

(2014) 07 GUJ CK 0135
In the Gujarat High Court
Case No : Second Appeal No. 85 of 2014

United India Insurance Co. Ltd.

APPELLANT

Vs

V.M. Vasant

RESPONDENT

Date of Decision : 08-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2014) LabIC 4587

Hon'ble Judges : N.V. Anjaria, J

Bench : Single Bench

Advocate : Palak H. Thakkar, Advocate for the Appellant; Amrita M. Thakore, Advocate for the Respondent

Judgement

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N.V. Anjaria, J.—The appellant-original defendant-United India Insurance Company Ltd. has preferred this Second Appeal under section 100 of the Code of Civil Procedure, 1908, challenging judgment and decree dated 30th September, 2013 of learned 3rd Additional District Judge, Jamnagar, in Regular Civil Appeal No. 109 of 1996, dismissing the said Appeal, in turn, confirming judgment and decree dated 7th June, 1996 of learned 4th Joint Civil Judge(J.D.), Jamnagar, in Regular Civil Suit No. 1038 of 1982.

1.1 Both the Courts below held that the order of termination of services of the respondent-original plaintiff, a Probationary Development Inspector, working with the appellant company, was illegal and violative of principle of natural justice.

1.2. The plaintiff in his Civil Suit prayed for declaration and permanent injunction that the order dated 20.10.1982 passed by the Regional Manager of the appellant company was illegal and further to restrain the defendants from implementing the said order and terminating his services.

2. The plaintiff came to be appointed as Development Officer by letter of appointment dated 12.06.1980. As per the conditions mentioned in the letter of

appointment, he was placed on probation for 12 months. The conditions inter alia further provided that the period of probation was extendable for further 12 months. It was also a condition that as a Probationary Development Officer, he was expected to yield a general premium income of at least Rs. 75,000/- in the 1st year, and for the subsequent years as may be fixed by the management. The plaintiff completed the probation period and also further 12 months on 15.06.1982. It was the case of the plaintiff that as per the conditions, he was given work for Rs. 95,000/- upon completion of above total period, as against for Rs. 75,000/- earlier given. It was contended by the plaintiff that the termination of his services sought to be effected by order dated 20.10.1982 was illegal and was passed behind his back for alleged misconduct and in breach of natural justice.

2.1 The defendants filed written statement at Exh. 12 and contested the Suit. It was contended that the plaintiff was not confirmed and the appellant company had right to take action against any of its employees, when requires. It was further contended that the plaintiff opted to help out insured person even after the accident took place and put the company to loss. It was stated that an explanation was also asked for in that regard from the plaintiff. It was then contended that the services of the plaintiff was terminated in terms of clause 10 of the appointment letter. The Trial Court framed issues at Exh. 27 and decreed the Suit. The finding of the Trial Court that the allegations were levelled against the plaintiff, for which, no departmental inquiry was conducted and his services came to be abruptly terminated without compliance of natural justice was confirmed by the First Appellate Court, culminating into the impugned judgment and decree in this Second Appeal.

3. Learned advocate for the appellants Mr. Palak H. Thakkar vehemently assailed the judgments of the Courts below and submitted that the order dated 20.10.1982 was a simple termination pursuant to clause 10 of the letter of appointment. He submitted that as per the said clause, the appellant was liable to be terminated at any time by giving one month's notice or month's salary in lieu without assigning any reason, and thus, status of the plaintiff was temporary. He submitted that the termination was not punitive, as sought to be made out.

