
(2010) 09 DEL CK 0326
In the Delhi High Court
Case No : Writ Petition (C) 8231 of 2009

Commissioner, NVS

APPELLANT

Vs

Rinku Sharma

RESPONDENT

Date of Decision : 16-09-2010

Acts Referred:

Citation : (2010) 09 DEL CK 0326

Hon'ble Judges : Pradeep Nandrajog, J; Mool Chand Garg, J

Bench : Division Bench

Advocate : S. Rajjapa and Puran Chand, for the Appellant; L.R. Khatana, for the Respondent

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—The petitioner i.e. Navodaya Vidyalaya Samiti is an autonomous body fully funded by the Government of India and is under the administrative control of Ministry of Human Resource Development. The petitioner has established and maintains schools in all over India popularly called Kendriya Vidyalayas.

2. Submitting an application in response to an advertisement inviting applications from eligible candidates for the post of Post Graduate Teachers (Economics) and being declared successful at the selection process a letter offering appointment dated 5.7.2001 was issued by the petitioner to the respondent, Clause 2 and Clause 10 whereof, being relevant are noted. They read as under:

2. You will be on probation for a period of two years from the date of appointment extendable by another one year at the discretion of the competent authority. Failure to complete the period of probation to the satisfaction of the competent authority or found unsuitable for the post during the probation period, will render you liable to discharge from services at any time without notice and without assigning any reasons thereto.

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10. Other conditions of service will be governed by the relevant rules and orders in force time to time in the samiti.

3. It may be highlighted that the dispute between the parties pertains to the effect of Clause 2 of the letter of offer, as per which respondent was to be on probation for a period of 2 years from the date of appointment and it stands stipulated that the period may be extendable by another 1 year at the discretion of the competent authority and failure to complete the probation to the satisfaction of the competent authority or found unsuitable during probation would render the respondent liable to be discharged from service without assigning any reasons.

4. The respondent accepted the letter of offer and joined at the Jawahar Navodaya Vidyalaya, Kurukshetra, Haryana where she was posted. On 30.4.2003 the respondent was directed to join a training programme for Post Graduate Teachers at Vishakapatnam from 6.5.2003 to 20.5.2003. The respondent expressed her inability to join the training course on medical grounds but surprisingly it was noted that she had been relieved from the school to join the course.

5. The school at Kurukshetra closed for summer recess and the recess being over by around mid July 2003, the petitioner reported for duty but proceeded on leave from 8.8.2003 till 12.8.2003. The leave was sanctioned. She had to join back on 13.8.2003 but did not do so. She sent a telegram on 14.8.2003 asking for leave to be extended which telegram was received on 16.8.2003. It was followed by an application seeking leave from 13.8.2003 till 27.9.2003 on medical grounds. The leave was sanctioned. The respondent had to join duties on 28.9.2003. She did not do so. An undated telegram was received by the head of the school on 30.9.2003 in which the respondent sought leave to be extended till 26.11.2003. Since the respondent was repeatedly seeking extension of leave on medical grounds, the head of the school sent a letter dated 3.10.2003 at the home address of the respondent requiring her to send a medical certificate from the Chief Medical Officer of the District in which she resided. The letter dated 30.10.2003 which was sent by registered post was returned with the endorsement by the postman that the "Addressee has gone to college."

6. An application dated 29.9.2003 was received by the head of the school from the respondent praying that on medical grounds leave be extended by another 60 days effective from 28.9.2003. The application was not supported with any medical papers evidencing the medical infirmity of the respondent.

7. A registered letter was sent to the respondent on 14.10.2003 requiring her to submit a medical certificate issued by the Chief Medical Officer and she was clearly informed that in the absence of such certificate leave on medical grounds could not be sanctioned. In response, the respondent sent a photocopy of a medical certificate obtained from some medical officer which had no official dispatch number. The certificate dated 10.11.2003 was received in the school on

2.12.2003. Thus, the certificate was rejected and the respondent was requested to join duties or send a proper certificate. On 5.12.2003 an undated letter was received from the side of the respondent in which she prayed that leave be extended. The respondent did not comply with the direction that she should obtain a medical certificate from the Chief Medical Officer of the District where she resided. She kept on sending either letters or telegrams praying that leave be extended, but did not send any certificate issued by the Chief Medical Officer and certifying that she was not medically fit to join duties. Finally, the respondent produced a medical certificate issued on 24.1.2004 and reported at the school on 26.1.2004. She was made to join but was asked to submit medical papers evidencing the treatment she had taken. None were submitted.

