

HIGH COURT OF JAMMU AND KASHMIR

AT JAMMU

SWP no. 1008/2003, CMA no. 1549/2004

c/w

SWP no. 2034/2003, CMA no. 2230/2003

Date of order: 14.03.2013

Dr. R. D. Vishwakarma

v

U.O.I. & ors.

Coram:

Hon'ble Mr. Justice M. M. Kumar, Chief Justice

Hon'ble Mr. Justice Dhiraj Singh Thakur, Judge

Appearing counsel:

For the petitioner(s) : Mr. M. K. Raina, Advocate

For the respondent(s) : Mrs. Neeru Goswami, Sr. Panel Counsel

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| i) Whether to be reported
Press, Journal/Media | Yes |
| ii) Whether to be reported in
Digest/Journal | Yes |
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M. M. Kumar, CJ

1. These two writ petitions* filed under Article 226 of the Constitution of India read with Section 103 of the Constitution of Jammu and Kashmir calls in question the order of the Central Administrative Tribunal, Chandigarh Bench in TA-54/JK of 2002 dated 20.05.2003 (for brevity the Tribunal). One of the petitions namely SWP no. 1008/2003 has been filed by the original applicant-writ petitioner and the other one has been preferred by the Union of India and its officers being SWP no. 2034/2003. The Tribunal in its impugned order has upheld the order dated 5th/6th April, 1999 discharging the original applicant-Dr. R. D. Vishwakarma from service on the ground that his

work and conduct was not satisfactory and reverted him to his original post of Principal, Kendriya Vidyalaya Sangathan. The pivotal question of law is 'whether the order of discharge is in fact an order of dismissal casting stigma and warranting an enquiry'. The Union of India has petitioned against the award of salary which relief necessarily emanates from the interim order of this High Court before transfer of the petition to the Tribunal.

2. In order to put the controversy in its proper perspective few facts may first be noticed. On 10.11.1995, respondent no. 3-Kendriya Vidyalaya Sangathan (KVS) issued an advertisement inviting application for filling up one post of Assistant Commissioner from the Scheduled Tribe quota. The original applicant-Dr. Vishvakarma was working on the post of Principal with respondent no. 3-KVS. He was eligible for the direct quota post of Assistant Commissioner and applied. He was selected and appointed vide appointment letter dated 20.03.1996 (Annexure-B). According to the terms and conditions of appointment, the original applicant-writ petitioner was to remain on probation for a period of two years

which was extendable upto three years. He was to be confirmed upon successful completion of period on his own turn according to the availability of a permanent vacancy. The original applicant-writ petitioner joined on the post of Assistant Commissioner in KVS on 08.04.1996. As repeated reference has been made on behalf of the petitioner to documents extending the period of probation with advise, it would be apposite to make express reference to the letter dated 17.02.1998 (Annexure-F) which is set out below *in extenso*:-

“KENDRIYA VIDYALAYA SANGATHAN 18,
INSTITUTIONAL AREA
SHAHID JEET SINGH MARG
NEW DELHI-110016
F. No. 3-1/96-KVS(Estt.I) Dated: 17/2/98

MEMORANDUM

Dr. R D Vishwakarma was appointed to the post of Assistant Commissioner initially on probation for two years vide this office memorandum No. F.1-33/93-KVS(E.I) dated 20.03.96.

The work and conduct of Dr. Vishwakarma during first year of probation has been assessed by the competent authority who has found that he has not been able to cope up with the assignment. Dr. Vishwakarma is hereby required to improve upon his performance during the remaining period. **(emphasis added)**

(D. K. Srivastava)
Jt. Commissioner (Admn.)”

3. After apprising the original applicant-writ petitioner that he needed to improve his performance

during the remaining period of his probation, the respondent-Kendriya Vidyalaya Sangathan extended the period of probation upto 07.10.1998 vide letter dated 07.04.1998 and the same is set out below *in extenso*:-

“KENDRIYA VIDYALAYA SANGATHAN 18,
INSTITUTIONAL AREA
SHAHID JEET SINGH MARG
NEW DELHI-110016
F. No. 3-1/96-KVS(Estt.I) Dated: 07/04/98
MEMORANDUM

Dr. R D Vishwakarma was appointed to the post of Assistant Commissioner w.e.f. 8.4.1996 on probation of 02 years. After reviewing the work and performance of Dr. R. D. Vishwakarma during the period of probation, the competent authority has decided to extend the period of probation in respect of Dr. R. D. Vishwakarma upto 7.10.1998 which, accordingly, stands extended upto 7.10.1998.

(D. K. Srivastava)
Jt. Commissioner (Admn.)
for Vice-Chairman, KVS.”

