
(1997) 12 CAL CK 0029
In the Calcutta High Court
Case No : F.M.A.T. No. 1746 of 1996

Union of India (UOI) and Others

APPELLANT

Vs

Subhas Jha

RESPONDENT

Date of Decision : 10-12-1997

Acts Referred:

Constitution of India, 1950 — Article 311(2)
Industrial Disputes Act, 1947 — Section 25F

Citation : (1999) 3 LLJ 1117

Hon'ble Judges : Satyabrata Sinha, J;Ranojit Kumar Mitra, J

Bench : Division Bench

Advocate : Tapas Hazra, for the Appellant; Sukumar Ghosh, for the Respondent

Final Decision : Allowed

Judgement

Satyabrata Sinha, J.—This appeal is directed against a judgment and order dated 10th May, 1996, whereby and whereunder the learned trial Judge quashed an order of termination of service of the petitioner during his probationary period on the ground of unsatisfactory work.

2. The fact of the matter lies in a narrow compass.

3. The petitioner was appointed as an Assistant Teacher in 1993 in Border Security Force Senior Secondary Residential School, Kadamtala, Siliguri run and managed by the Border Security Force. The petitioner was appointed on July 15, 1993 by reason of an appointment letter which, inter alia, provided that the petitioner would be under probation for a period of two years. The said period of probation was later on extended for another one year.

4. It is stated that a disciplinary proceeding was initiated against the petitioner wherein he was exonerated. The contention of the petitioner, inter alia, is that the school in question is affiliated to Central Board of Secondary Education and in terms of its guidelines a teacher can be put on probation for a period of one year and the same can be extended to another period of one year. It is, therefore,

urged that on the expiry of two years the petitioner would be deemed to have been automatically confirmed. According to the petitioner, as he filed a writ application in this Court, he was not given any pay and ultimately his services had been terminated.

5. The case of the appellant in short is that as the performance of the petitioner was not found satisfactory he did not derive any right to continue in service and in that view of the matter his services had been terminated.

6. The learned trial Judge in his impugned judgment, inter alia, held that the termination of the petitioner's service was bad in law as a disciplinary proceedings which had been initiated against him ended in his exoneration from the charges.

7. Mr. Hazra, the learned Counsel appearing on behalf of the appellant, inter alia, submitted that the petitioner did not have any legal right to continue in service after the expiry of the probationary period. According to the learned Counsel the concerned authority has an unfettered right to terminate his services during the probationary period on the ground of his unsatisfactory performance and, thus, the learned Trial Judge committed a serious error in allowing the writ application. Strong reliance in this connection has been placed on *K.V. Krishnamani Vs. Lalit Kala Academy*, and *Arun Kumar v. U.P. Hill Electronics Corporation Ltd., and Ors.* reported in 1997(1) SLR 136.

8. Admittedly, the petitioner was appointed with a stipulation that he would be on probation for two years, which he accepted without any demur whatever. He also accepted the extension of probationary period. The very fact that his probationary period was extended is itself a pointer to the fact that his performance during his probationary period was not satisfactory. The submission of Mr. Ghosh to the effect that the guidelines of the CBSE to which the school in question is affiliated provides for one year probationary period and, thus, the impugned order is bad in law cannot be accepted for more than one reason. Clause 2, L.R. of the CBSE guidelines for affiliation advisedly uses the terminology "normally. Such a provision has to be made obviously keeping in view the fact that a person may not be appointed permanently straight way and some reasonable period should be fixed for observing his performance. By keeping the petitioner on probation for a period of two years the guidelines of CBSE had not been violated. In fact, a school being affiliated to a Board of University, in the matter of appointment is entitled to fix a higher qualification or impose a greater restriction in the interest of the school itself.

9. We also cannot accept the argument of Mr. Ghosh to the effect that principles of natural justice are required to be complied with before terminating the services of a probationer.

