

Gnct Of Delhi And Ors vs Pradeep Kumar on 13 October, 2022

Author: Satish Chandra Sharma

Bench: Chief Justice, Subramonium Prasad

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 9050/2014
GNCT OF DELHI AND ORS

Through: Mrs. Avnish Ahlawat, SC,
with Mr. Nitesh Kr. Singh
Ms. Laavanya Kaushik and
Alam, Advs.

versus

PRADEEP KUMAR

Through: Ms. Kamalaksi Sin
Ms. Saudharya Singh, Advo

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

% 13.10.2022

1. The present petition is arising out of an order dated 12.02.2014 passed by the Central Administrative Tribunal in O.A. No. 2418/2012, allowing the Original Application preferred by the Respondent employee who was a contractual employee.

2. The facts of the case reveal that a notice was published on 29.04.2008 in the local daily newspaper for filling up of various posts on walk-in interview basis, including the post of pharmacist. Interviews took place for contractual appointments. The Respondent employee, based upon the recommendations of the Interview Board, was issued an appointment order on 14.05.2008 - appointing him on the post of Pharmacist (Contractual Service). He submitted his joining on 14.05.2008. The appointment order which is on record reads as under:

"GOVT. OF NCT OF DELHI OFFICE OF MEDICAL SUPERINTENDENT SHRI DADA DEV MATRI AVUM SHISHU CHIKITSALAYA DABRI, NEW DELHI-110045 NO. F. 2(4)/DDMSC/PM(C)/2008/956 Dated 14.05.2008 OFFER OF APPOINTMENT On the recommendation of interview board for the post of PHARMACIST for which interview was held on 05.05.2008 Shri Pradeep Kumar is hereby offered for appointment to the post of PHARMACIST on contract basis on a fixed remuneration of Rs. 9518/- per month for a period of 11 months from the date of joining or till the post is filled up by regular appointment whichever is earlier.

His/Her appointment will further be subject to the following conditions:

- a) He/she will be required to submit a declaration to the effect that he/she does not have more than one living spouse
- b) He/she will take an oath of allegiance to constitution of India and make a solemn affirmation thereto.
- c) He/she should not be employed elsewhere in any capacity.
- d) The appointment is purely on contract basis and subject to production of necessary original certificates, recognition of the degree/diploma by the statutory council /board/authority etc and their verification from issuing authorities.
- e) Appointment is subject to good performance and conduct.
- f) The candidate selected against the SC/ST/OBC category will have to produce the caste certificate issued by the Competent Authority.
- g) He/she will have to produce a certificate of Medical Fitness preferably from Surgeon/Medical Officer of Govt. Hospital within 15 days of joining.
- h) The appointment shall be terminated at any time by one month notice given by either side i.e. the appointee or the appointing authority without assigning any reason.
- i) Experience Certificate will not be issued before completion of tenure.
- j) He/she will be required to produce a certificate of registration from Delhi Nursing/Pharmacy Council and concerned state Medical Council with 15 days 'of joining.
- k) He/she will wear white coat when on duty at his/her own expense
- l) Character and antecedents will have to be verified by their district magistrate of the state/city where she/he have been living for the last five year. Any adverse remarks in this regard may lead to termination of services. These certificates are to be submitted to the undersigned with 30 days of joining.
- m) Absence without leave will be viewed seriously and appropriate action will be initiated against the absentee by the appointing authority.
- n) If any of the declaration given or information furnished by the candidate proves to be false or he/she is found to have willfully suppressed any material information,

He/she will liable to be removed from services and any such other action which the hospital/authorities may think fit. If Shri Pradeep Kumar accepts appointment on the above terms and conditions he should report to the undersigned immediately but not later than 16.05.2008 along with following document:

a. Acceptance letter.

b. Original Testimonials.

If the candidate dose not report within the stipulated period, it will be presumed that he/she is not interested for this post and the offer will be treated as cancelled.

