

(2017) 03 CAL CK 0125

In the Calcutta High Court

Case No : W.P. No. 33593 (W) of 2013 and C.A No. 9558 of 2015

Jayanti Mondal

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 03-03-2017

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) LIC 1926 : (2017) 2 LLJ 276 : (2017) 1 LLN 660

Hon'ble Judges : Arijit Banerjee, J.

Bench : Single Bench

Advocate : Mr. Jayanta Banerjee, Mr. Sunil Kumar Chakraborty, Ms. Rama Chakraborty Mukherjee and Ms. Sreetama Neogi, Advocates, for the Petitioner; Mr. Shyamal Chakraborty, Advocate, for the Respondent; Mr. Susanta Pal, Advocate, for the Respondent Nos. 2 and 3; Mr. Biswajit De and Ms. Tapati Samanta, Advocate, for the State

Final Decision : Disposed Off

Judgement

Arijit Banerjee, J.—The subject matter of challenge in this writ petition is an order dated 30 April, 2012 whereby the respondent no. 2 being Sri Aurobinda Institute of Education, Salt Lake, Kolkata (hereinafter referred to as "the Institute") terminated the service of the petitioner with effect from 2 June, 2012.

2. The brief facts of the case are that the Institute by a letter dated 18 November, 2010 appointed the petitioner as a Casual Ayah on contractual basis for a period of six months with effect from 9 November, 2010 subject to extension of another six months on the basis of her performance. By a letter dated 30 June, 2011, the Institute extended the service of the petitioner by six months with effect from 9 May, 2011. By a letter dated 13 January, 2012 the Institute offered further employment to the petitioner on inter alia the term that she would be on probation for a period of one year from 1 January, 2012 to 31 December, 2012. By an order dated 30 April, 2012 the Institute terminated the service of the petitioner with effect from 2 June, 2012.

3. The petitioner made representations dated 14 May, 2012, 12 September, 2012 and 30 January, 2013(through her Advocate) to the Institute but there was no response from the Institute. Being aggrieved, the petitioner has approached this Court by way of the present writ petition.

4. Appearing for the petitioner Mr. Jayanta Banerjee, Learned Senior Counsel submitted that the impugned order of termination has been passed in breach of the principles of natural justice and as such is bad. No show cause notice was issued. No opportunity of hearing was given. The order has been passed on the alleged basis that the petitioner is in the habit of absenting herself from duty without prior sanction of leave. No opportunity of hearing was given to explain or refute such allegation. The Management was aware that during the period of her absence from service, her son was taking Higher Secondary examination and thereafter became sick which compelled the petitioner to stay away from service for a few days. The story of unauthorised absence of the writ petitioner has been concocted by the respondent authorities with the oblique motive of removing the petitioner from service.

5. In answer to the preliminary objection raised by Learned Counsel for the Institute as regards maintainability of the writ petition on the ground that the Institute is a totally private body over which the State has no control or to which the State does not give any financial aid, Mr. Banerjee, relied on a Division Bench decision of this Court delivered on 14 July, 2015 in FMA 805 of 2015 (The Governing Body, Durgapur Institute of Advance Technology and Management v. Subhangshuman De & Ors.) in support of his submission that the Institute is discharging a public function inasmuch as it is imparting education to students and as such is amenable to the writ jurisdiction. Learned Counsel also relied on a decision of the Hon'ble Apex Court in the case of Ramesh Alhuwalia v. State of Punjab, (2012) 12 SCC 331. He also relied on a decision of the Hon'ble Apex Court in the case of Dr. Janet Jeyapaul v. SRM University, AIR 2016 SC 73.

6. Mr. Banerjee finally submitted that the impugned order is not one of termination simpliciter but attaches a stigma to the petitioner. In this connection he relied on a decision of the Hon'ble Apex Court in the case of Ratnesh Kumar Choudhary v. Indira Gandhi Institute of Medical Sciences, Patna Bihar, (2015) 15 SCC 151.

7. Appearing for the Institute, Mr. Shyamal Chakraborty, Learned Counsel submitted that the Institute is not a State within the meaning of Article 12 of the Constitution of India. Neither the State has any manner of control over the functioning of the Institute nor the Institute receives any financial aid from the State. It is a private institute and a writ petition is not maintainable against it. He submitted that the protection of Article 311 of the Constitution is not available to the petitioner as she did not hold any civil post. In this connection he relied on a decision of the Hon'ble Apex Court in the case of Dr. S. L. Agarwal v. The General Manager, Hindustan Steel Ltd., AIR 1970 SC 1150, and in particular paragraph 7 thereof which reads as follows:-

"7. Clause (2) of the article, which gives the protection opens with the words "no such person as aforesaid" and these words take one back to clause (1) which describes the person or persons to whom the protection is intended to go. Clause (1) speaks of (i) persons who are members of (a) a Civil Service of the Union, or (b) an All-India Service or (c) a Civil Service of a State, or (ii) hold a civil post under--the Union or a State. (a), (b) and (c) refer to the standing services which have been created in the Union and the States and which are permanently maintained in strength. In addition to the standing services there are certain posts which are outside the permanent services. The last category in Article 311(I) therefore speaks-of such posts on the civil side as opposed to the military side. Incumbents of such posts also receive protection."

