
(1999) 09 DEL CK 0121
In the Delhi High Court
Case No : LPA No. 98 of 1985

N.G. Kulkarni (Dr.)

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-09-1999

Acts Referred:

Central Civil Services (Temporary Service) Rules, 1965 — Rule 5
Constitution of India, 1950 — Article 226

Citation : (1999) 6 AD 797 : (1999) 82 DLT 405 : (1999) 51 DRJ 571

Hon'ble Judges : Usha Mehra, J; Madan B. Lokur, J

Bench : Division Bench

Advocate : Mr. Shyam Babu Adv, for the Appellant; Mr. H.S. Phoolka Advocate, for the Respondent

Judgement

Usha Mehra, J.—Appellant, Dr. N.G. Kulkarni challenged the order of his termination by way of writ petition in the High Court . The learned Single Judge by the impugned judgment dated 27th May, 1985 dismissed the same . Aggrieved by the same, the present appeal had been preferred, inter alia, on the grounds (i) that the learned single Judge failed to appreciate that the appellant was appointed on regular basis in permanent capacity to a permanent post of chemist (Research & Laboratory) Grade-I, in the Bank Note Press, Dewas (M.P), whereas in the impugned judgment his case had been considered as a temporary Government servant. (ii) Adverse material was used against him, the basis of his termination was neither supplied to him nor was he afforded any opportunity to explain the same. Still the learned Single Judge relying on the adverse remarks held that termination was not punitive. (iii) On the basis of allegations leveled against him his a service could not have been terminated by resorting to Rule 5 of CCS (Temporary Service) Rules, 1965. (iv) Learned Single Judge misread and misconstrued the Memo dated 15th April, 1959 issued by the Ministry of Home Affairs, Government of India. (v) Learned Single Judge fell in the error in not considering that the order of termination was in fact a camouflage for and order of dismissal. Adverse remarks were never communicated to him at any stage.

(vi) Learned Single Judge ignored the the report of Mr. H.C. Kachwai another member with Mr. P.D. Pal whom the Department entrusted the matter for enquiry.

2. In order to appreciate the challenge we must have quick glance to the facts of the case. Briefly stated the facts are that the respondent had offered the appellant the job of a chemist (Research & Laboratory) Grade-I in the Bank Note Press, Dewas, M.P., vide letter dated 19th August, 1976. The incumbent was to be on probation for a period of two years extendable at the discretion of the Ministry. This offer was accepted by the appellant vide his letter dated 25th August, 1976. After he accepted the same, a letter of appointment dated 3rd September, 1976 was issued effective from 24th June, 1976. Service of the appellant was terminated under Rule 5(i) of the Central Civil Service (Temporary Service) Rules, 1965 (hereinafter called Rules of 1965). This order of termination was assailed as pointed out above.

3. The first ground of attack is that since he completed successfully the period of probation of two years and the probation having not been extended, he is deemed to have been confirmed against the said post. That the order of termination was nothing but a camouflage for dismissal. The said order was passed with mala fide intention to favor respondent No. 4. The appellant was highly qualified, Therefore, in the presence of appellant respondent No. 4 could not have been appointed to the post of Chief Chemist. Hence respondents 2 & 3 developed professional grudge against him. They, Therefore, leveled false allegations amounting to misconduct on the part of the appellant.

4. Mr. Shyam Babu, Therefore, contended that after the expiry of initial period of two years the respondent had no authority to extend the period of probation. He based his argument of on the appointment letter which provides for a fixed period of probation of two years.

5. The terms of appointment as mentioned in the letter dated 3rd September, 1976 nowhere provided that respondent could extend the probationary period. We are afraid we can't subscribe to this contention of the counsel for the appellant for the simple reason that the letter of appointment cannot be read in isolation. The letter of appointment was a sequel to the offer of appointment dated 19th August, 1976 Which letter contained the terms and conditions pursuance to which appointment letter was issued. Appellant accepted those terms and conditions and communicated his acceptance vide his letter dated 19th August, 1976. Hence it cannot be said that since in the formal letter of appointment it was not specifically mentioned that respondent could extend the probation period hence the appellant deemed to have been confirmed after the expiry of initial period of probation of two years. The relevant extracts of the terms and conditions offered to the appellant vide letter dated 19th August, 1976 and which are relevant for our purpose are reproduced as under:

No.F. 4/15/74-BNP

Government of India

Ministry of Finance
Department of Economic Affairs

To,

Dr. N.G. Kulkarni,
Chemist Grade-I,
Bank Note Press,
Dewas (MP).

