

(1999) 02 CAL CK 0004
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction, W.P. No. 1234 (W) 1998

Kumari Amina Khatun

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 10-02-1999

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 21, 226

Citation : (1999) 2 CALLT 53 : (1999) 1 CHN 337 : (1999) LabIC 1479

Hon'ble Judges : Altamas Kabir, J

Bench : Single Bench

Advocate : Mr. Haripada Kar and Ms. Kaberi Ghosh, for the Appellant; Mr. Mukul Prokash Banerjee and Ms. Sankari Roy, for the Respondent

Judgement

A. Kabir, J.—With effect from 1st October, 1994, the petitioner was appointed as Laboratory Technician by the Central Council For Research in Unani Medicine (C.C.R.U.M.) In Its Regional Research Institute of Unani Medicine at Calcutta, on a temporary basis on probation for a period of two years which could be extended or curtailed at the discretion of the appointing authority. In the letter offering such appointment to the petitioner it was also stipulated that during the period of probation the petitioner's appointment could be terminated at any time without notice and without assigning any reason. It was further indicated that the petitioner would be governed by the provisions of the Central Civil Service (Conduct) Rules and the Central Service (Classification, Control and Appeal) Rules, as amended from time to time by the Government of India.

2. It is the petitioner's grievance that while all the staff and officers of the Calcutta Unit of the C.C.R.U.M. have been duly paid their salaries and other emoluments, the petitioner's salary has not been paid since the month of March, 1998.

3. According to the petitioner, from about the month of January, 1998, the work in the laboratory of the Research Institute had been severely dislocated on account of mechanical and functional disorder of the instruments in the

Laboratory which made it virtually impossible to conduct various pathological and other tests in the Calcutta Research Unit.

4. According to the petitioner, the matter was brought to the notice of the Research Officers and the Hony. Project Officer, but such complaints went unheeded and as a result the work relating to conducting of pathological tests virtually came to a standstill from about the month of March, 1998.

5. On or about 23rd April. 1998, the petitioner was served with a Memorandum issued by the Hony. Project Officer of the Institute at Calcutta alleging that the petitioner and one Shri Golam Yazdani another Laboratory Technician, had refused to perform laboratory tests on 4th April, 1998. The petitioner replied to the said Memo, on 27th April, 1998, denying the allegation that she had refused to perform the laboratory tests and explaining that because of the mechanical and functional disorder of the instruments involved it had become almost impossible to conduct such tests. In the said back-ground the concerned authority was requested by the petitioner to drop the charges levelled against her.

6. The Hony. Project Officer replied to the petitioner's letter on 30th April, 1998, reiterating the allegations made against the petitioner and expressed his inability to drop the charges levelled against her. This was followed up by a Memo dated 15th May, 1998 issued to the petitioner by the Hony. Project Officer informing her that since she had failed to respond to the Memo, dated 30th April, 1998, it must be deemed that she had admitted the charges against her and she was informed that her services as Laboratory Technician would stand terminated with effect from the 31st day of Issuance of the said letter.

7. The said order is the subject matter of challenge in this writ petition.

8. At the very outset an objection was taken on behalf of the respondents as to the maintainability of the writ application on the ground that the respondent Council was not a "State" or "other authority" within the meaning of Article 12 of the Constitution.

9. Appearing for the Council, Mr. Mukul Prokash Banerjee submitted that though the respondent Council was formed by the Central Government it was a society registered under the Societies Registration Act and was an autonomous body having its own Rules and Regulations and By-laws.

10. Referring to the provisions of the Rules and Regulations of the Council with regard to the composition of the Governing Body of the Society, Mr. Banerjee urged that the same did not reflect deep and pervasive control by the Central Government over the affairs of the Society.

11. Mr. Banerjee urged that it had repeatedly been held both by the Hon'ble Supreme Court and this court that a writ proceeding would not be maintainable against a Society. Referring to the decision of the Hon'ble Supreme Court in the case of Supreme Co-operative Group Housing Society Vs. M/s. H.S. Nag and Associates (P) Ltd., Mr. Banerjee submitted that since the dispute was between

the Society and one of its employees, such dispute was arbitrable and could not be decided on a writ petition under Article 226 of the Constitution.

