
(1980) 04 GUJ CK 0029
In the Gujarat High Court

Smt. Ramaben Santoshkumar Mangatani	APPELLANT
Vs	
Dist. Panchayat Kutch-Bhuj and Another	RESPONDENT

Date of Decision : 17-04-1980

Acts Referred:

Constitution of India, 1950 — Article 14, 311, 311

Citation : (1980) 2 GLR 71

Hon'ble Judges : A.N. Surti, J

Bench : Single Bench

Judgement

A.N. Surti, J.

The only two points, which I am required to consider in the present second appeal are as follows:

(1) Whether the impugned order Ex. 38 dated April 29, 1969 is by way of a penal order removing the appellant from her services or an order of termination simpliciter terminating the services of a temporary servant?

(2) Whether the District Health Officer, who in the submission of Mr. Mankad is an officer subordinate to the District Development Officer was competent to pass the impugned order Ex. 38 dated April 29, 1969, particularly when the appointing authority was the District Development Officer?

2. The appellant, original plaintiff was aggrieved by the dismissal of her Regular Civil Appeal No. 97 of 1972 by the learned District Judge, Kutch at Bhuj, and which had arisen as a result of the decree of dismissal passed by the learned Joint Civil Judge, Junior Division, Bhuj, in Regular Civil Suit No. 31 of 1972.

3. The suit was filed by the plaintiff for a declaration that the impugned order dated April 29, 1969 passed by respondent No. 2, the District Health-Officer was illegal, wrong and without jurisdiction and that the same was violative of Articles 14 and 311 of the Constitution of India. She alleged that she was appointed as a raid-wife at Kukma Maternity Home, Kukma by an order dated January, 1965

vide Ex. 28 by the District Development Officer, Bhuj. She states in her plaint that she had to go on leave on the ground of maternity, and that in the month of June, 1967 she was transferred from Kukma Maternity Home to Chirai, and on June 2, 1967 she appeared before the Medical Officer, Kukma. She alleged that she did request the Taluka Development Officer, Bhuj to issue a relieving order and the last pay certificate, but no reply was given by him. She also alleged that she also addressed letters to the Taluka Development Office, Bhuj and also to the District Development Officer, Bhuj to look into the matter, but to no useful purpose. She further states that on April 29, 1969, respondent No. 2-the District Health Officer by the impugned order Ex. 38 terminated her services. She also alleged that respondent No. 2-the District Health Officer is not the competent authority to terminate her services, and she was not given any show cause notice before the termination of her services. She also states that her husband was the officer of National Cadet Corps and that he had complained to the Superiors of the respondents-defendants concerning the negligence of respondent No. 2 in connection with vaccination of National Cadet Corps Camp. In substance, she attacked the impugned orders on two grounds:

- (1) That the impugned order is a penal order; and
- (2) the authority sub-ordinate to the appointing authority has no power to terminate her services.

4. The suit was resisted by the respondents. For the disposal of the present appeal, suffice it to say, that in substance during the entire hearing of the appeal, it was urged by Mr. Panchal, that in the facts and circumstances of the case, the impugned order is not penal in nature, and the District Health Officer being the competent authority even to appoint a midwife, was within his rights when he terminated the services of the appellant-plaintiff, who was a temporary servant of the District Panchayat, Kutch at Bhuj. It was also the case of the respondents that the appellant did remain absent from January 1967 to May 25, 1967 and again from June 1, 1967 to September, 1, 1967 even though her leave was not sanctioned. It was also the respondents' case that defendant No. 2 had warned the plaintiff by his letter No. DHO/EST/Resignation-5-961-1967 dated May 12, 1967 but the same had fallen flat on the plaintiff. They also stated, that the plaintiff was given an opportunity to explain her absence from duty, and in her explanation to the aforesaid notice, the plaintiff has admitted her mistakes. They also stated that the plaintiff was transferred from Kukma to Chirai under orders dated June 4, 1967 and she was actually relieved on September 2, 1967 by the Medical Officer, Kukma, and that thereafter, the plaintiff did not join her duty at Chirai. They also stated that the plaintiff was only in the temporary service, and that her services can be terminated at any time. They also stated that the plaintiff did not join duties at Chirai, and she disobeyed the orders of her superiors and that she was negligent in the discharge of her duties. Under the circumstances, the only alternative left with the defendants was to terminate her service, and defendant No. 2 had authority of law to pass an order terminating

