
(2013) 04 DEL CK 0408
In the Delhi High Court
Case No : W.P. (C) 6827/2010

MCD

APPELLANT

Vs

Suman Devi

RESPONDENT

Date of Decision : 01-04-2013

Acts Referred:

Citation : (2013) 04 DEL CK 0408

Hon'ble Judges : Pratibha Rani, J;Pradeep Nandrajog, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—The respondent was offered appointment on October 17, 1995, as an Assistant Teacher under the Municipal Corporation of Delhi. She was to be on probation for 2 years. The relevant portion of the letter offering appointment to the respondent read as under:-

1. Probation period shall be for two years.
2. The appointment is purely temporary and the appointee or the appointing authority can terminate the same without disclosing any reason by one month's prior notice or one month's pay in lieu thereof, nevertheless the right to terminate the same immediately on the expiry of notice period or prior thereto shall be at the discretion of the authority.
4. In case, the character, conduct and devotion to duty on the part of the appointee proved to be doubtful, he/she shall not be paid the wages even for the days he/she put in duty.

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9. In case, the appointee is found to be unfit or incapable by the Medical Officer, MCD during medical/test examination, his/her wages for the days he/she puts in shall not be paid and services put in by him/her shall be deemed to have been terminated w.e.f. the very appointment.

On the same date i.e. October 17, 1995, the respondent accepted the aforesaid appointment offered to her. The relevant portion of the letter dated October 17, 1995 written by the respondent reads as under:-

1. I accept the above terms and condition of the appointment.

7. Within 20 days of my taking over charge in the School, I shall, having obtained letter of medical check up from Education Department (Zonal Office), undergo medical check up.

2. The respondent joined duty in the MCD Primary School in Nand Nagri, O-Block, New Delhi on October 21, 1995. The school was closed for the next 3 days on account of Diwali. On reopening of the school i.e. on October 26, 1995 the respondent reported for duty.

3. On the very next day i.e. on October 27, 1995 the respondent did not report for duty.

4. This is where the problem began in the instant case. She only worked for two days.

5. It is the claim of the respondent that she suddenly fell ill on October 27, 1995, due to which she could not report for duty. She claims that on the same day i.e. October 27, 1995, she sent an application to the Headmistress of the school stating therein that she is unable to report for duty due to her ill-health and would resume duty immediately on improvement in her health. As claimed by her, the health of the respondent improved on February 29, 1996, on which date she claims to have met the Headmistress of the school in her office and submitted an application requesting that she be allowed to join duty at the school. Together with the said application, the respondent claims to have annexed a medical certificate dated February 29, 1996 issued by a private practitioner (doctor) recording that the respondent was suffering from Post Partum Hepatitis (Unal) since October 10, 1995 and she is fit to join duty with effect from February 29, 1996.

6. On the other hand, it is claimed by the petitioner that after working for just 2 days, the respondent absented herself from duty for a period commencing from October 27, 1995 till February 28, 1996 without giving any intimation to the school authorities regarding her absence. On February 29, 1996 her husband visited the school and submitted an application dated February 29, 1996, which recorded that the respondent was sick during the period of her absence from duty and she sought permission to join the school. As per the petitioner since the application was not accompanied by a proper medical certificate regarding the illness of the respondent, coupled with the fact that said application was not submitted by the respondent in person, the petitioner did not allow the respondent to join duty at school. It is further claimed by the petitioner that as per the terms of her appointment, the respondent was required to undergo medical examination within 20 days of her joining duty. Since the respondent did

not comply with said term, the petitioner did not allow her to re-join duty.

7. In August 1996, the respondent filed a writ petition under Article 226 of the Constitution of India before this Court, inter-alia, praying that the petitioner be directed to allow the respondent to join duty at a school.

8. While the aforesaid petition was pending adjudication, the Assistant Education Officer (Administration), MCD issued an order July 4, 1997 terminating the services of the respondent. The same reads as under:-

As per orders of Additional Commissioner (Education) dated 20-5-97, the services of Ms. Suman Devi, Teacher, MCD Primary School, Nand Nagri, O-Block, 1st shift, Shahdara (North) are hereby terminated w.e.f. 26-10-95.

