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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) No. 4968/2008

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26th August, 2013

RAJEEV KHURANA

.....Petitioner

Through: Petitioner in person.

VERSUS

PRINCIPAL, SARASWATI BAL MANDIR & ORS. Respondents

Through: Mr. Puneet Taneja, Adv. and Ms.

Shweta, Adv. for R-1 to 3.

Ms. Bandana Shukla, Adv. for R-4.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes.**

VALMIKI J. MEHTA, J (ORAL)

1. The present petition impugns the judgment of the Delhi School Tribunal dated 17.9.2007 dismissing the appeal of the petitioner herein whereby petitioner challenged the termination of his services during the probation period by the order dated 30.4.1998.

2. Petitioner was appointed on a probation for a period of two years in terms of the appointment letter dated 3.9.1997 and was terminated within the first year of service by the letter dated 30.4.1998. Though there are various reasons given for considering the termination of services of the petitioner as

a probationer, and which includes the issue of direction to the petitioner to improve his teaching practices, I may note that it is settled law that principles of natural justice have not to be followed before terminating the services of the probationer. This is so held by the Supreme Court in the judgment reported as *Muir Mills Unit of NTC (U.P.) Ltd. Vs. Swayam Prakash Srivastava & Anr. (2007) 1 SCC 491*. In this judgment the Supreme Court has held that if the termination order says that the performance is unsatisfactory, even then, it cannot be said that the order is stigmatic. Paras 44 to 46 of the said judgment read as under:

“44. Also in the case of *Registrar, High Court of Gujarat and Anr. v. C.G. Sharma* it was observed that an employee who is on probation can be terminated from services due to unsatisfactory work.

45. This Court's decision in the case of *P.N. Verma v. Sanjay Gandhi PGI of Medical Sciences* can be referred to in this context, where it was held by this Court that, the services of a probationer can be terminated at any time before confirmation, provided that such termination is not stigmatic. This Court in *State of Madhya Pradesh v. Virendera Kumar Chourasiya* also has held that in the event of a non-stigmatic termination of the services of a probationer, principles of *audi alteram partem* are not applicable.

46 We are also of the view that the award of the Labour Court is perverse as it had directed grant of back wages without giving any finding on the gainful employment of respondent No.1 and held that the discontinuance of the services of a probationer was

illegal without giving any finding to the effect that the disengagement of respondent No.1 was in any manner stigmatic. The decision in the case of ***MP State Electricity Board v. Jarina Bee (Smt)*** (supra), this Court held that payment of full back wages was not the natural consequence of setting aside an order of removal. In the instant case, though the termination was as far back as in 1983, the Industrial Adjudicator has not given any finding on unemployment. This Court in a recent case of ***State of Punjab v. Bhagwan Singh*** (2002)9SCC636 has held that even if the termination order of the probationer refers to the performance being “not satisfactory”, such an order cannot be said to be stigmatic and the termination would be valid.”

3. The Supreme Court in the judgment in the case of ***State of W.B. and Others Vs. Tapas Roy (2006) 6 SCC 453*** has held that where the discharge order mentions instances of unauthorized absence of the probationer and concluding that he was not interested in training and had no respect for discipline, making of such remarks in the termination order cannot be said to make the termination order a stigmatic one. Paras 4,5 7 and 8 of the judgment in the case of ***Tapas Roy (supra)*** read as under:-

“4. The High Court allowed the writ petition holding that Rule 10 of the Rules did not apply in the facts of the case. It was also of the view that the statement, quoted below; in the order of discharge casts a stigma on the respondent. Since no opportunity of hearing had been granted to the respondent, therefore, the order could not be sustained. The decision of the Tribunal was, accordingly, set aside and the appellants were given liberty to take appropriate action against the respondent on the same grounds in accordance with law.

5. The particular passage from the order of discharge which the High Court found to be stigmatic reads as follows:

“I am convinced that he is not likely to make an efficient constable and is unsuitable for the Police Department. His frequent unauthorised absence from training centre also indicates his lack of interest in training and his scant respect for discipline.”

7. The order of discharge has, as we have already indicated, set out several instances of the respondent absenting himself unauthorisedly from the training centre. These facts have been relied upon for the purpose of concluding that the respondent was not interested in the training and had no respect for discipline. This conclusion was a ground for holding that the respondent was unsuitable for the Police Department.

