(2011) 09 AP CK 0017

Andhra Pradesh High Court

Case No: Writ Petition No. 20141 of 2008

M. Davaid Sam Roy		APPELLANT
	Vs	
The Hyderabad Public School Society and others		RESPONDENT

Date of Decision: Sept. 28, 2011

Hon'ble Judges: L. Narasimha Reddy, J

Bench: Single Bench

Advocate: Rajendran, for the Appellant; J. Sudheer, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

L. Narasimha Reddy, J

1. The Hyderabad Public School, 1st respondent herein was established by the Government of Andhra Pradesh in the year 1951, by constituting a society under the Societies Registration Act. The institution is conferred with autonomous status, by providing land and buildings, which are owned by the Government. The institution is managed and administered by the Board of Governors, 2nd respondent herein. The service conditions of the employees of the institution were earlier governed by the Rules framed in the year 1994 and in supersession thereof, the 2nd respondent framed and adopted new Service Rules of the year 2002.

2. The petitioner was appointed as a Vice-Principal by the Principal of the institution, 3rd respondent herein on 17.06.2005 and he was placed on probation. One year thereafter, he was re-designated as Registrar, on the basis of a decision taken by the 2nd respondent.

3. The 2nd respondent decided to extend the period of probation by one more year, through its resolution passed at a meeting held on 26.05.2007. The decision was communicated to the petitioner by the 3rd respondent on 06.05.2008. The petitioner

filed W.P.No.11194 of 2008 challenging the same. The writ petition was allowed through order, dated 30.07.2008 on the ground that it was not competent for the 2nd respondent to extend the probation of the petitioner, the 3rd respondent being the appointing authority.

4. While the petitioner was continuing in service as Registrar, the 3rd respondent served upon him, an order, dated 12.09.2008. The petitioner was informed that his services are terminated with immediate effect and that a sum of Rs.83,422/-representing the salary for three months, in lieu of notice for that period is paid through a cheque of the same date. The petitioner challenges the order of termination. His contention is that on expiry of three years period, his probation stood declared and that the 3rd respondent should not have terminated his service, except through disciplinary proceedings. Certain other grounds are also urged.

5. On behalf of the respondents, a detailed counter affidavit is filed. It is stated that the petitioner continued to be in probation and that it was competent for them to terminate his services, without conducting enquiry. According to them, what is resorted to is "termination simplicitor" and that it does not entail in any penal consequences. They oppose the plea of the petitioner that his probation is deemed to have been declared.

6. Sri Rajendran, learned counsel for the petitioner submits that Rules framed by the respondents stipulate that an employee, who is appointed at the first instance, shall be under probation for a period of two years, to be completed within a period of 3 years and that on expiry of three years from the date of joining the duty, the petitioner has become a full member of the service. He submits that there is absolutely no basis for the respondents in treating the petitioner as probationer, after expiry of three years. Learned counsel further submits that the procedure invoked by the respondents themselves viz., payment of three months salary in lieu of notice is applicable only to the permanent employees and that for the termination of probation of an employee, the period of notice is only one month or salary for that period in lieu of notice. He has placed reliance upon the judgments rendered by the Hon''ble Supreme Court on the point.

7. Sri J. Sudheer, learned counsel for the respondents, on the other hand, submits that though the period of probation of two years is to be completed in a span of three years, the probation would come to an end, if only an order, specifically for that purpose is issued by the appointing authority, on being satisfied about the performance of an incumbent. He further submits that admittedly, no such order was passed, in the case of the petitioner and in that view of the matter, he continued to be a probationer, despite the expiry of three years from the date of appointment. Learned counsel submits that it is always competent for an appointing authority to terminate the services of a probationer, without assigning any reasons and that the necessity to conduct an enquiry would arise, if only any aspersions are made or stigma is cast.

