

H Shivakumar Vs. The Director

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Court : Karnataka

Decided On : Feb-16-2015

Judge : P.B.Bajanthri

Appeal No. : WP 15821/2012

Appellant : H Shivakumar

Respondent : The Director

Judgement :

1 IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE16H DAY OF FEBRUARY 2015 BEFORE THE HONBLE MR. JUSTICE P.B. BAJANTHRI WRIT PETITION No.15821/2012 (S-DIS) BETWEEN: H. Shivakumar S/o. late Hanumantha Aged about 41 years Ex-Second Division Assistant Town Panchayat Somwarpet - 571 236 Kodagu District. R/at: Near Mutton Market Nirmala Nagara, Hassan. ... PETITIONER (By Sri K.R.Bhavani Shankar, Advocate) AND: The Director & Commissioner of Municipal Administration 9th Floor, V!shveshwaraiah Towers Bangalore - 560 001. (By Sri Y.D. Harsha, AGA) ... RESPONDENT2This Writ Petition is filed under Articles 226 and 227 of the Constitution of India praying to quash the impugned order dated 19.04.2012 passed by the respondent vide Annexure-J holding the same illegal, bad in law, arbitrary one, violative of principles of natural justice and also against to Karnataka Civil Services (Probation) Rules, 1977 and thus violative of Article 14, 16 & 21 of the Constitution of India; direct the respondent to give further posting to the

petitioner and grant all consequential benefits. This Writ Petition coming on for Preliminary hearing in B group and having been heard and reserved for orders, the Court pronounced the following:-

ORDER

The petitioner while working as a second division assistant, Town panchayath, Somwarpet, Kodagu district, remained absented himself for some days. Based on those allegations and so also report of the Chief Officer, Town Panchayath, Somwarpet, the Deputy Commissioner, Kodagu district, Madikeri and an official memorandum dated 6.9.2011 of the Project Director, District Urban Development Cell, the petitioner has been discharged from service vide Annexure-J.

The petitioner being aggrieved by the order of discharge, presented the above writ petition. 3 2. The petitioner was appointed as a SDA on compassionate ground on 24.07.1997 in the pay scale of Rs.1040-1900. He was on probation for a period of two years. His probation period came to be completed on 23.07.1999, the date on which he completed two years of service. However, the appointing authority did not extend the period of probation of the petitioner and allowed to continue in service. The petitioner passed departmental examinations namely Municipal and Local Boards in the second sessions, 2006 and he has also passed General Law Part-I and Part-II, and Accounts Higher during the first session, 2009 which is evident from Annexures-B and C respectively.

3. The petitioner remained absented himself in the year 2011 for which show cause notice was issued on 21.6.2011 to show cause within three days for remaining absent on 15.06.2011, 17.06.2011 and 20.06.2011 and further stating that the Chief Officer, 4 Town Panchayat, Somwarpet, has come to the conclusion that the services of the petitioner is not required in his Office, further stated that why he should not recommend to transfer the petitioner, failing which, it is understood that Chief Officer would be recommending for initiation of departmental enquiry under Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957 (for short, KCS(CCA) Rules, 1957). When things stood thus, the Chief Officer, Pattana Panchayath, Somwarpet, issued a memorandum to the petitioner stating that his services have been relieved by the Chief Officer, Kodagu District,

Madikeri, with effect from 16.08.2011 from the Office of the Pattana Panchayath, Somwarpet, and further directing the petitioner to handover the project work and audit paras which were assigned to him before 5.00 P.M. on 22.9.2011 vide Annexure-G. The Chief Officer, Pattana Panchayath, Somwarpet, issued an official memorandum by which the petitioner has been relieved 5 from the Office of the Pattana Panchayath, Somwarpet, on 29.9.2011. In the said O.M. certain allegations have been made against the petitioner stating that on number of occasions show-cause notices were issued despite that the petitioner has not rectified his conduct, he has no duty conscious and therefore, his services are not required in the Pattana Panchayathi, Somwarpet. Further, the petitioner was also directed to report in the office of the respondent consequent upon relieving him from service on 29.9.2007 vide Annexure-H.

