CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A.NO.3186/2002

New Delhi, this the 20th day of April, 2004

HON'BLE SHRI JUSTICE V.S. AGGARWAL, CHAIRMAN
HON'BLE SHRI S.K.NAIK, MEMBER (A)

Shri Kirtan Kumar
s/o Shri Damodar Das
Ex-Principal
Kendriya Vidyalaya
H 571, Palam Vihar
Gurgaon - 122 017. ... Applicant

(By Advocate: Sh. P.I.Oommen with Sh. Thomas Oommen)

Versus

Kindriya Vidyalaya Sangathan
through

1. Commissioner
Kendriya Vidyalaya Sangathan
18, Institutional Area
Shaheed Jeet Singh Marg
New Delhi - 110 016.

2. Joint Commissioner (Admn)
Kendriya Vidyalaya Sangathan
18, Institutional Area
Shaheed Jeet Singh Marg
New Delhi - 110 016. ... Respondents

(By Advocate: Sh. S. Rajappa)

O R D E R

Justice V.S. Aggarwal:-

Applicant (Kirtan Kumar) had joined as Post Graduate Teacher (Chemistry) in Kendriya Vidyalaya Sangathan (for short 'KVS'). He was recruited against direct recruitment by virtue of the examination held on 19.10.1982. On 24.3.2000, he appeared for interview for the post of Principal in the KVS against direct recruitment quota. He was selected and appointed as Principal at KVS, Sambalpur on 15.6.2000. On 28.8.2000 at his request, he was posted as Principal at Rothak. The operative part of the order of 29.5.2001 placing him on probation reads:

"In view of emergence of vacancies in the general category, the Commissioner, KVS hereby appoints the following Principals of Kendriya Vidyalayas, who have been working on deputation basis against the temporary posts of Principal in Kendriya Vidyalayas on an initial pay of Rs.10,000/- in the pay scale of Rs.10,000-325-15-15,200/- or as admissible under the rules from the date of their joining on deputation basis.

This appointment is subject to the following terms and conditions:

a) They would be on probation for a period of two years from the date of their joining which may be extended upto three years. Upon successful completion of probation period, they will be confirmed in their turn.

b) During probation and thereafter, until they are confirmed, their services are terminable by one month's notice on either side without any reasons. The appointing authority, however, reserves the right to terminate the services before the expiry of stipulated period of notice by making payment to the appointee of a sum equivalent to the pay and allowances for the period of notice or the unexpired portion thereof. They will draw the allowances and other benefits in addition to pay at Central Govt. rates as admissible to Kendriya Vidyalaya Sangathan Employees. They will be liable to transfer any where in India."

2. On 5.6.2002, the services of the applicant as Principal were discharged by virtue of the orders so passed which reads:

"F.No.6-69/2000-KVS(E-II) 5th June, 2002

OFFICE ORDER

In terms of Para 2 (a) & (b) of the Office Order No.F.7-4/2000-KVS (Estt-II) dated 29th May, 2001, Shri Kirtan Kumar was appointed as Principal on probation for a period of two years with specific provision that his services are terminable by one month's notice during probation without any reasons being assigned therefor.

In pursuance of the aforesaid provisions, as contained in the offer of appointment, Shri Kirtan Kumar is hereby discharged from the services of the Sangathan with immediate effect. In lieu of one month's notice, he will be paid separately a sum equivalent to the pay and allowances for the period of notice of unexpired portion thereof.

Sd/-
(D.S.BIST)
Joint Commissioner(Admn.)
For Commissioner"

3. By virtue of the present application, he seeks quashing of the order discharging him from service, and further for a direction that he should be reinstated as Principal. He further seeks a direction that his absence period from the date of his illegal termination should be treated as period spent on duty with consequential benefits. Various pleas in this regard have been taken to be discussed hereinafter.

4. Needless to state that, in the reply filed, the application has been contested. Respondents plead that as per the recruitment rules in the KVS, 20% posts are filled up by promotion from amongst the existing Vice Principals and 80% by direct recruitment on the basis of the open advertisement. The difficulties were being faced by the KVS for filling up the posts of the Principals as suitable candidates were not available from direct recruitment quota. It was decided with the approval of the competent authority and in consultation with the Department of Personnel & Training that Post Graduate Teachers of KVS among others who were having 10 years experience could be appointed as Principals on deputation basis. Accordingly, an exercise was carried out and the applicant was selected during the year 2000 initially for a maximum period of five

years. It was further decided to allow deputation on year to year basis on usual deputation terms and conditions. Thereafter, the applicant was offered a temporary appointment for the post of Principal vide Officer Order of 29.5.2001.

5. Respondents plead further that Principal, KVS, Rothak initiated the disciplinary proceedings against the Music Teacher and inquiry was conducted. The Pricipal imposed the penalty of reduction of increment by seven stages which was toned down by the appellate authority. It is stated that the applicant was harassing the Teacher by using his official position which was unbecoming of the head of the Kendriya Vidyalaya. After considering his work and conduct, he was discharged. It is stated that the order has been passed in accordance with law.

