

(2013) 08 DEL CK 0170

In the Delhi High Court

Case No : Writ Petition (C) No. 5788 of 2011

Hem Singh

APPELLANT

Vs

The Director of Education and Others

RESPONDENT

Date of Decision : 26-08-2013

Acts Referred:

Constitution of India, 1950 — Article 21A

Citation : (2013) 08 DEL CK 0170

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : M.A. Niyazi, for the Appellant; Anjana Gosain, for R-1 and Mr. Vikram Saini, for Ms. Asha Saini, for R-2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—By this writ petition, the petitioner impugns the order of the Delhi School Tribunal dated 3.2.2011. By the impugned order the Delhi School Tribunal has dismissed the appeal and held that petitioner was rightly terminated from services during the period of probation. In the recent judgment dated 25.7.2013 in W.P.(C) 8652/2011 titled as Hamdard Public School Vs. Directorate of Education and Anr., I have after giving the reasons held as under:-

3. Sub-Rule 1 of Rule 105 provides the original period of probation as one year, and which can be extended by the appointing authority. What is the period for which probation can be extended is however not provided in Sub-Rule 1. Sub-Rule 1 further provides that services of an employee can be terminated without notice during the period of probation if the work and conduct of the employee is not satisfactory. First Proviso to the Sub-Rule 1 states that the requirement of the provision of Sub-Rule 1 of seeking approval of the Director of Education with regard to extension of period of probation by another year shall not apply in case of an employee of a minority school. The first proviso is therefore really limited for getting permission of the Director of Education for extension of the probation period "by another year". It be noted that the expression is not "only another

year" or "only another one year" or "a maximum period of another year" or "maximum period of another one year" etc. etc. The expression only uses "another year" without specifying an outer limit of the probation period. Also, even if in some manner of interpretation we take the expression "another year" to mean that there can only be one additional year of probation after the original one year of probation, even then, there is nothing found in the first proviso providing for automatic or deemed confirmation. As already stated above, first proviso only functions in a limited field qua getting permission of Director of Education. Neither the main body of Sub-Rule 1, nor the first proviso, provides for a maximum period of probation, and also they do not provide for automatic or deemed confirmation. The following conclusions therefore in my opinion can safely be drawn from reading of Sub-Rule 1 of Rule 105 alongwith its first Proviso.

(i) Sub-Rule 1 prescribes an initial probation period of one year, however, there is no maximum period of probation which is prescribed in this Sub-Rule.

(ii) Services of an employee can be terminated during the probation period (and which maximum probation period is not prescribed), if the work and conduct of the employee is not satisfactory.

(iii) Neither Sub-Rule 1 nor the first proviso provides for automatic or deemed confirmation on the expiry of the period of probation.

(iv) The first proviso only uses the expression "by another year" and not "by another one year" or "by another one year only" or "maximum by another year" i.e. in the first proviso there is no outer limit of probationary period prescribed like there is none in the body of the main Sub-Rule 1.

(v) The first proviso can in a way be said to only deal with a minority school not requiring permission of the Director of Education, and the same does not concern other schools in Delhi.

I must hasten to add that in terms of the judgments which have been passed by Division Benches of this Court in the cases of The Managing Committee of Geeta Bal Bharti Senior Secondary School and Another Vs. Director of Education and Others, and Delhi Public School and Another Vs. Shalu Mahendroo and Others, in spite of certain provisions requiring prior approval of Director of Education with respect to certain acts and actions of the school, it has been held that with respect to unaided schools, no prior permission is required of the Director of Education. I am of course not touching on those aspects because such aspects are governed by the ratios of the judgments in the cases of Kathuria Public School (supra) and Delhi Public School (supra).

