
(2014) 08 DEL CK 0255
In the Delhi High Court
Case No : W.P.(C) 1169/2013

Chandra Bose

APPELLANT

Vs

Governor NCT of Delhi

RESPONDENT

Date of Decision : 01-08-2014

Acts Referred:

Industrial Disputes Act, 1947 — Section 25F

Citation : (2015) 213 DLT 200

Hon'ble Judges : V. Kameswar Rao, J;Sanjiv Khanna, J

Bench : Division Bench

Advocate : Arjun Mitra, Advocate for the Appellant; Karan Mehta and Viraj R. Datar, Advocate for the Respondent

Final Decision : Dismissed

Judgement

V.Kameswar Rao, J.—The issue of "deemed" confirmation even though well settled has once again been raised in this writ petition under the guise of challenging the order dated May 24, 2012, whereby the petitioner has been reverted to his original position in Delhi Judicial Service with immediate effect.

2. The facts as culled out from the record are that the petitioner was appointed in Delhi Judicial Service ("DJS" in short) on November 02, 1992 with initial posting as a Metropolitan Magistrate. With effect from January 04, 2006 the petitioner along with others was promoted to Delhi Higher Judicial Service in terms of Rule 7(a) read with Rule 16(2) of the Delhi Higher Judicial Service Rules, 1970 ("Rules" in short) on temporary basis. On May 09, 2007 a charge-sheet was issued to the petitioner under the provisions of All India Service Rules. During the pendency of the disciplinary proceedings an order dated October 09, 2009 was issued whereby the officers promoted along with the petitioners were on confirmation appointed in substantive capacity in Delhi Higher Judicial Service with effect from 2008. The petitioner was not confirmed. The probation of the petitioner was extended vide order dated August 18, 2010 for a period of one year. Subsequently thereafter on May 24, 2012 the petitioner stood reverted to

his original position of Delhi Judicial Service.

3. The respondent No. 2 do not dispute the facts as narrated above. Part IV of the Rules which governs the appointment, probation and confirmation reads as under:

12. (1) Persons appointed to the service at the initial recruitment shall stand confirmed with effect from the date of appointment.

(2) All other candidates on appointment to permanent post shall be on probation for a period of two years.

EXPLANATION:- The period during which an officer hold a temporary post will be counted towards probation but he will be confirmed only when a permanent post is available.

13. All persons appointed to the service on probation shall be confirmed at the end of the said period of two years. Provided that the Administrator may, on the recommendation of the High Court, extend the period of probation, but in no case shall the period of probation extend beyond the period of three years.

14. The service of person appointed on probation are liable to be terminated without assigning any reason.

15. After successful completion of the period of probation the officer shall be confirmed in the service by the Administrator in consultation with the High Court and the same shall be notified in the Delhi Gazette.

4. Mr. Arjun Mitra, learned counsel appearing for the petitioner would submit that in terms of Rule 12 read with Rule 13 of the Rules, the probation could not have been extended beyond 3 years. He would state that 3 years were completed on January 03, 2009 and on that date the petitioner deemed to have been confirmed. That apart it was his submission that even assuming a charge-sheet was issued to the petitioner on the date when other similarly placed officers have been appointed on substantive basis, the proceeding insofar as the petitioner was concerned should have been kept in sealed cover. That apart it was his case that the Inquiry Officer had submitted her report on January 07, 2010, wherein the charges against the petitioner could not be proved, the extension of probation vide order dated August 18, 2010 for a further period of one year was unjustified both on the ground that there cannot be extension beyond a period of 3 years and also there was no material with the Competent Authority to extend the probation as the petitioner stood exonerated. He would also state that the impugned order has been passed on May 24, 2012 that too after 9 months of completing the extended period of probation. He would further state, there was nothing adverse against the petitioner as no adverse ACRs were ever communicated and extending the probation or reverting the petitioner to his substantive grade was uncalled for. He would rely upon the judgments reported as State of Punjab Vs. Dharam Singh, , Mr. M.S. Rohilla Vs. High Court of Delhi, , Sukhdev Singh Vs. Union of India (UOI) and Others, and Union of India Vs. K.V.

