
(2012) 05 GAU CK 0023

Gauhati High Court

Case No: Writ Petition (C) No. 1835 of 2012

Sultanul Arifin Ahmed

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision: May 9, 2012

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (2012) 3 GLD 32 : (2012) 3 GLT 397

Hon'ble Judges: Biplab Kumar Sharma, J

Bench: Single Bench

Advocate: N. Borah, for the Appellant; A. Verma, for the Respondent

Final Decision: Dismissed

Judgement

B. K. Sharma, J.

The petitioner is aggrieved by Annexure-H order dated 31.03.2012 by which his contractual appointment as Block Programme Manager (BPM) under the particular scheme of the Health Department has been dispensed with. The said order was issued by the Mission Director, NRHM, Assam and the Commissioner & Secretary, H & FW Deptt., Govt. of Assam. For a ready reference, the order dated 31.03.2012 is quoted below:

Office of the Mission Director

National Rural Health Mission, Assam

Saikia Commercial Complex, Shrinagar Path,

Christianbasti, G. S. Raod, Guwahati-05

No. NRHM/HRD/Performance Appraisal/404/11-12/36664 Dated 31.03.2012

ORDER

In the performance appraisal for the period 2010-11 held at district level, the performance appraisal committee graded the performance in respect of Mr. Arfin

Ahmed, Block Programme Manger, Barapujia BPHC, Nagaon District as not at all satisfactory. The undersigned directed Mr. Arfin Ahmed to improve his performance within three months. After lapse of 3 months the performance appraisal committee again reviewed the performance of Mr. Arfin Ahmed on 19.12.2011. After considering the performance before the performance appraisal committee and his performance in the Block after the first appraisal held in district, the performance appraisal committee is not satisfied with his performance and graded his performance as E which is below expectations. Under the above circumstances it is opined that the contract with Mr. Arfin Ahmed, Block Programme Manager, Barapujia BPHC, Nagaon District should not be further renewed in the interest of NRHM programme.

Therefore, the contact of Mr. Arfin Ahmed as Block Programme manger is hereby terminated with immediate effect as per clause 8 of terms of contract. As per clause 9 of terms of contract. Mr. A. Ahmed will be entitled to draw salary for 1 month in lieu of 1 month notice. He will hand over the charge to the Jt. Director of Health Services of the district immediately.

SD-

Mission Director, NRHM,
Assam & Comm. & Secy.

H. & FW Deptt., Govt. of Assam.

The petitioner was selected for BPM under NRHM by Annexure-D order dated 01.08.2009 and he was directed to sing the terms and conditions of the contract. Thereafter, he was appointed by order dated 01.09.2009 for a specific period of six months. The relevant clauses of terms and conditions are reproduced below:

4. The appointment of the party is purely on a contract basis and the party would not be entitled to any claims, right, interest or further benefits in terms of regulation or consideration of further appointment to the said post or any other post under the Society.

5. The services of the party shall stand automatically terminated at the expiry of contract period, without any necessity of the Society giving any notice or notice pay to the party and without any liability on part of the Society to pay any retrenchment or other compensation or other amounts to the party.

6. Any action either directly or indirectly of the party for the change of posting will be treated as disqualification for the post and the society will have the right to terminate this agreement without any notice for such action.

8. Notwithstanding anything contained herein above, the services of the party may be terminated at any time by the Society if the party is found to be guilty of any insubordination, intemperance or other misconduct or of any breach or non performance, it being clearly understood that the Society shall always invoke this

clause in consultation with the Chairman of the Society and Member Secretary of the Society.

9. Either of the parties hereto have the right to terminate this Agreement without assigning any reasons; provided that a written notice of one month is given to the other party. Both the parties may, in lieu of the written notice, give the other party a sum equivalent to the amount of his salary for one month or shorter notice than one month with a sum equivalent to the amount of his pay for the period of which such notice falls short of 1 month.

2. Although the initial period of six months expired, but the petitioner was allowed to continue in his service by time to time extension of the same. Lastly his such contractual appointment expired on 31.03.2012 by which date by Annexure-H order dated 31.03.2012 the Mission Director, NRHM & Commissioner and Secretary, H & FW Deptt. also issued the impugned order dispensing with his services.

3. I have heard Mr. N. Borah, learned counsel for the petitioner as well as Ms. A. Verma, learned SC, Health Department.

4. Mr. Borah, learned counsel for the petitioner submits that the impugned order having been passed in gross violation of the principal of natural justice, same is liable to be interfered with. According to him, the petitioner having performed efficiently, the respondent authority under whom he had worked could not have furnished the report adversely affecting his service. In support of his argument, he has placed reliance on a few decisions which are as follows:

1) [Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others,](#)

2) [National Textile Corporation \(M.P.\) Ltd. Vs. M.R. Jhadav,](#)

3) [Rijumoni Das Vs. State of Assam and Others,](#)

4) 2004 (2) GLT 253: Dharmeswar Baishya Vs. State of Assam & Ors.

