

(2013) 10 CAL CK 0056

In the Calcutta High Court

Case No : Writ Petition No. 17146 (W) of 2012 and CAN No"s. 8088 of 2012 and 10016 of 2013

Bhramar Bhandari

APPELLANT

Vs

Visva Bharati and Others

RESPONDENT

Date of Decision : 09-10-2013

Acts Referred:

Citation : (2014) 1 ESC 66

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : Pratik Dhar and Tanmoy Chowdhury, for the Appellant; Pantu Deb Roy, Siddhartha Ruj, Arunava Ghosh, Soumya Majumdar, Snehasis Sen and Ms. Dolon Dasgupta, for the Respondent

Final Decision : Dismissed

Judgement

Aniruddha Bose, J.—In this proceeding, the petitioner has questioned the decision of the Visva Bharati University dated 23rd July 2012 issued by its Registrar by which the petitioner has been discharged from service as his appointment has not been confirmed following his period of probation. The reason for this, as disclosed in the said decision, is his general unsuitability for the post of conservation assistant, to which he was appointed on probation upon going through a regular selection process on 10th February 2011. This reason has been disclosed in the said communication addressed to the petitioner on 23rd July, 2012, discharging him from his service with effect from 10th August, 2012. The letter of appointment of the petitioner dated 10th February, 2011, stipulated, inter alia:

The undersigned is directed to offer you the appointment to the post of Conservation Assistant, Visva-Bharati (OBC), with effect from the date you join the post, in the Pay Band-1 of Rs. 5,200-20,200 with Grade Pay of Rs. 2800/- plus usual allowances as admissible under the rules of the University.

Your pay will be fixed as per rules of Government of India as applicable to the University.

You will be on probation for a period of one year, which may be extended if the authority so desires. Eligibility for confirmation to the post will rest on your satisfactory performance during the probation period.

Subsequent to his appointment, a suit was instituted by one Sujoy Hazra questioning the validity of his appointment but that suit was subsequently dismissed. The said litigation, however, is not of much relevance to the present proceeding. Close to completion of his first year of appointment, probationary period of the petitioner was extended by six months with effect from 1st February, 2012. The petitioner sought information in writing the reason for extension of his period of probation and the petitioner was informed by the Registrar of the University that a case was pending against him on disciplinary ground and the said matter was at that point of time under investigation of the grievance committee. The allegation against the petitioner which was being enquired by the said committee was that he had threatened and mentally tortured one Mira Ruidas, a student of the university. It appears that an FIR was lodged at Shantiniketan Police Station in relation to that incident. A fact finding committee was constituted by the university, which had found the allegations against him to be false and baseless. Case of the petitioner is that the reason behind extension of his probation period without confirming his service was the pending enquiry or investigation on disciplinary ground and the subsequent act of discharge from his service even after he was exonerated by the fact finding committee constituted discharge with stigma. It has been argued by Mr. Dhar, learned counsel for the petitioner that the ground of un-suitability disclosed in the letter of discharge is to camouflage mala fide acts on the part of the university authorities and the petitioner ought to have been given the opportunity of hearing before he was discharged. According to him, the petitioner's performance at the time of recruitment was best among all the candidates and the performance appraisal or assessment of the petitioner while in service also showed him to be above average and he was given increment while in service. On this basis, he sought to establish that the petitioner's performance was satisfactory, contrary to the observation made in the letter of discharge. Main case of the petitioner is that his discharge was "stigmatic" and it was incumbent upon the authorities to give him opportunity of hearing before discharging him in compliance of the principles of natural justice.

2. In connection with the said writ petition, the university had taken out an application for vacating the interim order which was originally granted on 6th August, 2012, staying the order dated 23rd July, 2012. This application has been registered as CAN 8088 of 2012. In this application, it has been disclosed that a committee had been set up to look into the academic activities of the petitioner since his appointment, and process of his appointment to the said post. The said committee recorded that the petitioner did not have any knowledge of chemistry

as was stipulated in the advertisement inviting applications for the said post and he did not have experience or expertise in the field of conservation of museum objects. The university authorities also obtained information from the Adhyaksha, Rabindra Bhavana as to whether his performance as conservation assistant was satisfactory or not when he was functioning there and obtained a negative response. The other factor referred by the petitioner to sustain his case of mala fide is the enquiry conducted against him on the allegation of causing harassment to said Mira Ruidas. In relation to this proceeding, it has been pleaded in the writ petition that a fact-finding committee was constituted by the university and such committee found the allegations of said Mira Ruidas to be false. On a further complaint filed by said Mira Ruidas before the Ministry of Human Resource Development, Government of India as well as Scheduled Caste/ Scheduled Tribes cell, a grievance committee was constituted, which conducted further enquiry. It has been submitted by the petitioner that the said Committee had not given their finding. The stand of the university however is that the grievance committee had reported that the behavior of the petitioner appeared to be serious and special attention was needed to curb such type of criminal activities.

