

(2017) 12 OHC CK 0075

In the Orissa High Court

Case No : 22731 of 2017

Dr. Sibabrata Mishra

APPELLANT

Vs

State of Odisha and others

RESPONDENT

Date of Decision : 15-12-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court

Citation : (2017) 12 OHC CK 0075

Hon'ble Judges : S.N.Prasad

Bench : SINGLE BENCH

Advocate : Banoja Ku.Pattnaik, S.S.Parida, K.Mohanty, S.Pattanaik, M.R.Mohanty, Bibhu Prasad Tripathy, R.Acharya, T.Barik, A.Pati, N.Barik, S.R.Ojha, A.Patnaik

Final Decision : Dismissed

Judgement

1. This writ petition under Articles 226 and 227 of the Constitution of India whereby and where under the petitioner seeks for the following reliefs: (i) for quashing of the order dated 26.9.2017 whereby and where under the petitioner has been terminated from service with retrospective effect;

(ii) the order of relieve dated 26.9.2017 whereby and where under the petitioner has been relieved from duty; and

(iii) Opposite parties be directed to renew the contract service agreement and allow the petitioner to continue in the post of Hospital Manager, Rayagada with all service and financial benefits.

2. Brief facts of the case of the petitioner is that the Mission Director, National Rural Health Mission, Odisha, opposite party no.3, issued an advertisement being Advertisement no.22/11 inviting applications from eligible candidates for filling up various posts under Nationals Rural Health Mission, Odisha on contractual

basis for a period of 11 months subject to renewal as per the society norms. The petitioner having qualification of Master in Hospital Administration with post graduate in Diploma in computer application and being eligible, applied in the prescribed manner for the post of Hospital Manager in response to the said advisement. The petitioner being successful in the written test, was called for the interview and computer test in which he has found to be successful, was appointed as Hospital Manager on contract basis from 8.12.2011 with condition that the said appointment can be extended up to 11 months from the date of his joining subject to continuance of the project and the service would be extended if the performance is found to be satisfactory. The petitioner has started discharging his duty with utmost satisfaction of his superiors and since the date of his appoint the authorities taking into consideration his performance has renewed the contract time to time but the same has not been renewed and he has been terminated from service vide order issued in this regard on 26.9.2017 . The authorities after assessing his performance has kept his performance under observation for its assessment for the period of two quarters vide order dated 27.12.2016 under Annexure-11, but his performance has found not satisfactory, hence his contract has not been renewed vide order dated 26.9.2017 as contained under Annexure-16 on the ground that the Contract Renewal Committee in course of assessment of his performance has found it as poor. The petitioner, against the decision of the authorities vide office order dated 26.9.2017, is before this Court by way of the instant writ petition on the ground that the office order dated 26.9.2017 is not sustainable since it has been passed by not renewing the contract with effect from 26.6.2017 and from that date he has been relieved from service, hence it is a case of retrospective termination which is not permissible. The performance which has been assessed by the direct controlling authority is found to be very good but the reviewing authority and the highest authorities is of the view that his performance is poor but no basis of assessment is ever been furnished to him and it is settled that in case of adverse entries of the performance report, the same should be furnished before making adverse entry but here in the instant case the authorities, in complete defiance of the said proposition of law, has not renewed the contract and accordingly terminated him from service while he has discharged his duty with utmost satisfaction of the authorities, that is the reason his immediate controlling authority has assessed his performance as good and very good. The authorities have given no notice prior to termination and as such there is violation of principle of natural justice. The performance of the petitioner has been kept under observation for two quarters but other mandatory provision as provided under the guideline which contains provision of keeping performance of the engagee in three months observation, hence the petitioner has not been provided with adequate opportunity to improve himself even if there is poor performance. The authorities with malafide intention has assessed the performance of the petitioner as poor in order to substitute him with another stop gap arrangement which is not permissible and one stop gap arrangement cannot be substituted by another stop gap arrangement.

3. Learned senior counsel appearing for the petitioner has relied upon the judgment rendered by the Hon"ble Apex Court in the case of Dev Dutt -v- Union of India & others, AIR 2008 Supreme Court 2513 which contained provision of law that adverse entry made in the Annual Confidential Report if not communicated cannot be taken for the purpose of taking adverse decision against the concerned employee and the proposition in the said judgment is applicable since poor performance has never been communicated to him, hence the entire action of the State is absolutely illegal and not sustainable.