10. In *The United India Insurance Co. Ltd. v. Partha Sarathi Banerjee and Ors.* reported in 1997 CRILJ 348, I, speaking for a division Bench, upon taking into consideration a large number of decision held that the principles of natural

justice is not required to be complied with for the purpose of terminating the services during probationary period. It was noticed:

"In the The State of Orissa and Another Vs. Ram Narayan Das, this Court held that the services of a probationer can be terminated in accordance with the rules because a probationer has no right to the post held by him. Yet again in M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another, the Supreme Court held:

"Even under general law, the service of a probationer can be terminated after making overall assessment of his performance during the period of probation and no notice is required to be given before termination of such service. This aspect has been examined by this Court in the case of Governing Council of Kidwai Memorial Institute of Oncology, Bangalore Vs. Dr. Pandurang Godwalkar and another, wherein it has been pointed out that if the performance of the employee concerned during the period of probation is not found to be satisfactory on overall assessment, then it is open to the competent authority to terminate his service."

In that case also it was contended that services of the respondent No. 1 was terminated on irrelevant condition. It was held:

"The appointment letter issued in favour of the writ petitioner clearly suggests that confirmation in the service shall not be automatic on fulfilment of the above conditions, unless a letter of confirmation is specifically issued by the company. The said offer of appointment further suggests that unless letter of confirmation or extension of probationary period is issued to him, his service shall automatically stand terminated after the expiry of the period of probation. Keeping the aforementioned condition of service in view, we are of the considered opinion that the directions issued by the learned Trial Judge cannot be sustained and must be set aside. It is now well known that an employee who is on probation, has no legal right to be confirmed. No employee can be confirmed as the Apex Court has stated times without number, only upon completion of the period of probation, unless a statute or the offer of appointment otherwise suggests. For obtaining a writ of or in the nature of Mandamus, the writ petitioner has to show the existence of a legal right in himself. As in terms of the offer of appointment, the writ petitioner respondent no. 1 does not have any legal right to be confirmed in the service automatically, he, in our opinion, is not entitled to obtain a writ of or in the nature of Mandamus as had been directed to be issued by the learned Trial Judge. This aspect of the matter has also been considered by the Supreme Court of Union of India (UOI) and Others Vs. Arun Kumar Roy,

11. It is now well settled that a probationer or a temporary servant does not derive any right to continue in service. It is also a trite law that by reason of termination during the period of probation no stigma is cast. Only when services of a person are terminated by way of or in lieu of punishment, as a result of which the employee suffers civil or evil consequences, requirements of

compliance of the principles of natural justice becomes mandatory.

12. In *Dr. Ganesh Dubey v. Indian Iron & Steel Co. Ltd, & Ors.* reported in (supra): 2 1995 CLT 51. I, having considered the decision of the Apex Court in *Union of India v. Arun Kumar Roy* reported in (supra), held that a person appointed or promoted on probation has to be specifically confirmed.

13. The petitioner is not a workman as he is a teacher. It is only in a case of workman who has completed 240 days of service, retrenchment cannot be effected without compliance of the provisions u/s 25F of Industrial Disputes Act.

14. The impugned order of termination contains reason. This Court in exercise of its power of judicial review cannot go into the questions as to whether the performance of the respondent was satisfactory or not. Unsatisfactory performance may lead to the termination of the services on or before the probationary period. Reference in this connection may be made to *Sangeeta Pathak v. High Court of Judicature for Rajasthan* reported in 1995 LIC 1908.

15. In *Satya Narayan Athya Vs. High Court of M.P. and another*, the Apex Court observed:

"The question, therefore, is whether the petitioner has to be deemed to have been confirmed after his completion of two years of probation. Rule 24(1) of the M.P. Judicial Service (Classification, Recruitment and Conditions of Service) Rules, 1955, (for short "the Rules") provides thus:

"Every candidate appointed to the cadre shall undergo training for a period of six months before he is appointed on probation for a period of two years which period may be extended for a further period not exceeding two years. The probationers may, at the end of period of their probation, be confirmed subject to their fitness for confirmation and to having passed, by the higher standard, all such departmental examinations as may be prescribed.

