

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on :05.08 2010
Date of decision :13.08.2010

+ **WP (C) No.255/2000**

GOVT. OF NCT OF DELHI & ANR. ...PETITIONERS

Through: Ms.Avnish Ahlawat, Ms.Latika Chaudhary, Ms.Simran and Mr.Nitesh Singh, Advocates.

Versus

SUB INSPECTOR OM PRAKASH MEENA & ANR. ...RESPONDENTS

Through: Mr.Shyam Babu,
Advocate for R-1.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

SANJAY KISHAN KAUL, J.

1. The legal question which arises for consideration in the present case is as to whether a probationer, who during the extended period of probation is proceeded against departmentally, can be deemed to have been confirmed on the expiry of the extended period of probation even though departmental proceedings were pending and

subsequently culminated in punishment being imposed on the concerned probationer.

2. SI Om Prakash Meena/R-1 was appointed as a temporary SI(Executive) in Delhi Police on 10.04.1972 and was confirmed on 10.03.1976. The service tenure of R-1 was chequered inasmuch as his conduct invited censures on three occasions. There were adverse ACRs for two periods and one increment withheld for a period of one year with the suspension period not treated as spent on duty.
3. The case of R-1 was considered by the Departmental Promotion Committee on 11.03.1985 for Promotion List (F) Executive which decision was deferred because of pendency of departmental enquiry. On conclusion of enquiry, R-1's name was brought on the said Promotion List (F) Executive with effect from 11.03.1985. The R-1 was actually promoted to officiate as Inspector (Executive) with effect from 01.09.1986 giving him pro forma promotion from 13.06.1985 to 31.08.1986. The period of probation specified in Delhi Police (Promotion and Confirmation) Rules, 1980 {'the said Rules' for short} is two years and thus in normal course R-1 was due for confirmation in the rank of Inspector (Executive) with effect from 01.11.1987. However, his probation was extended for a period of one year with effect from 01.11.1987 due to indifferent record of service. This

order came to be passed on 11.04.1988 on account of initiation of departmental proceedings against R-1. The case of R-1 was examined for confirmation on the expiry of the extended period of probation on 31.10.1988, but since he was facing departmental enquiry, the issue of confirmation was kept pending till finalization of the departmental enquiry. The departmental enquiry resulted in an order dated 11.12.1989 whereby the punishment of reduction to the rank of Sub Inspector was imposed on R-1 for a period of three years. The ACR of R-1 even thereafter for the period 01.04.1989 to 31.03.1991 was recorded as adverse.

4. It is the case of R-1 that under the said Rules applicable to him, there could not have been an extension of probation for a period beyond 31.08.1989 and he should be deemed to have been confirmed irrespective of pendency of the departmental proceedings against him. This plea is predicated on a premise that nothing prevented the petitioner from reverting R-1 to the original post without any stigma during the period of probation.
5. The aforesaid plea found favour with Central Administrative Tribunal ('CAT' for short) before whom R-1 moved an OA and in terms of the impugned order dated 16.07.1999, the challenge laid by the petitioner to the order dated 22.02.1994 proceeding on the assumption

that R-1 had failed to complete his probation period was quashed and the petitioner was directed to restore R-1 to the rank of Inspector permanently from the date on which he was reverted to the post of SI with all consequential benefits in accordance with rules and regulations.

6. We may notice at this stage that the order dated 22.02.1994 records that since R-1 has been reduced to the rank of Sub Inspector as a measure of penalty on 11.08.1989, he is deemed to have been reverted to the rank of Sub Inspector with effect from 11.12.1989 for his failure to successfully complete the probation period. It is this decision which is now sought to be impugned by the petitioner/Govt. of NCT of Delhi by filing the present writ petition under Article 226 of the Constitution of India.
7. In order to appreciate the controversy, it is necessary to reproduce the relevant rules and thereafter proceed to interpret their effect. The same are Rule 5 and Rule 18(i) and (iv) of the said Rules.

“Rule 5 : General Principles of Promotion

i).....

ii) All the promotions from one rank to another against temporary or permanent vacancies, except in the case of ad hoc arrangements shall be on officiating basis and the employees shall be considered for confirmation only on availability of permanent posts and on successful completion of probation period of minimum 2 years provided that

the appointing authority may, by a special order in each case permit periods of officiating service to count towards the period of probation. On the conclusion of the probationary period, the competent authority may either confirm the promotee or revert or, if it so thinks fit, extend the period of probation by the year and on the cancellation of the extended period of probation pass such orders as it may deem fit provided that the period of probation shall not be further extended in any case while on probation, an officer may be reverted without departmental proceedings. Such reversion shall not be considered reduction in rank for the purpose of Rule 8(b) of Delhi Police (Punishment and Appeal) Rules, 1980.