4. This Court while hearing the writ petition at the first time on 7.12.2017 Mr. B.P.Tripathy, learned State counsel has accepted notice on behalf of the National Rural Human Mission and as such was directed to file counter affidavit and in view thereof, counter affidavit has been filed on behalf of the opposite party no.3, inter alia therein, it has been stated that the case of the petitioner has got no merit in view of the fact that the petitioner has been appointed with specific terms and conditions of having engaged on contract basis subject to good performance in service. The Manual related to National Rural Health Mission itself suggests that appointment will be on temporary basis which will be on contract with specific condition of termination of service on the ground of inefficiency, insubordination and insincerity in doing the work of the authority or for any misconduct or committing irregularities and impropriety of administrative and financial nature. It has been stated in the offer of appointment issued in favour of the petitioner an agreement was entered into and the same has been renewed since the date of appointment last being 16.1.2017 wherein specific condition has been inserted regarding duration of agreement i.e. from 27.12.2016 to 26.6.2017 subject to satisfactory performance of duties and midterm evaluation of the work concomitant to the provisions of Articles 6 and 7 of the agreement be renewed. The engagee shall neither have any right or lien on the contractual job and the services shall stand automatically terminated at the expiry of the contract period or at the end of the project or abolition of the post by Government of India or cessation of release of funds whichever is earlier. There will be performance appraisal in every eleven months and if two consecutive appraisals are found average the contract will stand automatically cancelled.

The agreement further contains condition regarding termination which confers power upon the authorities to terminate the agreement and no compensation shall be payable in such a case. Services can be terminated at any point of time by the competent authority of the Society if the engage is found to be involved in criminal offence or guilty of any insubordination, intemperance or other misconduct or of breach or non-performance or at the completion of the project as intimated.

5. An order has been passed by the Mission Director, National Health Mission dated 10.4.2015 which has been taken on the basis of the State Level Contract Renewal Committee meeting held on 30.3.2015 and 2.4.2015 whereby and where under it has been provided that those employees, whose remarks were

recorded in the Performance Appraisal Report as "Good" for two consecutive terms, their performance having been of minimum utility for achievement of Mission objectives and not having been improved from the previous year mediocre performance, their performance will be kept under observation for two quarters from the date of expiry of the last contract period with a day break in between the date of expiry of last contract period and commencement of the observation period. It has been further provided that in case of contractual employees whose Performance Appraisal Report assessment has been rated as "Good" or above for unexplained reasons, but has been assessed at the State level that the performance of the employee has been at the sub-optimal level and adverse to the interest of the scheme, the State authorities can take up independent evaluation and assessment of the employee by their own mechanism keeping the employee under three months observation period with a speaking order on the same. According to them, the case of the petitioner has been kept for observation for two quarters but during that period his performance is not found to be improved, hence the authorities in compelling situation has taken such decision.

It has been stated that the reporting officer has assessed the performance of the petitioner and according to the procedure the same has been sent before the immediate controlling authority but he has not agreed with the assessment of the ADMO(Medical) and overall assessment has been assessed by him as good, then it came before the Joint Director the highest authority who has agreed with the remark of the reviewing authority and he has given his opinion regarding the overall assessment of the appraisee as average with the reasons that he is not improving after instruction, he needs more involvement in the programme to improve the hospital (Heath service as a whole) and thereafter the final decision has been taken by the Mission Director who is the ultimate authority of the State to see the better performance of the scheme for the purpose of which it has been lunched but he, on considering the various reason, has assessed his assessment as poor and accordingly the authorities have issued notice to him, the authorities have given two quarters time even though he has not improved himself, hence the authorities have taken decision not to renew his contract.

6. Learned counsel for the Mission has submitted that the very basis of introducing the scheme of the Human Resource Development of the Central Government is to ensure improvement in the human resources of the country and that is paramount consideration of the scheme in which the petitioner has failed to achieve the project and as such the authorities without any mala fide intention in this regard has taken decision not to renew the contract. He further submits that the petitioner has got no right to claim his appointment since the very appointment is on contract basis depending upon the terms and conditions of the contract which he has accepted and knowing the entire terms and conditions of the contract and as such on the said terms and conditions the authorities on overall assessment of his performance has taken decision not to renew the agreement, hence there is no illegality.