Sub: Appointment to the post of Chemist (Research and Laboratory Grade-I Bank Note Press, Dewas (MP).

Sir,

I am directed to refer to your application dated 7.4.76 to the Union Public Service Commission and to say that on the recommendation of the UPSC the President has been pleased to offer you a temporary Class I Gazetted Post of Chemist (Research and Laboratory) Grade I in the Bank Note Press, Dewas (MP) on the following terms:-

(i) You will be appointed in the scale of pay of Rs.1100-50-1600 (Revised) with an initial pay of Rs.1200/- per month.

(ii) The appointment is terminable on one month's notice on either side.

(iii) You will be probation for a period of two years from the date of appointment. The period of probation may be extended at the discretion of this Ministry.

6. Pursuance to the offer of appointment appellant communicated his acceptance vide his letter dated 25th August, 1976 in the following words :-

"With reference to your appointment letter No. F.4/15//74-BNP dated 19th August, 1976, I have to state that I accept the offer on terms and conditions mentioned therein.

7. It is thereafter that notification dated 3rd September, 1976 was issued by respondent which reads as under :-

No. F.4/15/74-BNP

Government of India/Bharat Sarkar

Ministry of Finance Vitta Mantralaya

Deptt. of Economic Affairs Arthik Karya Vibhag

New Delhi, the 3rd Sept.,1976

N O T I F I C A T I O N

On the recommendations of the Union Public Service Commission, the President is pleased to appoint Dr. N.G. Kulkarni as Chemist (Research & Laboratory) Grade-I, in the Bank Note Press, Dewas (M.P.) on regular (officiating) basis, with effect from the 24th June, 1976 till further orders.

2. Dr. Kulkarni will be on probation for a period of two years from 24th June, 1976.

Sd/-

(L.K. Malhotra)

Under Secy. to the Govt. of India

8. Thus, the combined reading of these letters leave no manner of doubt that appellant was aware that he was appointment on probation to a temporary post initially for a period of two years but extendable at the discretion of the respondent. Even though the probationary period was not extended in express terms but in view of the powers vested with the respondent his probationary period stood extended when not expressly confirmed. Thus it can't be said that on expiry of two years the appellant automatically got confirmed. It is now well settled that despite the probationary period having not been extended even then it cannot deemed to have been confirmed on account of non extension of the probationary period. In the absence of such a stipulation in the terms and conditions of appointment automatic confirmation does not follow as held by Supreme Court in the case of State of Punjab Vs. Baldev Singh Khosla, wherein it has been held that until a positive order of confirmation is passed the probationer cannot claim automatic confirmation on the expiry of the initial period or the extended period of probation. Hence so long as specific order of confirmation is not made the probationer may continue and remain in service even after expiry of probation, but by allowing him to remain in service it would not amount to deemed confirmation. In the case of Dhanjibai Ramjibhai Vs. State of Gujarat reported in 1985 (1) SLR 595, it was observed by the Supreme Court that even where the initial period of probation expired and the competent authority has not extended the period of probation still the probationer cannot claim automatic confirmation. Further observed that State will be well within its right to consider the entire record of service rendered by the probationer and to determine whether he is suitable for confirmation or his service should be terminated. Confirmation implies the exercise of judgment by Confirming Authority on the overall suitability of the employee for permanent absorption in service. To the same effect are the observations of Supreme Court in the case of State of Maharashtra Vs. Veerappa R. Saboji reported in 1979 SLJ 621. In this case the Court opined that confirmation is not automatic. It can be delayed in order to find out whether the probationer is suitable for the job or not. Confirmation is not automatic has also been held by the Supreme Court in the case of Sukhbans Singh Vs. State of Punjab, . The Apex Court observed that unless rule expressly provides that after the expiry of the period of probation the

probationer will automatically get confirmed, the probationer in the normal course cannot seek automatic confirmation. This way the probationer does not automatically become a full member of the service on the expiry of the period of probation, until and unless he is confirmed expressly or by necessary implication. This view was reiterated by Supreme Court in the case of J.C. Kapoor Vs. International Airport Authority of India 1988 (3) SLR 774.

9. In view of the settled position of law it cannot be said that after the initial period of probation of two years because the probationary period of the appellant was not extended he automatically became a con-firmed employee. For confirmation, as held by Supreme Court, it requires a necessary passing of the order of confirmation. It required application of mind by the competent authority which in this case had not been done. Therefore, even if the probation period was not extended specifically still the appellant, at best could be said to have remained in service in the status of a probationer.

