

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 22681 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

MINAKSHIBEN LAXMANBHAI PARALIYA

Versus

STATE OF GUJARAT

Appearance:

MR AS ASTHAVADI(3698) for the Petitioner(s) No. 1

MR. KURVEN DESAI, ASSISTANT GOVERNMENT PLEADER/PP for the Respondent(s) No. 1

MR HS MUNSHAW(495) for the Respondent(s) No. 4

NOTICE SERVED BY DS for the Respondent(s) No. 1,2,3

CORAM: **HONOURABLE MR. JUSTICE BIREN VAISHNAV**

Date : 08/02/2022

CAV JUDGMENT

1 Rule returnable forthwith. Learned advocates for the respective respondents, waives service of rule on behalf of respondents.

2 In this petition under Article 226 of the Constitution of India, the petitioner has challenged the communication dated 17.07.2018 by which the services of the petitioner were terminated. Reading the communication, it would indicate that the services of the petitioner have been terminated in accordance with Condition No.12 of the Contract of Appointment that was entered into. While appointing the petitioner, Condition No.12 G provided that, in case the petitioner is found to have committed any misconduct, cheating or moral turpitude, the petitioner's services shall be put to an end. This decision is challenged by the petitioner. The facts in brief are as under:

2.1 The petitioner was appointed in the Gujarat Livelihood Promotion Company Ltd., as Taluka Livelihood Manager in the year 2011 by an order dated 29.07.2011. The appointment was on contractual basis. As is evident from the appointment order produced together with the petition. An F.I.R, being FIR No. I-26 of 2018 dated 07.07.2018 was registered against the petitioner as well as other officers and employees of the District Panchayat of the District Rural Development Agency levelling certain allegations. On this, the impugned communication was issued on 17.07.2018.

3 Mr.Asthavadi, learned counsel for the petitioner, would submit that, though, the employment was contractual, the communication of

termination dated 17.07.2018 was a stigmatic one and could not have been passed without an appropriate inquiry. He would draw the attention of the Court to the communication referred to in communication dated 17.07.2018 (communication of even date), which was referred to in the order putting the services of the petitioner to an end. That communication would indicate that in view of an FIR being filed against the petitioner on 17.07.2018, the services of the petitioner were put to an end in accordance with terms of the contract. This according to Mr.Asthavadi, learned counsel, was a stigmatic termination, and therefore, ought to be set aside.

3.1 Reliance was placed on a judgment dated 29.03.2019 rendered in Special Civil Application No. 48/2019 wherein, considering various decisions of the Hon'ble Supreme Court, it held that the order passed which tantamounted to stigma could not have been so passed without an appropriate inquiry. Reliance was also placed on the decision of the Division Bench confirming this view rendered in Letters Patent Appeal No. 1596 of 2019. Mr.Asthavadi, learned counsel, also relied on the following decisions:

- (i) **(2004) 3 SCC 43** rendered in the case of ***Union of India vs. Madhusudan Prasad***.
- (ii) ***Letters Patent Appeal No. 841 of 2019*** rendered in the case of ***State of Gujarat vs. Rahul Aydanbhai Vank.***

(iii) ***Letters Patent Appeal No. 1596 of 2019*** rendered in the case of ***State of Gujarat vs. Chetan Jayantilal Rajgor.***

(iv) ***Special Civil Application No. 17872 of 2017*** rendered in the case of ***Imran Anwar Majothi vs. State of Gujarat.***

(v) ***Special Civil Application No. 9458 of 2015*** rendered in the case of ***Sagar Makwana vs. State of Gujarat.***

(vi) ***Letters Patent Appeal No. 983 of 2017*** rendered in the case of ***State of Gujarat vs. Prajapati Hitesh Mohanlal.***

3.2 Mr.Asthavadi, learned advocate, would therefore submit that the order being stigmatic ought to be set aside.

4 Mr.H.S.Munshaw, learned counsel appearing for the respondent – Livelihood Corporation, would rely on the affidavit in reply filed on behalf of the Company and submit that the Company – respondent No.4, is incorporated under the provisions of the Companies Act. Condition No. 12 (JH) (2) of the contractual appointment order makes it clear that in case of a misconduct, fraud, disobedience as well as the act of moral turpitude, services of an employee, like the petitioner could be put to an end. He would submit that a letter dated 11.07.2018 was addressed by the Director of District Rural Development Agency to the Company, informing them that a police complaint is lodged by the Taluka Development Officer for financial irregularities committed by the

petitioner and on this count, the services of the petitioner were terminated.