the services of the plaintiff. They also stated that the plaintiff did not resume her duties for a long period of one and a half years, and so her services were terminated.

5. On the pleadings of the parties, the learned trial Judge raised various issues at Ex. 14, and, in substance, he took the view that the defendants proved that the plaintiff remained absent from her service during the period from 19th January, 1967 to 25th May, 1967 and 1st June, 1967 to 1st September, 1967. He also took the view that the impugned order Ex. 38 dated April 29, 1969 was passed by the District Health Officer, who had the authority and the jurisdiction to pass the impugned order. Suffice it to say, that the learned trial Judge held the various issues in favour of the respondents-defendants, and ultimately, dismissed the suit of the plaintiffs with costs.

6. The appellant-plaintiff was aggrieved by the decree of dismissal passed by the trial Court, and preferred Regular Civil Appeal No. 19 of 1973 in the Court of the learned District Judge, Kutch at Bhuj.

7. The learned District Judge took the view that the Order which was passed was not penal in nature, and that the impugned order was an order of termination simpliciter which had terminated the services of a temporary servant. He also took the view, that the District Health officer was the competent authority as discussed by him in detail in para 10 of the impugned judgment, and ultimately, dismissed the plaintiff's appeal with costs.

8. It is under these circumstances, that I am required to dispose of the present second appeal.

9. In the instant case, it is proved beyond doubt, that the plaintiff remained absent from the service during the period from 19-1-1967 to 25-5-1967 and 1-6-1967 to 1-6-1967. Suffice it to say, that in the case before me, there was not the least doubt that the plaintiff did remain absent from her duties as stated above. In the case before me, there was no dispute that the appellant was a temporary servant serving as a mid-wife in the District Panchayat Kutch-Bhuj. In the context of these facts, when I am reading Ex. 38, it is impossible for me to take the view that the impugned order is penal in nature. Even in the impugned order, Ex. 38s it is clearly stated, that her leave was not sanctioned as mentioned in the impugned order. It is also stated, that from September 3, 1967 till the passing of the impugned order till April, 25 1969 for long period of 1 1/2 years the appellant did not join her duties. Under the circumstances, it will be just and proper for the concerned authority to terminate the services of a temporary servant. If the temporary servant obstinately chooses to remain absent not only for days and not only for months but for 1 1/2 years, what should the authority do? Under the circumstances, can it be said by any stretch of imagination that the impugned order dated April 29, 1969 is penal in nature. I have carefully gone through the entire impugned order, and did take into consideration all the possible attendant circumstances, which ultimately led to the passing of the

impugned order and it is impossible for me to take the view that the impugned order is by way of punishment or is penal in nature as alleged by the appellant.