10. We find no merits in the submission of Mr. Shyam Babu that since in the appointment letter right to extend the probation was not reserved by the respondents, hence respondent had no powers to extend the probation period. In fact what the appellant wants this Court to do is to ignore the terms and conditions stipulated in the offer of appointment on the basis of which he was appointed. By this argument the appellant appears to ignore the fact that he himself vide his letter dated 25th August, 1976 accepted the offer of appointment letter dated 19th August, 1976 containing the terms to be his appointment letter. Having accepted those terms and conditions, the appellant cannot be allowed now to turn around and say that since these terms and conditions were not specifically incorporated in the letter of appointment hence no cognizance of the same can be taken. Reliance by Mr. Shyam Babu on the decision of Allahabad High Court in the case of S. Mukherjee Vs. State of U.P. 1975 FLR 258, is misplaced. No aid of this decision can be taken to support his contentions. That case is distinguishable on facts. In that case the government servant was appointed on substantive basis whereas appellant was appointed on officiating basis against a temporary post. Therefore, the question of substantive appointment against a substantive post or a permanent post does not arise in the facts of this case. The ratio of S. Mukherjee's (supra) does not apply to the facts of this case.

11. Reliance by Mr. Shyam Babu on the decision of Supreme Court in the case of Wasim Beg Vs. State of Uttar Pradesh and Others, is also of no help to him rather it supports the case of the respondents. Clause (2) of the letter of appointment dated 3rd September, 1976 read with the terms and conditions stipulated in the letter dated 19th August, 1976 clearly show the respondent had reserved the right to extend his probationary period. Clause (2) of the letter dated 3rd September, 1976 cannot be read in isolation. Had there been no offer of appointment containing the terms and conditions preceding the letter of appointment then perhaps there could have been force in the submission of Mr.

Shyam Babu. But unfortunately it is not so. In the present case, letter of appointment is preceded by the offer of appointment containing specific terms and conditions on the basis of which appointment was made. Those terms and conditions were accepted unequivocally by the appellant vide his letter dated 25th August, 1976. Hence no help can be taken by the appellant from the observations of the Supreme Court in the case of Wasim Beg (supra) nor it can be said that appellant after the expiry of initial period of probation got confirmed automatically.

12. Admittedly, no specific order confirming the probation period of the appellant was passed. According to appellant since he was confirmed in that case his probation is deemed to have been extended. If that be so then by deeming provision his probation stood extended beyond 24.6.78. In that case by virtue of office Memorandum dated 15th April, 1959 he ought to have been furnished the deficiency any shortfall of his performance. Having not done so the respondent violated and breached the provision of clause (ix) of Office Memorandum dated 15th April, 1959. By no means he would become a temporary employee.

13. Mr. H.S. Phoolka, counsel for respondent while refuting these arguments contended that Office Memorandum is only a recommendation issued by the Government. These are not statutory and, Therefore, breach of the same does not give any cause of action to the appellant.

14. Before we deal with the scope of this O.M. dated 15.4.59, we would like to deal first with the objection raised by Mr. Shyam Babu regarding the termination order in question. According to him it was not an order of termination simpliciter. It was termination which visited the appellant with evil consequences. Hence it was a termination by way of punishment for which regular enquiry ought to have been held. To establish that it was a punitive termination he relied on the observation made by learned Single Judge after scrutinising the official records namely the adverse remarks made against the appellant. In order to appreciate his contention the remarks in the ACRs of the appellant and as quoted by learned Single Judge after perusing the office record are reproduced as under:-

"There are to be a general appraisal of the officers" good and bad qualities in narrative form. There are general comments recorded by Reporting Officer and agreed to by the Reviewing Officer that the petitioner is insubordinate, indiscipline amongst subordinate staff, is incapable of initiating and/or carrying out research and development projects independently and that the petitioner lacks capacity to work with his own hands and depends more on his subordinate staff without exercising counter checks which has often tended to upset the production schedules, a secret note-book was also attached about the doubtful integrity of the petitioner."

15. It has further been observed as under:-

"The petitioner could not be retained in Government service and allegation needs a probe by the CBI."