4. Another letter was sent to the original applicant-writ petitioner bringing to his notice that his work and conduct was not satisfactory and he remained unable to show any marked improvement. He was advised to improve his performance. The aforesaid letter dated 06.10.1998 is also set out below in *extenso*:-

“KENDRIYA VIDYALAYA SANGATHAN
18, INSTITUTIONAL AREA
SHAHID JEET SINGH MARG
NEW DELHI-110016
F. No. 3-1/96-KVS(Estt.I) Dated: 06.10.1998

MEMORANDUM

Dr. R D Vishwakarma was appointed to the post of Assistant Commissioner on probation initially for two years which was liable to be extended, vide this office memorandum of even number dated 20th March 1996. The probation was subsequently extended till 07.10.1998. It has now been decided to extend the period of probation further till 07.04.1999.

The work and conduct of Dr. Vishwkarma has been assessed by the competent authority who has found that his work and conduct were not satisfactory and that he has not been able to show any marked level of improvement in his work and conduct. Dr. Vishwakarma is hereby required to improve upon his performance during the remaining period of probation i.e upto 07.04.1999.” (Emphasis added)

5. A perusal of the aforesaid letter shows that his probation period was to come to an end on 07.04.1999 and keeping in view his work and conduct during probation respondent no. 3-KVS passed an order dated 05.04.1999 discharging him from service. The order dated 5th/6th April, 1999 makes an interesting reading and the same reads as under:-

“KENDRIYA VIDYALAYA SANGATHAN
No. F. 133/93-KVS(Estt.I) Dated: 5th April, 99

OFFICE ORDER

1. Dr. R D Vishwakarma vide this office letter no. F.1-33/93-KVS(Estt.I) dated 20th March 1996 was as Assistant Commissioner in KVS Jammu Region on probation for two years which was liable to be extended upto three years. His probation period was accordingly extended upto 7th April, 1999, vide this office letter no. F. 3-1/96-KVS(Estt.I) dated 6.10.98.

2. In pursuance of para 3(ii) of the aforesaid offer of appointment, the competent

authority terminates the services of Dr. Vishwakarma as Assistant Commissioner, KVS with effect from 7.4.1999(AN). The competent authority further directs that he will be entitled to a sum equivalent to the amount of his pay plus allowances for a period of one month which he was drawing immediately before termination of his services as Assistant Commissioner, KVS in lieu of notice period.

3. On termination of his services in the post of Assistant Commissioner, Dr. Vishwakarma may be placed as Principal, KVS, the post he was holding prior to his appointment as Assistant Commissioner.”
(emphasis added)

6. Before the Tribunal, the original applicant-writ petitioner made two submissions. It was argued that the order dated 5th/6th April, 1999 cast a stigma and, therefore, respondent no. 3-KVS was required to follow the principles of natural justice by holding a regular departmental enquiry. The other argument was that the original applicant-writ petitioner deserved to draw pay and perks of the post of Assistant Commissioner. The Tribunal rejected the argument and proceeded to hold that the order of discharge terminating the service of the original applicant-writ petitioner was an order of termination simplicitor. It was further held that in such a case there was no legal obligation to hold a regular departmental enquiry because there was no allegation

of misconduct and the order could not be called stigmatic in nature. The allegations of malafide levelled against the Vice Chairman, KVS were also rejected. The view of the Tribunal after due inspection of the record is discernible from the following para which reads as under:-

“.....In order to satisfy ourselves that this was not a case of bias against the applicant, his original file relating to his probation period was called by us. We have examined the file which though confidential as relating to the applicant, clearly shows that not only the then Commissioner of KVS Shri H. M. Cairae on 24th March, 1999 recorded his displeasure about the performance of the applicant, it has also been mentioned that the work and performance of the applicant was likewise found to be wanting by two previous Commissioners namely, Smt. Lizzie Jacob and Shri R. S. Pandey. In order to controvert the allegation of the applicant that his immediate superior i.e. Joint Commissioner was unfavourably disposed towards him, the respondents have pointed out by producing the file that after a note by the then Commissioner on March 24, 1999, the decision to revert him was taken by the Vice Chairman, KVS, who cannot be taken to be biased against the applicant. We have also inspected the file to satisfy ourselves that the entire action was taken in a systematic manner. We find from the said file that on 12.11.97, Shri D. K. Srivastav, who had reviewed the work of the Assistant Commissioner, wrote to him stating that the work of the Asstt. Commissioner was found to be unsatisfactory during his visit to Jammu from 5th to 8th November, 1997 and he further issued certain directions to the applicant to improve his work. Another report on probation period was recorded