3. On these counts, submission of the petitioner is that he had fulfilled the eligibility criteria and chemistry as an academic subject was not an essential qualification for the said post. Mr. Dhar has further argued that the entire exercise of ascertaining information about the petitioner was carried out behind the back of the petitioner and reflected mala fide approach on the part of the university. Further point urged by the petitioner is that the Registrar of the university had no power to discharge the petitioner as under the statute such power is vested with the Vice-Chancellor or the executive council. On these grounds the petitioner has applied for invalidation of the letter of discharge. He has relied on judgments of the Hon'ble Supreme Court in the cases of Mathew P. Thomas Vs. Kerala State Civil Supply Corpn. Ltd. and Others, Anoop Jaiswal Vs. Government of India and Another, and Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and another, and invited this Court to lift the veil off the content of the letter of discharge and find out the real reason for terminating his service as a probationer, which according to him is mala fide and by way of punishment, without complying with the principles of natural justice. The judgment of the Hon'ble Supreme Court in the case of the Manager Government Branch Press and another v. D.B. Belliappa, 1979(1) 477, has also been relied upon by Mr. Dhar and he submitted that even for terminating the service of a probationer, principles of fairness and reasonableness were required to be adhered to by the employer. It has been urged on behalf of the petitioner that during the period of probation, he was given increment and this fact negated the stand of the respondents that the service of the petitioner was unsuitable or unsatisfactory. The authority relied on this point is a judgment of the Hon'ble Supreme Court in the case Ajit Singh and Others Vs. State of Punjab and Another, . The other point argued on behalf of the petitioner is breach of clause

14 of the service rules, which is entitled Service Rules for non-academic employees of the Visva-Bharati, which provides for notice of one month in writing before the service of a probationer is effected.

4. On behalf of the respondents main case has been argued by Mr. Arunava Ghosh, learned counsel for the university. It has been submitted by him that the executive council had approved discharge of service and non-confirmation of the petitioner and resolution to that effect was taken on 16th September, 2012. Earlier, though the impugned letter was issued by the Registrar, the Vice-Chancellor of the university had examined the recommendation of the Registrar and authorised him to discharge the petitioner from service. Thus, according to the respondents, the jurisdictional question in issuing the termination letter is no more open for examination. It has been further submitted that the petitioner's discharge was not on the allegation of any misconduct but it was a case of termination simpliciter on overall assessment of the performance of the petitioner and hence question of violation of the principles of natural justice cannot be urged. On the issue of grant of increment, contention of the university is that this was done bona fide and not to discriminate against the petitioner.

5. In the case of Mathew P. Thomas (supra), the Hon'ble Supreme Court dealt with the question of termination of service of a probationer, against whom there has been allegations of such nature which could constitute misconduct. Mr. Dhar, relying on this decision submitted that in the case of the petitioner, the order of his discharge was founded on the allegations of misconduct. In that judgment, referring to an earlier decision of the Hon'ble Supreme Court in Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, , in which distinction was made between foundation and motive leading to an order for discharge or termination of a probationer, it was held that the termination would be bad in law if it was founded on the allegations made against an employee on probation, without any departmental enquiry. But after allegations against an employee on probation surface, if an employer chooses not to proceed with any enquiry for imposing punishment but decides not to continue with employment of the probationer, then such allegations may constitute motive and not foundation of the order of termination, and in such a situation it would be a case of termination simpliciter. In the same judgment it has been held that in many cases it may be difficult to distinguish between "motive" and "foundation" of an order of termination from a plain reading of the order, and in such cases it would be necessary to travel beyond the order phrased as termination simpliciter to find out what was the nature of the order of termination." Similar view has been expressed by the Hon'ble Supreme Court in the cases of Anoop Jaiswal (supra) and Pavanendra Narayan Verma (supra). In the case of D.B. Belliappa (supra), the petitioner was a temporary employee and not a probationer. Complaint in this case was of hostile discrimination. It was held by the Hon'ble Supreme Court in this case that if hostile discrimination was established, an employee in temporary service would be entitled to protection of Articles 14 and 16 of the Constitution of India. But if service of a temporary

