



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.14 OF 2007

Mohan Dagadu Nimbalkar
Nageshwarwadi,
Aurangabad .. Petitioner.

Vs.

1.The State of Maharashtra
through its Secretary
Law & Judiciary Department,
Mantralaya, Bombay 400 032 ..
2.The Hon'ble the Chief Justice
High Court, Bombay .. Respondents.

Mr.Mohan Nimbalkar - Petitioner in person.
Mr.R.P.Behere A.G.P. for the State.

CORAM : S.B.MHASE & D.B.BHOSALE, JJ.
DATED : 20TH FEBRUARY, 2009.

ORAL JUDGMENT (PER D.B.BHOSALE, J.):

. This writ petition under Article 226 of the Constitution of India is directed against an order of termination dated 9th May, 1995 by which the petitioner, who was appointed as Civil Judge, Junior Division and Judicial Magistrate, First Class (for short "CJJD & JMFC") on probation, has been terminated from the date he received a copy of the order.

2. Necessary facts giving rise to this petition are that the petitioner was selected as CJJD & JMFC

vide notification dated 19th November, 1990 issued by the Government of Maharashtra, General Administration Department, Mantralaya (Law & Judiciary Department), Mumbai. The first posting of the petitioner was at Wardha where he joined on 10.1.1991 as a trainee for six months under the District and Sessions Court, Wardha. After completion of the training he was posted at Karanja (Ghadge) on 30.11.1991. He continued to work there till 31.5.1994. Thereafter he was transferred to the District Court at Thane as the 3rd Jt. CJJD and JMFC. The petitioner joined there on 6.6.1994 and continued to work till 25.2.1995 and from there he was transferred to Chandrapur vide High Court notification dated 24.1.1995 and as 4th Jt. CJJD and JMFC, Chandrapur. While at Chandrapur the impugned order dated 9.5.1995 came to be issued.

3. There is no dispute that his initial appointment vide notification dated 19.11.1990 was on probation for a period of two years. He completed the probation period of two years on 11.1.1993. His probation, in view of the observations made by the committee nominated by the Hon'ble the Chief Justice - respondent no.2 was extended by one year vide High Court Resolution No.A.3930(II)/90 dated 26th October, 1993. The

extended period of probation got over on 11.1.1994 and thereafter it appears that the probation period stood extended in view of the deeming provision under clause (iv) of sub-rule (4) of Rule (4) of the Bombay Judicial Services Recruitment Rules, 1956 (for short "the said Rules") till his termination vide order dated 9.5.1995. A copy of true translation supplied by the petitioner of the impugned notification dated 9.5.1995 read thus:

. "No.CJM 3295/324 (14) III General Administration (Law and Judiciary) Department vide Government Notification No.CJM 1090/400 (55) D III dated 19th November, 1990, Shri Mohan Dagadu Nimbalkar was appointed as Civil Judge Junior Division and Judicial Magistrate First Class in the State of Maharashtra on probation for a period of two years with effect from the date he assumes charge of his post. His probation period has been extended from 12th January, 1993 for a year but he could not complete the above probation period satisfactory. Hence his services as Civil Judge Junior Division and Judicial Magistrate First Class stand terminated from the date he receives copy of this order and his probation period be deemed to have been extended till he receives the copy of this order.

. By order and in the name of the Governor of Maharashtra."

4. The petitioner in the writ petition has stated that the order of termination though on plain reading seems to be a termination simplicitor, in

fact it was by way of punishment and is stigmatic. He made reference to an incident where some grievance was made by a lawyer at Thane against the petitioner allegedly demanding a bribe for giving judgment in favour of his client. It is further contended that in pursuance thereof an enquiry was initiated and that the petitioner was not given any opportunity of being heard and as a result thereof he came to be terminated in violation of Article 311(2) of the Constitution of India. In short, he submitted that his termination is stigmatic and it attracts Article 311(2) of the Constitution.

5. We have heard the petitioner in person. He invited our attention to the averments in the writ petition and its annexures so also to the reply affidavit filed by the respondents and its annexures to contend that his termination order was not termination simplicitor but it was by way of punishment and it was passed without giving him an opportunity of being heard or allowing him to explain his conduct and rebut the allegations against him. He submitted that though the impugned order appear to be a termination simplicitor it is punitive in nature and, therefore, the respondents were not justified in passing the said order. He submitted that the order terminating him is also

violative of the principles of natural justice and hence is void. In support of his contention he placed reliance upon the following judgments of the Supreme Court in **Radhey Shyam Gupta V. U.P. State Agro Industries Corporation Ltd. and Anr. 1999 (2) SRJ 232**, **Yoginath D. Bagde V. State of Maharashtra and Anr. AIR 1999 Supreme Court 3734** and **Anoop Jaiswal V. Government of India and Anr. AIR 1984 Supreme Court 363**.