This order is being circulated to all concerned for necessary action.

(Emphasis Supplied)

9. Thereafter the respondent amended the aforesaid writ petition filed by her and laid a challenge to the order dated July 4, 1997 issued by the Assistant Education Officer (Administration), MCD. Subsequent thereto, the aforesaid petition got transferred to the Central Administrative Tribunal, Principal Bench, New Delhi.

10. Vide judgment and order dated February 11, 2010, the Tribunal held the order dated July 4, 1997 to be illegal and allowed the petition filed by the respondent in the following terms:-

14. Resultantly, TA is allowed to the extent that the impugned order is set aside. Respondents are directed to forthwith reinstate the applicants in service. However, we restrict the back-wages to 50% with all other consequences admissible to applicant. This does not preclude the respondents, if so advised, to proceed in the matter in accordance with law.

(Emphasis Supplied)

11. In so concluding, the reasons given by the Tribunal are that:-

(i) as per the terms of appointment of the respondent, her services could be terminated after a month's notice or salary in lieu thereof, which was a condition precedent and this was not complied with;

(ii) since the order terminating the services of the respondent was punitive inasmuch as it was founded upon the conduct of the respondent of remaining absent from duty, the law required the petitioner to issue a show cause notice and grant opportunity of hearing to the respondent before terminating her services; and

(iii) the petitioner has terminated the services of the respondent with retrospective effect, which is impermissible in law.

12. Aggrieved by the judgment and order dated February 11, 2010 passed by the

Tribunal, the petitioner has filed the present petition under Article 226 of the Constitution of India.

13. Whether the Tribunal was correct in holding that since a month's prior notice before terminating the service of the respondent was not given and alternatively salary in lieu thereof was not given, the termination was illegal?

14. A similar question came up for consideration before a Division Bench of this Court in W.P. (C) No. 6619/2000 "Ashok Kumar v. Union of India". In said case, in the year 1994 the petitioner therein was appointed as an ad-hoc Assistant Librarian in Dr. Ram Manohar Lohia Hospital, New Delhi. On August 28, 1999 the respondents therein issued an office order terminating the services of the petitioner with effect from September 25, 1999. The letter of offer dated January 21, 1995, whereby the petitioner was informed of his selection for appointment, inter alia, contained the following terms and conditions:-

3(i) The services are liable to be terminated at any time without notice or assigning any reason.

(ii) However after putting in a service of three months, the services are liable to be terminated by one month's notice given by either sides without assigning reasons. It will be open to the undersigned to pay in lieu of notice pay for the period by which the notice falls short of one month.

4. The other conditions of service will be governed by the Central Civil Services (Temporary Service) Rules and other relevant rules and orders in force from time to time.

15. One of the contentions advanced before the Division Bench was that in terms of letter dated January 21, 1995, the petitioner therein was entitled to receive one month's notice or pay in lieu thereof before his services could be terminated, which condition was not fulfilled by the respondents before terminating the petitioner consequently, it was pleaded that the order terminating the services of the petitioner was illegal.

16. After exhaustively noting the dictum of law laid down by the Supreme Court in the decisions reported as Management Of MCD Vs. Prem Chand Gupta and Another, , Raj Kumar Vs. Union of India (UOI) and Others, , Rakesh Kumar Singh Vs. Committee of Management, Raibarali, and Oriental Insurance Co. Ltd. Vs. T. Mohammed Raisuli Hassan, , vide judgment and order dated November 1, 2006 the Division Bench repelled the above contention in the following words:-

14. Assuming that the terms of offer of appointment governed the rights of the parties, which appear to be more favorable to the petitioner, it is clear that after the petitioner had put in three months service, his ad-hoc appointment could be terminated by giving one month's notice. The respondent also had the option to give a shorter notice, and to make payment to the petitioner of pay in lieu of the period by which the notice falls short of one month. There is no requirement that such payment in lieu of notice period should be simultaneously tendered to the

petitioner. The said payment can be tendered or recovered even subsequently. The obligation to make such payment is not required, by the terms of the contract, to be performed either before, or simultaneously with the exercise of the right to terminate the service of the petitioner. The act of termination is not prescribed to be achieved only by making of the amount representing the shortfall in the notice period, but by the termination letter/order which may be issued. The termination of the contractual employment is achieved when a notice/order of termination is issued. The expression "by which the notice falls short of one month" suggests that even where the notice period is less than one month, a notice of termination would suffice to terminate the employment. The act of termination is not prescribed to be performed only by payment of the amount by which the notice falls short of one month.