3.1 Learned advocate for the appellants relied on judgment of the Supreme Court in Parshotam Lal Dhingra Vs. Union of India (UOI), . Referring to paragraph 26, 27 and 28 of the said judgment, he contended that the plaintiff had not acquired any right to continue in service. He further contended that where a person is appointed to a permanent post on probation, termination of his services during or end of period of probation will not be a punishment. Learned advocate further relied these judgments: (i) State of Uttar Pradesh and Another Vs. Kaushal Kishore Shukla, (ii) Triveni Shankar Saxena Vs. State of U.P. and others, , (iii) S.P. Vasudeva Vs. State of Haryana and Others, , (iv) Oil and Natural Gas Commission and Others Vs. Dr. Md. S. Iskender Ali, , (v) Governing

Council of Kidwai Memorial Institute of Oncology, Bangalore Vs. Dr. Pandurang Godwalkar and another, , (vi) Parshotam Lal Dhingra Vs. Union of India (UOI), , (vii) Rajasthan State Road Transport Corporation and Others Vs. Zakir Hussain, , (viii) Smt. Charulataben M. Gohil Vs. Surendranagar Joint Municipality and Another,

3.2 By pressing into service the above decisions, learned advocate for the appellants elaborated that merely because some preliminary inquiry was held, that by itself would not make the order stigmatic. He submitted that such inquiry was permissible to judge the suitability of the employee for continuing him in service. He submitted that reading of the termination order did not suggest in any way that the same was stigmatic or by way of a punitive action.

3.3 On the other hand, learned advocate Ms. Amrita M. Thakor submitted that it was a clear case, where the termination was based on allegation of misconduct. She submitted that the allegation was levelled against the plaintiff expressly in the letter dated 18.05.1982 that he had obliged the party by making insurance coverage effective from 25.02.1981 after the occurrence of accident, as if the coverage was effective from the previous date. She submitted that thereafter, behind back, decision of terminating plaintiff's services was taken in wake of the allegations of misconduct. She submitted that the allegations were levelled against the plaintiff and holding of departmental inquiry of plaintiff were necessary to prove the allegations. Learned advocate for the respondent submitted that the decision to terminate services was by way of punitive action, and cloaked as simple termination. She relied on these decisions in support of her submissions, (i) Anoop Jaiswal Vs. Government of India and Another, , (ii) The State of Punjab Vs. Prakash Singh Cheema, , (iii) State Bank of India and Others Vs. Palak Modi and Another etc., , (iv) Dinaben Vinaykumar Shah Vs. Surat Municipal Corporation, , (v) Thimmaiah and Others Vs. Ningamma and Another, (2)), (vi) Jasbir Rani and Others Vs. State of Punjab and Another,

4. In The State of Punjab Vs. Prakash Singh Cheema, , the Supreme Court held that the form of the order is not conclusive and whether or not, an order of termination by way of punishment would depend upon the facts and circumstances of each case. In Anoop Jaiswal Vs. Government of India and Another, , the Apex Court held that it is permissible for the Court to go behind the formal order of discharge so as to find out the real cause of action. In that case, the appellant was an IPS Officer, undergoing training as a probationer, arrived late by about 22 minutes at the place, even though prior intimation was sent about the time on which, the candidates were required to reach the venue. The incident of delayed reporting was considered to be one by the authorities calling for an inquiry and an explanation was sought for from the petitioner and all other probationer-trainees who had arrived late. On the basis of explanation, the Director recommended the Government for discharge of the appellant from service. The Government passed order of discharge on the basis of recommendation of the Director with whom, the only ground prevailing was that

the appellant did not show any sign of repentance. The High Court dismissed the Writ Petition. However, the Supreme Court allowed the Appeal and held that the order was punitive. The appellant was directed to be reinstated with full benefits.