(vi) Neither the main Sub-Rule 1 and nor the first proviso to Sub-Rule 1 in any manner specifically and categorically not only does not provide for a maximum period of probation but they also do not provide for deemed or automatic confirmation.

xxx xxx xxx

11. Now that takes us to the most vexed question as to what should be a reasonable period. We will have to keep in mind Article 21A of the Constitution for this purpose. To understand the issue of what should be a reasonable period qua Rule 105 as regards a teacher, let us start with two extreme examples. One extreme example is that probation period cannot be extended at all for the third year and the other extreme example is that the probation period can be kept on extending by the management even till the age of superannuation. Obviously, both these extreme situations cannot decide what is a reasonable period. In many statutory rules and rules of many organizations, there is provided a three year period of probation like in the case of Lawrence School (supra). Therefore, probation period undoubtedly can be of 3 years under Rule 105 because as already stated there is no outer limit of probation period provided. The question is that for how long beyond the third year can a period of probation continue. In my opinion, reasonable period will have to be dependent on the facts of each case including as to what is the post or nature of employment in question, what are the terms and conditions agreed to at the time of original appointment and subject of course to the same being in accordance with Delhi School Education Act and Rules, 1973. The nature of job or duties to be performed by the teacher will also have to be kept in mind. It will also have to be kept in mind whether the teacher will be overage for similar employment if he/she is not confirmed. Keeping in mind all the relevant facts, probation period, except in exceptional cases, so far as a teacher is concerned, should not continue beyond a period of 5 years from the first date of appointment. Even a period of 4/5 years has to be really in a very grave and exceptional case depending on the facts of that case. However, I do not express myself finally with respect to what should be a reasonable period between 3 to 5 years because Courts will necessarily examine that aspect in the facts and circumstances of each individual case. I am making these specific observations with respect to the maximum period of probation being ordinarily only of 5 years because in the absence of fixing an outer limit by the statute viz Rule 105, the entire purpose of a probation period and a probationary teacher being confirmed would be defeated by the machinations of the management of the schools in certain cases thus affecting education and bringing in of Article 21A in the Constitution. Therefore, I hold that the Rule 105 must be so interpreted that the reasonable period therein should ordinarily be around three years, should not extend beyond five years in most of the cases, and, in the rarest or rare cases, one more year upto 6 years may be considered. However again at the cost of repetition it is stated that six years period is being observed only as a most grave and rarest of rare circumstance in a case, and ordinarily, a probation period qua a teacher should not extend beyond/around three years which is a reasonable period, and as per the facts and circumstances of certain case, and which issues/decisions are of course justiciable before Courts the probation period can go up to 5/6 years as stated above.

12. Coming now to the facts of the present case, I have already reproduced the appointment letter above, and which not only does not contain a maximum

period, but the same also requires a confirmation order. Since Rule 105 does not contain a maximum period of probation, and having held that the same can ordinarily be of three years, it cannot be said that probation period could not have been for a third year in this case. Respondent no. 2 was terminated by non-stigmatic order of termination in the third year of appointment i.e. in the third year of probation. Once I have held that in many organizations even three years of period of probation is provided, I do not think that in the facts of the present case, the petitioner-school was in any manner acting illegally in continuing the probationary period to the third year. As already stated the letter of appointment of the respondent no. 2 specifically states that respondent no. 2's probationary period will come to an end successfully only by a specific order of confirmation. Since the termination of the respondent no. 2 is by a non-stigmatic order dated 1.10.2005, within the third year of probation, I am of the opinion that the services of respondent no. 2 were validly terminated during the period of probation. I may note that there is no challenge before me on behalf of the respondent no. 2, and nor was there such a challenge by the respondent no. 2 before the Tribunal, that the order of termination is not non-stigmatic. It is also not the case that the school-management has illegally, arbitrarily, vexatiously and malafidely not considered the respondent no. 2 for confirmation in spite of satisfactory work.

