(2005) 05 OHC CK 0035

In the Orissa High Court

Case No : Original Jurisdiction Case No. 2333 of 1991

Smt. Astamija Dash APPELLANT

Vs

Punjab National Bank and Others RESPONDENT

Date of Decision : 20-05-2005

Acts Referred:

Citation : (2005) 100 CLT 385 : (2005) 107 FLR 969 : (2006) 2 LLJ 32 : (2005) OLR 745 Supp

Hon'ble Judges : P.K. Mohanty, J;J.P. Mishra, J

Bench : Division Bench

Advocate : Jagannath Patnaik, H.M. Dhal, B.B. Ray, S.K. Patnaik and S.K. Satpathy, for the Appellant; B.B. Rath, B. Rath, J.N. Rath and S. Ghosh, for the Respondent

Final Decision : Allowed

Judgement

P.K. Mohanty, J.—The petitioner calls in question the order terminating her services in accordance with the terms and conditions of appointment (Annexure-3) and has prayed for the following reliefs :

"Under these circumstances the petitioner most humbly prays that this Hon''ble Court may be graciously pleased to pass a Rule Nisi calling upon the Opposite Parties to show cause as to why

(i) the order under Annexure-3 shall not be quashed;

(ii) it shall not be declared that the petitioner is deemed to be continuing in service under the Opposite Parties;

(iii) it shall not be declared that the petitioner is deemed to be confirmed in the Bank service on the expiry of 3 years from the date of her joining in the Bank services;

(iv) it shall not be declared that the confirmation test as postulated in Annexure-1 is ultra vires of the Bank''s Regulation, 1979 and the same cannot be enforced against the petitioner.

(v) the orders under Annexure-4 series dated 28.11.1990 and 18.3.1991 rejecting the appeal of the petitioner shall not be declared illegal;

(vi) it shall not be declared that the confirmation test held on 19.8.1990 is bad and illegal and the result thereof in respect of the petitioner is also illegal;

(vii) it shall not be declared that the petitioner is entitled to all the service benefits being a confirmed officer of the Bank on the expiry of the period of 3 years form the date of joining in the Bank services.

2. The short facts of the petitioner''s case is that she was appointed as a Management Trainee in the Punjab National Bank being duly selected by the Banking Service Recruitment Board, Delhi on the terms and conditions as laid in Annexure-1 dated July 28 1986. She was asked to appear in the confirmation test scheduled to be held on 29.5.1988 but despite miscarriage of conception, she appeared at the test but failed. She again was asked to appear on 5.9.1989 at the confirmation test and because of her pregnancy she could not appear at the test. The petitioner again appeared at the confirmation test held on 19.8.1990 but failed. By order dated 9.11.1990, the services of the petitioner were terminated on the ground that she could not succeed in the confirmation test in terms of the appointment order. She filed an appeal but the same was rejected and, hence the present Writ Application.

3. The main thrust of the argument of the learned counsel for the petitioner is that the services of the petitioner have no relationship with the conditions imposed in the appointment order. The petitioner having rendered services for a maximum period of probation is deemed to have been confirmed after expiry of the said period as no extension thereafter was permissible. Once this period is over, the termination order is bad. Non-passing of the confirmation test, according to the petitioner, cannot be a disqualification since the test is not contemplated under the Punjab National Bank Officer Employees (Conduct) Regulations, 1977 and Punjab National Bank (Officers) Service Regulations, 1979. The terms and conditions imposed upon the petitioner in the appointment order are ultra vires the regulations framed by the Bank in exercise of statutory power. The Bank having imposed different conditions of service other than the Nationalised Banks, the same is discriminatory and contrary to the public policy. The petitioner having not been able to appear at the test due to her physical disability, she ought to have been offered another chance like other officers of the Bank, namely, Miss. Indubala, Brijen Kousal, Kanwarjeet Singh, Kajli Thomas and W. J. Minz.

