
(2006) 09 GAU CK 0074
In the Gauhati High Court

Kendriya Vidyalaya Sangathan

APPELLANT

Vs

Poonam Tiwari

RESPONDENT

Date of Decision : 26-09-2006

Acts Referred:

Citation : (2007) 1 GLT 109

Hon'ble Judges : B.S. Reddy, C.J;B.P. Katakey, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.P. Katakey, J.—This petition is directed against the order dated 2.8.2001 passed by the learned Central Administrative Tribunal, Guwahati Bench, in Original Application No. 332 of 1999 allowing the same by setting aside the order of termination dated 15.12.1887 issued by the Kendriya Vidyalaya Sangathan (in short the K.V.S.) and directing the authority to re-instate the original applicant forthwith and to pay 50% of her back wages and further directing that she will be entitled to all service benefit including service seniority etc. By the said order it has been further directed to consider the leave application of the applicant as per law, for the period she was unable to attend her duty on account of Pulmonary Tuberculosis, in conformity with the CCS (Leave) Rules, 1972.

2. The facts in brief is that on the basis of the selection made against the temporary post of primary teacher in the K.V.S, the original applicant (respondent in the present writ petition) was appointed in the said capacity, against the temporary post, on the condition that she will be on probation for a period of two years, which may be extended and upon successful completion of the probation she will be confirmed, in her turn, according to the availability of permanent vacancies. A further condition was also imposed to the effect that during probation and thereafter until she is confirmed, the service of the appointee is terminable by giving one month notice, by either side, without showing any reason therefore and reserving the right of the appointing authority to terminate the service of the appointee before expiry of the stipulated period of

notice by making payment of equivalent pay and allowances for the period of notice or the unexpired portion thereof.

3. Pursuant to such order of appointment, the original applicant/ respondent joined her services on 1.8.1984 in Kendriya Vidyalaya, CRPF. Thereafter on the basis of the application filed by her, extra ordinary leave of 91 (ninety one) days from 20.8.1985 to 20.11.1985 was granted. On 18.6.1986 she sent another leave application to the Principal of Kendriya Vidyalaya along with a medical certificate seeking leave from 18.6.1986 to 17.7.1986, but as the medical certificate was not issued by the authorized medical officer attending her, she same was not considered and she was directed to join on or before 21.7.1986. As she did not join her duty, the authority gave another chance to join by 21.8.2006 by issuing memorandum dated 1.8.1986. In spite of such direction issued by the Assistant Commissioner, K.V.S. the original applicant/respondent did not join her service, for which the Assistant Commissioner, K.V.S. again on 17.10.1986 directed to her to join her duties within 10 (ten) days, intimating that in case of her failure to do so necessary action would be taken against her. The respondent thereafter on 10.11.1986 sent an application for granting maternity leave from 23.6.1986 to 20.9.1986 and the competent authority vide order dated 24.12.1986 granted the maternity leave for the said period. The respondent again on 26.12.1986 submitted another leave application seeking leave on medical ground for the period from 22.9.1986 to 20.11.1986 and again for the period from 21.11.1986 to 16.2.1987 vide application dated 29.12.1986 on the ground that she was suffering from Pulmonary Kocks. Vide another leave application dated 4.7.1987 further leave up to December 1987 was sought. The appellant thereafter vide order dated 15.12.1987 terminated her service by invoking Clause 5 of the terms of appointment contained in the order of appointment dated 12.7.1984. A departmental appeal was preferred by the respondents on 1.6.1988 before the Commissioner, K.V.S. which was rejected vide order dated 31.3.1989. The said order of termination has been challenged before the learned Tribunal, as discussed above. Hence the present writ petition.

4. We have heard Mr. K.N. Choudhury, learned senior counsel for the appellant, K.V.S. as well as Mr. A.K. Goswami, learned senior counsel appearing on behalf of the respondents. No service record, except copies of the documents filed in the Original Application before the learned Tribunal and before this Court along with writ petition, could be produced by the appellant before this Court on the ground that the same could not be traced out. An affidavit dated 8.9.2006 has been filed by the Assistant Commissioner, K.V.S. in that regard.