8. The petitioner was selected and appointed as Vice-Principal by the 3rd respondent, through order, dated 17.06.2005 and was placed on probation. Though he was re-designated as Registrar, through proceedings, dated 03.09.2007, his status, in terms of emoluments or classification, remained the same. An attempt to extend the probation of the petitioner was thwarted by this Court, on a technical ground viz., that the order was passed by an authority not vested with the power. About two months after this Court allowed the writ petition filed by the petitioner challenging the order extending the probation, the impugned order was issued terminating his services. The order is brief in its content and it reads as under:

Your services at The Hyderabad Public School Begumpet, as Registrar, are hereby terminated with immediate effect as "termination simplicitor".

Cheque No.434868 Dt.12/09/2008 of Rs.83,422/-towards three months pay in lieu of notice period is enclosed herewith.

Please sign and return the duplicate of the letter in acknowledgement.

You are directed to hand over charge immediately to Lt Col (Ret''d) PLN Sharma, the present Registrar of HPS-R, including all the school properties held under your charge.

9. One of the contentions urged by the petitioner is that he has become a full member of the service, on expiry of three years from the date of joining the duty, and that the respondents should not have terminated his services, except by initiating disciplinary proceedings. The respondents, on the other hand, plead that the petitioner continued to be a probationer. The moot question, therefore, would be as to whether the petitioner was a probationer as on the date of the impugned order or he has become a full member by that time. It becomes necessary to make reference to the relevant provisions and to take note of the principles laid down by the Hon''ble Supreme Court, to answer this question. First, a glance at the relevant provisions of the Rules framed by the 2nd respondent.

Rule 9 deals with the probation and it reads as under:

9. Probation:

a) Every person appointed by direct recruitment to any of the posts in this service shall, from the date on which he commences the duty, will be on probation for a total period of two years on duty within a continuous period of three years.

b) Every person appointed to any of the posts in this service either by promotion or by transfer shall, from the date on which he commences the duty, will be on probation for a total period of one year on duty within a continuous period of two years.

c) During the period of probation, the service of any employee appointed by the Board may be terminated without assigning any reason, after giving one month''s

notice in writing or one month''s salary in lieu of such notice.

d) Suspension or Termination of Probation: Where these rules of service prescribed a period of probation for any employee, the appointing authority may at any time before the expiry of such period suspend the probation of a probationer and discharge him from service for want of vacancy.

Rule 10 provides for confirmation of service and it reads as under:

10. CONFIRMATION:

All the probationers, whose probationary period has been declared as satisfactory, are confirmed members of the service.

10. The respondents have terminated the services of the petitioner by offering salary for a period of three months in lieu of notice.

11. A perusal of Rule 9 discloses that the period of probation for a direct recruitee is stipulated as two years and for a promotee or an appointee on transfer is one year. The matter is not left at that. The probation of two years for a direct recruitee is required to be completed within a continuous period of three years. The petitioner joined the service of the institution on 21.06.2005 on the basis of an order of appointment, dated 17.06.2005. While two years period came to an end on 20.06.2007, three years period expired on 20.06.2008. Before the expiry of three years, the respondents did make an attempt to extend the probation of the petitioner beyond two years. That however did not fructify with the intervention of this Court. The impugned order terminating the services of the petitioner is passed on 12.09.2008, which undisputedly is after the expiry of three years from the date, on which the petitioner joined the service.

12. There are certain settled principles in this regard. If the Rule simply stipulates the period of probation and says nothing more, an incumbent would continue to be a probationer, till the probation is declared by the appointing authority, on being satisfied about the performance of the candidate. In such cases, the gap between the date of commencement of probation and the date of any subsequent event of either extending or terminating or declaring the completion of probation and nature of rights of the employee, become relevant. Where however, the Rules stipulate the maximum period, within which an employee is required to complete the probation, different consequences would flow. The appointing authority is required to exercise its option of extending the probation up to the period, not exceeding the stipulated maximum, or to terminate the services within that time, in case the performance of the employee is not satisfactory. On expiry of the maximum period, the probation stands declared and the employee becomes a full member.

