

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No. 823
T.A. No.

1989.

DATE OF DECISION 5.9.1990.

(5)

Shri K.K. Loomba Applicant (s)

Shri Atul Wig, Advocate for the Applicant (s)

Versus
Union of India and Anr. Respondent (s)

Shri M.L. Verma, Advocate for the Respondent (s)

CORAM :

The Hon'ble Mr. Justice Amitav Banerji, Chairman.

The Hon'ble Mr. I.K. Rasgotra, Member (A)

1. Whether Reporters of local papers may be allowed to see the Judgement? *Ans*
2. To be referred to the Reporter or not? *Yes*
3. Whether their Lordships wish to see the fair copy of the Judgement? *No*
4. To be circulated to all Benches of the Tribunal? *No*

AB
(AMITAV BANERJI)
CHAIRMAN
5.9.1990.

(6)

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PRINCIPAL BENCH
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DATE OF DECISION: September 5, 1991

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.... Applicant.

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.... Respondents.

CORAM:

The Hon'ble Mr. Justice Amitav Banerji, Chairman.

The Hon'ble Mr. I. K. Rasgotra, Member(A).

For the Applicant.

.... Shri Atul Wig, Counsel

For the Respondents.

.... Shri M.L. Verma,
Counsel.

(Judgement of the Bench delivered by
Hon'ble Mr. Amitav Banerji, Chairman)

The applicant who was working in the Canteen Stores Department in the Government of India, Ministry of Defence, was promoted to the post of Assistant General Manager on 5.5.1982 on probation for two years. Thereafter, he worked on ad hoc basis as Assistant General Manager for almost seven years. He was also promoted on ad hoc basis to the next higher post of Regional Manager (Central) in July, 1984. The applicant stated that he should have been confirmed in the rank of Assistant General Manager from May 5, 1984. He prayed for issue an order or direction directing the respondent to confirm the applicant in the post of Assistant General Manager/Selection Grade Manager from the date of completion of probation period and accordingly restore his name at the proper place in the seniority list.

The respondents take the stand that the applicant is not entitled to any relief whatsoever. It is stated that his case for confirmation was considered by the D.P.C. and not recommended. He was informed about the same vide

Annexure A-8 dated 16.11.1988. It is further stated that the present Application is misconceived and is not maintainable under Law as no cause of action has accrued in favour of the applicant. The respondents' further stand is that a person has a right to be considered for promotion and not to promotion, as such the Application being / any merit, is liable to be dismissed. Another plea taken is that the Application is barred under Section 20 and 21 of the Administrative Tribunals Act, 1985. On the merits, the stand is that since the applicant had worked as a Regional Manager on ad hoc basis, for a short duration, he should be confirmed in the rank of Assistant General Manager, is not acceptable. The promotion was made only until regular appointment was made. Further, his probationary period was extended by the DPC because of his unsatisfactory performance, which fact was brought to his notice vide letter dated 13.4.1989. His ad hoc appointment as Regional Manager was merely due to exigencies of service and because of delay anticipated in drawing a fresh panel. Lastly, it was stated that the applicant was involved in a serious misconduct and the departmental inquiry against him was in progress at Delhi. There has been no violation of any rules and the instructions given by the DPC have been followed. The confirmation was not automatic but was subject to an officer's performance and conduct.

In a rejoinder, the applicant clarified that he has never based his claim for confirmation as Assistant General Manager on the fact that he was promoted on ad hoc basis to the

next higher post of Regional Manager. His stand was that his name would not have been recommended for the post of Regional Manager unless his performance was good in the feeder post of Assistant General Manager. The D.P.C. was not competent to deny confirmation since the applicant had served on a permanent basis for almost seven years. In fact, the period of probation could be extended only by six months after the period of two years and no more. Consequently, the department has erred in extending the period of probation beyond the maximum period and in denying the confirmation.

The question in this case is that whether the applicant is entitled to confirmation to the post of Assistant General Manager on the ground that he had been officiating as such for a period of more than seven years and also officiating in the next higher post of Regional Manager for two years and in spite of the D.P.C. not recommending his case for confirmation.