8. The High Court was of the view that Rule 10 of the Rules did not apply to orders which were stigmatic. As has already been held by this Court in Pavanendra Narayan Verma v. Sanjay Gandhi Post Graduate Institute Medical Sciences 2002(92)FLR349(SC) that in order to constitute a stigmatic order necessitating a formal inquiry, it would have to be seen whether prior to the passing of the order, there was an inquiry into the allegations involving moral turpitude or misconduct so that the order of discharge was really a finding of guilt. If any of these three factors are absent, the order would not be punitive. We have also held that a stigma in the wider sense of the word is implicit in every order of termination during probation. It is only when there is something more than imputing unsuitability for the post in question, that the order may be considered to be stigmatic. In our view, the language quoted earlier in the discharge order, cannot be said to be stigmatic as it neither alleges any moral turpitude or misconduct on the part of the respondent nor was there an inquiry as such preceding the order of discharge. The order has been passed strictly in terms of Rule 10 of the Rules. We are, accordingly, of the view that the appeal must be allowed. It is, accordingly, allowed and the impugned order is set aside.”
(emphasis added)

4. The Supreme Court in the judgment reported as ***Chaitanya Prakash and Anr. Vs. H. Omkarappa (2010) 2 SCC 623*** has again held that there is no need for following the principles of natural justice while terminating the

services of a probationer and even if the termination order refers to the unsatisfactory service of the probationer, the order is not stigmatic. Paras 18 and 21 of this judgment read as under:-

“18. It is no longer *res integra* that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In this connection, we make a reference to the decision of the decision of the Supreme Court in ***Abhijit Gupta v. S.N.B. National Centre, Basic Sciences*** (supra), wherein also a similar letter was issued to the concerned employee intimating him that his performance was unsatisfactory and, therefore, he is not suitable for confirmation. We have considered the ratio in light of the facts of the said case and we are of the considered opinion that the basic facts of the said case are almost similar to the one in hand. There also, letters were issued to the concerned employee to improve his performance in the areas of his duties and that despite such communications the service was found to be unsatisfactory. In the result, a letter was issued to him pointing out that his service was found to be unsatisfactory and that he was not suitable for confirmation, and, therefore, his probation period was not extended and his service was terminated, which was challenged on the ground that the same was stigmatic for alleged misconduct. The Supreme Court negated the said contention and upheld the order of termination.

21. In ***Abhijit Gupta*** (Supra.), this Court considered as to what will be the real test to be applied in a situation where an employee is removed by an innocuous order of termination i.e whether he is discharged as unsuitable or he is punished for his misconduct. In order to answer the said question, the Court relied and referred to the decision of this Court in ***Allahabad Bank Officers Assn. v. Allahabad Bank*** (1996) 4 SCC 504; where it is stated thus:

“14. ...As pointed out in this judgment, expressions like "want of application", "lack of potential" and "found not dependable" when made in relation to the work of the employee would not be sufficient to attract

the charge that they are stigmatic and intended to dismiss the employee from service.”

5. In the case of ***Rajesh Kumar Srivastava Vs. State of Jharkhand and Ors. (2011) 4 SCC 447*** Supreme Court has held that while taking a decision to terminate the services of the probationer, no notice is required to be given to the probationer nor is the probationer required to be given any opportunity of hearing. Para 10 of the said judgment reads as under:-

“10. The aforesaid decision to release him from service was taken by the Respondents considering his overall performance, conduct and suitability for the job. While taking a decision in this regard neither any notice is required to be given to the Appellant nor he is required to be given any opportunity of hearing. Strictly speaking, it is not a case of removal as sought to be made out by the Appellant, but was a case of simple discharge from service. It is, therefore, only a termination simpliciter and not removal from service on the grounds of indiscipline or misconduct. While adjudging his performance, conduct and overall suitability, his performance record as also the report from the higher authorities were called for and they were looked into before any decision was taken as to whether the officer concerned should be continued in service or not.”

6. In the case of ***Abhijit Gupta Vs. S.N.B.National Centre, Basic Sciences & Ors. (2006) 4 SCC 469*** the Supreme Court has held that even when a termination order of a probationer referred to earlier letters which called the probationer a person of “perverted mind” and “dishonest, duffer having no capacity to learn” yet, the order would not be stigmatic one, and

merely that if such an order was read by a prospective employer would prejudice the probationer's future employment, the same is not a correct test to determine the termination order as stigmatic. Paras 4,5,8,10,13, 15,16 and 17 are relevant which read as under:-

"4. On 20th November 1995 the appellant was served with a letter informing him that his performance during the probationary period was "far from satisfactory" and that it had been observed that he lacked drive, imagination and initiative 'in the performance of his duties'. He was informed that, despite being told time and again to improve performance in the said areas, but with no effect. He was advised to improve "in order to enable us to consider your case for confirmation favourably". He was issued several such letters drawing his attention to the fact that his services left much to be desired. His probationary service came to be extended from time to time, the last such extension being granted till 9th April 1998. Finally, by the letter dated 7.4.1998 the petitioner was informed that his service was "unsatisfactory in the areas of drive, initiative, promptness and leadership" and that despite advised verbally and through letter, what were deficiencies in his work he had shown no improvement. His attendance, office work and attention to the academic work and the affairs of the guest house were also unsatisfactory. The first respondent, therefore, said "your performance, ability and capability during the period of probation has been examined and your service during the period of probation is found to be unsatisfactory and hence you are considered unsuitable for the post you have to. The governing body is of the view that your performance was unsatisfactory and you are not suitable for confirmation". For these reasons the appellant's probationary period was not extended on the expiration of his probation period on 9th April 1999.