12. Replying to Mr. Banerjee's preliminary objection relating to the maintainability of the writ petition, Mr. Haripada Kar submitted that such objection was entirely misconceived. Mr. Kar urged that the composition of the Governing Body of the Council and the pattern of funding would at once make it clear that besides exercising financial control the Central Government also exercised deep and pervasive control over the management of the Society and its affairs. Apart from the above, the accounts of the Central Council are required to be audited by the Comptroller and Auditor General of India or any person appointed by him in that behalf. Provision has also been made in the Rules and Regulations for the Audit Report to be submitted to the Government of India by the Central Council along with its observations.

13. In support of his submissions that the writ petition was maintainable against the respondent Council, Mr. Kar firstly referred to and relied upon the decision of the Hon'ble Supreme Court in the case of P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others, wherein the Indian Council of Agricultural Research was held to be an "other authority" within the meaning of Article 12 of the Constitution on the finding that the Council being almost an inseparable adjunct of the Government of India having the outward form of a society, it could be said to be a society set up by the State and, therefore. It would be an instrumentality of the State.

14. Mr. Kar then urged that, in any event, the Council would be amenable to the writ Jurisdiction of this court since it discharged functions of a public nature giving rise to questions involving a public law element. Mr. Kar referred to the decision of the Hon'ble Supreme Court in the case of Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, wherein it was observed that if the rights involved in a particular matter are purely of a private character no mandamus would lie if the management of the College was purely a private body, with no public duty to discharge, mandamus would not lie. But if such exceptions were absent and the party had no other equally convenient remedy, mandamus could not be denied. In the context of the widening ambit of the court's powers to issue writs under Article 226 of the Constitution, it was observed further that mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found and technicalities should not come in the way of granting that relief under Article 226.

15. From the Rules and Regulations and Bye-Laws of the Council it appears that the Central Government exercises a considerable amount of control over its affairs in various respects, particularly with regard to its finances. Furthermore, there can be little doubt that most of the objects for which the Council was established, as indicated in its Memorandum of Association, are essentially of a public nature and are meant for the benefit of the public at large. Having regard

to the recant decisions in this regard such as the Anadi Mukta Sadguru case (supra) and even the case of Chandra Mohan Khanna v. NCERT. wherein the case of Ramachandra Iyer was considered and sought to be distinguished, in my view, writ would lie against the Council, even If it is not convered by the expression "State" or "other authority" within the meaning of Article 12 of the Constitution.

16. As to the merits of the case, Mr. Kar submitted that the petitioner's services had been terminated with a stigma, without giving her an opportunity of defending the stand taken by her in her letter of 27th April, 1998, explaining her position with reference to the letter of the Hony. Project Officer issued to her on 23rd April, 1998.

17. It was urged that the impugned decision to terminate the petitioner's services was taken in complete violation of the principles of natural justice and administrative fairplay and was liable to be quashed.

18. In support of his submissions, Mr. Kar referred to the decision of a learned single Judge of this court in Buddhadev Das Vs. The State of West Bengal and Others, where in it was held that when an order of termination is not an order of termination simpliciter but an order expressly casting a stigma on the petitioner the same could not be sustained where the petitioner was not given any opportunity to meet the allegations.

19. Mr. Banerjee, however, submitted that the petitioner having been appointed on a temporary basis on probation, the respondents were entitled to mak an assessment of the petitioner's work during the probationary period and being dissatisfied with her performance, were entitled to dispense with her services without holding any enquiry or giving her a formal opportunity of hearing. In fact, the respondents had given the petitioner an opportunity to explain as to why she had refused to carry out the laboratory tests, as directed, and finding her explanation unsatisfactory, the respondents had no option but to discontinue her services within the period of probation.

20. Mr. Banerjee submitted that being a probationer no right accrued to the petitioner In respect of the post to which she had been appointed. It was not, therefore, necessary to hold an inquiry before terminating the petitioner's services. Furthermore, as a probationer the petitioner did not have the right to be confirmed in service and it was up to the respondents to assess the suitability of the petitioner for her permanent absorption in service.

