

(2011) 11 DEL CK 0252

In the Delhi High Court

Case No : Writ Petition (C) 8117 of 2011

Union of India and Others

APPELLANT

Vs

Rajiv Kumar and Others

RESPONDENT

Date of Decision : 28-11-2011

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19

Citation : (2011) 11 DEL CK 0252

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Rajinder Nischal, for the Appellant; Avadh Kaushik Advocate for R-1, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—The petition impugns the order dated 8th March, 2011 of the Central Administrative Tribunal (CAT), Principal Bench partially allowing O.A. No.2730/2010 preferred by the respondent no.1 u/s 19 of the Administrative Tribunals Act.

2. The respondent no.1 was on 16th August, 2008 appointed to the post of Senior Theatre Technician, a Group-C non-gazetted post, on temporary basis and as per the terms of appointment was to be on probation for a period of two years and which period was extendable at the discretion of the petitioners if the work of the respondent no.1 was not found satisfactory. The services of the respondent no.1 were however terminated within the period of two years of probation vide order dated 9th August, 2010 as under:

In pursuance of the Proviso to sub-rule (1) of Rule-5 of the Central Civil Services (Temporary Service) Rules, 1965, read with the provisions contained in the Office Order No.6-814/08-RMLH (Tech) dated 16.8.2008, I, Dr. T.S. Sidhu, Medical Superintendent hereby terminate forthwith the services of Shri Rajiv Kumar, Senior OT Technician and direct that he shall be entitled to claim a sum

equivalent to the amount of his pay plus allowances for one month, in lieu of the notice period, at the same rate at which he was drawing them immediately before the termination of this services.

3. Aggrieved therefrom the respondent no.1 approached the Tribunal. It was his contention, that the work performed by him during the period of probation was satisfactory; nothing adverse was communicated to him and thus the termination was bad; that the termination of his employment was with mala fide intention to accommodate the respondents no.2 to 4 herein and subject to outcome of O.A. No.1708/2008 preferred by whom he had been appointed; that the petitioners were duty bound to give reasons for termination of his employment and in the absence of reasons the order of termination was illegal, arbitrary and stigmatic.

4. The petitioners in their reply before the Tribunal to the aforesaid O.A. pleaded, that the services of the respondent no.1 had been terminated owing to the respondent no.1 having furnished incorrect certification about his eligibility experience; that the application form clearly provided that in case of wrong information or suppression of fact, the services were liable to be terminated; that the eligibility for appointment to the said post was five years experience on the post of O.T. Technician and which the respondent no.1 had claimed to profess; however on making enquiries from the earlier employers of the respondent no.1, it was found that the respondent no.1 did not profess five years experience on the post of O.T. Technician; in the circumstances his services which were within the probation time were terminated. Reliance was placed on V.P. Ahuja Vs. State of Punjab and Others, and Union of India (UOI) and Others Vs. Bipad Bhanjan Gayen, .

5. The Tribunal, in the impugned order, has held that though the services of a probationer may be terminated during the period of probation by grant of non-stigmatic order but the Tribunal was competent to lift the veil and find out exactly what weighed with the authority in so terminating the services and if finds that there are certain allegations against the employee, the apparently innocuous termination order will have to be invalidated if the termination came about without holding of an enquiry. The Tribunal in the facts of the case held that the termination even though during the probation was owing to the respondent no.1 having made a false declaration as to his experience and no opportunity had been given to the respondent no.1 to show that he had such experience. The Tribunal thus allowed the O.A. preferred by the respondent no.1 by invalidating the order supra of his termination but by granting liberty to the petitioners herein to proceed afresh in the matter by complying with the principles of natural justice i.e. by affording the appropriate opportunity of hearing to the respondent no.1. It was however clarified that the opportunity to be granted would be of the character which would be available to a probationer when the competent authority gets to know certain factual inaccuracies in the information furnished. It was further clarified that if the respondent no.1 is not able to explain to the satisfaction of the petitioners, the petitioners shall be

entitled to again terminate the services of the respondent no.1.

6. Since the Tribunal has vide impugned order preserved the rights of the petitioner to terminate the probation of the respondent no.1 and has merely given an opportunity to the respondent no.1 to rebut the reasons for which his probation has been terminated, we called upon the counsels to without reference to the legal aspect, address first on as to what purpose the enquiry even if permitted to be held would serve.

7. The eligibility requirement of five years experience as an O.T. Technician in O.T. of a large Hospital is not in dispute. The respondent no.1 while filling up the application form for the post represented that he had served as O.T. Technician from March, 2000 to August, 2005 i.e. for more than five years, in Indraprastha Apollo Hospital, Sarita Vihar. It was also disclosed that from August, 2005 to August, 2008, the respondent No.1 had served as an O.T. Assistant in Hindu Rao Hospital, Malakaganj, Delhi. The respondent no.1 purportedly in support of his said claim furnished the certificates from Indraprastha Apollo and Hindu Rao Hospitals. The certificate from the Indraprastha Apollo Hospital was as under:

This is to certify that Mr. Rajiv Kumar S/o Mr. Mahavir Prasad has worked with us in our Organization from 21.03.2000 to 29.08.2005. At the time of leaving, he was designated as Technician in the Paramedical (OT) Department.

8. The petitioners however on subsequent enquires from Indraprastha Apollo Hospital were vide letter dated 11th June, 2010 informed that the respondent no.1 was promoted as O.T. Technician only with effect from 1st August, 2003.