A reading thereof would clearly indicate that every candidate appointed to the cadre shall undergo training initially for a period of six months before he is appointed on probation for a period of two years. On his completion of two years of probation, it may be open to the High Court either to confirm or extend the probation. At the end of the probation period, if he is not confirmed on being found unfit, it may be extended for a further period not exceeding two years. It is seen that though there is no order of extension, it must be deemed that he was continued on probation for an extended period of two years. On completion of two years he must not be deemed to be confirmed automatically. There is no order of confirmation. Until the order is passed, he must be deemed to continue on probation".

16. In *K.V. Krishnamani v. Lalit Kala Academy* reported in (supra) the Apex Court rejected the contention that a prior hearing was necessary. It was held at p 662:

"If on being found suitable he was regularised arises, only then he would have

acquired the right to continue in the post. During probation, it was found that his services were not satisfactory and reasons were given in support thereof. Thus, they do not constitute foundation but motive to terminate the services. We find force in the contention of the respondent. They have explained that the driving of the staff car was not satisfactory and that, therefore, they have terminated the services of the appellant during probation. The very object of the probation is to test the suitability and if the appointing authority finds that the candidate is not suitable, it certainly has power to terminate the services of the employee".

17. In *Kunwar Arun Kumar v. U.P. Hill Electronics Corporation Ltd. and Ors.* reported in (supra) it has been held:

"..... Shri Sehgal, learned Senior Counsel for the petitioner, contends that the finding recorded amounts to a stigma; action taken without conducting enquiry and giving an opportunity to the petitioner, is violative of Article 311(2) of the Constitution and the rules made thereunder. Therefore, he is entitled to an opportunity of being heard and be dismissed only on the ground of misconduct and not by termination simpliciter. We do not agree with the learned Counsel. The order may be a motive and not a foundation as a ground for dismissal. During the period of probation, the authorities are entitled to assess the suitability of the candidates and if it is found that the candidate is not suitable to remain in service they are entitled to record a finding of unsatisfactory performance of the work and duties during the period of probation. Under these circumstances, necessarily the appointing authority has to look into the performance of the work and duties during the period of probation and if they record a finding that during that probation period, the work and performance of the duties were unsatisfactory, they are entitled to terminate the service in terms of the letter of appointment without conducting any enquiry. That does not amount to any stigma. If the record does not support such a conclusion reached by the authorities, different complexion would arise. In this case, they have recorded the finding that the petitioner was regularly absent on one ground or the other. Under these circumstances, the respondents terminated his services. We do not find any illegality in the action taken by the respondents".

18. A probationer does not have any right to be confirmed and the employer is the sole authority to judge the suitability of the employee so as to enable him to arrive at a finding as to whether the performance of such employee is such which entitles his permanent absorption in the services. Of course such a power cannot be exercised unreasonably or by way of or in lieu of penalty or for unauthorised purpose.

19. It may be noticed that the Apex Court in *Union of India v. Shri Bihari Lal Sidhana*, reported in 1997 Lab. IC 2077 held that where services of a temporary employee was terminated despite his acquittal in a criminal case and despite mentioning the fact that he was under suspension was held to be of no consequences. The Apex Court stated:

" The termination order indicated the factum that he, by then, was under suspension. It is only a way of describing him as being under suspension when the order came to be passed but that does not constitute any stigma. Mere acquittal of Government employee does not automatically entitle the Government servant to reinstatement. As stated earlier, it would be open to the appropriate competent authority to take a decision whether the enquiry into the conduct is required to be done before directing reinstatement or appropriate action should be taken as per law, if otherwise, available. Since the respondent is only a temporary Government servant, the power being available under Rule 5(1) of the Rules, it is always open to the competent authority to invoke the said power and terminate the services of the employee instead of conducting the enquiry or to continue in service a Government servant accused of defalcation of public money. Reinstatement would be a charter for him to indulge with impunity in misappropriation of public money".

For the reasons aforementioned, we are of the opinion that the judgment and order passed by the learned Judge is incorrect in law. Consequently, the appeal is allowed, but in the facts and circumstances of this case, there will be no order as to costs.

Ranojit Mitra, J.

20. I agree.