Jankiraman, etc. etc., in support of his contentions.

5. On the other hand, learned counsel for respondent No. 2 would submit that due to pendency of disciplinary proceedings against the petitioner, he could not be confirmed/appointed on substantive basis in Delhi Higher Judicial Service. After conclusion of the disciplinary proceedings, the Full Court on January 15, 2010 recorded the ACRs of the petitioner for the years 2006 and 2007 and also recommended the extension of probation of the petitioner for a period of 1 year which was done in terms of notification dated August 18, 2010. After recording his ACRs for the years i.e. 2008 to 2010, the matter regarding his probation and confirmation was considered by the Administrative and General Supervision Committee in the meeting held on November 30, 2011 when it was decided not to confirm him and revert him to DJS which recommendation was accepted by the Full Court on May 02, 2012. He would rely upon the following judgments:

- (a) Gautam Kant Nimman vs. GNCT of Delhi & Ors. in W.P.(C) 6318/2010
- (b) Dy. Director of Education & Anr. vs. Veena Sharma in LPA 342/2010
- (c) High Court of Madhya Pradesh thru. Registrar and Others Vs. Satya Narayan Jhavar,
- (d) The Commissioner of Police, Hubli and Another Vs. R.S. More,
- (e) Sukhbans Singh Vs. State of Punjab,
- (f) Municipal Corporation, Raipur Vs. Ashok Kumar Misra,
- (g) 1996 (3) SCR State of Uttar Pradesh vs. Akbar Ali Khan
- (h) G.S. Ramaswamy and Others Vs. Inspector-general of Police, Mysore,
- (i) State of Punjab Vs. Baldev Singh Khosla,
- (j) Jai Kishan Vs. Commissioner of Police and another,

6. Having considered the rival submissions made by the counsel for the parties, we note that the petitioner had not challenged the extension of his probation for a period of one year vide notification dated August 18, 2010. The non-challenge would negate the submission of the learned counsel for the petitioner that on expiry of 3 years with effect from January 04, 2006 he is deemed to have completed his probation successfully. Further, on a reading of the rule more particularly Rule 15 of the Rules which inter-alia contemplate after successful completion of the period of probation, the officer shall be confirmed in service by the Administrator; (1) in consultation with the High Court and; (2) the same shall be notified in Delhi Gazette. It is not the case of the petitioner that the Administrator had consultation with the High Court and his confirmation has been notified in the Delhi Gazette. A perusal of this Rule would reveal that the confirmation pre-supposes the aforesaid procedure having been followed. In other words without following the aforesaid procedure, there is no confirmation. It further contemplates that under the rules there is no concept of "deemed

confirmation".

7. As far as the reliance placed by Mr. Mitra on the judgment of the Full Bench of this Court in M.S.Rohillas case (supra) is concerned, the Division Bench of this Court in Gautam Kant Nimmans case (supra) after exhaustively examining the applicable rules and the legal position has observed as under:

13. It, thus, follows from the reading of the aforesaid judgments that one has to look into the provisions of the applicable service rules/regulations to find out which of the three categories of the case at hand would fall. Keeping this position in law, we may examine the Rules relating to probation in the instant case :

(a) Initial period of probation is two years;

(b) The service of a probationer shall be confirmed after successful completion of the period of probation. This is to be done by the Administrator in consultation with the High Court;

(c) This probation can be extended by the Administrator, on the recommendation of the High Court, but the probation is not to extend beyond three years;

(d) An officer who is on probation is to be confirmed after successful completion of the period of probation;

(e) Order of confirmation has to be in writing and the same is to be notified in the gazette.

(f) Services of the probationer can be terminated without assigning any reason.

