before us, one further seemingly intractable area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking, when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment is also not stigmatic. The decisions

cited by the parties and noted by us earlier also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job.

30. As was noted in *Dipti. Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences* (supra).

AT the outset, we may state that in several cases and in particular in *The State of Orissa and Another Vs. Ram Narayan Das*, it has been held that use of the word "unsatisfactory work and conduct" in the termination order will not amount to a stigma.

31. Returning now to the facts of the case before us. The language used in the order of termination is that the appellant's "work and conduct has not been found to be satisfactory." These words are almost exactly those which have been quoted in *Dipti Prakash Banerjee's* case as clearly falling within the class of non-stigmatic orders of termination. It is therefore, safe to conclude that the impugned order is not ex facie stigmatic.

11. Their Lordships of the Hon^{ble} Supreme Court in *Chaitanya Prakash and Another Vs. H. Omkarappa*, have held that order terminating service during probation for unsatisfactory service cannot be said to be stigmatic. Their Lordships have further held that whether termination order is simpliciter or punitive has ultimately to be decided on facts and circumstances of each case. Their Lordships have held as under:

18. It is no longer res integra that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In this connection, we make a reference to the decision of the decision of the Supreme Court in *Abhijit Gupta v. S.N.B. National Centre, Basic Sciences* (supra), wherein also a similar letter was issued to the concerned employee intimating him that his performance was unsatisfactory and therefore, he is not suitable for confirmation. We have considered the ratio in light of the facts of the said case and we are of the considered opinion that the basic facts of the said case are almost similar to the one in hand. There also, letters were issued to the concerned employee to improve his performance in the areas of his duties and that despite such communications the service was found to be unsatisfactory. In the result, a letter was issued to him pointing out that his service was found to be unsatisfactory and that he was not suitable for confirmation and therefore, his probation period was not extended and his service was terminated, which was challenged on the ground that the same was stigmatic for alleged misconduct. The Supreme Court negated the said contention and upheld the order of termination.

19. In *Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd.*, (supra) also the concerned employee was kept on probation for a period of two years. During the course of his employment he was also informed that despite being told to improve his performance time and again there is no such improvement. His

shortfalls were brought to his notice and consequently by order dated 16.01.1997 his services were terminated, wherein also a reference was made to his unsatisfactory service. In the said decision, the Supreme Court has held that on the basis of long line of decisions it appears that 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.

20. In Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, ; this court had the occasion to determine as to whether the impugned order therein was a letter of termination of services simpliciter or stigmatic termination. After considering various earlier decisions of this court in paragraph 21 of the aforesaid decision it was stated by this Court thus:

One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.

21. In Abhijit Gupta (Supra.), this Court considered as to what will be the real test to be applied in a situation where an employee is removed by an innocuous order of termination i.e. whether he is discharged as unsuitable or he is punished for his misconduct. In order to answer the said question, the Court relied and referred to the decision of this Court in Allahabad Bank Officers Association and another Vs. Allahabad Bank and others, ; where it is stated thus:

As pointed out in this judgment, expressions like "want of application?", "lack of potential" and "found not dependable" when made in relation to the work of the employee would not be sufficient to attract the charge that they are stigmatic and intended to dismiss the employee from service.

22. In our considered opinion, the ratio of the above-referred decisions are squarely applicable to the facts of the present case. The respondent was time and again informed during the probation period about his deficiencies and was given ample opportunities to improve them. Therefore, enough precautions were taken by the appellants to see that the respondent improved his performance and such an opportunity was provided to him. But such advices and opportunity were totally misplaced as the respondent considered the same as unnecessary encroachment and interference in his work and wrote back rudely in an intemperate language.

12. Accordingly, in view of the observations and discussions made hereinabove, there is no merit in the petition and the same is dismissed. No costs.