

(2001) 11 RAJ CK 0021

In the Rajasthan High Court

Case No : Civil Special Petition No. 518 of 1993

Virendra Kumar Shah

APPELLANT

Vs

C.P. Chaudhary and Others

RESPONDENT

Date of Decision : 09-11-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Rajasthan Financial Corporation (Staff) Regulations, 1958 — Regulation 19

Citation : (2003) 3 RLW 2036

Hon'ble Judges : P.P. Naolekar, J;Gyan Sudha Mishra, J

Bench : Division Bench

Advocate : Paras Kuhad and Mahendra Singh, for the Appellant; R.D. Rastogi, Ajay Rastogi and R.N. Mathur, for the Respondent

Judgement

Naolekar, J.—Mr. C.P. Choudhary (respondent) filed writ petition NO. 763/1980 against the Rajasthan Financial Corporations Others wherein he prayed for quashing of order dated 28.9.1979 whereby he was confirmed on the post of Assistant Manager with effect from 1.4.1978 and the period prior to that was deemed to be extension of the probation period. Facts in brief of his case are that the post of Assistant Law Officer, redesignated as Assistant manager (Law) was advertised by the respondent Corporation in 1975. Respondent C.P. Choudhary applied for the same and after an interview he was selected along with other candidates and was appointed as Assistant Law Officer-vide order dated 20.2.1976 on probation for one year he joined duties as Assistant Law Officer on 6.3.1976. No order of confirmation nor extension of period of probation was issued after completion of one years" probation period, however, vide impugned order dated 28.9.1979 he was confirmed along with others as Assistant manager with effect from 1.4.1978. Respondent Choudhary made representation on 15.11.1979. On 14.3.1990 seniority list of Assistant Managers prepared on the basis of date of confirmation was issued. Case of the respondent (Choudhary) is that after completion of probation period of one year, his case was not considered at all for extension and for the first time his case was

considered on 28.9.1979 and he was confirmed with effect from 1.4.1978 which deemed extension of probation period upto that date. His contention is that probation period could not have been extended beyond prescribed period of one year without any cogent reason as he successfully completed probation period.

2. Case of Virendra Kumar Shah in his writ petition No. 1893/86, in brief is that pursuant to regular selection held by the respondent Corporation, appellant/petitioner was selected and placed at serial No. 1 in select list. Respondent CP Choudhary was placed at No. 2 in the reserved list. Appellant/petitioner was appointed as Assistant Law Officer (redesignated as Assistant manager (law)) on probation for one year. He joined service on 26.5.1975. On 6.12.1976 a resolution was passed in the Board Meeting of the respondent Corporation on the basis of opinion expressed by the managing Director for extending probation period of appellant/petitioner and GS Yadav upto 31.12.1976. In the Board's meeting of 14.3.1977 appellant/petitioner's probation period was further extended upto 30.6.1977. Vide order dated 28.9.1979 appellant/petitioner, respondent C.P. Choudhary and GS Yadav were confirmed with effect from 1.4.1978 extending their probation period upto that date. Appellant/petitioner impugned the said order dated 28.9.1979, challenged the orders of confirmation of various other respondents who have been confirmed prior to his date of confirmation. He challenged various seniority lists dated 14.3.1980, 12.9.1980, 5.12.1981, 3.5.1983, and 27.3.1984 of Assistant Manager and Deputy Manager. Some other orders dated 7.11.1978, 28.3.1979, 29.10.1979, 27.10.1979, 24.11.1980, 30.12.1982, 30.6.1983, 3.10.1983 and 3.4.1984 whereby persons shown senior to him, have been promoted on the post of Deputy Manager and/or Manager. The appellant/petitioner has claimed benefit of proviso(iii) of Regulation 19 of the Rajasthan Financial Corporation (Staff) Regulations, 1958 (hereinafter to be referred as "the Regulations"). The appellant/petitioner vide amendment dated 16.4.1993 has challenged the constitutional validity of Regulation 19 whereby seniority is adjudged from the date of confirmation of an officer and not from the date of initial appointment.

