

(2010) 11 SHI CK 0274
In the High Court Of Himachal Pradesh
Case No : CWP (T) No. 7598 of 2008

Rattan Chand

APPELLANT

Vs

Himachal Road Transport Corporation and Another

RESPONDENT

Date of Decision : 29-11-2010

Acts Referred:

Probation of Offenders Rules, 1968 — Rule 12

Punjab Civil Services (Punishment and Appeal) Rules, 1952 — Rule 8

Citation : (2010) 11 SHI CK 0274

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Petitioner was appointed as Store-Keeper in the Respondent-corporation on 10.1.1971. Disciplinary proceedings were initiated against him in the year 1987. He was compulsorily retired from service on 28.4.1990. He challenged the order dated 28.4.1990 before the learned erstwhile Himachal Pradesh Administrative Tribunal by filing original application. The same was dismissed on 8.6.1998. Petitioner was advised vide letter dated 24.8.1998 to file pension and gratuity claim immediately. Thereafter Petitioner was informed by the Regional Manager to supply the documents mentioned in letter dated 1.4.1999. He was again advised to appear before the Regional Manager vide letter dated 4.10.1999. However, the fact of the matter is that till date Petitioner has not been paid pensionary/retiral benefits.

2. Ms. Ranjana Parmar has strenuously argued that her client has worked for more than 19 years and was entitled to pensionary/retiral benefits.

3. Mr. Adarsh Sharma has vehemently argued that since the Petitioner was not confirmed against the post of Store-Keeper, pensionary/retiral benefits could not be paid to him.

4. I have heard the learned Counsel for the parties and have gone through the

pleadings carefully.

5. It is not in dispute that the Petitioner was appointed as Store-Keeper on 10.1.1971 and has been compulsorily retired from service on 28.4.1990. He has worked for more than 19 years. The only objection taken by the Respondent-corporation to deny the pensionary/retiral benefits to the Petitioner is that he was not confirmed. Since the Petitioner has been appointed on 10.1.1971, it can safely be perused that the Petitioner had completed the maximum prescribed period of probation, i.e. two years. Respondent-corporation has not placed any material on record to prove that the Petitioner's conduct during these two years was not satisfied. In these circumstances, no specific order of confirmation was required to be issued and the Petitioner will be deemed to have been confirmed. Petitioner has not been treated in a just and fair manner by the Respondent-corporation. Even if it is presumed that period of probation was extended, the same could not be extended beyond the maximum period initially provided, i.e. two years. In totality, the period of probation could not go beyond four years and thereafter Petitioner was to be deemed to have been confirmed.

6. The law of confirmation by implication has been succinctly laid down by their Lordships of the Hon''ble Supreme Court in the State of Punjab Vs. Dharam Singh, as under:

9. Immediately upon completion of the extended period of probation on October 1, 1960, the appointing authority could dispense with the services of the Respondents if their work or conduct during the period of probation was in the opinion of the authority unsatisfactory. Instead of dispensing with their services on completion of the extended period of probation, the authority continued them in their posts until sometime in 1963, and allowed them to draw annual increments of salary including the increment which fell due on October 1, 1962. The rules did not require them to pass any test or to fulfill any other condition before confirmation. There was no compelling reason for dispensing with their services and re-employing them as temporary employees on October 1, 1960 and the High Court rightly refused to draw the inference that they were so discharged from services and re-employed. In these circumstances, the High Court rightly held that the Respondents must be deemed to have been confirmed in their posts. Though the appointing authority did not pass formal orders of confirmation in writing, it should be presumed to have passed orders of confirmation by so allowing them to continue in their posts after October 1, 1960. After such confirmation, the authority had no power to dispense with their services under Rule 6 (3) on the ground that their work or conduct during the period of probation was unsatisfactory. It follows that on the dates of the impugned orders, the Respondents had the right to hold their posts. The impugned orders deprived them of this right and amounted to removal from service by way of punishment. The removal from service could not be made without following the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and without conforming to the

constitutional requirements of Article 311 of the Constitution. As the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 was not followed and as the constitutional protection of Article 311 was violated, the impugned orders were rightly set aside by the High Court.

7. Their Lordships of the Hon'ble Supreme Court in *S.B. Patwardhan and Another Vs. State of Maharashtra and Others*, have held that confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. Their Lordships have further held that confirmation does not have to conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the Government.

