

(2004) 02 GUJ CK 0025

In the Gujarat High Court

Case No : Special Civil Application No. 5649 of 1987

Mayooriben J. Thakore

APPELLANT

Vs

Gujarat Agro Industries

RESPONDENT

Date of Decision : 06-02-2004

Acts Referred:

Gujarat Agro Industries Corporation Limited Service Rules, 1969 — Rule 16, 19, 21, 30

Citation : (2005) 104 FLR 8 : (2004) 24 GLH 763 : (2004) 2 GLR 1707

Hon'ble Judges : R.R. Tripathi, J

Bench : Single Bench

Advocate : J.R. Nanavati and Hriday Buch, for the Appellant; Mihir Thakore and P.J. Davawala, for the Respondent

Final Decision : Dismissed

Judgement

Ravi R. Tripathi, J.—This petition was heard finally and disposed of by the learned single Judge (Mr. Justice C.K. Thakkar, as he then was). Being aggrieved of that, the respondents had filed Letters Patent Appeal being LPA No.162 of 2000, which came to be allowed by judgment and order dated 19th August 2003 (Coram: Mr. Justice B.J. Shethna & Mr. Justice Ravi R. Tripathi) wherein paras 4 and 5 read thus:

"4. On merits learned counsel Shri Mihir Thakore for the appellants argued the matter for a considerable time. While going through the judgment of the learned Single Judge, we found that the matter was practically decided ex parte without giving an opportunity of hearing to the present appellants.

5. Considering the peculiar facts and circumstances of the case, both the learned counsel Shri Mihir Thakore for the appellants and Senior Advocate Shri Maganbhai Barot appearing for Shri Hriday Buch for the respondent agreed that without assigning any reasons and expressing any opinion on the merits of the case the matter be remanded to the learned single Judge by setting aside the judgment and order dated 4.4.2000 passed by the learned Single Judge allowing

the writ petition, i.e. Special Civil Application No. 5649 of 1987 and the learned Single Judge whosoever taking up such matters be requested to hear and decide the writ petition as early as possible, because it is an old matter."

The Division Bench issued final directions contained in para 6 of the judgment.

2. The facts of the case are that the petitioner herein was appointed by appointment order dated 6.11.85, a copy of which is produced at Annexure-C to the petition, of which clause 1 reads as under:

"1) Initially, you will be on probation on the post for a period of six months on satisfactory completion of which your service will be confirmed, if found satisfactory. During the probationary period, at any time your services are liable to be terminated, if not found satisfactory."

3. Learned counsel Mr. J.R. Nanavati appearing with Mr. Hriday Buch contended that the Service Rules are framed by the Board of Directors of the respondent Corporation prescribing the terms and conditions for appointment and all other relevant aspects of service in various departments like administrative, executive, legal, commercial, financial, accounts, audit, technical and other departments of the Corporation. The Rules also lay down the functions, duties, conduct, discipline and remuneration of the employees. The rules are titled as "Gujarat Agro-Industries Corporation Limited Service Rules, 1969". Learned counsel pressed into service rule 16, which reads thus:

"16. The first appointment to a post shall be made on probation for a period of six months; provided that the appointing authority may from time to time extend such period of probation as may be considered necessary."

The controversy has arisen as the petitioner was allowed to continue in service beyond the period of six months. She continued to serve the respondent Corporation till her services came to be terminated by order dated 27th August, 1987 after which the petitioner approached this Court by filing this petition, praying that the Honourable Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction quashing and setting aside the order dated 27.8.87 passed by respondent No.2. On 3rd December, 1987, this Court issued notice pending admission and notice as to interim relief and after the matter was adjourned on a few occasions, on 29th October, 1990, the Court passed the following order:

"Rule. Having regard to the facts and circumstances of the case interim relief as prayed for cannot be granted. Grant of interim relief would amount to allowing the petition without adjudicating the issues involved in the matter. Such interim relief is not called for in the facts of the case. Hence interim relief refused. However, respondents are directed to file affidavit-in-reply on or before December 31, 1990. Thereafter, it will be open to either parties to request for fixed date of hearing."