5. Mr. Choudhury, the learned senior counsel for the appellant has submitted that from the terms of the appointment dated 12.7.1984 it is evident that the respondent was appointed against the temporary post, on probation, initially for a period of two years, with the provision for extension of probation and also with a further condition that upon successful completion of the probation period her services will be confirmed in her turn subject to availability of permanent

vacancy and therefore, there cannot be any deemed confirmation, even after expiry of the initial period of two years and even if no order extending the period of probation was passed, as positive action confirming the service of the petitioner is required to be taken by the authority, which is again subject to availability of permanent vacancy. Mr. Choudhury, has further contended that since the respondent continued to be in probation, in the absence of any order of confirmation, she can be terminated from service by giving one month notice or pay in lieu thereof, as stipulated in Clause 5 of the terms of appointment, which terms having been accepted by the respondent, she cannot subsequently challenge the order of termination from service. It has further been submitted by the learned senior counsel that the absence from duty unauthorizedly and without leave which was taken into account by the appellate authority while disposing of the appeal, being not the motive but the foundation for issuance of the order on termination, it cannot be said that the said order is not the order of termination simpliciter but punitive and stigmatic.

6. Referring to the conduct of the respondent in applying leave from 20.8.1985 i.e. just after expiry of one year from the date of joining and her continued absence from duty, the learned Counsel has submitted that conduct and the performance of the respondent do not even warrant confirmation of her services, as during the two years original period of probation, she did not perform her duty for almost one year. Referring to the provision of the Kendriya Vidyalaya Sangathan (Appointment, Promotion, Seniority, etc.) Rules, 1971 (in short the 1971 Rules), more particularly Rule 10 and 11 of the said Rules, the learned senior counsel has submitted that Rule 10 provides for initial period of two years of probation extendable by another year and Rule 11 provides that such appointee on successful completion of the period of probation shall be eligible for substantive appointment and such substantive appointment would be made in order of seniority as indicated in the select penal. Therefore, according to the learned senior counsel, an appointee on probation shall continue to be in probation unless a positive order confirming such appointment is passed and such appointee is appointed against the substantive vacancy and hence there cannot be any deemed confirmation in service. The learned senior counsel in support of his submission has placed reliance on the decision of the Apex Court in *State of Punjab Vs. Baldev Singh Khosla*, .

7. Mr. Goswami, learned senior counsel appearing on behalf of the respondents, on the other hand, has submitted that since the appointment of primary teacher in K.V.S. is governed by a set of rules namely 1971 Rules, the provisions contained in the said rules shall be applicable, irrespective of any conditions put in the order of appointment of the respondent. In other words, it has been submitted that any conditions in the order of appointment contrary to the provisions of the 1971 Rules cannot be made applicable. Mr. Goswami, has further submitted that it is evident from the Rule 10 of the 1971 Rules that a person can be appointed on probation initially for a period of two years from the date of his/her appointment and which may at the most be extended by another

one year, for the reasons to be recorded in writing, therefore, maximum period of probation can at the most be three years from the date of appointment. The said period of three years being the maximum outer limit for probation, such appointee gets automatically confirmed in service on completion of three years period, if such appointee has not been terminated during the period of such probation. In the instant case according to the learned Counsel the respondent was appointed on 12.07.1984 and she was terminated from service vide order dated 15.12.1987 i.e. more than three years either from the date of her appointment or from the date of her joining in service, which was 01.08.1984. Therefore, according to the learned senior counsel her service having deemed to be confirmed on 31.07.1987, she cannot be terminated from service by invoking Clause 5 of the order of appointment.

