SUPREME COURT OF INDIA

Jaswantsingh Pratapsingh Jadeja

Vs.

Rajkot Municipal Corporation

C.A.No.4812 of 2007

(S.B. Sinha and Harjit Singh Bedi JJ.)

11.10.2007

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. Appellant was a major in the Army. He joined the Respondent Municipal Corporation (the Corporation) as a Vigilance Officer on or about 21.12.1999. He was put on probation for a period of six months. The power to appoint on a temporary basis is conferred on the Municipal Commissioner under the 2nd proviso appended to Section 53(3) of the Bombay Provincial Municipal Corporation Act, 1949 (BPMC Act). The period of probation provided for therein is six months. It reads as under: Save as otherwise provided in this Act, the power of appointing municipal officers and servants whether permanent or temporary vests in the Commissioner;

Provided that such power in respect of permanent appointments shall be subject to the statement for the time being in force prepared and sanctioned under Section 51:

Provided further that no temporary appointment shall be made by the Commissioner for any period exceeding six months and no such appointment carrying a monthly salary exceeding such amount as may be fixed in this behalf, by a general or special order, from time to time by the State Government in the case of each Corporation shall be renewed by the Commissioner on the expiry of the said period of six months without the previous sanction of the Standing Committee.

3. Although there does not exist any statutory provision in this behalf, the probation period was extended from time to time. At the first instance, it was extended by an order dated 4.7.2000 upto 31.12.2000 and yet again upto 31.12.2001 by an order dated 07.01.2001. The period of probation was yet again extended till 31.12.2002 by an order dated 31.02.2002. No further order of extension of probation was passed. Appellant continued to function as a Vigilance Officer. He, however, allegedly informed his superior officer that he had been suffering from some illness. He applied for leave. He proceeded on leave on and from 3.2.2003. The period of leave, however, expired. He did not join as allegedly he continued to suffer from the ailments. He telephonically informed his officer for extension of leave. He was, however, served with a show cause notice on or about 22.03.2003

asking him to show cause as to why his services should not be terminated for alleged misconduct of remaining absent from duty without prior leave. The show cause notice reads as under :

You were assigned various duties of importance requiring expeditious attention. It is the prenary responsibility of a vigilance officer to keep vigil and investigate and report however in your case you have gone on long leave and your absence has created stagnation and when such stagnation cannot be tolerated in public utility services when work has to be completed in a particular time frame.

You had been on leave from 3.2.2003 to 6.2.2003 for a period of 4 days and you ought to have reported on 7.2.2003, however till date you have not reported for duty. You have not given any oral or written intimation till date you are absent from 7.2.2003 till today. Such long absence in such an important assignment cannot be confessed.

There is also breach of condition No.4/6 of the appointment order dated 22.12.1999. Also there has been negligence, carelessness in discharge of your duties and on evaluation it is found that you have shown absolute disregards towards your duties.

Therefore, why should you not be discharged from service in accordance with Section 56(2) of BPMC Act, 1949 after office hours on 31.3.2003. This final notice is given to you as and the reply within 7 days from require thereof. If it is not so that it will be presumed that you do not want to submit any reply.

4. Cause was shown by him. The same having been found to be unsatisfactory was rejected. No departmental enquiry was conducted. A finding of fact was arrived at to the effect that the enquiry proceedings which were pending against him were not brought to its logical end. His period of probation was extended upto 30.4.2003 without assigning any reason. There was no such power in the appointing authority. His services, however, were discharged stating :

Major J.P. Jadeja was appointed as Vigilance Officer (General) in the Vigilance Department of the Rajkot Municipal Corporation. Thereafter Shri Jadeja was on leave from 3.2.2003 to 6.2.2003 and was to have reported for duty on 7.2.2003. However, as he remained absent till 22.3.2003 without any intimation a final notice referred to at Serial No.2 above was issued to which a fax report for additional leave was received as referred. A reply was received to the final notice as above. The reply after consideration requires to be rejected. As a Vigilance Officer, it is expected of him to complete inquiries within a fixed time frame and as a result of long absence from such important duties could result in stagnation which cannot be tolerated and is in breach of condition 4/6 of the appointment order.

Looking to the assessment of work as referred to hereinabove, the period of probation is extended from 1.1.2003 to 30.4.2003. Thereafter the period is not extended and it is directed that services be thereafter discharged after payment of one months notice pay.

5. He filed a writ petition which was dismissed by a learned Single Judge of the Gujarat High Court by an order dated 9.12.2004. He preferred an intra-court appeal thereagainst. The said appeal has also been dismissed by reason of the impugned order.