on 5.12.97 in which it has been stated that he has not been able to cope up with the assignment. Performance needs to be monitored. This was thereafter conveyed by the Joint Commissioner to the applicant on 17.7.98. Yet again on 31st March, 1998, the officer reporting on his work clearly mentioned that the work of the Asstt. Commissioner needed substantial improvement and his supervision and control over critical areas was also found wanting. It is further stated in the said assessment report that the defects needed in his performance were brought to his notice verbally as well as in writing, but were continued to be noticed. We need not go into further details of the various reports against him because this matter is sufficient to show that the respondent-department (and not only the Joint Commissioner) in its entirety, applied its mind and came to the conclusion that the probationary period performance of the applicant was not satisfactory.....”(emphasis added)

7. However, with regard to his entitlement to the salary as Assistant Commissioner for the specified period, his prayer was accepted because there was an interim order issued by the High Court before the matter was taken to Hon'ble the Supreme Court on the ground that the High Court did not have jurisdiction to entertain the petition which was eventually transferred to the Tribunal. The argument of the respondent-KVS did not find favour with the Tribunal that the interim order being an order without jurisdiction was not to be acted upon. The following observations made by the Tribunal leading to the

award of wages in respect of the period the original applicant-writ petitioner has worked on the post of Assistant Commissioner would thus read as under:-

“...The question now remains as to whether the applicant shall be entitled to the salary as Assistant Commissioner for the period from the date of the order of the Supreme Court changing the jurisdiction of the case till the date of our order. The argument put-forth by the respondents is that since the High Court did not have the jurisdiction to hear the matter, could not have passed the interim order and, therefore, the order passed without jurisdiction need not have been carried out. We are in strong disagreement with this contention of the respondents. The Supreme Court merely stated that the case should go to the Tribunal, but it did not mean to bar the original jurisdiction of the Hon’ble High Court under Article 226 of the Constitution. For, even after our order, the same can be challenged before the High Court under Article 226. The jurisdiction of the High Court is supreme. All that Apex court meant was that the case should go in the first instance to the Tribunal and only then if the petitioner/applicant is aggrieved by the order of the Tribunal, he can approach the High Court. We cannot agree with the contention that the interim order passed by the High Court was without any jurisdiction. We are not going into the merits or facts of the interim order as that order is binding on all concerned. We find no logic in the action of the respondent-department in stopping the salary that they were already giving to the applicant merely because the Hon’ble Supreme Court held that the case should be filed before the Tribunal. Much has been made by the respondents of the fact that the applicant was not paid his salary

because he stopped attending the office. First of all, the applicant contended that he was not given a room or a place to sit in and therefore it is not correct to say that he did not attend the office. More over, he had been clearly directed by the Hon'ble High Court not to deal with any file relating to KVS and, therefore, even if he went to office, what work would he do? Therefore, it is incorrect to say that the applicant could not be paid salary because he did not attend the office. In fact before the Supreme Court orders, the interim order was being executed in toto by the respondents and it is only after the order of the Supreme Court, directing to go to the Tribunal first that the respondents stopped paying him the salary. A note to this effect is also found in his personal file dated 25.9.2002. We are afraid that the action of the respondent-department in denying salary to the applicant over the change of jurisdiction laws unjustified and rather amounts to contempt of the order of the High Court." **(emphasis added)**

8. Mr. M.K.Raina, learned counsel for the original applicant-writ petitioner has argued that the order dated 5th/6th April, 1999 must be regarded as a stigmatic order. The order firstly itself says that he was reverted to the post of Principal, Kendriya Vidyalaya Sangathan. According to the learned counsel the previous letter also contained words which reflect on the competence of the officer. For example a reference has been made to letter dated 17.02.1998 which shows that the petitioner has not

been able to cope up with the assignment. Likewise the words 'work and conduct not satisfactory' would further reflect on his competence to discharge duties. Mr. Raina has submitted that it would amount to casting a stigma on the career of the original applicant-writ petitioner, therefore, a regular departmental enquiry was required to be held. According to the learned counsel discharging an officer during the period of probation cannot be a ruse for his dismissal merely because in the departmental enquiry the misconduct is required to be proved. In support of his submission, Mr. Raina has placed reliance on two judgments of Hon'ble the Supreme Court in the case of ***D. P. Banerjee v. S. N. Bose National Centre for Basic Sciences 1999 (3) SCC 60*** and ***V. P. Ahuja v. State of Punjab & ors. 2000 (3) SCC 239*** and argued that the order of discharge passed on 5th/6th April, 1999 is *ex-facie*, stigmatic and punitive. According to the learned counsel the order should not be examined in isolation and the same requires to be read in the light of three earlier letters written on 17.02.1998 (supra, Annexure-F), 07.04.1998 (supra, Annexure-G) & 06.10.1998 (supra,

Annexure-H). The combined effect of reading those letters, according to the learned counsel would be that the original applicant-petitioner has failed to perform his duty properly and, therefore, the principles of natural justice were required to be followed. Placing reliance on the judgment in V.P. Ahuja's case (*supra*) learned counsel has argued that the use of expression failure in 'performance of duties administratively and technically' has been regarded as an order *ex-facie*, stigmatic & punitive.