4.1 In support of his submission, Mr. Munshaw, learned advocate, relied on a decision of the Hon'ble Supreme Court in the case of ***Rajasthan State Roadways Transport Corporation vs. Paramjeet Singh***, reported in ***(2019) 6 SCC 250***. He would rely on para 9 of the judgment and submit that an employee who is engaged on a temporary basis can be terminated without notice following the principles of natural justice.

5 Considering the submissions made by the learned counsels appearing for the respective parties, the question is, whether the communication dated 17.07.2018 by which the services of the petitioner have been put to an end can be termed as stigmatic. The decision is referred to by learned counsel for the petitioner in the case of ***Niteshkumar Pradeepbhai Makwana vs. District Program Coordinator and Director.***, rendered in ***Special Civil Application No. 48 of 2019***. Having considered the decisions rendered by this Court and the Hon'ble Supreme Court, in paras 5.1 to 6.9 of the said decision, the Court held as under:

“5.1 The question posed in wake of the aforesaid fact and submissions in the controversy is whether the impugned order against the petitioners is punitive and whether it ought to have been preceded with the inquiry against the petitioners in respect of what is mentioned and alleged in the impugned order even though

the petitioners were employed in the scheme.

5.2 The above question was addressed by this Court in Manishbhai Nayanbhai Mod v. Vadodara Municipal Corporation being Special Civil Application No. 8339 of 2016 decided on 30th November, 2017. This decision was confirmed in Letters Patent Appeal No. 1189 of 2018 decided on 20th February, 2018. These decisions were followed by this Court also in Rahul Aydanbhai Vank v. State of Gujarat being Special Civil Application No.889 of 2018 as also in Sandip Ajitsinh Vaghela v. State of Gujarat being Special Civil Application 12071 of 2018 decided on 26th February, 2019.

5.3 The position of law in relation to effecting termination of service of an employee, even if on the fixed pay or temporary, by passing a stigmatic order without following principles of natural justice came to be delineated and discussed by this Court also in Imranbhai Anwarbhai Majothi (supra). In that case, petitioner was appointed as Beat Guard. The allegations were raised against him inter alia that he had stolen two pass-books, that he mentioned wrong information in the Register to allow trucks to passby illegally. It was stated in the order leading to his termination of service that he used the pass-book for illegal purpose for which it was stolen and due to the act of negligence, caused damage to the forest's properties to a large extent. It was mentioned in the order that if the petitioner was to continue in service, it would entail greater loss and that it was not advisable to continue the petitioner in service since the petitioner was found to be negligent and careless in discharge of his duties.

6. 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)

6.1 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 probationertrainees 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.

6.2 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)

6.3 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.

6.4 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."

(Para 9) (Emphasis supplied)

6.5 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. 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.

6.6 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, even though the petitioner was a fixed period employee, without giving the petitioner a fullfledge 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.”

6.7 The Division Bench in Letters Patent Appeal No. 189 of 2018 confirmed the decision in *Manishbhai Nayanbhai Mod (supra)* and observed as under,

“4.1 As a necessary corollary, when there is a breach of procedure of instituting full-fledged departmental inquiry, particularly, when termination order referred to following of Gujarat Civil Services [Discipline & Appeal] Rules, 1971, the issuance of show cause notice, receiving reply and then to take final decision to terminate services of an employee was unjust, unreasonable, arbitrary, in breach of the Rules, 1971, violative of principles of natural justice and Article 14 of the Constitution as it would not make any difference whether the employee was appointed temporarily for a fixed term on a fixed salary incorporating various conditions.”

6.8 The principles laid down in the aforesaid decisions were in the context of temporary employees or the employees on the fixed pay appointed for fixed period wherein it was underlined that an order of termination passed in stigma could not have been passed without following the principles of natural justice and holding the inquiry for the alleged misconduct made basis of the order. In the present case, the petitioners were employed in MNREGA Scheme. Though he was an employee appointed on contractual basis, however his service conditions are governed as per the order of this Court in *Prajapati Hitesh Mohanlal v. State of Gujarat* being Special Civil Application No.13621 of 2014 and allied matters. In the said decision, followed in several cases in respect of the other similarly situated employees of the MNREGA Scheme, the Court in paragraphs 52 to 52.7 issued direction protecting services of such class of employees to order that they shall not be replaced by other

set of contractual employees on adhocism and that they shall be continued in the Scheme. There can be no gainsaying that principles laid down above and the position of law arising, would apply to an employee like the petitioners under the MNREGA Scheme. In view of the directions issued by this Court in Prajapati Hitesh Mohanlal (supra), such class of employees enjoy better service conditions than a pure contractual or temporary employees.

