

HIGH COURT OF JAMMU AND KASHMIR

AT JAMMU

LPASW no.68/2007

CMA no. 80/2007

Date of order: 24.12.2013

Kuljeet Singh

Vs.

State of J&K and others

Coram:

Hon'ble Mr. Justice M. M. Kumar, Chief Justice

Hon'ble Mr. Justice Hasnain Massodi, Judge

Appearing counsel:

For the Appellant(s):

Mrs. Sindhu Sharma, Advocate.

For the Respondent(s) :

Mr. Gagan Basotra, Sr. AAG.

i) Whether approved for reporting in
Law journals etc.:

Yes

ii) Whether approved for publication
in press:

Yes

M. M. Kumar, CJ

1. The instant appeal under Clause 12 of the Letters Patent preferred by the appellant- Kuljeet Singh is directed against judgment and order dated 13.03.2007 rendered by the learned Writ Court, holding that the appellant, who was working on the post of Helper as probationer was rightly discharged from service. It was further held that a notice to provide him opportunity to explain his conduct was sufficient. The learned Writ Court held that order dated 13.05.2004 was merely an order of discharge which could not have been regarded as order of dismissal warranting holding of a regular departmental enquiry.

2. Brief facts of the case are that the appellant- writ petitioner was appointed as Helper on compassionate grounds

on 03.07.2003. He was to remain on probation for a period of one year which was to expire on 03.07.2004. His work and conduct during the period of probation was found unsatisfactory and it was held that on account of his negligence theft of a Generator Set has taken place from the premises of the Corporation. The order dated 13.05.2004 terminating the services of the appellant, which has been upheld by the learned Writ Court, would read as under:-

“Whereas you were appointed in this Organisation on compassionate grounds after the expiry of your father, who died while in service.

Whereas on your request enabling you to appear in the examination you were posted in the Regional Office, Jammu.

Whereas throughout your stay in the Regional Office, Jammu, it has been observed that you have never been serious in performing your duties and numberless explanations had been called from you.

Whereas on 16th of April, you were put on a duty roster for duties from 9 P.M. to 7 A.M. the theft of Generating Set has taken place.

Whereas it has been reported by the Enquiry Committee that you had interchanged your duty shift with some other Chowkidar of your own with the result due to your carelessness and negligence the theft of above Gen. Set has taken place.

Whereas the Enquiry Committee in their report also has substantiated the fact that you have never been punctual in your duties so much so the Liaison Officer had recommended a strict disciplinary action against you besides your transfer.

Whereas the Gen. Set was in the office on 16.04.2004 till the closure of the office and it got lost once the office closed which is a sufficient proof that you have been careless about your duties.

Whereas it has been reported that you are involved in other theft cases as well though you have made good the losses but after taking a lenient view, no action was taken against you. Moreover, you have been again on unauthorised absence w.e.f. 17th April, 2004 till 28th April as reported by the concerned officer which clearly indicates that you are not taking your job seriously and that you left the office at the mercy of God of your own.

Consequent upon above and heavy loss occurring to the Corporation your services are being terminated forthwith. Before issuing final orders still you are once again given a chance for explaining your position and nullifying the charges against you within 2 days failing which termination orders shall be issued without further notice.”

3. Mrs. Sindhu Sharma, learned counsel for the appellant has vehemently argued that the order terminating the services of the appellant is ex facie a stigmatic order which proceeds on the assumption that the appellant has been negligent in performing his duties which resulted in stealing of a Generator Set. According to the learned counsel, in the later paras of the order the appellant has been dubbed as a thief being involved in other theft cases. Once the aforesaid conclusion is reached by the respondents then such an order has to be regarded as an order of dismissal which could not have been passed without holding a regular departmental enquiry. Mrs. Sharma has relied upon Regulations known as the Jammu and Kashmir State Agro Industries Development Corporation Service Regulations, which contemplate holding of a regular departmental enquiry for any act of misconduct. Referring to Chapter VII of the Discipline and Appeal of the Regulations, learned counsel has relied upon Rule 84 (vi) and argued that for every act of misconduct procedure for imposing major penalty has been provided by Regulation 87. The appellant has neither been served with any charge sheet nor was any regular

departmental enquiry held in terms of the Regulations. To substantiate her stand learned counsel has placed reliance on the judgment of Hon'ble the Supreme Court rendered in the case of **State Bank of India and ors v. Palak Modi and anr (2013) 3 SCC 607** and argued that where allegations of misconduct constitutes foundation of action taken then the ultimate decision taken by a competent authority must be nullified on the ground of violation of rules of natural justice. In the cases where the order does not *ex facie* reveal any misconduct the Court can lift the veil and examine whether in the garb of termination simpliciter, the employer had in fact punished the employee for his misconduct.

4. Mr. Gagan Bsotra, learned Sr. AAG, has, however, argued that a probationer does not acquire any right to the post and therefore, mere furnishing of an opportunity by issuing show cause notice was sufficient. According to the learned counsel a regular departmental enquiry in case of a probationer was not necessary.

5. Having heard the learned counsel, we are of the considered view that in a case where the order *ex facie* is stigmatic then in terms of Regulation 84 it has to be considered as an order founded on misconduct. Regulation 84 itself defines and illustrates acts of misconduct and theft of corporation property or dishonesty is listed as one such misconduct by

clause (vi). Regulation 84 with relevant clauses is set out below

in extenso:-

“84. Acts of Misconduct:

Without prejudice to the general meaning of the term ‘misconduct’ it shall be deemed, for example to mean and include the following:-

(i) Habitual late attendance, wilful or habitual absence from duty without leave or without sufficient cause.

(ii) Negligence or neglect of duty, malengine and slowing down of work.