3. Learned single judge partly allowed writ petition No. 763/1980 C.P. Choudhary v. RFC and Ors., quashing the order dated 28.9.1979 so far it related to confirmation of C.P. Choudhary with effect from 1.4.1978, and declared that C.P. Choudhary shall stand confirmed as Assistant Manager with effect from 6.3.1977 on completion of one year probation period. The respondent Corporation was directed to assign seniority of Choudhary as Assistant manager treating his date of confirmation as 6.3.1977 and then to consider his case for promotion to the post of Deputy Manager with all consequential benefits in accordance with rules, regulations and orders governing promotion to the post of Deputy Manager, if Choudhary was found fit to be promoted. It has also been held that on 5.3.1977 probation period of Virendra Kumar Shah, (appellant/petitioner) was extended, therefore, he cannot claim seniority on the basis of proviso (iii) to Regulation 19 of the Regulations. Aggrieved by the said order Virendra Kumar Shah Filed Special Appeal No. 518/93. Virendra Kumar Shah has filed separate Writ Petition

No. 1893/86.

4. The counsel for appellant/petitioner submits that on successful completion of probation period and on confirmation, he is entitled to be assigned seniority, on true construction of Regulation 19 with proviso (iii), irrespective of the date of confirmation, as per his position in the select list. It is further urged that Choudhary could not have been assigned confirmation and seniority, on assumed successful completion of probation period of one year simple because his case for extension of probation period was not considered immediately after one year, and that there was nothing on record against the appellant/petitioner to extend period of probation before confirmation.

5. Submission of the counsel for appellant/petitioner is based on Regulations 14 and 19 of the Regulations which governs service conditions of the parties. Regulation 14 of the Regulations reads thus:-

"14 Period of Probation:-An employee recruited to the Corporation's service shall be required to be on probation for a period which shall not be less than six month in case of employees of classes "B" and "C" and not less than one year in case class "A" employees and may be extended upto 2 years or more, if considered necessary.

Under Regulation 14 of the Regulations an employee recruited in class "A" Post of the respondent Corporation is required to undergo probation period of not less than one year which may be extended upto two years or more if considered necessary. Thus under the Regulation, there is no fixed maximum period of probation. The probation period is subject to extension upto two years or more if considered necessary. There is no provision that with expiry of period of one year the probationer shall be confirmed on the post neither there is a maximum period provided under the Regulation whereby on expiry of the period the employee gets confirmation automatically. Rule of confirmation on successful completion of the probation period is now well settled which is that after expiry of the probation period the probationer does not automatically get confirmation unless the rule so provides or the maximum period of probation is prescribed under the rules, which is so held by apex Court in G.S. Ramaswamy v. Inspector-General of Police, Mysore (1); State of Uttar Pradesh v. Akbar Ali Khan (2); State of Maharashtra v. Veerappa R. Saboji and Anr.) (3); Dhanjibhai Ramjibhai v. State of Gujarat (4); M.P. Chandoria v. State of M.P. and Ors.; (5) and Tarsem Lal Verma v. U.O.I and Ors. (6)

6. In the present case admittedly appellant/petitioner's case was considered for extension of his probation period vide orders dated 6.12.1976 and 14.3.1977 upto 30.6.1977. When employee's case is considered and it is found by the employer that it would be necessary for regular recruitment of the employee in service that his period of probation is to be extended, the employer is well within his rights to extend the period. Court is not called upon to look into the propriety of the reasons for extension of the period of probation unless it is

demonstrated that the reasons for extension of probation period are perverse so as to say that no reasonable person could reach to that conclusion or that the reason for which the probation period is extended is on account of malice on the part of the officer who has extended the period or the extraneous factors are taken into consideration for the extension. For the responded Corporation, consideration of the case of probationers for extension of period of probation is essential and necessary as under Regulation 19 seniority is to be counted from the date of confirmation and not from the date of initial appointment. Under Regulation 19 when seniority is dependent on date of confirmation of an employee in the service, it is incumbent on the authorities to consider the case of its employee before or at the time or immediately after expiry of the period of probation and to take a decision whether the period is to be extended or take a decision whether the period is to be extended or not and if the authority decides to extend the period of probation it should give reasons for such extension. The authority however, is not bound to communicate the reasons to the employee, but if challenge is made to extension, the authority is required to satisfy the court with reason for such extension. The respondent Corporation cannot take up the plea that under Regulation 14 it is within its rights to extend the probation period upto two years or more. Regulation 14 gives authority to put the class "A" employee, on probation for not less than one year and may extended the period upto two years or more, if considered necessary. The words "if considered necessary" clearly denotes that initial probation period could be extended only after taking into consideration the service record of the employee and all other such matters, relevant for ascertaining the performance of the employee. The act of extension of the probation period of an employee has to be based on reasons and not merely because the Regulation permits, that the period of probation can be extended.