6.9 Reverting to the impugned order, on the bare reading thereof and even without lifting the veil, it could be seen that the order is stigmatic and cast stigma on the petitioners. The authority has readily concluded that the petitioners were directly involved in the irregularities and that the petitioners committed financial defalcation and that they indulged into corrupt practice. This was a finding arrived at without holding any inquiry. A straightway finding was reached and the termination orders passed only on the ground that F.I.R. was registered. The order is founded on the allegation of misconduct and therefore, it is manifestly stigmatic. Such orders could not have been passed even though petitioners' service was under a contract in MNREGA Scheme. A full fledged opportunity of defend and holding of departmental inquiry was necessary to precede before coming to such conclusion and taking the penal action against the petitioners."

5.1 The same was confirmed by the Division Bench of this Court in Letters Patent Appeal No. 1596 of 2019. Referring to the said decision in the context of motivating foundation, while relying on the decision of the Hon'ble Supreme Court in the case of **Chandra Prakash Shahi vs. State of Uttar Pradesh & Ors.**, reported in (2000) 5 SCC 152, what is considered is that the question needs to be addressed while adjudicating an order of termination and ask as to what is the factor that compelled the employee to take action. If the order founded on misconduct and the allegations thereof and motive being the motivating power of such action,

then the order is stigmatic. Even in Letters Patent Appeal No. 1596 of 2019, the Division Bench, on 24.07.2020 while affirming the decision of the learned Single Judge extensively reproducing the judgment even in the context of contractual employees, held that a full scale inquiry deserves to be undertaken irrespective of whether the delinquent was a regular employee or a contractual employee. Para 11 of the decision of the Division Bench rendered in Letters Patent Appeal No. 1596 of 2019 read as under:

“11 From the overall material on record and in consideration of aforesaid observations, we see no distinguishable material to take a different view or deviate from the same. Since almost in similar issue, the proposition is to the effect that whenever any charge is levelled and action is found to be stigmatic, a full-scale departmental inquiry deserves to be undertaken irrespective of whether the delinquent was a regular employee or contractual employee on a fixed salary. As a result of this, we are of the considered opinion that since undisputedly by a brief procedure, an action is initiated against the respondents herein while dismissing their services, said action itself is found to be not on the touchstone of aforesaid proposition of law. As a result of this, no error is committed by the learned Single Judge. Having perused these material, we are not satisfied with the submissions made by learned counsel for the appellants in both these appeals.”

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5.2 In the case of ***Dipti Prakash Banerjee vs. Satvendra Nath Bose National Centre For Basic sc., Calcutta***, rendered in ***Civil Appeal No. 750 of 1999*** dated ***10.02.1999*** , reported in ***AIR 1999 SC 983***, while considering the question of whether the order is passed on a motive or foundation and whether it can be said to be stigmatic, the Hon'ble

Supreme Court at point No.3 answered the question which reads as under:

“Point 3:

The next question is whether the reference in the impugned order to the three earlier letters amounts to stigma if those three letters contained anything in the nature of a stigma even though the order of termination itself did not contain anything offensive.

Learned counsel for the appellant relies upon Indrapal Gupta vs. Managing Committee [1984(3) SCC 384] decided by a three Judge Bench of this Court. In that case the order of termination of probation, which is extracted in the judgment, reads as follows:

“with reference to the above (viz. Termination of service as Principal), I have to mention that in view of the resolution No.2 of the Managing Committee dated April 27, 1969 (copy enclosed) and subsequent approval by the D.I.O.S., Bulandshahr, you are hereby informed that your service as Principal of this Institution is terminated”

Now the copy of Resolution of the Managing Committee appended to the order of termination stated that the Report of the Manager was read at the meeting and that the “facts contained in the Report of the Manager being serious and not in the interests of the institute, that therefore the Committee unanimously resolved to terminate his probation.” The Report of the Manager was not extracted in the enclosure to the termination order but was extracted in the Counter filed in the case and read as follows:

“It will be evident from the above, that the Principal’s stay will not be in the interest of the Institution. It is also evident that the serious view of the lapses is enough to justify dismissal but no educational institution should take all this botheration. As such my suggestion that our purpose will be served by termination of his service. Why, then, we should enter into any botheration. For the termination of his period of probation, too, the approval of the DIOS will be necessary. Accordingly, any delay in the matter may also be harmful in our interests.

Accordingly, I suggest that instead of taking serious action, the period of probation of Sri Indar Pal Gupta be terminated without waiting for the period to end.”

