

(2013) 08 MAD CK 0217

In the Madras High Court

Case No : Writ Petition No's. 1123 of 2013

Arun P. Diwakar

APPELLANT

Vs

The State Bank of India

RESPONDENT

Date of Decision : 30-08-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9
Constitution of India, 1950 — Article 311, 32
Limitation Act, 1963 — Section 5

Citation : (2013) 7 MLJ 231

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : N. Subramaniam, for the Appellant; C.K. Chandrasekhar for Respondents 1 and 2 and Mr. P.D. Audikesavalu for 3rd Respondent, for the Respondent

Judgement

M. Venugopal, J.—The Petitioners have preferred the present Writ Petition praying for issuance of Certiorari Mandamus in calling for the records relating to the impugned orders, viz., Lr. No. L&D/36 dated 05.04.2011 issued by the 3rd Respondent and Lr. No. L&D/ME 2010-11/218 dated 10.05.2011 issued by the 2nd Respondent and to quash the same. Further, the Petitioners have sought for issuance of an order by this Court in directing the Respondents 1 and 2 to reinstate them and to treat the period of absence from service due to the impugned orders as duty with all consequential service and monetary benefits including seniority and arrears of pay therefor and all other attendant and incidental benefits. Moreover, they have prayed declaring the results of the confirmation examination/evaluation test that took place on 06.03.2011 in respect of them and based on the same, to consider them for confirming in the post of Management Executive in the set up of 1st Respondent respectively from the initial date of joining. The Factual Matrix of the Writ Petitions:

(i) The Petitioner in W.P. No. 1123/2013 holds the Degree in M.B.A., which is the required qualification for the Management Executive post under the 1st

Respondent. The Petitioner in W.P. No. 1124/2013 is a M.B.A. Degree Holder, which is required qualification for the Management Executive post under the 1st Respondent. The Petitioner in W.P. No. 1125/2013 holds a Post Graduate Degree in Business Administration and in Commerce which is the required qualification for the Management Executive post under the 1st Respondent. The three Petitioners applied for the post of Management Executive and they were selected in the examination conducted by the 1st Respondent during September 2009. Pursuant to their selection, they were appointed as Management Executive in the set up of the 1st Respondent as per order HR:RC 4759 dated 26.03.2010 issued by the 2nd Respondent/Appointing Authority and they were required to join duty as Management Executive MMG scale 2 and assumed duties as Management Executive with effect from 05.04.2010 and was placed on probation/training for a period of one year.

(ii) The Petitioner in W.P. No. 1123/2013 during the period of probation was deputed to work as part of the job training from April 2010 in various branches of the Bank viz., Arakkonam, Egmore Branch, RACPC Chennai, Chinglepet, Siruthozhil Branch Chennai, SMECCC Chennai, RCPC Madurantakam. The Petitioner in W.P. No. 1124/2013 during probation period was deputed to work as part of the job training from April 2010 in various branches of the Bank viz., Chengam, Tiruvottiyur, RACPC Chennai, Kolappalur, Tiruvannamalai, RCPC Vellore, STL Vellore, RASMECC Vellore. The Petitioner in W.P. No. 1125/2013 during the period of probation was deputed to work as part of job training from April 2010 in various branches of the Bank viz., Chinglepet, Naganallur, RACPC Chennai, Mamallan Nagar Kancheepuram, Commercial Chennai Branch, SMECCC Chennai, RCPC Madurantakkam. The Petitioners passed the examination conducted by the Indian Institute of Banking & Finance on 31.01.2011, 05.01.2011 and 26.07.2010 respectively.

(iii) According to the rules of the 1st Respondent/State Bank of India, the probation period of the Petitioners was evaluated and the officers under whom they worked appreciated their performance and none of the officers had intimated any shortcomings on the performance of Writ Petitioners as required under the Rules. As such, the Petitioners were of strong belief that they had passed/completed the probation satisfactorily insofar as the working performance in various branches during their probation and they also satisfied second condition viz., "Satisfactory completion of the in service training during probation". The Petitioners are required to undergo evaluation test for confirmation. Based on the minimum marks scored in the evaluation test by the Probationers i.e. 50% marks [45% marks for SC/ST] in each category, the probationers would be confirmed as MMG II and the officer who scored 75% and above and pass group discussion and interview will be confirmed as MMG III after evaluating the one year performance in MMG-II.