4. The opposite parties in their counter affidavit denied the claim made by the petitioner. It is the specific case of the Opposite Parties that the termination of the petitioner''s service is strictly as per the terms and conditions of contract of appointment. The petitioner having accepted the terms and conditions of appointment as contained in the appointment order, she is estopped from

challenging the same. The petitioner having been offered ample opportunity to get herself confirmed by qualifying in the Bank''s Confirmation Test and having miserably failed to succeed in the test, cannot complain of any discrimination.

5. The main questions that need determination are (a) as to whether the terms and conditions laid in the offer of appointment dated 28.7.1986 (Annexure 1) with regard to passing of a confirmation test is contrary to the Service Regulations and, as such, not binding on the petitioner; (b) as to whether the petitioner having been allowed to continue beyond the period of two years as stipulated in the terms of appointment is deemed to have been confirmed in the service without requiring her to pass the confirmation test and (c) whether she has been discriminated having not been offered another chance to clear the conformation test as in case of Indubala whose services were terminated during the probation period having not been successful in three chances but was given another chance to appear in the confirmation test and thus was given reinstatement.

6. The petitioner was appointed as a Management Trainee in the Bank on the terms and conditions stipulated in letter dated 28.7.1986 (Annnexure 1). Clause 2 of the letter stipulated as under:

"You will be on training/probation for a period of 2 years from the date of your joining the Bank and you will be considered for confirmation in the service, subject to your satisfactory report on your training, passing Bank''s confirmation test and receipt of satisfactory report from the Police authorities about your character and antecedents. You may also be required to pass a test in a language other than your mother tongue before confirmation.

In the event of your not satisfactorily completing the training referred to above or failure to qualify the Bank''s confirmation test within the training/probation period of two years or to pass the test in a language other than your mother tongue, your probation may be extended by a further period not exceeding one year.

(Emphasis supplied)

The appointment was to be governed by the Punjab National Bank Officer Employees (Conduct) Regulations, 1977, Punjab National Bank Officer Employees (Discipline and Appeal) Regulations, 1977 and Punjab National Bank (Officers) Service Regulations, 1979 and other rules and conditions of service laid down by the Bank from time to time for its officers as stipulated in Clause 4 of the letter.

7. Shri Jagannath Patnaik learned Senior Advocate for the petitioner, referring to Clause 16 of Chapter IV of the Punjab National Bank (Officers) Service Regulations, 1979 (hereinafter called the ''Service Regulations, 1979'') submits that confirmations of a Management Trainee like the petitioner has to be made in accordance with Clause 16 of the Service Regulations, 1979 and there is no provision for conducting a confirmation test for such officers in order to find out

that the officer is fit to be confirmed in the service. Emphasis is laid on Sub-clause (1) of Clause 16 that the competent authority has to formulate opinion as to the satisfactory completion of the training in any institution to which the officer may have been deputed for training and the in-service training in the Bank. If in the opinion of the competent authority an officer has not satisfactorily completed either or both the trainings referred to therein, the officer''s probation may be extended by a further period not exceeding one year. It is submitted that the only test that is contemplated under the proviso to regulation 16(1) is a test in a language other than the mother tongue and not a test to ascertain the merit or performance of an officer for the purpose of confirmation. According to the learned counsel the stipulation and conditions made in the offer of appointment being contrary to the Service Regulations has no binding force even if the petitioner at the time of appointment had accepted the said terms contemplating a confirmation test.

Learned Counsel has relied on a decision of the Apex Court in State of Punjab Vs. Dharam Singh, in support of his contention that where the Service rules fix a certain period of time beyond which the probationary period cannot be extended and 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 has to be deemed to have been confirmed. The petitioner having been allowed extension of one year, he ought to have been treated as deemed confirmed. However this case is of no assistance to the petitioner since what the Apex Court held in Dharam Singh''s case was that where the Service Rules stipulates a period of probation beyond which it could not be extended and in spite of that an employee has been permitted to continue beyond such period without being confirmed in service, he cannot be deemed to be in probation thereafter. In such situation when the probation was allowed to continue beyond the maximum period of probation in which an employee could continue, an inference could be drawn that he has been confirmed. This ratio has been followed in Om Parkash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow and Others, . The authority continued them beyond the maximum period of probation in their posts and allowed them to draw annual increments and the rules did not require them to pass any test or fulfill any other conditions before confirmation, there could be no compelling reason for dispensing with their services and reemploying them as temporary employees. The facts and circumstances of the case in which the Apex Court rendered the judgment are quite different and the ratio as such is not applicable to the case of the petitioner.