5. The appellant challenged the order of termination of his service on the ground that it was a stigmatic termination by way of punishment for alleged misconducts. The learned single Judge of the High Court allowed the writ petition and quashed the order of termination and directed re-instatement of the appellant with full back-wages. The Division Bench of the High Court, however, allowed the letters patent appeal and held that the letter dated 7th April 1998 was not stigmatic and that it was a legitimate exercise of assessment of probationer's service by the employer, and, therefore, there was no scope for judicial interference therewith. In this view of the matter, the Division Bench allowed the appeal, set aside the judgment of the learned single Judge and dismissed the writ petition. Hence, this appeal.

8. Heavy reliance was placed on *Dipti Prakash Banerjee v. Satyendra Nath Bose National center for Basic Sciences, Calcutta and Ors.* [1999]1SCR532 ,where

this Court held that the termination of service of the employee in similar circumstances amounted to misconduct. We may mention here that it is common ground that while the matter was pending before the learned single Judge, sometime in the year 2005, the appellant attained the age of superannuation. The learned Counsel for the appellant contended that in the letter dated 7.4.1998 there is reference to certain earlier letters in which the appellant had been called a person of "perverted mind" and "dishonest, duffer having no capacity to learn". A reading of all the letters referred to in the letter of 7.4.1998 would clearly make out a case of allegations of misconduct against the appellant, in the submission of the learned Counsel.

10. In *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and Anr.* (2002)ILLJ690SC this Court considered what should be the best to determine whether a letter of termination of service was termination simpliciter or stigmatic termination. After referring to a number of authorities including the judgment in *Parshotam Lal Dhingra v. Union of India* (1958)ILLJ544SC and *Dipti Prakash Banerjee* (supra) the Court observed (vide para 19):

“Courts continue to struggle with semantically indistinguishable concepts like motive” and “foundation”; and terminations founded on a probationer’s misconduct have been held to be illegal while terminations motivated by the probationer’s misconduct have been upheld. The decisions are legion and it is an impossible task to find a clear path through the jungle of precedents.”

13. In the case of the appellant before us, the record in uncertain terms makes it clear that every time the appellants attention was drawn to his deficiencies and he was repeatedly advised to improve his behavior, conduct and discharge of work. True, that in some of the letters there was intemperate language used (the appellant was also equally guilty of doing that). Notwithstanding the intemperate language, we are unable to accept the contention of the appellant's counsel that the letter dated 7.4.1998 indicates that the appellant was being charged with the misconduct and, therefore, being removed from service. Read as a whole, the letter gives the impression that the removal of the appellant from service was only because the respondents, after giving a long rope to the appellant, had come to the conclusion that the appellant's service was unsatisfactory and there was no hope of his improvement.

15. The learned Counsel for the appellant, however, strongly contends that the "stigma" cast on the employee may not be confined to his personal character but may also affect his capacity to work. The test, learned Counsel for the appellant submitted, is that, if what is stated in the order of termination is read by a future employer, it prejudices the future employment of the employee. In the face of the

law laid down in the judgment just referred, we are unable to accept this as the correct test.

16. In *Ravindra Kumar Misra v. U.P. State Handloom Corporation Ltd. and Anr.* (1988)ILLJ73SC this Court pointed out that in a large corporation administration is bound to be impersonal and in regard to public officers assessment of service has got to be in writing for purposes of record, though it cannot be assumed that such an assessment recorded and the order of termination made with reference to that record would automatically take a punitive character.

17. The High Court has carefully considered all the circumstances placed before it and arrived at the conclusion that the respondent's work was under observation during the probationary period and that he was given repeated opportunities to improve his performance for which purpose his probation was extended from time to time. The fact that the authority did not find him fit for confirmation was also brought to his notice several times and yet he was given opportunities of improving by extending his probationary service. The High Court has correctly found that the letter dated 7.4.1998 was not punitive in nature and stated, albeit in prolix fashion, that the service of the appellant were unsatisfactory. The High Court points out, and we agree, that detailed reference to all other correspondence was not necessary, but it did not reflect any malice or bias. Finally, as this Court pointed out in P.N. Verma's case (supra) "a termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, does not ipso facto become stigmatic"

(underlining added)

7. In my opinion therefore there is no strength in the argument urged by the petitioner that since principles of natural justice have not been complied with, the probation order must fail. Also, there is no requirement in law and reasons must be given for termination of services of the probationer, in fact if reasons are given for termination, the same may amount to stigmatic order and therefore, orders of termination simplicitor of a probationer have been upheld.