10. The second point, which was canvassed before me was that the District Health Officer has signed the impugned order, Ex. 38, whereas the appointment was made by District Development Officer by an order dated January 1, 1965 vide Ex. 28. It was urged by Mr. Mankad, that as the District Health Officer was subordinate to the District Development Officer, the impugned order Ex. 38 is not in conformity with the constitutional provisions contained in Article 311(1) of the Constitution. I must say at this very stage, that by the impugned order the plaintiff was not dismissed, nor was removed from service, nor there was any reduction in rank. In the case before me, the services of the temporary servant were terminated not by way of any punishment. The appellant-plaintiff had no legal right whatsoever to continue in service. From the impugned order, it is impossible to say that the impugned order casts any stigma on the appellant which might visit her with any evil consequences when she will seek another job in any future day. Under the circumstances, the authority is perfectly justified in terminating the services of a temporary servant, but apart from what has been stated above, I am convinced, that in the instant case, the District Health Officer is an officer even competent to appoint a mid-wife, and hence, he is competent even to terminate the services of the plaintiff who was discharging the duties as a mid-wife. It is true that the initial order of appointment was passed by the District Development Officer, but having regard to the powers conferred on the District Health Officer, even to appoint mid-wife, it cannot be said that the District Health Officer is subordinate to District Development Officer. In this view of the matter, I had the advantage of reading para 10 of the impugned judgment, where the learned District Judge did take into consideration the provisions of the Gujarat Panchayat Service (Classifications and Recruitment) Rules, 1967, Gujarat Panchayats Service (Discipline and Appeal) Rules, 1964, and the relevant provisions of the Gujarat Panchayat Services (Appointing Authorities) Rules, 1967, and the learned District Judge has rightly come to the conclusion that the District Health Officer did terminate the services of the appellant-plaintiff legally.

11. During the course of the hearing of the appeal, my attention was invited to the decision of this Court in *State of Gujarat v. Madhusudan Tulsidas XIV*, Gujarat Law Times, 77, wherein it is observed as follows:

The Supreme Court has now spoken on the subject finally and the well settled legal position appears to be as follows: (i) that if a right exist under a contractor service rules to terminate the services of a probationer or temporary servant, the employer can undoubtedly in exercise of the said right terminate the services of the employee; (2) that in such a case, the motive operating on the mind of the employer would wholly irrelevant; that if the order of termination is, however, sought to be founded on misconduct and negligence, inefficiency or other disqualification, then it would be penal in nature and if it is made in

contravention of the statutory rules or the protection of Article 311(2), it would be ultra vires", (4) that no abstract proposition could be laid down that where a probationer or temporary servant is discharged without saying anything more in the order of termination than that the services have been terminated, it could never amount to a punishment in the facts and circumstances of the case; (5) that if the facts and circumstances of the case indicate that the substance of the order was that the termination was by way of punishment, the employee would be entitled to the protection of the relevant statutory rules and Article 311 because it is the substance of the order and not the form which is decisive; (6) that the employer in some cases might be of the view that the conduct of the employee might result in dismissal or removal on an inquiry and, in such cases, he may without holding an inquiry simply discharge the employee with a view to giving him a chance to make good in other walks of life without a stigma and such an order of termination would not be penal in nature; (7) that if, on the other hand, the employee was faced with an inquiry on charges of misconduct or inefficiency or corruption or the like and his services were terminated without following the provisions of the relevant service rules or Article 311(2), he could ordinarily claim that the order was ultra vires in other words, if, instead of following the easy course of simply terminating the services without holding any inquiry, the employer chose the more difficult one of starting proceedings against the employee and branding him as a dishonest or incompetent person, the order of termination may be presumed to be penal in nature and (7) that where the employer holds an inquiry on the basis of a complaint of misconduct against a probationer or temporary servant, the employer must be taken to have abandoned his right to terminate simpliciter and to have undertaken disciplinary proceedings bring in its wake the protective operation of Article-311.

If we look at the entirety of the circumstances precedent or attendant on the impugned order, it is abundantly clear that the alleged misconduct of the respondent for which the show-cause notice was issued against him only a few days before the order of termination came to be passed is the very foundation of the order and that the appellant having chosen the more difficult course of starting disciplinary proceedings against the respondent and branding him as a dishonest person, the appellant must be presumed to have abandoned its right to terminate the services of the respondent by an order of discharge simpliciter is passed, it must be treated as a penal order.