6. Mr. Gaurav Agrawal, learned counsel appearing on behalf of the appellant, would, in support of

the appeal, raise the following contentions : (i) The order of termination is stigmatic. (ii) Being punitive in nature, the impugned order is founded upon a misconduct for absence from duty without prior leave. (iii) As a show cause notice was issued by taking recourse to the provisions for initiation of the disciplinary proceedings in terms of Section 56 of the BPMC Act, the impugned order cannot be sustained.

7. Mr. Sunil Gupta, learned senior counsel appearing on behalf of the respondents, on the other hand, contended that : (i) as the order discharging the petitioner from service did not result in a finding of guilt on moral turpitude and only because the explanation of the appellant had not been accepted and extension has not been granted, the same by itself cannot be held to be punitive in nature; (ii) The impugned order being not an order of termination of service, it is sustainable;

(iii) It was a case where the employer had merely recorded its satisfaction while passing the order of discharge which is not stigmatic in nature.

8. A disciplinary oriceedubg on allegations of serious misconduct on the part of the appellant was initiated. His explanation in this behalf was rejected.

9. The tests governing termination of probation is no longer res integra. When a disciplinary enquiry is initiated on the premise that there are serious allegations of misconduct on the part of the delinquent officer; his explanation thereupon had been rejected pursuant whereto a full scale formal enquiry has been initiated culminating in a finding of guilt, the order terminating the service would be held to be stigmatic. There may also be cases where the allegations involved moral turpitude on the part of the delinquent officer. The language used in the order of termination of service may ex facie be stigmatic. The language used therein may also show that there was something over and above the assertion that the officer was found unsuitable for the job. The aforementioned tests, however, are not exhaustive.

10. We may apply the said tests in the instant case. In the instant case, the language used in the impugned order is ex facie stigmatic. It referred to the earlier orders containing allegations of misconduct on the part of the appellant and the fact that he had been found guilty thereof. Appellant was said to have been absented from duties. He had been found guilty of negligence, carelessness and showing absolute disregard towards his duties. A disciplinary proceeding was initiated therefor. His explanation to the show cause notice was rejected. He was, therefore, found guilty of the charges leveled against him. Only thereafter, he was discharged from service by reason of the impugned order dated 29.4.2003.

11. Before, however, we embark upon the legal questions, we must notice that the appellant had not been confirmed in his services from 1999 to 2003. The power of Commissioner of Municipality to appoint a person on temporary basis is governed by the statutory rules. It has not been shown before the High Court or before us as to under what provisions of law the period of probation was extended from time to time. Applicability of the provisions of the Act is not in dispute. It may be true that such a contention was not raised before the High Court, but if under the statute, the period of probation could not have been extended, he will be deemed to have been confirmed on expiry of the period of probation.

12. We may notice that the respondent had taken into consideration while passing the impugned order the fact that the appellant did not have the correct mindset to serve as a Vigilance Officer who,

although took long leave for serving the territorial army, did not join the said post.

13. Respondents themselves relied upon Rules 17.2 and 17.3 of the Bombay Civil Services Rules which are said to be applicable in the case of the appellant which read as under :

17.2 In the case of direct recruitment, the period of probation for the posts of Class III should be for one year and for the posts of Class I or Class II the period of probation should be for two years. If the Appointing Officer deems proper, the period may be extended for one year in case of Class III employees and for two years in case of Class I or Class II employees during the period of probation.
17.3. If the performance of the employee is not up to the expected level during the period of probation, then such an officer/employee shall be discharged upon the expiry of the period of probation.

14. A bare perusal of the aforementioned provisions clearly shows that the maximum period of probation provided for there is two years.

15. Such a jurisdictional fact had not been taken into consideration by the appropriate authority. Presumably, keeping in view the aforementioned provision, his probation period had not been extended after 31.2.2003. The nature and character of the order, therefore, must be considered having regard to the aforementioned statutory provision.

16. If the satisfaction of the employer rested on the unsatisfactory performance on the part of the appellant, the matter might have been different, but in that case, from the impugned order it is evident that it was not the unsatisfactory nature and character of his performance only which was taken into consideration but series of his acts as well, misconduct on his part had also been taken into consideration therefor. It is one thing to say that he was found unsuitable for a job but it is another thing to say that he was said to have committed some misconduct.