14. Rule position that follows from the aforesaid is that though maximum period of probation is provided, at the same time rules also provide that Judicial Officer would be confirmed subject to his fitness. In these circumstances, it cannot be said that at the end of the maximum period of probation, the probationer would be deemed to be confirmed automatically.

8. Learned counsel for the petitioner faced with the aforesaid situation submits that the ratio and the findings of the Division Bench in Gautam Kant Nimmans case (supra) are contrary to the ratio decidendi expounded by the Full Bench in M.S.Rohillas case (supra). Our attention has been drawn to the following observation of the Full Bench:

17. We had also called for the records of the High Court to ascertain the nature of promotion of the petitioner from Delhi Judicial Service to Delhi Higher Judicial Service in 1989. From the records of the High Court, it is revealed that the promotion of the petitioner from Delhi Judicial Service to Delhi Higher Judicial Service was made by the High Court pursuant to selection under the Rules against a temporary post, though in the Notification dated 1.11.1989, the nomenclature of appointment was given as `temporarily in officiating capacity". It is clearly mentioned in the Notification, by which the petitioner was promoted, that his appointment to Delhi Higher Judicial Service was under Rule 7(a) read

with Rule 16(2) of Delhi Higher Judicial Service Rules. As per these Rules, the High Court is competent to recommend promotions, both against `temporary" and `permanent post" in Delhi Higher Judicial Service. The appointment either against `temporary" or against `permanent post" can be made in substantive capacity or in temporary/officiating capacity. The petitioner, at the time he was selected for promotion in 1989, fulfilled all the eligibility conditions required under the Rules for promotion to Delhi Higher Judicial Service and his selection was done strictly according to the Rules. The nomenclature in the Notification dated 1.11.1989 that the appointment of the petitioner was in `temporary, officiating capacity" appears to be a misnomer. For all practical purposes, the appointment of the petitioner appears to us to have been made on regular basis against a substantive vacancy.

18. Since the procedure for selection as contemplated under Delhi Higher Judicial Service Rules was followed while making promotion of the petitioner, his promotion done in 1989 by no means can be said to be an ad hoc or promotion in officiating capacity.

19. In State of U.P. and Another vs. Dr. M.J. Siddiqui and Others, it was held by the Supreme Court that even a substantive appointment could be made to a purely temporary vacancy. In the said case, the question for consideration before the Apex Court was whether the appellants were appointed purely on a temporary basis or in a substantive capacity though against temporary posts. The appellants in that case were appointed after reference to and on the recommendation of the Public Service Commission. The Apex Court held that the appellants must be held to have been appointed in a substantive capacity to temporary post as reference to the Public Service Commission and its recommendation was the due procedure which had been adopted.

20. Yet again in the case of Ramesh K. Sharma and Another Vs. Rajasthan Civil Services and Others, , it was held that:-

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...In the Service Jurisprudence a post could be temporary or it could be permanent or it could be created for a definite period to meet a definite contingency. If an incumbent is appointed after due process of selection either to a temporary post or a permanent post and such appointment not being either stop-gap or fortuitous, could be held to be on substantive basis. But if the post itself is created only for a limited period to meet a particular contingency, and appointment thereto is made not through any process of selection but on a stop-gap basis then such an appointment cannot be held to be on substantive basis. The expression substantive basis is used in the Service Jurisprudence in contra-distinction with an ad hoc or purely stop-gap or fortuitous.....

21. To the same effect is the judgment of the Supreme Court in P.D. Aggarwal and Others Vs. State of U.P. and Others, . So far as the Delhi Higher Judicial Service is concerned, the matter was considered by the Apex Court in the case of

O.P. Singla and Another Vs. Union of India (UOI) and Others, . In the said case, it was observed by the Supreme Court that the promotees who were appointed to the service either under Rule 16 or Rule 17 belong to the same class as direct recruits and that they are appointed on regular basis to posts in the service in the same manner as direct recruits are appointed. It has been specifically observed that all incumbents holding either substantive post or temporary post in substantive capacity are members of the service in the context of Delhi Higher Judicial Service Rules.