12. Mr. Panchal also invited my attention to the reported decision of the Supreme Court in S.P. Vasudeva Vs. State of Haryana and Others, , wherein the appellant was appointed to a post on ad hoc basis, which really meant, temporarily, was reverted to his original post on the ground that his work was not only perfunctory but below average. Besides he was found to be acting beyond the scope of his activities. The appellant alleged that several senior officials had colluded against him and his reversion was by way of punishment. Hence he was entitled to the protection of Article 311 which has been denied to him. The Supreme Court held, that the appellant had no right to the post from which he

was reverted. He has failed to substantiate his plea of mala fides. The order was passed on the ground of his unsuitability and not as a measure of punishment. Besides he was found acting beyond the scope of his activities without permission or sanction of his superiors. Hence the order cannot be assailed. It was further held in the said decision as follows:

Where an order of reversion, as in the present case, of a person who had no right to the post, does not show *ex facie* that he was being reverted as a measure of punishment or does not cast any stigma on him, the courts will not normally go behind that order to see if there were any motivating factors behind that order though certain cases of the Supreme Court have taken a different view.

13. In *The State of U.P. Vs. Ram Chandra Trivedi*, , the respondent temporary clerk was required to appear in a departmental examination. At the optional typewriting test another clerk was found to impersonate for him. The Executive Engineer obtained the explanations of both the clerks and reported the matter to the Superintending Engineer who in turn sent a report to the Chief Engineer. The Chief Engineer wrote back recommending award of suitable punishment. The Superintending Engineer thereafter issued the impugned order terminating services of the respondent clerk giving one month's notice. The respondent's representations having failed, he filed suit challenging the order being one by way of punishment for non-compliance with Article 311(2) and claiming arrears of pay. Both the trial Court and the appellate Court dismissed the suit. A Single Judge of the High Court however disagreed and decreed the suit. He went through the official correspondence preceding the order and concluded that the order was passed by way of punishment. It was under these circumstances that the Supreme Court held:

The test for attracting Article 311(2) of the Constitution is whether the misconduct or negligence is a mere motive for the order of reversion or termination of service or whether it is the very foundation of the order of termination of service to the temporary employee. The form of the order, however, is not conclusive of its true nature. The entirety of circumstances preceding or attendant on the impugned order must be examined by the court and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order.

14. In *The Municipal Corporation of Greater Bombay Vs. P.S. Malvenkar and Others*, , the Supreme Court has made the following observations:

The impugned order terminating the services of the respondent was a fact and in reality passed by the General Manager himself who was the competent authority under Standing Order 3(e) and was merely communicated by his Executive Assistant. The draft of the order shows that it was put up before the G. M, and was duly approved and initialled by the former. The President, Industrial Court, was wrong in observing that since the decision to terminate the services of an employee is an act consciously to be undertaken and performed by the

concerned officer, the mere initialling of the draft order by the G.M. was not enough to make in an authenticated order of termination. Whether a written document or order bears full signature or only initials of the competent authority docs not make any difference nor does the affixation of signature by initials detract from the authority of the document or order unless the law or rule requires that the full "signature should be affixed to make it authentic. Signature generally means initials also.

The question whether a particular order terminating the services of an employee is by way of punishment or not his to be determined on the facts and circumstances of each case and from the order is not decisive of the matter.

The Supreme Court further observed:

In the present case the reason for termination was the unsatisfactory record of the respondent. No misconduct was alleged nor was any misconduct made the foundation of the impugned order. The order was not passed by way of punishment for any misconduct. The view that the service of the respondent was unsatisfactory was based on past incidents set out in the record. For cash of the incidents punishment in one form or another had already been meted out. It was not by way of punishment for any of these incidents, but because, as gathered from the incidents, the respondent's record of service was unsatisfactory that her service was terminated under Standing Order 26.

