

(2015) 04 BOM CK 0107

In the Bombay High Court

Case No : Writ Petition No. 6448 of 2014

Rajesh Murlidhar Nikam

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 22-04-2015

Acts Referred:

Citation : (2015) 4 ALLMR 802 : (2016) 1 BomCR 86 : (2015) 4 MhLj 180

Hon'ble Judges : N.H. Patil, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : Vicky A. Nagrani, for the Appellant; Vinod Joshi, Advocates for the Respondent

Final Decision : Dismissed

Judgement

N.H. Patil, J.—Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

2. The petitioner's contention is that he was appointed on probation for a period of two years on 30th August, 2012 on the post of Dy. Director, (Administration and Finance) by the respondents 1 and 2.

3. An exhibition was organized by Grahak Panchayat at Goregaon between the period 28th September, 2013 to 30th September, 2013. The petitioner was deputed to attend the said exhibition at Goregaon. He was entitled to claim TA in respect of his expenses incurred on traveling starting from his home and ending upto his home, since the same being official holiday in the department of Bureau of Indian Standard. From 28th September, 2013 he was deputed to attend office and then attend the exhibition center. The petitioner had put in six months service but on 16th April, 2014 he received a memo alleging that (i) he had submitted a false TA/DA claim despite using his staff car vehicle on 28th September, 2013. (ii) he lacks confidence (iii) his performance has not been proved. The petitioner was asked to submit a reply within 10 days from the date of receipt of the memo. On 9th May, 2014 the petitioner submitted his reply and

expressed his regret about the issues raised in the memo and assure that he will do his best in future. On 30th June, 2014 though he was assured that no damage will be caused to him or his service, the petitioner was served with an order of termination of his services with immediate effect. It is the contention of the petitioner that though the termination was simplicitor but it was stigmatic and punitive in nature.

4. Consequent to the notice issued, the respondent filed affidavit-in- reply through T.D. Gadgil, Scientist. The deponent contends that the work and conduct of the petitioner was adversely criticized by his superior officer namely Dy. Director General (West) in his confidential note dated 26th February, 2014 which was addressed to the Director General, the appointing authority of the petitioner. It was reported that the petitioner was not competent to independently deal with an issue and was killing time by simply passing papers to subordinates and thus found no value addition after his joining service. It was opined that petitioner failed to improve his performance as well as to communicate in English language. It was reported that petitioner tries to manipulate TA/DA claims. The deponent further submits that investigation was made on the TA/DA claim made by the petitioner in the month of September, 2013. Thus, the petitioner's Controlling officer namely DDGW has found him of no use for the job. It is the contention that petitioner's "unsuitability" was the reason and not the wrong claim of T.A.

5. The deponent further submits that petitioner did not exhaust option to apply to Executive committee of BIS before approaching the Court for legal redressal. The petitioner's performance did not improve during his tenure of working for more than one and half years, inspite of repeated advises verbal and in writing. The deponent had referred to some of the issues which had come to the notice, in paragraph 10 as under:

- 1) Recovery of Rs. 5500/- on late payment of TDS.
- 2) Approval of expenses not permitted.
- 3) Lack of supervision (Exhibit 9-A).
- 4) Claim made for the journey for which he did not spend any money.

6. The learned Counsel appearing for the petitioner submitted that the impugned order though termed as discharge simplicitor is stigmatic, punitive in nature. The affidavit-in-reply filed on behalf of respondents confirms the submissions of the petitioner as respondents have also placed reliance on the alleged material and allegations appearing on record against the petitioner which was the foundation for passing an order of discharge simplicitor. It was submitted that in lieu of affidavit-in- reply filed it is very clear that the issues like submission of TA/DA bill was made matter of enquiry on which explanation was sought from the petitioner. The four issues explained in Paragraph 10 of the affidavit-in- reply makes it expressly clear that it was foundation of the impugned order.

7. The Counsel appearing for respondents submitted that in the facts of the case

the impugned order cannot be termed as stigmatic in nature. It is an order of simple discharge which the employer was entitled to pass during the probation period in accordance with the service regulations and paragraph 3 of the appointment letter dated 30th August, 2012. Merely calling for explanation from the employee in respect of TA/DA bill cannot be termed as foundation for passing the order of simple discharge. The reply of the employee was called for on issues concerning day to day administration of the office. The issues were procedural in nature. The Senior Officers of the petitioner noticed that he was not competent to handle his job. There was lack of supervision. The employer found that there was no improvement in the petitioner's performance. He was not found suitable for the job and considering these facts, a decision was taken at the higher level.

8. The Counsel appearing for the petitioner placed reliance on the judgment in the case of Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, AIR 1999 SC 983 : (1999) 81 FLR 687 : (1999) 1 JT 396 : (1999) 1 SCALE 421 : (1999) 3 SCC 60 : (1999) SCC(L&S) 596 : (1999) 1 SCR 532 : (1999) AIRSCW 605 : (1999) 2 Supreme 34 . In the facts of the case the Apex Court observed in paragraph 35 and 40 as under.

"35. The above decision is, in our view, clear authority for the proposition that the material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its Annexures. Obviously such a document could be asked for or called for by any future employer of the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular inquiry was conducted. We shall presently consider whether, on the facts of the case before us, the documents referred to in the impugned order contain any stigma.

40. The above language in the letter dated 11.12.95 would clearly imply that this was not a case of any preliminary findings. If these were referred to as mere allegations, it would have been a case of motive. But as these definitive conclusions of misconduct are evident on the face of this letter dated 11.12.95 and this letter falls within the "whole period", the conclusion is inescapable that these findings were part of the foundation of the impugned order and it is not a case of mere motive. On this ground, the order requires to be set aside."

