

Gujarat High Court

Yogeshbhai Rupabhai Vatukiya vs State Of Gujarat on 26 November, 2020

Bench: S.H.Vora

C/SCA/13245/2020

CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 13245 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE S.H.VORA

1 Whether Reporters of Local Papers may be allowed to Yes see the judgment ?

2 To be referred to the Reporter or not ? Yes 3 Whether their Lordships wish to see the fair copy of the No judgment ?

4 Whether this case involves a substantial question of law No as to the interpretation of the Constitution of India or any order made thereunder ?

===== YOGESHBHAI
R U P A B H A I V A T U K I Y A V e r s u s S T A T E O F G U J A R A T
===== Appearance:

MR.DIPAK B PATEL(3744) for the Petitioner(s) No. 1 MR KRUTIK PARIKH, AGP for the Respondent(s) No. 1 NOTICE SERVED BY DS(5) for the Respondent(s) No. 2,3
===== CORAM:
HONOURABLE MR. JUSTICE S.H.VORA Date : 26/11/2020 CAV JUDGMENT

1. With the consent of learned advocates appearing for the respective parties, present petition is taken up for final disposal today.

2. By way of this petition under Article 226 of the Constitution of India, the petitioner has made following prayers in terms of para 8(A):

"8(A) Allow this petition by issuing an appropriate writ, order or direction by quashing and setting aside the impugned orders dated 20.2.2020 passed by the respondent no.2 and 3 (Annexure A) and thereby, be pleased to direct the respondents to reinstate the petitioner in service with all consequential benefits as if the impugned orders were never passed."

3. Heard learned advocate Mr. Dipak Patel for the petitioner and learned AGP Mr. Krutik Parikh for the respondent State.

4. The grievance ventilated in the present petition is such that the impugned orders annexed at Annexure A to the petition came to be passed without affording any opportunity of hearing and without holding any departmental inquiry even though, termination was sought to be based on allegation of misconduct of demanding bribe.

5. It appears that the petitioner was appointed on 14.6.2017 pursuant to his selection in the process undertaken by the Gujarat Subordinate Service Selection Board. The appointment of the petitioner was on the basis of fixed pay for a period of five years on ad-hoc basis with fixed pay as Revenue Talati (Class III). On account of registration of FIR No.02 of 2020 dated 29.1.2020, which came to be registered against the petitioner with ACB Police Station, Surat City for the offences punishable u/s 7(A) of the Prevention of Corruption Act, the impugned orders dated 20.2.2020 came to be passed by the respondent Nos.2 and 3 stating that the petitioner had committed the offence and resulting serious misconduct by demanding bribe. According to the respondent No.2, the petitioner was appointed for fixed period and on fixed pay and that since he had shown serious dereliction of duties of dishonesty in discharge of his duties, it amounted to serious misconduct and therefore, as per condition No.14(A) of the letter of appointment, services of the petitioner came to be terminated without giving notice and without holding any departmental enquiry.

6. According to the petitioner, he made written representations to the respondent Nos.1 and 2 and the same came to be rejected by the respondent No.2, while representation made to the respondent No1 remained unanswered till date of the petition.

7. Per contra, learned AGP did not dispute the factual averment made in the petition and therefore, the State has chosen not to file any affidavit-in-reply.

8. The position of law in relation to effecting termination of service of an employee, even if on the fixed pay, by passing a stigmatic order without following principles of natural justice came to be discussed by the Coordinate Bench in the decision rendered in Special Civil Application No.10439 of 2019 dated 13.8.2019, wherein the Coordinate Bench observed as under:

"5.1 The law on the aspect was discussed with reference to the decisions of the Apex Court. In judging whether termination is simpliciter or punitive, a trite distinction is made between motive of the order and foundation of the order. In Chandra Prakash Shahi v. State of U.P. [(2000) 5 SCC 152], the Supreme Court explained the concept of motive and foundation in respect of probationer as under:

"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." (para

29) (emphasis supplied) 5.2 The above statement of law that if the order is punitive and stigmatic in nature, even if the employee concerned is a temporary employee or holding the post as on probation, his dismissal or removal would warrant a regular inquiry and full-fledged compliance of natural justice, emanated from the early decision of the Apex Court in *Anoop Jaiswal v. Government of India* [(1984) 2 SCC 369]. In that case, 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.

5.3 The principle stated was that even the form of the order may be merely a camouflage for order of dismissal actually passed on the basis of misconduct. In such circumstances, the Apex Court stated, it is always open to the court before which the order is challenged, to go beyond the form and ascertain the true character of the order. The Supreme Court held, "If the court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground where the aggrieved officer is not afforded a reasonable opportunity to defend himself as provided in Article 311(2). It is wrong to assume that it is only when there is a full scale departmental enquiry any termination made thereafter will attract the operation of Article 311(2)." (Paras 11 and 13) 5.4 It is the foundation of the order which really matters.