Sd/-

(DR V K KADAM) MEDICAL SUPERINTENDENT"

3. The undisputed facts of the case also reveal that his contractual appointment was extended from time to time. It is stated by the Counsel for the Petitioners that on 01.07.2010, a memorandum was issued stating that the Respondent was found absent from duty without information to the pharmacy incharge on 30.06.2010 as well as on some other dates. Finally on 17.04.2012, a termination order was issued putting an end to the contractual services of the Respondent. The Respondent employee preferred an Original Application before the Ld. CAT and the Ld. CAT has allowed the Original Application vide order dated 12.02.2014.

4. The order passed by the CAT in paragraphs 5 and 6 read as under:

"5. We find from the tone and tenor of the Additional Secretary's letter dated 23.03.2009 that services of existing contractual staff could continue but fresh recruitment on contract basis may not be made. It was further clarified in the aforesaid letter that all contractual staff rendered surplus due to regular appointment, may be adjusted in hospitals having clear vacancies. The respondents do not say that they have done such an exercise and thus, it is presumed that there are vacancies available. In fact in 2009 circular, 404 vacancies were indicated. Moreover, during the course of arguments, it was also made clear that it was not a general order but a specific order only for the applicant. The applicant has cited other orders of this Tribunal where relief has been granted to the contractual employees in terms that they shall not be removed till regular appointment is made, following the Additional Secretary's letter referred to above. By picking up the applicant only, the respondents have not acted in a fair manner. If they felt that applicant's performance was not up to the mark, they should have issued him a show cause notice, given opportunity to him to file reply and then taken a decision. Here, after having worked for four years, the applicant suddenly finds himself on the street without any livelihood, for reasons not told to him and when similarly placed persons are continuing in service.

6. We, therefore, come to the conclusion that the action of respondent no. 3 is arbitrary and his order dated 17.04.2012 is quashed and set aside. The respondents will Issue a fresh order appointing

the applicant on contract basis on usual terms and conditions and his services shall not be terminated till regular appointment is made. The aforesaid order shall be passed by the respondents within a period of two months from the date of receipt of a copy of this order. However, on such fresh engagement, this order shall not preclude the respondents to adjust the applicant in any other hospital, if they so choose, for any administrative exigency. No costs. "

5. In the present case, undisputedly, no show cause notice was issued to the Respondent in the year 2012 in respect of the alleged misconduct and the reply filed by the Petitioners before the CAT in paragraph 4(iii) reads as under:

"Para 4(iii) That -the contents of the corresponding para are denied. It is however submitted that the vacancies are still lying vacant in this hospital. It is submitted that out of total sanctioned post of 5 pharmacists which all filled hence there is no vacant post: Moreover the continuance of the services of the contractual staff depends on the performance of the worker, and HOD is competent for appointment/termination of the services of pharmacist, therefor, the directions given in Addl Secretary (Health), vide circular dated 23.03.2009 cannot be made applicable in the case of the applicant, as he could not render satisfactory service to the hospital, and was terminated for indiscipline, misbehaviour, dishonesty, and poor performance in terms of clause 2,3,5 of the offer of appointment issued vide letter No. 3423 dated 07.02.2011."

6. The aforesaid reply before the Tribunal makes it very clear that the Petitioners took a stand before the CAT that the employee was terminated on account of indiscipline, misbehaviour, dishonesty, and poor performance in terms of clause 2,3,5 of the offer of appointment issued vide letter No. 3423 dated 07.02.2011. Meaning thereby, as per the admission of the Petitioners, the Respondent employee was terminated on account of misconduct. It is an undisputed fact that in light of the so called misconduct, no disciplinary proceedings took place. Even if it is assumed that the termination is not on account of any misconduct, a month's notice was also not issued to the employee before putting an end to his service. In those circumstances, the Tribunal has allowed the Original Application directing reinstatement of the employee and has also held that the employer shall be free to take action afresh against the Respondent Employee.