8. Learned Counsel then submitted that a probationer is bound by the terms of his/her appointment. The letter appointing the petitioner for one year on probation clearly stipulates that her service could be terminated by giving one month's notice without assigning any reason. There was no question of issuing a show cause notice or holding any enquiry. The person who is given provisional employment can be summarily discharged. In this connection he relied on a judgment of the Delhi High Court delivered on 11 February, 2015 in WP(C) 5603 of 2013 (Suresh Chand Jain v. Director General). He also relied on a decision of a Division Bench of this Court in the case of Surajit Bala v. State of West Bengal, 2011 (3) CHN (Cal) 329.

9. On facts, Learned Counsel submitted that the service of the petitioner was not satisfactory and she was warned in that regard by the Secretary of the Institute by a letter dated 24 November, 2011 whereby the petitioner was given an opportunity to improve her performance. In response to the order of termination, the petitioner by her letter dated 14 May, 2012 rendered unconditional apology for any laches on her part which indicates that she was conscious of her poor performance. On the basis of these submissions, Learned Counsel for the Institute prayed for dismissal of the writ petition. Court's View:

10 Taking up the point of maintainability of the writ petition first, it is clear that the present trend is to give the term "authority" used in Article 226 of the Constitution a liberal meaning unlike that term in Article 12. The Hon"ble Apex Court observed in the case of Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V. R. Rudani, (1989) 2 SCC 691, that Article 226 confers power on the High Courts to issue writs for enforcement of fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very relevant. In Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111, the Hon"ble Apex Court observed that even a purely private body, where the State has no control over its internal affairs would be amenable to the writ jurisdiction of the High Court provided the private body is

performing public functions which are formally expected to be performed by the State Authorities. In *Ramesh Alhuwalia v. State of Punjab* (supra), the Hon''ble Apex Court held that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. In that case the Apex Court held that the DAV Public School, Amritsar, although a purely unaided private educational institute, yet, was performing a public function, i.e. providing education to children in their institutions throughout India and hence, was amenable to the writ jurisdiction of the High Court.

11. In *Dr. Janet Jaypaul v. SRM University* (supra), the Hon''ble Apex Court held that the SRM University, Madras was engaged in imparting education in higher studies to students at large and was therefore discharging a public function. Hence, it is an "authority within the meaning of Article 12 of the Constitution and a writ petition would be maintainable against the University.

12. Our Division Bench in the case of *The Governing Body, Durgapur Institute of Advance Technology and Management v. Subhangshuman De* (supra), also held that since the institute, although a private body, was discharging public functions, an application under Article 226 of the Constitution would be maintainable against it.

13. I have referred to some of the case laws on the subject. There are legion more. There seems to be a consensus across all High Courts and also in the Hon''ble Apex Court that the form of a particular body or entity is not important. No single factor is decisive as to whether or not a body is a State or other authority within the meaning of Article 12 of the Constitution. Of course, if the administrative or financial control of the State over a body and its internal affairs is all pervasive, clearly the body would be amenable to the writ jurisdiction of the High Court. However, even an unaided institute enjoying complete autonomy and free from State interference as regards its internal administration may be amenable to the writ jurisdiction if the institute discharges functions of a public nature. It is irrelevant whether or not such public function is being performed pursuant to any statutory mandate. If a body operates in the public field touching the lives of public at large, its acts and omissions should be amenable to judicial review on the usual grounds of arbitrariness, unreasonableness, breach of natural justice etc.

14. In the present case, the institute indisputably is discharging a public function. It is imparting education to students at large. Hence, keeping in mind the above principles, I am inclined to hold that the present writ petition is maintainable. The preliminary objection raised on behalf of the institute accordingly fails.