21. Mr. Banerjee reiterated that the petitioner's performance having been found to be unsatisfactory, the respondents were entitled to dispense with her services during the period of her probation, without holding any enquiry into her refusal to perform the duties for which she had been appointed.

22. In support of his aforesaid submissions, Mr. Banerjee firstly referred to a decision of the Hon''ble Supreme Court in the case of M/s. Oswal Pressure Die Casting Industry, Faridabad Vs. Presiding Officer and Another, , wherein the point

for consideration was whether the service of the respondent before the Hon''ble Supreme Court, who was on probation, could have been terminated without holding an enquiry. Although the Hon''ble Supreme Court allowed the appeal, it was in agreement with the finding of the High Court that the order terminating the services of the respondent was not required to be made upon holding a domestic enquiry.

23. Mr. Banerjee also relied on a Bench decision of this court in *Union of India and Ore. v. Subhas Jha*, reported in 1998 (1) CLJ 29, in which it was observed that a probationer does not derive any right to continue in service and that by reason of termination during the period of probation no stigma is cast. It was observed further that only when the service of a person is terminated by way of or in lieu of punishment, as a result of which the employee suffers civil or evil consequences, compliance with the principles of natural justice becomes mandatory, while allowing the appeal against the order of the learned single Judge who held the termination of the writ petitioner's services to be bad. the appeal court further observed that a probationer does not have any right to be confirmed in his post and the employer is the sole authority to judge the suitability of the employee to enable him to come to a finding as to whether the employee should be absorbed permanently in the regular establishment.

24. Mr. Banerjee urged that the law was quite clear that a probationer could not question the termination of his/her services unless such power was exercised unreasonably or in a manner which cast a stigma on the probationer so as to cause serious prejudice to him/her. Mr. Banerjee urged that this was not a case where any stigma was attached to the petitioner, but on an assessment of the petitioner's performance the respondents did not wish to continue with her services.

25. Mr. Banerjee urged that the facts of this case did not call for any interference in the present writ application.

26. It is well settled that a probationer's appointment necessarily implies that such appointment can be terminated within the period of probation if the employer finds the employee to be unsuitable for the job. During the period of probation, it is for the employer to assess the suitability of the candidate and if the candidate is not found to be suitable to be retained in service, the employer is entitled to record a finding to that effect and to terminate the service of the probationer without conducting an enquiry. However, if it appears from the conduct of the employer that the termination of the probationer's services is by way of punishment, then the employee is entitled to be heard since such termination casts a stigma on his competence and affects his future career adversely.

27. In the oft-referred to case of *Samsher Singh Vs. State of Punjab and Another*, the Hon''ble Supreme Court, while considering the termination of the service of a probationer who was a member of the subordinate judicial service,

observed that no abstract proposition could be laid down that where the service of a probationer are terminated it can never amount to a punishment. Before a probationer is confirmed, the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory and whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to a conclusion that on account of inadequacy her the job or on account of any objection involving moral turpitude the probationer is not suitable for the job and must be discharged, Such a step does not involve any punishment. If, however, the authority was of the view that the conduct of the probationer may result in dismissal or removal on an enquiry, in such cases the authority may not hold an enquiry and may simply discharge the probationer to enable him to be gainfully employed elsewhere without attaching any stigma at the time of termination of his services within the period of probation. If, on the other hand, the probationer is faced with an enquiry on charged of misconduct or inefficiency or corruption and if his services are terminated without following the procedure for conducting an enquiry, he is entitled to claim protection from such action.

28. Applying the aforesaid tests in the instant case, It will be quite evident that the termination of the petitioner's services was not on account of her incompetence and/or unsuitability for the Job. but by way of punishment on account of her purported refusal to perform certain laboratory tests. The termination of the petitioner's services did not amount to termination simpliciter. The reason given for termination of her services is also not quite acceptable in the circumstances.