17. Mr. Gupta has placed strong reliance on State of Punjab & Ors. v. Sukhwinder Singh [(2005) 5 SCC 569] wherein a three Judge Bench of this Court was considering a case where the appellant, who was a Constable, before completion of his probation period of three years, absented from duties without seeking permission. The order of discharge in that case read as under :

Constable Sukhwinder Singh No.644/ASR of this District is discharged from service w.e.f. 16.3.1990 under the Punjab Police Rules 12.21 as he is not likely to become an efficient police officer.

18. The Rule which was operating in that case being Rule 12.21 of the Punjab Police Rules reads as under :

A constable who is found unlikely to prove an efficient police officer may be discharged by the Superintendent at any time within three years of enrolment. There shall be no appeal against an order of discharge under this Rule.

In a situation of that nature, this Court held :

In the present case neither any formal departmental inquiry nor any preliminary fact finding inquiry had been held and a simple order of discharge had been passed. The High Court has built an edifice

on the basis of a statement made in the written statement that the respondent was habitual absentee during his short period of service and has concluded therefrom that it was his absence from duty that weighed in the mind of Senior Superintendent of Police as absence from duty is a misconduct. The High Court has further gone on to hold that there is direct nexus between the order of discharge of the respondent from service and his absence from duty and, therefore, the order discharging him from service will be viewed as punitive in nature calling for a regular inquiry under Rule 16.24 of the Rules. We are of the opinion that the High Court has gone completely wrong in drawing the inference that the order of discharge dated 16.3.1990 was, in fact, based upon the misconduct and was, therefore, punitive in nature, which should have been preceded by a regular departmental inquiry. There cannot be any doubt that the respondent was on probation having been appointed about eight months back. As observed in Ajit Singh and Ors. etc. v. State of Punjab and Anr. (supra) the period of probation gives time and opportunity to the employer to watch the work ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserves a right to dispense with his service without anything more during or at the end of the prescribed period, which is styled as period of probation. The mere holding of preliminary inquiry where explanation is called from an employee would not make an otherwise innocuous order of discharge or termination of service punitive in nature. Therefore, the High Court was clearly in error in holding that the respondent's absence from duty was the foundation of the order, which necessitated an inquiry as envisaged under Rule 16.24(ix) of the Rules.

19. Even in Abhijit Gupta v. S.N.B. National Centre, Basic Sciences & Ors. [(2006 (4) SCC 469], the order of termination, on which decision also reliance was placed by Mr. Gupta, reads as under : Your performance, ability and capability during the period of probation has been examined and your service during the period of probation is found to be unsatisfactory and hence you are considered unsuitable for the post you have to. The governing body is of the view that your performance was unsatisfactory and you are not suitable for confirmation.

20. Yet again, in State of Punjab & Ors. v. Bhagwan Singh [(2002) 9 SCC 636], whereupon also Mr. Gupta relied, the order of termination read as under :

It has been reported to me by In-charge of PTC, Ladha Kofthi, Sangrur, Inspector Joginder Singh, RI Police Lines, Faridkot and Inspector Sadhu Ram, PS City Kot Kapura that the act and conduct of Const. Bhagwan Singh, No.1819/Fdkt. On the whole is not satisfactory and he is unlikely to become a good police officer. I am also satisfied with their reports. I, Jasminder Singh, IPS, SSP/Faridkot being competent authority do hereby discharge Const. Bhagwan Singh, No.1819/Fdk. From service w.e.f. today i.e. 4-9-1992 A.N. under PPR 12.21 as he is found to be unlikely to prove a good police officer.

21. This line of cases amongst others clearly goes to show that taking into consideration the factor as to whether the employee had satisfactorily performed his duties during the period of probation is a relevant factor and the same can form foundation for passing an order of discharge.

22. In Kunwar Arun Kumar v. U.P. Hill Electronics Corporation Ltd. & Ors. [(1997) 2 SCC 191], the order of discharge was as under : You will be on probation for a period of 12 months from the date of your joining, which period may be extended from time to time at the discretion of the Management. During the period of probation, your services may be terminated without assigning any reason therefor.

During the period of probation your work performance was found unsatisfactory. Therefore, your services are hereby terminated with effect from 16 Jan. 91 as per Clause (2) of your appointment letter referred to above.

23. In this case, however, the period of probation as provided for under the statute had expired and his misconduct had been taken note of. Such misconduct was not founded only upon absence from duty, but also upon carelessness, negligence on the part of the appellant and lack of devotion amongst others.