6. On the other hand Mr. Behere, learned A.G.P. invited our attention to the affidavit filed by the Additional Registrar (Legal), High Court, Appellate Side, Bombay and submitted that the order of termination is based upon the assessment of the petitioner's work and conduct during the entire period of probation and since it was found that he failed to complete the probation period satisfactory, the impugned order terminating his service was issued. He submitted that the order of termination was issued on the basis of the recommendations made by the committee appointed by respondent no.2 and it was accepted by the committee of the Administrative Judges headed by the Chief Justice. He submitted that from bare perusal of the impugned order and even other material on record it is clear that the alleged complaint by the lawyer at

Thane against the petitioner was not a reason for recommending termination of the petitioner. The termination was based upon the opinion expressed by the learned District Judges under whom the petitioner worked. Our attention was drawn to all the annexures to the reply affidavit in support of the aforesaid contentions.

7. It appears that on expiry of the initial probation period of two years the petitioner's performance regarding work and conduct was assessed by the committee nominated by respondent no.2 in October, 1993. The committee on assessment of his overall performance made the following observations insofar as the judicial work is concerned:

".... The civil judgments may broadly be said to be in proper form. However, there is no proper appreciation or use of legal phraseology. Similar is the position regarding his criminal judgments. He requires more efforts and attempt to write better. Therefore, I am not commenting on his competence at this stage.

I, therefore, recommend that his probationary period may be extended by one year.

16.10.93"

. It is on the basis of these observations the

probation period of the petitioner was extended and it was continued till the impugned order of termination was passed.

8. Under the provisions of clause (iv) of sub-rule (4) of Rule (4) of the Rules a person appointed as CJJD and JMFC has to be on probation for a period of two years, which may be extended by the High Court from time to time as it may deem fit. It is also provided therein that during the period of probation and until expressly confirmed by written order, the service of such person is liable to be terminated by one month's notice on either side, without any reason being assigned for the same by payment of salary for the period of notice or unexpired portion thereof. These rules do not contemplate holding of any enquiry for terminating the services of a probationer Judge, who fails to complete his probation period satisfactorily. In such cases, the order of termination is not penal, but it is a termination simplicitor.

9. In view of the guidelines laid down by the High Court, any District and Sessions Judge is required to forward his report in the prescribed proforma about the conduct and work of the probationer Judge. Such opinions are placed before

a committee of Judge/Judges of the High Court, constituted by the Chief Justice, for assessing overall performance of the probationer and for considering whether he has satisfactorily completed his probation period. The said committee, besides examining judgments of the concerned probationer Judge, also considers special reports of District Judge, report from the S.I.D. about complaints, if any, report from the Inspection Branch about quarterly disposal of the probationer Judge during reporting period with remarks, warning, if any, and such other relevant material which the committee thinks fit and proper to consider. The recommendations of the committee are thereafter placed before the committee of Administrative Judges headed by the Chief Justice. They take decision whether a certificate regarding completion of the probationary period should be granted to the concerned Judge or whether probation period should be extended or whether in case of unsatisfactory performance, his service should be terminated.

10. From the perusal of the entire record, in the present case, we find that the aforementioned procedure has been followed scrupulously by the committee so also by the committee of the Administrative Judges. The reports of two District

Judges dated 15.1.1994 and June, 1994, apart from the other material regarding the petitioner, were placed before the committee to assess the performance of the petitioner. The opinion recorded by the committee read thus:

." I have perused enclosed judgments in Civil and Criminal matters.

. As regards judgments in Civil matters, I find that the judgments are based on totally erroneous understanding of the T.P.Act. Specific Relief Act and the Contract Act. The judgments are also based on extraneous factors. As regards judgments in Civil matters, there is no proper appreciation of facts. The form of the Civil judgments broadly appear to be clear and unambiguous. The concerned judge was given extension regarding probationary period on the last occasion. I find that the legal concepts have not been understood by the Judge and there is no improvement in any aspect. None of the parameters are satisfied. The knowledge of Civil law appears to be poor.

. As regards judgments in Criminal matters, marshalling of evidence is very poor and abrupt. There is no discussion on evidence. The entire approach is callous. The judgments are based only on summary of the evidence. There is no coherence in the thinking as reflected by the contents of the judgment. There is no improvement despite opportunity being given in the past when the period of probation was extended.