16. On the basis of these remarks in the appraisal report of the appellant it is clear that his termination was not a termination simplicitor. The respondent was contemplating a CBI enquiry against the appellant because his integrity was found doubtful and he was not found fit to be retained in security organisation like Bank Note Press where the process of printing ink was very crucial. Relying heavily on these observations Mr. Shyam Babu contended that if we tear the veil and pierce behind the termination order it would become clear that cause for termination was insubordination, indiscipline, doubtful integrity. These are serious allegations leveled against the appellant. These were the foundation of his termination. Hence the order of termination cannot be called termination simplicitor. It was used as a camouflage for dismissal as the respondent never wanted to follow the due process of law. By adopting this short-cut method, the respondent deprived valuable right of the appellant to defend himself. The appellant at no stage was made aware of these serious charges. Had he been given the opportunity to rebut the same and defend himself, he would have proved that these allegations were made mala fide, engineered at the instance of respondent No. 1 & 2 in order to favor respondent No.4. They were biased against the appellant. According to Mr. Shyam Babu such serious allegations amounting to misconduct could not have been taken note of behind his back without first giving him opportunity to explain. Even his integrity certificate was withheld. This was a clear pointer towards the department doubting his integrity and still not holding enquiry. In fact the appellant was dismissed from service under the garb of "termination simplicitor". No dismissal otherwise could have taken place except after holding regular enquiry and finding him guilty. But the respondent achieve their object to get rid of the appellant by terminating his service under Rule 5(i) which rule in the facts of this case did not apply. Mr. H.S. Phoolka on the other hand tried to convince us by saying that in order to consider the performance of the appellant the department had not appraise his work, conduct and performance. That while assessing the performance some observations were noted. These observations recorded by the department by no means would amount to casting stigma on the appellant. In fact while assessing the performance the department had to appraise his conduct as to whether it amounted to insubordination, indiscipline or not. But assessment of performance and conduct will not amount to casting aspersion on his character or integrity. These remarks neither amounted to stigma nor were made with any malafide intention. The post of Chemist which was held by the appellant was not given to the respondent No. 4, Therefore, there was no question of any mala fide nor motive could be assigned to the respondent in terminating his services.

17. At the outset we have to keep in mind the settled principle that this Court in order to find out correct position if need be can X-ray and scan the order. It has ample power to lift the veil and screen the order in order to reach to its depth. In this case we have to see in view of the adverse entries made in the ACRs of the appellant whether the termination was implicate or was in fact an order of dismissal or that the termination implicate was used as a camouflage to short-cut

the procedure required to be followed in case of dismissal. Admittedly while assessing the performance of the appellant the authorities found that he misconducted himself. The learned Single Judge after glancing through the official record found that the acts of the appellant amounted to insubordination. He created indiscipline amongst subordinate staff. He was incapable of initiating and/or carrying out research and development work for which he was appointed. The matter did not end here, authority found downward trend in quality control of ink produced in that year by ink factory of the press for which the responsibility was that of the appellant. It was also found that to retain him in service would be against the interest of the security of the organisation where process of printing ink was very crucial. Since the authority found that his integrity was doubtful hence did not issue him integrity certificate. To our mind these were serious allegations leveled against him. At one point of time it was considered that since allegations were serious those should be got probed by CBI. It would not be correct to say that these allegations as reproduced by the learned Single Judge in his judgment did not amount to misconduct or that these were not root cause or basis of his termination from the service. Admittedly, he was never put to notice regarding any of these allegations at any point of time. All these allegations remained in the records of the respondent and were considered against him behind his back.

18. It would not be correct on the part of Mr. H.S. Phoolka to urge that there was no violation of principle of natural justice or the provisions of Office Memorandum dated 15th April, 1959 being mere recommendation of the Government of India would be flouted with impunity. Admittedly, the provisions of Article 311(2) of the Constitution apply only to the permanent employees. But the fact remains that even when the service of a probationer is to be terminated specifically when the basis of the same are serious allegations amounting to misconduct then the person concerned has to be appraised of those allegations. He must at least be given reasonable opportunity to explain his part of the story. The principle is well settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, on one hand to afford opportunity to the person to improve and on the other to the authority to take decision on the basis of the Explanation offered by the person concerned, so that authority could arrive at a conclusion whether the adverse report or allegations against him were justified. Article 311(2) may as such be not applicable to a probationer, that is why for probationers Government of India issued Office Memorandum dated 15th April, 1999 reproduced by P. Muthu Swamy in his compilation on Establishment and Administration, Chapter 19 under the heading "Probation on Appointment". Clause (ix) of the said Office Memorandum provides that when a probationer is not making satisfactory progress or shows himself to be inadequate for the service he must be communicated his shortcomings. Clause (ix) of O.M. dated

15th April, 1959 is reproduced as under:

(ix) The decision whether an employee should be confirmed or his probation extended should be taken soon after the expiry of the initial probationary period, that is ordinarily within six to eight weeks, and communicated to the employee together with the reasons in case of extension. A probationer who is not making satisfactory progress or who shows himself to be inadequate for the service in any way should be informed of his shortcomings well before the expiry of the original probationary period so that he can make special efforts at self-improvement."