Their Lordships have held as under:

39. If officiating Deputy Engineers belong to Class II cadre as much as direct recruits do and if the quota system cannot operate upon their respective confirmation in that cadre, is there any valid basis for applying different standards to the members of the two groups for determining their seniority? Though drawn from two different sources, the direct recruits and promotees constitute in the instant case a single integrated cadre. They discharge identical functions, bear similar responsibilities and acquire an equal amount of experience in their respective assignments. And yet Clause (iii) of Rule 8 provides that probationers recruited during any year shall in a bunch be treated as senior to promotees confirmed in that year. The plain arithmetic of this formula is that a direct recruit appointed on probation, say in 1966, is to be regarded as senior to a promotee who was appointed as an officiating Deputy Engineer, say in 1956, but was confirmed in 1966 after continuous officiation till then. This formula gives to the direct recruit even the benefit to his one year's period of training and another year's period of probation for the purposes of seniority and denies to promotees the benefit of their long and valuable experience. If there was some intelligible ground for this differentiation bearing nexus with efficiency in public services, it might perhaps have been possible to sustain such a classification. It is interesting that time and again the State Governments themselves found it difficult to justify the hostile treatment accorded to the promotees. In various affidavits filed on their behalf, entirely contradictory contentions were taken, sometimes in favour of the promotees and sometimes in favour of direct recruits. Instead of adopting an intelligible differentia, Rule 8 (iii) leaves seniority to be determined on the sole touchstone of confirmation which seems to us indefensible. Confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. A glaring instance widely known in a part of our country is of a distinguished member of the judiciary who was confirmed as a District Judge years after he was confirmed as a Judge of the High Court. It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been

confirmed. It shows that confirmation does not have to conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the government.

8. Their Lordships of the Hon''ble Supreme Court in *Om Parkash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow and Others*, have held that Regulations 17 of the U.P. Cooperative Societies Employees Service Regulations, 1975 did not permit continuation of an employee on probation for a period of more than two years, the necessary result would follow that after the expiry of two years probationary period, the employee stand confirmed by implication. Their Lordships have held as under:

3. The U. P. Co-operative Institutional Service Board constituted by the State of Uttar Pradesh in accordance with Sub-section (2) of Section 122 of the U. P. Co-operative Societies Act, 1965 has framed the U. P. Co-operative Societies Employees Service Regulations 1975 which regulate the condition of service of employee of all the co-operative societies placed under the purview of the Institutional Service Board by the Government Notification No. 366-C/XIIC-3-36-71 dt. March 4, 1972. These regulations contain provisions for recruitment, probation, confirmation, seniority and disciplinary control. Regulation 17 provides for probation, it lays down that all persons on appointment against regular vacancies shall be placed on probation for a period of one year. Proviso to the Regulation lays down that the appointing authority may, in individual cases, extend the period of probation in writing for further period not exceeding one year, as it may deem fit, Clause (ii) of the Regulation provides that if, at any time, during or at the end of the period of probation or the extended period of probation, it appears to the appointing authority that the employee placed on probation, has not made sufficient use of the opportunity offered to him, or has otherwise failed to give satisfaction, he may be discharged from service, or reverted to the post held by him substantively, if any, immediately before such appointment. Regulation 18 provides for confirmation of an employee on the satisfactory completion of the probationary period. Regulations 17 and 18 read together, provide that appointment against a regular vacancy is to be made on probation for a period of one year, this probationary period can be extended for a period of one year more. The proviso to Regulation 17 restricts the power of the appointing authority in extending period of probation beyond the period of one year. An employee appointed against a regular vacancy cannot be placed on probation for a period more than two years and if during the period of probation the appointing authority is of the opinion that the employee has not made use of opportunity afforded to him he may discharge him from service or revert him to his substantive post but he has no power to extend the period of probation beyond the period of two years. Regulation 18 stipulates confirmation of an employee by an express order on the completion of the probationary period. The regulations do not expressly lay down as to what would be the status of an employee on the expiry of maximum period of probation where no order of confirmation is issued and the employee is

allowed to continue in service. Since Regulation 17 does not permit continuation of an employee on probation for a period more than two years the necessary result would follow that after the expiry of two years probationary period, the employee stands confirmed by implication. This is implicit in the scheme of Regulations 17 and 18. In *State of Punjab Vs. Dharam Singh*, a Constitution Bench of this Court held:

Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication.