(iv) While undergoing the probation, during March 2011, the Petitioners were instructed to give option based on a circular issued by the 1st Respondent in

Circular No.: CDO/P&HRD-CM/80/2010 11, dated 26.02.2011 modifying the terms and conditions of appointment. According to the scheme of the examination announced, the confirmation examination for the Management Executives of 2010-2011 batch of Chennai Circle was held on 06.03.2011 at Chennai and the Petitioners appeared for the examination held on 06.03.2011. They performed well in the examination. However, the results were not released.

(v) When the Petitioners were expecting the orders of confirmation as MMG-II, shockingly, they were served with the extension order of their probation for further period of three months, upto 04.07.2011, in a letter dated 05.04.2011, received by the Petitioners on 07.04.2011 by the Assistant General Manager (HR), who is not at all competent to extend the probation of the Management Executives like the Petitioners. In fact, in terms of resolution of the Central Executive Board of the 1st Respondent, the 2nd Respondent/Appointing Authority alone is competent to extend the probation.

(vi) The Petitioners made enquiry with the 2nd Respondent and other higher officers as to what are the marks they obtained in the examination and requested them to disclose the same since they could not believe of themselves scoring less marks than 50% marks, cut-off marks as applicable to an OBC and SC/ST candidates. In respect of other candidates who scored marks lesser than the cut-off marks of 50% (45% for SC/ST), their marks were published and they were given an opportunity to undergo probation for further period of six months as per the terms and conditions of probation modified subsequent to the appointment. However, the marks of the Petitioners were not published. In the meanwhile, they were discharged from probation based on the reason that they were not fit for confirmation. They received the official communication i.e., L&D/ME 2010-11/218 dated 10.05.2011 issued by the 2nd Respondent to this effect on 16.05.2011 at Chennai. On receipt of the said communications, the Petitioners along with their colleagues had a legal advise that as the probation order does not cast any stigma, nothing could be done and they went to their respective native places and were in searching of jobs. They came to know in November 2012, through one of their friends, that several persons like them were discharged from the probation on the ground of malpractice in the confirmation examination held on 06.03.2011. Their further enquiry revealed that one Ms. Anitha, B. filed W.P. No. 18366 of 2011 before this Court challenging the discharge from the probation and after coming to know of the same, the Petitioners have filed the present Writ Petitions.

(vii) That apart, the Petitioners came to know from the Writ Petitioner in W.P. No. 18366 of 2011 that the malpractice was simply presumed based on statistical theory evolved by a Private Agency viz., IBPS by comparing the answers given to the objective questions feeding in a computer if there are 12 identical wrong answers or more between any examinees. Further, the Petitioners were not aware of the actual allegations against them.

2. Counter Pleas of the Respondents:

(i) In the counter filed by the 3rd Respondent on behalf of the Respondents 1 and 2, it is, inter alia, pleaded that the Petitioners claim that they specified certain conditions during the period of promotion were all self-serving and they were not conclusive to determine the suitability of the Petitioners for their confirmation in service. Further, the Competent Authority viz., the General Manager (NW-2) in the proceedings on 05.04.2011 extended the probation of the Petitioners for the period of three months i.e. upto 04.07.2011 in terms of Rule 16(2) of the State Bank of India Officers' Service Rule, 1992, which was communicated by the Assistant General Manager (HR) vide letter dated 05.04.2011. As such, the contra stand taken on behalf of the Petitioners is untenable.

(ii) Indeed, the report of IBPS indicating the unfair means/malpractice of copying inferred to was adopted by Petitioners and 11 others in the confirmation test held on 06.03.2011, which is based on impeccable logic and corroborated by statistical and circumstantial evidence, which could not be brushed aside. The Petitioners candidature were cancelled altogether owing to unfair means/malpractice of copying inferred to have been adopted by them. In fact, the Petitioners had not failed in the examination.

(iii) Also that, the Petitioners had accepted the order of termination individually during their period of probation in which it was stated that "It was not deemed fit to confirm you in the service of the Bank". The decision to extend the probation of the Petitioners for three months period was taken by the Competent Authority after taking into account the relevant considerations for assessing their suitability to continue in service. The service rules in the present case provide for an initial period of probation of one year which could be further extended for another year and requires passing of the confirmation test and as such, the Petitioners could not claim deemed confirmation in service just because the extension of their probation for a period of three months through communication dated 05.04.2011 after the expiry of the initial probation period of one year from 05.04.2010.