Rule 18 Confirmation

i) Save as otherwise provided in these rules, confirmation in all ranks shall be strictly on the basis of seniority when permanent posts become available.

ii)...

iii)...

iv) No member of subordinate rank, who is under suspension or facing departmental/criminal proceedings shall be eligible for confirmation. Their cases shall be decided by the DPCs concerned after such proceedings are over. A departmental enquiry shall be deemed to have been initiated after the summary of allegations has been served."

8. We may also extract the Circular No. 13794-876/CB dated 19.04.1980 governing confirmation and the relevant para 4(ii) of the same reads as under:

" Where an officer has been awarded a punishment either minor or major for an act of misconduct reflecting adversely on his integrity, he will be placed on probation for two years from the date of the availability of

permanent post and will not be given the benefit of converting his officiating period into probation as in the case of others.”

9. It is the interplay of the aforesaid rules which would certainly determine the controversy in question and it is the submission of the learned counsel for the petitioner that the CAT has referred to and mis-interpreted Rule 5(ii) without noticing rule 18(iv) of the said Rules.
10. Learned counsel for the petitioner has also pointed out to us that even during the period of reversion, R-1 was awarded a major penalty of forfeiture of six years approved service for a period of six years which punishment was also upheld by the CAT in OA No.1474/2002 clarifying that R-1 was not to get any increment during these periods of six years when his pay was reduced.
11. This conduct of R-1 also invited a show cause notice under Rule 7(ii) of the said Rules on 06.04.1994 for removal of the name of R-1 from Promotion List (F) and his name was removed on 09.09.1994.
12. Now proceeding to the said Rules, it is quite apparent that the salient features of Rule 5(ii) of the said Rules laying down the general principles of promotion are as under:
 - All promotions from one rank to another against temporary or permanent vacancies shall be on officiating basis.

- An employee shall be considered for promotion only on availability of permanent posts.
- An employee can be considered for promotion on successful completion of probation period of minimum two years.
- On the completion of probation period, the competent authority may either confirm or revert the promotee as it deems fit or extend the period of probation by one year.
- In case of extension of probation period by one year, on completion of such extended period the competent authority may pass such orders as it deems fit.
- The period of probation shall not be further extended in any case while on probation, an officer may be reverted without departmental proceedings.

13. Similarly, the salient features of Rule 18(iv) of the said Rules are as under:

- No member of the subordinate rank, who is under suspension or facing departmental/criminal proceedings, shall be eligible for confirmation.
- The cases of such candidates will be decided by DPC concerned after such proceedings are over.
- The departmental enquiry shall be deemed to have been initiated after the summary of allegations has been served.

14. Insofar as the factual matrix is concerned, learned counsel for R-1 initially sought to contend that since name of R-1 was brought on the Promotion List (F) with effect from 13.06.1985, the period of two years of probation and one year of extended period of probation should be counted from the said date. However, this plea is without any merit for the question of probation to begin would only arise when a person starts working on a post though he may have got some other benefits retrospectively. Undoubtedly, R-1 started functioning on the promoted post only from 01.09.1985. His probation has been counted from the said date and also extended accordingly which was never challenged. The day to reckon would thus be 01.09.1985.
15. The departmental proceedings were initiated on 11.04.1988 and were in progress when R-1 completed the extended period of probation on 31.10.1988. The case of R-1 was kept pending for such consideration of confirmation or reversion in view of the departmental enquiry which resulted in a punishment only on 11.12.1989. The moot point which thus arises for consideration is whether pending such enquiry in the absence of either confirmation or reversion, can R-1 be deemed to have been confirmed.
16. We may notice at this stage that there was apparently amendment to the Rules with effect from 09.05.1989

during the pendency of the proceedings and the relevant amended Rules are as under:

“Rule 5 : General Principles of Promotion

i).....

ii) All promotions from one rank to another temporary or permanent vacancies, except in the case of adhoc arrangements shall be on officiating basis. The competent authority on completion of probation period of two years may assess the work and conduct of the officer himself and in case the conclusion is that the officer is fit to hold the higher grade, he will pass an order declaring that the person concerned has successfully completed the period of probation. If the competent authority considers that the work of the officer has not been satisfactory or needs to be watched for some more time, he may recruit him to the post or grade from which he was promoted, or extend the period of probation, as the case may be.

