
(1989) 07 BOM CK 0041

In the Bombay High Court

Case No : Writ Petition No. 1059 of 1988 and Notices of Motion No's. 3562 and 2662 of 1988

Vinayak Dashrath Sontakkey (Dr.)

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 31-07-1989

Acts Referred:

Constitution of India, 1950 — Article 309, 311

Citation : (1990) 1 BomCR 280

Hon'ble Judges : S.M. Daud, J

Bench : Single Bench

Advocate : A.P. Shah and M.L. Patil, for the Appellant; N.H. Gursahani and L.C. Chogle, for the Respondent

Judgement

S.M. Daud, J.—Petitioner, a Deputy Director of Health Services, invokes Article 226 to protect and further his career in the Public Health Department of the State of Maharashtra.

2. Petitioner and three others while holding different posts were appointed as Deputy Directors on a recommendation of the Maharashtra Public Service Commission. This was under Government Resolution dated 2-11-1981 which is at Ex.A. The clause in regard to probation therein reads thus :

"All the officers will be on probation for a period of 2 years from the date they take over a charge of the post. In case they do not complete the period of probation of 2 years satisfactorily the same may be extended by Government by such period as it may consider proper. If during the extended period, their performance remains unsatisfactory, their services are liable to be terminated without notice and they are liable to be posted back to their substantive appointments as the case may be."

He was selected for a W.H.O. fellowship to study Expanded Programme on Immunisation in Thailand and Sri Lanka. The order at Ex. B extended

petitioner's probation period in proportion to that during which he was to be away from his post. Consenting to a deputation, petitioner was seconded to the Pimpri- Chinchwad Municipal Corporation as a Medical Officer of Health. Whilst there petitioner who had applied for confirmation to the Director of Health Services, was informed that a proposal for the expiration of his probation had been forwarded to the Government. This was on 18th April, 1984. Prior to this i.e. on 5-10-1983, the Government in the Public Health Department communicated adverse remarks from the 1981-82 and 1982-83 confidential reports to petitioner. The first related to his lack of initiative and drive while the second remarked that his District Health Officers had not been made to achieve better results and that his attitude to work was casual. Petitioner lodged a strong protest. For the year 1983-84 his performance was described as mediocre and not satisfactory at the best. Again the petitioner protested. The protests were over ruled and petitioner so intimated under a letter dated 10th February, 1986. Earlier on 20th September 1984, Government had extended petitioner's probation upto 23-1-1985. The communication so intimating acknowledged that in the normal course the probation should have expired on 23-1-1984. On 26-12-1985 Government informed petitioner of its desire to hold an enquiry against him under Rule 8 of the Maharashtra Civil Services (Discipline & Appeal) Rules, 1979. Briefly the enquiry was in relation to irregularities in the matter of purchase of drugs, equipment and instruments as also making appointments to Class IV posts in contravention of rules and "for some ulterior motives". Having regard to this decision, Government on 2nd January, 1986 issued Ex. Z, the material part whereof reads thus :--

"The probation period of Dr. Sontakke is therefore extended from 23rd January, 1985 to 1st January, 1987 or till the end of departmental action taken against him, whichever takes place earlier."

The enquiry had been entrusted to the Special Officer, Departmental Enquiries at Pune and is yet in its infancy.

3. The present petition was filed on 6-4-1988. The case put forth by petitioner is that under the terms of appointing him to the post of Deputy Director, his probation ended on 23-1-1984. Respondents were not at liberty to extend the probation and certainly not after the expiry of the outer limits specified in the communications dated 20th September, 1984 and 2nd January, 1986. The adverse remarks were false and contrary to what the 2nd respondent had observed in several laudatory communications addressed to the petitioner. The enquiry proposed to be held against him was based on non-existent grounds. Lapses identical to those ascribed to him were attributed to other Officers. A Joint Director had carried out a preliminary enquiry and submitted a report of exoneration. The report had been accepted by the Government and it was not at liberty to discriminate against him and commence a departmental enquiry for the same lapses. The non-confirmation and proposed departmental enquiry were affecting his future prospects. His juniors had superseded him to a higher post.

The adverse remarks and contemplated departmental enquiry be disregarded. Various reliefs flowing from the above were sought in the petition lodged on 6-4-1988.