15. Now, I take up the point of legality/sustainability of the order passed by the institute terminating the petitioner's service. It is not in dispute that the service of the petitioner was terminated by the impugned order dated 30 April, 2012 when she was on probation. The order of termination reads as follows:-

"It appears from the records that Smt. Jayanti Mondal and Ms. Gopa Barik whose services are placed on Probation are in the habit of absenting themselves from duty without prior sanction of leave from the appropriate Sanctioning Authority which is highly irregular and may be treated as Violation of Rules. The Authority is also not satisfied with their services rendered so far. Hence as per terms and conditions as referred to in their letter of Probation notice period is given to them for termination of their service w.e.f. 02.06.2012 i.e. their service is no longer required for this Institute from this date."

16. The grievance of the petitioner is that she was not given an opportunity of hearing before the order of termination was passed. This amounts to a breach of the principles of natural justice. The question thus arises to what extent a probationer is entitled to a hearing prior to termination of his/her service?

17. In *H. F. Sangati v. Registrar General, High Court of Karnataka*, (2001) 3 SCC 117, the appellants were appointed on probation in the Karnataka Judicial Service as Munsifs. The Administrative Committee of the High Court, after considering their confidential records and remarks given by their superiors on assessment of their work, formed an opinion that their performance as a Judicial Officer was not satisfactory for their confirmation in that post. That opinion was considered and accepted by the Full Court. The High Court made a reference to the State Government which in turn issued a notification discharging them from service on the ground of their unsuitability to hold the post of Munsif. Their challenge to such notification having failed before the High Court, they approached the Supreme Court. It was held that the service of an appointee to a permanent post on probation can be terminated or dispensed with during or at the end of the period of probation because the appointee does not acquire any right to hold or continue to hold such a post during the period of probation. The Supreme Court referred to its earlier seven Judge Bench decision in *Samsher Singh v. State of Punjab*, (1974) 2 SCC 831, wherein it was observed that the period of probation is intended to assess the work of the probationer as to whether it is satisfactory and whether the appointee is suitable for the post; the Competent Authority may come to the conclusion that the probationer is unsuitable for the job and hence, must be discharged on account of inadequacy for the job or for any temperamental or other similar grounds not involving moral turpitude. No punishment is involved in such a situation. The Supreme Court also referred to its earlier decision in *Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences*, (1999) 3 SCC 60, wherein it was held that termination of a probationer's service, if motivated by certain allegations tantamounting to misconduct but not forming foundation of a simple order of termination cannot be termed punitive and hence would be valid. The Supreme Court also held that since no stigma was cast on the appellants, there was no requirement to comply with the principles of natural justice, much less to hold any formal proceedings of enquiry before making such an order.

18. In *Purshotom Lal Dhingra v. Union of India*, AIR 1958 SC 36, the Hon'ble

Apex Court observed that in the case of an appointment to a permanent post in a Government service on probation (emphasise is mine) or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain any more that a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time.

19. Thus, it is clear that the law is well settled that during the probationary period, an employee's service can be terminated without going through the process of holding a disciplinary proceeding. As observed by the Hon'ble Apex Court in *Ajit Singh v. State of Punjab*, (1983) 2 SCC 21, to guard against the errors of human judgment in selecting suitable candidates for service, the new recruit is to be on test for a period before he is absorbed in service or acquires a right to the post. The period of probation gives time to the employee to observe the work, ability, efficiency, sincerity and competence of the servant and if the employer finds that the candidate is not suitable for the post, he has the right to dispense with his service without further ado during or at the end of the period of probation. The aforesaid principles were reiterated by the Hon'ble Apex Court in *State Bank of India v. Palak Modi*, (2013) 3 SCC 607.

20. The other question that arises is whether discharging an employee on probation on the ground of non-satisfaction with his performance would ipso facto amount to termination by way of punishment or casting a stigma on the employee concerned. In *Ajit Singh* (supra), the Hon'ble Apex Court held that the termination of service of a probationer during or at the end of the period of probation will not ordinarily and by itself be a punishment because the servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to. The period of probation furnishes a valuable opportunity to the master to closely observe the work of the probationer and by the time the period of probation expires, to make up his mind whether to retain the servant by absorbing him in regular service or to dispense with his service. The power to put an employee on probation for watching his performance is the prerogative of the employer.

21. In *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences*, AIR 2002 SC 23. The language used in the order of termination was that the probationer's "work and conduct has not been found to be satisfactory". It was held in paragraph 21 of the reported judgment that one of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct, (c) which culminated in a finding of guilt. If all the three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld. It was further held that the use of the word "unsatisfactory work and conduct" in the termination order will not amount to a stigma.

