

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 27.07.2012

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W.P. (C) 98/2011

PRADIP KUMAR DAS

... Petitioner

Versus

UNION OF INDIA & OTHERS

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Mukul Rohatgi, Sr Advocate with Mr Saurabh Kirpal

For the Respondent No.1 : Mr Dayan Krishnan with Mr Nikhil Nayyar, Mr Nikhil Menon,
Mr Ruchir Mishra and Mr Swapnil Verma

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

JUDGMENT

BADAR DURREZ AHMED, J

1. This writ petition is directed against the order dated 09.12.2010 passed in O.A. No.3544/2009 by the Central Administrative Tribunal, Principal Bench, New Delhi. The petitioner is aggrieved by the fact that his said original application, which had been filed challenging the termination of probation order dated 20.11.2009, was dismissed.

2. The facts giving rise to the present writ petition are as under:

2.1 The petitioner was a practicing advocate in the Calcutta High Court as well as before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) for about 20 years mainly dealing with the customs, excise and service tax matters. On 22.04.2006, the petitioner appeared for an interview before the Selection Committee for the post of Member (Judicial) in CESTAT. He was selected. On 22.11.2006, the petitioner assumed charge as Member (Judicial) in CESTAT. On 21.11.2007, the petitioner completed the mandatory period of probation of one year under Rule 8(1) of the CESTAT Members (Recruitment and Conditions of Service) Rules 1987 (hereinafter referred to as 'the said Rules'). No order extending the period of probation was issued. However, the petitioner continued to work as Member (Judicial). As pointed out in the impugned order, the petitioner served under three Presidents, namely, Justice Abichandani, Justice S.N. Jha and Justice R.M. Khandparkar. According to him, he never received any adverse comment from any of them during his tenure of service as a Member (Judicial). According to the petitioner, he was expecting that his probation period would come to an end and he would be confirmed in the post of Member (Judicial). But, he received an order dated 19.11.2009 extending his probation period first upto 21.11.2008 and then further upto 21.11.2009. Because of this, the petitioner came under great stress and tension, as a result of which, he tendered his resignation from the post of Member (Judicial) on 20.11.2009. On that very day, the order dated 20.11.2009 was issued, whereby the petitioner was discharged from his service. The said Order No.5 dated 20.11.2009 reads as under:-

“F. No.26/8/2006-Ad.IC
Government of India

Ministry of Finance
Department of Revenue

.....

New Delhi, the 20th Nov., 2009

ORDER No.5 of 2009

In pursuance of rule 8(3) of the Customs, Excise and Service Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1987, the President hereby discharges forthwith Shri P.K. Das, Member (Judicial) in Customs Excise & Service Tax Appellate Tribunal from service.

2. By order and in the name of the President.

Sd/-

(Victor James)

Under Secretary to the Govt of India

To,
Shri P.K. Das, Member (Judicial)
CESTAT, West Block No.2,
R.K. Puram, New Delhi.

Copy to:

1. President, Customs, Excise & Service Tax Appellate Tribunal, New Delhi
2. Registrar, Customs, Excise & Service Tax Appellate Tribunal, New Delhi
3. Establishment Officer, Department of Personnel & Training, North Block
4. Pay and Accounts Officer, Department of Revenue
5. Notification Folder.

Sd/-

(Victor James)

Under Secretary to the Govt. of India”

2.2 Thereafter, by a letter dated 23.11.2009, the petitioner withdrew his resignation under Rule 9(2) of the said Rules within the prescribed period.

2.3 As mentioned in the impugned judgment, there is a note dated 26.11.2007 in File No.27/22/2005-Ad.IC, which was obtained under the Right to Information Act, 2005, in which it has been mentioned that the action for initiation of the process of confirmation of the petitioner, which was due on 22.11.2007, would be initiated in a new file. There is a noting of 23.01.2008 calling for the ACRs of the petitioner and two other members. On 06.06.2008, Justice S.N. Jha, President of CESTAT wrote to the Secretary, Department of Revenue requesting him to take steps for the confirmation of some of the members of CESTAT, including the petitioner. The Vigilance Cell also conveyed its clearance from the vigilance angle insofar as the petitioner was concerned. But, out of the blue, on 14.09.2009, the petitioner received a note from the President of the CESTAT annexing therewith a copy of the complaint from the members of the bar about an incident alleged to have occurred in the petitioner's court on 09.09.2009 and also requesting for a report about the incident. The complaint was alleged to be related to misbehavior of the departmental representatives with the members of the bar. The President prepared a report dated 18.11.2009 regarding the incident, which, *inter alia*, contained the following observations with regard to the conduct of the petitioner:-