8. It has further been submitted by the learned senior counsel that, in any case, the respondent having been terminated from service for unauthorized absence from duty, the same is punitive in nature and therefore, the order of termination cannot be termed as termination simpliciter. Relying on the constitutional bench decision of the Apex Court in *State of Punjab Vs. Dharam Singh*, , the learned senior counsel has submitted that since in the present case the maximum period of probation is fixed, which is three years and which cannot be extended beyond the said period, in view of the provision of Rule 10 of the 1971 Rules, the services of the respondents must be held to be deemed to have been confirmed in the post, though the appointing authority did not pass any formal order of confirmation, as, it is required to be presumed to have been passed by allowing the respondents to continue in her post after 01.08.1987.

9. Mr. Goswami, in support of his contention that as the 1971 Rules provides for maximum period of probation beyond which the period of probation cannot be extended, on the date of expiry of such maximum period of probation the service of the respondents deemed have been confirmed and as such she cannot be terminated by the appellant, has also placed reliance on the decision of the Apex Court in *Om Parkash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow and Others*, , in *Wasim Beg Vs. State of Uttar Pradesh and Others*, as well as in *Registrar, High Court of Registrar, High Court of Gujarat and Another Vs. C.G. Sharma*,

10. The learned Tribunal relying on the provision contained in the 1971 rules, more particularly Rules 10 and 11 as well as Article 81 of the Education code came to the finding that since the respondent pursuant to her order of appointment dated 12.7.1984 joined her service on 1.8.1984 and the maximum period of probation being three years, her services deemed to have been confirmed on expiry of the said period of three years and the impugned order dated 15.12.1987 being beyond the said period of three years, is illegal, as after her services deemed to have been confirmed, she cannot be terminated from service by giving one month notice or pay in lieu thereof by invoking Clause 5 of the terms of appointment. The learned Tribunal considering the appellate order

passed by the Assistant Commissioner rejecting her appeal, has also held that she was terminated from service because of the alleged misconduct of absence from duty from 21.09.1986 to 15.12.1987, without considering her application for leave and without taking any action as contemplated under CCS (CCA) Rules 1965.

11. The question which requires our consideration is--whether under 1971 Rules, more particularly in view of the Rules 10 and 11 thereof, the services of an appointee on probation can be treated as deemed to have been confirmed, on the expiry of the period of probation, without there being a specific order confirming the service of the such appointee, in other words, whether rule requires passing of a specific order of confirmation of service of a probationer and until such order is passed, the probationer continues to be on probation, even after expiry of the period of probation.

12. There is no dispute that the respondent was appointed vide order of appointment dated 12.7.1984, pursuant to her selection, against a temporary post of primary teacher in K.V.S. on probation for a period of two years, extendable by another one year and also with the condition that upon successful completion of probation she will be confirmed according to the availability of the permanent vacancy. There is another stipulation in the said order of appointment regarding termination of service, by either party, by giving one month notice or by paying salary in lieu thereof. Consequent to such appointment order the respondent joined on 1.8.1984. There is also no dispute that the leave was granted to the respondent with effect from 20.8.1985 to 20.11.1985. Though the respondent applied for leave again from 21.9.1986 up to December, 1987 on medical ground, no order sanctioning such leave was passed by the authority. The management of K.V.S. thereafter vide order dated 15.12.1987 terminated the service of the respondent by invoking Clause 5 of the terms of appointment.

13. The 1971 Rules has been framed regulating the service conditions namely appointment, promotion, seniority, etc. of an employee appointed in K.V.S. There being such rules governing the service conditions of the employee appointed in to the service of K.V.S. they are to be governed by such rule irrespective of the conditions stipulated in the terms of appointment.

14. Rules 10 and 11 of the 1971 Rules provides for appointment on probation as well as the confirmation of probationer in service. Rule 12 provides for discharge or reversion of probationer. For better appreciation Rules 10, 11 and 12 of the 1971 Rules, are reproduce below:

10. Probation:

(1) Every direct recruit shall initially be appointed on probation, the period of probation being two years from the date of appointment, which may be extended to three years by the competent authority for reasons to be recorded in writing.

(2) Every (sic) other than a probationer shall when first appointed, to any post,

be on probation for a period of two years from the date of such appointment, which may be extended to three years by the competent authority for reasons to be recorded in writing.