(iv) That apart, the failure of the Petitioners to promptly assail their order of termination necessarily give rise to an inference that they unmistakably accepted the decision of the Competent Authority that it was not deemed fit to confirm them in the service of the Bank. At any rate, in the event of Petitioners being directed to be reinstated into service, they should be subjected to fresh decision to be taken by the Competent Authority in the matter of their confirmation as Probationers after providing opportunity of hearing against the allegations of use of unfair means in the test held and the Petitioners could not be exempted from such exercise.

Petitioners' Contentions:

3. The Learned Counsel for the Petitioners urges before this Court that the Petitioners discharged from probation on the ground of malpractice without conducting an enquiry under Rule 50(8) of the State Bank of India Officers'

Service Rules after giving reasonable opportunity is not only against the Principles of Natural Justice but also violative of Article 311 of the Constitution of India.

4. The Learned Counsel for the Petitioners contends that the impugned order dated 05.04.2011 extending the probation for three months issued by the 3rd Respondent is by an authority not competent to extend the probation and therefore, the said order is void ab initio and is liable to be quashed.

5. Yet another submission of the Learned Counsel for the Petitioners is that in the absence of not satisfying with any of the terms and conditions of probation stipulated under Rule 16(2) of the Rules viz., in the absence of any shortcomings or non-satisfying performance or scoring lesser marks than the cut-off marks by the Petitioners during the period of probation, they ought to have been confirmed as per Rule 16(1) of the Rules.

6. The Learned Counsel for the Petitioners submits that a fraud has been committed upon the Petitioners by the Respondents and further, the Respondents have suppressed the facts leading to the discharge and to lend support to the contention that fraud vitiates the impugned orders dated 05.04.2011 and 10.05.2011, he relies the decision of the Hon"ble Supreme Court in A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, wherein it is laid down as follows:

Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam.

7. He relies on the decision of the Hon"ble Supreme Court in State Bank of India and Others Vs. Palak Modi and Another etc., wherein in paragraphs 26 & 27, it is observed and held as follows:

26. There is a marked distinction between the concepts of satisfactory completion of probation and successful passing of the training/test held during or at the end of the period of probation, which are sine qua non for confirmation of a probationer and the Bank's right to punish a probationer for any defined misconduct, misbehaviour or misdemeanor. In a given case, the competent authority may, while deciding the issue of suitability of probationer to be confirmed, ignore the act(s) of misconduct and terminate his service without casting any aspersion or stigma which may adversely affect his future prospects but, if the misconduct/misdemeanor constitutes the basis of the final decision taken by the competent authority to dispense with the service of the probationer albeit by a non stigmatic order, the Court can lift the veil and declare that in the garb of termination simpliciter, the employer has punished the employee for an act of misconduct.

27. The use of unfair means in the evaluation test/confirmation test held by the Bank certainly constitutes a misconduct. The Bank itself had treated such an act to be a misconduct (paragraph 10 of advertisement dated 1.7.2008). It is not in dispute that the services of the private respondents were not terminated on the ground that there was any deficiency or shortcoming in their work or performance during probation or that they had failed to satisfactorily complete the training or had failed to secure the qualifying marks in the test held on 27.2.2011. As a matter of fact, the note prepared by the Deputy General Manager, which was approved by the General Manager makes it crystal clear that the decision to dispense with the services of the private respondents was taken solely on the ground that they were guilty of using unfair means in the test held on 27.2.2011. To put it differently, the foundation of the action taken by the General Manager was the accusation that while appearing in the objective test, the private respondents had resorted to copying. IBPS had relied upon the analysis made by the computer and sent report to the Bank that 18 candidates were suspected to have used unfair means. The concerned authority then sent for the chart of seating arrangement and treated the same as a piece of evidence for coming to the conclusion that the private respondents had indeed used unfair means in the examination. This exercise was not preceded by an inquiry involving the private respondents and no opportunity was given to them to defend themselves against the charge of use of unfair means. In other words, they were condemned unheard which, in our considered view, was legally impermissible.