“15. It must be noted that, whenever any act of misbehavior on the part of the parties or their representatives takes place in the Court, it is essentially for the Presiding officer to administer proper control and to try to defuse the tension, if any, caused on that count and not to retire immediately to the chamber. Abstaining from and abandoning the Court in such a situation and leaving it open and free for all could result in encouraging indiscipline in the Court. Merely

because some of the representatives of the parties start raising voice or make allegations against the Bench, it would not be proper to abandon the Court functioning and to retire to Chamber. Rather the Presiding Officer has to try to control such situation by use of administrative acumen. In the case in hand, there does not appear any efforts made by the Presiding Officer in that regard.”

It is perhaps because of this that the petitioner’s services were terminated by the said order of discharge dated 20.11.2009.

3. The learned counsel for the petitioner submitted that the order of discharge, which virtually amounted to termination, was bad in law. First of all, he submitted that it smacked of arbitrariness and was the product of malice in law. Secondly, the learned counsel for the petitioner submitted that the discharge order was punitive in nature inasmuch as it was stigmatic and, therefore, it was essential that an enquiry under Article 311 of the Constitution ought to have been undertaken. Thirdly, the learned counsel for the petitioner submitted that the relevant rules and, in this case, Rule 9(2) of the said Rules, required the giving of one month’s notice prior to termination. That notice was admittedly not given and, therefore, the termination was bad. Lastly, the learned counsel for the petitioner submitted that by virtue of operation of Rule 8 of the said Rules, the petitioner could be deemed to have been confirmed.

4. Although, the four points were taken by the learned counsel for the petitioner and on all those four points, Mr Dayan Krishnan, appearing on behalf of the respondents, presented his counter-case, the only point of relevance and importance for our purposes is the third one

which involves interpretation of Rule 8(3) and Rule 9(2) of the said Rules. Rule 8 deals with ‘probation’ and Rule 9 deals with ‘reversion or termination of service of members’. Both the rules are set out hereinbelow:-

“Rule 8. Probation. – (1) Every person appointed as a member shall be on probation for a period of one year.

(2) The Central Government may extend the period of probation for a further period of one year at a time so that the period of probation in aggregate may not exceed three years.

(3) A member may be discharged from service at any time during the period of probation without assigning him any reason.”

“Rule 9. Reservation or Termination of the Service of members. – (1) In the case of a person appointed as a technical or a judicial member from any post under the Union or a State, unless such a person is confirmed, the Central Government may at any time revert him to his parent post without assigning any reason, after giving him one month’s notice of such reversion and in case a technical or a judicial member wishes to revert to his parent post, he shall be required to give one month’s notice to the Central Government.

Provided that in case such a technical or judicial member has already superannuated according to the relevant rules of his parent post, the appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month’s notice of such termination and in case such technical or judicial member wishes to resign, he shall be required to give one month’s notice to the Central Government.

(2) In case of a person appointed as a judicial

member directly from the Bar, unless he is confirmed, the appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month's notice of such termination and in case such judicial member wishes to resign, he shall be required to give one month's notice to the Central Government."

5. It was the contention of the learned counsel for the petitioner that Rule 9(2) would have to be read harmoniously with Rule 8(3) of the said Rules and, if that were to be done, then it is obvious that a judicial member directly appointed from the bar, unless he is confirmed, could suffer termination of his service by the Central Government at any time without assigning any reason, but only after giving him one month's notice of such termination. Since, admittedly, the one month notice was not given to the petitioner, that was a clear violation of the rules and, therefore, the termination was bad in law.

6. It was further submitted that, although the letter dated 20.11.2009 indicated that the petitioner was discharged from his service under Rule 8(3) of the said Rules, it would also amount to termination under Rule 9(2). This is so because, according to the learned counsel for the petitioner, 'discharge' and 'termination' mean one and the same thing. For this proposition, the learned counsel for the petitioner referred to the Supreme Court decision in the case of **S.K. Sarma v. Mahesh Kumar Verma: 2002 (7) SCC 505**, wherein in paragraphs 11 and 12 thereof, the Supreme Court accepted the view that the word 'discharge' embraced all types of termination of contract of employment. The Supreme Court also observed that the word 'discharge' is of the widest amplitude and would include a cessation of relationship of an employer or employee, maybe by

retirement, resignation, dismissal or removal. Therefore, according to the learned counsel for the petitioner, it did not matter if the word “discharge” was used instead of the word ‘termination’. All that had to be seen was that there was a cessation in the relationship of employer and employee.