4.1 The Supreme Court in *Anoop Jaiswal Vs. Government of India and Another*, stated the law in the following words:.

"...where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

4.2 This Court in *Maharaja Sayajirao University Vs. Ram Mangaram Mirchandani*, had before it a reverse case. The Court but propounded the very principle that what matters is the substance of the order, not its form. The Registrar of the University, while communicating the order of termination of services of the probationer Lecturer, used the words "inquiry" or "charges". The contention raised on behalf of the respondent-employee was that because of these words, the order on the face of it was one of penal character, because those words were expressly mentioned. This Court, after looking into the original resolution passed by the Syndicate of the University, held that from the said resolution, it was clear that the services of the respondent were terminated purely on the ground of unsatisfactory work during the probation period and it was then observed by the Court that though the Registrar communicated the order giving an impression, as if the same charge against the respondent was proved, it was an error of communication only and the order was actually passed by the Syndicate on the ground of suitability alone. It was held that the error of communication of the order would not convert it to be punitive, when otherwise it was not. Therefore, in the facts and circumstances of the case, as seen above, though the order was looked on its bare reading the termination simpliciter, it was on the backdrop of allegations of misconduct and some inquiry held and conclusion arrived at in that regard by the appellant company behind the back of the respondent.

4.3 In judging whether termination of a probationer is simpliciter or punitive, a trite distinction is made between "motive" of the order and "foundation" of the order. In *Chandra Prakash Shahi Vs. State of U.P. and Others*, the Supreme Court explained the concept of "motive" and "foundation" in respect of probationer as under:

"The important principles which are deducible on the concept of "motive" and "foundation", considering a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in

question. If for the determination or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his services, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

4.3.1 The Court explained,

"Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the act would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were to be true in the preliminary inquiry." (emphasis supplied)

4.4 In *Rao Narain Singh (dead) by L.R.s. Vs. Union of India*, the Supreme Court stated,

"If findings were arrived at in an enquiry as to misconduct, behind the back of the office 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 circumstances, the allegations would be a motive and not the foundation and the simple order of termination would be valid".

4.5 If there are allegations of misconduct in the foundation of misconduct, the action would take a colour of punishment and would be bad in law for want of conducting an inquiry to prove the allegations after giving due opportunity to the employee and complying with the natural justice. The preliminary inquiry when conducted in respect of allegation of misconduct behind the back of the employee to ascertain the truth, followed by an order of termination, would make the termination penal.

4.5.1 Whether in the foundation of order, there were allegations of misconduct has to be found out by lifting the veil. In *State Bank of India and Others Vs. Palak Modi and Another etc.*, the Supreme Court stated thus:

"There is a marked distinction between the concepts of satisfactory completion of probation and successful passing of the training/test held during or at the end of the period of probation, which are sine qua non for confirmation of a probationer and the Bank's right to punish a probationer for any defined misconduct, misbehaviour or misdemeanour. In a given case, the competent authority may, while deciding the issue of suitability of the probationer to be confirmed, ignore the act(s) of misconduct and terminate his service without casting any aspersion or stigma which may adversely affect his future prospects, but, if the misconduct/misdemeanour constitutes the basis of the final decision taken by the competent authority to dispense with the service of the probationer albeit by a non-stigmatic order, the Court can lift the veil and declare that in the garb of termination simpliciter, the employer has punished the employee for an act of misconduct." (Emphasis supplied)

5. From above decisions, the principles emerged are that whether an order of termination of a probationer can be said to be by way of punishment or not, depends upon whether certain allegations which are cause of termination and which led the action on part of the employer to terminate the services of the employee. Though the employer is not precluded in law from holding preliminary inquiry, the acid test is whether the purpose of making preliminary inquiry was to assess overall performance and thereby to judge the suitability of the probationer/temporary employee for continuing him in service, or to investigate some acts of misconduct about which the allegations were levelled against him where the foundational facts were allegations or misconduct inquired and a decision taken keeping the employee in dark thereabout and behind his back, then the resultant action of terminating the services would assume penal robes. Hence, mere fact of aspect that reading of the order make it look innocuous, was irrelevant. The order of termination notwithstanding the way it was produced or the language in which it was couched, would have to be countenanced as penal and casting stigma. For judging the true character and colour of the order, the lifting of veil is permissible. The Court may remove the cloak and know the behind-the-certain conduct of the employer and to gather the factual foundation of the order. It is the process of scanning and catching the real picture, to be undertaken by the Court.