(Emphasis added)

2. In the present case, petitioner was first employed on probation in terms of the letter of the school dated 15.3.2007. Probation period was of one year till 14.3.2008. School thereafter instead of extending the period of probation gave a fresh appointment of one year from 1.4.2008. This period of probation was continued in terms of the letter dated 31.3.2009 of the school up to 31.3.2010. I am treating the appointment of the petitioner as continuing on probation since 15.3.2007 and am not treating the appointment given in terms of the letter dated 30.5.2008 for one year w.e.f. 1.4.2008. Thus the petitioner was terminated from service within the third year from the first date of employment inasmuch as first date of employment is 15.3.2007 and the termination order is dated 19.2.2010. The termination order dated 19.2.2010 reads as under:-

Army Public School

Shankar Vihar

Delhi Cantt-10

19 Feb 2010

1105/APS SV

Mr. Hem Singh

Army Public School

Shankar Vihar

TERMINATION OF APPOINTMENT

Dear Sir,

1. Based on your performance report and the advisories given to you during your period of probation at Army Public School, Shankar Vihar, the Management Committee has decided to terminate your services in the school with effect from 20 February 2010 without any notice.

2. One month salary in lieu of the notice period will be credited to your salary account as per the Terms and Conditions of your appointment.

Yours sincerely

(Sanjeev Relia)

Colonel

Manager for Chairman

3. The termination is therefore by a non-stigmatic order which states that the petitioner's service is not continued on the basis of performance report and advisories given during the period of probation.

4. Counsel for the petitioner sought to contend that the petitioner's services were satisfactory and termination of services of the petitioner was malafide because the school had issued the general directions in terms of the certain letters dated 19.4.2009 and 30.3.2009 whereupon all employees have to be terminated from services and employed afresh on term basis on consolidated pay instead of pay-scales.

It is settled law that this Court cannot sit in the arm-chair of the employer to decide the suitability of services of an employee. The termination letter in this case dated 19.2.2010 refers to the performance report and advisories given to the petitioner during the period of probation for terminating the services. Unless and until, *ex facie*, the judicial conscience of this Court is shocked, I cannot substitute my decision for that of the employer to decide the confirmation of an employee who is on probation. The Supreme Court in the recent judgment of *Muir Mills Unit of N.T.C. (U.P) Ltd. Vs. Swayam Prakash Srivastava and Another*, has held that if the termination order says that the performance is unsatisfactory, even then, it cannot be said that the order is stigmatic. Supreme Court further observed that there was no need of compliance of the principles of natural justice with respect to the termination of the services of a probationer. Paras 44 to 46 of the said judgment read as under:

44. Also in the case of *Registrar, High Court of Gujarat and Anr. v. C.G. Sharma* it was observed that an employee who is on probation can be terminated from services due to unsatisfactory work.

45. This Court's decision in the case of *P.N. Verma v. Sanjay Gandhi PGI of Medical Sciences* can be referred to in this context, where it was held by this

Court that, the services of a probationer can be terminated at any time before confirmation, provided that such termination is not stigmatic. This Court in *State of Madhya Pradesh v. Virendera Kumar Chourasiya* also has held that in the event of a non-stigmatic termination of the services of a probationer, principles of *audi alteram partem* are not applicable.

46 We are also of the view that the award of the Labour Court is perverse as it had directed grant of back wages without giving any finding on the gainful employment of respondent No. 1 and held that the discontinuance of the services of a probationer was illegal without giving any finding to the effect that the disengagement of respondent No. 1 was in any manner stigmatic. The decision in the case of *MP State Electricity Board v. Jarina Bee (Smt) (supra)*, this Court held that payment of full back wages was not the natural consequence of setting aside an order of removal. In the instant case, though the termination was as far back as in 1983, the Industrial Adjudicator has not given any finding on unemployment. This Court in a recent case of *State of Punjab v. Bhagwan Singh*, (2002) 9 SCC 636 has held that even if the termination order of the probationer refers to the performance being "not satisfactory", such an order cannot be said to be stigmatic and the termination would be valid.

(Emphasis added)

5. The Supreme Court in the judgment in the case of *State of West Bengal and Others Vs. Tapas Roy*, has held that where the discharge order mentions instances of unauthorized absence of the probationer and concludes that he was not interested in training and had no respect for discipline, then making of such remarks in the termination order cannot be said to make the termination order a stigmatic one. Paras 4,5 7 and 8 of the judgment in the case of *Tapas Roy (supra)* read as under:-

4. The High Court allowed the writ petition holding that Rule 10 of the Rules did not apply in the facts of the case. It was also of the view that the statement, quoted below; in the order of discharge casts a stigma on the respondent. Since no opportunity of hearing had been granted to the respondent, therefore, the order could not be sustained. The decision of the Tribunal was, accordingly, set aside and the appellants were given liberty to take appropriate action against the respondent on the same grounds in accordance with law.

