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MATHEW P. THOMAS

v.

KERALA STATE CIVIL SUPPLY CORPN. LTD. AND ORS.

FEBRUARY 19, 2003

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[SHIVARAJ V. PATIL AND ARIJIT PASAYAT, JJ.]

Service Law:

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Termination of services—Probationer—Termination simplicitor on alleged ground of misconduct—Challenge to—Dismissed by Trial Court—Appeal/writ petition/writ appeals dismissed by the High Court—On appeal, Held, though services of a probationer terminated by an order of termination simplicitor it appears to be founded on misconduct—Necessity to go beyond the order of termination to find out whether suitability of the probationer was adjudged to continue him in service or whether he was removed from service

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mainly on the foundation of misconduct—Since the services of the incumbent was terminated for his failure in performing duties and not on the foundation of alleged misconduct, there is no good reason to interfere with the findings of the High Court.

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'Foundation' and 'motive' in connection with order/termination simplicitor—Discussed.

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Appellant-employee was appointed as Junior Manager (Quality Control) by the respondent-employer. On complaint, he was served with a show cause notice and on consideration of his explanation, authorities dropped further proceedings against him. However, he was again found negligent in performing his duties and was again served with a show cause notice with some stipulation of misconduct. However, not satisfied with the explanation, authorities ultimately terminated his services. Against the termination order, appeal and subsequently writ petition and writ appeals were dismissed by the High Court but allegations of misconduct in the show cause notices were directed to be withdrawn. Hence the present appeal.

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It was contended for the appellant that though the order of termination appears to be simplicitor but it was founded on the alleged misconduct against the appellant; and that no distinction was drawn between allegation of misconduct and mere failure in performing duties

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by the appellant.

On behalf of the respondent, it was submitted that since the services of the appellant was not found satisfactory during probation period, order of termination simplicitor was rightly passed by the authorities.

Dismissing the appeal, the Court

HELD: 1.1. It is clear from the order of termination that the respondents did not rely on allegation of misconduct in the show-cause notice. The Division Bench in the impugned judgment rightly observed that the appointing authority had abandoned those charges and concentrated only on the lapses committed by the appellant in wrongfully recommending acceptance of bad stock. Even otherwise these allegations in the show cause notice stand withdrawn as per the direction given by the High Court. [228-F-G]

1.2. Whether an order of termination is simplicitor or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simplicitor falling in one or the other category, based on misconduct as foundation for passing the order of termination simplicitor or on motive on the ground of unsuitability to continue in service. If the form and language of the so called order of termination simplicitor of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simplicitor or punitive. In such cases it becomes necessary to travel beyond the order of termination simplicitor to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from service on the foundation of his misconduct. [229-G-H; 230-A-D]

Deepti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Ors., [1999] 3 SCC 60 and *Payendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and Anr.*, [2002] 1 SCC 520, relied on.

1.3. In the instant case, even on earlier occasions when the appellant

A failed to perform his duties properly during probation period he was warned to improve and continued in the service. If he was to be removed from service on the allegations of misconduct at that time itself the respondents could have removed him from service. This is also a circumstance to indicate that his order of termination was simplicitor. **B** Therefore, having regard to the particular facts and circumstances there is no good reason to interfere with the impugned order. [230-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 672 of 2001.

C From the Judgment and Order dated 11.1.2000 of the Kerala High Court in W.A. No. 1795 of 1997.

L. Nageshwara Rao, Roy Abraham, A.K. Jain and Himinder Lal, for the Appellant.

D T.L.V. Iyer, Subramonium Prasad, Abhay Kumar, R. Gopal Krishnan and S.N. Jha, for the Respondents.

The Judgment of the Court was delivered by

E **SHIVARAJ V. PATIL, J.** The appellant, in this appeal, has assailed the validity and correctness of the order passed by the Division Bench of the High Court affirming the order of the learned Single Judge passed in original writ petition upholding the order of termination of his services. The appellant was appointed by the respondent-corporation on 7.10.1994 as Junior Manager (Quality Control) subject to certain terms and conditions. The relevant condition for the purpose of this case reads:

F “You will be on probation for a period of two years within a continuous service of three years. You will be absorbed in the regular service of this corporation only on satisfactory completion of the period of probation. If your performance during the period of probation is found unsatisfactory, the Corporation reserves the full right to terminate your service without any prior notice.”