6. During the course of the submissions, learned counsel for the applicant had contended that applicant was posted in Jammu & Kashmir region which was a mala fide posting. While the matter was pending, his lien has been terminated and they had passed illegal orders. It was rightly pointed on behalf of the respondents that these facts are not subject matter of controversy in the Original Application before this Tribunal. Once it is not a subject matter of controversy nor such relief has been claimed, we are not delving into this controversy because law of pleadings cannot be thrown to the winds

7. Learned counsel for the applicant, at the outset, had argued that the applicant had been appointed by the Commissioner of KVS while the impugned order has been signed by the Joint Commissioner and, therefore, it is illegal.

8. We have already referred to above the operative part of the impugned order. It clearly shows that it is signed by the Joint Commissioner (Administration) on behalf of the Commissioner. In other words, if the necessary sanction has been obtained and order is only issued for and on behalf of the Commissioner, it cannot be termed to be illegal. It is not the claim of the applicant that the approval of the Commissioner, KVS had not been obtained, therefore, we have no hesitation in rejecting the said contention.

9. In that event, it had been urged that the applicant had been placed on probation. The period of probation was two years and his services have been terminated on 5.6.2002 which according to the applicant had been done after two years and, therefore, applicant must be deemed to have been confirmed. Even on this count, the sequence of events clearly show that plea has to be stated to be rejected.

10. Vide order of 17.5.2000, copy of which is at Annexure A-3, the applicant was taken as Principal on deputation basis. He was placed on probation only on 29.5.2001 and we have already reproduced the relevant paragraph. The order was passed discharging

his services on 5.6.2002, i.e., within two years from 29.5.2001. Therefore, even this plea also is of no avail. Even if we assume that the applicant's period of probation had to be taken from 17.5.2000, still the plea must fail.

11. The Supreme Court in the case of **Jai Kishan vs. Commissioner of Police and another**, (1995) 31 ATC 148 was dealing with a situation where the rules provided for a maximum period of probation and also provided that the confirmation would be on successful completion of the probation period. The concerned person had failed to improve his performance and had been allowed to continue in service beyond the maximum statutory period of probation. The termination of the service was held to be valid.

12. Similar was the view expressed by the Supreme Court in the case of **The Chief General Manager, State Bank of India & Anr. v. Shri Bijoy Kumar Mishra**, JT 1997 (8) S.C.221.

13. Reliance with advantage can also be placed on a decision of the Apex Court in the case of the **High Court of Madhya Pradesh Thru. Registrar & others vs. Satya Narayan Jhavar**, 2001 (5) SCALE 233. Almost a similar question had come up for consideration before the Supreme Court. The Supreme Court held that an order of confirmation is a positive act on the part of the employer which the employer is required to pass in accordance with the rules governing the question of confirmation and the plea that after the probation period when there was no

deemed confirmation as per the contract, it would not automatically make a person a confirmed employee necessarily must fail.

14. The ratio deci dendi of the earlier decisions of the Supreme Court particularly in the case of **State of Punjab vs. Dharam Singh,** (1968) 3 SCR 1 had been explained. It was further held:-

> "36. In the case of the Judicial Officers who are respondents before us, it is the positive case of the High Court that their case for confirmation was considered while they were continuing on probation but the Full Court did not consider them suitable for confirmation and they were given a further opportunity of improving themselves. Even notwithstanding such opportunity they having failed to improve themselves and the High Court having considered them unsuitable for confirmation the order of termination emanated. It is difficult for us to comprehend that a probationer while continuing on probation, on being considered is found unsuitable for confirmation by the Appointing Authority and yet it can be held to be a deemed confirmation because of maximum period of probation indicated in the rule, merely because instead of termination of the services he was allowed to continue and was given an opportunity for improving and even after the opportunity he failed to improve and finally the Appropriate Authority finding him unsuitable directs termination of his services. The very fact that sub-rule (1) of rule 24 while prescribing a maximum period of probation therein entitles a probationer for being considered for confirmation and confers a right on the Appointing Authority to confirm subject to the fitness of the probationer and subject to his passing the higher standard of all departmental examination must be held to be an inbuilt provision in sub-rule (1) which would negative the inference of a confirmation in the post by implication, as interpreted by this Court in the case of Dharam Singh (supra) while interpreting rule 6 of the Punjab Educational Services (Provincialised Cadre) Class III Rules 1961."

As already noticed above, there was no provision in rules for deemed confirmation on the expiry of the period of probation prescribed. It has to be clearly contemplated in the order of confirmation which would be subject to fitness of the probationer i.e the applicant. Merely because he happens to continue, necessarily does not imply that he was found fit and deemed to have been confirmed.

15. It was not disputed at either end that if the order is stigmatic in nature, in that event, it can certainly be quashed. As per the respondents, it is not so.