6. Proceeding now to consider the facts of the case in light of the above principle highlighted, the appellant-Insurance Company gave a notice (Exh. 66) on 18.05.1982 to the plaintiff employee. It was a notice in respect of plaintiff taking an insurance policy for a particular truck. It was stated in that notice that the plaintiff had obliged a party by giving effect of insurance coverage from a particular date. An explanation was called for from the plaintiff.

6.1 The said notice dated 18.05.1982 (Exh. 66) read as under:

"To Mr. V.M. Vasant Development Inspector JAMNAGAR.

Re. Policy No. 26501/24/7/00088/81 Truck No. GTY 3960.....

1. This is to bring to your notice the following facts and require you to submit your explanation within eight days hereof:--

2. That it appears that you had taken a T.P. Insurance Coverage for Truck No. GTY-3960 and have issued the cover note No. 678320 in the name of Mr. Jagdish B. Mirani. From the cover-note, it appears that the effective date of commencement of insurance for the purpose of the Act has been given as 25-1-1981.

3. The amount of premium of Rs. 253/- has been in fact, paid by you on 27-2-1981 and has been credited in the company on that date only.

3A. It subsequently transpired that the said vehicle had met with an accident at about 10.00 A.M. on 26-2-1981, near Mental Hospital on the Jamnagar-Rajkot Highway. You had informed the Company about the said accident by undated letter, presented by you in this office as late on 4-9-81.

4. You are aware that the Insurance Coverage commences only from the time when the amount of premium is paid to the Insurance Company. From the circumstances, it appears that the insurance for this vehicle was taken only after the accident had occurred, i.e. after 10.00 A.M. on 26-2-1981, and that you have obliged the party by taking insurance as if, it is from 25-2-1981. If the Insurance Coverage was in fact given on 25-2-1981, there is no reason why the amount of premium was not deposited by you 25th Feb. 1981.

5. Arising out of the accident, a claim petition has been filed against the Insured, his driver, and the Company, claiming a huge amount of Rs. 2.50 Lacs.

6. It is apparent that it is only on account of the reason, that you had issued the Cover-note as from 25-2-1981, even though, the insurance was in fact taken after the accident. That the Company is saddled with the risk of defending this claim.

8. You are, therefore, called upon to render a true and complete explanation regarding the aforesaid matter.

Needless to say, the Company reserves the right to take appropriate actions against you in case any liability is fastened due to your actions,

Yours faithfully, (J.P. Parekh) Branch Manager"

(emphasised here)

6.2 The notice (Exh. 66) was replied to by the plaintiff-respondent on 26.05.1982 (Exh. 67). In the reply addressed to the Branch Manager of the appellant company, the respondent stated that he had paid a sum of Rs. 253/- on 25.02.1981 and Insurance Certificate was with the company and copy was with

him. He explained that it was clearly mentioned therein that the insurance started on 25.02.1981 and it was not true that it started on 27.02.1981; the party had informed late, but insurance was not at all taken after occurrence of accident as was alleged and he further denied that he had obliged the party.

6.3 This followed another communication dated 31.05.1982 (Exh. 68) by the appellant company signed by the Branch Manager and the said communication read as under:

"We are in receipt of your letter dated 26-5-82, received by us on 27-5-82 and once again do not agree with your clarification, stated in the said letter.

We have already withdrawn your authority to issue cover-notes in any department what-so-ever orally since long. However, we again mention here that we have withdrawn your authority to issue cover-note in any department and to cover any risk without our prior approval. You are also hereby called upon to surrender the cover-note books, lying with you either utilised or non-utilised.

Inspite of our repeatedly asking you to submit cover-note utilisation form for the cover-note issued by you, right from the date of your appointment, we are sorry to say that till date you have not provided us the said forms except a few and hence, you are hereby called upon to submit the same without any further loss of time, which is long due requirement.