22. The judgment in Shri O.P. Singla's case (supra) again came up for consideration before the Constitution Bench of the Supreme Court in the case of Rudra Kumar Sain and Others Vs. Union of India and Others, and also in Union of India and Others Vs. K.B. Rajoria, . wherein aforesaid view taken in O.P. Singha (supra) was reaffirmed.

23. In view of the law laid down by the Supreme Court in all the aforementioned cases, the promotion of the petitioner to Delhi Higher Judicial Service in 1989 has to be held on regular basis though it was against a temporary post.

24. Once the petitioner is held to have been appointed on regular basis, the provisions of Rule 12(2) of the Delhi Higher Judicial Service Rules comes into play and would be applicable by its own force and Rule 13 will follow the suit. In the case of petitioner, there had been no extension of probationary period. We are of the view that an Officer cannot be placed on probation with effect from the back date. The petitioner is deemed to have been confirmed in Delhi Higher Judicial Service by virtue of operation of law."

9. It was also submitted by the learned counsel for the petitioner that the Division Bench is bound by the aforesaid observations and the ratio in M.S.Rohillas case (supra) of the Full Bench being a larger bench will override the decision of the Bench in Gautam Kant Nimmans case (supra). He also states that the decision in M.S.Rohillas case (supra) has not been considered by the Division Bench.

10. We have considered the said contention including the submission that if required the matter should be referred to a larger bench but on a deeper analysis do not think that it is necessary in view of the subsequent authoritative pronouncement of the Supreme Court in Head Master Lawrence School Lovedale case (supra). The Full Bench judgment is, therefore, impliedly overruled. It would be relevant to note down the facts and the reasoning/ratio given in Head Master Lawrence School Lovedale case (supra) wherein the Supreme Court was dealing with a case of an employee, who was appointed in the petitioner school on the post of Mistress with effect from September 01, 1993. The Letter of Appointment stipulated that she would be on probation for a period of 2 years which may be extended for another one year, if necessary. In November, 1995 while she was working as a Mistress in the school she has received some money from one Nathan. A meeting was convened on September 09, 1997 and in the proceedings

certain facts were recorded. Suffice to state, on June 18, 1997 an order of termination was passed. The order of termination was assailed and the learned Single Judge allowed the writ petition on the ground that the same was stigmatic in nature. During the hearing of intra court appeal, a contention was canvassed by the employee that she had earned the status of a confirmed employee having completed the period of probation and her services could not have been dispensed with without holding any inquiry. In other words, she was deemed to have been a confirmed employee of the school. The Division Bench relied upon the judgment of the Supreme Court in the case of Satya Narayan Jhavar case (supra) and allowed the appeal.

11. In Lawrence School case (supra), the Supreme Court has interpreted Rule 4.9 which is reproduced as under:

4.9 All appointments to the staff shall ordinarily be made on probation for a period of one year which may at the discretion of the Headmaster or the Chairman in the case of members of the staff appointed by the Board be extended up to two years. The appointee, if confirmed, shall continue to hold office till the age of 55 years, except as otherwise provided in these Rules. Every appointment shall be subject to the conditions that the appointee is certified as medically fit for service by a Medical Officer nominated by the Board or by the Resident Medical Officer of the School."

12. In the said case, the Supreme Court has held as under:

37. Bearing in mind the aforesaid conceptual meaning, when the language employed under Rule 4.9 is scrutinised, it can safely be concluded that the entitlement to continue till the age of superannuation, i.e. 55 years, is not absolute. The power and right to remove is not obliterated. The status of confirmation has to be earned and conferred.

38. Had the rule-making authority intended that there would be automatic confirmation, Rule 4.9 would have been couched in a different language. That being not so, the wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed confirmed employee after expiry of three years of probationary period as that would defeat the basic purpose and intent of the Rule which clearly postulates "if confirmed". A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed.