In the present case the learned single judge has rightly reached to the conclusion that there was nothing on record to show that the period of probation of respondent C.P. Choudhary has been extended after consideration of his service record or other relevant matters. So far as appellant/petitioner is concerned, his case was taken into consideration on two occasions i.e. vide orders dated 6.12.1976 and 14.3.1977 and his probation period was extended upto 30.6.1977. However, when the order dated 28.9.1979 confirming him with effect from 1.4.1978 was issued, the respondent Corporation has not come up with the case as to how and why his probation period has been extended from 30.6.1977 to 1.4.1978. In the matter of appellant/petitioner also the principle adopted by the learned single Judge in the matter of respondent C.P. Choudhary shall apply. C.P. Choudhary has been granted relief on the ground that extension of his probation period after one year was not shown by the respondent Corporation to be based on some justiciable reason. Similarly extension of period of probation without consideration of relevant material at relevant time from 1.7.1977 to 1.4.1978 of the appellant/petitioner is not based on any reason and thus is illegal.

7. The submission of counsel for appellant/petitioner Mr. Singh is that under

proviso (iii) to Regulation 19, the appellant/petitioner shall be entitled to the assignment of seniority over the persons who have been appointed to the post as a result of the one and the same examination and/or interview in accordance with their placement in merit/select list. Admittedly appellant/petitioner was at No. 1 in the select list and on that basis he claims seniority over all the persons who have been appointed as a result of one and the same examination and/or interview.

Regulation 19 reads as under:-

19. Seniority:- An employee confirmed in the corporation service shall rank for seniority in his grade according to his date of confirmation in the grade, and employee on probation according to the length of his probation service.

Provided

(i) That among persons appointed to a class of posts during the same year by promotion and by direct recruitment, persons appointed by promotion shall be senior to those appointed by direct recruitment.

(ii) That the persons selected and appointed as a result of selection, which is not subject to review and revision, shall rank senior to the persons who are selected and appointed as a result of subsequent selection. Seniority inter se of persons selected on the basis of seniority-cum-merit and on the basis of merit in the same selection shall be the same as in the next below grade.

(iii) That the seniority inter se of the persons appointed to particular class of posts as a result of one and the same examination and/or interview except those who do not join the services when vacancies are offered to them, shall follow the order in which they have been placed in the list.

It is the general rule of interpretation that for interpreting a section/rule, the entire rule is to be read as a whole and has to be given effect to so as to avoid any inconsistency or repugnance and endeavor of court should be to avoid "a head-on clash" between the principal section and its provisos, whenever it is possible to be so to construe a provision which appears to conflict, so that they harmonize. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is on the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. But Provisos are often added not as exceptions or qualifications to the main enactment but as saving clauses in which cases they will not be construed as controlled by the section. The saving clauses are seldom used to construe Acts. These clauses are introduced into Acts which repeal others, to safeguard rights which, but for the savings, would be lost. The effect of an excepting or a qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso is to except or qualify something enacted in the substantive clause, which but for the proviso would be within that clause. It may ordinarily be presumed in construing a

proviso that it was intended that the enacting part of the section would have included the subject-matter of the proviso. But the question is one of interpretation of the proviso, and there is no rule that the proviso must always be restricted to the ambit of the main enactment. Occasionally in a statute a proviso is unrelated to the subject-matter of the preceding section, or contains matters extraneous to that section, and it may have then to be interpreted as a substantive provision, dealing independently with the matter specified, therein and not as qualifying the main or the preceding section. (Reliance is placed on *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha* (AIR (7); *Kedarnath Jute manufacturing Co. Ltd. v. The Commercial Tax Officer and Ors.* (8); *Ishverlal Thakorelal Almaula v. Motibhai Nagjibhai* (9).

