
(2002) 05 RAJ CK 0106
In the Rajasthan High Court
Case No : Civil Special Appeal No. 637 of 1998

Ota Ram	Vs	APPELLANT
State of Rajasthan		RESPONDENT

Date of Decision : 03-05-2002

Acts Referred:

Rajasthan Jail Service Rules, 1959 — Rule 28, 28A
Rajasthan Service Rules, 1951 — Rule 34A

Citation : (2003) 2 RLW 910 : (2002) 3 WLC 317

Hon'ble Judges : Arun Kumar Mishra, C.J.; Asok Parihar, J

Bench : Division Bench

Advocate : R.D. Rastogi, for the Appellant; Ghanshyam Brijwasi, for the Respondent

Final Decision : Allowed

Judgement

Kumar, C.J.—This appeal is directed against the judgment of the learned Single Judge dated 12.8.97, dismissing the writ petition filed by the appellant.

2. Briefly, the facts of the case are that the appellant joined service as Dy. Superintendent, Jails, w.e.f. 1.3.85 after selection through the Rajasthan Public Service Commission. The appointment letter was issued on 14.2.85 and in pursuance thereof, the appellant joined service on 1.3.85. Since, this was a direct recruitment, the appellant was placed on probation for a period of two years under Rule-28 of the Rajasthan Jails Service Rules, 1959 (hereafter to be referred to as the Rules of 1959). Soon after joining, the appellant was sent for training for a foundational course. He completed the training in April/May, 1985.

3. The initial period of probation of the appellant came to an end on 28th February, 1987. The respondent sought to extend the period of probation by six months under Rule 34-A of the Rajasthan Service Rules, 1951 (for short, the Rules of 1951) vide order dated 8th April, 1987. The probation was further extended from time to time under the said Rule-34A. The orders by which the probation period was extended to not mention any reason for extension, much

less, there is any suggestion in the said orders regarding unsatisfactory performance of duties by the appellant. Rule 34-A of the Rules of 1951 is as under:

"Where an order of penalty of withholding of increments of a Government servant or his reduction to a lower service, grade or post, or to a lower time-scale, or to a lower stage in a time scale is set aside or modified by a competent authority on appeal or review, the pay of the Government servant shall notwithstanding anything contained in these Rules, be regulated in the following manner:

(a) if the said order is set aside, he shall be given for the period of such order has been in force, the difference between the pay to which he would have been entitled had that order not been made and the pay he had actually drawn;

(b) if the said order is modified, the pay shall be regulated as if the order as so modified had been made in the first instance.

Explanation : If the pay drawn by a Government servant in respect of any period prior to the issue of the orders of the competent authority under this rule is revised, the leave salary and allowances (other than travelling allowances), if any, admissible to him during that period shall be revised on the basis of the revised pay."

4. It is the case of the appellant that the said rule is wholly inapplicable for purposes of extension of probation period. Therefore, reliance placed by the respondents on the said rule for extending the period of probation was wholly illegal and as untenable. The learned counsel for the appellant has drawn our attention to Rule 28A of the Rajasthan Jails Service Rules, 1959, according to which, if no order of confirmation is issued by the Appointing Authority within a period of six months, after completion of two years probation period, an employee appointed on temporary or officiating basis is entitled to be treated as confirmed if permanent vacancies are available. The case of the appellant is that since no order of confirmation was issued within six months of completion of two years period of probation and since there was no allegation of unsatisfactory work against the appellant and permanent vacancies were available, the appellant was entitled to be treated as confirmed. Alternatively, it is submitted that in the first proviso to Rule 28-A (a) of the Rules of 1959, the period of probation could be extended for a maximum period of one year subject to certain conditions contained in the proviso. None of the conditions contained in the proviso apply in the case of the appellant. Neither he failed to give satisfaction so far as his work is concerned, nor other conditions applied, therefore, there could be no question of extension of period of probation by one year. Yet, it is argued that assuming that the period of probation could be extended by one year under the said proviso, the appellant completed the said period also by 29th Feb., 1988 and he was entitled to be treated as confirmed. At this stage, it will be appropriate to reproduce Rule 28.A(a) of the Rules of 1959, which reads as

under:

"28.A(a) Notwithstanding anything contained in the rule if no order of confirmation is issued by the Appointing Authority within a period of six months an employee appointed on temporary or officiating basis who has, after the date of his regular recruitment by either method of recruitment completed a period of two years service, or less in the case of those appointed by promotion where the period of probation prescribed is less, on the post of a higher post under the same Appointing Authority or would have so worked but for his deputation or training, shall on the occurrence of permanent vacancies be entitled to be treated as confirmed if the same conditions as are prescribed under the Rules for the confirmation of a probationer are fulfilled subject to the quota prescribed under the Rules and in accordance with his seniority.

