

(2000) 03 BOM CK 0028

In the Bombay High Court

Case No : Writ Petition No. 1098 of 1987

Mukund Laxmikant Bhalerao

APPELLANT

Vs

Zilla Parishad, Jalna and another

RESPONDENT

Date of Decision : 08-03-2000

Acts Referred:

Citation : (2000) 3 ALLMR 440 : (2001) 4 BOMLR 222 : (2001) 3 MhLj 843

Hon'ble Judges : V.K. Barde, J;A.S. Bagga, J

Bench : Division Bench

Advocate : D.A. Gursahani, for the Appellant; A.S. Bajaj for Respondent No. 1 and S.V. Chillarge, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

V.K. Barde, J.—The Petitioner was appointed as Junior Assistant in Panchayat Samiti, Bhokardan under Zilla Parishad after due selection by the Selection Board. He resumed duty on 12-2-1973. The Petitioner thereafter was promoted on the post of Senior Assistant as per order dated 21-9-1984 and he resumed on his promotional post on 29-9-1984 in the irrigation Department of the Zilla Parishad, Jalna - Respondent No. 1. He worked on that post till 29-12-1985 and during that period, his work was satisfactory but, he was suffering from tuberculosis so, from 30-12-1985, he was under the treatment for tuberculosis and was on leave. He went to take treatment from Government Medical Officer (tuberculosis) at Jalna and Aurangabad T.B. Hospital. The Petitioner was examined by the Medical Board on 25-6-1987 but, he did not receive the report of the Medical Board till the date of filing of the petition. However, he received the order of joining duty on 8-7-1987. However, because of the monsoon climate, he was not keeping well and he did not join on duty.

2. The Petitioner has contended that he received regular pay till December, 1985 but, thereafter, he has not received regular pay and tuberculosis allowance and other admissible allowances. As per the Rules, an employee suffering from tuberculosis is entitled to diet allowance of Rs. 50/-per month but, he did not

receive even that amount. So, on 16-6-1986, the Petitioner served a notice on the Respondent for the pay and allowances. On receipt of this notice, instead of paying the allowances and meeting the grievances of the Petitioner, the Respondent No. 1 issued order and by order dated 18-6-1986, the Petitioner was reverted to the post of Junior Assistant w.e.f. 18-6-1986.

3 . Being aggrieved by this order of reversion, the Petitioner filed an appeal before the Respondent No. 2 i.e. Commissioner, Aurangabad Revenue Division as per the provisions of the Maharashtra Zilla Parishad District -Services (Discipline & Appeal) Rules, 1964 (hereinafter referred to as Discipline and Appeal Rules, 1964). Till the date of filing of the petition, no decision was given on the appeal filed by the Petitioner.

4. The Petitioner has contended that because of reversion on the post of Junior Assistant the Petitioner suffered financially to the extent of Rs. 100 to 150 per month. It is also contended that the Petitioner was transferred by an order dated 9-6-1986 from Irrigation Department to Public Health Department.

5. The Petitioner has contended that the Respondent No. 1 has issued confirmed seniority list on 7-2-1986 and the name of the Petitioner is shown at Sr. No. 36. This was the list dated 1-4-1985 that means, more than six months after the promotion of the Petitioner in the cadre of Senior Assistant. The Petitioner was granted leave upto 31-8-1986 treating him as Senior Assistant. The Petitioner received pay and allowances till 31-8-1986 as Senior Assistant. However, his pay and allowances were wrongly withheld w.e.f. 1-9-1986. So, according to the Petitioner, he was confirmed in the cadre of Senior Assistant after his promotion on that post.

6. The Petitioner has further contended that reversion is major punishment as per Rule" 4(4) of the Discipline & Appeal Rules, 1964. It is contended by the Petitioner that not making payment of pay and allowances, not paying the special tuberculosis allowance since 1-9-1986 and not sending necessary remarks to the Respondent No. 2 for early disposal of the appeal by the Respondent No. 1, all this indicates mala fide intention of the Respondent No. 1. The order of reversion is mala fide. It was passed without holding any Departmental Enquiry as provided under the Discipline & Appeal Rules, 1964.