4. In the meanwhile, the Deputy Commissioner, Kodagu District, Madikeri, based on the communication of the Chief Officer, Pattana Panchayathi, Somwarpet, dated 24.6.2011 ordered that the petitioner should be relieved from the post of SDA, Pattana Panchayathi, Somwarpet, with effect from 16.8.2011, while referring to the unauthorized absence of the petitioner, which has resulted in delay in 6 implementation of assigned works. It was also pointed out that despite earlier show-cause notices issued to the petitioner the petitioner has not changed his conduct. These factual aspects have been made available to the Deputy Commissioner, Kodagu District, Madikeri..

5. On 19.4.2012 the respondent discharged the petitioner from service based on the O.Ms. dated 29.9.2011 and 2.1.2012 issued by the Chief Officer, Pattana Panchayathi, Somwarpet, and official Memorandum dated 6.9.2011 of the Project Director, District Urban Development Cell, Kodagu District, Madikeri. The aforesaid official memorandum are relating to various allegations made against the petitioner like issuance of number of show-cause notices about the conduct of the petitioner and remaining unauthorized absence to the duty. It was also stated that the petitioners probation period is yet to be declared. It is further stated that the petitioner has not 7 shown any interest in discharging the duties of the post held by him. Taking consideration of the above facts and circumstances relating to conduct of the petitioner the respondent discharged the petitioner, vide Annexure-

J.

In pursuance of the order of discharge, the Chief Officer, Pattana Panchayathi, Somwarpet, relieved the petitioner on 26.4.2012 vide Annexure-K.

6. The learned counsel for the petitioner submitted that the petitioner has passed the prescribed departmental examinations and he has rendered 15 long years of service. It is further contended that the reports of the Chief Officer, Town Panchayath, Somwarpet, are all false and frivolous. Therefore, the impugned order of discharge dated 19.4.2012 (Annexure-J) is without issuing any notice and without conducting any enquiry. It was further submitted that the order of discharge dated 19.4.2012 attaches stigma and before discharging the petitioner under Rule 6(1) of 8 the Karnataka Civil Services (Probation) Rules, 1977 (for short Probation Rules) the respondent should have complied later part of Rule 6(1) viz., but the order of discharge except when passed by the Government shall not be given effect to, till it has been submitted to and confirmed by the next higher authority.. At this stage, it is relevant to reproduce Rule 6 and Rule 7:-

6. Discharge of a probationer during the period of probation.- (1) Notwithstanding anything in Rule 5, the Appointing Authority may, at any time during the period of probation, discharge from service a probationer on grounds arising out of the conditions, if any, imposed by the rules or in the order of appointment, or on account of his unsuitability for the service or post; but the order of discharge except when passed by the Government shall not be given effect to, till it has been submitted to and confirmed by the next higher authority. (2) An order discharging a probationer under this rule shall indicate the grounds for the discharge but no formal proceedings under the Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957, shall be necessary.

9 7. Termination for misconduct.- No order terminating the services of a probationer, whether during or at the end of the period of probation for any misconduct, shall be passed except in accordance with the Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957.

7. Having regard to the above provisions, the petitioners counsel submitted that before giving effect to the order of discharge it should have been confirmed by the next higher authority i.e. Government, further before passing of discharge order, he should have been subjected to disciplinary proceedings since the order of

discharge is with reference to the allegation of unauthorized absence made against the petitioner. The unauthorized absence of an employee amounts to misconduct. Therefore, enquiry under the KCS(CCA) Rules, 1957 read with Rule 7 of Probation Rules, 1977 is a must. 10 8. The petitioners counsel also submitted that before passing the order of discharge the petitioner is entitled for show-cause notice and without hearing him the order of discharge has been passed which is violative of Articles 14, 16 and 21 of the Constitution of India. He has also contended that, it is true that he remained absented himself for few days due to domestic issues like he has to take care of his aged mother who was ill and his wife, who was pregnant at the relevant point of time. Moreover, the petitioner had leave at his credit and his absence could have been treated as leave at his credit instead of discharging him.