11. Confirmation of Probationers:

When an employee appointed to a post on probation or on trial has completed his/her probation/trial to the satisfaction of the appointing authority, he/she shall be eligible for substantive appointment or continuance therein, as the case may be, and such substantive appointment shall be made in the order of seniority as indicated in the relevant select panel.

12. Discharge or Reversion of Probationers:

1. An employee appointed to any post in the Kendriya Vidyalaya Sangathan, specified in the Schedule, who has no lien on any post under the Central Government or any State Government or the Kendriya Vidyalaya Sangathan shall, while on probation, be liable to be discharged from the post at any time with one month's notice or pay in lieu thereof, if

(i) On the basis of his/her performance of conduct during the probation he/she is considered unfit for further retention in the post concerned;

or

(ii) On the receipt of any information relating to his/her nationality, age, health or antecedents, the appointing authority has satisfied that he/she is ineligible or otherwise unfit for being an employee of the Kendriya Vidyalaya Sangathan.

(2) An employee who holds a lien on a post under the Central Government or any State Government or in the Kendriya Vidyalaya Sangathan may while on probation be reverted to such post at any time in any of the circumstances specified in Sub-rule (1).

(3) An employee appointed to any post specified in the Schedule, who is not considered suitable for confirmation or continuance in that post during or at the end of the period of probation specified in Rule 10 or at the end of the extended period of probation, if any, shall be discharged or reverted in accordance with the Sub-rule (1).

(4) An employee of the Kendriya Vidyalaya Sangathan "trial" in any of the posts specified in the Schedule who is not considered suitable for continuance in that post during or at the end of the period of trial specified in Sub-rule (1) or (2) of Rule 10 or the extended period, if any, shall be reverted to the next lower grade.

15. Rule 10 of the 1971 Rules provide for appointment on probation initially for a period of two years and extendable by one year by the competent authority, for reasons to be recorded in writing. Rule 11 provides, when a person appointed to a post on probation, on completion of his/her period of probation to the satisfaction of the appointing authority, shall be eligible for substantive

appointment. Sub-rule 3 of Rule 12 empowers the authority to discharge an employee from service who was appointed to any post on probation and who has not been considered to be suitable for confirmation or at the end of the period of probation or extended period of probation, contained in Rule 10 of the said rule. Therefore, Rules 10, 11 and 12 are to be read together in order to ascertain as to whether, in absence of a specific order of confirmation, an employee can be treated to be confirmed in service, on expiry of the period of probation i.e. 3 years in all.

16. A constitutional bench of the Apex Court in *Dharam Singh* (supra) has held that where the service rule fixes a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post, on probation, is allowed to continue in that post after completion of the maximum period of probation, without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication, for the reason that such an implication is negated by the service rules forbidding extension of the probationary period beyond the maximum fixed by it and in such a case, it is permissible to draw the inference that such employee has been confirmed in the post by implication. In another constitutional bench decision in *Samsher Singh v. State of Punjab and Anr.* AIR 1974 SC 192 relying its various earlier decisions, including the decision in *Dharam Singh* case, the Apex Court has held that whether the service of an employee appointed on probation can be deemed to have been confirmed on expiry of the period of probation, depends upon the rules governing such employee. It has been held that if the rule provides for passing of a specific order of confirmation, then in that case, even after expiry of the period of probation stipulated, the service, of such employee cannot be treated to have been deemed to be confirmed and the probation period of such employee gets automatically extended.