7. Heard learned counsel for the parties and perused the materials available on record.

8. This Court has thought it proper, before going into the legality and propriety of the decision by the authority, to go through the scheme of appointment which is under National Rural Health Mission for effective Human Resource Management which can help in ensuring that the staff knows the what they are supposed to do and get feedback and feed value and opportunity to grow in the job. The basic aim of the Mission is to achieve human resources development across the country has been constituted under the control of the Department of Health and Family Welfare of the Government of Odisha for smooth functioning of the scheme carried out by the Society by the financial aid of the Government of India and the State Government. National Rural executed by the State Government through the society. The authority has come out with an advertisement for engagement of various categories of posts under the scheme which is absolutely temporary in nature, one of the advertisement published for selection as Hospital Manager in which the petitioner being an applicant has participated and accordingly he was declared to be successful and subsequently he has been engaged by virtue of an agreement entered into in between the opposite party in the year 2011 and started discharging his duty. The terms of the contract is for one year subject to satisfactory performance of duties and midterm evaluation of the work concomitant to the provisions of Articles 6 and 7 of the agreement , it can be renewed. The specific condition has been put that there will be performance appraisal in every eleven months and two consecutive appraisals are average the contract will stand automatically cancelled. The petitioner agreed with the said terms and conditions has joined and his terms of contract as extended from 2011 till passing of the order dated 26.9.2017 but vide office order dated 26.9.2017 the authorities have decided not to renew his contract on the ground of having poor performance for the assessment period rendered from 27.12.2016 to 26.6.2017 which has been assessed as poor. The petitioner being aggrieved with the said decision is before this Court by way of the instant writ petition.

9. It is evident that the period in question the petitioner has entered into agreement on 16.1.2017 accepting the terms and conditions that the contract shall be from 27.12.2016 to 26.6.2017 to be renewed subject to satisfaction of the performance of duty and performance appraisal can be assessed in every 11 months and if two consecutive appraisals are average the contract will stand automatically cancelled. The other terms of the contract is that the services of the engage may be terminated at any point of time by the competent authority of the Society if the engage is found to be involved in criminal offence or guilty of any insubordination, intemperance or other misconduct or of breach or non-performance or at the completion of the project as intimated. The performance appraisal report of the petitioner has been assessed for the period from 26.12.2016 till 26.6.2017 and the immediate controlling authority in course of evaluation of the managerial and personal interest which has been duly been

filled up by the Asst. CDMO(Medical). The period of assessment 7.11.2016 to 6.5.2017 and from its perusal it is evident that ability to plan, monitor and assess the assigned job has been assessed as very good; Interpersonal relationship, communication creativity and innovation, flexibility and adaptability, leadership, ability to persuade others in carrying out assigned duties, updating profession/technical competency and decision making skills have been assessed as very good.

The assessment conducted by the Assist. District Medical Officer(Medical) has been scrutinized by the CDMO, Rayagada who has not agreed with the assessment of the Assistant District Medical Officer by giving a reason that lot of gap of the work assigned and job completed, obedient, honest, sincere but take lacks initiatives and attitude, not willing for input of extra effort, managerial skill lacking and authority and command over staffs under his control not up to mark, hence it has been assessed regarding ability of the appraisee on strengthening programme implementation and monitoring needs to improve physical, psychological attitude to fix a goal and prepare the microplan to achieve. There needs to find the path to settle the issues if at all and to foresee the inevitable and accordingly overall assessment of the appraisee has been assessed as good.

The Director of the Mission in course of the assessment of the performance has admitted the assessment of CDMO with an assessment that the petitioner has to improve his working pattern and attitude and accordingly overall assessment has been assessed as average. But so far as the overall grading, according to his opinion, the petitioner is not improving after several instructions, he needs more involvement in the programme to improve his hospital administration as a whole.

The Mission Director has also not agreed with the assessment of the reviewing authority and as such his performance is poor. It is evident from the performance assessment of the appraisal of the petitioner that save and except the reviewing authority and other higher authorities who in course of review, the decision taken by the reviewing authority has found the performance of the petitioner as poor and accordingly the authorities in compliance to the terms and conditions of the agreement, has issued notice after following the provision made in the contract to give two quarters for his improvement but even that he has not improved, hence decision has been taken not to renew the contract.

10. Learned senior counsel submits that the authorities in highly arbitrary and illegal manner and in order in order to substitute him by another stop gap arrangement, the decision has been taken reversing view of the reviewing authority hence the entire decision is illegal but this argument is not acceptable to this Court for the reason that the CDMO or the Joint Director(Technical), National Health Mission , all the three authorities have concurred regarding the poor performance of the petitioner by treating with the opinion given by the reviewing authority. The petitioner has not alleged any allegation of malafide against any of the authorities and no pleading to that effect has been made in the writ petition and it is settled that leveling allegation or malafide is easy but