8. The respondent worked from 26.1.2004 till 11.3.2004 and applied for leave for 2 days i.e. 12th and 13th March 2004 stating that her mother-in-law was unwell. The leave was sanctioned and she did not report for duties on the said two days. She did not join back and sought leave to be extended from 15.3.2004 to 24.3.2004 stating that her mother-in-law was unwell. She sent a telegram on 27.3.2004 seeking leave to be extended by 15 days stating that she had fallen sick. She did not submit any medical papers and continued to remain absent beyond 15 days and sought further leave stating that she had fallen sick. No medical papers were submitted. She remained absent till 25.4.2004 and joined duty on 26.4.2004 and worked up to 30.4.2004 when the school was closed for summer vacations. She did not report for duty after the school opened after the summer recess on 2.7.2004 and sought for leave for 2 days i.e. 2.7.2004 and 3.7.2004. She continued to remain absent beyond 4.7.2004 and sent a telegram on 6.7.2004 praying for leave to be extended. On 7.7.2004 she was informed that her request for leave was not genuine and she should report back for duties. The respondent continued to play truants and did not join back and instead kept on sending leave applications to which she was repeatedly responded that she had to return back to work. The respondent was told that she should appear before a Medical Board so that she could be examined properly. The respondent continued to play truant. She kept on sending letters and telegrams and did not join the school till 30th September 2004.

9. The competent authority extended the probation of the respondent up to 25.1.2005 vide order dated 30.9.2004, relevant part whereof reads as under:

On the recommendations of the DPC held on 29.9.2004 the probation period of Smt. Rinku Sharma, PGT (Economics), Jawahar Navodaya Vidyalaya, Niwarsi Distt. Kurukshetra (Haryana) is hereby extended upto 25.1.2005.

She is further directed to show improvement in her work and behaviour during the extended period of probation. In case she fails to do so within this extended period of probation her services are liable to be terminated as per terms and conditions of her appointment.

10. The respondent continued to remain absent in spite of being told in writing to

improve her performance and noting the disinclination of the respondent to work an order was passed on 19.1.2005 i.e. within the extended period of probation discharging the respondent from service with immediate effect. The order reads as under:

In accordance with the provisions contained in Ministry of Home affairs O.M. 44/1/59-ESTT.(A) dated 15th April, 1959 and in exercise of the powers conferred upon the competent authority and in accordance with the terms and conditions of the offer of appointment in Navodaya Vidyalaya Samiti, Smt Rinku Sharma, PGT(Economics), Jawahr Navodaya Vidyalaya, Niwarsi Distt. Kurukshetra (Haryana) is discharged from services of the Navodaya Vidyalaya Samiti with immediate effect on the basis of the recommendations made by the Departmental Promotion committee.

11. The respondent preferred an appeal against the said order discharging her from service. Vide order dated 16.8.2005 the appellate authority rejected the same.

12. Aggrieved by the order dated 19.1.2005 discharging the respondent from service and the order dated 16.8.2005 rejecting her appeal, the respondent filed Original Application No. 2848/2005 before the Central Administrative Tribunal praying that the order dated 19.12.2005 and the order dated 16.8.2005 be quashed.

13. In the Original Application it was urged by the respondent that as per the letter dated 5.7.2001 offering her appointment, terms whereof she has accepted, vide Clause 2 it was stipulated that she would be on probation for an initial period of 2 years which may be extendable by another one year; the period to reckon from the date she joined. She stated that she joined service on 25.7.2001 and the 3 years? period came to an end on 25.7.2004 and that she would be on deemed confirmation after 25.7.2004 as her services were continued beyond said period and on said reasoning she urged that treating her on probation, her services could not be terminated. She stated that the actual reason for terminating her service was her alleged misconduct in respect whereof she stated that an inquiry had to be held in which she would have justified her absence.

14. In response the petitioner drew the attention of the Tribunal by making necessary pleadings and highlighting the facts noted by us in paras 4 to 9 above. It was pleaded by the petitioner that it had flamed no statutory rules and none were framed by the Government and in the absence of notified statutory rules the executive instructions issued on the subject by DOP & T held the field. It was pleaded that as per DOP & T's circular (Number and Date not mention) but reproduced in Swami's Establishment and Administration Manual it was provided that:

While the normal probation may certainly be extended in suitable cases, it is not desirable that an employee should be kept on probation for years as happened

occasionally at present. It is, therefore, suggested that, save for exceptional reasons, probation should not be extended for more than a year and no employee should be kept on probation for more than double the normal period.

15. Thus, according to the petitioner, in the absence of any statutory rule occupying the territory, the DOP & T's circular was the executive instruction and hence the law governing probation and resolving the dispute of deemed confirmation.

16. The Tribunal allowed the Original Application filed by the respondent vide judgment and order dated 20.3.2007. The Tribunal held that the main issue before it was whether the period of probation could be continued beyond the period mentioned in the condition (Clause 2) in the letter of appointment. Adjudicating upon the said issue, the Tribunal has held as under:

13. From the above discussion it is clear that the applicant was appointed to the Navodaya vidyalaya and one of the conditions, among others, was relating to the probation which could be for a maximum period of three years. Therefore it would not be in the powers of the competent authority to extend the period of probation after the completion of prescribed three years. The school may be dissatisfied with the performance of the applicant but in such a case, we would recommend the maxim of audi altrem partem and feel that the applicant should be given an opportunity to be heard and then a decision be taken about her continuance or termination, as the case may be. It would not be fair to terminate her services by taking the specious plea of unsatisfactory performance during the period of termination.

