

(2009) 04 AHC CK 0767
In the Allahabad High Court
Case No : Spl. Appeal No. 156 of 2000

District Co-operative Bank Ltd.	Vs	APPELLANT
Inder Deo Ram & Ors.		RESPONDENT

Date of Decision : 24-04-2009

Acts Referred:

Uttar Pradesh Co-operative Societies Act, 1965 — Section 122
Uttar Pradesh Co-operative Societies Employees Service Regulations, 1975 —
Regulation 17(ii), 17(iii)

Citation : (2009) 04 AHC CK 0767

Hon'ble Judges : Pradeep Kant, J and Syed Nazim Husain Zaidi, J

Final Decision : Disposed Of

Judgement

1. Heard Shri Rakesh Srivastava, learned counsel for the appellant. None appears for the respondents, while the names of Shri N.K. Seth, Km. Vishwa Mohini and Shri Vimal Kumar have been shown in the cause list nor there is any request of passing over the case.
2. This Special Appeal has been filed challenging the judgment and order dated 122000, by means of which the learned Single Judge has allowed the writ petition preferred by the respondent No. 1 and has quashed the order of discharge/termination of services dated 1371985, passed by the Secretary/ General Manager of District Cooperative Bank Ltd., Shahjahanpur with all consequential benefits. The order further directs that the respondent No. 1 shall be treated to have continued in service as if, there was no order of discharge/ termination and shall also be entitled to salary and service benefits.
3. The question involved in the Special Appeal is, whether an employee of Cooperative Society can be discharged by an order of termination after expiry of period of probation, though his services were not terminated during the period of probation or the extended period of probation and thus he remained in service, even after the maximum period of probation prescribed and he became entitled to be confirmed or could be deemed to have been confirmed in terms of

Regulation 17(ii) & (iii) of U.P. Cooperative Societies Employees Service Regulations, 1975 (hereinafter referred to as Regulations of 1975). In other words, can such an employee only be ousted from service by holding a departmental enquiry on the ground of misconduct and not by an order of discharge simpliciter.

4. The respondent in this case was appointed as a Class IV employee on the post of helper in District Cooperative Bank Ltd. Shahjahanpur vide order dated 1911983 and he was placed on probation on 2411983. The initial period of probation as given in Regulation 17 (i) of the Regulations 1975 is one year which can be extended for another maximum period of one year under the proviso. The respondent No.1 remained in service for more than the maximum period of probation as prescribed above and he was discharged from service by an order dated 1371985, though his term of probation ended on 2311985.

5. The learned Single Judge relying upon the judgment in the case of *Om Prakash v. U.P. Cooperative Society*, reported in AIR 1986 SC 1844, found that there was no power to extend the period of probation beyond the period of two years, therefore, he would be deemed to have been confirmed after 2311985.

6. The question as to whether an employee would be deemed to have been confirmed on expiry of the period of probation, if any, or maximum period as prescribed, is a question which, requires consideration in the instant case.

7. An employee who goes on unauthorised leave during the period of probation or extended period of probation, whether can claim the benefit of the deeming fiction regarding his confirmation after the expiry of the maximum period of probation is the short question involved in the petition.

8. The provision for placing an employee on probation is for the purpose of judging his ability, worth and competence during the period of the probation before confirming him in service. In case the work and conduct is not found satisfactory, then his services are liable to be terminated and he would not be confirmed.

9. It is a different issue that in different services different period of probation have been prescribed but in most of the services the initial period of probation is one year. In some service rules, there is provision for extension of the probation period for some given period, wherein the period of probation can be extended for a further definite period, may be one year or two years but not beyond that and in some service rules there is no prescription of maximum period of probation, where the probation can be extended for any period whatsoever.

10. In a case where the probation can be extended without any prescribed period, an employee who is placed in probation has no right to claim himself to be confirmed after putting any length of service unless specific order of confirmation is passed in writing or he is declared confirmed. We take notice of the fact that in various Service Rules, there is a separate provision for

confirmation of an employee which requires passing of an order of confirmation.