39. The Division Bench has clearly flawed by associating the words "if confirmed" with the entitlement of the age of superannuation without appreciating that the use of the said words as a fundamental qualifier negatives deemed confirmation. Thus, the irresistible conclusion is that the present case would squarely fall in the last line of cases as has been enumerated in paragraph 11 of Satya Narayan Jhavar (supra) and, therefore, the principle of deemed confirmation is not

attracted.

(emphasis supplied)

13. We may note here that in para No. 11 of Satya Narayan Jhavar case (supra) the Supreme Court has held as under:

11. The question of deemed confirmation in service Jurisprudence, which is dependent upon language of the relevant service rules, has been subject matter of consideration before this Court times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. Other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry order of termination has not been passed. The last line of cases is where though under the rules maximum period of probation is prescribed, but the same require a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor the person concerned has passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired .

(emphasis supplied)

14. It would be relevant to note that in M.S.Rohillas case (supra) the main issue was whether or not the officer had been promoted to the Delhi Higher Judicial Service temporarily/officiating capacity or on regular basis. It was only after arriving at a conclusion that M.S.Rohilla was granted promotion on regular basis, that the observation quoted above has been made. We note that the Full Bench in M.S.Rohillas case (supra) did not specifically refer to applicable rules more particularly Rule 15 and interpreted them with reference to the judgments and the legal position. Even otherwise we have held that the aforesaid ratio would be contrary to the ratio and the legal position elucidated in Head Master Lawrence School Lovedale.

15. Insofar as the contention of Mr. Mitra that the proceedings wherein decision was taken not to confirm and appoint the petitioner in the Delhi Higher Judicial Service should have been kept in sealed cover in terms of the instructions and the judgment of the Supreme Court in K.V.Jankiramans case (supra) is concerned the said submission is liable to be rejected inasmuch as there is

marked difference between an employee not being considered for promotion by the departmental promotion committee on account of pendency of disciplinary proceedings which required sealed cover procedure as per K.V.Jankiramans case (supra) and an employee who is already working on a post but on probation and against whom departmental proceedings were initiated in respect of work done on the said post while on probation. We do not think K.V.Jankiramans case (supra) for sealed cover procedure has any applicability to the later cases and the petitioner has not pointed out or referred to any judgment which records and holds that sealed cover procedure is mandated in such cases also. Sealed cover procedure is prescribed because a person facing departmental proceedings or under cloud should not be given higher responsibility and promotion though his colleagues including juniors are being considered for promotion, if found fit. This may adversely affect the seniority and cause prejudice to such employee who may be ultimately exonerated. Insofar as confirmation on probation, the employee continues and remains on the same post and in case he is not confirmed, he is reverted. Thus no prejudice is caused. For confirmation of probation several aspects have to be taken into consideration. In any case delayed confirmation would not adversely affect the employee as the date of promotion does not change. The petitioner had not challenged action of the Respondent No. 2 for not placing the proceedings in the sealed cover or for that matter extension of probation period vide notification dated August 18, 2010. The Judgment of the Supreme Court in K.V.Jankiramans case (supra) has no application in the facts of this case.

16. The submission of Mr. Mitra on merits that there was nothing adverse against the petitioner which could be a reason for the respondent No. 2 deny confirmation to the petitioner in Delhi Higher Judicial Service; we note that the Full Court in its meeting initially held on September 23, 2009 considered/ approved the recommendations made by the Administrative and General Supervision Committees meeting dated August 31, 2009 that confirmation of Mr. Chandra Bose-the petitioner herein be deferred because of the pendency of the departmental inquiry. After the petitioner was absolved of the charges in the month of January, 2010, the matter was again placed before the Administrative and General Supervision Committee on July 23, 2010. The committee on consideration of the matter decided to extend the period of probation of the petitioner for a period of one year. The Full Court in its meeting of July 28, 2010 after considering the recommendations of Administrative & General Supervision Committee had extended the probation for a period of one year. On expiry of one year, the matter regarding confirmation of the petitioner was again considered by the Administrative and General Supervision Committee held on November 30, 2011. By that time his ACRs for the year 2008 to 2010 had been recorded wherein, he was for the years 2009 and 2010 graded "B." The committee was of the view that the petitioner was not fit for being confirmed in the Delhi Higher Judicial Service. It recommended that the petitioner be reverted to his original position in the Delhi Judicial Service. The petitioner made a representation dated