7. During the pendency of this petition, the Respondent No. 2 commissioner heard the appeal filed by the Petitioner against the order of reversion and by his order dated 17-11-1992, the appeal was dismissed. Hence, the Petitioner has amended the petition and has challenged the order of dismissal of appeal also. The Petitioner, therefore, has prayed that the order of reversion as well as the order of dismissal of appeal be set aside. The Respondent No. 1 be directed to pay him all the pay and allowances w.e.f. 1-9-1986 and also the diet allowance which is payable to an employee suffering from tuberculosis.

8. The Respondent No. 1 in the affidavit-in-reply, has contended that the Petitioner was promoted on the post of Senior Assistant as per the order dated

29-9-1984. However, this order of promotion was conditional for the period of six months and it was made clear that if the services of the Petitioner were not found satisfactory, he would be reverted to the original post. So, the Petitioner cannot contend that he was promoted and confirmed in the cadre of Senior Assistant. It is further contended that during the period when the Petitioner was serving on the post of Senior Assistant, his work was not found satisfactory and, therefore, he was reverted to his original post.

9. It is denied by the Respondent that this order of reversion is mala fide or that, it has to do anything with the notice which was served by the Petitioner on the Respondent No. 1 with respect to his salaries and allowances. It is contended that the action as to whether the Petitioner be continued on the promotional post had started since long and the order is based on the two reports dated 1 -6-1985 and 30-12-1985 received from the Executive Engineer. There is no connection between the order of reversion and the notice served by the Petitioner. As the Petitioner was not confirmed in the post of Senior Assistant by any specific order, he continued to be on probation on that post till 18-6-1986 the date on which the order of reversion was passed.

10. It is also contended that the seniority list is published as per the Rules which includes permanent as well as temporary servants and not only the confirmed servants. The seniority list is final seniority list and not a list of confirmed Senior Assistants. So, the Petitioner cannot claim that he was confirmed in the post of Senior Assistant because of appearance of his name in the seniority list.

11. It is further contended that as the Petitioner was working on the post of Senior Assistant till the date of reversion, his salary is drawn and paid as per the scale of Senior Assistant and therefore, any order passed granting him leave treating him as Senior Assistant does not mean that he was confirmed in the post of Senior Assistant. It is further contended that the salary during the leave period can be paid only after production of the certificate from the Medical Board specifying the period for which the leave was recommended. Such certificate was awaited and hence, his leave salary from 1-9-1986 was not paid. The certificate was received afterwards and the process of payment of leave salary to the Petitioner is undertaken.

12. It is contended that as the reversion of the Petitioner was not by way of penalty, it was not at all necessary to hold any Enquiry as per the Discipline and Appeal Rules, 1964. The promotion order itself was conditional and when the services of the Petitioner were not found satisfactory on the promotional post, he was reverted. It is, therefore, prayed by the Respondent No. 1 that the writ petition be dismissed.

13. The Respondent No. 2 has not filed any return though has filed appearance.

14 The Respondent No. 1 has filed additional affidavit making some statements with respect to the Departmental Examination required for the promotion and that is in reply to the stand taken by the Petitioner in the petition by effecting

amendment. However, so far as the present case is concerned, the question of passing of Departmental Examination is not at all relevant. The promotion is not given on the basis of passing of Departmental Examination and the reversion is also not on the basis of non passing the Departmental Examination. So, this aspect of the case is not being considered in the present matter.