Also, at page 24 of the aforesaid decision in paragraphs 33 and 34, it is held as under:

33. The proposition laid down in none of the five judgments relied upon by the learned counsel for the appellants is of any assistance to their cause, which were decided on their own facts. We may also add that the abstract proposition laid down in paragraph 29 of the judgment in Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences (supra) is not only contrary to the Constitution Bench judgment in Samsher Singh v. State of Punjab (supra), but large number of other judgments State of Bihar v. Shiva Bhikshuk Mishra (supra), Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha (supra) and Anoop Jaiswal v. Government of India (supra) to which reference has been made by us and to which attention of the two-Judge Bench does not appear to have been drawn. Therefore, the said proposition must be read as confined to the facts of that case and cannot be relied upon for taking the view that a simple order of termination of service can never be declared as punitive even though it may be founded on serious allegation of misconduct or misdemeanor on the part of the employee.

34. In the result, the appeals are dismissed. The appellants shall reinstate the private respondents within 15 days of the production of copy of this judgment before respondent No. 3 and give them all consequential benefits like pay,

allowances, etc. within next one month. However, it is made clear that this judgment shall not preclude the competent authority from taking fresh decision in the matter of confirmation of the private respondents after giving them effective opportunity of hearing against the allegation of use of unfair means in the test held on 27.2.2011.

8. Apart from the above, the Learned Counsel for the Petitioners draws the attention of this Court to the decision of the Hon''ble Supreme Court in *Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others*, wherein it is held that "Limitation for filing petition for refund of tax paid under mistake of law by assessee and illegally or unauthorisedly collected, the three years period from the date of knowledge about the mistake is normally followed and there is no hard and fast rule in this regard".

9. He invites the attention of this Court to the decision of the Hon''ble Supreme Court in *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, at special page 112 wherein it is held that "A Writ Petitioner under Article 32 can only seek to enforce an existing right. No question of limitation can avail in such cases. Further, the Petitioner did act under a mistake of law. Not stating a proper ground for quashing an invalid law, cannot affect the petitioner's stand."

10. The Learned Counsel for the Petitioners contends that the Petitioners only during the month of November 2012 had come to know through one of their friends that sever persons like them were discharged from the probation on the ground of malpractice in the confirmation examination held on 06.03.2011 and their further enquiry reveal that one Ms. Anitha, B. filed W.P. No. 18366 of 2011 before this Court and therefore, the date of knowledge must be taken into consideration for commencing of limitation. In this connection, the Learned Counsel for the Petitioners cites the decision of the Hon''ble Supreme Court in *Dhan Kumar and Another v. Iqbal Hussain and others*, (2004) 13 SCC 696 at page 697 wherein in paragraphs 4 and 5, it is, inter alia, observed and held as follows:

4. ...It was explained as to how the appellants filed the application the moment they came to know about the pendency of the appeal. Learned counsel for the respondent submitted that two courts have come to the conclusion that the plea set up by the appellants is not tenable and these being findings of fact, should not be interfered with.

5. We find that the plea taken by the appellants and the materials placed were not only really inadequate to support their stand. That being so, the technical view, as adopted, should not have been taken about the non-production of the original letter. The courts below should have accepted prayer of the appellants. Be that as it may, the respondents have been put to unnecessary expenses by fighting litigation. The costs of Rs. 5000 as costs would meet the ends of justice. The amount of Rs. 5000 as costs shall be paid within four weeks from today. On the amount being paid, the appeal shall be restored by the District Court and the

application in terms of Order 22 Rule 9 read with Section 5 of the Limitation Act shall be allowed and the proper parties shall be impleaded in terms of the application.

11. Per contra, the Learned Counsel for the Respondents relies on the decision of the Hon'ble Supreme Court in *Chairman, U.P. Jal Nigam and Another Vs. Jaswant Singh and Another*, wherein it is, inter alia, observed as follows:

The statement of law has also been summarized in Halsbury's Laws of England, Para 911, pg. 395 as follows:

In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches.

In view of the statement of law as summarized above, the respondents are guilty since the respondents has acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or while away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the Court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussion on the financial management of the Nigam. Why the Court should come to the rescue of such persons when they themselves are guilty of waiver and acquiescence.