The matter was then heard finally and disposed, against which, a Letters Patent

Appeal was preferred wherein an order was passed and as stated hereinabove, the matter was remitted back for fresh hearing.

4. The short question for the consideration of this Court which arises in this matter is, as to whether in light of the contents of appointment order dated 6.11.85 and in light of the Rules on the subject, can it be said that the petitioner was confirmed and that being so order of termination dated 27.8.87 is illegal and requires to be quashed by this Court.

5. The learned counsel for the petitioner submitted that the effect of the Rules and the order is that the petitioner was confirmed and that is why her services could not have been brought to an end in the manner in which the respondent Corporation has done it, that the act of the respondent Corporation of terminating the services of the petitioner is unjust, arbitrary and also vitiated on account of non-communication to the petitioner to improve her performance, though according to Mr. Nanavati, it was the bounden duty of the respondent Corporation to do so.

6. The petition is contested by the respondent Corporation by filing an affidavit in reply affirmed by Shri D.Bose, Divisional Manager (Personnel and Administration), contending that in view of the clear provisions of the Rules, there is no question of "deemed confirmation" of the petitioner and that the Corporation has rightly terminated the services of the petitioner in terms of rule 21, after paying a sum of Rs.2774.65 ps. towards seven days salary in lieu of notice period and towards unpaid salary upto 27th August, 1987.

7. In view of the aforesaid rival contentions of both the sides, this court is required to consider as to, what is the effect and implication of the contents of clause (1) of the appointment order reading the same in light of rule 16, 19, 21 and 30. The submission made on behalf of the petitioner is that as provided in rule 16, the first appointment to a post is made on probation for a period of six months, thereafter appointing authority may, from time to time, extend such period of probation as may be considered necessary (emphasise supplied). It is contended that there being no order extending the period of probation in writing and in view of the fact that increment was released in favour of the petitioner on 28.11.86, the petitioner stood confirmed even there being no explicit order for the same. The learned advocate for the petitioner submitted that rule 30 is relevant in this regard of which sub-rule (i) reads as under:

"(i) In an incremental scale, the increment shall accrue on the completion of each special period of service excluding probationary service not followed by confirmation of one calender year on each stage of that scale whether such service be probationary, officiating or substantive."

The submission of the petitioner is that in view of the above provision, service rendered as a probationer is required to be excluded while considering the service put in by an employee entitling him/her to earn an increment. In the case of the petitioner, the order of appointment is dated 6.11.85 and the increment

was released on 28.11.86. It is therefore submitted from this it should be construed that the period of probation is taken into consideration because even the Corporation treated the same to be of regular service and thus no period of her service is excluded, treated her to be on probation and granted increment on completion of one year. He also made his submissions relying on sub-rule (iii) of rule 30 which reads thus:

"(iii) Sanction to draw increments will be given by the Managing Director or an Officer empowered by him in this behalf. An increment may be withheld by the Managing Director, or such officer for unsatisfactorily or inadequate performance."

The learned advocate submitted that, the fact that an increment is released without being withheld, which could have been withheld had the services of the petitioner were found unsatisfactory, the claim of the petitioner of confirmation even in absence of any explicit act of confirmation stands substantiated and fortified because the increment of the petitioner is released on completion of one year in service right from the date of appointment treating the period of probation also as regular service.

8. The next argument on behalf of the petitioner is that the act of termination of service of the petitioner treating him to be in probation under rule 21 is not a lawful act and is an unjust and arbitrary act because in view of the aforesaid facts, the petitioner stood confirmed even in absence of any explicit act in this regard.

9. Mr. Nanavati, the learned counsel for the petitioner, relied upon a judgment of the Hon'ble the Apex Court in the matter of Dr. Mrs. Sumati P. Shere v. Union of India, AIR 1989 SC 1431, in support of his contention that "a probationer has a right of communication in advance of the defects in work and deficiency in his performance before his service could be terminated on account of unsuitability". He emphatically submitted that such communication is necessary and without such communication, termination of service is arbitrary. Mr. Nanavati relied upon para 5 of the judgment which reads thus:

"5. We must emphasize that in the relationship of master and servant there is a moral obligation to act fairly. An informal, if not formal, give-and-take, on the assessment of work of the employee should be there. The employee should be made aware of the defect in his work and deficiency in his performance. Defects or deficiencies; indifference or indiscretion may be with the employee by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, in our opinion, it would be arbitrary to give a movement order to the employee on the ground of unsuitability."