24. In Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta & Ors. [(1999) 3 SCC 60], Jagannadha Rao, J (as His Lordship then was) opined that material which amounts to sigma need not be contained in termination order but may also be contained in an order or proceeding referred to in termination order or in an annexure thereto. We have noticed various orders passed by the respondent heretobefore. When a report in a disciplinary proceeding form the foundation for the order, it would be stigmatic in nature. It would have civil consequences.

25. V.P. Ahuja v. State of Punjab & Ors. [(2000) 3 SCC 239] is a case where the order impugned in the writ petition was as under : Shri V.P. Ahuja, s/o late Shri H.N. Ahuja was appointed on probation for 2 years as Chief Executive of the Coop. Spg. Mills Ltd., vide orders Endst. No. Spinfed/CCA/7844-45 dated 29.9.1998 and posted at Bacospin. However, he failed in the performance of his duties administratively and technically. Therefore, as per clause I of the said appointment order, the services of Shri V.P. Ahuja are hereby terminated with immediate effect.

It was held to be stigmatic in nature stating : 7. A probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principles of natural justice.

8. The affidavits filed by the parties before the High Court as also in this Court indicate the background in which order, terminating the services of the appellant, came to be passed. Such an order which, on the face of it, is stigmatic, could not have been passed without holding a regular inquiry and giving an opportunity of hearing to the appellant.

26. Yet again, in Radhey Shyam Gupta v. U.P. State Agro Industries Corporation Ltd. & Anr. [(1999) 2 SCC 21], a case on which counsel for both the parties relied upon, this Court held : The theory of 'object of the inquiry' was further emphasised by the Constitution Bench in Jagdish Mitter v. Union of India, That was a case of a temporary employee. The discharge from service was by way of an order 'simpliciter'. But there, an inquiry was held and the termination order was based on it as it stated on its face that it was 'found undesirable' to retain the employee and hence his services were being terminated. The order was held to be punitive on its face and was quashed. Gajendragadkar, J. (as he then was) discussed the earlier cases and held that in every case the purpose of the inquiry was crucial. If the inquiry was held 'only for the purpose of deciding whether the temporary servant should be continued or not', it could not be treated as punitive and that the motive operating in the mind of the authority was not relevant. But "the form in which the order terminating the service is expressed will not be decisive." It was held "what the Court will have to examine in each case would be, having regard to the material facts existing upto the time of discharge, is the order of discharge in substance one of dismissal?"

Therefore, the 'form' was not of importance but the 'substance' was.

It was further held :

We shall now refer to a different type of cases where a departmental inquiry was started, then dropped and a simple order of termination was passed. In State of Punjab v. Sukh Raj Bahadur, the charge memo was served, reply given and at that stage itself, the proceedings were dropped and a termination order was passed. The High Court felt that the object of departmental inquiry, being to punish the employee, the order of termination must he treated as punitive. This was not accepted by a three Judge Bench consisting of Justice Shah (as he then was) who had laid down in Madan Gopal's case the principle of 'object of the inquiry'. This Court reversed the High Court judgment and held that neither Madan Gopal's case nor Jagdish Mitter's case applied. This was because in the case before them the inquiry did not go beyond the stage of the explanation. No findings were given and no inquiry report was submitted as in the above two cases. In that case (i.e. Sukh Raj Bahadur) this Court felt that the decision in A.G. Benjamin v. Union of India (Civil Appeal No. 1341 of 1966 dated 13-12-1966) (SC) Reported in (1967) 1 Lab LJ 718 was more direct. In Benjamin's case, a charge memo was issued, explanation was received and an Enquiry Officer was also appointed but before the inquiry could he completed, the proceedings were dropped stating that : departmental proceedings will take a much longer time and we are not sure whether after going through all the formalities, we will be able to deal with the accused in the way he deserves. There also the order was held not to be punitive. Following the above case, this Court in Sukh Raj Bahadur's case stated that the position before them was similar to what happened in Benjamin's case and concluded as follows :

the departmental inquiry did not proceed beyond the stage of submission of a charge-sheet followed by the respondent's explanation thereto. The inquiry was not preceded with, there were no sittings of any inquiry officer, no evidence recorded and no conclusion arrived at in the inquiry.

27. From the discussions made hereinbefore, it is evident that termination of services of the appellant purporting to discharge him simplicitor cannot be accepted, being stigmatic in nature. The form of the order terminating the services coupled with the background facts clearly leads to the conclusion that the order impugned in the writ petition by the appellant was punitive.

28. For reasons aforementioned, the impugned order is set aside. The appeal is allowed. There shall, however, be no orders as to costs.