December 23, 2011 for review and upgradation of his ACRs for the year 2010 and as the said representation was pending consideration of Inspecting Judges, the Full Court on January 18, 2012 deferred their decision. After the Inspecting Judges Committee decided the representation and the recommendation of the committee was considered by the Administrative & General Supervision Committee on February 16, 2012, their recommendations were placed before the Full Court along with his representation for confirmation. The Full Court decided not to confirm the petitioner in the Delhi Higher Judicial Service and reverted the petitioner to the Delhi Judicial Service.

17. We cant find fault in the decision of the Full Court as it is noted that the same is based on his record which is reflected from his ACRs grading and other aspects. The other officers who were confirmed and appointed on substantive basis in Delhi Higher Judicial Service all were graded either A and/or B+ for the 2 years. The judgment in the case of Sukhdev Singh (supra), relied upon by the learned counsel for the petitioner, would be of no help as it is noted from the above that the petitioner against his ACR of the year 2010, had made a representation, which was rejected, confirming his ACR bearing as "B." We find, the reason for non-confirming the petitioner was objectively and fairly considered. The scope of judicial review in the matters of this nature is quite well settled and in this regard we refer to the judgment of the Supreme Court in M/s. Oswal Pressure Die Casting Industry, Faridabad Vs. Presiding Officer and Another, , wherein the Supreme Court has held as under:

6. From the letter of appointment it is quite clear that the respondent was appointed on probation. The High Court was also inclined to take that view and for that reason it did not uphold that part of the award of the Labour Court whereby it was held that Section 25F of the Industrial Disputes Act applies to the facts of the case. The High Court did not agree with the finding of the Labour Court that the order of termination was not an order of discharge simpliciter as it was stated in it that "you are not found fit to confirm" and, therefore, it was necessary to hold a departmental inquiry. It, however, held that it was necessary for the appellant to produce material to show that respondent's performance was not satisfactory and as no such material was produced the order of termination was bad. We find, as disclosed by the award of the Labour Court, that the appellant had examined two witnesses. Satish Dudeja and Om Prakash to prove that his work was not satisfactory. It was, therefore, not correct to say that no evidence was led by the appellant to prove that the work of the respondent was not satisfactory. Both the witnesses had clearly stated that he was found negligent in his work and because of his negligence he had met with an accident in the factory premises. It was not the case of the respondent that the action of the employer was malafide. The Labour Court had also not held that the satisfaction of the Management was vitiated by malafides. It had struck down the order of termination on the ground that it was stigmatic and, therefore, it could not have been passed without holding a domestic inquiry. The High Court rightly did not accept that finding. What the High Court failed to appreciate was

that it was not open to it to sit in appeal over the assessment made by the employer of the performance of the employee. Once it was found that the assessment made by the employer was supported by some material and was not malafide it was not proper for the High Court to interfere and substitute its satisfaction with the satisfaction of the employer. The High Court was also wrong in holding that in order to support its satisfaction it was necessary for the appellant to produce some reports or communication or other evidence to show that performance of the respondent was below the expected norms. We find that the whole approach of the High Court was wrong and, therefore, the order passed by it will have to be set aside. We, therefore, allow this appeal, set aside the judgment and order passed by the High Court and also the award passed by the Labour Court and hold that the impugned termination order was validly passed by the appellant.

18. In view of above conclusion, we do not see any merit in the writ petition and the same is accordingly dismissed.

19. No costs.

C.M No. 2207/2013

Dismissed as infructuous.