

CWP No.10597 of 1996
Date of Decision: 16.5.2016

... Petitioner

Versus

... Respondents

Mr.Meherdeep Singh, Advocate for the respondent

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J. (Oral)

1. The services of the petitioner were terminated during probation vide order dated 26th April, 1996 (Annex.P-6) passed by the Managing Director, MARKFED invoking rule 2.15 (B) of the Markfed (Common Cadre) Service Rules, 1990 (for short “the Rules”). The order is simpliciter and non-stigmatic in character. The relevant part of Rule 2.15 reads as follows:-

“PROBATION:

2.15 A) person appointed to any post in service shall remain on probation for a period of two years if recruited by direct recruitment and one years if appointed otherwise:

(i) to (iii) XXX XXX XXX

B) If in the opinion of the appointing authority, the work or conduct of a person during the period of probation is not satisfactory or if he

has failed to pass the prescribed departmental examination within a period not exceeding the period of probation prescribed two years from the date of appointment, it may:

(i) If such person is recruited by direct recruitment, may extend his period of probation or dispense with his services without assigning any reason or revert him to a post which was held by him and/or on which he holds a lien; and

(ii) if such person is recruited otherwise:

(a) revert him to his former/lower post; or

b) Extend his period of probation and there after pass such orders as it would have passed on the expiry of the first period of probation;

Provided that the total period of probation including extension, if any, shall not exceed three years for appointment made by direct recruitment and two years for appointments made through promotion or otherwise.

2. The facts of the case are these: The petitioner was directly recruited on the post of Accounts Officer in MARKFED on 13th April, 1993. The termination order was passed 13 days after the expiry of the period of three years of the probationary period and it is sought to be faulted by the petitioner on the ground that it was passed beyond three years of the date of recruitment/joining. It has been explained by the MARKFED in the written statement filed to contest the case that previously, the petitioner was absent from duty without permission during probation for 34 days and accordingly MARKFED took action against him by sanctioning those 34 days as extraordinary leave without pay. Thus the period of probation expired on 17th May, 1995 and not on 14th April, 1995 as asserted by the petitioner. This period of 34 days of extraordinary leave was not permitted to be counted towards the period of probation. It was excluded from it. It was for this

reason that the period of probation was, in the first instance, extended from 14th

April, 1995 to 17th May, 1995.

3. At this juncture, learned counsel for the petitioner draws the attention of this Court to the order dated 9th November, 1995 (Annex.P-3) extending the period of probation of the petitioner upto 14th April, 1996 and from this event, it is argued that on the date of termination, the period extended for probation had come an end and the impugned action was taken prematurely during the currency of the extension as the confirmation should be treated automatically operative by lapse of three years. Therefore, the argument of the respondents that the order was passed within three years is not sustainable in sufficient degrees to sustain the impugned order.

4. Without going into that question in any depth for the present, the answer lies in Rule 2.15 (B) (i) itself which prescribes that in case of a direct recruit, the period of probation may be extended by period not specified in the rules and without assigning any reason. The question of confirmation of a probationer will always depend on the language of the rule. The proviso to Rule 2.15 (B) has to be read in the case of a direct recruit in a directory manner when it prescribes that the period of probation should not exceed three years both in cases of direct recruitment and promotion. The scheme in Rule 2.15 (B) (ii) (b) prescribes passing orders of confirmation even after extension of period of probation which militates the case against the petitioner that he is protected by mere lapse of time.

5. It appears well settled that the proviso to rule cannot take away the rule itself which empowers the competent authority to extend the period of probation without limit of time depending on assesment of work and conduct. In such circumstances, the rule has to be read in such a manner that it does not operate automatically. Automatic confirmation is not inbuilt in Rule 2.15 (B) and even in case there has been over-stepping of three years period prescribed in the proviso by

detract from the order terminating the services during probation in the absence of order of confirmation made in writing. It is common ground that there was no such order passed. Therefore, no right would flow to the petitioner during the probation period for retention in service. There is no automatic confirmation unless probation is declared to have been successfully completed. For case law on automatic confirmation of probationers research judgments in Wasim Beg v. State of U.P., (1998) 3 SCC 321; Chandu Khamaru v. Nayan Malik, (2011) 12 SCC 314 etc.