15. The learned Counsel for the Petitioner Shri Gursahani has specifically pointed out that the order of promotion was passed on 21-9-1984. The Petitioner resumed charge of the promotional post on 29-9-1984. As per the order of promotion which is at Exh. A on page 8 of the petition, the promotion was on trial basis for the period of six months. The pay of the Petitioner in the cadre of Senior Assistant was fixed on 23-5-1985 that means, after completion of the period of six months from the resumption of duty on promotional post. The Petitioner, continued on the said post till 18-6-1986. Meanwhile, he was even transferred from one department to another department but, in the cadre of Senior Assistant. So, all these circumstances clearly indicate that the even after expiry of six months, Petitioner was continued in the cadre of Senior Assistant, that means he was confirmed in the cadre of Senior Assistant. So, in such circumstances, he could not have been reverted to the post of Junior -Assistant only by saying that his services were not satisfactory. Once he is deemed to be confirmed in the post of Senior Assistant, Departmental Enquiry ought to have been held before passing any order of reversion. No such procedure was followed by the Respondent No. 1 and, therefore, the order of reversion is illegal and bad.

16. The learned Counsel for the Petitioner has also argued that if there were any adverse remarks against the Petitioner, they were not communicated to the Petitioner ever till the date of reversion order. Therefore, such adverse remarks cannot be taken into consideration for reverting the Petitioner.

17. The learned Counsel for the Petitioner has gone one step ahead stating that the order of promotion indicates that it was on trial basis for six months which itself was not proper and as per the Service Rules of the Zilla Parishads. The Service Rules do not provide that the order of promotion may be on trial basis or for a period of probation. So, once a person is promoted then it must be considered that he is promoted on permanent basis and confirmed in the cadre of promotional post. The condition put while passing the order of promotion was without having any authority to the Chief Executive Officer, Zilla Parishad. So, that part of the order of promotion be ignored altogether. The learned Counsel for the Petitioner has also strongly contended that if the sequence of the instances is taken into consideration, then definitely the order of reversion is linked with the notice served by the Petitioner on the Respondent No. 1 because of non-payment of pay and allowances. The notice is dated 16-6-1986. This is mala fide order and, therefore, it must be set aside.

18. To consider the points raised by the learned Counsel for the Petitioner, we will have to look into the Maharashtra Zilla Parishads District Service Recruitment Rules, 1967 (hereinafter referred to as the Recruitment Rules). Rule 6 provides

for appointment by nomination, promotion or transfer. No doubt, in this rule it is not mentioned that a person to be promoted first be promoted on temporary basis or on trial basis or as probationer. The Rule 6 is silent in this respect. It is also to be noted that the Rule 6 does not prohibit the promotion on such condition. The rule only prescribes that the promotion be given on considering seniority-cum-merit.

19. Shri Bajaj, learned Counsel for the Respondent No. 1 has argued that Sub-rule (6) of Rule 6 of the Recruitment Rules, 1967 makes the provision that no person shall be confirmed in a post in district service unless he has satisfactorily put service for continuous period of not less than one year or completes period of his probation satisfactorily. So, according to the learned Counsel for the Respondent No. 1, confirmation would not be given unless there is satisfactory service of one year on promotional post and here, the Petitioner had not put in satisfactory service.

20. However, we do not think that Sub-rule (6) of Rule 6 of the Recruitment Rules, 1967 can be made applicable in the case of promotion. This rule can be made applicable only when there is recruitment for the first time in the district service. As it is, the Recruitment Rules, 1967 do not provide that a person be kept on probation or on trial basis after promotion. However, the rules also do not prohibit passing of such conditional order and, therefore, the Chief Executive Officer, in the given circumstances, found it proper or necessary to give conditional order. We do not think that such conditional order would be bad especially, when the Petitioner had taken advantage of such conditional order and has resumed duties on promotional post. He accepted the order with condition and now, he cannot, say that the condition is not binding on the Petitioner. So, the order directing that the promotion of the Petitioner would be subject to satisfactory service and specifying the limit of six months is quite legal, proper and valid.

21. The next question arises whether it can be said that on completion of period of six months as mentioned in the promotion order dated 21-9-1984, the Petitioner automatically was confirmed in the promotional post. Here, the learned Counsel for the Petitioner has relied upon the order of pay fixation and the order of transfer. But, once the Petitioner was promoted, whether temporary or on probation or on trial basis in the cadre of Senior Assistant, then he ought to have been paid salary of that cadre. So, in the normal course, the order of pay fixation is passed. That cannot be treated as confirmation of services in the cadre of Senior Assistant, although it was passed after the period of six months. Similarly, for administrative purposes, the Petitioner was transferred from one department to another department where there was work of Senior Assistant. So, that transfer order also does not imply that he was confirmed in the post of Senior Assistant.

