

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C.) No. 1276/2010**

% **Date of Decision: 03.03.2010**

NEERAJ KUMAR PETITIONER

Through Mr. Pankaj Kumar, Advocate

Versus

JOINT COMMISSIONER, NAVODAYA VIDLAYA RESPONDENT
SAMITI, DELHI.

Through None.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

MOOL CHAND GARG, J.

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1. The petitioner is aggrieved by the order passed by the respondent terminating the services of the petitioner under Sub-rule (1) of Rule 5 of the CCS (Temporary Services) Rules, 1965 during the period of his probation. The termination order has been placed on record which is at page 167 of the paper book and reads as under:

Office Order

In pursuance of Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules 1965, the undersigned hereby terminates the services of Shri Neraj Kumar, PGT (Geo.), JNV-Dhemaji (Assam) with immediate effect.

(M.L. Sharma)
Deputy Commissioner.

2. According to the petitioner this termination letter though appears to be an innocuous order but essentially it was punitive in nature and has attached stigma to the termination. It has been submitted that the basis of termination were several false and motivated charges including the false charge of sexual harassment in which a full scale formal enquiry was made by the respondent and which culminated in an arbitrary and illegal finding of guilt after gross procedural violations in conducting the said enquiry. It has been submitted that the basis of his termination is unsatisfactory performance or unsuitability.

3. The petitioner aggrieved from the aforesaid termination order approached the Central Administrative Tribunal (hereinafter referred to as Tribunal) vide O.A. No. 2158/2008 which has been dismissed vide order dated 02.04.2009.

4. It is the submission of the petitioner that the Tribunal has illegally upheld the termination order and has wrongly considered the Sexual Harassment Committee to be Complaints Committee and not the Inquiry Authority and the report of the said Complaints Committee to be preliminary report instead of report under the CCS (CCA) Rules, 1965 which can never be a preliminary report. It has been submitted that the observations of the Ld. Tribunal are inconsistent and incoherent with the documents placed on record.

5. It has been submitted that in terms of the Government Notification No. 11012/5/2001-Estt.(A) dated 01.07.2004 published under the directions issued by the Hon'ble Supreme Court in *Medha Kotwal Lele & Ors Vs. UOI & Ors.* W.P.(Crl.) No. 173-177/1999, the Complaints Committee as envisaged in the *Vishakha & Ors. Vs. State of Rajasthan & Ors.*, AIR 1997 SC 3011, would be deemed to be an inquiry authority for the purposes of Central Civil Services (Conduct) Rules, 1964 and its report would be considered as a report under the CCS (CCA) Rules, 1965. It has been submitted that such report under the CCS (CCA) Rules, 1965 in the circumstances has to be arrived at by following the due procedure laid down in Rule 14 and the said report is a final and formal inquiry report and not a preliminary report.

6. It has been submitted that the foundation of the order of termination in the case of petitioner though is based upon the impugned Inquiry Report along with statements given by the complainant in sexual harassment case/ all proceedings among other false charges; the respondent in order to hide their illegal act and at the same time with a view to punish the petitioner, took the illegal recourse of a camouflaged Termination Simplicitor order acting on the biased, prejudiced, perverse and malafide recommendation of the DPC. The Tribunal have failed to appreciate that stigma has been attached to the termination of the petitioner inasmuch as the DPC in recommending for termination of petitioner was biased, malafide, prejudiced and perverse.

7. We have heard the learned counsel for the petitioner and have given thoughtful consideration to the submission made at the bar. At the outset, we may observe that it is not in dispute that the petitioner's services have been terminated by the respondent during the period of probation. The order and judgment dated 02.04.2009 which has been impugned before us only on 24.02.2010 after seven months.

8. The Tribunal has considered all the submissions made before the Tribunal and has also taken note of the judgment cited by the petitioner at the bar. Even though, no formal reply has been filed on behalf of the respondent, but arguments were addressed by the respondent before the Tribunal also. The basic submission made by the respondent was that the order of termination was a simple innocuous order as per the terms as despite warning, the applicant had failed to successfully complete the probation. His probation was curtailed and his services were dispensed with. It was further submitted that when an employee is under probation, it is open to the competent authority to take a disciplinary action after making a regular enquiry and to judge his suitability for the post and to terminate his service. Without going into the truth or otherwise of the allegations the Respondent have proceeded to consider the suitability, where the question of misconduct has not been gone into. The orders passed by the Respondent do not suffer from any legal infirmity. It has been further submitted that a proven charge of sexual harassment of a fellow Teacher being Principal of the school is not only immoral but also throws doubt on the integrity of the

applicant, which is unbecoming of a government servant. It is stated that school is a built in complex, where students and employees sit together. In fact, applicants suitability has been judged. The termination of his service under Rule 5 does not suffer from any legal infirmity.