17. In *Om Prakash Maurya* (supra), the Apex Court has held that where the maximum period of probation is provided under the Rules and an employee appointed against the regular vacancy cannot be placed on probation for a period more than that maximum period provided and even though under the regulation confirmation of an employee by express order of confirmation of the probationary period is required, on expiry of the maximum probationary period, such employee stands confirmed by implication, however, such employee can be discharged from service during the period of probation, if the appointing authority is of the opinion that the employee has not made use of the opportunity afforded to him, to improve his performance. In *Baldev Singh Khosla* (supra), the Apex Court observed that outer limit of the period of probation as provided under the Rules is an enabling provision to allow the probationer to continue in service without being reverted or discharged from service, for failure to satisfactorily complete the period of probation and it would not mean that the probationer, on expiry of that period, must be deemed to have been confirmed if the rule itself envisages a positive order of confirmation. It has further been observed that so

long as the order of confirmation is not made, even after expiry of probation, the probationer may continue and remain in service, but by allowing him to remain in service, it cannot be concluded that he must be deemed to have been confirmed.

18. The Apex Court in Wasim Beg (supra) has observed that whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, depends upon the provisions in the relevant Service Rules relating to probation and confirmation. The Apex Court has further observed that there are two sets of authorities dealing with the question, in one set, the Court has held that where the maximum period of probation is provided and beyond which the probation cannot be extended, the probationer, after expiry of the maximum period of probation will be deemed to be confirmed unless rules provide to the contrary and in another set of authorities, it has been held that even when the rules prescribed a maximum period of probation, if there is a further provision in the Rules for continuation of such probation beyond the maximum period, there will be no deemed confirmation in such cases. A third line of the cases, which has been dealt with by the Apex Court in the said case, is that in those cases where under the rules there is no maximum period of probation prescribed and either there is a rule providing for extension of probation or there is a rule which requires a specific act on the part of the employer either by issuing an order of confirmation or any similar act which would result in confirmation of the employee, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period. The Apex Court in a recent judgment in Registrar, High Court of Gujarat (supra) referring to Dharam Singh case, Shasher Singh case, Wasim Beg case as well as its earlier decisions has held that where the rule requires confirmation in service upon satisfactory performance, there cannot be any deemed confirmation of service, even if the period of probation prescribed expires and the probationer is allowed to continue beyond the said period as mentioned in the rules.

19. From the aforesaid pronouncements of the Apex Court it is therefore, evident that the question whether there can be deemed confirmation or not depends upon the language of the rule governing the service condition of such probation.

20. In the instant case Rule 10 of 1971 Rules though provides the period of probation as two years, extendable by another year by competent authority for reasons to be recorded in writing, Rule 11 of the said Rule provides that such probationer shall be eligible for substantive appointment, as per seniority, on completion of her probation, to the satisfaction of the appointing authority. By reading both the Rules 10 and 11 together, it is therefore, evident that the confirmation of probationer requires satisfactory performance and only in that event they would be eligible for substantive appointment, that too, in order of seniority. Hence it requires a specific order to be passed by the authority

confirming the service of the probationer in a post, even though the outer limit of three years of probation has been provided under Rule 10 of the said rule. Because the respondent was allowed to continue beyond that period of three years, it cannot, therefore, be said that she deemed to have been confirmed in the post against which she was appointed, more so, admittedly, when the post in which the respondent was appointed is a temporary post. Respondent, therefore, shall continue to be on probation unless a specific order of confirmation is passed by the authority.

21. Sub-rule (3) of Rule 12 empowers the authority to discharge the probationer either during the probation or end of the period of probation. Clause 5 of the order of appointment also empowers the appointing authority to discharge the probationer by giving one month notice or pay in lieu thereof. As held above, in the present case, there cannot be any deemed confirmation in view of the provisions of Rule 10 and 11 of the 1971 Rules and hence even if the respondent was allowed to continue beyond three years of period of probation, she will continue to be on probation till an order of confirmation is passed. Therefore, it is within the authority of the appellant to discharge such probationer by invoking Clause 5 of the order of appointment, which is nothing but Rule 12(3) of the 1971 Rules, by taking into account her performance as well as unauthorized absence from duties, for which no regular disciplinary proceeding is required to be initiated by the authority against her.

22. In view of the aforesaid discussion, we have no alternative but to set aside the order dated 2.8.2001 passed by the learned Tribunal. Accordingly the order of the learned Tribunal is set aside.

The writ petition is allowed with no order as to costs.