
(2006) 08 GAU CK 0114
In the Gauhati High Court
Case No : Writ Appeal No. 80 of 2001

State of Tripura and Others	Vs	APPELLANT
Krishna Kanta Debbarma		RESPONDENT

Date of Decision : 31-08-2006

Acts Referred:

Citation : (2006) 4 GLT 80

Hon'ble Judges : B.K. Sharma, J;A.B. Pal, J

Bench : Division Bench

Advocate : S. Chakraborty, for the Appellant; P.R. Barman, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—The State of Tripura has preferred this appeal against the judgment of the learned Single Judge allowing the writ petition being Civil Rule No. 632 of 1992 by setting aside the impugned order by which the writ Petitioner, who is the Respondent herein, was discharged from service during the period of probation.

2. The Petitioner was appointed as Constable under the Appellants by order dated 25.11.1992. While he was under going training, he was discharged from his temporary service invoking Rule 746(k) of the Police Regulations of Bengal, 1943 (P.R.B.). The order of discharge was passed on 24.08.1994. There is no dispute that the Petitioner was in temporary service and on probation when the impugned order of discharge was passed. There is also no dispute that the Petitioner while undergoing training in the Police Training College at Narshingharh remained unauthorizedly absent for the period from 06.04.1994 to 29.06.1994, i.e. for about three months. After reporting for duty after the said period of absence, he again remained absent w.e.f. 01.07.1994 to 04.07.1994.

3. The P.R.B. 746(k), invoking the provision of which the Petitioner has been discharged from service, reads as follows:

746(k). Discharge-Probationers may at any time be discharged from service by the Superintendent, without proceedings. If found unsuitable, provided that the grounds for discharge shall be stated in the order of discharge which however, shall not be given effect to till it has been submitted to and confirmed by the Deputy Inspector-General. No appeal shall lie against such an order.

4. The learned Single Judge has set aside the impugned order primarily on the ground that the same is punitive in nature and the purported failure on the part of the authority to consider that after the initial period of absence from duty, the Petitioner was allowed to resume duty by treating the said period as "Dies Non". It has further been observed by the learned Single Judge that such termination of service of the Petitioner is not in accordance with the terms and conditions of appointment. While setting aside the impugned order of discharge, the learned Single Judge directed for reinstatement of the Petitioner in service without however, any arrear salary but with continuity in service for the purpose of seniority and promotion and other retirement benefits.

5. Being aggrieved by the aforesaid judgment and order dated 27.06.2001 passed by the learned Single Judge, the State has preferred this appeal and while entertaining the appeal, this Court was inclined to stay the judgment and order passed by the learned Single Judge. Thus, there is no dispute that the Petitioner is out of employment ever since he was discharged from service by the impugned order dated 24.08.1994. By now more than 12 years have passed.

6. Mr. S. Chakraborty, learned State counsel appearing for the Appellants submits that the impugned judgment and order passed by the learned Single Judge is not sustainable simply for the reason that the Petitioner, who was admittedly in temporary service and under probation, was discharged by invoking the aforementioned provision of P.R.B. 746(k). He further submits that the impugned order of discharge will have to be decided in the touchstone of the fact that the Petitioner was on probation and the factum of his unauthorized absence from duty/training is an established position. He has placed reliance on the decision of the Apex Court, reported in AIR 2001 SC 1148 (H.F. Sangati v. R.G. High Court of Karnataka).

7. Mr. P.R. Barman, learned Counsel for the writ Petitioner/Respondent, on the other hand, supporting the impugned judgment and order submits that when primarily the order of discharge is punitive in nature, the same is not sustainable in law. He submits that although as per P.R.B. 746 (k) the service of a temporary employee is liable to be discharged but the authorities are not empowered to do so by exercising arbitrary power and jurisdiction. He has placed reliance on the following decisions: Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, Radhey Shyam Gupta Vs. U.P State Agro Industries Corporation Ltd. and Another, AIR 2000 SC 1706 (Chandra Prakash Shahi v. State of U.P. (1999) 2 GLR 550 (Tabong Pasar v. State of Arunachal Pradesh) (5) (2000) 2 GLR 166 (Lal Zarzoliani v. State of Mizoram) (6) Jai Shanker Vs. State of Rajasthan, and (7) D.K. Yadav Vs. J.M.A. Industries Ltd.,