22. The seniority list is produced on record by the Petitioner. It is at Exh.J pages 20 and 21 of the annexure of the petition. This is the final Seniority list and it is

not the seniority list of confirmed Senior Assistants. No doubt, the name of the Petitioner is appearing at Sr. No. 36 in the cadre of Senior Assistant but, it is worth noting that in Column No. 6, the Petitioner is shown "HANGAMI" that means, temporary and not permanent. So, as per the seniority list dated 1-4-1985, the Petitioner was treated as temporary Senior Assistant and not permanent or confirmed Senior Assistant. So, even this seniority list does not go to show that the Petitioner was confirmed in the cadre of Senior Assistant.

23. It is also worth noting that the wording of the order of promotion (Exh.A, page 8) mentions in the beginning,?

This means that the promotion was on trial basis for a period of six months. It was by way of interim arrangement or ad hoc arrangement and it was temporary promotion. The further conditions are there in the order of promotion but, we are concerned most with the condition No. 4, which reads,:

It means that till the promotion is not confirmed, the order of promotion was liable to be cancelled without giving any reason. So, this is an order of promotion but, subject to the condition that it is on trial basis and only if the services are found satisfactory, then he may be considered for confirmation. It was a temporary arrangement made on ad hoc basis. In such circumstances, the Petitioner cannot claim that because the period of six months has expired it should be deemed, that he was confirmed in the promotional post of Senior Assistant. The order of confirmation is necessary. Till then the promotion is on probation.

24. The learned Counsel for the Respondent No. 1 has relied upon the ruling of the Apex Court in the matter of State of Uttar Pradesh Vs. Akbar Ali Khan, . In the said matter, the Respondent was selected for permanent promotion in April, 1951. As per the Service Rules, there was probation period of two years for getting confirmation in the promotional post. However, by the order dated 13th August, 1957, the Respondent was reverted to the post of Naib Tahsildar and that order of reversion was challenged. It is observed in para 6, :

The scheme of the rules is clear; confirmation in the post which a probationer is holding does not result merely from the expiry of the period of probation, and so long as the order of confirmation, is not made, the holder of the post remains a probationer. It has been held by this Court that when a first appointment or promotion is made on probation for a specified period and the employee is allowed to continue in the post, after the expiry of the said period without any specific order of confirmation he continues as a probationer only and acquires no substantive right, to hold the post. If the order of appointment itself states that at the end of the period of probation the appointee will stand confirmed in the absence of any order to the contrary, the appointee will acquire a substantive right to the post even without an order of confirmation. In all other cases, in the absence of such an order or in the absence of such a service rule, an express order of confirmation is necessary to give him such a right. Where after the

period of probation an appointee is allowed to continue in the post without an order of confirmation, the only possible view to take is that by implication the period of probation has been extended, and it is not a correct proposition to state that an appointee should be deemed to be confirmed from the mere fact that he is allowed to continue after the end of the period of probation.

25. The Apex Court has made it clear that once the promotion is on probation or with conditional order then unless and until there is order of confirmation, the employee cannot claim that he is made permanent in the promotional post. The deemed confirmation only on the expiry of the period mentioned in the order is not contemplated. Here also, as we have pointed out, the order does not say that on the expiry of the period of six months, the Petitioner would be considered confirmed in the cadre of Senior Assistant. On the contrary, it is made clear that there must be an order of confirmation and unless and until that order of confirmation is there, he cannot be considered as confirmed in the cadre of Senior Assistant. In such circumstances, we do not agree with the argument advanced by the learned Counsel for the Petitioner that the Petitioner was confirmed in the cadre of senior Assistant only because he had worked for more than six months after the first period of six months had expired.