In Municipal Corporation, Raipur Vs. Ashok Kumar Misra, , the Apex Court distinguished the case of Dharam Sing and Om Prakash (supra) and held that mere expiry of the period of probation did not automatically have the effect of deemed confirmation. The Apex Court observed that if the rules do not empower the appointing authority to extend the period of probation beyond certain period or where the rules are absent about confirmation or passing of the prescribed test for confirmation of probation and inaction for a very long time may lead to an indication of the satisfactory completion of probation. But where the rules expressly prescribes otherwise and it is said that the period of probation is subject to extension by order in writing for another period of one year, passing the examination and successful completion of probation and test to make an order of confirmation as a condition precedent, in such a case mere expiry of the initial period of probation does not automatically have the effect of deemed confirmation. In the case at hand, the petitioner was allowed chances to appear at and clear the confirmation test, she did take the chances but failed to clear such examination.

Learned Counsel for the Opposite Party Bank has referred to a judgment of Allahabad High Court in General Manager, Punjab National Bank and Ors. v. Khar Bhan Ram in Special Appeal No. 283 of 1992 dated 26.9.1994 to contend that in an exactly similar case the Division Bench of the Allahabad High Court has rejected the contention of the petitioner therein that in view of rule 16 of Chapter IV of Punjab National Bank (Officer) Service Regulations, 1979, a confirmation test is impermissible and is not an essential pre-requisite for confirmation in service. It appears form the copy of the judgement in the aforesaid case submitted by the learned counsel for the Opposite Parties that the Division Bench of the Allahabad High Court in a similar situation repelled such contention and has taken the view that Rule 16 of Chapter IV of the relevant Service Regulations clearly prescribes satisfactory completion of training as an essential pre-requisite for confirmation in service and that the Bank''s confirmation test would clearly fall within the ambit of this requirement. We are in agreement with the view taken by the Division Bench of the Allahabad High Court in the aforesaid case.

8. The petitioner admittedly had accepted the terms in Clause 2 of the letter of appointment which postulated that in the event of the petitioner not satisfactorily completing the training or failure to qualify the Bank''s confirmation test within the training/the probation period of two years or to pass the test in language other than the mother tongue, the probation may be extended by a further period not exceeding one year. The petitioner in terms of the conditions appeared at the confirmation test conducted by the Bank and in such situation when she has failed to qualify in the test, she is estopped from challenging the stipulation/ condition of confirmation test as being not contemplated under the Service Regulations.

9. The learned Counsel for the petitioner lastly contended that since the Bank in a similar situation has allowed one Miss Indubala to appear at the test beyond the three chances, she ought to have been offered another chance to clear the confirmation test and since that has been denied to her, she has been discriminated against. In contra, the opposite parties have taken the stand that Miss Indubala was a prior trainee and stands on a different footing. Miss Indubala could not avail the third and final opportunity given to her by the Bank due to unavoidable circumstances whereas the petitioner has availed the same but

failed to qualify and , therefore, her termination was legal and justified and her case could not be treated as similar to that of Miss Indubala. A reference has been made to the Executive Committee decision of the Bank held on 16.8.1989 annexed as Annexure-A/1 wherein the case of Miss Indubala was considered. In the Executive Committee it was decided that in accordance with its earlier decision, Management Trainees shall be allowed only three chances to qualify in the confirmation test failing which their services shall be automatically terminated. Miss Indubala having failed to avail the last and final opportunity given to her to qualify in the confirmation test on account of her mother''s illness the Committee decided that she may be given yet another opportunity to appear at the confirmation test and in the event she qualifies in the test, she would be reinstated and confirmed in the Bank''s service.