22. In *Municipal Committee, Sirsa v. Munshi Ram*, AIR 2005 SC 792, it was held that if the order of termination indicates that it is a termination simpliciter and does not cast any stigma on the employee, the mere fact that there was an enquiry into his conduct earlier would not by itself render the termination invalid. In that case, the order of termination was an order of discharge simpliciter. But in the course of enquiry, the Labour Court noticed that on an earlier day there was some incident where the administrative officer found some lacuna in the working of the probationer but based on that no charge sheet was served nor enquiry was conducted. However, the management came to the conclusion that it is not in its interest to continue the petitioner's services and hence discharged him. In that background, the mere fact that there was a misconduct on the part of the probationer which was not enquired into ipso facto would not lead to the conclusion that the order of termination was colourable or punitive.

23. In *Progressive Education Society v. Rajendra* (2008) 3 SCC 310, the Hon'ble Apex Court, inter alia, held as follows:-

"The law with regard to termination of the services of a probationer is well established and it has been repeatedly held that such a power lies with the appointing authority which is at liberty to terminate the services of a probationer if it finds the performance of the probationer to be unsatisfactory during the period of probation. The assessment has to be made by the appointing authority itself and the satisfaction is that of the appointing authority as well. Unless a stigma is attached to the termination or the probationer is called upon to show cause for any shortcoming which may subsequently be the cause for termination of the probationer's service, the management or the appointing authority is not required to give any explanation or reason for terminating the services except informing him that his services have been found to be unsatisfactory."

24. In *Abhijeet Gupta v. S.N.B. National Centre, Basic Sciences*, (2006) 4 SCC 469, a termination letter was issued to the concerned employee intimating that his performance was unsatisfactory and therefore he was not suitable for confirmation. Rejecting the contention raised by the employee that the termination on the ground of alleged misconduct was stigmatic, the Apex Court held that the order of termination due to unsatisfactory performance is a termination "simpliciter" and not "punitive" in nature. In *Chaitanya Prakash v. H. Omkarappa*, (2010) 2 SCC 623, the service of the probationer was terminated as he failed to improve upon his misconduct in spite of he having been informed repeatedly, during the period of his probation, about his deficiency. The Hon'ble Apex Court held that the termination of such an employee was termination "simpliciter" due to unsatisfactory conduct/performance and not a case of "punishment" for misconduct.

25. Hence, it now appears to be well settled by judgments of the Hon'ble Apex Court that terminating the service of a probationer on the ground of unsatisfactory performance of service is termination simpliciter and does not amount to casting a stigma on the concerned employee.

26. In the present case, the order of termination mentions two things. Firstly, that the petitioner was in the habit of absenting herself from duty without prior sanction of leave; and, secondly, that the authority was not satisfied with her service rendered till the date of termination.

27. In *Ratnesh Kumar Choudhary v. Indira Gandhi Institute of Medical Sciences, Patna*, (2015) SCC 151, the Apex Court held that termination of the service of a temporary servant or one on probation on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory, will not be punitive inasmuch as the said facts are merely the motive and not the foundation for discharging the probationer. In the instant case, although the institute was not required to give any reason for terminating the service of the petitioner, it has chosen to record two reasons. The second reason of the performance of the petitioner being unsatisfactory is unexceptionable. An employer is entitled to say so in the termination letter and that does not per se amount to a stigma.

However, the other reason i.e. repeated unauthorised absence from work is an allegation of a serious nature and the same ought not to have been made a basis for issuance of the termination letter without giving an opportunity of hearing to the petitioner. Such a statement is definitely stigmatic as it amounts to alleging that the petitioner is not serious and sincere about her duties. It casts an aspersion on the work ethos of the petitioner. The question is what the Court should do in these circumstances?

28. I am of the considered view that since the petitioner has no right to hold the post that she was holding and the institute is not satisfied with her performance as a probationer, it would not be proper to set aside the order of termination in its entirety. The court will not impose an employee on the institute in whom the institute has no faith as regards her capability and sincerity and with whose performance the institute is dissatisfied. It will also be futile to quash the order of termination and remand the matter to the authority for taking a fresh decision after giving an opportunity of hearing to the petitioner as regards the allegation of unauthorised absenteeism since all that the institute is required to do is to pass a fresh order without the allegation of being absent without sanction of leave. Hence, in my opinion, the proper course of action would be to direct the institute to issue a fresh order of release to the petitioner in substitution of the order impugned by deleting the allegation of the petitioner being in the habit of absenting herself from duty without prior sanction of leave from the appropriate sanctioning authority and I order accordingly. Such fresh order of release which shall be dated 30 April, 2012, shall be issued within a fortnight from date and will be deemed to be in supersession of the impugned order dated 30 April, 2012.

29. Writ Petition No. 33593 (W) of 2013 and CAN No. 9558 of 2015 are accordingly disposed of. There will be no order as to costs.

30. Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.