26. The learned Counsel for the Petitioner has also argued that if the Petitioner was not to be confirmed in the Cadre of Senior Assistant, then the order of reversion ought to have been passed within a reasonable period after completion of the period of six months but, here the order is passed after more than one and half years and that shows that the Petitioner was confirmed and it should be presumed that there was confirmation in the cadre of Senior Assistant. However, we do not agree with this because of the observations made by the Apex Court as above. It is true that there was some delay in passing the order of reversion but, it also has to be noted that the Petitioner was on leave from January, 1986 even after the date of reversion. In such circumstances, the delay might have been there in passing the order of reversion.

27. The order of reversion is based on assessment of the work done by the Petitioner on the post of Senior Assistant. The order dated 18-6-1986 (Exh. G, page-15 of the petition) makes it clear that as the work of the Petitioner was not found satisfactory, he was being reverted.

28. It may be that the remarks in his annual Confidential Reports or the reports submitted by his superiors, had been taken into consideration before passing the reversion order but those remarks and reports were taken into consideration to assess the work of the Petitioner and not to impose any penalty on him. The Respondent No. 1 was within his limits to consider the remarks and the reports to assess the work of the Petitioner as to whether he should be continued in the cadre of Senior Assistant or not. The Petitioner cannot say that as those remarks were not communicated to him, the Respondent No. 1 cannot act on those remarks. Those remarks or reports were to be taken into consideration to find out whether the services of the Petitioner were satisfactory to continue him in

the cadre of the Senior Assistant and for that limited purpose, they were taken into consideration. Those are not taken into consideration to penalise the Petitioner.

29. Here, the Discipline & Appeal Rules, 1964 make a specific provision regarding reversion as to when it is to be treated as penalty. Rule 4 lays down the penalties to be imposed and reduction to a lower grade is as one of the major penalties. However, explanation to this rule provides that the following shall not amount to penalty within the meaning of this rule, namely, revision (a) to a lower service, (b) to a lower grade, or (c) to a lower post of a Parishad servant officiating in a higher service, grade or post on the ground that he is considered after trial, to be unsuitable for such higher service, grade or post, or on administrative grounds unconnected with his conduct.

30. So, the Service Rules make it clear that if there is reversion to the lower grade of a person working on a higher post, and if it is on the ground that after giving trial, he was not found suitable, then it is not a penalty. In such circumstances, departmental enquiry is not contemplated.

31. The Petitioner was promoted with conditional order that it was on trial basis. During the period of his service in the senior cadre, his services were not found satisfactory. Reports to that effect were received as stated by the Respondent No. 1 in para 8 of the affidavit-in-reply and, therefore, as he was found unsuitable in the cadre of Senior Assistant, he was reverted. Therefore, even as per the Service Rules this reversion is not a punishment. Departmental Enquiry was not expected to be carried out for passing the order of reversion before the confirmation of the Petitioner in the cadre of Senior Assistant.

32. So, considering all these circumstances, the order of reversion as well as the order passed in appeal by the Respondent No. 2 cannot be interfered with.

33. The Petitioner has claimed, pay and allowances. However, it appears that all the pay and allowances are paid to him. Now, there is only dispute with respect to the diet allowance payable to an employee suffering from tuberculosis. The learned Counsel for the Respondent No. 1 has made a reference to Sub-rule 3(iv) of Rule 15 of the Maharashtra Zilla Parishads District Services (Medical Attendance) Rules, 1971. This rule makes a provision for payment of diet, allowance at the rate of Rs. 50/- p.m. or equal to the actual expenditure incurred, whichever is less. It further makes a provision that there should be a declaration in prescribed form from the employee to claim diet allowance, the learned Counsel for the Respondent No. 1 has argued that the declaration was not submitted duly countersigned by the Medical Attendant and, therefore, the Petitioner was not paid diet allowance. It thus, appears that the Petitioner had not submitted the declaration as per the rules and, therefore, the diet allowance was not paid. In the given circumstances, the Petitioner is not entitled to diet allowance. Hence, this aspect of the case also is to be answered in favour of the Respondent No. 1.

Hence, the writ petition stands dismissed. Rule is discharged.