5. The particular passage from the order of discharge which the High Court found to be stigmatic reads as follows:

I am convinced that he is not likely to make an efficient constable and is unsuitable for the Police Department. His frequent unauthorised absence from training centre also indicates his lack of interest in training and his scant respect for discipline.

7. The order of discharge has, as we have already indicated, set out several instances of the respondent absenting himself unauthorisedly from the training

centre. These facts have been relied upon for the purpose of concluding that the respondent was not interested in the training and had no respect for discipline. This conclusion was a ground for holding that the respondent was unsuitable for the Police Department.

8. The High Court was of the view that Rule 10 of the Rules did not apply to orders which were stigmatic. As has already been held by this Court in *Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr*, that in order to constitute a stigmatic order necessitating a formal inquiry, it would have to be seen whether prior to the passing of the order, there was an inquiry into the allegations involving moral turpitude or misconduct so that the order of discharge was really a finding of guilt. If any of these three factors are absent, the order would not be punitive. We have also held that a stigma in the wider sense of the word is implicit in every order of termination during probation. It is only when there is something more than imputing unsuitability for the post in question, that the order may be considered to be stigmatic. In our view, the language quoted earlier in the discharge order, cannot be said to be stigmatic as it neither alleges any moral turpitude or misconduct on the part of the respondent nor was there an inquiry as such preceding the order of discharge. The order has been passed strictly in terms of Rule 10 of the Rules. We are, accordingly, of the view that the appeal must be allowed. It is, accordingly, allowed and the impugned order is set aside.

(Emphasis added)

6. The Supreme Court in the judgment reported as *Chaitanya Prakash and Another Vs. H. Omkarappa*, has again held that there is no need for following the principles of natural justice while terminating the services of a probationer and even if the termination order refers to the unsatisfactory service of the probationer, the order is not stigmatic. Paras 18 and 21 of this judgment read as under:-

18. It is no longer *res integra* that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In this connection, we make a reference to the decision of the decision of the Supreme Court in *Abhijit Gupta v. S.N.B. National Centre, Basic Sciences* (*supra*), wherein also a similar letter was issued to the concerned employee intimating him that his performance was unsatisfactory and, therefore, he is not suitable for confirmation. We have considered the ratio in light of the facts of the said case and we are of the considered opinion that the basic facts of the said case are almost similar to the one in hand. There also, letters were issued to the concerned employee to improve his performance in the areas of his duties and that despite such communications the service was found to be unsatisfactory. In the result, a letter was issued to him pointing out that his service was found to be unsatisfactory and that he was not suitable for confirmation, and, therefore, his probation period was not extended and his service was terminated, which was challenged on the ground that the same was stigmatic for alleged

misconduct. The Supreme Court negated the said contention and upheld the order of termination.

21. In *Abhijit Gupta (Supra.)*, this Court considered as to what will be the real test to be applied in a situation where an employee is removed by an innocuous order of termination i.e. whether he is discharged as unsuitable or he is punished for his misconduct. In order to answer the said question, the Court relied and referred to the decision of this Court in *Allahabad Bank Officers Association and another Vs. Allahabad Bank and others*, ; where it is stated thus:

14....As pointed out in this judgment, expressions like "want of application", "lack of potential" and "found not dependable" when made in relation to the work of the employee would not be sufficient to attract the charge that they are stigmatic and intended to dismiss the employee from service.