15. In the course of administration, it may be necessary to terminate an adhoc appointment on short notice or without notice. The administration should not be obstructed in the efficient discharge of its functions and responsibilities by requiring the fulfillment, as a pre-condition, of an obligation which is not otherwise required by contract or by law to be discharged as such.

16. On a reading of the contractual terms, we do not find that the respondent was required to make simultaneous payment to the petitioner of the amount of pay which would cover the period by which the notice fell short. Such payment can be made subsequently as well, and on this account the termination cannot be said to be illegal.

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29. In view of the aforesaid legal pronouncement of the Apex Court, the termination clause contained in the offer of appointment dated 21.1.1995 does not cast an obligation on the respondent to simultaneously tender pay in lieu of notice period for the period by which the notice falls short of one month while terminating the services of the employee concerned. Even when the services are terminated by a notice which falls short of one month, the act of termination is completed on issuance of such a notice. We cannot read into the said clause, a prescription that the notice of termination, if less than one month is necessarily to be accompanied by payment for the period by which the notice falls short of one month.

30. In view of our aforesaid discussion, it makes no difference to the result of the present case, whether we proceed on the basis of Clause 3 of the offer of appointment dated 21.1.1995, or on the basis of Rule 5 of the CCS (Temporary Service) Rules. In either case, there is no such requirement of tendering to the petitioner pay in lieu of the period by which the notice fell short of one month simultaneously.

17. From the above judicial pronouncement, it is clear that the Tribunal fell into an error in holding that in the absence of a month's notice or salary in lieu thereof given the termination was invalid.

18. The issue of termination of probationers has cropped up time and again. It has received judicial attention over four decades. Tests have been evolved, found to be difficult to apply; they have been formulated from time to time.

19. Till date no test has been devised where a person's capacity, integrity, suitability, utility and capacity to work in harmony with the others can be tested at one go. Therefore, law vests a right in the employer, to keep under the watch, the services of the person he has employed; but for a specified duration of time. This is to guard against errors of human judgment in selecting a suitable candidate. The employee remains on test for a specified duration i.e. the period of probation before he gets a right to be permanently absorbed. This period of probation affords to the employer, locus to watch the efficiency, ability, integrity, sincerity, suitability and the competence of the probationer employee. This is the period of reassurance for the employer to reassure that his initial judgment was right. Therefore, an employer has a legal right to dispense with the services of the employee without anything more, during or at the end of the prescribed period, which is styled as the period of probation.

20. In the light of the aforesaid concept of probation as understood under Service Jurisprudence, termination of the services of the probationer, during or at the end of the period of probation does not affect any right of his, as indeed he has no right to continue to hold the post, save and except after confirmation.

21. However, where a probationer is stigmatized, evil consequences flow. He has to live with the stigma all his life. This stigma would affect his future prospects of finding suitable employment elsewhere. Therefore, harmonizing the right of the employer and the right of the employee, the service jurisprudence has recognized that where the termination of services of a probationer visits him with a stigma or is penal or is mala fide, the probationer would have a right to have justified the cause which has resulted in his being removed other than relating to his personal capacity, suitability, utility or capacity to work.

22. When is the order of termination of services of probationer discharge simpliciter and when is it stigmatic/punitive?

23. What is stigma?

24. In the decision reported as Kamal Kishore Lakshman Vs. Management of Pan American World Airways Inc. and Others, it was observed: According to Webster's New World Dictionary, it (stigma) is something that detracts from the character or reputation of a person.... The Legal Thesaurus by Burton gives the meaning of the word "to be blemish, defect, disgrace, disrepute, imputation, mark of disgrace or shame".