4. Petitioner moved Motion No. 2662 of 1988 so that respondents considered his suitability for promotion to the exclusion of the adverse confidential reports and extension to his probation made on 20-6-1988. While admitting the writ petition, respondents had been restrained from filling up the posts of Joint Directors until the said petition's disposal. It is to get over this interim restraint that respondents have moved Motion No. 3562 of 1988 to fill up one post of Joint Director. It is not necessary to decide these motions separately for the disposal of the writ petition will make the motions superfluous.

5. The petition has undergone certain changes pursuant to happenings subsequent to its admission. By a Government Resolution dated 20th June, 1988, petitioner's probation was extended till the finalisation of the departmental enquiry initiated against him. Petitioner challenges this resolution as mala fide and actuated by the intent to deny him an overdue promotion to the ranks of a Joint Director. Having regard to the Government Resolution dated January 2, 1986, petitioner stood confirmed on 1st January, 1987 and this could not be undone by the Government Resolution of 20th June, 1988. Respondents deny any limitation to their power to extend probation.

6. Pleadings summarised above give rise to two broad questions : One, whether petitioner stands or is to be treated as confirmed and if so whether and from when is he entitled to be considered for promotion and two, whether the adverse remarks and the departmental enquiry initiated against petitioner deserve to be quashed? These issues are being considered simultaneously in view of a great degree of overlapping of the material germane to them.

7. Mr. Shah submits that having regard to the terms of his client's appointment, petitioner stood confirmed on 23-1-1984. The subsequent three extensions made on 20-9-1984, 2-1-1986 and 20-6-1988 were exercises in futility. Alternatively, there could be no revival of probation after 1st January, 1987 having regard to the clear inference flowing from the Government Resolution dated 2-1-1986. The reply is that Government's power to extend probation comes to an end only after its servant is expressly confirmed. For petitioner reliance is placed upon M.K. Agarwal Vs. Gurgaon Gramin Bank and Others, and Shivkumar Sharma v. Haryana State Electricity Board, at page 1673 in the same journal. Respondents counter with State of Uttar Pradesh Vs. Akbar Ali Khan, and Shri Kedar Nath Bahl Vs. The State of Punjab and Others, . These lay down what is expressed in the following excerpt from para 9 of the last mentioned decision :

"Where a person is appointed as a probationer in any post and a period of probation is specified it does not follow that at the end of the said specified period of probation he obtains confirmation automatically even if no order is passed in that behalf. Unless the terms of appointment clearly indicate that

confirmation would automatically follow at the end of specified period, or there is a specific service rule to that effect, the expiration of the probationary period does not necessarily lead to confirmation. At the end of the period of probation an order confirming the officer is required to be passed and if no such order is passed and he is not reverted to his substantive post, the result merely is that he continues in his post as a probationer."

M.K. Agarwal's case (supra) predicates confirmation where there is an order for neither confirmation nor discharge at the end of the maximum prescribed period of probation. The limitation on the period of probation was by Regulations framed under the Regional Rural Banks Act of 1974. The Regulations did not prescribe what would happen at the end of the probation period with the employee still continuing in employment. The omission coupled with the continuance were held to amount to confirmation by implication. Shivkumar Sharma (supra) deals incidentally with the question of confirmation. In fact it recognises the perils of a Government servant not being automatically confirmed after the expiry of probationary period when it enjoins Government and other authorities to think over the problem and relieve Government servants of becoming victims of arbitrary action pursuant to archaic rules.

8. Tested in the light of the foregoing it cannot be said that petitioner stood confirmed on 23-1-1984 or 23-1-1985 or even 2-1-1986. On each occasion the power of extension was exercised after the expiry of the last outer limit of the probationary period. But the continuance in service was as a probationer and not as a confirmed employee. This cannot be said as from 1st January, 1987. On 2-1-1986. Government took into consideration the long pending issue of petitioner's confirmation as also the departmental enquiry. The Joint Director enquiring into the lapses committed by another Deputy Director of the State had submitted his report on 9-2-1985. Petitioner's departmental superior the Director of Health Services does not seem to have disfavoured the idea of confirming him. As early as 18-4-1984, the Directorate had informed petitioner that Government had been moved by it to terminate his probation. It is only in this background can one understand the Government Resolution of 2-1-1986. This time an outer limit in terms of alternatives was placed on the extended probation. The limit was 1st January, 1987 or the end of the departmental action taken against him whichever took place earlier. The argument is that the Government Resolution does not say that at the end of the outer limit petitioner will stand confirmed. Therefore on 1st January, 1987 petitioner did not stand confirmed. Pressing the ratio of Kedar Nath Bahl (supra) petitioner merely continued as a probationer and this because of indulgence shown to him, though he could have been reverted to his substantive post. The argument forgets the consequences of the Government Resolution of 2-1-1986 Government bound itself to a certain outcome on the happening of the first of the alternatives in point of time. None of the previous probation extensions were so worded. Until 1st January, 1987 Government could have amended the Government Resolution of 2-1-1986 for neither of the outer limits of that Government Resolution had