15. In *State of Uttar Pradesh Vs. Bhoop Singh Verma*, , the facts were that the respondent was a sub-Inspector of Police on a temporary post when he was discharged on July 13, 1957, on ground of misbehaviour with a woman. That order was struck down by the High Court for denial of the benefit of Article 311(2) since a stigma was attached by the termination order. On December 15, 1959, he was reinstated in service, granted an increment, but on January 21, 1980, his services were terminated by a simple order of termination on the ground that he was no longer required by the State. The Sub-Inspector filed a suit for declaration challenging the order as mala fide and passed to avoid a departmental enquiry. The motive was again the earlier allegation against him and he was denied the opportunity to clear himself. The trial Court decreed the suit and the High Court affirmed it in appeal and second appeal. Allowing the appeal the Supreme Court held:

(1) The order of termination simpliciter passed in accordance with the rules, without reference to the earlier proceedings, cannot be regarded as one of punishment. The termination was of a temporary servant no longer required in service, within the power of the superior authority.

(2) Even if the impugned order was made in the background of the previous allegations of misbehaviour, there was nothing to prevent the superior authority from deciding that instead of instituting disciplinary proceedings against him it should consider whether he was suitable for retention in service. Once the earlier order was quashed and the respondent reinstated in service, the position

reverted to which it was when the superior authority received report on the preliminary enquiry against him. The respondent's service could be terminated without a departmental enquiry. The reprehensible conduct of the respondent merely constituted the motive for passing the order but was not the foundation of that order. There was no element of punishment.

16. State of Maharashtra v. Veerappa R. Saloji : (1979)IILLJ393SC , the Supreme Court has observed as follows:

Even in the case of a temporary or officiating government servant his services cannot be terminated by way of punishment casting a stigma on him in violation of the requirement of Article 311(2). But ordinarily and generally the order of termination has to be looked at on the face of it and it has to be found whether it casts any stigma on the government servant. In such a case there is no presumption that the order is arbitrary or mala fide unless a very strong case is made out and proved by the government servant who challenges such an order.

17. In the light of the aforesaid decisions I have carefully gone through the contents of Ex. 38 the impugned order, dated April 29, 1969. From the impugned order it is clear that the plaintiff was remaining absent without any just or reasonable cause. It is also clear to my mind, from the impugned order Ex. 38, that she never believed in taking any leave, and that she voluntarily absented herself from time to time. But what is more shocking is, that she did not attend the duty for one year and six months. Under the circumstances, can it be said by any stretch of imagination that the impugned order Ex. 38 is by way of punishment? I have also gone through the impugned order Ex. 38 terminating the service of the plaintiff and whether from the contents of the said order could it be carved out that any stigma could be passed and that evil consequences will follow if she would go for any employment in future? From this view point, I with considerable anxiety looked at the impugned order to protect the constitutional rights conferred on the public servant under Article 311(2) of the Constitution; but I do not find either impliedly or expressly any indication showing that any stigma would be attached to her or the impugned order will come in her way when she goes for any other service in future. All that the impugned order mentions is, that she remained absent without the leave being sanctioned, and the department was perfectly justified in terminating her services. Not only she did one unauthorised act, but a series of unauthorised acts, remained absent from time to time and, the last act on the part of the plaintiff can never be condoned even when one is having charitable and magnanimous consideration in favour of our public services. How can a temporary public servant remain absent continuously for If years. In the facts and circumstances of the case, and applying the principles laid down by the Supreme Court in the aforesaid cases, in the case before me. I am convinced beyond any doubt, that the impugned order is not punitive in nature).

18. The impugned order is an order simply terminating the services of the appellant who was merely a temporary servant. From this view point, I must say

that there is no tittle of substance or merit in the appeal filed by the plaintiff. I need not say once again, that in the instant case, for the reasons mentioned by the learned District Judge in para 10 of the impugned judgment, the District Health Officer had the authority of law and the jurisdiction to pass the impugned order Ex. 38 as he was also an equally competent authority to appoint mid-wife in the service of the District Panchayat.

19. As a result of the aforesaid discussion, the appeal must necessarily fail, and is dismissed, but, having regard to the fact, the appellant was a poor employee in the Panchayat, I make no order as to costs.