G It was his duty to inspect all the commodities received by the Corporation at the depots and to verify the quality of goods in conformity with the specification given by the Head Office. On complaints received as to the quality of red chillies accepted by him and sent for distribution, a show-cause notice dated 25.11.1995 was issued to him. He submitted his explanation **H** requesting to drop further proceedings and giving assurance that in future,

utmost care would be taken while accepting the commodities. In that view, A
further proceedings were dropped. Again on a similar report as to failure of
his duty, a show-cause notice dated 12.12.1996 was issued, which is extracted
below:-

"No.E5-17135/96

Dated 12th December, 1996

SHOW CAUSE NOTICE

Ref: 1. Lr. No. D10-10427/90(1) dated 07.10.1994 of M.D. KSCSC.

2. Inspection Report of Manager (QC) No. Q/c.3/96.

You are directed to show cause within 7 days of receipt of this notice
why your service should not be terminated on the following grounds:

1. That you Sri. Mathew P. Thomas, Junior Manager (QC) D
Koshikode Region inspected the Consignment of 220 bags
Bengalgram (Small) on 24.10.1996 delivered in truck No. KL13
A-3409 supplied by M/s. "Suresh Trading Kochi received at the
District Depot, Kannur on 23.10.1996 and certified the analysis
report that the Consignment is within specification and as per
sample and recommended for acceptance even though the stock E
was found not in conformity with the samples supplied from
Head Office and the actual refraction was not within the rejection
limit as found on a super check conducted" by Manager (QC).
2. That you have recommended for acceptance of the stock of
Greengram for which GRS was issued vide No. 166/7 dated F
18.10.1996 which was not in conformity with the tender samples
and the actual refraction was not within rejection limit which is
revealed on a check conducted by Manager (QC).
3. That you have accepted the following Consignments which were
kept at District Depot, Kannur even though they were found not G
acceptable in the analysis conducted by Manager (QC) on
19.11.1996.
 - (a) Toordhal supplied by M/s Sagar Enterprises.
 - (b) Bengalgram (small) by Suresh Trading. H

A (c) Toordhal supplied by M/s. Swastic Sales Agencies.

4. That you have colluded with the suppliers for undue pecuniary benefits.

B 5. That you have betrayed the confidence reposed on you as responsible officer of the Corporation.

Your action described above amounts to grave misconduct, gross negligence, dereliction of duty, disobedience of orders, clear violation of standing instructions detrimental to the interest of this Corporation which tantamounts to unsatisfactory performance on your part.

C If nothing is received within the stipulated time, action will be proceeded with on the presumption that you have no defence in this case and your services will be terminated as laid down in Clause 2 of the reference first cited.

D Sd/-
Managing Director

To:

Shri Mathew P. Thomas
Junior Manager (QC)

E (Through Manager (QC), for service and return.”

The appellant gave explanation to the said show-cause notice. The respondents found the explanation unsatisfactory. Consequently, his services were terminated by the proceedings dated 16.1.1996 which read:-

F “No. E5-17135/956 dated 16th January, 1997

PROCEEDINGS

G Sub: Kerala State Civil Supplies Corporation Establishment-Termination of Service Mathew P. Thomas (Shri) Junior Manager (QC) termination of services—Orders issued.

Ref: Letter No. D10-10427/90(1) dated 7.10.1994 of the Managing Director, Kerala State Civil Supplies Corporation.

H 1. Show Cause Notice No. E5-17135/96 dated 12.12.1996

2. Explanation dated 26.12.1996 of Shri Mathew P. Thomas. A

Shri Mathew P. Thomas, was appointed as Junior Manager (QC) in the Corporation vide letter first cited above and joined duty on 1.2.1995. In the order of appointment, it had been stated that "You will be on probation for a period of two years within a continuous service of three years. You will be absorbed in the regular service of this corporation only on satisfactory completion of the period of probation. If your performance during the period of probation is found unsatisfactory, the Corporation reserves the full right to terminate your service without any prior notice." B

Notice was issued to him vide the reference second cited to show cause as to why his services should not be terminated for wrongfully recommending acceptance of inferior stock. He has sought extension of the period given to him for submitting his statement of defence and this was granted. He has accordingly submitted his explanation on 26.12.1996. This has been considered in detail. C

The explanation has been found unsatisfactory. This officer has wrongfully recommended acceptance of bad stock not once and several times. As such the undersigned holds that his services have been unsatisfactory. Accordingly the services of Shri Mathew P. Thomas, Junior Manager (QC) are hereby terminated with effect from today (16.1.1997). D

Sd/-

Managing Director E

To:

Shri Mathew P. Thomas F
Junior Manager (QC)
(Through Manager (QC), for service and return.)

