

(1981) 09 CAL CK 0003
In the Calcutta High Court
Case No : E. M.A No. 506 of 1980

M.A. Vidyadharan

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 09-09-1981

Acts Referred:

Constitution of India, 1950 — Article 133, 234, 235, 309, 311

Citation : 86 CWN 132

Hon'ble Judges : Chittatosh Mukherjee, J;B.N. Maitra, J

Bench : Division Bench

Advocate : Saktinath Mukherjee and Mihir Kumar Chakravorty, for the Appellant; Tapas Chandra Roy and S.K. Panja, for the Respondent

Final Decision : Dismissed

Judgement

Chittatosh Mookherjee, J.—The appellant was a probationary Munsif The Governor of West Bengal by his order dated 11th July 1980 terminated his said appointment in the interest of public service on payment of one month's salary in lieu of notice. After hearing the appellant and the respondent State B.C. Roy, J. summarily rejected his writ petition challenging the said order of the Governor of West Bengal terminating his appointment. Being aggrieved thereby, the appellant has preferred this appeal. We may briefly set out the facts of the present case. The Secretary, Government of West Bengal Judicial Department by Notification No. 1361 (I) dated 25th January, 1974 stated that the Governor had been pleased to appoint-, the appellant and two others to the West Bengal Civil Service (Judicial) as Munsifs. The petitioner and the said two others were placed on probation for a period of two years during which they were required to undergo the prescribed training and to pass completely the departmental examination. The said notification further stated "There confirmation will depend on their passing the departmental examination and on their general fitness". The Additional Registrar, Appellate Side, High Court by Order No. 2728(A) dated 2nd March, 1974 posted the petitioner and two others, all of whom were Munsifs on

probation for training to the headquarter station of the districts mentioned against their names. The First Assistant Registrar of this Court while forwarding the said notification by Memo No. 2735 (A) requested the appellant to report to the District Judge, Burdwan on the forenoon of 7th March, 1974 or as soon thereafter for receiving training under Item No. (1) of Rule 3 of the rules regulating the training and probation of the members of the West Bengal Civil Service (Judicial) as embodied in the Services (Training and Examination) Rules, West Bengal. The petitioner had thereafter joined and continued to serve as a probationary Munsif. The petitioner could not completely pass the departmental examination within the original period of two years of his probation. Accordingly, his probationary period was extended from time to time by the order of this Court.

2. On 18th July, 1979 the Additional Registrar, Appellate Side. High Court issued Memo No. 6440 (A) dated 18th July. 1979 stating that the period of probation in respect of the appellant who was then serving as Munsif, 4th Court. Alipore had been extended by the court by one year more from 16th of March. 1979 or until he passed the departmental examination completely whichever was earlier. A copy of the said Memo was forwarded to the appellant.

3. The appellant in his writ petition had claimed that in July, 1979 he had passed Bengali, Part-I Paper of the departmental examination and the result was communicated to the Hon"ble the High Court. We are unable to agree that merely by passing completely the departmental examination the appellant was bound to be confirmed and that the Governor of West Bengal had no power and or authority to terminate his appointment. Mr. Tapas Chandra Roy, learned advocate for the State, has placed before us the Notification No. 7976 (J) dated 17th September, 1935 publishing the rules regulating the training and probation of the members of Bengal Civil Service (Judicial). The Rule 1 prescribed that every candidate on appointment as a Munsif will be on probation for two years and will be liable to removal at the discretion of the Government, after consultation with the High Court at any time during the period. The High Court may extend the period in particular cases. In the instant case from time to time the High Court had extended the appellant's probation period because he till then did not completely pass the departmental examination. The Secretary, Government of West Bengal, Judicial Department while notifying the order of the Governor appointing the appellant on probation had also stated that his confirmation will depend on the following :-