7. The learned counsel for the petitioner also placed reliance on the Supreme Court decision in the case of **Chandra Prakash Sahai v. State of U.P.**: 2000 (5) SCC 152, wherein the Supreme Court held as under:-

“33. Where, therefore, the services of a probationer are proposed to be terminated and a particular procedure is prescribed by the Regulations for that purpose, then the termination has to be brought about in that manner. The probationer Constable has to be informed of the grounds on which his services are proposed to be terminated and he is required to explain his position. The reply is to be considered by the Superintendent of Police so that if the reply is found to be convincing, he may not be deprived of his services.”

(Underlining added)

8. From the extracted portion, it is clear that when the services of a probationer are proposed to be terminated and a particular procedure is prescribed by the regulations for that purpose, then the termination has to be brought about in that manner. It, therefore, follows that if termination is brought about in a manner which is not as per the prescribed procedure, then the termination would be bad in law. In this backdrop, the learned counsel for the petitioner submitted that the manner of termination is clearly provided in Rule 9(2) of the said Rules which requires the giving

of 'one month's notice. Since the said notice was not given to the petitioner, the termination would be bad in law.

9. The learned counsel for the petitioner also placed reliance on the Supreme Court decision in the case of **Secretary, Akola Taluka Education Society v. Shivaji**: 2007 (9) SCC 564, which, although it pertained to permanent employees, indicated that where the respondents therein had not been given the requisite three months notice, the order of termination was bad in law.

10. It is in this backdrop that the learned counsel for the petitioner emphatically argued that Rule 9(2) cannot be ignored and Rule 8(3) has to be read in conjunction with Rule 9(2) and when the two provisions are read together, it is imperative that before the services of a probationer are terminated and / or discharged, one month notice is to be given. If that is not given, then the termination would be bad. Therefore, the learned counsel for the petitioner submitted that the Tribunal erred in law in not recognizing this position and in dismissing the petitioner's said original application.

11. Mr Dayan Krishnan, appearing on behalf of the respondents, also submitted that Rules 8(3) and 9(2) have to be read harmoniously. But, according to him, such a harmonious construction could only be possible by acknowledging that Rule 8(3) applies during the three year period of probation and Rule 9(2) applies after the three year period is over and the person concerned is still not confirmed. On the basis of this submission, he maintained that no notice was at all necessary for discharging the services of the petitioner inasmuch as the petitioner had

not completed the three year period and, therefore, the provisions of Rule 9(2) had not been triggered into action. He further submitted that the discharge of the service of the petitioner by virtue of the order dated 20.11.2009 was not bad in law.

12. Before we examine the rival contentions with regard to the interpretation to be placed on the said Rules 8(3) and 9(2) of the said Rules, it would be appropriate to notice two decisions of the Supreme Court with regard to interpretation. In **Superintendence Co. of India v. Krishan Murgai**: 1981 (2) SCC 246, the Supreme Court observed as under:-

“63. The true rule of construction is that when a covenant or agreement is impeached on the ground that it is in restraint of trade, the duty of the Court is, first to interpret the covenant or agreement itself, and to ascertain according to the ordinary rules of construction what is the fair meaning of the parties. If there is an ambiguity it must receive a narrower construction than the wider. In *Mills v. Dunham*, L.R. [1891] 1 Cha 576 Kay, LJ. observed:

‘If there is any ambiguity in a stipulation between employer and employee imposing a restriction on the latter, it ought to receive the narrower construction rather than the wider-the employed ought to have the benefit of the doubt. It would not be following out that principle correctly to give the stipulation a wide construction so as to make it illegal and thus set the employed free from all restraint. It is also a settled canon of construction that where a clause is ambiguous a construction which will make it valid is to be preferred to one which will make it void.’”

13. Although the observations are in the context of covenants or agreements between employers and employees, the same principles would apply where the relationship is engrafted in the form of rules. The principle that is discernible from the above mentioned decision of the Supreme Court is that in employer-employee contracts, there is inequality of bargaining power between the parties and, as a result when covenants or agreements between such employers or employees are under the scanner, and if a doubt arises as to the construction of any of the provisions of such covenants or agreements, the benefit of that doubt must go to be employee. Of course, a construction which would make the covenants valid is to be preferred to one which would make it void.

14. Another decision of the Supreme Court on the principle of construction of a contract is that of **Bank of India and Another v. K. Mohandas and Others**: 2009 (5) SCC 313, wherein the Supreme Court observed as under:-

“32. ... It is a well-known principle of construction of contract that if the terms applied by one party are unclear, an interpretation against that party is preferred. [*Verba Chartarum Fortius Accipiuntur Contra Proferentum*].”