You are also hereby required to provide insurance particulars of truck No. GTY 3960 prior to the above said policy and at the same time, also provide us if the said truck is renewed with us on 25-2-82, alongwith a copy of the FIR and Panchnama of the so called accident on 26-2-81 to the said truck.

Please provide us the above requirement and explanation within eight days here-of.

Needless to say again that the company reserves the right to take appropriate actions against you in the case, and liability is fastened due to your actions."

(Emphasised here)

6.4 The plaintiff responded to above letter on 7-6-1982 (Exh. 69). Thereafter, on 15-9-1982, Senior Divisional Manager of the appellant company addressed a letter to the respondent. The same is re-produced herein below. It may be noted here that after the letter below, immediately followed was the termination order dated 20.10.1982 (Exh. 71).

"DO:CJG:P/339:82

Shri V.S. Vasant Probationary Inspector Branch Office, JAMNAGAR

Our Jamnagar Branch Office No. 01062/81 Claim No. 00088/81 Your Cover Note No. 678320 Truck No. GTY-3960 Insured: M/s. Jagdish B. Mirani MACT No. 107/81 at Jamnagar

Dear Sir,

We refer to the letter addressed to you by our Jamnagar Branch on 31-5-82, wherein they have asked you:

- (1) To surrender all Cover Note Books--used or unused lying with you.
- (2) To provide particulars of insurance of the above truck prior to your issue of Cover Note on 25-2-1981.

To that letter you are replied by your letter dated 78-6-82 but we regret to observe that you are totally silent on the requirements mentioned above.

Even with regard to the submission of Cover Note Utilisation Forms you have stated that "will be submitted in few days". We would like to know whether you have furnished these forms. The available records indicates that you have issued Cover Note No. 678320 after the occurrence and our Regional office is examining the matter further. Pending such action as may be found appropriate to be taken, you are hereby called upon:

- (1) To immediately surrender to our Jamnagar Branch all the Cover Note Books--used or unused and take a proper acknowledgment for them.
- (2) Now to accept any risk without prior approval of Jamnagar Branch Office.

This letter is sent to our Jamnagar Branch Office in duplicate and you are advised to sign the duplicate in token of your receipt of this letter.

Thanking You,

Yours faithfully, (C.J. Gandhi)"

(Emphasised here)

6.5 From the above correspondence, it could be seen that in the notice dated 18.05.1982 (Exh. 66), the appellant company levelled a clear allegation against the respondent-plaintiff that he had obliged a party by taking insurance as if it was from a particular date and providing insurance coverage was from that particular date, though it in fact took effect after the accident. In other words, the allegations (paras 4 to 6 and 8 of Exh. 66) were made against the plaintiff that he had acted to extend benefit of insurance coverage by making it to be particular dated in respect of accident which had taken place in actuality subsequently. In that, the company stated that they had withdrawn the authority from the plaintiff to issue cover note in any department and asked him to surrender cover note books either utilised or unutilised, and that it reserved right to take appropriate action in case any liability is fastened due to his action. The plaintiff continued to plead not guilty in his reply.

6.6 Upon reading of the communication dated 15.09.1982 (Exh. 70) of the Senior Divisional Manager, it could also be gathered firstly that the Regional Office was examining the matter and secondly, it was pending for action as may

be found appropriate to be taken. The plaintiff employee was directed to surrender all the cover note books used or unused and not to accept any risk without prior approval. Immediately followed was the order of termination. It was a punitive action in disguise.

6.7 It was sought to be urged by learned advocate for the appellant that merely because some inquiry was held, it would not make the order penal, when on reading of it, the same could not be viewed as penal and not casting any stigma and further it was permissible for the employer to terminate services of the respondent who was a probationer. Though the employer is free to undertake preliminary inquiry for judging on continuance of a probationer in service, the crux lies the purpose for which such inquiry was done. If the inquiry was in order to judge the suitability or assessing the performance of the probationer employee, a resultant order of termination would be an order simpliciter. In this case, there were allegations of wrongful conduct amounting to misconduct were expressly made and stated against the respondent. For passing such order based on and actuated by allegations of misconduct, there has to be due compliance of natural justice and holding of inquiry to prove the charges of misconduct.