8. The main argument of the petitioner was that before terminating the services of the petitioner as probationer, permission of the Director of Education ought to have been taken, and for which purpose, reliance is placed upon an order of the Supreme Court dated 3.2.2011, passed in Civil Appeal No. 2719/2007 in the case titled as ***DAV College Managing Committee Vs. Surender Rana & Ors.*** This order reads as under:-

“ORDER

“The first respondent was appointed on 1.8.1996, as Store Keeper, on probation for a period of one year, by the appellant, which runs a private unaided school. He was removed from service on 1.7.1997 by giving a month’s salary in lieu of notice. The first respondent challenged his removal by filing an appeal before the Delhi School Tribunal. The said appeal was allowed on 15.1.2002 and the order of removal was set aside on the ground that the appellant had not taken the prior permission of the Director of Education. The writ petition filed by the appellant challenging the said order, was dismissed by a learned single Judge of the High Court on 8.2.2006 and the appeal filed by the appellant was also dismissed by a Division Bench on 30.11.2006. The said order is challenged in this appeal by special leave.

2. Rule 105 of the Delhi School Education Rules, 1973 deals with probation and prescribe the period probation. The second proviso to sub-Rule (1) of the Rule 105 clearly provides that no termination from service, of an employee on probation shall be made by a school, other than a minority school, except with the previous approval of the Director.

3. The appellant does not dispute the fact that it is not a minority school. Therefore, the second proviso to Rule 105(1) applies to the order of the removal of first respondent from service.

4. In the circumstances, the orders of the Tribunal and the High Court holding that the termination without the previous approval of the Director under Rule 105 was illegal, does not call for interference. The appeal is dismissed.”

9. The order which was passed by the Supreme Court was a challenge to the judgment of a Division Bench in the case of ***DAV College Managing Committee Vs. Surender Rana & Anr. 135(2006) DLT 307 (DB)***.

10. I may state that the Division Bench of this Court deciding the case of ***DAV College Managing Committee (supra)*** has not referred to the binding precedent of an earlier Division Bench judgment in the case of ***Kathuria Public School Vs. Director of Education, 123 (2005) DLT 89(DB)***; and which holds that an unaided private school does not require prior permission of the Director of Education before terminating the services of even a confirmed employee. The Division Bench in the case of ***Kathuria Public School (supra)*** has relied upon the Constitution Bench judgment of the Supreme Court in the case of ***T.M.A.Pai Foundation & Ors. Vs. State of Karnataka & Ors. (2002) 8 SCC 481***. Thus the issue of prior permission of the Director of Education having been squarely decided in the case of ***Kathuria Public School (supra)***, it is this earlier judgment of the Division Bench in ***Kathuria Public School (supra)*** which is binding and not the

subsequent judgment in the case of *DAV College Managing Committee (supra)*. I may note that the judgment in the case of *DAV College Managing Committee (supra)* does not discuss the Constitution Bench judgment in the case of *T.M.A.Pai (supra)*. It may further be noted that the Division Bench judgment in the case of *Kathuria Public School (supra)* has been further followed recently by a Division Bench judgment of this Court in the case of *Delhi Public School & Anr. Vs. Shalu Mahendroo & Ors.(2013) 196 DLT 147(DB)*.

11. In my opinion, therefore, the order which is relied upon by the petitioner of the Supreme Court therefore would have no application because the issue was squarely decided in the case of *Kathuria Public School (supra)*, and that judgment was not brought to the notice of the Division Bench which decided the case in the case of *DAV College Managing Committee (supra)*. I would also like to note that in the order of the Supreme Court dated 3.2.2011 there is no reference to the binding observations of the Constitution Bench judgment in the case of *T.M.A.Pai (supra)*. For the sake of convenience I am not reproducing the various paragraphs of the Division Bench judgment in the case of *Kathuria Public*

School (supra) inasmuch as that judgment is now the law so far as the Delhi is concerned that unaided schools do not require prior permission of Director of Education before terminating the services of an employee of a school and as already stated above as also been recently followed in the Division Bench judgment in *Delhi Public School (supra)*.

12. In view of the above, there is therefore no merit in the petition, which is therefore dismissed, leaving the parties to bear their own costs.

AUGUST 26, 2013
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VALMIKI J. MEHTA, J.