7. The Apex Court in the case of Anoop Jaiswal Vs. Government of India and Another, (1984) 2 SCC 369, has held that even in the case of probationers if the services are to be put to an end, they are certainly entitled for opportunity of hearing and principles of natural justice and fair play are to be followed. Paragraphs 11, 12 and 13 of the aforesaid judgment are reproduced as under:

"11. On behalf of the Union of India reliance has been placed on State of Punjab v. Shri Sukh Raj Bahadur [AIR 1968 SC 1089 : (1968) 3 SCR 234 : 1968 Cri LJ 687 : 1968 Lab IC 1286] ; Union of India v. R.S. Dhaba [(1969) 3 SCC 603]; State of Bihar v. Shiva Bhikshuk Mishra [(1970) 2 SCC 871 : AIR 1971 SC 1011 : (1971) 2 SCR 191] ; R.S. Sial v. State of U.P. [(1975) 3 SCC 111 : 1974 SCC (L&S) 501 : AIR 1974 SC 1317 : (1974) 3 SCR 754 : 1974 Lab IC 858] ; State of U.P. v. Ram Chandra Trivedi [(1976) 4

SCC 52 : 1976 SCC (L&S) 542 : AIR 1976 SC 2547 : (1977) 1 SCR 462 : 1976 Lab IC 1647] and I.N. Saksena v. State of M.P. [AIR 1967 SC 1264 : (1967) 2 SCR 496 : (1967) 2 LLJ 427] . We have gone through these decisions. Except the case of Ram Chandra Trivedi all other cases referred to above were decided prior to the decision in Shamsher Singh case [(1974) 2 SCC 831 : 1974 SCC (L&S) 550 : AIR 1974 SC 2192 : (1975) 1 SCR 814 : 1974 Lab IC 1380] which is a judgment delivered by a Bench of seven Judges. As pointed out by us in all these cases including the case of Ram Chandra Trivedi the principle applied is the one enunciated by Parshotam Lal Dhingra case [AIR 1958 SC 36 : 1958 SCR 828 : (1958) 1 LLJ 544] which we have referred to earlier. It is urged relying upon the observation in Shri Sukh Raj Bahadur case [AIR 1968 SC 1089 : (1968) 3 SCR 234 :

1968 Cri LJ 687 : 1968 Lab IC 1286] that it is only when there is a full scale departmental enquiry envisaged by Article 311(2) of the Constitution i.e. an enquiry officer is appointed, a charge-sheet submitted, explanation called for and considered, any termination made thereafter will attract the operation of Article 311(2). It is significant that in the very same decision it is stated that the circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial. As observed by Ray, C.J., in Samsher Singh case [(1974) 2 SCC 831 : 1974 SCC (L&S) 550 : AIR 1974 SC 2192 : (1975) 1 SCR 814 : 1974 Lab IC 1380] the form of the order is not decisive as to whether the order is by way of punishment and that even an innocuously worded order terminating the service may in the fact and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311(2).

12. It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.

13. In the instant case, the period of probation had not yet been over. The impugned order of discharge was passed in the middle of the probationary period. An explanation was called for from the appellant regarding the alleged act of indiscipline, namely, arriving late at the gymnasium and acting as one of the ringleaders on the occasion and his explanation was obtained.

Similar explanations were called for from other probationers and enquiries were made behind the back of the appellant. Only the case of the appellant was dealt with severely in the end. The cases of other probationers who were also considered to be ringleaders were not seriously taken note of. Even though the order of discharge may be non-committal, it cannot stand alone. Though the noting

in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis or foundation for the order should be read along with the order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Article 311(2) of the Constitution."

8. In the considered opinion of this Court, as no notice of any kind was given to the employee and the principles of natural justice and fair play were violated, the Tribunal was justified in allowing the Original Application. This Court does not find any reason to interfere with the Order passed by the Ld. CAT.

9. Another important aspect of the case is that after the order was passed by the Ld. CAT, the Division Bench of this Court has stayed the Order passed by the Ld. CAT and, therefore, the employee in question shall not be entitled for back wages for the period of time when the matter was pending before this Court. The Petitioners are directed to reinstate the Respondent forthwith. It has been also pointed out by Ms. Ahlawat that the posts have been filled by regular employees and no posts are available. If such situation exists, then liberty is granted to the Petitioners to take appropriate steps in accordance in law. The liberty already granted by the Tribunal shall be available to the employer.

10. With the aforesaid, the Writ Petition stands disposed of.

SATISH CHANDRA SHARMA, CJ SUBRAMONIUM PRASAD, J OCTOBER 13, 2022 N.Khanna