9. Their Lordships of the Hon'ble Supreme Court in *State of Gujarat Vs. Akhilesh C. Bhargav and Others*, have taken into consideration the executive instructions issued by the Ministry of Home Affairs, Government of India dated 16.3.1973 while considering the issue whether an order of confirmation has to be made or confirmation would follow automatically. In the instructions issued by the Ministry of Home Affairs, Government of India, it is stated that save for exceptional reasons, the period of probation should not, therefore, be extended by more than one year and no member of the service should, by convention, be kept on probation for more than double the normal period i.e. four years. Their Lordships have held as under:

4. Reliance has been placed on a series, of decisions of this Court which have held that an order of confirmation has to be made and confirmation would not follow automatically. The position here, however, is somewhat different.

5. While the Probation Rules prescribed an initial period of two years of probation it did not provide any optimum period of probation. Administrative instructions were issued by the Ministry of Home Affairs, Government of India, on 16th March, 1973, indicating the guidelines to be followed in the matter. The relevant portion thereof may be extracted:

(ii) It is not desirable that a member of the service should be kept on probation for years as happens occasionally at present. Save for exceptional reasons, the period of probation should not, therefore, be extended by more than one year and no member of the service should, by convention, be kept on probation for more than double the normal period i.e. four years. Accordingly, a probationer, who does not complete the probationers' final examination within a period of four years, should ordinarily be discharged from the service.

6. It is not disputed that the circular of the Home Ministry was with reference to

the Indian Police Service (Probation) Rules. We have not been shown that these instructions run counter to the rules. It is well settled that within the limits of executive powers under the Constitutional scheme, it is open to the appropriate Government to issue instructions to cover the gap where there be any vacuum or lacuna. Since instructions do not run counter to the rules in existence, the validity of the instructions cannot be disputed. Reliance has been placed in the courts below on the constitution Bench judgment of this Court, and which reported in *Sant Ram Sharma Vs. State of Rajasthan and Another*, here Ramaswami J. speaking for the Court stated thus (at P. 1914):

...We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principles to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

7. We are of the view that the rules read with instructions create a situation as arose for consideration by this Court in the case of *State of Punjab Vs. Dharam Singh*, The Constitution Bench of this Court in that case interpreted the Punjab Educational Service (Provincialised Cadre) Class III Rules and found that there was a maximum limit of three years beyond which the period of probation could not be extended. When an officer appointed initially on probation was found to be continuing in service beyond three years without a written order of confirmation, this Court held that it tantamounts to confirmation. In view of what we have stated above we are in agreement with the High Court about the combined effect of the rules and instructions. We hold that the Respondent stood confirmed in the cadre on the relevant date when he was discharged. For a confirmed officer in the cadre, the Probation Rules did not apply and therefore, proceedings in accordance with law, were necessary to terminate service. That exactly was the ratio of the decision in *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, On the analysis indicated above, the net result, therefore, is that the Respondent No. 1 had become a confirmed officer of the Gujarat I.P.S. cadre and under Rule 12 (bb) of the Probation Rules his services could not be brought to an end by the impugned order of discharge.

10. Similarly, their Lordships of the Hon''ble Supreme Court in *M.K. Agarwal v. Gurgaon Gramin Bank and Ors.* AIR 1988 SC 286 have held that maximum period under the Service Regulations 1980 probation was for 18 months and the probationer was neither confirmed nor discharged, then it was a case of implied confirmation. Their Lordships have held as under:

4. The first point need not detain us. The period of the probation was one year, in

the first instance. The employer could extend it only for a further period of six more months. The limitation on the power of the employer to extend the probation beyond 18 months coupled with the further requirement that at the end of it the services of the probationer should either be confirmed or discharged render the inference inescapable that if the probationer was not discharged at or before the expiry of the maximum period of probation, then there would be an implied confirmation as there was no statutory indication as to what should follow in the absence of express confirmation at the end of even the maximum permissible period of probation. In cases where, as here, these conditions coalesce, it has been held, there would be confirmation by implication. (See: State of Punjab Vs. Dharam Singh, Om Parkash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow and Others,

5. Now to the second point. The bank is constituted under the Regional Rural Banks Act 1976. Having regard to its constitution and nature of its legal entity and the measure of State control, it is an Instrumentality of the State and is made of latter's own "flesh and bones" and is, accordingly, "State" within the meaning, and for purposes, of Article 12 of the Constitution. The said Regn. 10(2) (a) provides:

10. Termination of service by notice:

(2)(a) The Bank may terminate the service of an -

(i) Officer after giving him three months' notice or pay in lieu thereof;

(ii) employee after giving him one month's notice or pay in lieu thereof;

(b) The power to terminate the service of an officer or employee shall be exercised by the Chairman.