8. We have given out anxious consideration to the submissions made by the learned Counsel for the parties. We have also perused the materials on record. As noticed above, there is no dispute that the Petitioner was on probation and he was in temporary service. At the time of discharge from the service he was undergoing training. However, he remained absent from training unauthorisedly for the period from 06.04.1994 to 29.06.1994. Thereafter he reported for duty on 30.06.1994 and again remained unauthorisedly absent from 01.07.1994 to 04.07.1994. In Annexure-C appeal dated 30.08.1994 addressed to the Director General of Police, Government of Tripura, which has been annexed to the writ petition, the Petitioner himself has admitted about such unauthorized absence. However, he furnished the explanation that he had to remain absent as because he had suddenly fallen ill and had to take treatment under the particular Doctor.

9. It is on record that a detailed report regarding unauthorized absence of the Petitioner was furnished by the Principal of the Training College to the Superintendent of Police, West Tripura. It is also on record that the aforesaid appeal preferred by the Petitioner was rejected by the Appellant authority by order dated 19.01.1995. Mr. P.R. Barman, learned Counsel for the Respondent putting emphasis on the distinction between "motive" and "foundation" towards dismissal of a temporary employee on probation submits that the alleged misconduct on the part of the Petitioner being the foundation towards formation of opinion to discharge the Petitioner, same is not sustainable in law. The decisions on which he has placed reliance are primarily on the principle enunciated and reiterated by the Apex Court on the distinction between motive and foundation.

10. In the case of Radhey Shyam Gupta (supra) the Apex Court held that where the termination is preceded by an inquiry and evidence is received and findings as to misconduct of a punitive nature are arrived at behind the back of the Officer and where on the basis of the report, the termination order is issued, such an order will be violative of principles of natural justice. Similarly, in the case of Dipti Prakash Banerjee (supra) the Apex Court observed that if the findings are arrived at in an inquiry 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. The Supreme Court further observed that if the inquiry was not held, no findings were arrived at and the employer was not inclined to conduct an inquiry 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.

11. From the materials on record as available in the instant case, the aforesaid two decisions on which the learned Counsel for the Respondent has placed reliance is distinctly distinguishable. In the instant case facts are admitted. As has been held by the Apex Court in the case reported in Channabasappa Basappa Happali Vs. The State of Mysore, that admission of facts amounts to admission of

guilt. In the appeal preferred by the Petitioner, he himself has admitted that he was unauthorisedly absent from the training. Although he has taken the plea of taking medical treatment but the same could not have authorized him to remain absent from training without any intimation to his superior authorities. The Respondent being a member of the disciplined force ought to have followed much more discipline than any other ordinary employee.

12. The other decisions, on which the learned Counsel for the Respondent has placed reliance, are more or less on the same principles about which the Apex Court in the aforesaid two decisions have discussed. We have failed to understand as to why the decision of the Apex Court in *Jai Shanker* (supra) has been pressed into service. That was the case of automatic termination of service upon overstaying leave. The Apex Court held that the principles of natural justice required issuance of notice before termination of service. This is not the situation in the instant case. The service of the Petitioner has been dispensed with primarily on the ground of unsatisfactory service as empowered by P.R.B. 746(k).

13. In the case of *H.F. Sangati* (supra), the Apex Court upheld the dispensation of the service of the unsuitable probationer. In that case, the Appellant was appointed as Munsiff on probation. He was discharged by an order recording that he was unsuitable to hold the post of Munsiff. As in the instant case, in that case also the particular rule empowered the employer to discharge the employee on the ground of unsuitability of the appointee from the service or post. In the instant case also the Petitioner on the established fact was discharged from service.