In the very decision, the Supreme Court also held as under:-

“28. The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the

intention of the parties.

31. It is also a well-recognized principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible. [(The North Eastern Railway Company v. L. Hastings) 1900 AC 260].”

It is, therefore, clear that the contract (and, in our case, the rules) must be read as a whole and the true meaning of the clauses should be ascertained from the words used and not upon what the parties choose to say afterwards.

15. It is clear that Rule 8 specifically speaks of probation. It is also clear that Rule 8(1) stipulates that every person appointed as a member shall be on probation for a period of one year. By virtue of sub-Rule (2) of Rule 8, the Central Government is empowered to extend the period of probation for a further period of one year at a time so that the period of probation in the aggregate does not exceed three years. Rule 8 (3), which is important for our purposes, stipulates that a member may be discharged from service at any time during the period of probation without assigning him any reason. These are the substantive provisions with regard to the probation period of a member and his discharge from service during the period of probation. It only makes clear what is otherwise a well-settled principle that during the probation period, the service of an employee can be terminated without assigning any reason.

16. On the other hand, Rule 9 speaks of ‘reversion or termination of the service of members’. Rule 9(1) deals with the case of a person appointed as a technical or a judicial member from any post under a Union or a State. It provides that the services of such a person, unless he is confirmed, may be brought to an end and he could be reverted to his parent post without assigning any reason after giving him one month’s notice of such reversion. The proviso to Rule 9(1) stipulates that where such a technical or a judicial member has already superannuated according to the Rules of his parent post, his appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month’s notice of such termination. Thus, in the said Rules, which also form part of the terms of appointment which govern the petitioner’s period of probation, it is clear that during probation, a member of CESTAT may be discharged from service at any time without assigning any reason. It is also clear that a person, who is not confirmed as a judicial member and, if he is directly appointed from the bar, would have to be given one month’s notice if his services are to be terminated. Of course, here, too, there is no requirement for assigning any reason. The only requirement being that one month’s notice must be given. Qualitatively and substantively, there is no difference between Rule 8(3) and Rule 9(2), both of which speak of discharge / termination of the services of a member without assigning any reason during the probation period. Rule 8(3), if we examine the provision closely, deals with all members of CESTAT. No distinction between technical members or judicial members is made in that rule.

17. The case of the technical members and judicial members, who have come from any posts under the Union or the State, are dealt with differently inasmuch as instead of termination / discharge, they would suffer reversion. It is only when such a person, by virtue of operation of the proviso, has already superannuated according to the relevant rules of his parent post, that he would suffer termination. In the case of a judicial member appointed directly from the bar, there can be no question of any reversion and, therefore, his services can only be terminated. It is for this reason that while Rule 8(3) stipulates that the services of a member may be ‘discharged’ at any time during the period of probation without assigning him any reason, the individual cases of different types of technical and / or judicial members are specifically dealt with under Rule 9 and the expressions ‘reversion’ and ‘termination’ are used.

18. In a sense, Rule 9(2), apart from prescribing the substantive provisions with regard to termination during probation, also prescribes the procedure, whereby such termination is to be carried out. Therefore, when the two provisions, i.e., Rule 8(3) and Rule 9(2) are read harmoniously, there is no conflict between them. The only interpretation that follows upon a conjoint reading of the said two rules is that the services of a probationer member can be terminated at any time during the period of probation and, if the probationer member happens to be a judicial member directly appointed from the bar, then his services can be terminated only after giving him one month’s notice.

19. Therefore, we agree with the submission made by the learned counsel for the petitioner that if no notice had been given in terms of Rule

9(2) of the said Rules, the termination / discharge order dated 20.11.2009 would be bad in law. We do not agree with the submission made by the learned counsel for the respondent that Rule 8(3) would apply only during the three year period of probation and that Rule 9(2) would apply only to a situation of an unconfirmed member beyond the period of three years. There is no such indication in the rules. In any event, we must not forget the salutary principle of interpretation that when there is any doubt, the benefit must go to the employee.

20. Because of the view we have taken on this aspect of the matter, it would not be necessary for us to examine the other three arguments raised by the learned counsel for the petitioner.

21. As a result, the impugned order passed by the Tribunal as also the 'discharge' order dated 20.11.2009 are set aside. The writ petition is allowed to the aforesaid extent. In the circumstances, there shall be no order as to costs.

BADAR DURREZ AHMED, J

V.K. JAIN, J

July 27, 2012

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