

Central Administrative Tribunal
Principal Bench

O.A.No.2054/2003

(6)

Hon'ble Shri Shanker Raju, Member (J)

New Delhi, this the 11th day of September, 2003

Tikam Singh
s/o Sh. Saudhan Singh
r/o House No.223
Gali No.D-5, Nand Nagri
Delhi.

... Applicant

(By Advocate: Sh. M.K.Bhardwaj)

Vs.

1. Union of India & Ors.
through Secretary
Ministry of Urban Development
and Poverty Alleviation
Nirman Bhawan
New Delhi.
2. Chairman
Nagar & Gram Niyojan Sangathan Sahkari
E-Block Vikas Bhawan
New Delhi.
3. Secretary
Sehkari and Rozgar Ministry
New Delhi.
4. K.D.Gurmukhi
Chief Planner
Nagar and Gram Niyojan Sangathan
E-Block Vikas Bhawan
I.P.Estate
New Delhi.
5. The Director
Nagar and Gram Niyojan Sangathan
E-Block Vikas Bhawan
I.P.Estate
New Delhi.
6. K.V.Singh
Administrative Officer
Nagar and Gram Niyojan Sangathan
E-Block Vikas Bhawan
I.P.Estate
New Delhi. .. Respondents

(By Advocate: Ms. Rinchen O. Bhutia)

O R D E R

By Shri Shanker Raju, Member (J):

Applicant impugns respondents' notice of termination dated 30.7.2003. He has sought quashment of the above with all consequential benefits.

2. By an interim order dated 28.8.2003 notice dated 30.7.2003 has been stayed.

3. Applicant was engaged on casual basis in the year 1995 his services were terminated. Three persons from outside allegedly were engaged as peons. Applicant filed OA 422/1996 but the same was withdrawn with liberty.

4. OA 1400/1996 preferred before this Court was disposed of 3.2.1997 with a direction to re-engage the applicant in preference to outsiders and freshers and on re-engagement, to work out his rights for grant of temporary status.

5. As the orders have not been complied, CP 130/1997 filed by the applicant was disposed of on 1.9.1997 to consider the applicant for regular appointment. No review selection was held and the applicant was not considered for regularisation against any of the posts held by his juniors.

6. Applicant filed OA 556/1999 which was disposed of on 5.8.1999 with direction that in the event applicant represents for absorption as a peon consider the same in accordance with rules and instruction on the subject, and meanwhile, in the event that applicant has completed the required period of service as provided in DoPT OM dated 10.9.1993 and fulfills other eligible conditions, respondents should also consider applicant's prayer for grant of temporary status. Accordingly, applicant was

regularised and appointed as Chowkidar on 24th September 1999. He made several representations to regularise him as Peon.

7. Applicant preferred OA 1020/2000 which was disposed of on 14.2.2001 with direction to pass a speaking order on the representation of the applicant. Respondents have considered the representation but rejected it on 12.6.2001. The claim of the applicant for temporary status on completion of 206 days was also rejected.

8. Applicant further filed OA 2533/2001 which was disposed of on 5.7.2002 with directions to the respondents to consider the appointment of the applicant as Peon. A major penalty charge-sheet under Rule 14 of the CCS (CCA) Rules, 1965 was served upon the applicant on 21.5.2002. In pursuance thereof a major penalty of reduction of pay has been imposed upon the applicant by an order dated 20.2.2003.

9. By resorting to Rule 5(1) of the CCS (Temporary Services) Rules, 1965, the applicant was issued a notice for termination effective on expiry of one month, giving rise to the present OA.

10. Shri M.K.Bhardwaj, learned counsel for applicant, relying upon the decision of the Apex Court in Om Prakash Maurya v. U.P.Co-operative Sugar Factories Federation, Lucknow and Others, 1986 ATJ (SC) 142 contends that as the maximum period of probation incorporated in the terms and conditions,

and as per the rules is only two years the applicant is deemed to have been confirmed and as such Rule 5(1) of the Rules ibid cannot be unaffected.