Rule 18 Confirmation

i) Confirmation shall be made only once in the service of an official which shall be in the entry grade. Confirmation is delinked from the availability of permanent vacancy in the grade. In other words, an officer who has successfully completed the period of probation may be considered for confirmation.

ii)....

iii)....

iv) No member of subordinate rank, who is under suspension or facing departmental/criminal proceeding shall be eligible for confirmation. Their cases shall be decided by competent authority

concerned after such proceedings are over. A departmental enquiry shall be deemed to have been initiated after summary of allegations has been served.”

17. We may, however, note that the impugned order also has proceeded on the basis that unamended Rules would apply. In any case, insofar as R-1 is concerned, we may say that the unamended Rules are more beneficiary especially Rule 5(ii) of the said Rules on which R-1 has relied.
18. The legal issue relating to ‘deemed confirmation’ has been noticed in a catena of judgments of the Supreme Court. There have been different lines of reasoning on this principle being applied to service jurisprudence. The various judgments have been discussed in a recent judgment of the Supreme Court in Khazia Mohammed Muzammil v. The State of Karnataka & Anr; JT 2010 (7) SC 149.
19. The Supreme Court has itself re-cognized that there are two views prevalent in the Supreme Court. The first view is that there can be deemed confirmation after an employee has completed the maximum period of probation provided under the said Rules. The second view is that there would be no deemed confirmation and at best after completion of maximum probation period provided under the said Rules governing an employee, the employee becomes eligible for being confirmed in his

post. The period of probation remains in force till written document of successful completion of probation is issued by the competent authority. In fact, the Supreme Court observed “having examined the various judgments cited at the bar, including that of all larger Benches, it is not possible for this Bench to state which of the view is correct enunciation of law or otherwise. We are of the considered opinion, as to what view has to be taken, would depend upon the facts of a given case and the relevant Rules in force.”

20. The fact that the purpose of probation is to ensure that before an employee attains the status of confirmed regular employee, he should satisfactorily perform his duties and functions to enable the Authorities to pass appropriate orders, has been recognized in para 12 of the judgment in Khazia Mohammed Muzammil v. The State of Karnataka & Anr.’s case (supra). Thus, the scheme of probation is to judge the ability, suitability and performance of an officer under probation. Thereafter there is discussion on the different judgments earlier pronounced by the Supreme Court. We would like to cull out the substance of the views expressed in different judgments.
21. In State of Punjab v. Dharam Singh; AIR 1968 SC 1210, it was observed that there would be confirmation by implication when there is certain period beyond which

the probation period cannot be extended. The Seven-Judge Bench of the Supreme Court in Shamsher v. State of Punjab; (1974) 2 SCC 834 while examining the question whether termination during probation could be viewed as a punitive action in some cases or always has to be as discharge simplicitor during the said periods, also discussed at some length whether a probationer can automatically be confirmed on the expiry of period of probation. It was held that though the principle of deemed confirmation existed in that case, any confirmation by implication was negated because before the completion of three years, the work as well as the conduct of the concerned officer was found to be unsatisfactory and a notice was given to the officer. Where such a notice is given, it was observed, that the period of probation gets extended till the enquiry proceedings come to an end in pursuance to that notice and the period of probation shall be deemed to have been extended impliedly. In Dayaram Dayal v. State of MP; (1997) 7 SCC 443, the Supreme Court specifically noticed the two lines of rulings pronounced by that Court in its different judgments. The conclusion was that there was no serious conflict between the two sets of decisions and it depended on the conditions contained in the order of appointment and the relevant rules applicable. Similarly, in Karnataka State Road Transport Corporation

v. S.Manjunath; (2000) 5 SCC 250, it was observed that a person should not be considered to have satisfactorily completed the period of probation unless specific order to that effect is made and the delay in issuance of certificate would not entitle the person to be deemed to have satisfactorily completed the period of probation. While observing so, a reference was also made to the view in Wasim Beg v.State of UP; (1998) 3 SCC 321. In that context, it was observed that one line of cases held that if the rule or order of appointment specified a period of probation, power to extend probation is also conferred and the officer is allowed to continue beyond the prescribed period of probation, he cannot be deemed to be confirmed and there is no bar on the power of termination of the officer after expiry of the initial or extended period of probation. This is so, as at the end of probation, the officer merely becomes qualified or eligible for substantive permanent appointment.

22. The second line of cases are where even though there is a provision in the said 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. It is in this line of cases that the continuation beyond period of probation as a probationer stood negated by the fixation of a maximum time-limit for the extension of probation.