(iii) Gambling, drunkenness, riotous, disorderly or indecent behaviour.

(iv) Deliberately spreading false information or rumours.

(v) Habitual indiscipline or wilful insubordination or dishonesty in connection with the Corporation’s business.

(vi) Theft of Corporation’s property and fraud or dishonesty in connection with the Corporation’s business.

(vii) Giving false information regarding one’s particulars for purposes of employment.

(viii) Taking or giving bribes or any illegal gratification whatsoever or indulging in corrupt practices.

(ix) Assaulting or intimidate any employee of the Corporation.

(x) Sabotage or wilful damage to or loss of Corporation’s goods or property.

(xi) Unauthorised communication of official documents or information relating to Corporation’s business.

(xii) Striking work or inciting others to strike work in contravention of the provision of any law or rules having the force of law.

(xiii) Conviction in a court of law for any criminal offence involving moral turpitude.

(xiv) Adjudged insolvency not warranting continuance of the Corporation’s trust and confidence which the duties of the employee call for.

(xv) Writing of anonymous letters etc. addressing appeal or representations to an authority other than the appellate of the appropriate authority.

(xvi) Abetment or attempt to an act of misconduct.”

6. A perusal of the aforestated Regulation 84 reveals that negligence or neglect of duty is covered by an act of misconduct. Likewise, theft of Corporation's property and fraud or dishonesty in connection with the Corporation's business are also illustrated to be acts of misconduct.

7. If there is an act of misconduct then Regulation 87 provides for procedure for imposing major penalties. It would be profitable to extract the provisions *in extenso* which is set out below:-

“87. Procedure for imposing Major Penalties.

(1) When an employee is charged with misconduct which may lead to the imposition of a major penalty, the competent authority shall frame definite charges on the basis of the allegations against him. The charges together with a statement of the allegations on which they are based, shall be communicated in writing to the employee, who shall be required to submit within such time as may be specified by the competent authority (not exceeding 15 days) a written statement of his defence.

(2) On receipt of the written statement of the employee or if no such statement is received within the time specified, an enquiry may be held by the competent authority itself, or by an officer or committee appointed for the purpose (hereinafter called the Inquiry Authority) by the Competent Authority.

(3) At the enquiry reasonable opportunity shall be afforded to the employee for explaining and defending his case.

Note:- The inquiring authority shall be the sole judge to decide what 'a reasonable opportunity' would be.

(4) At the conclusion of the enquiry, the inquiring authority shall prepare a report of the enquiry recording its findings on each of the charges, together with the reasons therefore.”

8. A perusal of the aforesaid Regulation would show that when an employee is charged with misconduct which may lead

to imposition of a major penalty then a regular departmental enquiry is mandatory and the competent authority is obliged to frame definite charges on the basis of the allegations against a delinquent employee. The charges along with a statement of allegations on which such charges are based, is therefore required to be communicated in writing to the delinquent employee. He shall there upon submit a written statement of his defence. Thereafter the enquiry may be held by the competent authority itself or by an officer or a committee appointed for the purpose by the competent authority. At the enquiry also a reasonable opportunity is required to be afforded to the employee for explaining and defending his case.

9. Mr. Basotra, learned counsel for the Corporation, has candidly accepted that no charge sheet in terms of Regulation 87 was ever issued nor the procedure provided by that Regulation was followed. Once the aforesaid factual position is conceded then no detailed discussion would be necessary to reach a conclusion that order dated 13.05.2004 passed by the respondents is *ex facie* an order of dismissal. It labels allegations of negligence in performance of duty which resulted in stealing of a Generator Set. It also alleges inter changing duty with some other Chowkidar. In the last but one paragraph it has also been noticed that the appellant was involved in other theft cases. This would clearly lead to a conclusion that order

dated 13.05.2004 terminating the services of the probationer has referred to various acts of misconduct. Thus the foundation of the order of termination was misconduct. In order to crystallize the whole issue their Lordships of the Hon'ble the Supreme Court in the case of Palak Modi (supra) has examined various judgments delivered by it in earlier cases including **Parshotam Lal Dhingra v. Union of India, AIR 1958 SC 36, State of Punjab v. Sukh Raj Bahadur, AIR 1968 SC 1089, State of Bihar v. Shiva Bhikshuk Mishra (1970) 2 SCC 871, Samsher Singh v. State of Punjab (1974) 2 SCC 831, Gujarat Steel Tubes Ltd. v. Mazdoor Sabha, (1980) 2 SCC 593** and many others, and have reached the following conclusion in para 25 which is set out below:-

“25. The ratio of the abovenoted judgments is that a probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post held by him. If the competent authority holds an enquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice.”

10. When the principles enunciated by Hon'ble the Supreme Court in Palak Modi's case are applied to the facts of the present case, it becomes evident that by no stretch of imagination the order dated 13.05.2004 passed by the respondents could be regarded as an order of discharge

because ex facie it discloses the acts of misconduct committed by the appellant. Moreover the test as to whether the delinquent officer would be employed by anyone else would stand satisfied because once such an order dated 13.05.2004 is in operation no vigilant employer would like to engage the appellant. Therefore, the order would not be sustainable in the eyes of law. The appeal is meritorious and deserves to be allowed.

11. As a sequel to the above discussion this appeal succeeds. The impugned judgment and order dated 13.03.2007 is set aside. The order dated 13.05.2004 passed by the respondents is set aside. The respondents shall reinstate the appellant within 30 days of the production of a copy of this order and give him all consequential benefits. However, it is made clear that this judgment shall not preclude the competent authority from taking fresh decision in accordance with law.

(Hasnain Massodi)
Judge

(M. M. Kumar)
Chief Justice

Jammu,
24.12.2013
Anil Raina, Secy