5. I have considered the submissions made by the learned counsel for the parties and the entire materials on record. As noted above, the last extension of service of the petitioner was expired on 31.03.2012 and the impugned order was also issued on the same date dispensing with the services of the petitioner. According to the petitioner, his service ought to have extended at par with the others.

6. By the said Annexure-H order dated 31.03.2012, the service of the petitioner was dispensed with providing one month salary in lieu of one month notice. Such a course of action was adopted in reference to Clause-9 of the terms and conditions referred to above. However, since the term of appointment of the petitioner was to expire on 31.03.2012, such a course of action was not necessary. Be that as it may, the authority found it prudent to invoke Clause 9 towards dispensation of service of the petitioner.

7. The decision of Delhi Transport Corporation (*supra*) on which the learned counsel for the petitioner has placed reliance, relates to termination of service of permanent employees of public/semi-govt. undertakings or statutory corporation. In the said case service was terminated by giving one month's notice or pay in lieu of such notice without any authority. It was in such circumstances, the Apex Court held that such termination is not permissible in respect of the employees of the public/semi-govt. undertakings.

8. In the instant case, the petitioner is not a Govt. employee. He was appointment purely on contractual service for a limited duration which was extended from time to time. The petitioner can not claim that such contractual service should be extended indefinitely.

9. The decision in *M.R. Jadhav* (*supra*) has been pressed into service to buttress the argument that the adverse materials found against him having not been communicated, the same could not have been made the basis towards dispensation of the service.

10. In the counter affidavit filed by the respondents they have enclosed Annexure-A performance appraisal report of BPM. The said report includes as many as 13 BPMs. Their performance was assessed by the District Programme Manager, Nagaon; Joint Director of Health Services, Nagaon and the Addl. Deputy Commissioner (Health), Nagaon. As per the said appraisal report, the petitioner's performance was below expectation. While appraising the performance of different BPMs, the committee assigned marks at individual level. As per the said report, the petitioner secured the lowest average marks which is 4.

11. There is some dispute regarding service of show cause notice dated 18.02.2012. The said notice reflected the performance of the petitioner as below expectation. The notice also stated about non-performance of the petitioner directly or indirectly affecting the Block PHC. According to the petitioner, the said notice was not received by him. However, it is the stand of the respondents that the said notice was handed over to the appropriate authority for furnishing the petitioner. Irrespective of service of the notice, the performance of the petitioner having been adjusted by a duly constituted committee and there being recommendation not to continue his services on expiry of the term of contract on 31.03.2012, the petitioner being a contractual employee, cannot harp upon the plea of non-receipt of the show cause notice.

12. In the case of *Dharmeswar Baishya* (*supra*) the Court was concerned with the question as to whether the termination of the incumbent was termination simpliciter or punitive. It was held that dispensation of service of the petitioner was by way of penalty. His service was dispensed on the ground of unauthorised absence and dereliction of duty. The respondent also conducted an ex-parte enquiry without providing opportunity of being heard to the petitioner. It was in such

circumstances, the order of termination was held to be punitive.

13. In the instant case, same is not the position. The service of the petitioner has been dispensed with upon appraisal of performance which is normally done in case of contractual employees and even in case of temporary govt. employees who are on probation.

14. In *Rijumoni Das (supra)* the dispensation of service of the petitioner was on the basis of the enquiry conducted relating to financial irregularity purportedly committed by the petitioner. In such situation, it was held that service of the petitioner could not have been dispensed without providing him an opportunity of being heard. In the said case there was serious allegation of committing financial irregularity by the petitioner and accordingly an enquiry was conducted without providing any opportunity of being heard to the petitioner. It was also found that the employees like that of the petitioner were graded on the basis of their performance appraisal and while doing so, the employees graded as below average and poor were retained in service. However, the petitioner who was graded above them was not retained in service. As per the requirement of Clause-8 of the terms of agreement involved in the said case, the service of the petitioner could not have been terminated without affording him an opportunity of being heard.

15. Unlike the above case, the service of the petitioner was dispensed with on the basis of the appraisal of his performance by a duly constituted committee. As narrated above, his service even otherwise also came to an end on expiry of the term on 31.03.2012 and thus, there was no requirement of issuing any notice to him. However, the respondents in their wisdom paid one month salary in lieu of notice.

16. Even in case of temporary govt. employee, the service can be dispensed with on the basis of the performance. While adjudging such performance or taking any action on the basis of the such performance, no notice is required to be given to the temporary govt. employee.

17. Clause 5 of the terms and conditions referred to above, also empowers the employer to dispense with the service of the contractual employee. The said clause provides automatic dispensation of contractual service on expiry of the period of employment. In the instant case the petitioner's terms expired on 31.03.2012. This court exercising its power under Article 226 of the Constitution of India cannot issue any mandamus to continue the contractual service of the petitioner beyond its term. For all the aforesaid reasons, I do not find any merit in the writ petition. Accordingly, the writ petition is dismissed.