14. We cannot persuade ourselves to the argument of the learned Counsel for the Respondent that the service of the Petitioner was dispensed with on the ground of misconduct. The impugned order dated 24.08.1994 speaks only of the conduct of the Petitioner which according to the appointing authority is serious and detrimental for discipline in the police force. The P.R.B. 746(k) empowers the appointing authority to discharge a probationer if found unsuitable. It further requires stating the grounds for discharge in the order itself. Thus, it was obligatory on the part of the appointing authority to mention the grounds for discharge in the order itself and while doing so towards issuance of the impugned order; they did not commit anything wrong. The order does not constitute a stigmatic and/or punitive order to the extent as has been argued by the learned Counsel for the Respondent.

15. The Apex Court in the case of *Kamal Kishore Lakshman Vs. Management of Pan American World Airways Inc. and Others*, explained the meaning of stigma in paragraph 8 of the judgment as follows:

According to Webster's New World Dictionary it is something that detracts from the character or reputation of a person, a mark sign, etc. indicating that something is not considered normal or standard. The Legal Thesaurus by Burton gives the meaning of the word to be blemish, defect disgrace, disrepute

imputation, mark of disgrace of shame. The Webster's Third New International dictionary gives the meaning as a mark or label indicating a deviation from a norm. According to yet another dictionary "stigma" is a matter for moral reproach.

16. In several cases and in particular in *The State of Orissa and Another Vs. Ram Narayan Das*, the Apex Court held that the use of the word "unsatisfactory work and conduct" in the termination order will not amount to a stigma. In that case the Apex Court held that an order discharging a public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification, may appropriately be regarded as one by way of punishment, but an order discharging a probationer following upon an enquiry to ascertain whether he should be confirmed, is not of that nature. The Apex Court further observed that the fact of the holding of an enquiry is not decisive. What is decisive is, whether the order is by way of punishment. In the instant case the termination of services of the Petitioner was not preceded by any full-fledged enquiry making the same to be the foundation of termination of the services of the Petitioner. The appointing authority itself noticed the shortcomings and poor performance of the Petitioner and it was on that basis his services were terminated after giving him due warnings to improve in his performance. Thus it was the motive and not the foundation on the basis of unsatisfactory performance which led to termination of services of the Petitioner. Such a termination cannot be said to be stigmatic.

17. The Apex Court in the case of *Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr*, held that the language used in the order of termination, "work and conduct has not been found to be satisfactory" falls within the class of non-stigmatic orders of termination. Referring to various decisions of the Apex Court and tracing back the history of such cases in which the services of a probationer are terminated, the Apex Court held that an 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. The Apex Court observed that whenever a probationer challenges his termination, the Court's first task will be to apply the test of stigma or the "form" test and if the order survives this examination, the "substance" of the termination has to be found out. The Apex Court further observed that generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for job, whether by reason of misconduct or ineptitude whatever the language used in the termination order may be. When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Equally an order which is otherwise valid cannot be invalidated by reason of any statement in any affidavit seeking to justify the order.

18. We may also gainfully refer to the decision of the Apex Court as reported in

Krishnadevaraya Education Trust and Another Vs. L.A. Balakrishna, . In that case also the services of the probationer was terminated on the basis of the opinion formed by the committee set up for evaluation of the general performance of the probationer. The committee was of the opinion that the probationer's job proficiency was not up to the mark. Making the same explicit in the order of termination, the services of the probationer was dispensed with. The Apex Court held that there can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job, then the employer has a right to terminate the services as a reason thereof. The Apex Court pointed out that if the termination during probationary period is without any reason, perhaps such an order would be sought to be challenged on the ground of being arbitrary. Therefore, normally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged.

19. In the instant case the Petitioner was discharged from service on the specified ground as reflected in the impugned order dated 24.08.1994. The appointing authority as per the provision of P.R.B. 746(k) had the right to terminate his services which was exercised by way of issuance of the impugned order. Such an order of discharge cannot be said to be stigmatic and must be held to be an order of termination simplicitor.

20. For all the foregoing reasons and discussions, we are of the considered opinion that the impugned judgment and order dated 27.06.2001 passed by the learned Single Judge in Civil Rule No. 632 of 1994 is liable to be interfered with, which, we accordingly do.

21. The appeal is allowed by setting aside and quashing the impugned judgment and order dated 27.06.2001 passed by the learned Single Judge. Consequently, the writ petition being Civil Rule No. 632 of 1994 stands dismissed. There shall be no order as to costs.