It is well settled that a person who has been appointed to a service initially on probation, has to successfully complete that period. If the rules permit, the period of probation can be extended. But on the conclusion of that period, the confirmation is not automatic, then the Appointing Authority must take steps to consider him for confirmation and pass appropriate orders.

In the present case, the applicant had served for a period of two years as probationer. The period of probation could be extended for a maximum period of six months thereafter and no more. The applicant's case is that on the conclusion of the period of probation, he was entitled to be confirmed.

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The respondents' case is that he could not be confirmed automatically for there is no provision under the Rules. His case was put up before a D.P.C. which did not agree for his confirmation. Learned counsel for the applicant stated that he continued as Assistant General Manager nearly seven years on ad hoc basis and had not been confirmed. If he was not found fit enough, he should have been reverted. But that was not done. On the contrary, the applicant was allowed to work as Regional Manager, which indicates that his performance was satisfactory. The respondents' case is that he was continued as Regional Manager because of the exigencies of the situation and not because his performance was satisfactory. As a matter of fact, there is no material on the record to show that his service was satisfactory or unsatisfactory when he was promoted on ad hoc basis as Regional Manager.

In the case of NARENDER CHADHA AND OTHERS VS. UNION OF INDIA & OTHERS: (1986) 1 SCR 211, the officers were promoted although without following the procedure prescribed under the rules, but they continuously worked for long period of nearly 15-20 years on the posts without being reverted. The period of their continuous officiation was directed to be counted for seniority as it was held that any other view would be arbitrary and violative of articles 14 and 16. In the case of THE DIRECT RECRUIT CLASS II ENGINEERING OFFICERS' ASSOCIATION AND OTHERS VS. STATE OF MAHARASHTRA AND OTHERS (JT 1990 (2) 264),

their Lordships held -

"There is considerable force in this view also. We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service".

As far as seniority is concerned, there is no difficulty. The period which has been spent uninterruptedly as officiating or ad hoc would be counted towards seniority. But that does not give an automatic right for being confirmed. There was a regular D.P.C. and the D.P.C. had not approved his confirmation. We will observe that the D.P.C. should have been held soon after completion of the probationary period and not in 1988 by which time he had worked as Assistant General Manager for more than four years. One cannot be left in the lurch waiting for his confirmation for years together. In the first place, a stand is taken that the person is not fit for being confirmed, yet on the other hand he is being continued on the post uninterruptedly for six years. This, in our opinion, is not fair. The matters like this should be dealt with by the department promptly and not drive the employee to seek reliefs from Courts or Tribunals. The law laid down by the Supreme Court is not meant only for the courts but it is applicable on all concerned including the Government departments.

We now refer to the cases cited by the learned counsel for the applicant. The first case is STATE OF GUJARAT VS. AKHILESH C. BHARGAV AND OTHERS, (1987) 4 SCC 482). It would

be worthwhile quoting the paragraph 8 of that report, which reads as follows:-

"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 Education Service (Provincialised Cadre) Class II 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 Vs. General Manager, N.E.F. Railways, Maligaon, Pandu. On the analysis indicated above, the net result, therefore, is that respondent 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".

In that case, the respondent had been appointed to the Indian Police Service in July, 1969 and had been discharged by the impugned order on April 9, 1974. After he was appointed by the Union of India he was allotted to the State cadre of Gujarat and the order of discharge had been made on the basis of steps taken by the State of Gujarat. A writ petition had been filed against the order of discharge before the High Court of Gujarat. The decision of the High Court by a Single Judge and the Appellate Bench was to be the same effect and in favour of the officer. One appeal was filed by the State

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of Gujarat. The Supreme Court held that the respondent No. 1 Shri Akhilesh C. Bhangar 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.

Reference has been made in the above case to the STATE OF PUNJAB VS. DHARAM SINGH (1968) 3 SCR 1). In that case, the Bench was considering the proviso to Rule 6(3) of the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961. Their Lordships held that where 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.