Government servant is terminated in accordance with the conditions of service on account of unsatisfactory conduct or un-suitability for the job, or for a reason of this nature he is marked off as a class from other temporary Government servants, then Article 16 would have no application in his case. In the case of Ajit Singh and others (supra), there was allegation of sudden en bloc termination of temporary employees soon after an increment was granted to them. The Hon''ble Supreme Court found such act to be "thoroughly arbitrary, smacks of discrimination "On the question of grant of increment, it has been observed in the said judgment that the petitioners therein continued in employment after each one of them was allowed an increment, and for this reason it was found that justification of their termination on the ground that their performance was not satisfactory was untenable. On behalf of the university, it has been argued that the employer is entitled to enquire into the performance and conduct of the probationer before confirmation and a test of subjective satisfaction is to be applied. The judgments relied on this issue are the cases of Pavaranendra Narayan Verma (supra) Rajesh Kumar Srivastava Vs. State of Jharkhand and Others, Rajesh Kohli Vs. High Court of J. and K. and Another,

6. The case of Registrar, High Court of Gujarat and Another Vs. C.G. Sharma, , has been cited by Mr. Ghosh to argue that a probationer cannot seek confirmation as matter of right. The other judgment relied upon by Mr. Ghosh is on the decision of the Hon''ble Supreme Court in the case of Samsher Singh Vs. State of Punjab and Another, in which it has been held that mere fact of holding an enquiry before termination is not always a conclusive test to determine as to whether an order of termination was being passed by way of punishment or not, and what is to be ascertained in such a situation is whether the order has been passed really by way of punishment as a result of the finding revealed by such enquiry.

7. So far as the status of a probationer is concerned, law is well established that a person on probation does not have any vested legal right to seek confirmation on completion of the period of probation. The said Service Rules lays down the provisions guiding probation and confirmation of non-academic employees, and clause 11 thereof stipulates:

11. Probation and confirmation:

(1) Every person appointed permanently to a post under the University after commencement of these rules, whether by promotion or by direct recruitment, shall ordinarily be on probation in such post for a period of one year provided that the appointing authority may in any individual case, reduce the period on being satisfied that the employee has already proved his fitness and deserves to be confirmed before the expiry of the period, or extend the period of probation for a further period not exceeding one year in case the appointing authority is not so satisfied but thinks that another opportunity should be given. In the latter case the reasons for such extension shall be recorded in writing by the appropriate authority.

(Note: Service as a probationer is sui generis-neither substantive nor officiating. An employee who is recruited as a probationer with a view to substantive appointment to the cadre of a service does not therefore acquire a lien on a post in that cadre until he is confirmed in the service.)

(2) Where a person appointed on probation is, at any time during his period of probation, whether original or extended, found unsuitable for holding that post the appointing authority may:

(i) in the case of a person appointed by promotion revert him to the post held by him immediately before such appointment;

and

(ii) in the case of a person appointed by direct recruitment terminate his services under the University without notice.

(3) Every person appointed on probation to a permanent post under the University by promotion or by direct recruitment shall, on satisfactory completing his period of probation as mentioned in Clause (i), be eligible for confirmation in that post.

(4) No employee shall be confirmed in any post:

(i) unless such post is permanent and no one else holds a lien on the post;

and

(ii) unless the service of the employee under the University is approved by the appointing authority and an order for confirmation is recorded by him in this behalf.

It shall be the duty of the appointing authority to take up the case of the employee's confirmation at least two weeks before the period of probation is about to expire, and it shall be permissible for the employee to represent to the appointing authority for the purpose one month before the due date.

8. The legal position which emerges from the authorities cited on behalf of the learned counsel for the parties, is that in the event continuance of service of a probationer is sought to be terminated by way of punishment, then it would carry a stigma and in such a situation the principles of natural justice would have to be followed. It is also permissible for the Court to examine as to whether an act of termination is by way of punishment or not, when service of a probationer is sought to be terminated on the ground of unsuitability. In the instant case, scrutiny on this basis is necessary in my opinion, because there has been reference to several alleged acts bordering on misconduct on the part of the petitioner during the period he served the university under probation. If such allegations were proved and it was established that the petitioner was being discharged because of having committed such acts of misconduct, then the petitioner ought to have been given prior opportunity of being heard. In this case

I have been invited to do so as the order of discharge records general unsuitability whereas past events show that the petitioner was subjected to various forms of enquiry. The petitioner has also sought to justify his case that his discharge was mala fide on the basis that such enquiries were conducted behind his back, and he was given increment while in service. The other point argued on his behalf is that at the time of extension of his term of probation, he was not disclosed the reason for not confirming his service at that stage. But such reason was subsequently disclosed, and this factor in my view cannot be raised again to sustain the case of the petitioner.