9. The learned additional Government advocate Sri. Harsha, submitted that the petitioner has passed the prescribed service examination only in the year 2007-2009. It was also stated in Para 3 of the reply statement that during the period of probation service of the petitioner was satisfactory. Thereafter it was 11 contended that the petitioner remained absent on 21.6.2011, 6.9.2011, 12.9.2011 and 29.9.2011 for which show-cause notices had been issued seeking the explanation of the petitioner. It was further contended that after verifying the service record of the petitioner, the appointing authority has discharged the petitioner on account of unsuitability to hold the post. All along it was stated that the petitioner remained absent for few days and he had been discharged from service on the ground of unsuitability. Delay in not declaring the probation period would not be a hurdle for discharging a probationer. He has also contended that there is no deemed satisfactory of completed probation. It was also pointed out that Under Rule 9 of the Probation Rules, there is no order of confirmation passed. In view of the above facts and circumstances, it was contended that the writ petition is without any merit. 12 10. Under Rule 6(1) of the Probation Rules, after passing the order of discharge by the appointing authority and before giving effect to the same it has to be placed before the next higher authority for confirmation if an order is passed by other than Government. In the present case, the order of discharge has been passed by the respondent namely the Director and Commissioner of Municipal Administration. Therefore, the order of discharge dated 19.4.2012 is required to be

confirmed by the next higher authority namely the State Government. On this short ground, the order of discharge dated 19.4.2012 is to be set aside. The learned Additional Government Advocate fairly submitted that the order of discharge dated 19.4.2012 has not been confirmed by the Government, who is higher authority to the respondent herein. 13 11. It is true that the petitioner is already subjected to issuance of show-cause notice. However, necessary disciplinary proceedings should have been initiated under Rule 7 of the Probation Rules, 1977 read with Rule 11 or 12 of the KCS (CCA) Rules, 1957.

12. In Anoop Jaiswal .vs. Government of India and another (AIR 1984 SC636 the Apex Court pointed out that the form of order is not decisive as to whether it is by way of punishment or not and that even an innocuously worded order terminating the services may in the fact and circumstances of the case establish that an enquiry into the allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311(2). The Apex Court pointed out that the cause for the order cannot be sidetracked and the recommendations which is the basis or foundation for the order should be read along with the order for the purpose of determining its 14 character. Para 13 of the aforesaid decision is relevant which reads as follows:- 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 acting as one of the ring leaders 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 ring leaders 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. 15 Even in the present case, the petitioner is already subjected to disciplinary proceedings since number of notices have been issued seeking explanation of the petitioner. In fact, even issuance of show-cause notice is not in accordance with the KCS(CCA) Rules, 1957. The CCA Rules provides issuance of show-cause notice along with the articles of charge both under Rules 11 and 12. In other words, the respondents have totally ignored the provisions of law relating to Probation Rules read with KCS(CCA) Rules, 1957 before passing the impugned order of discharge.

13. The petitioners counsel also submitted that the petitioner completed his probation period in the year 1999 and it was not extended. Consequently, he cannot be discharged since the appointing authority has no power to extend the period of probation after expiry of probation period. Even assuming that the respondent 16 has no power the State Government has ample power under Rule 4 of the Probation Rules, 1977.

14. The learned counsel for the petitioner submitted that in the present case two issues are involved viz., for unauthorized absence an employee can be discharged from service and discharged order passed by other than Government requires higher authority's confirmation before giving effect to the order of discharge. Thus he argued that unauthorized absence amounts to misconduct and consequently disciplinary enquiry is necessary under rule 7 of the Probation Rules. It was further argued that the order of discharge has been passed by the appointing authority i.e., The Commissioner/Director of Municipal Administration and he is subordinate to Government. Hence without confirmation by the Government the same cannot be given effect. Per contra the learned Govt., Advocate submitted that question of subjecting 17 the petitioner to disciplinary proceedings is not required as it is undisputed that the petitioner was unauthorized for some days. Further it was contended that question of confirmation by the Government may not be required as it is only directory in nature.