9. Mrs. Goswami, learned Senior standing counsel for Union of India has stated that there cannot be any other way of assessing the work and conduct of an employee during the period of probation. According to the learned counsel the order dated 07.04.1999 does not even *ex-facie* express any opinion and, thus, cannot be regarded as a stigmatic order. It simply terminates his services from the post of Assistant Commissioner after noticing that the period of his probation was liable to be extended upto three years which was done. Accordingly, his probation period was to come to an end on 07.04.1999. Mrs. Goswami has further submitted that there is nothing stigmatic

in the letters advising the original applicant-writ petitioner to improve his work and conduct. This was the only way with respondent-KVS to encourage the original applicant-writ petitioner to successfully complete his period of probation, but unfortunately he remained unsuccessful.

10. Having heard the learned counsel for the parties, we are of the considered view that the order passed by the Tribunal does not suffer from any legal infirmity warranting interference of this Court. The original applicant-writ petitioner was selected and appointed on the post of Assistant Commissioner, KVS with specific condition that he would be put on probation for a period of two years which was extendable by another year. The post of Assistant Commissioner is a direct cadre post and respondents have framed Rules which are known as Appointment, Promotion, Seniority etc Rules, 1971. These Rules are statutory in character and have been framed by virtue of power vested in the Board of Governors of the Kandriyia Vidyalaya Sangathan by Rule 22 of the Rules. Apart from the advertisement Rule 10 and 11 deals with probation and the confirmation of probationers. The

terms and conditions in the advertisement were verbatim copy of Rule 10 & 11 which are set out below:-

“10. Probation.

(1) Every direct recruit shall initially be appointed on probation, the period of probation being two years from the date of appointment, which may be extended to three years by the competent authority for reasons to be recorded in writing.

(2) Every person other than a probationer shall when first appointed to any post, be on probation for a period of two years from the date of such appointment, which may be extended to three years by the competent authority for reasons to be recorded in writing.”

11. Confirmation of Probationers

When an employee appointed to a post on probation or on trail has completed his/her probation/trial to the satisfaction of the appointing authority, he/she shall be eligible for substantive appointment or continuance therein, as the case may be, and such substantive appointment shall be made in the order of seniority as indicated in the relevant select panel.”

11. A con-joint reading of the Rules would show that a direct recruit may initially be appointed on probation for a period of two years which may be extended to three years for the reasons to be recorded in writing. It is only on successful completion of probation period that an employee becomes entitled to confirmation as is borne out from Rule 11. However, if an employee appointed in Kendriya Vidyalaya Sangathan remains

unable to successfully complete his probation period then he is liable to be discharged at any point of time with one month's notice or pay in lieu thereof. Rule 12 in so far it is relevant to the controversy at hand reads as under:-

“Discharge or Reversion of Probationers

- (i) An employee appointed to any post in the Kendriya Vidyalaya Sangathan, specified in the Schedule, who has no lien on any post under the Central Government or any State Government or the Kendriya Vidyalaya Sangathan shall, while on probation, be liable to be discharged from the post at any time with one months' notice or pay in lieu thereof, if;
 - (i) On the basis of his/her performance or conduct during the probation he/she is considered unfit for further retention in the post concerned; or
 - (iii) On the receipt of any information relating to his/her nationality, age, health or antecedents, the appointing authority has satisfied that he/she is ineligible or otherwise unfit for being an employee of the Kendriya Vidyalaya Sangathan.”