25. In the decision reported as Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, , the Supreme Court had an occasion to determine as to whether the impugned order issued to a probationer therein was a letter of termination of services simpliciter or stigmatic termination. After

considering its various earlier decisions, the Court observed as under:-

29. Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties as noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job.

(Emphasis Supplied)

26. In the decision reported as : (2002) 9 SCC 636 State of Punjab v. Bhagwan Singh the Supreme Court observed as under:-

4.In our view, when a probationer is discharged during the period of probation and if for the purpose of discharge, a particular assessment of his work is to be made, and the authorities referred to such an assessment of his work, while passing the order of discharge, that cannot be held to amount to stigma.

5. The other sentence in the impugned order is, that the performance of the officer on the whole was "not satisfactory". Even that does not amount to any stigma.

27. In the decision reported as Krishnadevaraya Education Trust and Another Vs. L.A. Balakrishna, , the services of probationer/respondent were terminated on the ground that his on the job proficiency was not up to the mark. The Supreme Court held that merely a mention in the order by the employer that the services of the employees are not found to be satisfactory would not tantamount to the order being a stigmatic one. It would be relevant to note following observations made in said decision:-

5. There can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the recruit/appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job, then the employer has a right to terminate the services as a reason thereof. If the termination during probationary period is without any reason, perhaps such an order would be sought to be challenged on the ground of being arbitrary. Therefore, naturally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged, without assigning any reason. If the order on the face of it states that his services are being terminated because his performance is not satisfactory, the employer runs the risk of the

allegation being made that the order itself casts a stigma. We do not say that such a contention will succeed. Normally, therefore, it is preferred that the order itself does not mention the reason why the services are being terminated.

6. If such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer were terminated. Mere fact that in response to the challenge the employer states that the services were not satisfactory would not ipso facto mean that the services of the probationer were being terminated by way of punishment. The probationer is on test and if the services are not found to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services.

(Emphasis Supplied)

28. In the instant case, the order dated July 4, 1997 issued by the petitioner contains no reasons for terminating the services of the respondent.

29. In the counter affidavit filed, the petitioner pleaded that the services of the respondent were terminated for the reason her performance was found unsatisfactory inasmuch she worked for only 2 days after her appointment and thereafter absented herself from duty for a period of 4 months without giving any intimation or justifiable reason regarding her absence from school.

30. While the respondent contends that she had given intimation to the school authorities regarding her absence from duty as also medical certificate to the concerned authorities explaining her absence, the petitioner has denied the same.

31. We cannot go into aforesaid disputed questions of facts in exercise of our jurisdiction under Article 226 of the Constitution of India. However, one fact which strikes us is that the medical certificate claimed to have been given by the respondent to the petitioner has been issued by a private practitioner and not a government doctor. Being a government employee, the respondent could have easily gone to a government doctor/hospital and obtained a certificate regarding her illness. Not much mileage can be drawn by the respondent upon the medical certificate claimed to have been given by her to the petitioner for the reason the same is a self-serving document.

32. With respect to the judicial pronouncements relating to probationers, the action of the petitioner to terminate the service of the respondent on account of her unsatisfactory performance during probation period can hardly be termed as stigmatic or punitive. As a necessary corollary thereof, since the action of the petitioner to terminate the services of the respondent is neither stigmatic nor punitive, the petitioner was not required to issue any show cause notice or grant opportunity of hearing to the respondent before terminating her services.

33. We have noted herein above that while accepting the letter offering appointment, the respondent undertook to undergo a medical check-up within 20 days. We all know that when a person joins government service, the person concerned has to subject himself/herself to a medical examination. The

respondent did not do so and looked at from said aspect of the matter one can say that since the respondent did not comply with one essential term of the letter offering her appointment, the offer lapsed and the respondent was left with no right.