15. Unauthorized absence amounts to misconduct. Unauthorized absence means without informing the employer remaining absent for duty by an employee. Therefore conduct of an employee amounts to misconduct. Hence disciplinary enquiry is to be held to prove that an employee remained unauthorized absent willfully. In so far as before giving effect to discharge order obtaining confirmation by the next higher authority is a mandatory requirement having regard to the provision employed in Rule 6 (1) of Probation Rules.

16. It is relevant to discuss meaning of Probation. Probation means testing of an employees 18 capacity, conduct or character especially before he is admitted to regular employment. In Websters dictionary probation is said to have been derived from the Latin word probation and French Probare meaning to try, examine, prove and is itself defined as any proceeding design to ascertain truth, to determine character, qualification etc., examination, trial or a period of trial, as to engage employee/person on probation. In the present case the petitioner was appointed on probation for a period of 2 years from 1997. Thereafter he has passed prescribed departmental examination only in 2006 -2009. It was duty cast on the Respondent-appointing authority to extend the probation period of the petitioner as and when he had completed 2 years of service as provided under probation rules. However the petitioner was allowed to continue for more than one and half decade without declaring his probation. Continuation of his service indicates that there is no infirmity in discharging 19 the duties of the post of Second Division Assistant. Moreover Rule 5 specifically mandates the authority to declare the probation as soon as possible. Now all of a sudden on account of unauthorized absent the petitioner has been discharged from service, which amounts to arbitrary exercise of power.

17. Apex court in the case of D.P. Banerjee .v. S.N. Bose, National Centre for Basic Sciences, Calcutta [(1999) 3 SCC60 it is held as follows: Material which amounts to stigma need not been contained in order of termination of the probationer but might be contained in any document referred to in the termination order or in its annexures. Obviously, such a document could be asked for or called for by any future employer of the probationer. In such case, the order of termination would stand vitiated on the ground that no regular enquiry was

conducted. Whereas in the present case it is crystal clear that order of discharge has been passed on account of unauthorized absence. Therefore without enquiry under Rule 7 of Probation rules read with KCS (CC&A) 20 Rules, 1957 passing of discharge order is illegal and arbitrary. A probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated in a punitive manner without complying with the principle of natural justice.

18. Apex court in the case of *Shamsher Singh v. State of Punjab* [AIR 1974 SC2192 it is held as follows: If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service without the meaning of Article 311(2) of the Constitution. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to attract Article 311. The substance of the order and not the form would be decisive.

19. Reading of entire impugned discharge order reveals that order has been passed with reference to the petitioners unauthorized absence on 15.6.2011, 21 17.6.2011 and 20.6.2011. The appointing authority- Respondent should have conducted disciplinary proceedings as provided in the probation rules read with KCS (CC&A) Rules, 1957. Non-compliance of the aforesaid provision is arbitrary. The courts are always faced with this kind of problem of assessing the real cause for a particular order whether it is by way of penalty or by way of discharge simplicitor. No doubt allegation of unauthorized absence of the petitioner resulted in work hamper in the office where he was working. But the law shall have to be applied as it stands. When the real foundation for the order is the misconduct the resultant order in reality becomes an order of penalty rather than a simple order of discharge.

20. For the reasons stated above, I am constrained to set aside the impugned order dated 19.04.2012 vide Annexure-J.

22 21. Writ petition is, accordingly, allowed. The Respondent is directed to take back the petitioner to duty forthwith and this order would not come in the way of

holding disciplinary proceedings for unauthorized absence by the competent authority. In effect, petitioner stands reinstated to the post of SDA but in the facts and circumstances, petitioner is entitled to full pay for the intervening period i.e. from the date of his disengagement till the date of reinstatement. However, the aforesaid period shall be treated on duty for all purposes. The respondent is directed to pay the arrears, if any, to the petitioner within three months. Sd/- JUDGE. *alb/-.

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