What is taken into consideration by the Hon'ble the Supreme Court is reflected from para 3 of the said judgment, that is, the Tribunal in the course of hearing of the case had perused the confidential file relating to the appellant, wherein it was recorded that the authorities were not satisfied with the performance of the

appellant and so her re-appointment after the expiry of the term was not recommended. In the present case, there is nothing on the record to show that any such noting was made and the same was not communicated to the petitioner. In that view of the matter the decision of the Hon"ble the Apex Court will have no application.

10. Mr. Nanavati, the learned counsel for the petitioner then relied on a decision of Hon"ble the Apex Court in the matter of State of Gujarat v. Akhilesh C. Bhargav, AIR 1987 SC 2135. This decision of the Hon"ble the Apex Court is on the facts of the case wherein the Hon"ble the Apex Court was pleased to hold that probationer an IPS Officer was confirmed in view of the combined effect of Rules and Circular of Home Ministry dated 16.3.73 on the relevant date and was pleased to hold that the order of discharge passed against him under rule 12(bb) was not legal. This decision is also not applicable to the facts of the case on hand in light of the provisions of the rules applicable in the present case, which are mentioned hereinabove and discussed hereafter.

11. Mr. Thakore, the learned senior Counsel appearing with Ms.Davawala for the respondent Corporation relied upon a decision of the Hon"ble the Apex Court in the matter of High Court of M.P. through Registrar and others v. Satya Narayan Jhavar, (2001) 7 SCC 161 wherein the Hon"ble the Apex Court after taking into consideration almost all the decisions on the point of "deemed confirmation" pronounced the law on the point. The Hon"ble the Supreme Court has divided the cases in three categories and declared the law applicable in each of those categories. Para 11 of the judgment is relevant for our purpose which reads as under:

"11. The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the 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 in 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. The other line of case is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period of such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the 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 requires 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 has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired."

Mr. Thakore, the learned counsel, submitted that looking to the facts of the present case, it will fall in the first category, wherein no maximum period is prescribed for an appointment on probation of an employee. Not only that a positive act is contemplated under the "Rules" for confirmation of an employee in service. He submitted that rule 19 provides that "on satisfactory completion of the period of probation, on production of a certificate of medical fitness the competent appointing authority or the Managing Director or an officer authorised by him may confirm an employee in the service of the Corporation". Thus a specific positive act of confirming an employee is contemplated on happening of two events, namely, (i) completion of the period of probation satisfactorily and (ii) on production of certificate of medical fitness. Besides discretion is with the authorities as the words used are "may confirm". He further submitted that in clause (1) of the appointment order it is stated in no uncertain terms that "..... on satisfactory completion of which your service will be confirmed, if found satisfactory"

12. Mr. Thakore, the learned counsel submitted that from the contents of the appointment order and rule 19, it has to be inferred that a "positive act", as is required in category 1 of the judgment of the Hon'ble the Apex Court was required in the facts of the case on hand, and therefore, the claim of the petitioner that she was deemed to have been confirmed is ill-founded and misplaced as is not supported by the facts of the case.

13. Taking into consideration the contents of the appointment order and rules 16 and 19 together, the submissions made by Mr. Nanavati regarding increment do not convince the Court to uphold his contention. Sub-rule (i) of rule 30 which deals with increment can be read to mean that, "it gives power/discretion to the Management to grant an increment even to a probationer". The words used are "in an incremental scale, the increment shall accrue", it confers a right on the employees. But then the words "excluding probationary service not followed by confirmation", it carves out an exception qua the probationers. Because for the probationers, it is only an enabling provision. To test the correctness of the aforesaid interpretation of the rule, a question is to be asked as to "whether by virtue of this rule, can a probationer claim grant of increment" and the answer is in negative.

