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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) No.9060/2016

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25th November, 2016

GURVINDER SINGH SAINI

..... Petitioner

Through: Mr. Saurabh Chadda, Advocate.

versus

DIRECTOR OF EDUCATION AND ORS.

..... Respondents

Through: Mr. Santosh Kumar Tripathy, ASC
with Mr. Rizwan, Advocate for
GNCTD.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. By this writ petition under article 226 and 227 of the Constitution of India, the petitioner impugns the judgment of the Delhi School Tribunal (DST) dated 21.7.2016 by which the DST has upheld the impugned order dated 25.11.1997 passed by the respondent nos.2 and 3/Sri Guru Nanak Public School terminating the services of the petitioner who was a probationer.

2. The facts of the case are that the petitioner was appointed by the respondent nos.2 and 3/school on probation as a TGT (PET) on

1.1.1995. The appointment was pursuant to the letter of the respondent nos.2 and 3/school dated 24.12.1994 and this letter reads as under:-

“ Ref. No.Adm/Appll/94

24.12.1994

To

S. Gurvinder Singh Saini
DIA/90, Janak Puri
New Delhi-110058.

Reg: Appointment of P.E.T.

Dear Sir,

The Management committee is pleased to appoint you as P.E.T. in the pay scale of Rs.1400-40-1600-50-2300-EB-2600 on the terms and conditions attached w.e.f. 01.01.1995.

In case the terms and conditions are acceptable to you, you may state so in writing. You are requested to submit medical fitness and character certificate along with you joining report.

Yours faithfully
Sd/-
Hony. Secretary”

3. The probation period of the petitioner was extended vide Office Order no.10/1995 dated 16.12.1995 extending the period of probation by one year w.e.f 1.1.1996. During the course of probationary services of the petitioner, petitioner had resigned on 20.9.1996 but thereafter he was again appointed in the month of November, 1996. However, as per the case of the petitioner he continued in services because he had withdrawn his resignation.

4. There is a limited issue in this case of whether petitioner's services have been rightly or wrongly terminated by the respondent nos.2 and 3/school by an order dated 25.11.1997. It is settled law that it is the employer who decides whether or not probationary services of an employee are or are not satisfactory. This Court cannot substitute its decision with that of the competent authority which decides that the services of a probationer are or are not satisfactory for the employer. Accordingly, the petitioner who was terminated by the order of the respondent nos.2 and 3/school dated 25.11.1997 has been rightly terminated including for the reason that the letter dated 25.11.1997 cannot be said to be stigmatic in nature. To show that this order dated 25.11.1997 does not put stigma on the petitioner, this letter is reproduced as under:-

“SHRI GURU NANAK PUBLIC SCHOOL
(Recognised Secondary School)
Managed by Sri Guru Singh Sabha Majlis Park, Adarsh Nagar (Regd.)

BUNGALOW ROAD, ADARSH NAGAR, DELHI-110033

Ref. No.Adm/Staff/11/97

Dated: 25.11.1997

BY REGISTERED POST/AD

To

Shri Gurvinder Singh Saini, PET
Home Address:B23/2 Mahatma Gandhi Road
Adarsh Nagar Delhi-110033

Dear Sir,

You joined the school as PET w.e.f. 27.11.1996 on a probation period of one year in terms of the conditions laid down in the contract of service.

The Management committee of the school having judged your performance as PET during this period of one year and is not satisfied with your services and hence your probation period is not extended any further. Your services shall not be required any further after 26.11.1997. The one month salary in lieu thereof in terms of contract of service is enclosed herewith vide cheque no.693169 dated 25.11.1997 which may be acknowledged.

Your Pay & Allowance for the month of Nov. 97 paid in Dec. 1997 is also forwarded herewith vide cheque no.643170 dated 25.11.1997 for Rs.4521.00.

Yours Faithfully,

Sd/-
Hony. Secretary
For and on behalf of the Managing
Committee of the School.

Copy to:

1. DDE (North-West) for information and record.
2. Personal File.”

5. That the probationer need not be confirmed in services and in fact if ‘reasons’ are given for terminating of services of a probationer, then, merely because the reasons may in some way show lack of efficiency or any other negative aspect as regards the employee, would not mean that services are terminated by a stigmatic order. The services of a probationer can be terminated by a non-stigmatic order is clear from the ratios of the judgments of the Supreme Court in the cases of *Muir Mills Unit of NTC (U.P.) Ltd. Vs. Swayam Prakash Srivastava & Another* (2007) 1 SCC 491, *State of W.B. and Others Vs. Tapas Roy* (2006) 6 SCC 453, *Chaitanya Prakash and Another Vs. H. Omkarappa* (2010) 2 SCC 623, *Rajesh Kumar Srivastava Vs. State of Jharkhand and Others* (2011) 4 SCC 447 and

Abhijit Gupta Vs. S.N.B.National Centre, Basic Sciences & Others (2006)

4 SCC 469. All these judgments have been considered by me in the case of

Rajeev Khurana Vs. Principal, Saraswati Bal Mandir & Ors. in W.P.(C)

No.4968/2008 decided on 26.8.2013 wherein the relevant paras of the

judgments of the Supreme Court in the aforesaid cases have been referred to

in paras 2 to 6, and which paras 2 to 6 of the judgment in the case of ***Rajeev***

Khurana (supra) read as under:-

“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.”