9. The counsel for the petitioners has contended that the respondent no.1 thus did not fulfill the qualifying five years experience as an O.T. Technician since he had worked as an O.T. Technician in Indraprastha Apollo Hospital from 1st August, 2003 till August, 2005 i.e. for two years only and in Hindu Rao Hospital he was admittedly not employed as the O.T. Technician but as O.T. Assistant. He contends that the respondent no.1 was appointed on his representation that during his employment from March, 2000 to August, 2005 with Indraprastha Apollo Hospital he was working as the O.T. Technician and thus had the requisite experience and upon the same having proved false, his services were terminated.

10. We have as such enquired from the counsel for the respondent no.1 as to what the respondent no.1 will prove in the enquiry even if allowed to be held as directed by the Tribunal. The counsel for the respondent no.1 contends that the respondent no.1 will prove that though designated as O.T. Assistant in Hindu Rao Hospital from August, 2005 to August, 2008, he was performing the duties of an O.T. Technician. However on enquiry he is not able to deny that the post of O.T. Assistant is distinct from and junior to the post of O.T. Technician. A perusal of the application form filled up by the respondent no.1 and on the basis whereof he was given the appointment also shows that though he declared to have worked as an O.T. Technician in Indraprastha Apollo Hospital from March, 2000 to August, 2005 which is a post higher than O.T. Assistant, the reason given by him

for moving to Hindu Rao Hospital was "to get a government service". Similarly, the reason given for applying for appointment in the petitioner Ram Manohar Lohia Hospital though already working in the Hindu Rao Hospital managed by the MCD, was "to get a higher post in government service". The same makes it clear that the respondent no.1 was fully aware that the post of O.T. Assistant on which he was working was junior to the post of O.T. Technician for which he was applying. In the circumstances, we fail to see as to how the respondent no.1 can be allowed to now contend that the post of O.T. Assistant is the same as the post of O.T. Technician. In our opinion, the enquiry ordered by the Tribunal would not serve any purpose.

11. We are also of the opinion that the Tribunal has misconstrued the scope of termination during the probation period. A three Judges Bench of the Supreme Court in *State of Punjab and Others Vs. Sukhwinder Singh*, held that a probationer does not have any right to the post and an enquiry conducted to obtain primary facts cannot qualify as termination punishment. It was held that where a superior officer in order to satisfy himself whether the employee concerned should be continued or not in service makes enquiry for the purpose, it would be wrong to hold that the enquiry which was held was really intended for the purpose of imposing punishment. Yet further it was held that if in every case where some kind of fact finding inquiry is made, whether the employee is either given an opportunity to explain or the enquiry is held behind his back, it is held that the order of discharge or termination from service, is punitive in nature, even a bona fide attempt by the superior officer to decide whether the employee concerned should be retained in services or not would run the risk of being dubbed as an order of punishment. A probationer is on test and a temporary employee has no right to the post. If merely holding of an enquiry to ascertain the relevant facts for arriving at a decision on an objective considerations whether to continue the employee in service or to make him permanent is treated as an enquiry "for the purpose of imposing punishment" and an order of discharge or termination of service as a result thereof "punitive in character", the fundamental difference between a probationer or a temporary employee and a permanent employee would be completely obliterated and which would be wholly wrong. The same view was reiterated in *State of Punjab and Others Vs. Constable Avtar Singh (dead) through LRs.*, . Reference may also be made to *Municipal Committee, Sirsa Vs. Munshi Ram*, , *Chaitanya Prakash and Another Vs. H. Omkarappa*, and *Ram Narain Jha Vs. T.M. Apartments Pvt. Ltd.*, all to the effect that during the probation period the services of an employee can be terminated and merely because the employer on appraisal of the performance of the employee finds the employee not upto the mark, the order of termination of probation or cessation of probation does not become stigmatic. Mention may also be made of *Rajesh Kohli Vs. High Court of J. and K. and Another*, also laying down that consideration of the service record to determine whether a probationer should be continued on probation or be discharged or confirmed and/or reaching a conclusion that he is not to be continued would not amount to casting any

aspersion nor his discharge be construed as stigmatic. Opinion expressed in the termination order that the probationer's work and conduct has not been found satisfactory was held to be not stigmatic requiring compliance of the principles of natural justice. It was further held that 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.

12. Another Division Bench of this Court (speaking through one of us i.e. Hon'ble the Acting Chief Justice) in *Gautam Kant Nimaan Vs. GNCT of Delhi and Others*, has also exhaustively dealt with the said aspect.

13. We may also mention that the order of termination of probation/services of the respondent no.1 does not even mention the aforesaid facts. However when the respondent no.1 challenged the same before the Tribunal, the petitioners had no option but to state the same. Merely because the employer in defence to a challenge made to termination of probation states the reasons therefore cannot entitle the employee to turn around and say that no opportunity had been given to him to meet the same. The same if allowed, as aforesaid would obliterate the distinction between a probationer and a permanent employee.

14. We therefore are of the opinion that the Tribunal erred in directing the petitioners to grant an opportunity of being heard to the respondent no.1, who was a mere probationer. The record reveals objective considerations to have prevailed in termination of the probation of the respondent no.1.

15. However since the respondent no.1 is found to have left his employment as an O.T. Assistant in Hindu Rao Hospital, to join the petitioner Ram Manohar Lohia Hospital, we enquired from the counsel for the petitioners whether there was any possibility of the respondent no.1 being taken back in Hindu Rao Hospital as an O.T. Assistant. The counsel has however informed that the control and management of the Hindu Rao Hospital being with the MCD, the petitioners do not have any say in the matter.

16. The petition is accordingly allowed. The order dated 8th March, 2011 of the Tribunal allowing the O.A. preferred by the respondent no.1 is quashed/set aside and the order of the petitioners terminating the probation of the respondent no.1 is upheld. Rule is made absolute.

No order as to costs.