- 1) passing the departmental examination, and
- 2) his general fitness,

Neither the Governor of West Bengal who was the appointing authority nor the High Court which was to be consulted had at any stage dispensed with or modified the aforesaid two conditions upon which the appellant's confirmation depended. It is settled law that it is the Governor who alone can prescribe the

rules for recruitment of persons other than the District Judge to judicial service and in making appointment's to judicial service, the Governor is required to consult both the State Public Service Commission and the High Court. The High Court also exercises control under Article 235 of the Constitution over the district and subordinate courts. It is because of the appellant's failure to timely pass in all subjects of the departmental examination from time to time this court had extended, his period of probation as a Munsif, until he completely passed the said examination or till the specified date whichever was earlier. There was no substance in the contention that while extending his period of probation to enable the appellant to pass the departmental examination, the High Court had already formed their opinion about his general fitness. The appellant in terms of his appointment letter dated 25th January, 1974 was required to maintain his general fitness during, his entire period of probation including the extended period upon completion of his training and passing completely the departmental examination, his general fitness for confirmation could be considered. Even if he had completely passed the departmental examination the appellant could not lawfully claim that he ought to be automatically confirmed. We have stated that his confirmation depended not only on passing the departmental examination but upon his general fitness.

4. Mr. Tapas Chandra Roy, learned advocate for the State, has placed before us a copy of the letter No. 7770 (A) dated 11th June 1980 written by the Additional Registrar, Appellate Side, High Court to the Secretary Government of West Bengal, Judicial Department in the following terms :-

I am directed to say that the Court has decided that probationary period of Slid M.A. Vidyadharan, Probationary Munsif now sitting in Court at Aliporube not extended further in the public interest.

I would, therefore, request that this may kindly be noted by the Government and action taken accordingly.

5. In view of the above letter of the additional Registrar conveying the decision of the Court not to extend any; further the probationary period of the appellant, there is no substance in his contention that the High Court was not consulted before the Governor had terminated his appointment. Subject to the provisions of Article 235 and the Rules of Recruitment, the Governor was the Appointing Authority of the appellant. The Supreme Court in *Samsher Singh Vs. State of Punjab and Another*, *inter alia* held that the appointment as well as removal of the members of the Subordinate Judicial Service were an executive actions of the Governor to be exercised with the aid and advice of the Council of Ministers in accordance with the provisions of the Constitution. In *Samsher Singh's* case (*Supra*) the order of the Governor of Haryana terminating the services of a member of the Subordinate Judicial Service was, however, set aside on the ground that the High Court had failed to discharge its duty vested under Article 235 of the Constitution by suggesting that an enquiry be made through the Director of Vigilance to satisfy it self about the unsuitability of the appellant. The

High Court should have conducted the said enquiry. The Supreme Court further held that the order of termination passed in the said case was clearly by way of punishment and the High Court had denied the appellant the protection under Article 311 and also denied itself of the control over the subordinate judiciary. The Supreme Court also found on merits that the charge against the appellant was not sustainable and also in violation of Rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952. Therefore, the Supreme Court recognised that the Governor who is the constitutional head of the State is the appointing authority and also the disciplinary authority of the members of the Judicial Service but the Governor is bound to exercise such powers in accordance with the provisions of Article 235 of the Constitution. The learned trial judge had correctly relied upon the decision of the Supreme Court in *Ram Gopal Chaturvedi Vs. State of Madhya Pradesh*, . The appellant of the said case was holder of temporary appointment as a civil judge. The Governor issued an order terminating his appointment. It transpired that the Chief Justice of the Madhya Pradesh had made enquiries regarding a complaint against the appellant. The High Court passed a resolution that the State Government should terminate the appellant's services. Thereupon, the Governor had passed the impugned order of termination. The Supreme Court held that the said order did not cast any stigma and it was immaterial that the order was proceeded by an informal enquiry into the appellants conduct with a view to ascertain whether he should be retained in service. In the instant case after the appellant had completed the departmental examinations, the High Court decided that his probationary period be not extended in the interest of public and requested the Governor to take action accordingly. Therefore, the Governor's order terminating the appellant's service was not prima facie by way of punishment.