34. In the instant case, the service of the respondent has been terminated with retrospective effect.

35. Suspension or dismissal or removal from service with retrospective effect was held to be illegal and invalid in the decisions reported as Sudhir Ranjan Halder Vs. State of West Bengal and Another, and Smt. Lalita Kumari Vs. State of Bihar and Others, . But the principle of severability was not noted in the said two decisions.

36. In the decision reported as R. Jeevaratnam Vs. The State of Madras, , the Supreme Court had an occasion to examine a similarly worded order terminating the services of a government servant with retrospective effect. Applying the principle of severability, the Supreme Court disagreed with the wide observations of the Calcutta High Court in Sudhir Ranjan Haldhar's case (supra). It was observed:-

The order dated October 17, 1950 directed that the appellant be dismissed from service with effect from the date of his suspension, that is to say, from May 20, 1949. In substance, this order directed that (1) the appellant be dismissed, and (2) the dismissal to operate retrospectively as from May 20, 1949. The two parts of this composite order are separable. The first part of the order operates as a dismissal of the appellant as from October 17, 1950. The invalidity of the second part of order, assuming this part to be invalid, does not affect the first part of the order. The order of dismissal as from October 17, 1950 is valid and effective. The appellant has been lawfully dismissed, and he is not entitled to claim that he is still in service. We may now notice the cases relied on by counsel for the appellant. In Hemanta Kumar v. S.N. Mukherjee, the Calcutta High Court had occasion to consider an order dated April 29, 1952 by which a civil servant had been placed under suspension with effect from January 16, 1951. While holding that the order of suspension for the period, January 16, 1951 up to April 28, 1952 was invalid and should be quashed, the Court held that the order of suspension was valid and effective as and from April 29, 1952 and this part of the order should be upheld. As a matter of fact, the validity of suspension as from April 29, 1952 was not even questioned by counsel for the parties. Far from supporting the appellant, this decision is against him on the point under consideration. In Abdul Hamid v. the District School Board, the Calcutta High Court had occasion to consider an order dated April 18, 1952 discharging a teacher employed by a District School Board from service with effect from July 15, 1951, the date on which he had been arrested in connection with a pending criminal case against him. While holding that the dismissal from the period from July 15, 1951 up to April 17, 1952 was invalid, the High Court also held that the order of dismissal was entirely bad and was not effected even from April 18,

1952. The High Court observed: It appears to me that when the real intention of the Board was to discharge the petitioner with effect from the date when he was put under arrest it is not within the jurisdiction of the Court to substitute a different intention and maintain the order of discharge in a modified manner. The order must stand or fall in toto. In this view of the matter it appears to me that the order of discharge passed by the Board cannot stand.

Our attention is drawn to similar observations in *Sudhir Ranjan Halder v. State of West Bengal*. With respect, we are unable to agree with this line of reasoning. An order of dismissal with retrospective effect is, in substance, an order of dismissal as from the date of the order with the superadded direction that the order should operate retrospectively as from an anterior date. The two parts of the order are clearly severable. Assuming that the second part of the order is invalid, there is no reason why the first part of the order should not be given fullest effect. The Court cannot pass a new order of dismissal, but surely it can effect to the valid and separable part of the order.

(Emphasis Supplied)

37. In view of the above authoritative pronouncement, it has to be held that the order dated July 4, 1997 can be divided into 2 parts viz.

- (i) the services of the respondent are terminated; and
- (ii) the termination to take effect from October 26, 1995.

The second part of the order dated July 4, 1997 is invalid. However, the termination order as from July 4, 1997 is clearly valid and effective.

38. This aspect of the matter has clearly been lost sight of by the Tribunal.

39. The conclusion which emerges from the above discussion is that the action of the petitioner to terminate the service of the respondent is completely legal. Needless to state, the order terminating the service of the respondent shall take effect from July 4, 1997. We clarify here that the respondent shall not be entitled to payment of any salary or other allowances for the period from October 26, 1995 to July 4, 1997 on the principle of "no work on pay" for she had not worked during the said period.

40. The present petition is allowed and the judgment and order dated February 11, 2010 passed by the Tribunal is set aside. No costs.