14. In the result, the application succeeds and the impugned orders No. F87-1/NVS-JR/PROB-PGT (ECO) 6043 dated 30.9.2004, No. F87-1/NVS-JR/PROB-PGT (ECO)9257 dated 19.1.2005, No. F.9-9/05-NVS (Estt) dated 16.8.2005 are quashed and set aside. Respondents are directed to reinstate the applicant in service and allow her all the consequential benefits within a period of three months from the date of receiving the certified copy of this order. They are however at liberty to take any appropriate legal action against the applicant under the prescribed rules. No order as to costs.

17. The petitioner has challenged the order dated 20.3.2007 passed by the Tribunal.

18. The facts noted by us in paras 4 to 9 above are not in dispute. Indeed the said facts show the recalcitrant, obdurate and non-working attitude of the respondent and indeed none can argue that such a person requires to be confirmed in service. Without proof of any medical infirmity and refusing to subject herself to a medical examination before a duly constituted Medical Board, the respondent did not work. From the facts noted in said paragraphs it is apparent that after 30.4.2003 the petitioner hardly worked, in truncated periods for not more than 3 months in the remainder of the period spanning 1 year and 7 months.

19. We now deal with the legal issue required to be dealt with. Whether the maximum period for which the respondent could be kept on probation was 3 years or the period was 4 years. To put it differently whether it was Clause 2 of the letter of offer dated 5.7.2001 which had to be treated as controlling the period of probation or it was the DOP & T's circular, relevant part whereof has been noted in para 14 above.

20. The law on deemed confirmation of a probationer is clear and stands very clearly noted in the decision reported as High Court of Madhya Pradesh thru. Registrar and Others Vs. Satya Narayan Jhavar, High Court of M.P. v. Satya Narayan Jhavar, followed with approval by the Supreme Court in the decision reported as Rajinder Singh Chauhan and Others Vs. State of Haryana and Others, Three situations result in two different results is the ratio which can be culled out from the said two decisions. Situation one is where in the service rules or in the letter of appointment a period of probation is specified with a power to extend the same without prescribing any maximum period of probation and no order is passed confirming the probationer. The second situation is where the rules for initial probation and extension thereof provide a maximum period for extension and also provide that beyond the maximum period it is not permissible to extend the probation. The third is where the rules prescribe a maximum period of probation but also require a specific act on the part of the employer to issue an order confirming the appointment. It was held that no order confirming the probation would not be treated as a case of deemed confirmation under situation one or situation three. Only under situation two would it be treated as a case of deemed confirmation.

21. The logic of the reasoning is clear. If, as in situation two a maximum period for probation is provided with a negative stipulation that beyond said period probation cannot continue, it follows automatically that if the probation continues beyond the maximum period it has to be treated as a case of deemed confirmation for the reason the negative stipulation prohibiting continuation of probation beyond the maximum period prescribed must take its effect.

22. In the instant case even if we read Clause 2 of the letter offering appointment as the rule of law governing probation of the respondent, it only stipulates that the period of probation could be extended by one year. No negative covenant is contained therein that the probation cannot be extended beyond one year of the initial period prescribed i.e. two years. Thus, even on the language of Clause 2 it cannot be said that after the third year reckoned with effect from 25.7.2001 i.e. on 25.7.2004 it has to be treated that the respondent was deemed to be confirmed.

23. That apart, as held by the Supreme Court in the decision reported as Sant Ram Sharma Vs. State of Rajasthan and Another, It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue

administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

24. Thus, the admitted position being that no statutory rules have been framed by the petitioner or by the Government governing the field of appointment, probation and confirmation of teachers of Kendriya Vidyalaya, the DOP & T guidelines, relevant contents whereof have been noted in para 14 above would govern the field as occupied territory and thus it is a case where the period of initial probation of 2 years was extendable by another 2 years. The view which we have taken is in conformity with the view taken by a Co-ordinate Division Bench of this Court in its decision dated 19.1.2006 in W.P.(C) No. 4447/2003 *Shri Dinesh Kumar v. The Commissioner Navodaya Vidyalaya Samiti*. The first period of probation commenced on 25.7.2001 and 2 years were over on 25.7.2003, the probation could be extended for another 2 years. The same was extended on 30.9.2004 with retrospective effect and the extended period was up to 25.1.2005 which is well within the next 2 years period which would be completed by 25.7.2005. It was within this extended period that services of the respondent were dispensed with by an order which is innocuous and non-stigmatic. We note that there are good grounds not to confirm the services of the respondent.

25. Thus, the writ petition is allowed. Impugned judgment and order dated 20.3.2007 is set aside and OA No. 2848/2005 is dismissed.

26. Keeping in view that the respondent has lost a job we refrain from imposing any cost.