6. The Supreme Court in their recent decision in *B.S. Yadav and Others Vs. State of Haryana and Others*, , at pages 585-586, observed that the power conferred by the proviso to Rule 10(1) of the Punjab Superior Judicial Service Rules was ex facie bad because such a power directly impinged upon the control vested in the High Court by Article 235 of the Constitution. If at all any authority could exercise such power, it was the High Court and not the Governor. According to their Lordships, the rule must be understood to mean that the High Court and not the Governor has the power of confirmation and that the normal period of probation of direct recruits was two years and unless there was exceptional circumstances attaching to each individual case, the direct recruit could not be confirmed from a date on which he had satisfactorily completed his probation of two years. The said observations of the Supreme Court were made in the context of the rules considered in the case of *B. S. Yadav's case* (supra). Secondly, in the present case, the High Court through its Registrar had conveyed to the Government its decision not to extend the probationary period of the appellant in the public interest. Therefore, instead of confirming him the High Court had decided to terminate the appellant's probationary appointment. Therefore, the Governor by issuing the impugned termination order had merely given effect to

the said decision of the High Court and the termination order was not constitutionally invalid.

7. There is prima facie no substance in the submission that when the appellant had completely passed the departmental examination the Governor was bound to confirm him. A probationer must fulfil all the terms and conditions of his appointment before he can claim to be considered for confirmation. The rules relating to appointment and confirmation may be prescribed by statutory rules. In case of Judicial Officers prima facie such rules must be in compliance not only with the Article 309 but also with Article 235 of the Constitution. In case for any particular post, there are no statutory rules, the appointing authority may issue administrative directions regarding its terms of appointments to such a post. Again, the High Court is required to be consulted even in case of making of such administrative orders in respect of judicial officers. Thirdly the appointing authority in the appointment order itself may set out the terms and conditions for appointment and confirmation. In the instant case the Secretary, Judicial Department, Government of West Bengal while conveying the Governor's order appointing the appellant on probation, had stipulated that his confirmation would depend on passing the departmental examination and on his general fitness. Because of the appellant's own failure to timely pass the departmental examinations, his probationary period was extended. But the petitioner cannot take any advantage of his own failure to timely pass the departmental examinations and claim that the High Court while extending his probationary period had impliedly found him fit. The appellant during his entire probationary period was required to remain fit, i.e., worthy or eligible for confirmation. On a review or consideration of the records of his entire probationary period including for the extended period, his fitness was to be decided. Therefore, his conduct during his extended period of probation it is found that he is not fit to be confirmed, the appointing authority was entitled to terminate his probationary appointment and to refuse to confirm him.

8. There is also no substance in his contention that the High Court having extended the appellant's probationary period till September, 1980, the Governor could not prematurely terminate his appointment with effect from 18th August, 1980. The High Court lastly extended the appellant's probation till 30th September, 1980 until he passed the departmental examinations whichever was earlier. Therefore, when he passed in the subject of the departmental examinations, the petitioner completed his probationary period and upon his fitness or otherwise the Governor in consultation with the High Court was required to pass necessary order. Subject, to the rules, if any, for confirmation, when the stipulated period of probation is completed there could be three possibilities. The appointing authority may confirm the probationer and substantively appoint him. Secondly, if it is of opinion that he is not fit to be confirmed, the appointing authority may refuse to confirm and terminate the probationary appointment. Thirdly, the appointing authority may defer consideration of the question of confirmation and extend the probationary period

of an appointee unless the rules preclude such extension.