14. Under sub-rule (i) of rule 30, a probationer cannot claim an increment as a matter of right, but at the same time, the employees who are in regular service, are conferred a right that on completion of one calendar year service, on each stage of that scale an increment stands accrued and in such cases, the service rendered by an employee may be, probationary, officiating or substantive. The words "excluding probationary service not followed by confirmation" is different than that of the "probationary" service provided in the later part of sub-rule.

Only if the rule is read in the aforesaid manner it makes a harmonious reading of the rule.

6.2.2004

15. Mr. Thakore, the learned Senior Counsel, appearing for the respondents submitted that the attempt on the part of the petitioner to expand the scope of the petition is not warranted. He submitted that the only question which remains to be decided in this petition is as to whether the petitioner who was appointed on probation for a period of six months and who was not confirmed as specifically required under rule 19 and contents of clause (1) of the appointment order, can be said to have been deemed confirmed only on the basis of grant of an increment. He submitted that assuming that the Management was considerate enough to grant increment, but then that may be because the performance of the petitioner may not have been found to be so unsatisfactory or inadequate so that that the authority like the Managing Director or any other officer may pass an order for withholding of the increment. He submitted that in fact sub-rule (iii) of rule 30 is only an empowering provision under which authority may withhold an increment of a regular employee which otherwise falls due on completion of one calendar year service on each stage of the scale which is incremental. He further submitted that, as submitted hereinabove, the act of granting increment to a probationer is to be treated as a gesture of goodwill and nothing beyond that. Rule 30 regulates the aspect of granting increment and sub-rule (i) of rule 30 provides for a right of regular employee to get annual increment. Sub-rule (iii) empowers the authorities to withhold an increment which otherwise an employee is getting under this rule. He emphatically submitted that it cannot be argued in reverse order that only because an increment was granted by the Management to the petitioner who was a probationer, it should be held in first instance that an increment is not withheld because her performance was satisfactory and then in second instance that because her performance was satisfactory, petitioner - a probationer stands deemed confirmed. Mr. Thakore, learned counsel submitted that in fact rule 30 has no play in the facts of the present case. He submitted that the present case is required to be decided only by taking into consideration the contents of the appointment order issued by the Management, the provisions of rule 16 which provides for appointment being on probation, and the fact that the said period can be extended from time to time and that too there being no maximum time limit. Rule 19 provides for a positive act on the part of the Management on happening of two eventualities before an employee is finally confirmed. He submitted that nothing beyond these two rules and the contents of the appointment order are required to be looked into. That being so, in view of the law laid down by the Hon'ble the Apex Court in the matter of High Court of MP (supra), the present petition is required to be dismissed.

16. Mr. Nanavati, the learned senior counsel for the petitioner lastly submitted that as the rules referred to are not the statutory rules, the matter is governed

by the contract between the parties and when the matter is governed by the contract between the parties, rules are not to be applied in strict terms and the conduct of the parties is to be taken into consideration. He submitted that in that view of the matter, conduct of the Management of granting an increment must go in favour of the petitioner and it must be held that it was only after the performance of the petitioner was found satisfactory an increment was released on completion of one year service including that of the probationary period and, therefore, for all practical purposes, the petitioner was a confirmed employee and therefore the Management could not have terminated her service under rule 21.

17. This submission is also not found convincing in view of the aforesaid discussion. Taking overall view of the matter, it is clear that the petitioner was appointed by appointment order dated 6.11.85 and rules 16 and 19 are the relevant rules applicable to the fact and on reading all of them together, the case falls within the first category as laid down by the Hon'ble the Apex Court in the matter of High Court of M.P. (supra).

18. In view of the aforesaid discussion, the petition is dismissed. Rule is discharged.

19. At this juncture, Mr. Nanavati, learned senior counsel prays that the operation and implementation of this order be stayed for some time, more particularly in light of the fact that after the matter was decided by the judgment and order dated 4.4.2000, the Management has reinstated the petitioner and that fact is recorded in the order of the Division Bench in Letters Patent Appeal. Taking into consideration the aforesaid facts, particularly the fact that the petitioner is reinstated in service by the Management, the request is granted. The operation and implementation of this order is stayed for a period of two weeks from the date of receipt of this judgment and order.