In the case of U.S. SHARMA VS. UNION OF INDIA & ORS, 1988(6)ATC 655, the Division Bench held that where a maximum period of probation is prescribed either in recruitment rules or standing instructions or appointment/promotion, employee is deemed to have satisfactorily completed that period, if he is retained beyond that period. In this case, the Division Bench referred to a principle of law which is not enunciated

and which has been relied -

"Where a person is considered fit for promotion to a senior post, it is implicit that he is fit to hold the feeder post from which he is promoted".

In that case, the applicant was reverted. But in the present case, there is no such order.

Another principle of law laid down in U.S. SHARMA'S CASE (Supra) is that-

"Where the period of probation cannot be said under any circumstances to be extended beyond the specified period, then the officer stood confirmed on the expiry of the said period".

It further observed-

"Once there is deemed confirmation, it will relate back to the date of creation of the post".

In view of the above, the applicant's confirmation would relate back to the date when he completed the period of probation.

We may now turn to the provision of the Rules applicable in this case. Regulation 9 in the Service Manual of the Canteen Stores Department reads as follows:-

- "(a) All employees, whether appointed by promotion or by direct recruitment, will be on probation as under:-
 - (i) Officers of Class I and Class II Categories- Two years.
 - (ii) All other categories - One year.
- (b) If a direct recruit is not found suitable within the probationary period, his services will be terminated without assigning any reason and without any notice by the appointing authority. If an individual appointed by promotion is considered unsuitable for retention on a regular basis, either during or at the expiry of the period of his probation, he will be reverted to his lower post.

Where the promotion is effected after an individual has qualified at a prescribed test, he will not be required to be on probation.

(c) The decision whether an employee should be declared regular in the CSD(I) service or otherwise, should be taken soon after the expiry of the probationary period, and it should be subject to confirmation by the Departmental Promotion Committee.

(d) As the period of probation as prescribed above is quite enough to judge the performance of an employee, the period of probation will not normally be extended save in exceptional circumstances where it may be extended not beyond a period of six months. The cases of individuals on probation be reviewed few days before the completion of probationary period so that action to retain them on regular basis or otherwise could be taken soon after the completion of the period of probation".

A perusal of the above Rules show that the period of probation is not to be normally extended except in exceptional circumstances and even then it cannot be extended beyond the period of six months. There is also provision that if an individual appointed by promotion is considered unsuitable for retention on a regular basis, either during or at the expiry of the period of his probation, he should be reverted to his lower post. Nothing was found against the applicant nor he was ever held to be unfit during the period of probation. He completed the period of probation and was promoted as Assistant General Manager and continued as such from 1982 onwards for nearly seven years when he filed the present O.A. Complying the principle laid down in the case of STATE OF PUNJAB VS. DHARAM SINGH (Supra), it would be appropriate to hold that the applicant was confirmed by implication.

The only matter that has to be considered is the pendency of a disciplinary proceeding against the applicant.

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In paragraph 4 (viii) of the reply by the respondents, it was mentioned that the applicant was not allowed to continue as Regional Manager "due to the pending disciplinary case against him". Even if he was not allowed to continue as Regional Manager which was for a short duration, he was reverted as Assistant General Manager. The point is that if his service was found unfit, he should not have been considered as Regional Manager. The particulars of the disciplinary proceedings pending against him have not been brought to our notice.

On the question of seniority, the Rule laid down in the case of U.S. SHARMA (Supra) indicated that the seniority would relate back to the date from which the ad hoc appointment was made. We hold accordingly.

In this view of the matter, we conclude that the applicant would be deemed to have been confirmed with effect from the date when he completed the period of probation. The entire uninterrupted officiating period is to be taken into consideration for determining his seniority.

In the result, we allow this O.A. to the extent indicated above. The applicant would be deemed to have been confirmed from the date when he completed his probation period and the entire officiating uninterrupted period would be counted for calculating his seniority.

There will be no order as to costs.


(I.K. RASGOTRA)
MEMBER (A)
5-9-1990


(AMITAV BANERJI)
CHAIRMAN
5-9-1990