9. Much reliance was placed by the petitioner on the judgment delivered by the Hon'ble Supreme Court in the case of *Pavanendra Narayan Verma Vs. Sanjay Gandhi* **2002 SCC (L&S) 170** where the Apex Court laid down a test to determine whether in substance an order of termination is punitive, certain factors have been considered viz., whether prior to termination there was a full scale formal enquiry into allegations involving moral turpitude or misconduct, which culminated in a finding of guilt. If all the factors are present the termination has been held to be punitive irrespective of the form of the termination order. But if any of it is missing the termination has been upheld. With this backdrop, the following observation needs to be considered:

32. We are also not prepared to hold that the enquiry held prior to order of termination turned this otherwise innocuous order into one of punishment. An employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. A charge sheet merely details the allegations so that the employee may deal with them effectively. The enquiry report in this case found nothing more against the appellant than an inability to meet the requirements for the post. None of the three factors catalogued above for holding that

the termination was in substance punitive exists here.

10. The Tribunal has taken note of the aforesaid judgment and rightly held that having regard to the aforesaid observation, the enquiry held prior to an order of termination with prerogative of the employer to specify whether the probationer is liable to be confirmed on the basis of record, the enquiry report is nothing but an inability to meet the requirement of the post and thus the order has been upheld.

11. Moreover, In *State of Punjab Vs. Sukhwinder Singh (2005) 5 SCC 569*, a Bench of three learned Judges after referring to several earlier decisions of this Court including those referred to above, laid down the principle in para 19 of the report :

"19. It must be borne in mind that no employee whether a probationer or temporary will be discharged or reverted, arbitrarily, without any rhyme or reason. Where a superior officer, in order to satisfy himself whether the employee concerned should be continued in service or not, makes inquiries for this purpose, it would be wrong to hold that the inquiry which was held, was really intended for the purpose of imposing punishment. If in every case where some kind of fact finding inquiry is made, wherein the employee is either given an opportunity to explain or the inquiry 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 service or not would run the risk of being dubbed as an order of punishment. The decision to discharge a probationer during the period of probation or the order to terminate the service of a temporary employee is taken by the appointing authority or administrative heads of various departments, who

are not judicially trained people. The superior authorities of the departments have to take work from an employee and they are the best people to judge whether an employee should be continued in service and made a permanent employee or not having regard to his performance, conduct and overall suitability for the job. **As mentioned earlier a probationer is on test and a temporary employee has no right to the post. If mere holding of an inquiry to ascertain the relevant facts for arriving at a decision on objective considerations whether to continue the employee in service or to make him permanent is treated as an inquiry "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, which would be wholly wrong."**

17. As shown above, the nature of enquiry conducted against the respondent was merely a preliminary or fact finding enquiry and no formal full scale departmental enquiry had been conducted against the respondent. In fact, the enquiry officer had himself recommended that disciplinary action be taken against the respondent. However, the authorities chose not to hold a disciplinary enquiry against the respondent and did not serve him with any article of charges or take any further steps in that regard. Instead they chose to exercise power under the terms and conditions of the appointment order. The termination order is wholly innocuous and does not cast any stigma upon the respondent nor it visits him with any evil consequences. The High Court seems to have proceeded on a wholly wrong basis and has treated the enquiry which was only a preliminary or fact finding enquiry into a regular disciplinary enquiry, which was not the case here. In these circumstances the judgment of the High Court is wholly erroneous in law and has to be set aside.