proving it is difficult, moreover no such allegation has been leveled rather learned counsel for the petitioner has argued that since on the basis of the principle that one stop gap arrangement cannot be substituted by another stop gap arrangement when the review authority assessed the performance, what led the authority to differ with his view and also on the ground that differing of the view by the authority has never been communicated to him and as such it is settled that on the ground that non-communication of the adverse entries, no decision can be taken which is detrimental to the interest of the concerned employee but all the three grounds, in course of assessment of the material aspects in the writ petition is having not force for the reason that the petitioner has been engaged in the year 2011 and he has continued up to the period of not renewal of the contract i.e. for the period of more than 5 years, but in the current years the authorities have found that his performance is not good rather it is poor and this decision has been taken and opined by them taking into consideration the basic objective of the Mission which is for betterment of the Hospital Management in the State and the same is on the basis of the target and achievement of the project and the engagee is not in a position to achieve the target, the authorities will not be suppose to retain in service irrespective of his bad performance. The petitioner's grievance is that the said communication has not been communicated and as such the same cannot be treated against him but this principle is not applicable in this case because it is not adverse entry made in the Annual Confidential Report but it is the appraisal of the performance depending upon the terms and conditions of the contract which stipulates the condition that on every 11 months the performance of the engagee will be assessed and in case it is found that the assessment is not found good he can be terminated from service and as such the principle which has been laid down in the service jurisprudence that if the adverse entry made in the Annual Confidential Report, no decision has been made regarding adverse entry, the same is not applicable. The decision has been taken by the authority in pursuance to the terms and condition of the contract and the paramount consideration to take such decision is for betterment of the State hence the public cause at large is involved.

The second argument that one stop gap arrangement cannot be substituted by another stop gap arrangement, is also not applicable but here it is not substitution of one stop gap arrangement rather the petitioner has been terminated by not renewing the contract on the ground of bad performance in discharging of his duties and if that would be there, competent authority has got every right to replace such type of employee by better one to achieve the mission.

11. Learned senior counsel for the petitioner has submitted that the reviewing authority has assessed the performance of the petitioner as very good but there was no occasion for the three authorities to completely differ with the same, hence there is malafide but who is at malafide intention that has not been mentioned in the writ petition and it is the considered view of the Court that all

the three authorities cannot have grudge against the petitioner and moreover this has not been pleaded in the writ petition. He has further submitted that in view of the provision of Clause No.viii in the order dated 10.4.2015 since has not been complied, hence the petitioner has not been provided provided to improve himself but the same is also having no force for the reason that the order dated 10.4.2015 contains the two provisions, one is (vii) and another is (viii). For better appreciation both the clauses have been quoted herein below:

(vii) Those employees, whose remarks were recorded in the PAR as "Good" for two consecutive terms, their performance having been of minimum utility for achievement of Mission objectives and not having been improved from the previous year mediocre performance, their performance will be kept under observation for 2(two) quarters from the date of expiry of the last contract period with a day break in between the date of expiry of last contract period and commencement of the observation period.

(viii) In case of contractual employees whose PAR assessment has been rated as "Good" or above for unexplained reasons, but has been assessed at the State level that the performance of the employee has been at the sub-optimal level and adverse to the interest of the OSH&FW Society scheme, the State authorities can take up independent evaluation and assessment of the employee by their own mechanism, keeping the employee under 3(three) months observation period with a speaking order on the same."

The provision made in the clause-vii is to create with respect to such type of employee whose remarks were recorded in the performance appraisal report as good for two consecutive terms, their performance having been of minimum utility for achievement of Mission objectives and not having been improved from the previous year mediocre performance, their performance will be kept under observation for two quarters from the date of expiry of the last contract period with a day break in between the date of expiry of the last contract period and commencement of the observation period. According to the opposite parties as also the petitioner this has been followed and even in following that, performance of the petitioner is not been approved, hence the decision has been taken by the appraiser not to renew the contract but the grievance of the petitioner is for non observance of the condition stipulated in clause no.viii but the same is not applicable so far it relates to the case of the petitioner is concerned, for the reason that the same is related to the performance appraisal report assessment for unexplained reasons and in that category of the employee the three months observation period has been provided but here in the instant case, this Court has come across is not for unexplained reason rather the reason is known that is the poor performance that has been arrived by three concurrent authorities while assessing the performance of the petitioner, hence there is no applicability of the condition stipulated in clause-viii for further giving three months rather the petitioner has been given six months i.e. two quarters in pursuance to the condition stipulated in clause-vii.

12. This court, after taking into consideration the entire aspect of the matter as per the discussion made in the above, is of the view that the petitioner has failed to make out a case for remaining in service and furthermore since it is contractual appointment and the petitioner is knowing his fate on the basis of the terms and conditions mentioned in the agreement and also considering the fact that no malice has been levelled against the petitioner by the opposite parties rather that has been done in all fairness, notice has been issued, but as per the counter affidavit the petitioner has denied to accept it which is also example of insubordination and not expected from such category of employee to not to face the situation as would be evident from para-11 of the counter affidavit which has not been rebutted by the petitioner. Hence in the entirety of the facts and circumstances of the case the petitioner fails to make out a case, hence the writ petition lacks merit.

Accordingly, the same is dismissed.