(Emphasis added)

7. Again in the case of *Rajesh Kumar Srivastava Vs. State of Jharkhand and Others*, Supreme Court has held that while taking a decision to terminate the services of the probationer, no notice is required to be given to the probationer nor is the probationer required to be given any opportunity of hearing. Para 10 of the said judgment reads as under:-

10. The aforesaid decision to release him from service was taken by the Respondents considering his overall performance, conduct and suitability for the job. While taking a decision in this regard neither any notice is required to be given to the Appellant nor he is required to be given any opportunity of hearing. Strictly speaking, it is not a case of removal as sought to be made out by the Appellant, but was a case of simple discharge from service. It is, therefore, only a termination simpliciter and not removal from service on the grounds of indiscipline or misconduct. While adjudging his performance, conduct and overall suitability, his performance record as also the report from the higher authorities were called for and they were looked into before any decision was taken as to whether the officer concerned should be continued in service or not.

(Emphasis added)

8. In the case of *Abhujit Gupta Vs. S.N.B. National center, Basic Sciences and Others*, Supreme Court has held that even when a termination order of a probationer referred to earlier letters which called the probationer a person of "perverted mind" and "dishonest, duffer having no capacity to learn" yet, the order would not be stigmatic one, and merely that if such an order was read by a prospective employer would prejudice the probationer's future employment, the same is not a correct test to determine the termination order as stigmatic. Paras 4, 5, 8, 10, 13, 15, 16 and 17 are relevant which read as under:-

4. On 20th November 1995 the appellant was served with a letter informing him that his performance during the probationary period was "far from satisfactory" and that it had been observed that he lacked drive, imagination and initiative "in

the performance of his duties". He was informed that, despite being told time and again to improve performance in the said areas, but with no effect. He was advised to improve "in order to enable us to consider your case for confirmation favourably". He was issued several such letters drawing his attention to the fact that his services left much to be desired. His probationary service came to be extended from time to time, the last such extension being granted till 9th April 1998. Finally, by the letter dated 7.4.1998 the petitioner was informed that his service was

"unsatisfactory in the areas of drive, initiative, promptness and leadership" and that despite advised verbally and through letter, what were deficiencies in his work he had shown no improvement. His attendance, office work and attention to the academic work and the affairs of the guest house were also unsatisfactory. The first respondent, therefore, said "your performance, ability and capability during the period of probation has been examined and your service during the period of probation is found to be unsatisfactory and hence you are considered unsuitable for the post you have to. The governing body is of the view that your performance was unsatisfactory and you are not suitable for confirmation". For these reasons the appellant's probationary period was not extended on the expiration of his probation period on 9th April 1999.

5. The appellant challenged the order of termination of his service on the ground that it was a stigmatic termination by way of punishment for alleged misconducts. The learned single Judge of the High Court allowed the writ petition and quashed the order of termination and directed re-instatement of the appellant with full back-wages. The Division Bench of the High Court, however, allowed the letters patent appeal and held that the letter dated 7th April 1998 was not stigmatic and that it was a legitimate exercise of assessment of probationer's service by the employer, and, therefore, there was no scope for judicial interference therewith. In this view of the matter, the Division Bench allowed the appeal, set aside the judgment of the learned single Judge and dismissed the writ petition. Hence, this appeal.

8. Heavy reliance was placed on *Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others*, where this Court held that the termination of service of the employee in similar circumstances amounted to misconduct. We may mention here that it is common ground that while the matter was pending before the learned single Judge, sometime in the year 2005, the appellant attained the age of superannuation. The learned Counsel for the appellant contended that in the letter dated 7.4.1998 there is reference to certain earlier letters in which the appellant had been called a person of "perverted mind" and "dishonest, duffer having no capacity to learn". A reading of all the letters referred to in the letter of 7.4.1998 would clearly make out a case of allegations of misconduct against the appellant, in the submission of the learned Counsel.

10. In *Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences*

and anr, this Court considered what should be the best to determine whether a letter of termination of service was termination simpliciter or stigmatic termination. After referring to a number of authorities including the judgment in Parshotam Lal Dhingra Vs. Union of India (UOI), and Dipti Prakash Banerjee (supra) the Court observed (vide para 19):

Courts continue to struggle with semantically indistinguishable concepts like motive" and "foundation"; and terminations founded on a probationer's misconduct have been held to be illegal while terminations motivated by the probationer's misconduct have been upheld. The decisions are legion and it is an impossible task to find a clear path through the jungle of precedents.