23. The third string which emerges from Shamsher v. State of Punjab's case (supra) is that despite indication of a maximum period of probation, the implied extension was held to render the maximum period of probation a directory one and not mandatory and an order of confirmation is a must. In such a situation, what is also material is whether there is anything else in the Rules which had the effect of whittling down the right to deemed confirmation on account of the prescription of a maximum period of probation beyond which there is an embargo upon further extension being made.
24. In High Court of Madhya Pradesh v. Satya Narayan Jhavar; (2001) 7 SCC 161, the Supreme Court declined to accept the contention that the employee was entitled to an automatic confirmation after expiry of the probation period. The rule provided maximum period of probation, but it depended on the fitness of such employee and his passing departmental examination by high standards. This view has been followed in Registrar, High Court of Gujarat v. C.G.Sharma (2005) 1 SCC 132.
25. It is in the conspectus of the aforesaid judgments that the Supreme Court in Khazia Mohammed Muzammil v. The State of Karnataka & Anr.'s case (supra) came to the conclusion that the pith and substance of the stated principles of law is that it will be the facts and the Rules which will have to be examined by the Courts as a

condition precedent to the application of the dictum stated in any of the line of cases noticed. There can be cases where rules require a definite act on the part of the employer before officer on probation can be confirmed and in those cases automatic confirmation would not arise. On satisfactory completion of probation period, the authorities shall have to consider the suitability of the probationer to hold the post to which he was appointed.

26. If the aforesaid principles and Rules are applied to the facts in the present case, we find that Rule 5(ii) of the said Rules requires “successful completion of probation period of minimum 2 years”. This is a pre-requisite for confirmation on an available permanent post. This of course has to be read with the stipulation that the competent authority may either confirm or revert or extend the period of probation by a year without further extension of period of probation. However, in our considered view, the successful period of probation is mandatory and it can hardly be said that there is a successful completion of the period of probation when during the extended period of one year, a departmental proceeding itself is initiated which has culminated in a punishment.

27. The most important aspect is that Rule 18(iv) of the said Rules seems to have been lost sight of and not even noticed in the impugned order. It has already been

observed in Khazia Mohammed Muzammil v. The State of Karnataka & Anr.'s case (supra) that in determining the question of such deemed confirmation, the play of other rules has also to be taken into account as to whether they whittle down this principle. If in this context Rule 18(iv) of the said Rules is analyzed, it is obvious to us that where departmental proceedings are initiated, no person is eligible for confirmation and the competent authority has to decide the issue of confirmation only after such departmental proceedings are over. This is exactly what has happened in the present case. The departmental proceedings had commenced well before the expiry of the extended period of three years. When the extended period of three years was expiring on 31.08.1988, it was deemed appropriate to keep the matter in abeyance pending departmental enquiry. These departmental proceedings ultimately culminated in a punishment of reduction of rank of R-1 to SI for a period of three years vide order dated 11.12.1989. If we were to accept the contention of learned counsel for R-1, that the absence of exercise of power of reversion without any stigma ought to have been exercised within the extended period and the petitioner ought not to have waited till the conclusion of the departmental enquiry, an anomalous position would emerge where R-1 himself would have challenged any such reversion on the

ground that it is tainted by a view taken in view of the pendency of the departmental proceedings which had not culminated against or in favour of R-1. It would be travesty of justice if a person like R-1 was to be given the benefit of such deemed confirmation while departmental proceedings are pending against him.

28. The career graph of R-1 from the inception has been tardy inviting three censures, two adverse ACRs and one increment being withheld for one year even prior to his being placed on Promotion List (F). When R-1 got the benefit to serve on the promoted post, he failed to render satisfactory service to an extent that the department instead of merely reverting him deemed it appropriate to initiate proceedings even during the probation period which culminated in R-1 being imposed with the punishment of reduction of rank for a period of three years vide order dated 11.12.1989. Even thereafter in another departmental enquiry, R-1 has been awarded a major penalty of reduction of pay in six stages for a period of six years on 28.09.1990 apart from subsequent censure.
29. If the facts of the present case are thus examined along with the relevant Rules, we have no doubt in our mind that R-1 can hardly be said to be a person who has been found suitable to hold the post or that he has satisfactorily performed his duties. In fact, it is a case of

deemed extension of probation period in view of departmental proceedings having commenced against R-1 during the period of probation. The impugned order is predicated on only Rule 5(ii) of the said Rules ignoring Rule 18(iv) of the said Rules.

30. The writ petition is accordingly allowed, the impugned order of the CAT dated 16.07.1990 is set aside and the Rule is made absolute. The parties are left to bear their own costs.

SANJAY KISHAN KAUL, J.

August 13, 2010
dm

VALMIKI J. MEHTA, J.