9. Learned Counsel for the petitioner further placed reliance in the case of V.P. Ahuja Vs. State of Punjab and Others, AIR 2000 SC 1080 : (2000) 85 FLR 197 : (2000) 3 JT 1 : (2000) 1 LLJ 1099 : (2000) 125 PLR 696 : (2000) 2 SCALE 233 : (2000) 3 SCC 239 : (2000) 2 SCR 130 : (2000) 1 UJ 630 : (2000) AIRSCW 792 : (2000) 2 Supreme 259 wherein the Apex Court placed reliance on the judgment of the Dipti Prakash Banerjee as cited supra.

10. Learned Counsel appearing for respondents placed reliance on judgments in the case of Dilip s/o. Punjaji Kharat Vs. State of Maharashtra through its Secretary, Department of Home and ors. {2011(4) LJSOFT 144 } and in the case

of Mathew P. Thomas Vs. Kerala State Civil Supply Corpn. Ltd. and Others, AIR 2003 SC 1789 : (2003) 96 FLR 1166 : (2003) 2 JT 162 : (2003) 2 LLJ 272 : (2003) 2 SCALE 254 : (2003) 3 SCC 263 : (2003) 2 SCR 220 : (2003) 2 SLJ 327 : (2003) AIRSCW 1230 .

11. We have perused the record placed before us and the case laws cited (supra). One of the authorities of Bureau of Indian Standard Mr. C.K. Maheshwari had noted the observation concerning functioning of the petitioner which reads as under:

"a) Apparently, there is no initiative from his side concerning the activities under his charge.

b) As has been noticed and understood from inputs from various quarters, he is not in a position to appropriately guide the people working under him. Despite his exposure to BIS work for more than six months, his presence is not being felt.

c) Does not appear to be exerting himself in his area of work.

d) It is expected from him to monitor various activities under his charge and take timely appropriate actions.

e) Actions are required to be prioritized based on the urgency of the work.

f) Certain issues being referred to senior level are expected to be decided and settled at his level.

g) About a month back he attended an appeal in Service Tax Department accompanied by SOAC and CA. Despite being an urgent matter, the undersigned was neither briefed nor consulted prior to this meeting. Moreover, after this meeting, no informal or formal report was submitted. Despite DDGW personally telling him about related problems in similar matter at HQ, report is still awaited."

12. The another note drawn by the said authority on 26th February, 2014 is also placed on record. Paragraph 2 of the said note reads as under:

"Despite having spent 16 months in WRO he lacks confidence in Administration and Accounts functions. He is fully dependent on SO (A) and Accounts personnel even for minor issues. He is not competent to independently deal with any issue. His drafting is very poor (sample enclosed). He is not in a position to assert himself and is killing time by simply passing papers to subordinates. This is causing frustration among staff working under him. Earlier when SO (A) and SO (A/cs) were directly reporting to DDGW, work progress was good but now with one additional level with no value addition, efficiency has gone down. Directly or indirectly staff is expressing their frustration."

13. The clarification was sought from the petitioner in respect of the issues raised in the communication dated 16th April, 2014 by Director Establishment (Exhibit R-11). Petitioner has in writing communicated his explanation on 9th May, 2014 (R-12).

14. In the affidavit-in-reply, respondents submitted that no misconduct of the petitioner was taken into cognizance. It was non-performance and unsuitability of the petitioner which prompted the BIS to discharge the petitioner. The submission of TA/DA bill is also not the reason for discharging from service.

15. From the material placed on record; the notes maintained by respondent authority, by the department and reply submitted by the petitioner we can gather that the issue concerning submission of TA/DA bill was not the foundation for discharging the petitioner from services. It is not conceivable to accept the petitioner's contention that he was assured that no adverse action would be taken and under that belief he had submitted reply on 9th May, 2013. As regards the reimbursement bill the petitioner submitted that it was due to oversight it happened which was unintentional and he is regretful for the same. The petitioner has further replied saying that he had earlier experience of private service where the system of working was entirely different from Government Department. At one stage the petitioner stated that most of his education was in Marathi medium because of which his English is not good.

16. The respondents have also placed reliance on the Central Civil Services (Temporary Service) Rules, 1965. It is the contention that under the relevant service rules the employer was entitled to discharge the petitioner from service and accordingly without causing any stigma after assessing the petitioner's performance, the respondents decided to discharge him from service. The impugned order, therefore, is not punitive in nature and no formal enquiry is required to be conducted.

17. In the facts and circumstances of the case, we are of the view that the assessment of the petitioner's performance including the explanation called on the issue of T.A./D.A. was not the foundation for passing impugned order but a motive in discharging the petitioner from services.

18. The period of probation furnishes an opportunity to the employer to observe the performance of the probationer as by the time the probation expires, the employer would make up his mind whether to retain the employee or dispense with his services. The probationer's appointment is terminated if he is found unfit for the job whether for reason of misconduct or inaptitude. A simple termination order is not stigmatic.

19. There exists a distinction between motive and foundation. It is settled law that if misconduct is the foundation of such an order, the same would be bad-in-law even if it appears to be an innocuous one. In the facts of a case, the Court is entitled to go behind the form and ascertain the true character of the order.

20. In view of the aforementioned facts and circumstances and settled principles behind terminating services of the petitioner/probationer, we are not inclined to hold that impugned order is stigmatic or punitive in nature. In the facts of the case, a formal departmental enquiry is not required to be conducted. The Petition is dismissed. Rule is discharged with no costs.