19. Contention of Mr. H.S. Phoolka, that this O.M. was only a recommendation cannot be accepted. This was a recommendation by the Government of India to be followed by its various Ministries. It may not be statutory or mandatory, but the recommendations of Government of India to its Ministries concerning the employees to be covered by the same has a force of law particularly when those recommendations deal with affording opportunity to the concerned employees based on the principle of natural justice. We are in respectful disagreement with the observation of the learned Single Judge that Office Memo dated 15.4.59 was not applicable because there was no proposal to extend the initial period of probation. In fact these observations are contrary to the settled proposition of law which prescribes that if the initial period of probation is not extended by any specific order then unless and until the rules prescribed otherwise the probation period shall deem to have been extended. For this conclusion support can be taken from the decision of the Supreme Court in the case of Wasim beg's (supra) where it was observed that:

"When the Rules prescribe a maximum period of probation, if there is a future provision in the rules for continuation of such probation beyond the maximum period, the courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended."

20. Therefore, if the probation was deemed to have been extended then in the extended period as per clause (ix) of the Office Memorandum dated 15.4.59, appellant should have been intimated about his shortcomings and the deficiencies. But nothing of this sort was done. In the case of Dr. Mrs. Sumati P. Shere Vs. Union of India (UOI) and Others, , the Apex Court while dealing with termination of the service of an employee on the ground of unsatisfactory performance observed that such an employee must be given opportunity by indicating to him the deficiency and the shortcomings so that he could improve upon the same. It would otherwise be arbitrary termination.

21. We are also respectful disagreement with the conclusion arrived at by learned Single Judge that the appellant after expiry of initial period of probation would acquire the status of a temporary employee. This conclusion, to our mind, it against the law hence unsustainable. A probationer remains a probationer till

he is confirmed. We find substance in the submission of Mr. Shyam Babu that provision of Rule 5(i) which is applicable to a temporary government servant could not have been invoked in the present case. Before the expiry of initial period of probation the appellant's services could have been terminated or those could have been terminated during the extended period as per the term of his appointment but not under Rule 5(i) and in case of serious allegations after affording reasonable opportunity to explain his part of the case.

22. As regards appellant's contention that there was conspiracy or the termination order was based on mala fide, we find no merit in this submissions of Mr. Shyam Babu. No material had been placed on record wherefrom it could be inferred that his termination was motivated or due to mala fide reasons. It may be in the realm of appellant's imagination that respondent No. 4 could not have been promoted to the post of Chief Chemist if the appellant had continued in the job. It is all hypothetical. There is nothing concrete which had been placed on record to establish the same. We, Therefore, find no merit in this submission of the appellant.

23. Having held that the termination of the appellant was not implicate nor the appellant a temporary Government servant hence the provisions of Rule 5(i) could not have been invoked in terminating his services. Judgment of the learned Single Judge thus on this count cannot be sustained. The same is accordingly set aside.

24. The question now arises for consideration is what relief be granted to the appellant. Appellant was on deemed extended probation as on 30th March, 1979 i.e. the day his services were terminated and the termination order having been set aside on technical ground, we feel it would serve no purpose to order for his reinstatement as probationer particularly when he is stated to be on the verge of his retirement. Even otherwise the appellant as per his own showing vide his letter dated 25th August, 1996 had kept the lien for his parent organisation. This is apparent from his letter of acceptance dated 25th August, 1976 wherein he stated that

"However, while giving this consent it is presumed that my lien is kept in my parent department i.e. Regional Research Laboratory, Hyderabad for two years as is normally done in case of persons going from Government Department to Autonomous organisations and vice-versa."

25. Having held a lien in his parent department i.e. Regional Research Laboratory (Hyderabad), he could might have joined there. And if he did not do so he himself has to blame. At the same time keeping in view that injustice was done to him, we feel the appellant deserves to be compensated. We feel that the end of justice would be met if he is paid a sum of Rs. Three lacs as compensation by the respondents for terminating his probation period without following the procedure. This amount be paid by the respondent Union of India to the appellant within a period of four weeks from today.

26. With these observations the appeal stands disposed.