13. A Constitution Bench of the Supreme Court in State of Punjab Vs. Dharam Singh, was dealing with an employee governed by the Punjab Educational Service

(Provincialised Cadre) Class III Rules (1961). As in the instant case, a ceiling was put upon the period, within which the probation must be completed. The period of probation was stipulated under Rule 6(1) as one year and the authority was conferred with the power to dispense with the services of the employee or to extend the period of probation. However, a period of three years was stipulated as the total period of probation, including extensions if any. Interpreting that Rule, the Hon''ble Supreme Court held as under:

In the present case, Rule 6(3) forbids extension of the period of probation beyond three years. Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee, allowed to continue in the post on completion of the maximum period of probation, has been confirmed in the post by implication.

14. The ratio laid down by the Supreme Court squarely applies to the facts of the present case. To the same effect is the principle laid down in Samsher Singh v. State of Punjab AIR 1974 SC 2193 . The judgment rendered by the Hon''ble Supreme Court in Om Parkash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow and Others, is still closer to the facts of the present case. The gist of rule involved therein was summed up as under:

Regulation 18 provides for confirmation of an employee on the satisfactory completion of the probationary period. Regulations 17 and 18 read together, provide that appointment against a regular vacancy is to be made on probation for a period of one year, this probationary period can be extended for a period of one year more. The proviso to Regulation 17 restricts the power of the appointing authority in extending period of probation beyond the period of one year.

15. Thereafter, the principle was enunciated by making reference to the judgment in Dharam Singh''s case (1 supra). Their lordships held :

An employee appointed against a regular vacancy cannot be placed on probation for a period more than two years and if during the period of probation the appointing authority is of the opinion that the employee has not made use of opportunity afforded to him he may discharge him from service or revert him to his substantive post; but he has no power to extend the period of probation beyond the period of two years. Regulation 18 stipulates confirmation of an employee by an express order on the completion of the probationary period. The regulations do not expressly lay down as to what would be the status of an employee on the expiry of

maximum period of probation where no order of confirmation is issued and the employee is allowed to continue in service. Since Regulation 17 does not permit continuation of an employee on probation for a period more than two years the necessary result would follow that after the expiry of two years probationary period, the employee stands confirmed by implication.

16. Similarly, in M.K. Agarwal v. Gurgaon Gramin Bank AIR 1988 SC 286, the Supreme Court held that whenever the Rules stipulate the maximum period, within which the probation must be completed, the employee would become a member of the services, in case, no orders terminating the probation are passed, before expiry of that period.

17. Learned counsel for the respondents placed reliance upon the judgments of the Supreme Court in Federation of All India Customs and Central Excise Stenographers (Recognised) and others Vs. Union of India and others, and Registrar, High Court of Gujarat and Another Vs. C.G. Sharma, apart from several other judgments on the same point.

18. In Wasim Beg''s case (5 supra), the Supreme Court took note of the judgments referred to above and observed as under:

15. Whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant Service Rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In those cases where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary. This is the line of cases starting with State of Punjab Vs. Dharam Singh, ; M.K. Agarwal Vs. Gurgaon Gramin Bank and Others, ; Om Parkash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow and Others, ; State of Gujarat Vs. Akhilesh C. Bhargav and Others,

19. The case on hand, obviously falls into this category. In Paragraph 16 of the judgment, reference made to a different category of the cases was discussed as under:

16. However, even when the Rules prescribe a maximum period of probation, if there is a further provision in the Rules for continuation of such probation beyond the maximum period, the Courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended. In this category of cases we can place Samsher Singh Vs. State of Punjab and Another, which was the decision of a Bench of seven Judges where the principle of probation not going beyond the maximum period fixed was reiterated but on the basis of the Rules which were before the Court, this Court said that the

probation was deemed to have been extended. A similar view was taken in the case of Municipal Corporation,