6. In defence of the writ petition it has been explained in the written statement that the petitioner's work and conduct was not found satisfactory during the period of probation. It is open to the employer to disclose in the written statement during the course of litigation the motive and foundation of the order. The termination order in the present case is not founded on work and conduct, but only on the motive. Motive and foundation have been explained by the Supreme Court in Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tubes Mazdoor Sabha, (1980) 2 SCC 593 at pg 616 : AIR 1980 SC 1896 as follows:-

“50. The anatomy of a dismissal order is not a mystery, once we agree that substance, not semblance, governs the decision. Legal criteria are not so slippery that verbal manipulations may outwit the court. Broadly stated, the face is the index to the mind and an order fair on its face may be taken at its face value. But there is more to it than that, because sometimes words are designed to conceal deeds by linguistic engineering. So it is beyond dispute that the form of the order of the language in which it is couched is not conclusive. The court will lift the veil to see the true nature of the order.

51. Many situations arise where courts have been puzzled because the manifest language of the termination order is equivocal or misleading and dismissals have been dressed up as simple termination. And so, Judges have dived into distinctions between the motive and the foundation of the order and a variety

of other variations to discover the true effect of an order of termination. Rulings are a maze on this question but, in sum, the conclusion is clear. If two factors coexist, an inference of punishment is reasonable though not inevitable. What are they?

52. If the severance of service is effected, the first condition is fulfilled and if the foundation or *causa causans* of such severance is the servant's misconduct the second is fulfilled. If the basis of foundation for the order of termination is clearly not turpitudinous or stigmatic or rooted in misconduct or visited with evil pecuniary effects, then the inference of dismissal stands negated and vice versa. These canons run right through the disciplinary branch of master and servant jurisprudence, both under Article 311 and in other cases including workmen under managements. The law cannot be stultified by verbal haberdashery because the court will lift the mask and discover the true face. It is true that decisions of this Court and of the High Courts since *Dhingra case* [Purshotam Lal Dhingra v. Union of India, AIR 1958 SC 36] have been at times obscure, if cited de hors the full facts. In *Shamsher Singh case* [(1974) 3 SCC 831] the unsatisfactory state of the law was commented upon by one of us, per Krishna Iyer, J., quoting Dr Tripathi for support: (SCC p. 889, paras 160, 161)

“In some cases, the rule of guidance has been stated to be ‘the substance of the matter’ and the ‘foundation’ of the order. When does ‘motive’ trespass into ‘foundation’? When do we lift the veil of ‘form’ to touch the ‘substance’? When the Court says so. These ‘Freudian’ frontiers obviously fail in the work-a-day world and Dr Tripathi’s observations in this context are not without force.” He says:

“As already explained, in a situation where the order of termination purports to be a mere order of discharge without stating the stigmatizing results of the departmental enquiry a search for the ‘substance of the matter’ will be indistinguishable from a search for the motive (real, unrevealed object) of the order. Failure to appreciate this relationship between motive (the

real, but unrevealed object) and form (the apparent, or officially revealed object) in the present context has led to an unreal interplay of words and phrases wherein symbols like 'motive', 'substance' 'form' or 'direct' parade in different combinations without communicating precise situations or entities in the world of facts."

7. Compelled or forced disclosure in the written statement that the work and conduct of an employee was not found satisfactory during the period of probation which led to discharge or termination does not cast stigma as it becomes the duty of the respondent facing litigation to disclose to this Court candidly the reason for termination when the reason has not been disclosed by the respondent on the face of the termination order. In right of defence of action taken disclosure of true state of things by respondent is constitutionally protected when breach of Article 311 is alleged, complained of and pressed by claimant as a ground of challenge to termination of service. Having heard the counsel I find that there is no error in the simpliciter termination and the motive behind the order and its justification having been explained satisfactorily in the written statement supported by record then no ground for interference by this Court is made out to fault the impugned order.

8. For the foregoing reasons, I find no merit in this petition which is accordingly dismissed.

16.5.2016
MFK

(RAJIV NARAIN RAINA)
JUDGE