. As regards service record, there are serious complaints, but since they are being processed, I do not wish to comment on that aspect.

. Looking to the enclosed judgments, I am of the view that the work is not up to the mark. In fact, it is unsatisfactory and, therefore, the probationary period of Shri Nimbalkar should not be extended.

. In the circumstances, I am of the view that the Certificate about satisfactory completion of probationary period should not be issued."

11. From bare perusal of the report of the committee it is clear that other material such as the complaint of the lawyer at Thane was not taken into consideration while deciding whether the petitioner has satisfactorily completed his probation period. The recommendation made by the Judgment Examination Committee were also placed before the committee of the Administrative Judges headed by the Chief Justice. Upon considering the aforementioned material the committee of the Administrative Judges seems to have accepted the recommendations made by the committee and pursuant thereto the impugned order came to be issued terminating the petitioner's service on the ground that he has failed to complete satisfactorily his probation period.

12. At the end of probation period the probationer-Judge could be confirmed subject to his fitness for confirmation. The question of fitness can be considered only at the end of the period of probation, and on such consideration if the probationer is found suitable by the appointing

authority then the appointing authority may issue an order of confirmation. It is well settled that an order of confirmation is a positive act on the part of the employer which the employer is required to pass in accordance with the rules governing the question of confirmation subject to a finding that the probationer is in fact fit for confirmation. In such a case there is no bar against termination at any point of time after expiry of the period of probation, more particularly when there is a provision in the rules for initial probation and extension thereof. It is also well settled that even if the maximum period of probation has expired and neither any order of confirmation has been passed, he cannot be deemed to have been confirmed merely because the said period has expired. Thus, if the probationer while continuing on probation has been considered and found not suitable for confirmation by the appointing authority, it is open to the appointing authority to terminate his services without affording him an opportunity of being heard.

. Merely because some enquiry of the alleged misconduct was pending during the probation period, it cannot be treated as stigma more particularly when an order of termination, in such a case, was

issued on the ground that the probationer failed to complete his probation period satisfactorily and if his termination was not based upon such enquiry or its outcome against the probationer. Similarly, if there is no material on record to connect the enquiry with the order of termination or if the termination is not based on such enquiry, such termination cannot be treated as stigmatic and in that case an opportunity of being heard need not be provided before issuance of the order of termination. In other words, if termination is based upon an assessment of the probationer's work and conduct during the entire period of probation and if he fails to complete the probation period satisfactorily, it is not necessary to give any opportunity of being heard to the probationer Judge.

13. In the present case we find that the order of termination has absolutely no connection with the alleged complaint of the lawyer from Thane and the enquiry initiated in pursuance thereof or with the agitation by the lawyers in the form of abstention against the petitioner. The petitioner's period of probation was continued till the impugned order of termination was issued. There is no dispute that the petitioner was simply a probationer and he had no right on the post. It was not necessary to

afford him an opportunity of being heard when it is clear from the record that the order of termination was issued on the basis of the other material available during the period of probation.

. The decision to terminate his service for non satisfactory completion of probation period is legally taken by the competent authority and it is not open to the petitioner to challenge it on the ground that it is stigmatic and attracts the provisions of Article 311(2) of the Constitution and, therefore, an opportunity of being heard ought to have been given before his termination. The respondents in their reply affidavit have clearly stated that termination of the petitioner by the order under challenge has no relevance either with the complaint of the lawyer at Thane or the enquiry conducted in pursuance thereof. In any case a complaint by the lawyer at Thane was not the reason for termination of the service of the petitioner although the said incident was mentioned in the report of the District Judge, Thane about the conduct of the petitioner. The judgments relied upon by the petitioner are of no avail to the petitioner in view of the fact that all the judgments are in the cases of permanent employees and not the probationers. The impugned order of

termination is undoubtedly not based upon any material which would cast stigma on the petitioner. In the circumstances the writ petition fails. Rule is discharged. No costs.

(D.B.BHOSALE, J.)

(S.B.MHASE, J.)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE**

WRIT PETITION NO.14 OF 2007

Date of Decision: 20th February, 2009.

For approval and signature:

The Hon'ble Mr.Justice : S.B.MHASE

And

The Hon'ble Mr.Justice : D.B. BHOSALE

1. Whether Reporters of Local papers may be allowed to see the judgement ?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?
5. Whether it is to be circulated to the Civil Judges?
6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur, Aurangabad & Goa Offices?