8. On the aforesaid guidelines laid by apex Court if the proviso (iii) is to be construed it has to be read with the main Regulation which says that an employee confirmed in the corporation service shall rank for seniority in his grade according to his date of confirmation in the grade. Therefore, for the purposes of seniority, "confirmation is the touch stone. If the proviso is read independently and not as qualifying the main Regulation, then it shall read, that although the person is confirmed on a latter date, he shall be placed above in the seniority list to the persons who have been confirmed on prior date, because of his merit rank in the select list, prepared of the same examination and interview. If the proviso is to be applied independently, the employee who stood above in merit/select list has to be taken senior to the person who is shown below in the merit list, although the employee shown below in the merit list is confirmed prior to the employee who has been shown above in the merit list. If the Regulation is to be given effect to on the basis of proviso alone then the main Regulation shall become nugatory whereunder the confirmation is the criteria for seniority. On harmonious construction if the criteria for seniority. On harmonious construction of Regulation 19 it has to be interpreted in the manner, that in case the employees who have been selected as a result of one and the same examination and/or interview and are confirmed on the same date, the employee whose name appeared in the merit/select list at the top shall be considered as senior to an employee who stands after him. This interpretation to Regulation 19 can only save main part of the Regulation 19 as well as the provisos. If both has to stand together, this is the only possible interpretation which can achieve the result. Regulation 19 has to be construed in this manner so as to save it to become a useless lumber or dead letter.

9. Third limb of argument of the counsel for appellant/petitioner is that Regulation whereby the date of confirmation is taken to be date for ascertaining the seniority of an employee is ultra vires and is against the provisions of the Constitution of India. The petitioner has relied upon various decisions of apex Court. We may briefly refer to them to the extent they are relevant for our purpose. Main portion of Regulation 19 clearly states that it is the date of confirmation which will determine the seniority of an employee. In *S.B. Patwardhan and Anr. v. State of Maharashtra and Ors.* (10), three judges bench

of the Supreme Court considered similar contention wherein it was contended that although the direct recruits are appointed on probation as Deputy Engineers enter Class II cadre from the very day of their appointment, the persons promoted as officiating Deputy Engineers do not belong to Class II Cadre until they are confirmed as Deputy Engineers. The apex court held that there is no intelligible ground for differentiating the promotes and direct recruits. The valuable right of seniority to depend upon mere accident of confirmation is not justiciable under Articles 14 and 16 of the Constitution and it is impermissible. In *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Ors.* (11), while considering the question of inter se seniority between direct recruits and promotees, the constitution bench of Supreme Court has held that where appointment is made in accordance with the rules, seniority is to be counted from the date of such appointment and not from the date of confirmation, but where the initial appointment is not made following the procedure laid down by rules but the appointee is continued in the post uninterruptedly till regularisation of his service in accordance with rules, the officiation in such post can be taken into account for considering the seniority. Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. Seniority cannot be determined on the sole test of confirmation, for, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter se seniority has to conform to the principles of equality spelt out by Articles 14 and 16. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority. Thus the apex court has taken a view that seniority cannot be ascertained merely on the basis of confirmation.

In *Devadutta and Ors. v. State of M.P. and Ors.* (12), the Supreme Court has held that seniority of existing inspectors cannot be fixed from the date of confirmation because ignoring service from date of appointment till confirmation will be against the principles laid down in *Direct Recruit Class II Engineering Officers' Association* case.

In *Dr.(Capt.) Akhouri Ramesh Chandra Sinha and Ors. v. State of Bihar and Ors.* (13), it is said by the apex court that on satisfactory completion of probation, confirmation dates back to the initial appointment.

10. The main part of Regulation 19 simply lays down that an employee confirmed in the Corporation service shall rank for seniority in his grade according to his date of confirmation in the grade. Date of confirmation is the only tough store, on the basis of which seniority is to be adjudged. It does not speak of any examination to be parsed before the employee is confirmed on the post nor it lays down any principle on the basis of which the employee is to be confirmed.

Adjudging seniority on the basis of confirmation only, encroaches upon the principles of equality enshrined in Articles 14 and 16 of the Constitution and thus, we hold that the main part of Regulation 19 of the Regulations (not regarding probation) is ultra vires of the Constitution.

11. In the preceding part of this judgment we have interpreted Regulation 19 as a whole and we have said that the main part of Regulation 19 has to be read along with provisos. But when we are declaring the main part of Regulation 19 ultra vires to the constitutional provisions, the question remains whether the provisos to Regulation 19 can survive without there being existence of the main part or the entire Regulation 19 is to be declared unconstitutional.

Proviso (i) to Regulation 19 speaks that among persons appointed to a class of posts during the same year by promotion and by direct recruitment, persons appointed by promotion shall be senior to those appointed by direct recruitment. Thus if appointments are made in the same year by promotion and by direct recruitment, the persons given appointment by way of promotion shall rank senior to the direct recruits. Thus proviso is not dependent on the main Regulation 19 and it can be given meaning independently.