Provided that if the employee has failed to give satisfaction or has not fulfilled any of the conditions prescribed for confirmation, such as passing of Departmental Examination, training or promotion cadre course etc. the aforesaid period may be extended as prescribed for probation or under the Rajasthan Civil Services Departmental Examination Rules, 1959 and any other Rules, or by one year, whichever is longer. If the employee still fails to fulfil the prescribed conditions or fails to give satisfaction, he will be liable to be discharged from such post in the same manner as a probationer or reverted to his substantive or lower post, if any, to which he may be entitled.

Provided further that no person shall be debarred from confirmation after the said period of service if no reasons to the contrary about the satisfactory performance of his work are communicated to him within the said period."

5. Out attention was particularly drawn to the second proviso to Rule 28A(a) and it was submitted on the basis thereof that since nothing was ever pointed out to the appellant by way of his service being unsatisfactory, he ought to have treated as confirmed under the said rule. There was nothing to debar the appellant from being confirmed. Reference to Rule 29 is also called for at this stage, relevant portion of which is reproduced as under:

"29. "Unsatisfactory progress during probation:

(1) If it appears to be the Appointing Authority, at any time, during or at the end of the period of probation, that a member of the service has not made sufficient use of his opportunities or that he has failed to give satisfaction, the Appointing authority may revert him to the post held substantively by him immediately preceding his appointment, provided he holds a lien thereon or in other cases may discharge or terminate him from service."

6. It will be seen from the aforesaid Rule 29 that the Appointing Authority has to take a decision at any time during or at the end of probation about satisfactory work of a probationer. If this decision is not taken during or at the end of the probation period, then the deeming provision contained in Rule 28A(a) regarding

automatic confirmation will come into play. In the present case, no such decision was taken by the Appointing Authority during or at the end of probation. Therefore, confirmation must follow.

7. Some further facts need mention at this stage. On 8th April, 1987, when an order of extension of probation period under Rule 34A of the Rules of 1951 was passed, another order suspending the appellant was also passed. This suspension was, however, revoked on 7th August, 1987 and, therefore, has no bearing on the case of the appellant.

8. A Memo was issued to the appellant under Rule 16 of the Rajasthan Civil Services (Classification, Control & Appeal) Rules, 1958 (for short, "the CCA Rules"), on 11.4.88, which was later on converted into Rule 17 of the CCA Rules. Ultimately, the charge-sheet was dropped on 28th June, 1990. Thus, this aberration can also not be taken against the appellant.

9. Learned counsel for the appellant pointed out that for the first time, the appellant was asked to improve his work vide letter dated, 30th April, 1988 (Annex.35). This was much beyond the period of prescribed under the Rules of 1959 referred to above, which entitled the appellant to be treated as confirmed.

10. In reply to the submissions made on behalf of the appellant, learned counsel appearing for the respondent was unable to controvert any of the facts stated. He was unable to justify the action of the respondent in invoking Rule 34A of the Rules of 1951 for extending period of probation in case of the appellant. Learned counsel for the respondent also did not dispute the fact that in the present case, the Rajasthan Jails Service Rules, 1959 were applicable. As a matter of fact, the impugned order dated, 28.2.1990, terminating the services of the appellant, was passed under Rule 29 of the said Rules. On merits, the only submission made on behalf of the respondent was that the work of the appellant was not satisfactory during the probation period. However, the learned counsel was unable to justify this oral submission on the basis of any record. In spite of our repeated enquiry, he was unable to point out anything on record whereby the appellant could be said to have been informed about unsatisfactory work on his part during the first three years of his service as Dy. Superintendent Jails.