The Supreme Court in *Anoop Jaiswal* (supra) stated that if from the record and the attendant circumstances of the present case it becomes clear that the real foundation for the order of discharge of the appellant-probationer was the alleged act of misconduct, the impugned order would amount to termination of service by way of punishment and in absence of any enquiry held in accordance with Article 311(2), it was liable to be struck down. The Supreme Court thereafter directed

reinstatement of the appellant of the said case in service with the same rank of seniority he was entitled to before the impugned order passed as if it had not been passed at all.

5.5 The Supreme Court in *Gujarat Steel Tubes Limited v. Gujarat Steel Tubes Mazdoor Sabha* [(1980) 2 SCC 593] stated and observed thus, "53. Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinised, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used." (Emphasis supplied) (Para 9)

5.5.1 Having delineated the aforesaid principles, the Apex Court held that the order in the case before it could not be treated as a simple order of retrenchment and that it was an order passed by way of punishment. It was held that such order of dismissal which was passed without holding a regular departmental inquiry cannot be allowed to be sustained.

5.6 In *Ratnesh Kumar Choudhary* (supra) also the Supreme Court considered its own various decisions on the aspect and after referring to the decision in *Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd.* [(1999) 2 SCC 21] observed that the proposition of law operating two ways. In certain cases of temporary servants and probationers if the inquiry undertaken about the very conduct forms the motive of termination order, then the termination could not be said to be punitive merely because principles of natural justice have not been followed. In such circumstances, without becoming stigmatic, the employer can exercise its right to terminate service of the employee concerned. In the other line of decisions, the Supreme Court has ruled that if the facts revealed in the inquiry or from the narration of the order itself that the inquiry into the conduct was not the motive but it was a foundation and the allegation of misconduct considered against employee becomes foundation of termination of service of temporary servant or probationer, such action would become punitive and it would make the order legally unsound. The Supreme Court in *Ratnesh Kumar Choudhary* (supra) thereafter referred to the above quoted observations from *Gujarat Still Tubes Limited* (supra) terming them as instructive.

5.7 In *Imranbhai Anwarbhai Majothi* (supra), it was thereafter observed and held, "6. When the impugned order is assessed, evaluated and considered in light of the aforesaid principles, it is even not necessary to adopt the process of lifting of veil. It is not necessary to remove the facade even, for, the order in these very recitals could be manifestly said to be based on allegations of misconduct. The plain reading of order casts stigma. It is a stigmatic action of termination of petitioner's

service. Such an action could not have been taken, eventhough the petitioner was a fixed period employee, without giving the petitioner a full-fledge opportunity to defend and thus by holding a regular departmental inquiry. The employer is not allowed to hire and fire employee. Even if the temporary, ad-hoc or probationer employee is driven out of service on the ground of misconduct without holding inquiry and stigma is caste on his career by the punitive order, it is also a facet of behaving with hire and fire attitude by the employer."

5.8 Also stand to support the petitioner another decision of this Court in Special Civil Application No.1095 of 2016 decided on 21st September, 2016 in which, it was observed in paragraph 8 of the judgment that the order ex facie indicated that the basis of the order of termination was criminal complaint lodged against the petitioner. As the order was passed without compliance of natural justice, it was required indulgence of the Court, stated the Court, after discussing the position of law in that regard."

9. In light of the aforesaid principles and the position of law on the aspect and looking to the undisputed facts of the present petition, the petitioner was appointed on 14.6.2017 as Revenue Talati (Class III) for a fixed period of 5 years as stated in the appointment order and his tenure was to come to an end as per appointment order, on 13.6.2022. However, in view of impugned order dated 20.2.2020, the petitioner's service was put to an end after about three and half years.

10. Having regard to the contents mentioned in the termination order dated 20.2.2020 about filing of the FIR, it was alleged that the petitioner demanded bribe of Rs.2000/- for preparing Pedhinama of the complainant's client Ms. Simaben Bavisi and since the petitioner committed misconduct by asking for gratification, his services were terminated.

11. Thus, it is clear from the bare reading of the contents made in the termination order that the foundation of the impugned order was alleged misconduct of demanding bribe, for which F.I.R. was registered. Thus, the order in question could be treated as stigmatic. It is a matter of fact that the termination order was passed without compliance of principles of natural justice and without holding any departmental enquiry and therefore, the position of law as reproduced herein above would operate to grant relief to the petitioner.

12. Since the impugned order will be liable to be quashed and petitioner will be liable to be reinstated, it is clarified that the petitioner's reinstatement would be for the remainder period which would make up the total fixed period of five years, for which he was appointed.

13. In view of above fact situation and position of law, impugned order dated 20.2.2020 passed by the respondent No.2 - Collector, Surat is hereby quashed and set aside and the respondents are directed to reinstate the petitioner within a period of four weeks from the date of receipt of this order on the original post with similar service conditions to make up total five years period as per the original appointment period. It is further made clear that the petitioner shall not entitled to any monetary benefits or salary for the intervening period and the respondents are not precluded from proceeding against the petitioner in accordance with law for the alleged misconduct.

14. The petition is allowed accordingly. Direct service is permitted through e-mail.

(S.H.VORA, J) SATISH