18. Learned counsel for the respondent has relied upon *Samsher Singh vs. State of Punjab & Anr.* (1974) 2 SCC 831, *Bishan Lal Gupta Vs. State of Haryana & Ors.* (1978) 1 SCC 202, *Anoop Jaiswal Vs. Government of India & Anr.* (1984) 2 SCC 369 and *Dipti Prakash Banerjee vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta & Ors.* (1999) 3 SCC 60 in support of

his submission that the impugned order of termination of services had been passed by way of punishment and as the same had been done without affording an opportunity of defending himself, the termination order was illegal. In *Bishan Lal Gupta (supra)* it was held where the intention behind an inquiry against a probationer was not to hold a full departmental trial to punish but a summary inquiry to determine only suitability to continue in service of the probationer and the probationer was given ample opportunity to answer in writing whatever was alleged against him in show cause notice, the innocuous order of termination following such summary inquiry could not be said to be an order of punishment which entitled him to a full-fledged inquiry contemplated by Article 311 of the Constitution. In *Anoop Jaiswal (supra)* and *Dipti Prakash Banerjee (supra)* it was found as a fact that the misconduct alleged was the foundation of the impugned order of termination of services. It was after analysis of all earlier decisions that the principle of law has been laid down in *Pavanendra Narayan Verma vs. Sanjay Gandhi PGI of Medical Sciences*, referred to above. Therefore, the authorities cited by learned counsel for the respondent do not advance his case in any manner”.

12. Applying the aforesaid legal position to the facts of this case, the Tribunal rightly held that:

17. if one has regard to the above, a misconduct, which is a motive, i.e., when the overall performance of a probationer has not been evaluated as apt for his further continuance an order passed to dispense with his service and before that if any enquiry, which is not a formal enquiry, has been held to determine the misconduct in the context of his unsatisfactory performance, the order is a simple order of termination within the jurisdiction of the authorities as per the conditions of service and letter of appointment cannot be found fault with in law. Applying the aforesaid dicta in the present case, during a tenure of more than 1-1/2 years only one show cause notice has been issued to applicant. However, on a specific complaint of misconduct amounting to moral turpitude, i.e., sexual harassment a complaint committee was constituted. In view of the decision of the Apex Court in *Vishaka v. State of Rajasthan*, JT 1997 (7) SC 384 guidelines have been issued in case a conduct relating to sexual harassment by an employees when proves, unbecoming of a government servant has been treated to be a misconduct within the definition of Rule 3 of the CCS (Conduct) Rules, 1964 and a

methodology has been laid down by DoP&T OM dated 13.7.1999. In such an event, when a conduct amounts to misconduct an appropriate action has to be initiated. The complaint committee has to be formed as per the Rules. Accordingly, Rule 14 (2) of CCS (CCA) Rules, 1965 in a situation where complaint of sexual harassment as a misconduct against the government servant is received a complaint committee established in each Ministry has to go for enquiring into such complaint and in such an event if no separate procedure has been prescribed for the complaint committee holding the enquiry into the complaint of sexual harassment, the procedure laid down under the CCS (CCA) Rules, 1965 has to be followed. Admittedly the stand of the applicant is that an appropriate enquiry proceeding has not been followed and there was no laid down procedure for the complaint committee. In such an event, the finding recorded by the complaint committee cannot be termed as following of the due procedure laid down under the CCS (CCA) Rules, 1965. **As a consequence thereof, we cannot hold that a regular DE has been ordered against the applicant. In such an event, the alleged misconduct against applicant and on determination whether in substance the order of termination is punitive, we do not find that a full-scale formal enquiry has gone into. As such, one of the factors evolved in Pavanendra Narayan Verma (supra) is missing, the enquiry held by the Respondent is to satisfy about the truth of the allegation of sexual harassment by the applicant. The complaint and details of the allegations were provided to afford an opportunity to applicant to effectively deal with it and the report of the complaint committee is nothing but indicates that the applicant has been found to have performed unsatisfactorily as to the subjective satisfaction of the concerned authority, no punitiveness exists in the action of the Respondent.**

13. It is a matter of record that the DPC while considering the applicant for confirmation did not found the performance of the petitioner satisfactory. It is not that one of the reasons which affected the decision of the Departmental Promotion Committee was alleged

misconduct of sexual harassment to the fellow teacher but the termination of the services of the petitioner were dispensed with in accordance with the terms and conditions of his appointment on account of the dismal performance. The order passed by the respondent is neither punitive nor stigmatic in any manner. It is an order being a simpliciter termination on unsatisfactory performance of the petitioner, who failed to complete the period of probation satisfactorily and as such, the said order was perfectly legal and has been rightly upheld by the Tribunal by the impugned order. We find no reason to interfere with the said order. Accordingly, the writ petition is dismissed.

MOOL CHAND GARG, J.

MARCH 03, 2010

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ANIL KUMAR, J.