Against the said order, he preferred an appeal which was dismissed. Hence, he filed the writ petition before the High Court challenging the order of termination of his services. The learned Single Judge dismissed the writ petition. The writ appeal filed by the appellant was also dismissed by the High Court affirming the order of the learned Single Judge with some modification. Hence, this appeal. G

Shri L. Nageshwara Rao, learned Senior Counsel for the appellant urged H

A that although the order of termination of services appears to be innocuous and simpliciter but foundation for passing the said order was alleged misconduct of the appellant; serious allegations of misconduct are made in the show-cause notice which constitute ground for termination of services as in the order of termination of services, reference is made to the said show-cause notice; there is nothing to indicate in the order of termination of services

B that any distinction was made between the allegations of misconduct and mere failure of the appellant in performing the duties. He submitted that the learned Single Judge as well as the Division Bench of the High Court have exceeded power of judicial review in correcting the order of termination of services to sustain it by giving certain directions to delete paras 4 and 5 of

C the order of termination of services.

Opposing the above submissions, Shri T.L.V. Ayer, learned Senior Counsel for the respondents urged that the impugned order is perfectly justified having regard to the facts and circumstances of the case. He submitted that the appellant was a probationer and on finding his work unsatisfactory, order

D of termination of his services was passed; the services of the appellant were terminated when he was found unsuitable to continue in service; even though certain allegations of misconduct were made in the show-cause notice, the order of termination was not passed on that basis as is evident from the very order of terminating his services; the directions given by the High Court to

E withdraw or delete paras 4 and 5 of the show-cause notice are to the benefit of the appellant and he cannot complain in that regard stating that the High Court exceeded its power of judicial review.

We have carefully considered the submissions made by the learned counsel for the parties. The main contention urged before the learned Single

F Judge of the High Court was that the order terminating the services of the appellant was of punitive nature and it attached stigma to him particularly relying on two grounds mentioned in show-cause notice (1) that the appellant had colluded with the suppliers for undue pecuniary benefits and (2) he had betrayed the confidence reposed on him as a responsible officer of the Corporation. The learned Single Judge observed that admittedly the appellant

G was a probationer and his services could be terminated by an order of simple termination without casting any stigma on him; the management was entitled to assess the performance of the probationer during the period he was in service either to confirm him in service or to terminate his services. On facts of the case and material placed before him, he expressed the view that the

H respondent-Corporation found that the performance of the appellant was not

satisfactory and as such his services could be terminated. In regard to para 4 of the show-cause notice that the appellants had colluded with the suppliers for undue pecuniary benefits, the learned Single Judge held that it would cast a stigma on the appellants looking to allegations of serious misconduct. In that view, while upholding the order of termination of services of the appellants, the learned Single Judge held thus:-

“In the said circumstances, I am not inclined to interfere with the order of termination. However, ground No. 4 stated in the show cause notice to the effect that petitioner has colluded with the suppliers for undue pecuniary benefits, they should frame proper charge and conduct proper enquiry following the procedure down in departmental proceedings. If the Corporation withdraws the said charge, no enquiry need be conducted and the order would stand.”

Before the Division Bench, the principal contention advanced on behalf of the appellants was that the order of termination stigmatized the appellants and the said order should have been preceded by a full-fledged inquiry. The Division Bench of the High Court, after considering the respective contentions and looking to the records, held that the termination has been ordered not as a penalty for any misconduct but for his unsatisfactory service during his tenure as a probationer. Dealing with the contention as to the allegations of misconduct stated in show-cause notice, the Division Bench of the High Court held thus:-

“The further contention, advanced by the learned counsel for the appellants is that since Ext. P2 show cause notice contains major charges against the appellants, his service should not have been terminated without those charges being enquired into and found proved against him in a duly conducted enquiry, giving him an opportunity to defend himself and prove his innocence. Here again, we fail to appreciate the contention of the appellants since, in our view, the appointing authority focused his attention and zeroed in on the appellants only on the question of his unsatisfactory performance as a probationer by wrongfully recommending acceptance of bad stock for purchase and distribution. Of course, ext. P2 show cause notice would state that the appellants colluded with the suppliers for undue pecuniary benefits and that he betrayed the confidence reposed on him as a responsible officer of the Corporation. The appellants would have been on a sound wicket had the appointing authority pursued

A those charges mentioned as (4) and (5) in Ext. P2 and a finding recorded. For a perusal of the files, we find that the appointing authority has abandoned those charges and concentrated only on the lapses committed by the appellant in wrongly recommending acceptance of bad stock, as already observed. No finding at all is entered on the charges of collusion and betrayal of confidence mentioned as item Nos. (4) and (5) in Ext. P2. Therefore, we hold that the contention in this regard is without merit.”