9. Neither the terms of appointment of the appellant nor the service rules applicable to him provided that the appellant's confirmation would automatically follow at the end of a specified period or upon passing departmental examinations. Therefore, the appellant cannot claim that on the expiry of the said period or on his passing in all subjects of the departmental examination, he had any right to be confirmed as a Munsif. The Supreme Court in *Chand and Others Vs. State of U.P.*, had pointed out that at the end of the period of probation an order confirming the officer is required and if no such order is passed and he is not reverted, the result merely is that he continues in his post as a probationer. The ratio of this decision also applies to the facts of the case before us. The decision of the Supreme Court in *State of Punjab Vs. Dharam Singh*, ought to be read in the context of Rule 6 of the Punjab Educational Service (Provincialised Cadre) Class-111 Rules, 1961. According to the Supreme Court, the said Rule fixed a certain period of time beyond which the probationary period could not be extended and an employee appointed or promoted to a post on probation was allowed to continue not only after completion of the maximum period of probation without an express order of confirmation, he could be deemed to continue in that post as a probationer by implication. The reason was that such implication was negated by the Service Rule considered by the Supreme Court in *The State of Punjab v. Dharam Singh* (supra). But in the instant case, neither service rules nor the terms of appointment of the appellant either expressly or by implication did provide for his automatic confirmation on completion of the maximum period of probation.

10. After the appellant completed his probationary period and also passed all the departmental examination, he had become eligible to be considered for confirmation but he had no vested right to be confirmed as a Munsif. The respondents were entitled to consider whether or not the appellant was suitable and fit to be confirmed as Munsif. When following an enquiry to ascertain fitness of a probationary service is terminated. Article 311(2) of the Constitution does not apply (vide *The State of Orissa and Another Vs. Ram Narayan Das*,).

The Supreme Court in their later decision in *Samsher Singh v. State of Punjab* and another AIR 1974 SC-2192, had pointed out that in these matters no abstract proposition can be laid down. But the court recognised that before a probationer is confirmed, the authority concerned is under an obligation to consider whether work of the probationer is satisfactory or whether he is suitable for the post. When the authority comes to the conclusion that on account of inadequacy for the job or for any temperament or other cause not involving moral turpitude, the petitioner is unsuitable for the job and hence he should be discharged, according to the Supreme Court, no punishment is involved. We have pointed out that in the instant case the Additional Registrar, Appellate Side of this Court by a memo dated 11th June, 1980 had conveyed to the State Government the decision of this court that probationary period of the present appellant be not

extended further in the public interest and requested the Government to take action accordingly. In this context, we are unable to hold that even prima facie the impugned order of the Governor of West Bengal terminating the appellant's appointment as a probationary Munsif in the interest of public Service was not a penal order. No stigma was cast upon the character or integrity of the appellant. Same also did not visit him with evil consequences.

11. We are unable to accept as sound the submission of Mr. Mukherjee, learned advocate for the appellant, that the order of the Governor of West Bengal terminating appellant's appointment in interest of public Service cast any stigma upon the appellant. We have already observed that the State is entitled to consider the appellant's suitability for confirmation The Supreme Court in Union of India (UOI) Vs. Col. J.N. Sinha and Another, , held that an order of compulsory retirement in public interest under the Fundamental Rules 56(j) does not involve any civil consequence and the said Rule was not intended for taking any penal action. For the same reason the termination of the petitioner's appointment as a probationer in the interest of public Service cannot be considered as a penal order.

12. By filing amendment petition the appellant has not brought before the court any other additional material to support this claim that his termination was by way of punishment. On the other hand, we find that on the recommendation of the High Court the Governor had terminated the appellant's appointment and, therefore, there was no substance in the claim that the provisions of Articles 234 and 235 of the Constitution had been contravened.

13. We accordingly, dismiss this appeal. There will be no order as to costs.

14. The application for amendment of the writ petition is also disposed of for the reasons indicated above.

15. After the judgement is delivered, Mr. Mukherjee, appearing on behalf of the petitioner-appellant, prays for granting a certificate under Article 133 of the Constitution of India, We do not consider this a lit case for granting a certificate under Article 133 of the Constitution of India. The prayer is rejected.

16. Let the certified copy of this judgment, if applied for, be expeditiously granted.

B.N. Maitra, J.

I agree.