12. At this juncture, the Learned Counsel for the Petitioners produces a copy of the order dated 09.04.2013 in W.P. No. 18366 of 2011 between *Anitha, B. v. The*

State Bank of India, Mumbai and two others, wherein in paragraphs 2 and 3, it is observed and held as under:

2. Learned counsel appearing for the Petitioner submitted that in similar circumstances, when similar discharge was set aside by the High Court of Allahabad, the State Bank of India, the respondents herein, has approached the Hon"ble Apex Court and the Hon"ble Apex Court, in the judgment reported in State Bank of India and Others Vs. Palak Modi and Another etc., dismissed the appeal preferred by the State Bank of India with a direction to the respondents to reinstate the employee. Paragraph 34 of the said judgment is usefully extracted hereunder:-

34. In the result, the appeals are dismissed. The appellants shall reinstate the private respondents within 15 days of the production of copy of this judgment before respondent No. 3 and give them all consequential benefits like pay, allowances, etc. within next one month. However, it is made clear that this judgment shall not preclude the competent authority from taking fresh decision in the matter of confirmation of the private respondents after giving them effective opportunity of hearing against the allegation of use of unfair means in the test held on 27.02.2011.

3. In view of the same, the present writ petition stands ordered, directing the State Bank of India, the respondents herein to reinstate the petitioner in service and give her all consequential benefits like pay, allowances, etc. within one month from the date of receipt of a copy of this order. However, I make it very clear that the order made hereunder shall not preclude the competent authority from taking fresh decision in the matter of confirmation of the petitioner after giving her effective opportunity of hearing against the allegations of use of unfair means in the test held on 6.3.2011. No costs.

and contends that the present Writ Petitioners are similarly placed persons and therefore, the said order passed by this Court in W.P. No. 18366 of 2011 dated 09.04.2013 squarely applies to them.

13. Repelling the contention of the Learned Counsel for the Petitioners, the Learned Counsel for the Respondents submits that the Writ Petitioner in W.P. No. 18366 of 2011 approached this Court for redressal of her grievance immediately. However, the three Writ Petitioners, in the case on hand before this Court, have approached this Court by filing the present Writ Petitions with a delay of nearly 19 months. As such, the Petitioners case stand on a slightly different footing than that of the Petitioner in W.P. No. 18366 of 2011.

14. It is to be remembered that a Probationer cannot claim confirmation as a matter of right.

15. Moreover, there cannot be a deemed confirmation of Probationer after expiry of initial or extended period of probation as per the decision in K. Dasarath Vs. Labour Court-I and Another,

16. At this stage, this Court worth recalls and recollects the following decisions, to prevent an aberration of Justice:

(a) In the decision of the Hon"ble Supreme Court in 2001 (2) AWC 1291 (SC) , it is laid down as follows: An order of termination of a temporary employee or a probationer or even a tenure employee, simpliciter without casting any stigma may not be interfered with by the Court.

(b) In the decision Ajeet Kumar Singh Vs. Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow and others, it is held that "The termination of a probationer for serious misconduct without affording opportunity will be set aside".

(c) In the decision Smt. Parimala Vs. Banking Service Recruitment Board, Bangalore and Others,),it is held that "The termination of a probationer will be set aside when it is casts stigma.

On a careful consideration of respective contentions and in view of the fact that the Petitioners in the Writ Petitions are similarly placed with that of the Writ Petitioner in W.P. No. 18366 of 2011, this Court comes to an inescapable conclusion that the order passed by this Court in W.P. No. 18366 of 2011 dated 09.04.2013 between Anitha, B. v. State Bank of India, represented by its Chairman, Mumbai 21 and two others, will apply to the facts of the present cases full vigour. As such, this Court, following the said order passed in W.P. No. 18366 of 2013 dated 09.04.2013, sets aside the Lr. No. L&D/36 dated 05.04.2011 issued by the 3rd Respondent and Lr. No. L&D/ME 2010-11/218 dated 10.05.2011 issued by the 2nd Respondent in respect of the three Petitioners and further directs the Respondents 1 to 3 to reinstate the Petitioners in service and grant them all consequential benefits like pay, allowances etc. from 09.01.2013, the date of filing of these Writ Petitions [although the Petitioners claim these benefits from the date of purported knowledge during the month of November 2012, as stated by them in their affidavit in the Writ Petitions] as Fair, Equitable, Just and Reasonable one, within a period of one month from the date of receipt of copy of this order. At this juncture, this Court pertinently makes it crystal clear that the present order passed by this Court will not preclude the Competent Authority in any manner from taking a decision afresh, of course, after providing enough opportunities to them by adhering to the principles of natural justice as regards the allegations of use of unfair means in the test that took place on 06.03.2011. Resultantly, these Writ Petitions are ordered in aforesaid terms. There shall be no order as to costs.