29. As indicated hereinbefore, the petitioner was served with a Memo dated 23rd April, 1998, issued by the Hony. Project Officer of the Institute at Calcutta alleging that the petitioner and one Shri Golam Yazdani had refused to perform certain laboratory tests on 4th April, 1998, and also alleging that she had refused to perform her duties in the mobile spot on 20th April, 1998 and 23rd April, 1998. The petitioner was informed that her acts of disobedience/insubordination and negligency towards duties amounted to mis-conduct attracting disciplinary action under the CCS(Conduct) Rules. The petitioner was directed to explain as to why necessary punitive action should not be taken against her for her said acts of misconduct.

30. The petitioner replied to the said Memo on 27th April, 1998, emphasising that she had not refused to obey any order to perform laboratory tests, but that she was unable to perform the tests on account of mechanical and functional disorder of the instruments in the laboratory. The petitioner appealed to the Hony. Project Officer to consider the matter after a thorough examination of the facts and circumstances and to drop the allegations.

31. The Hony. Project Officer wrote back to the petitioner on 30th April, 1998, and while acknowledging the petitioner's said reply regretted his Inability to drop the charges levelled against her. Subsequently, on 15th May, 1998, the said

authority wrote to the petitioner informing her that since she had not responded to the letter of 30th April, 1998. it was to be deemed that she had accepted the charges of misconduct levelled against her in the Memo, of 23rd April, 1998. The petitioner was informed that her wilful disobedience insubordination and negligence towards her duties were not compatible with the smooth and orderly functioning of the Institute and that her actions amounted to misconduct and doubtful integrity punishable under the standing service rules. The petitioner was informed further that her services would stand terminated with effect from the 31st day of issuance of the letter.

32. The said Memo, dated 15th May, 1998, clearly indicates that the respondents came to a conclusion that the petitioner's conduct, which amounted to misconduct and doubtful integrity, was punishable under the service rules and that the termination of the petitioner's services was consequent thereupon.

33. In my view, the decision contained in the aforesaid Memorandum suffers from various infirmities.

34. By the Memo, dated 23rd April, 1998, the petitioner was informed that her alleged acts of disobedience/insubordination amounted to misconduct attracting disciplinary action and she was directed explain why she should not be punished. The petitioner duly replied to the said show-cause notice on 27th April, 1998, and requested that the charges against her be dropped. By his letter of 30th April, the Hony. project officer informed the petitioner that her request had been turned down. Having showed cause once, the question of responding to the second memo., in the absence of any direction to that effect, did not arise and treating that to be an admission on her part and terminating her services on that basis without any enquiry, was, in my view quite unjustified and arbitrary.

35. The initial notice dated 23rd April, 1998, contemplated the commencement of disciplinary proceedings against the petitioner. The same was abandoned and the petitioner's services were terminated without a hearing in a manner which was highly arbitrary, notwithstanding the fact that the petitioner was a probationer.

36. In my view, the impugned order of termination of the petitioner's services cannot be sustained on the ground indicated in the Memo, of 30th April, 1998, and it must be held that such termination, without holding any enquiry, being by way of punishment was therefore, arbitrary and in violation of the principles of natural justice and administrative fair-play. The respondents were free to terminate the services of the petitioner during the period of her probation, but not in the manner in which it was done. In fact, the decision of the Hon'ble Supreme Court in Subhas Jha's case (supra), relied upon by Mr. Banerjee, may be applied to the facts of this case also.

37. The writ application, accordingly, succeeds and is allowed. The impugned order of termination of the petitioner's services, as contained in the Memo dated 15th May, 1998, being annexure "F" to the writ petition, is hereby quashed. The

respondent are directed to re-instate the petitioner in service and to pay to her all her salaries and other emoluments as if the order of termination has not been passed.

38. This order will not, however, prevent the respondents from proceeding against the petitioner afresh, but upon holding a proper enquiry and after giving the petitioner a proper opportunity of defend the charges levelled against her.

There will be no order as to costs. If an urgent xerox certified copy of this judgment and order is applied for, the same is to be supplied expeditiously, subject to compliance with all the required formalities.

39. Application succeeds