(underlining 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" (emphasis is mine)"

6. It is seen that termination of the petitioner was by a non-stigmatic order of termination dated 25.11.1997, and therefore, the petitioner cannot argue that services of the petitioner were terminated by a stigmatic order. In fact, ratios of the judgments of the Supreme Court show that even if reasons are given showing as to why the services are not satisfactory, and which may result in some sort of observations as to lack of potential or character of a probationary employee, even then, such language has been held by the Supreme Court to be not stigmatic. This is clearly stated in the judgment in the case of *Tapas Roy (supra)* wherein the Supreme Court has said that in a wider sense stigma is implicit in an order of termination during probation but it is only when something is more than imputing unsuitability for the post in question that order may be considered as stigmatic. In that case, it was also observed that the probationer was guilty of frequent unauthorised absence from training centre and which indicates his lack of interest in training and his scant respect for discipline

and which observations have been held by the Supreme Court to be not stigmatic.

7. In the case of *Chaitanya Prakash and Another (supra)*, Supreme Court has relied upon the observations made by it in an earlier judgment in the case of *Allahabad Bank Officers Association and Another Vs. Allahabad Bank and Others (1996) 4 SCC 504* wherein it was stated that expressions like "want of application", "lack of potential" and "found not dependable" would not be sufficient to attract the charge that they are stigmatic. I therefore hold that the petitioner has been terminated from services by a non-stigmatic order.

8. Before the DST, petitioner had relied upon a certificate dated 14.9.2005 issued by the respondent nos.2 and 3/school in which there are statements that petitioner's services were unsatisfactory and that he knowingly and willfully neglected his duty and which shows disrespect towards the constituted authority and that the petitioner had not abided with the rules and regulations of the school. Petitioner in this certificate dated 14.9.2005 is stated to be a person whose retention was against the interest of the school because it would encourage indiscipline and also create hindrance in the proper functioning of the school. This certificate dated 14.9.2005 has rightly been held by the DST not to be the order of

termination of services because the order of termination of services was passed way back earlier on 25.11.1997 and the later certificate dated 14.9.2005 was got issued from the school at the request of the petitioner and therefore the certificate dated 14.9.2005 cannot be said to be an order of termination. The certificate dated 14.9.2005 which was issued after about eight years of termination of services of the petitioner cannot be relied upon by the petitioner to claim that his services were terminated by a stigmatic order because the order of termination dated 25.11.1997 is not stigmatic.

9(i) On behalf of the petitioner, it is then argued that petitioner is taken to be confirmed in the job as he has worked for more than two years, and for which purpose reliance is placed upon the judgment of a learned Single Judge of this Court in the case of ***Kasturi Ram International School & Anr. Vs. Directorate of Education & Anr. 2012 (130) DRJ 96*** wherein the learned Single Judge held that there is deemed confirmation of service on completion of two years of period of probation if the services are continued thereafter. It is argued that in the present case, the petitioner's services have continued beyond two years, and therefore, the petitioner is deemed to have been confirmed to the post of TGT with the respondent nos.2 and 3/school.

(ii) Reliance placed upon by the petitioner upon the judgment in the case of ***Kasturi Ram International School & Anr. (supra)*** is misplaced for the reason that in a subsequent judgment this Court in the case of ***Hamdard Public School Vs. Directorate of Education and Anr. 202 (2013) DLT 111*** has for interpreting Rule 105 of Delhi School Education Act & Rules, 1973 has referred to the ratio of the judgment of the Supreme Court in the case of ***Head Master, Lawrence School, Lovedale Vs. Jayanthi Raghu and Anr. (2012) 4 SCC 793*** wherein the Supreme Court speaking through Hon'ble Mr. Justice Dipak Misra has referred to all earlier judgments of the Supreme Court in detail as to when there is an automatic confirmation or there is no automatic confirmation of a probationary employee, and the judgment of the learned Single Judge of this Court in the case of ***Kasturi Ram International School & Anr. (supra)*** does not refer to the judgment of the Supreme Court in the case of ***Head Master, Lawrence School, Lovedale (supra)***, and therefore, it is the ratio of the judgment of this Court in the case of ***Hamdard Public School (supra)*** which will prevail and which holds that there is deemed confirmation only after at least three years of service and that services are continued beyond three years.

10(i) Learned counsel for the petitioner then argued that respondent nos.2 and 3/school had *malafides* in terminating the services of the

petitioner because the petitioner had become a witness in an anti corruption case against the school, and that petitioner's services are satisfactory because petitioner was granted two increments during the period of his services, and accordingly it is argued that the termination order dated 25.11.1997 is liable to be set aside on the ground of *malafides* and the fact that petitioner's services were satisfactory with the respondent nos.2 and 3/school.

(ii) Once again, this argument urged on behalf of the petitioner is misconceived, because as already discussed above, satisfaction of services or otherwise has to be judged by the school and this Court cannot substitute its own opinion for that of the school by holding that services of the petitioner were satisfactory although the respondent nos.2 and 3/school found that services were not satisfactory. Also, the issue of *malafides* in a case like the present cannot have any effect once the issue is of satisfactory services or otherwise of an employee wherein it is the competent authority/ the school which decides the satisfactory nature of services of an employee or otherwise.

11. Dismissed.

NOVEMBER 25, 2016/ Ne

VALMIKI J. MEHTA, J