12. The law with regard to probationer is fairly well settled. The concept of attaching stigma must emanate from the order of discharge itself and *ex-facie* the order should contain stigmatic words to attract the provisions of Article 311 of the Constitution. Remarks like want of application to banks work or lack of potential have been found to have been made in relation to the work of an employee and in the

context of assessment on his work which would not amount to allegations of misconduct casting any stigma on such an employee. In that regard, reliance may be placed on the judgments of Hon'ble the Supreme Court in ***Shailaja Shivajirap Patil v. President, Hon'ble Khasdar UGS Sanstha and others (2002) 10 SCC 394, Commandant 11th Battalion, A. P. Special Police (IR), Cuddapah, Cuddapah District v. B. Shankar Naik (2003) 5 SCC 580*** and ***Union of India & ors. v. A.P. Bajpai & ors. (2003) 2 SCC 433***. In a well known judgment rendered by 7-Judge Bench of Hon'ble the Supreme Court in ***Shamsher Singh & anr. v. State of Punjab AIR 1974 SC 2192*** detailed discussion is available as to the motive and foundation on which an innocuous order is passed. Law on this subject has also again been discussed in ***Radhey Shayam Gupta v. U. P. State Agro Industries Corporation Ltd and anr. (1999) 2 SCC 21***. In nutshell, the view taken by Hon'ble the Supreme Court is that if *ex-facie* an order of discharge is likely to affect adversely to the future prospects of an employee then such an order is regarded as penal in nature.

13. When we examine the order dated 5th/6th April, 1999 ex-facie there is nothing which may show the original applicant-writ petitioner in bad light. All that the order of discharge indicates is that during the period of probation his services were being terminated in the light of para 3 (ii) of the letter of appointment. Even in the earlier letters dated 17.02.1998, 07.04.1998 & 06.10.1998 (supra, Annexures F, G & H), there is nothing to conclude that the order suffers from any stigma which may result into an opinion that the order is punitive in character and an enquiry was required to be held. Moreover, the original applicant-writ petitioner was yet to acquire any right to hold that post and in any case he was given back his post of Principal, KVS on which he presumably held a lien. Had there been any reflection of these letters on his career then he would not have been allowed to join as Principal. There was no affect of letters dated 17.02.1998, 07.04.1998 & 06.10.1998 (F, G & H, supra) on his service career. In that regard reliance may be placed on the judgments of Hon'ble the Supreme Court in the cases of ***Ajit Singh v. State of Punjab (1983) 2 SCC 217***, ***State of U.P v.***

Kaushal Kishore Shukla (1991) 1 SCC 691* and *State of Punjab v. Sukhwinder Singh (2005) 5 SCC 569.

14. The judgment of Hon'ble the Supreme Court on which reliance has been placed, we does not support the case of the original applicant-writ petitioner. For example in the case of *D. P. Banerji's case* (supra) the letters of termination levelled specific allegation of preparing false bills, mis-behaviour with women academic staff members who had sent a written complaint, frequent absence from office premises and in that regard complaint filed by faculty members were some of the instances which have been indicated in para 5 of the judgment. There are further allegations of similar nature extracted from letters addressed to the employees in para 6 of the judgment. Therefore, the foundation of the order of termination was traced to the allegation of misconduct by piercing the veil. Likewise in the case of *V. P. Ahuja's case* (supra) the words used in the discharge order were that the employee failed in the performance of his 'duties administratively and technically'. In the case at hand, no such words would find mention either in the

order of discharge dated 5th/6th April, 1999 nor in the letters dated 17.02.1998, 07.04.1998 & 06.10.1998 (Annexures F, G & H,). Accordingly, we express our inability to conclude that the judgments of Hon'ble the Supreme Court in the case of *V. P. Ahuja's* case (supra) & *D. P. Banerjee's* case (supra) would have any application to the facts of the case at hand.

15. Learned counsel for the respondents-petitioner in (SWP no. 2034/2003) has argued that no salary is payable to the original applicant-writ petitioner-Dr. R. D. Vishwakarma which is attached to the post of Assistant Commissioner, KVS. The aforesaid argument is liable to be rejected because the interim order passed by the High Court was required to be accepted. We are of the view that the Tribunal has rightly held that the respondents department did not act within the parameters of law in stopping the salary of Dr. R. D. Vishwakarma which they were already paying him, it has been rightly rejected the argument that after Hon'ble the Supreme Court had held that the Tribunal had the jurisdiction and the matter be transferred to the Tribunal, the interim order of the High Court order was without jurisdiction

because the interim order continued to be in operation. Therefore, the action of the respondents-department in denying salary of the original applicant-writ petitioner on account of change of jurisdiction was wholly unjustified and amounted to violation of the order of the High Court.

16. We find no legal infirmity in the view taken by the Tribunal with regard to the payment of salary to the original applicant-writ petitioner.

17. As a sequel to the above discussion, both the petitions are dismissed. Keeping in view the peculiar facts of this case the parties are left to bear their own costs.

(Dhiraj Singh Thakur)
Judge

(M. M. Kumar)
Chief Justice

Jammu,
14.03.2013
Parshant

✻

S. No	Title
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