It was held by Venkataramiah, J. (as he then was) (p.392) that the letter of termination referred to the resolution of the Managing Committee, that the resolution was made part of the order as an

enclosure and that the Resolution in its turn referred to the report of the Manager. A copy of the Manager's Report had been filed along with the counter and the said report was the 'foundation'. Venkataramiah, J. (as he then was) held that the Manager's Report contained words amounting to stigma. The learned Single Judge said: "This is a clear case where the order of termination issued is merely a camouflage for an order imposing a penalty of termination of service on the ground of misconduct", that these findings in the Manager's Report amounted to a 'mark of disgrace or infamy' and that the appellant there was visited with evil consequences. The officer was reinstated with all benefits of backwages and continuity of service.

It will be seen from the above case that the resolution of the committee was part of the termination order being an enclosure to it. But the offensive part was not really contained in the order of termination nor in the Resolution which was an enclosure to the order of termination but in the Manager's Report which was referred to in the enclosure. The said report of the Manager was placed before the Court along with the counter. The allegations in the Manager's Report were the basis for the termination and the said report contained words amounting to stigma. The termination order was, as stated above, set aside.

The above discussionis, in our view, clear authority for the proposition that the material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or its Annexures. Obviously such a document could be asked for or called for by any future employer of the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular inquiry was conducted. We shall presently consider whether, on the facts of the case before us, the documents referred to in the impugned order contain any stigma.

It was in this context argued for the Respondent that the employer in the present case had given ample opportunity to the employee by giving him warnings, asking him to improve and even extended his probation twice and this was not a case of unfairness and this Court should not interfere. It is true that where the employee had been given suitable warnings, requested to improve, or where he was given a long rope by way of extension of probation, this Court has said that the termination orders cannot be held to be punitive.

Hindustan Paper Corporation vs. Purendu Chakraborty [1996 (11) scc 404] See in this connection, Oil & Natural Gas Commission vs. Md. S.Iskendu [1980 (3) scc 428], Unit Trust of India vs. T.Bijaya Kumar [1992 (5) Serv. L.R. 855 (SC)], Principal, Institute of P.G.Medical Education & Research, Pondichery vs. S.Andel & Others [1995 Suppl. (4) SCC 609] and a labour case Oswal Pressure Die Carting Industry vs. Presiding Officer [1998 (3) SCC 225]. But in all these cases, the orders were simple orders of termination which did not contain any words amounting to stigma. In case we come to the conclusion that there is stigma in the impugned order, we cannot ignore the effect it will have on the probationer's future whatever be earlier opportunities granted by the respondent organization to the appellant to improve.

On this point, therefore, we hold that the words amounting to 'stigma' need not be contained in the order of termination but may also be contained in an order or proceeding referred to in the order of termination or in an annexure thereto and would vitiate the order of termination . Point 3 is decided accordingly."

5.3 Considering that, though Mr.Munshaw, learned counsel may be right in submitting that the order of termination do not refer to anything except the terms of contract which could give him the benefit to terminate the petitioner, what is evident from reading point No.3 in the case of **Dipti Prakash Banerjee (supra)** is that the material which amounts to stigma need not be contained in the order of termination but may contain in the documents referred to in the termination order or its annexures. Therefore, when reading the impugned order of termination dated 17.07.2008, what is evident is that a reference is made to an FIR and a case filed against the petitioner, the order of termination is bound to be stigmatic. Even in the decision of the Hon'ble Supreme Court which

Mr.Munshaw, learned advocate, relied on **Rajasthan State Roadways Transport Corporation (supra)**, the Hon'ble Supreme Court considered the decision in the case of *Hari Ram Maurya vs. Union of India & Ors.*, reported in *(2006) 9 SCC 167*. That short order of the Hon'ble Supreme Court in the case of **Hari Ram Maurya (supra)**, would indicate that the decision relied upon by Mr.Munshaw, learned advocate, is clearly distinguishable. In the facts of **Hari Ram Maurya (supra)** also, the Hon'ble Supreme Court held that an inquiry therefore was mandatory.

6 Accordingly, the order of termination dated 17.07.2018 is quashed and set aside. The petitioner is directed to be reinstated in service. The respondents are directed to take back the petitioner in service on his original post and position with continuity of service, salary and wages for the interregnum as if the order of termination is not passed.

However, it is left open for the respondents to take appropriate recourse to departmental proceedings or an inquiry before terminating the services of the petitioner. The petition is allowed, accordingly. Rule is made absolute to the above extent.

(BIREN VAISHNAV, J)

Bimal