11. We have perused the relevant rules which have been quoted above in this judgment. In our view, Rule 34A of the Rules of 1951 has no application in the facts of the present case. The said rule is attracted in cases of imposition of penalty on a Government on the basis of enquiry and has no relevance at all, in cases of extension of probation period as is the present case. Rule 34A does not refer to probation or extension of probation at all. Invocation of the said rule, therefore, in the present case for extension of probation period shows total non-application of mind on the part of the respondent. This is not once, but repeatedly in every letter regarding extension of probation Rule 34A of the Rules of 1951 was invoked.

12. Coming to the relevant rules contained in the Rajasthan Jails Service Rules,

1959, it is to be noted that under Rule 28A(a), the probation period can be extended maximum by one year under the first proviso to the Rule subject to conditions laid down in the said proviso, one of which being unsatisfactory performance. Not once the respondent informed the appellant that his service was unsatisfactory during the first three years of service. We have already pointed out that first time, any allegation of unsatisfactory work that was levelled against the appellant, was vide letter dated 30th April, 1988, which is much beyond the period of three years. In normal course, during the initial two years period of probation and before its expiry, the Appointing Authority has to take a decision, whether to extend the probation period on account of reasons mentioned in Rule 28A(a). The extension can be for a maximum period of one year. In the present case, no such decision appears to have been taken. In such an event, as provided in Rule 28A(a) of the Rules of 1959, a government servant was entitled to be treated as confirmed. It is no-bodies case that permanent vacancies were not available at the relevant time. Second proviso to Rule 28A(a), puts the matter beyond any pale of controversy by providing that no person shall be debarred from confirmation if no reasons to the contrary about the satisfactory performance of his work are communicated to him within the said period. In the present case, no reasons to the contrary about satisfactory performance of his work were communicated to the appellant during his initial three years" period of service, therefore, his confirmation could not be stopped and he is entitled to be treated as confirmed.

13. Before parting with the judgment, we would like to deal with the question as to whether present is the case of confirmation without any specific order having been passed by the Appointing Authority in this behalf? In normal course, the legal position is that there can be no automatic confirmation; being a positive act, specific order by the competent authority is required to be passed before an officer can be said to be confirmed in a post, In the present case, as per facts already noted, there is no specific order of confirmation passed qua the appellant. The position emerging from the relevant Rules in the present case, however, makes an exception to the normal rule regarding confirmation, the Rule itself provides that on completion of period of probation, unless specific order is passed to the contrary, an officer is to be treated as confirmed if permanent vacancies are available. The learned counsel for the respondent neither disputed the fact that the appellant could be treated as confirmed nor did he raise any dispute about availability of permanent post at the relevant time. Rule 29 of the Rules of 1959 enjoins upon the Appointing Authority to pass an order regarding extension of probation or revision of an officer on account of unsatisfactory work during or at the end of period of probation. In the present case, as already noted, the Appointing Authority failed to pass any such order. The consequence of this is that there could be no bar to the confirmation of the appellant and he was liable to be treated as confirmed. When the Rules specifically permit such a course of action and provide for deemed confirmation, there can be no bar in treating the appellant as confirmed.

14. Thus, the appellant was to be treated as a confirmed employee and his service could not be terminated by a simple termination order. His service could be terminated only by following the procedure prescribed in the CCA rules after holding enquiry. The order dated, 28.2.1990 purporting to be an order of termination of service of the appellant simpliciter without following the procedure under the CCA rules, is, therefore, not sustainable and is liable to be quashed. It is ordered accordingly.

15. The writ petition filed by the challenging the order of termination of his service dated, 28th Feb., 1990 was, therefore, liable to be allowed. Unfortunately, the learned Single Judge proceeded on totally different grounds, which in our view, were not germane for decision of the writ petition. The learned Single Judge, while deciding the writ petition, lost sight of the real issue involved in the case, which resulted in an erroneous approach.

16. This appeal is accordingly allowed. The judgment of the learned Single Judge is set aside. The Writ Petition filed by the appellant-petitioner is allowed. The impugned order of termination of service of the appellant dated, 28th Feb., 1990 is hereby set aside, the respondent is directed to process the case of the appellant for confirmation in accordance with Rule 28A (a) of the Rajasthan Jails Service Rules, 1959. In the facts and circumstances of the present case, the respondent is directed to pay costs to the appellant which are quantified at Rs. 2,000/-.