This Court dealing with the constitutionality of similar provisions which enabled governmental authorities such terminations-simpliciter has held that the constitutional pledge of equality and the constitutional guarantee against arbitrary action contained in Article 14, frown upon conferment on the State or its instrumentalities such arbitrary power. See West Bengal State Electricity Board and Others Vs. Desh Bandhu Ghosh and Others, ; Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others,

It requires, therefore, to be held that impugned Regn. 10(2)(a) conferring as it does, on the Bank an arbitrary and unguided power is unconstitutional. Consequently, the order dt. 17-8-1982 of purported termination (Annex. 10) of Petitioner's services, which has for its foundation a provision which is unconstitutional would require to be and is hereby quashed.

11. Their Lordships of the Hon'ble Supreme Court in Bhaskar Gajanan Kajrekar Vs. Administrator, Dadra and Nagar Haveli and Others, have held that when the Petitioner had retired after 23 years of service, non-finalization of Recruitment

and Promotion Rules could not be the ground for keeping him unconfirmed for 23 years. Their Lordships have further held that the question of confirmation, which was due in 1967, could not be linked with inquiry, which was initiated much later. Their Lordships have held as under:

6. It is not disputed that the findings in the two enquiries were never communicated to the Appellant during the period of his service. Those were served on him only after retirement. The question of his confirmation which was due in the year 1967 could not have been linked with the enquiries which were initiated at a much later stage. The Departmental Promotion Committee should have considered the Appellant for confirmation on the basis of the record of the Appellant as existed in the year 1967/1968. There is no material before us to show that the service record of the Appellant prior to 1970 was adverse in any manner rather the averments made by the Appellant in the rejoinder to the effect that there was nothing adverse against him on the record prior to 1971, have not been controverted. Even the Departmental Promotion Committee found the confidential reports of the Appellant for the last three years as good. We are of the view that on the availability of a permanent post of Chief of Police on 14/06/1967 the Appellant was entitled to be confirmed against the said post. It was wholly arbitrary for the Respondents to have deferred the question of confirmation of the Appellant on the ground that there were no recruitment rules. We, therefore, hold that the Appellant having served the Respondents for about thirteen years on 14/06/1967 when the post of Chief of Police was made permanent and there being nothing adverse against him at that point of time, he was entitled to be confirmed in the said post. In that view of the matter the Appellant was a confirmed employee when he retired from service on 31/07/1977.

7. We, therefore, direct the Respondents to treat the Appellant as having been retired as a confirmed employee and fix his pension and other postretiral benefits on that basis. We further direct the Respondents to complete the pension case of the Appellant within three months from today and pay him all the arrears of the pension within two months thereafter along with 12% interest on the said arrears. We allow the appeals with costs which we quantify as Rs. 10,000.00.

12. In the instant case also, Petitioner was appointed in the year 1971 and no adverse material has been placed on record to show that the conduct of the Petitioner was not satisfactory even upto the maximum period of probation, i.e. 1974. He was required to be confirmed since he had already put in 19 years of service.

13. Their Lordships of the Hon^{ble} Supreme Court in *Jaswantsingh Pratapsingh Jadeja v. Rajkot Municipal Corporation and Anr.* (2007) 10 SCC 71 while interpreting Bombay Civil Services Rules have held that in the absence of any specific provision permitting extension of probation, Appellant deemed to have been confirmed on completion of initial probation period. Their Lordships have held as under:

10. We may apply the said tests in the instant case. In the instant case, the language used in the impugned order is ex facie stigmatic. It referred to the earlier orders containing allegations of misconduct on the part of the Appellant and the fact that he had been found guilty thereof. Appellant was said to have been absented from duties. He had been found guilty of negligence, carelessness and showing absolute disregard towards his duties. A disciplinary proceeding was initiated therefor. His explanation to the show cause notice was rejected. He was, therefore, found guilty of the charges leveled against him. Only thereafter, he was discharged from service by reason of the impugned order dated 29.4.2003.

14. In view of the definitive law laid down by their Lordships of the Hon''ble Supreme Court, the Petitioner will be deemed to have been confirmed as Store-Keeper. Accordingly, the petition is allowed. The Petitioner will be deemed to have been confirmed as Store-Keeper for all intents and purposes. Respondents are directed to release the pensionary/retiral benefits to the Petitioner after counting his entire qualifying service with effect from 1971 till 28.4.1990. Petitioner is held entitled to interest @ 7% per annum on the retiral/pensionary benefits. Needful be done within a period of two months from the date of production of certified copy of this judgment by the Petitioner. No costs.