13. In the case of the appellant before us, the record in uncertain terms makes it clear that every time the appellants attention was drawn to his deficiencies and he was repeatedly advised to improve his behavior, conduct and discharge of work. True, that in some of the letters there was intemperate language used (the appellant was also equally guilty of doing that). Notwithstanding the intemperate language, we are unable to accept the contention of the appellant's counsel that the letter dated 7.4.1998 indicates that the appellant was being charged with the misconduct and, therefore, being removed from service. Read as a whole, the letter gives the impression that the removal of the appellant from service was only because the respondents, after giving a long rope to the appellant, had come to the conclusion that the appellant's service was unsatisfactory and there was no hope of his improvement.

15. The learned Counsel for the appellant, however, strongly contends that the "stigma" cast on the employee may not be confined to his personal character but may also affect his capacity to work. The test, learned Counsel for the appellant submitted, is that, if what is stated in the order of termination is read by a future employer, it prejudices the future employment of the employee. In the face of the law laid down in the judgment just referred, we are unable to accept this as the correct test.

16. In Ravindra Kumar Misra Vs. U.P. State Handloom Corpn. Ltd. and Another, this Court pointed out that in a large corporation administration is bound to be impersonal and in regard to public officers assessment of service has got to be in writing for purposes of record, though it cannot be assumed that such an assessment recorded and the order of termination made with reference to that record would automatically take a punitive character.

17. The High Court has carefully considered all the circumstances placed before it and arrived at the conclusion that the respondent's work was under observation during the probationary period and that he was given repeated opportunities to improve his performance for which purpose his probation was extended from time to time. The fact that the authority did not find him fit for confirmation was also brought to his notice several times and yet he was given opportunities of improving by extending his probationary service. The High Court has correctly

found that the letter dated 7.4.1998 was not punitive in nature and stated, albeit in prolix fashion, that the service of the appellant were unsatisfactory. The High Court points out, and we agree, that detailed reference to all other correspondence was not necessary, but it did not reflect any malice or bias. Finally, as this Court pointed out in P.N. Verma's case (supra) "a termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, does not ipso facto become stigmatic".

(Underlining added)

9. In my opinion, letters which are relied upon by the petitioner do not persuade me to hold the termination letter dated 19.2.2010 as malafide inasmuch as letters relied upon by the petitioner only show that there would have to be a fresh appointment after the original period of appointment. Also it is not disputed that there is no challenge before me to the contents of the letter dated 19.2.2010 which show that the services of the petitioner were not satisfactory as per the school. The practice which has already been followed at the time of granting of second appointment when instead of continuing the probation, a fresh appointment was granted, this aspect, I have already disregarded and have treated the petitioner as having continued from the date of first appointment in 2007.

10. Accordingly, I have no reason to substitute my judgment for that of the school with respect to the performance report of the petitioner and also the advisories given during the period of probation. I may note that counsel for the petitioner contended that no advisories were given to the petitioner during the period of service, however, on a pointed query, nothing could be pointed out that such averment has been made in the writ petition.

11. In the present case, petitioner was not a teacher in the school but was an Estate Supervisor. In my opinion, administrative staff of a school and other staff of the school, and who do not fall in the category of teachers, should be treated similarly to teachers because educational institution/school imparts education as a result of joint effort of all the employees. There is no reason to give a lesser beneficial treatment to non-teaching staff, and who should also be entitled to benefit of the ratio in the case of Hamdard Public School (supra).

However, even applying the said ratio, the respondent no. 1 services have been terminated during the probationary period of three years and for non-satisfactory services, therefore, the termination order is valid within the period so prescribed as per the ratio of Hamdard Public School (supra).

In view of the above, there is no merit in the petition and adopting the ratio in the case of Hamdard Public School (supra) and the fact that petitioner has been terminated in the third year of probation on account of non-satisfactory services the writ petition will stand dismissed, leaving the parties to bear their own costs.