16. The principles of law in this regard have been prescribed from time to time, but are not much in controversy. In the case of **Radhey Shyam Gupta** v. **U.P.State Agro Industries Corporation Limited & Anr.**, JT 1998(8) SC 585, the Supreme Court concluded that if the termination is preceded by an inquiry and evidence is received and findings as to misconduct of a definite nature are arrived at, the order terminating the services could be vitiated. The Supreme Court concluded:-

> "35. But in cases where the termination is preceded by an inquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the Officer and where on the basis of such a report, the termination order is issued, such an order will be violative of principles of natural justice inasmuch as the purpose of the inquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental inquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the

> employer feels that there is a mere cloud against the employees conduct but are cases where the employer has virtually accepted the definitive and clear findings of the Inquiry Officer, which are all arrived at behind the back of the employee-even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases.

In the subsequent decision in the case of **Dipti Prakash Banerjee** v. **Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and others**, 1999 (1) S.C.396 the same question had again come up before the Supreme Court and again, it was reiterated that if findings are arrived at in the inquiry as to misconduct behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as a founded on the allegation and will be bad. It was further held that the words used in the order are not material. The court can lift the veil and see the real face of the transaction. Ultimately, the Supreme Court concluded:-

> "42. It was argued that the appellant was give notice of the above inquiry by the Committee but he was 'not cooperative'. In our view findings arrived at by such an informal Committee against the appellant, which Committee was, in fact, constituted on a complaint by the appellant against Mr.Chakraborty, - cannot be used for terminating the appellant's probation, without a proper departmental inquiry. The said findings, in our view, were the foundation for the impugned order among other facts. Such findings must, in law, be arrived at only in a regular departmental inquiry."

17. The applicant relied upon a decision of the Supreme Court in the case of **V.P.Ahuja** v. **State of Punjab and Others**, (2000) 3 SCC 239. In the cited case, the order terminating the services itself

recited that the concerned person had failed to perform his duties administratively and technically. The order therefore was said to be stigmatic in nature and was quashed. The facts of the said case, therefore, must be held to be totally distinguishable.

18. The abovesiad findings had been reiterated by the Supreme Court in the case of **A.P.State Federation of Co-operative Spinning Mills Ltd. and Anr.** v.**P.V.Swaminathan**, 2001 LLR 560. In that case, the Supreme Court held that an order of termination of the services can be stigmatic. An order can look into all the facts and circumstances. The Supreme Court laid down:-

> "3. The legal position is fairly well settled that an order of termination of a temporary employee or probationer or even a tenure employee, simplicitor without casting any stigma may not be interfered with by court. But the court is not debarred from looking to the attendant circumstances, namely, the circumstances prior to the issuance of order of termination to find out whether the alleged inefficiency really was the motive for the order of termination or formed the foundation for the same order. If the court comes to a conclusion that the order was, in fact, the motive, then obviously the order would not be interfered with, but if the court comes to a conclusion that the so called inefficiency was the real foundation for passing of order of termination, then obviously such an order would be held to be penal in nature and must be interfered with since the appropriate procedure has not been followed. The decision of this Court relied upon by Mr. K. Ram Kumar also stipulates that if an allegation of arbitrariness is made in assailing an order of termination, it will be open for the employer to indicate how and what was the motive for passing the order of termination and it is in that sense in the counter affidavit it can be indicated that the unsuitability of the person was the reason for which the employer acted in accordance with the terms of employment and it never wanted to punish the employee. But on examining the

assertions made in paragraphs 13 and 14 of the counter affidavit. In the present case it would be difficult for us to hold that in the case in hand, the employer appellant really terminated the services in accordance with the terms of the employment and not by way of imposing the penalty in question."

19. From the aforesaid, it is obvious that a clear distinction has to be made as to whether the order terminating the services is based on a foundation or a motive for a foundation for doing the act. It is these facts which have to be kept in view while deciding the controversy.

20. Once the performance is not upto the mark then during the probation, the respondents could certainly terminate the services. The Supreme Court in the case of **Krishnadevaraya Education Trust & Anr. v.L.A.Balakrishna,** 2001 (1) SCALE 196 clearly held that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the appointee is to be seen. Once it is unsatisfactory, the employer has a right to terminate the services.Identical is the position herein.

21. When the present case is examined on the touch-stone of the aforesaid, it cannot be stated that the order is stigmatic in nature. Perusal of the order itself indicates that there was no stigma that was attached. It is true that this Tribunal can lift the veil and see as to whether the order was stigmatic or not. In the present case, it is not shown to be so. Merely because departmental action is being contemplated by itself will not permit this Tribunal to conclude that it is stigmatic. It is not shown

that any such disciplinary proceedings have been initiated. The question thus bringing the facts to the notice of the applicant in detail would not arise. If on totality of the facts and circumstances it is clear that work and performance is not up to the mark, the order can certainly be passed as in the present case. Therefore, as held in the case of **Krishnadevaraya Education Trust & Anr.** v. **L.A.Balakrishna** (supra) the employer is at liberty to assess the suitability of the employee and if the work and performance is unsatisfactory, his services could well be terminated. Therefore, even this plea must fail.

22. No other arguments have been advanced.

23. Taking stock of the facts and circumstances, we find that the OA is without merit. It must fail and is accordingly dismissed.

(S.K. Naik)
Member (A)

(V.S. Aggarwal)
Chairman

/NSN/