10. In the further affidavit filed on behalf of the Opposite Parties at para-5, it has been submitted that both the cases, i.e., the case of the petitioner and that of Miss Indubala stand on different footing. Indubala is not a batchmate of the petitioner and she joined as Bank''s Management Trainee on 12.11.1984. She was called for the confirmation test on 13.7.1986 but she did not appear in the said test. She was given another chance for confirmation test held on 26.4.1987, she appeared but failed. She was again called for confirmation test held on 29.5.1988 as per the decision of the Executive Committee of the Bank but she could not take the confirmation test this time due to her illness and accordingly her services were terminated by the Bank on 29.5.1988. On appeal, the matter was put up before the Executive Committee of the Bank and the Executive Committee in its meeting held on 16.8.1989 decided that in view of the fact that Indubala could not avail of the last i.e. 3rd chance due to her illness, she may be afforded another opportunity to appeared at the confirmation test and this is how Indubala was given one more chance. But the decision of the Executive Committee dated 16.8.1989 reveals that Miss Indubala could not avail of the last and final opportunity given to her to qualify in the confirmation test on account of her mother''s illness and therefore, it was decided that she should be afforded another opportunity. It is interesting to note that in the counter as well as in the additional affidavit filed by the opposite parties a stand has been taken by the Bank that it was because of the illness of Miss Indubala that she was afforded another chance beyond the three chances whereas the decision of the Executive Committee (Annexure-A/1) reflects that she could not appear because of her mother''s illness. The counter affidavit filed by the Bank to this effect is factually incorrect.

11. The petitioner''s consistent case which has not been denied in the counter affidavit was that she was asked to appear in the confirmation test to be held on 29.5.1988 but due to miscarriage of her conception in the month of April 1988, the petitioner had to stay alone at the place of posting and could not prepare for the examination, The next test was held on 1.10.1989 and at that point of time, she being in the advanced stage of pregnancy on the advise of the doctor not to move since she has miscarriage on two occasions, could not attend the test. The

petitioner was again asked to appear at the confirmation test on 19.8.1990 and according to her she having undergone caesarian delivery, she was advised rest by the doctor and her son by the time she was to appear at the examination was only six months old and was not keeping good health. She therefore could not do well for which she had prayed for another chance to appear at the test. The. case of Miss Indubala, however stands on a much weaker footing, as would be evident from the counter affidavit filed by the Bank. Indubala''s appeal was allowed on the grounds that she could not appear at the third chance because of the illness of her mother. However, in the counter affidavit it has been stated that she was allowed due to her illness which is contrary to the facts stated in the decision of the Executive Committee by which her appeal was allowed allowing her another chance to appear at the test. The Opposite Party-Bank, however, has taken a stand that it was solitary case and one wrong cannot justify another wrong and, as such, the petitioner could not claim advantage relying on the same. We are not able to appreciate as to if Indubala was allowed a fourth chance for the reason that she could not appear at the test because of her mother''s illness, how the Executive Committee could not take a sympathetic decision when the petitioner herself had undergone surgical operation and suffered several other ailments. We area also not able to appreciate as to how the case of the petitioner does not stand on the same footing as that of Miss Indubala and, as such she would not be entitled to the same treatment. Thus the contention of the learned counsel that the petitioner''s case having stood on a much better footing than that of Miss Indubala who was allowed.a fourth chance of appearing at the confirmation test on the ground of her mother''s illness has been rejected and, therefore, she has been discriminated against, has sufficient force. It appears that the petitioner''s case compared to the case of Miss Indubala stands on a much better footing. She was suffering from ailment and had undergone surgical operation herself but her appeal has been dismissed whereas the appeal filed by Miss Indubala has been allowed on the ground that she could not appear at the confirmation test because of her mother''s illness. In our considered opinion, personal ailment of the petitioner is a better ground than the ailment of the mother of an employee which prevented her from appearing at the confirmation test.

12. In such view of the matter, the impugned order rejecting the petitioner''s appeal suffers, from the vice of discrimination and as such illegal and arbitrary. The appellate order thus has to be quashed and is quashed accordingly. However, the petitioner''s appeal is remitted back to the appellate authority for fresh consideration of her case in accordance with law keeping in view the order passed in the case of Miss Indubala.

The Writ Petition is, therefore, allowed to the extent indicated. But, however, there shall be no order as to costs.

J. P. Mishra, J.

13. I agree.