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C Taking an overall view and totality of the facts and circumstances of the case, the Division Bench declined to interfere with the order passed by the learned Single Judge but added that ground no. 5 mentioned in the show-cause notice was also liable to be withdrawn by the respondents.

D Paras 1 to 3 of the show-cause notice reflect about the unsatisfactory performance of the duty of the appellant. Paras 4 and 5 of the show-cause notice were not taken into consideration in passing the order of termination of services as is evident from the termination order although reference is made to the show-cause notice. The last para of the show-cause notice also indicates that the action was proposed in terms of clause 2 of the order of appointment, namely, terminating the services during probationary period. The order of termination of services refers to relevant clause in the order of appointment and explanation given by the appellant to the show-cause notice.

E The last paragraph of the said order shows that his explanation was found unsatisfactory. The appellant had wrongfully recommended acceptance of bad stock not once but several times; as such it was held that his services have been unsatisfactory. Hence, the order of termination was passed. From this order of termination, it is clear that the respondents did not rely on paras

F 4 and 5 of the show-cause notice. The Division Bench in the impugned judgment, after perusal of the files observed that the appointing authority had abandoned those charges and concentrated only on the lapses committed by the appellant in wrongly recommending acceptance of bad stock. We have no good reason to differ with this finding recorded by the Division Bench after perusal of the relevant files and records. Even otherwise, paras 4 and 5

G of the show-cause notice stand withdrawn as per the direction given by the High Court. This being the position, no prejudice is caused to the appellant to complain that High Court has exceeded its power to judicial review when such a deletion of paras 4 and 5 from the show-cause notice is to the benefit and advantage of the appellant. This also protects the appellant from any

H adverse affect when he seeks employment elsewhere and prospective employer

may not have any ground to take adverse view of the alleged misconduct contained in paras 4 and 5 of the show-cause notice. A

An order of termination simplicitor passed during the period of probation has been generating undying debate. The recent two decisions of this Court in *Deepti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Ors.*, [1999] 3 SCC 60 and *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and Anr.*, [2002] 1 SCC 520], after survey of most of the earlier decisions touching the question observed as to when an order of termination can be treated as simplicitor and when it can be treated as punitive and when a stigma is said to be attached to an employee discharged during period of probation. The learned counsel on either side referred to and relied on these decisions either in support of their respective contentions or to distinguish them for the purpose of application of the principles stated therein to the facts of the present case. In the case of *Deepti Prakash Banerjee* (supra), after referring to various decisions indicated as to when a simple order of termination is to be treated as “founded” on the allegations of misconduct and when complaints could be only as motive for passing such a simple order of termination. In para 21 of the said judgment a distinction is explained, thus: - C D

“21. If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as “founded” on the allegations and will be bad. 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 a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.” E F

From long line of decisions it appears to us whether an order of termination is simplicitor or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simplicitor falling in one or the other category, based H

- A** on misconduct as foundation for passing the order of termination simplicitor or on motive on the ground of unsuitability to continue in service. If the form and language of the so called order of termination simplicitor of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simplicitor or
- B** punitive. In cases where the services of a probationer are terminated by an order of termination simplicitor and the language and form of it do not show that either it is punitive or stigmatic on the face of it but there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other
- C** words, the facade of the termination order may be simplicitor but the real face behind it is to get rid of services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simplicitor to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that
- D** process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from service on the foundation of his misconduct.

E In the present case, even on earlier occasions when the appellant failed to perform his duties properly during probation period he was warned to improve and continued in the service. If he was to be removed from service on the allegations of misconduct at that time itself the respondents could have removed him from service. This is also a circumstance to indicate that his order of termination was simplicitor. Therefore, having regard to the particular facts and circumstances and in view of what is stated above we have no good reason to disagree with the impugned order.

F Thus, looking from every angle, we decline to interfere with the impugned order particularly having regard to the facts and circumstances of the case, which are available on record. Hence, the appeal is dismissed. No costs.

G S.K.S.

Appeal dismissed.