Proviso (ii) to Regulation 19 says that the persons selected and appointed as a result of selection, which is not subject to review and revision, shall rank senior to the persons who are selected and appointed as a result of subsequent selection. Therefore, the persons selected and appointed in the preceding year shall rank senior to those who are selected and appointed in latter year and seniority inter se of persons selected on the basis of seniority inter se of persons selected on the basis of seniority-cum-merit and on the basis of merit in the same selection shall be the same as in the next below grade. This proviso can also be independently read without there being existence of the main Regulation 19.

Proviso (iii) to Regulation 19 reads that the seniority inter se of the persons appointed to particular class of posts as a result of one and the same examination and/or interview except those who do not join the services when vacancies are offered to them, shall follow the order in which they have been placed in the list. For the purposes of inter se seniority of persons appointed to a particular class as a result of one and the same examination and/or interview, their position in the merit list shall continue for determining their seniority. This proviso also can independently be read without existence of the main part of Regulation 19.

Occasionally in a statute a proviso is unrelated to the subject matter of the preceding section, can be interpreted as substantive provision dealing independently with the matter specified therein and not as qualifying the main or preceding section. When we can read the three provisos independently than the main part of Regulation 19, there is no reason as to why they be also struck down because the main part of Regulation 19 is declared ultra vires to the

Constitution. For the aforesaid discussion we hold that the three provisos are not ultra vires to the Constitution and shall survive.

12. Now the question is what shall happen to the promotions already made on the basis of seniority lists prepared as per Regulation 19. The appellant/petitioner has challenged the Regulation by way of amendment in the year 1993 whereas various persons have been promoted in accordance with the seniority list prepared by respondent Corporation placing reliance on Regulation 19. The power of this court to issue an appropriate writ under Article 226 of the Constitution is discretionary and this court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, this court can refuse to exercise the jurisdiction vested in it. This court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and being in this train new injustices. The rights of third parties intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. This court has also to take into consideration, while considering unexplained delay, the creation of third party rights in the meanwhile. In the matters of *Ramana Dayaram Shetty v. International Airport Authority of India* (14); and *Ashok Kumar Mishra v. Collector* (15), the apex court refused to grant relief to the petitioner on the ground that the writ petition filed by a petitioner was belated even though the State action was held to be violative of Article 14 of the Constitution. Thus, normal rule which is to be followed by courts in the matters which have been agitated with inordinate delay where rights of third parties have intervened and entertainment of such matters will create confusion and public inconvenience and cause new injustices to the parties concerned, is to decline to interfere even if the State action complained of is unconstitutional or illegal. In the present case the Regulations are of 1958, Petitioner has not chosen to challenge the Regulations till 16.4.1993. In the meanwhile various promotions have been made on the basis of seniority list prepared by the respondent Corporation on the touch stone of date of confirmation of its employees. If main part of Regulation 19 is taken to be removed from the Regulations, right from the beginning the whole exercise made by the respondent Corporation of given promotion to various officers on the basis of seniority, has to be entertained again. It will not only create confusion but will also cause injustice to various persons. Thus, we find it appropriate, considering all the factors, that the operation of our order of striking down main part of Regulation 19 of the Regulations, which reads - "An employee confirmed in the corporation service shall rank for seniority in his grade according to his date of confirmation in the grade." - shall be from the date this judgment is delivered. All promotions made or any action taken by the respondent Corporation to the basis of seniority list prepared as per Regulation 19 of the Regulations prior to the date of this

judgment will not be affected by Regulation 19 being declared unconstitutional.

13. For the aforesaid reasons, the appeal and petition are partly allowed; order dated 28.9.1979 confirming the appellant/petitioner on the post of Assistant Manager with effect from 1.4.1978 is quashed and it is hereby declared the petitioner shall stand confirmed as Assistant Manager with effect from 1.7.1977. Respondent Corporation is directed to assign appellant/petitioner's seniority in the category of Assistant Managers treating his date of confirmation as 1.7.1977, and then to treat his case of promotion to the post of Deputy manager in accordance with the rules and regulations governing promotion to the post of Deputy Manager, and if he is found fit to be promoted, he shall be assigned that date and he shall be entitled to all consequential benefit of arrears of salary, pay fixation, etc. The main part of Regulation 19 of the Regulations is declared ultra vires of the Constitution and is struck down. The three provisos are intra vires. Effect of this judgment shall be prospective, i.e. to say, from the date of judgment. There shall be no order as to costs.