9. Such past enquiries per se would not lead to an inference that there was some mala fide behind making such enquiries. An employer may want to verify certain aspects pertaining to his employee's conduct or antecedent in connection with his employment. If the process of enquiry is confined to such verification and not followed by any penal measure, then it would not be legally necessary to give opportunity of hearing to such employee to comply with the principles of natural justice. Only if such verification process leads to a proceeding and the employer intends to take action against the employee on the basis of facts revealed by such verification, then only prior opportunity of hearing would be necessary. In the case of the petitioner, it does not appear that the result of such verification process directly led to his discharge. Three situations have been cited so far as the petitioner is concerned, which, according to the petitioner would lead to a conclusion that his discharge in reality was a punishment. These are the initial suit, followed by the allegations of mental torture of a girl student which led to lodging of an F.I.R. as also internal enquiry by the university and the enquiry into the academic activities of the petitioner and the process of his appointment. The question which I will have to address now is as to whether the decision not to confirm the service of the petitioner was direct result of any of these three factors, or on collective impact of these three factors alone. The impugned decision records that the petitioner's service was being terminated for his general unsuitability for the post. But the Court is not to be guided by such recorder, and duty of the Court, in a case like this, would be to find out the real intention of the employer. To come to a finding that the university discharged the petitioner from his service because of any of the aforesaid reasons, a direct link between the enquiry or incidence and the order of termination or discharge would have to be established, whether directly or on interpreting the surrounding circumstances. In this case, what is before this Court are certain instances of enquiry pertaining to the petitioner's conduct and experience. In the event because of cumulative effect of such conduct or experience the employer decided not to confirm the service of the petitioner while making overall assessment of performance of the petitioner, then it would be within the power and authority of the employer, in this case being the university, not to confirm the service of the petitioner. In the event an employer is to come to a finding as to whether an employee is suitable for a job or not after completion of his period of probation, then also such finding would have to be arrived at on the basis of various factors

pertaining to performance of the employee. To come to a finding that an employee is unsuitable for a job, then obviously certain negative factors pertaining to his employment would have been considered. Consideration of such negative factors which may ultimately influence the decision of the employer not to retain him in service would not constitute punishment. Unless a particular incidence or a series of acts of an employee on probation directly influence the decision of the employer to terminate his service, discharge or termination of such employee cannot be held to be punishment, and consequentially "stigmatize" him. In this case I do not find any direct link between the enquiries initiated against the petitioner and the ultimate decision of the university not to confirm his service.-

10. It is also not an absolute proposition of law that if someone is given increment during the period of probation, it would automatically imply that the employer found him suitable for confirming his service. This question has been addressed to by the Hon''ble Supreme Court in the case of Rajesh Kohli (supra). While granting increment may be held to be an act of condonation of past misconduct on the part of the employer, I do not think the same principle can apply to a probationer on the question of confirmation of his service. As regards the authority of the Registrar to issue the order of termination, it has been submitted on behalf of the university that the Registrar was communicating the decision of the Vice-chancellor. It has also been submitted that the executive council of the university has approved this decision subsequently. Thus, the order of termination stands approved by the proper authority. So far as the question of breach of clause 14 of the Service Rules is concerned, the said clause permits termination of service of an employee on probation without notice, also on payment of one month's pay. The petitioner, in such circumstances would be entitled to pay if his service has been terminated within the period prescribed in the said Rules. I do not find any illegality in the decision of the university in relation to the decision impugned.

11. As regards the connected applications being CAN No. 8088 of 2012 and CAN No. 10016 of 2013, the first one has been taken out by the university for vacating the interim order passed in this matter on 6th August 2012, and the second one is for directing the petitioner to secure the sum already received by him till September 2013 in terms of the interim order passed in this matter on 21st September 2012. These applications are also treated as on day's list and are being disposed of by this judgment. In this matter interim order was originally passed on 6th August, 2012 staying the operation of the impugned decision. This interim order was modified on 21st September, 2012 to the effect that the petitioner may not report for duty for a period of two weeks or until further order whichever was earlier but for that period the salary of the petitioner was not to be deducted on condition that in the event eventually the writ petition failed, his salary was to be refunded. The said order has also been extended from time to time. In view of my judgment in the main writ petition, these two applications shall also stand disposed of with the direction that in the event the

authorities have not utilized any service of the petitioner during the period of subsistence of the aforesaid interim order as modified on 21st September 2012, then the petitioner shall refund the sum received as salary in terms of the interim orders passed by this Court. With this direction the connected applications being CAN 8088 of 2012 and CAN 10016 of 2013 stand disposed of.

12. The writ petition accordingly stands dismissed and the interim orders passed in this matter shall stand dissolved.

13. There shall be no order as to costs. Urgent photo-stat certified copy of this judgment, if applied for, be given to the parties on usual undertakings.