been reached. Government waited till nearly 27 months after the lodging of the petition on 6-4-1988 and then issued the order of 20-6-1988. But on 1-1-1987 the probation ended and as petitioner was not reverted to his substantive post, by an implication clear and imperative stood confirmed. The clock could not be set back nearly 18 months later by the innocently worded Government Resolution of 20-6-1988. A power of this nature does not flow from the authorities relied upon by the respondents. In fact the recognition of such a power could justifiably be used to undo express confirmations and more. Nothing more destructive of civil service stability or morale can be conceived of. To conclude petitioner stood confirmed on 2nd January, 1987 and the Government Resolution dated 20-6-1988 is a nullity.

9. This brings me to the adverse remarks in the confidential reports of petitioner for the years 1981-82 to 1983-84 (both inclusive). Petitioner contends that these went against the laudatory communications sent during the same period to him. These communications are annexed at Exs. E to H to the petition. Respondents contend that the communications were meant to convey the Public Health Department Secretary's appreciation of the work done by the department as a whole and did not constitute a comment on petitioner's individual performance. A certain degree of self-contradictoriness is clear but nothing much turns thereon. Government had a right to take an overall view and the delaying of the confirmation till 1st January, 1987 cannot be faulted.

10. The petitioner takes exception to the initiation and prosecution of the departmental enquiry against him. The argument is that other Deputy Directors were exonerated and not proceeded against though the charges levelled at them were indetical to those levelled against the petitioner respondents plead a vast difference in the situations. It would not be correct to interdict a departmental enquiry on a seeming discriminatory exercise of power specially when petitioner has not been even transferred from Pune where the acts of misconduct are said to have been committed. This however does not settle the controversy for there remains the question as to what bearing the departmental enquiry has on petitioner's claim to either promotion or considerations for promotion.

11. Petitioner claims that he should be directed to be promoted with effect from 5-12-1984 when his juniors were promoted. The post of a Joint Director to which petitioner aspires is not the last rung in Class I posts. That rung is occupied by the post of a Deputy Director. Government Resolution No. SRV-1074/D G.A.D. dated 28th January 1975 lays it down that promotion above the first promotion to Class I should be strictly by selection. This has to be decided by the authorities concerned and cannot go by the rule of thumb notions of length in service Lack of confirmation is not to be an impediment in the eligibility of petitioner to promotion. This is because the Government Resolution of 28th January 1975 itself prescribes positive merit and achievement of tangible good results as primary requirements coupled with previous service where that be an eligibility criterion. There is one post of a Joint Director waiting to be filled in and

petitioner may be considered therefor. I hold that he is eligible for such consideration for the reasons given below.

12. The issue of promotion of persons whose conduct is under investigation is covered by G.A.D. Circular dated 2nd April 1976. This circular is a complete code on the subject, and, if I may say so the epitome of fairness combined with rectitude. It speaks of three stages in the processing of such cases. First, is the stage of preparation of select list. An officer facing departmental enquiry is to be considered in the same manner as others i.e. on the basis of previous service record. If found fit, his name is to be included at the appropriate place in the select list. Once the officer goes through this stage the competent authority has to take a conscious decision whether the promotion should go through without waiting for the conclusion of the enquiry. For this purpose the authority has to look into the nature of the charges. An affirmative decision will result in a provisional promotion. Then comes the third stage after the conclusion of the enquiry. Depending on the result of the enquiry the provisional promotion may become final or ended with there being variations in between the two. Petitioner's case together with a deemed date of promotion for purposes of seniority can be dealt with under the above Circular.

13. The foregoing discussion leads to the conclusion that petitioner stands confirmed as a Deputy Director as from 2nd January 1987. His entitlement to promotion would be dealt with in accordance with Circular dated 2nd April, 1976. He is not entitled to other reliefs claimed in the petition. Notices of Motion disposed as superfluous. Rule in the writ petition made partially absolute with parties being left to bear their own costs.