20. Learned counsel for the respondents placed strong reliance upon this and submits that since Rule 10 of the Rules mandates that an order of confirmation must be passed, the petitioner is deemed to be under probation, till such an order is passed. However, on a close perusal of Rule 10, it becomes clear that by itself, it does not enlarge the scope of Rule 9, in the context of the period of probation or the span, within which it must be completed. It only stipulates the consequences that follow on declaration of probation viz., that an employee would become confirmed and beyond that, the Rule has no purpose to serve. The declaration of probation can be express, i.e., through a specific order, or by necessary implication that flows from the operation of a provision of law.

21. In C.G. Sharma''s case (5 supra), the Hon''ble Supreme Court was dealing with the Rules, which did not stipulate any cap on the period, within which, the probation must be completed. In that context, the Supreme Court held that even after the period of two years, stipulated for probation had expired, the employee would continue to be a probationer, till it is declared by the appointing authority. Such is not the case here. Learned counsel has also cited the judgments in Shri Kedar Nath Bahl Vs. The State of Punjab and Others, and certain other cases, which are on the same lines.

The result of the above discussion is that

(a) Where the Rule is silent as to the maximum period, within which the probation of an employee must be completed, he would continue to be a probationer, till the probation is declared by the appointing authority, through a specific order.

(b) Where however, the Rule, apart from stipulating the period of probation, prescribes the time limit for completion thereof, it would be competent for the appointing authority to extend the probation, up to the maximum period or to terminate the probation within that time; and if no such steps are taken, the employee shall be deemed to have successfully completed the probation and would become a confirmed member of service; on expiry of the maximum period.

(c) Even where the maximum period is stipulated by the Rules for completion of probation, the confirmation can be only though a specific order, if the Rule so warrants and the employee would continue to be a probationer after expiry of the maximum period also, unless such a specific order is passed, and

(d) The case on hand falls into the second category of cases.

22. There is intrinsic evidence to establish that even the respondents understood that the petitioner ceases to be a probationer. The reason is that in case, the petitioner were to be treated as a probationer, the respondents would have invoked Rule 9(1) to terminate his services by giving one month''s notice or salary in lieu of

the notice period. They havepaid three months salary in lieu of notice for that period. Such an arrangement is provided for only under Rule 14, which reads:

14. Termination of Service Due to Abolition Posts ETC.

1. If an employee at any time after confirmation, intends to resign he/she shall give three months notice in writing or three months salary including all allowances, to the School in lieu of such notice.

2. The Board of Governors is competent authority to terminate the services of a confirmed employee in case of abolition of the post due to closing down of a school/ a class or reduction in the number of section of a class or discontinuance of teaching a subject or discontinuance of a section of Boarding House/Dining Hall by giving three months notice in writing or three months salary thereof.

NOTE: Also, the Board is competent authority to impose any of the major penalties mentioned in "Discipline and Appeal Rules for the Employees of The Hyderabad Public Schools 2002.

3. The Board of Governors on the recommendation of the Principal shall have the power to relax the period of notice or payment of salary in special circumstances in the above context.

23. This Rule enables an employee as well as the employer to put an end to the employment by giving notice of three months or payment of salary for that period. Choice of the employee to avail such a facility is not circumscribed by any conditions. However, the discretion of the 2nd respondent to put an end to the services of the employee, even by giving notice of three months or by paying salary in lieu thereof, is limited to the cases, where the post is abolished due to closure of institution or reduction in the number of sections of a class and the like. No such circumstances are pleaded either in the impugned order or in the counter affidavit. Further, Rule 14 applies only for a confirmed employee.

24. The inescapable conclusion is that the impugned order is contrary to the Rules framed by the respondents and the law laid down by the Hon''ble Supreme Court. Therefore, the writ petition is allowed and the impugned order is set aside. There shall be no order as to costs.