11. It is further stated that once on deemed confirmation, respondents have subjected the applicant to a proceedings under Rule 14 ibid his status cannot be of a temporary servant. The action is violative of Article 311 of the Constitution.

12. It is further stated that the applicant has been terminated by an order, which is founded on his specific act of misconduct, as such the same is violative of Articles 14 and 16 of the Constitution of India.

13. Respondents' counsel, Ms. Rinchen O. Bhutia denied the contentions and stated that in pursuance of directions of this Court in OA 556/1999 applicant was appointed as Chowkidar on temporary basis. As per the terms and conditions of his appointment, his appointment is temporary and on becoming permanent, his claim for absorption would be considered. During this interregnum, his services are liable to be terminated without assigning reasons on expiry of period of notice. The probation of the applicant was a period of two years from the date of appointment.

14. In this view of the matter, by producing the relevant record, it is contended that the case of the applicant for confirmation has come up for consideration and it has been decided that the DPC

should decide confirmation as per merit and record as well as performance of the applicant. As such the contention put forth is that in absence of any specific order confirming the applicant, he cannot claim deemed confirmation and will remain as a temporary employee.

15. By referring to the various memos, issued during this period, it is stated that the order passed by the respondents is on the basis of unsatisfactory performance of the applicant and as he has not improved upon, the termination is a simple order of termination as per the terms and conditions, and is neither founded on misconduct nor punitive. It is further stated that order of termination does not cast any stigma upon the applicant.

16. In the rejoinder, applicant has reiterated his pleas taken in the OA.

17. I have carefully considered the rival contentions of the parties and perused the material on record.

18. The three judges bench of Apex Court in High Court of M.P. v. Satyanarayan Jhawar, 2001(7) SCC 161, it has been held as under:

"There are three lines of cases decided by Supreme Court on the question of deemed confirmation. One line of cases is where in the service rules or in the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases

there is no bar against termination at any point of time after expiry of the period of probation. (Para 11)

The other line of cases is where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case, before its expiry, the order of termination has not been passed. (Para 11).

The last line of cases is where, though under the rules a maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired. (Para 11)

In Rule 24(1), while a maximum period of probation has been indicated, yet the question of confirmation of such a probationer is dependent upon his fitness for such confirmation and his passing of the departmental examination by the higher standard, as prescribed. It necessarily stipulates that the question of confirmation can be considered at the end of the period of probation, and on such consideration if the probationer is found to have passed the prescribed departmental examination then the appointing authority may issue an order of confirmation. (Para 35)

It is too well settled that an order of confirmation is a positive act on the part of the employer which the employer is required to pass in accordance with the Rules governing the question of confirmation subject to a finding that the probationer is in fact fit for confirmation. Therefore, it cannot be held that since a maximum period of probation has been provided, at the end of that period the probationer must be held to be deemed to be confirmed. (Para 35)

Ordinarily a deemed confirmation of a probationer arises when the letter of appointment so stipulates or the rules

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governing service conditions so indicate. In the absence of such term in the letter of appointment or in the relevant Rules, it can be inferred on the basis of the relevant rules by implication. But it cannot be said that merely because a maximum period of probation has been provided in the Service Rules, continuance of the probationer thereafter would *ipso facto* must be held to be a deemed confirmation. (Para 37)"

19. Following Satyanarayan Jhawar's case supra, Apex Court in Commissioner of Police v. R.S. More, 2003 SCC (L&S) 178 held as under:

"8. In our view, the case at hand falls under Category 3. As noticed, sub-rule (2) of Rule 5 requires that a probationer shall not be considered to have satisfactorily completed the probation unless a specific order to that effect is passed. No specific order having been passed by any authority, certifying the satisfactory completion of probation period of the respondent, has been brought to our notice. Mr. Hegde, learned counsel, submitted that no order as contemplated under sub-rule (2) of Rule 5 has been passed by the competent authority. Admittedly, the order discharging the respondent, in exercise of powers under Rule 6, has been passed after the extended period of probation was over. In our view, however, that itself would not entitle the respondent to have claimed deemed confirmation in absence of the specific order to that effect. In service jurisprudence, confirmation of service on a particular post is preceded by satisfactory performance of the incumbent unless service rules otherwise prescribe. In the instant case, sub-rule (2) of Rule 5 of the Rules provides that unless there is a specific order that the probationer has satisfactorily completed the period of probation, he shall not be entitled to be deemed to have satisfactorily completed the probation by reason of his being continued in service beyond the extended period of probation. The High Court has failed to consider this important aspect of the matter, resulting in miscarriage of justice. In our view, the High Court fell into error resulting in miscarriage of justice."

20. In MD. Muzaffar Alam v. State of Bihar & Others, 2002 SCC (L&S) 685, the following observations have been made:

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"4..... The fact remains that the statutory Rule provides the period of probation for two years. It neither indicates that the period of probation can be continued nor does it indicate that confirmation is automatic after expiry of the period of probation. We are, therefore, unable to accept Mr Dwivedi's contention that the employee is bound to be confirmed on the expiry of the period of probation."

21. If one has regard to the above, the decision in Om Prakash Maurya's case supra is impliedly overruled. Even if the terms and conditions of the appointment do not stipulate any provision, for extension of probation, or deemed confirmation, automatic deemed confirmation cannot be inferred, unless an express declaration as to satisfactory completion of period of probation, is passed by the respondents. Act of confirmation is a positive act on the part of the employer which is to be passed on recording of finding that the probationer is fit for confirmation. Merely because the maximum period of probation is provided and has expired would not confirm permanent status upon the Government servant. Any provision either in the letter of appointment or rules governing the service conditions. For deemed confirmation on expiry of maximum period of probation would not ipso facto confer confirmed/permanent status to a Government servant.

22. Moreoso, as no express order has been passed by the respondents to confirm the applicant and his confirmation is yet to be declared on consideration by the DPC, I am of the considered view that the applicant was not deemed confirmed and had remained as

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a temporary employee for which Clause-2(ii) of the appointment letter regarding termination can be resorted to.

23. In so far as holding of an inquiry under Rule 14 of the Rules supra is concerned, though it cannot be disputed that only confirmed employees or having permanent status, are amenable to proceedings under Section 14 of the Rules, but yet in view of the above findings when the applicant was not even been confirmed would not infer deemed confirmation of the applicant. This may be an irregularity but in absence of any positive confirmation by the respondents applicant remained as a temporary employee amenable to Rule 5(1) of the Temporary Service Rules ibid.

24. As regards the foundation of the order being misconduct, it is settled position of law that if Government does not want to retain a temporary employee and without inquiring into the misconduct and arriving at a finding of guilt and without proceeding him in a disciplinary proceedings, consideration of his unsatisfactory record would only be a motive.

25. The order of termination does not refer to any Annexures from which the stigma can be inferred. The simple order of termination does not cast any stigma upon the applicant.

26. I have perused the record of the applicant. Despite several opportunities accorded to him, he continued to have unsatisfactory performance, which was the basis of his termination. Being a

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temporary employee, termination on unsatisfactory performance is valid in law as held by the Apex Court with the following observations in Mathew P. Thomas v. Kerala State Civil Supply Corporation Ltd. & Others, 2003 SCC (L&S) 262:

"12. In the present case, even on earlier occasions when the appellant failed to perform his duties properly during probation period he was warned to improve and continued in the service. If he was to be removed from service on the allegations of misconduct, at that time itself the respondents could have removed him from service. This is also a circumstance to indicate that his order of termination was simpliciter. Therefore, having regard to the particular facts and circumstances and in view of what is stated above, we have no good reason to disagree with the impugned order."

27. In the result, for the foregoing discussion, I do not find any infirmity in the order of termination, OA is accordingly bereft of merit and is dismissed. Stay already granted is vacated. No costs.

S. Raju
(Shanker Raju)
Member (J)

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