11. However, in a case where there is a fixed period of probation either initial or further extension being provided, it does not give any authority to the employer or the appointing authority to extend the period of probation beyond the maximum prescribed period. If the service of an employee is satisfactory and has continued for the maximum period of probation, then on expiry of aforesaid period he would be deemed to have been confirmed but this legal fiction of confirmation would not be available to an employee who is not allowed to continue by the department by a conscious decision but despite his unsatisfactory service or otherwise, may be because he remains absent or goes on unauthorised leave before the expiry of maximum period of probation, the continuance of such an employee for the whole period of probation may not allow him to claim the benefit of deemed confirmation.

12. The Apex Court in the case of Chief General Manager, State Bank of India and another v. Bijoy Kumar Mishra reported in (1997) 7 Supreme Court Cases 550 : (AIR 1997 SC 3981) had an occasion to consider the aforesaid question and after considering the case of State of Punjab v. Dharam Singh reported in AIR 1968 SC 1210, has observed as under:

"It is significant that the effect of permitting the employee to continue in the post even on completion of the maximum period of probation without an express order of confirmation results in the only logical inference that he has been confirmed in the post by implication. For drawing such inference, it is necessary that the employer should allow the employee to continue on the post even after expiry of the maximum period of probation which is consistent only with the fact of his confirmation on the post. This inference is drawn from the conduct of the employer which is consistent only with the fact of confirmation of the employee. It is a rule of evidence applied to the facts of the case. Thus the deemed confirmation which is inferred from the employer's conduct is permissible only when it follows from the positive act of the employer permitting the employee to continue to work on the post even after completion of the maximum period of probation permitted under the Service Rules since no other inference is possible in such a situation from the employer's conduct of continuing to take work from the employee after that period. The decision in Dharam Singh can have no application in a case where the employee was absent from duty from a date much prior to the expiry of the maximum period of probation and remained absent even thereafter for a long time. There was no occasion in such a case for the employer to allow the employee (respondent) to continue to work on the post after the expiry of the maximum period of probation because he was absent and was not working on the post at the time of the expiry of the period of probation. When there is no such conduct of the employer, the very foundation for the argument of deemed confirmation and reliance on Dharam Singh is not existent."

13. The respondents having gone on unauthorized absence during the extended period of probation also and, thus, allowed maximum period of probation to be

passed, could not have been given the benefit of legal fiction of deemed confirmation.

14. It would be apposite to mention at this stage that learned counsel for the appellant has very candidly stated that the appellant does not challenge the order under Special Appeal in so far as the Court directed the reinstatement of respondent No.1 in service and that he has already been reinstated but challenge is to the order directing payment of salary and arrears of salary to the respondent No.1 from the date of discharge from service till the date of passing of the order.

15. In this view of the matter we have only explained the legal position with respect to Regulation 17 (ii) & (iii) of the Regulations of 1975 and observe that in such a case Regulation 84 and 87 of the Regulations of 1975 would not be applicable.

16. We do not intend to disturb the reinstatement of respondent No. 1 when it is not being challenged before this Court. However, the plea that the respondent having not worked for more than 14 years, he could not be allowed the benefit of backwages/wages and arrears of salary requires consideration.

17. In view of the legal position stated above, if the respondent was to be reinstated/continued in service, award of arrears of salary/backwages to him under the aforesaid facts and the legal position, does not appear to be justified.

18. The award of backwages/arrears of salary is the discretion of the Court and while exercising this discretion, all relevant factors have to be taken into account. It would be relevant in such a case to see whether the order of discharge or termination from service has been set aside on some mere technicality or on merit. If the Court finds that on merit the order of punishment/discharge was bad in law or that the order is wholly arbitrary and mala fide, there may be a case for awarding the backwages either fully or partially but here in the instant case, the Court is satisfied that no interference was called for by the Court in the matter of discharge of the respondent No.1 on the plea of deemed confirmation and looking into the facts that during the period of probation he went on unauthorised leave for a period of three months which period was later converted into leave without pay, we do not find that the respondent No. 1 is entitled for full backwages. He may, however, be allowed only 50% of the backwages.

19. The other benefits as directed by the learned Single Judge shall also be made available to him in accordance with law.

20. The Special Appeal is accordingly disposed of.