7. In *Nehru Yuva Kendra Sangathan Vs. Mehbub Alam Laskar*, , the facts were that the appellant Sangathan was an autonomous body operating under a department of the Central Government and the respondent was appointed as a Youth Co-ordinator and was placed on probation with the stipulation that during the probation period, his services could be terminated without notice and without assigning any reasons. The respondent allegedly withdrew some amount from the Government fund and deposited in his personal account, for which, an enquiry ensued which was conducted behind his back and on the basis thereof, his probation was terminated. When the action was challenged before the High Court, the High Court held allowing the Writ Petition that the order had an effect of casting an stigma and could not have been passed without affording a reasonable opportunity. In the Appeal before the Supreme Court preferred by the employer Sangathan, it was held that the order of termination indisputably based on the finding that an inquiry had been made behind the back of the respondent. As result of preliminary inquiry being taken into consideration for the purpose of judging the suitability of the respondent to continue in service, the same could not have been said to be a punitive for terminating the probation.

7.1 The Supreme Court explained the law thus:

"The respondent was appointed on a temporary basis. He was put on probation. Indisputably, the period of probation was required to be completed upon rendition of satisfactory service. Only in the event of unsatisfactory performance by the employee, the termination of probation would have been held to be justified. It is, however, well known that when the foundation for such an order is not an unsatisfactory performance on the part of the employee but overt acts amounting to misconduct, an opportunity of hearing to the employee concerned is imperative. In other words, if the employee is found to have committed a

misconduct, although an order terminating probation would appear to be innocuous on its fact, the same would be vitiated, if in effect and substance it is found to be stigmatic in nature."

8. The chain of events revealing from the aforesaid correspondence culminating into the termination unmistakably indicates that an allegation of misconduct was levelled against the respondent-plaintiff about he having issued a back dated insurance coverage to cover an accident occurred subsequently and thereby, obliged the party. He was called upon to explain and while reiterating allegations levelled in the letter dated 31.05.1982, the appellant company stated that it has reserved right to take appropriate action. The subsequent last letter dated 15.09.1982 aforementioned showed that after considering the reply of the respondent, some conclusion was drawn by the company in the letter. It was indicated that the Regional Office had been examining the issue and the action was pending. It was stated that the liability on the employer was fastened and it suffered due to the acts or misbehaviour of respondent. The contention of learned advocate for the respondent that the contents of said letter was indicative of the fact that a penal action against the respondent-employee was in pipeline could be well countenanced.

8.1 It could not be gainsaid that the action shown to be pending was in the context of the allegation. As aforesaid, it was about alleged misconduct committed by the plaintiff as Development Officer by issuing an antedated cover note and obliged the insurer by giving wrongful benefit of the insurance coverage in respect of an accident. The termination order (Exh. 72) immediately followed after the aforesaid letter dated 15.09.1982 (Exh. 70). If the cloak is removed and the facts are scanned lifting the veil, it was clear that; the order of termination was for and in the context of the allegation of misconduct as above. It could not be said that the inquiry which was undertaken by the appellant company was only for the purpose of judging the suitability of the respondent for his retention in service. Therefore, the order of termination has to be treated as penal in nature. The form of the letter of termination or formal expression of language therein did not matter, when in substance, it was found to be a penal character and on the foundational facts a stigmatizing one.

9. The concurrent finding recorded by both the courts below was cogent and convincing, when they held that the order of termination was illegal and in breach of natural justice. For the aforesaid reasons and discussion, there is no substance in the present Appeal. The Appeal does not involve any question of law much less any substantial question of law and accordingly, it is dismissed.

Registry to send back the record and proceedings.