

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

Date of decision: 18th May, 2011

+ W.P.(C) 3352/2011

% SH. DINESH KUMAR MISHRA Petitioner
Through: Mr. Hanu Bhaskar, Advocate

Versus

UNION OF INDIA & ANR. Respondents
Through: Ms. Sukhbeer Kaur Bajwa, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the Office Order dated 14th December, 2010 of the respondent No.2 Kendriya Bhandar according sanction for extending the probation of the petitioner for a period of one year with effect from 16th July, 2010, for the reason of some complaints against the petitioner being under investigation in Vigilance Division.

2. The petitioner was appointed to the post of Assistant Manager in the respondent No.2 vide appointment letter dated 1st July, 2008, Clause 2 whereof was as under:

“2. You will be on probation for a period of two years in the first instance, which will be extendable at the discretion of the Management during which one month notice from either side will be necessary before leaving / termination of the services. After satisfactory completion of the probation period, your services will be confirmed in the grade / post and thereafter three months notice will be necessary from either side before leaving / terminating the services.”

3. The contention of the petitioner is that he completed the period of probation of two years on 16th July, 2010; that he has very good ACR; that he was not communicated prior to 16th July, 2010 or immediately thereafter of extension of his probation; that he is thus deemed to have been confirmed and the order dated 14th December, 2010 extending his probation by one year retrospectively with effect from 16th July, 2010, issued six months after the expiry of two years of probation period is *mala fide*. He contends that the notice of the petition should be issued and the

respondents should be asked to explain as to why the period of his probation has been extended, that too after six months of completion of initial period of two years and as to why he has not been confirmed. Reliance is placed on *Rajinder Singh Chauhan Vs. State of Haryana* (2005) 13 SCC 179 and on the Office Memorandums dated 15th April, 1959 and 30th August, 2010 of the Ministry of Home Affairs and Ministry of Personnel respectively of the Government of India, relating to “probation”.

4. The question whether there can be any automatic / deemed confirmation pursuant to the completion of probation period has recently been revisited in *Kazia Mohammed Muzzammil Vs. State of Karnataka* (2010) 8 SCC 155 which judgment also formed the basis for issuance of the Office Memorandum dated 30th August, 2010 (supra). The Apex Court noticed that though jurisprudence has for sometime past recognized automatic or deemed confirmation after an employee has completed the maximum probation period provided under the Rules whereafter his entitlement and conditions of service are placed at parity with the confirmed employee but there would be no deemed confirmation after

completion of maximum probation period if not so provided under the Rules governing the employee. It was held that the period of probation remains in force till a written document of successful completion of probation is issued by the competent authority. It was further held that where the Rules require a definite act on the part of the employer before an officer on probation can be confirmed, there can be no deemed or automatic confirmation. Deemed / automatic confirmation was held to be applicable where the Rules do not contemplate issuance of such specific order in writing but merely require the probationer to take an exam or clear some other test for being confirmed, upon passing / clearing the said test.

5. Seen in the aforesaid light, the term of appointment in the present case clearly provided for extension of probation “after the period of two years in the first instance” and also provided for confirmation after satisfactory completion of probation period. In the present case, admittedly there has been no act of confirmation till now.

6. As far as the judgment in ***Rajinder Singh Chauhan*** (supra) relied upon by the counsel for the petitioner is concerned, the same was a case of continuing even after the maximum period of probation. In the present

case, the petitioner had not completed the maximum period of probation and the appointment letter itself provided for extension after the probation of two years in the first instance, in the sole discretion of the employer.

7. I am also of the opinion that once the terms between the employer and the employee are governed by the contract, there cannot be judicial review of whether the employer should have confirmed the employee or should have extended the period of probation. The writ remedy cannot also be used to commence a roving and fishing enquiry as the petitioner is seeking to do, by calling upon the respondent to disclose reasons for not confirming him and for extending his probation. The Full Bench of this Court in *Prakash Vir Shastri Vs. UOI* AIR 1974 Delhi 1 refused an application seeking production of documents to find out if there had been any violation of Article 14 and held that the petition should be decided on the material on record and under Article 226 of the Constitution, the Court should not embark upon a roving enquiry. The Division Bench of this Court recently also in *A.G.R. Investment Ltd. Vs. Additional Commissioner of Income Tax* 176 (2011) DLT 703 held that to make a roving enquiry does not come within the ambit and sweep of exercise of

power under Article 226. The Apex Court also in *A. Hamsaveni Vs. State of T.N.* (1994) 6 SCC 51 held that the petition can succeed only if the petitioners make out a case but not to give a chance to establish a claim.

8. The respondent in the present case has in any case given reason for extending the probation, i.e. “complaints against the petitioner being under investigation”. The petitioner himself has filed an Office Memo dated 7th January, 2011 and other documents showing inquiry into complaints being underway. There was thus sufficient reason for the respondent to extend the probation of the petitioner. The Supreme Court in *Oswal Pressure Die Casting Industry Vs. Presiding Officer* (1998) 3 SCC 225, a matter relating to probation held that it is not open to the High Court to sit in appeal over the assessment made by the employer of the performance of the employee and once it is found that the assessment made by the employer was supported by some material and was not *mala fide*, it is not proper for the High Court to interfere and substitute its satisfaction with the satisfaction of the employer. The Supreme Court also held the approach of the High Court in holding that in order to support its satisfaction it was necessary for the employer to produce evidence to show

that the performance of the employee was below the expected norms to be wrong. The petitioner, as aforesaid, has failed to establish any *mala fides* in the decision for extension of his probation and without a *prima facie* case of *mala fides* or arbitrariness being made out, there can be no judicial review of the right vested in the respondent under the terms of appointment of the petitioner to extend the probation.

9. Reliance by the petitioner on the Office Memorandums of the Government of India is also found to be misconceived. Kendriya Bhandar is admittedly a Multi State Cooperative Society. The said Office Memorandums govern the probations under the All India and Central Services; the petitioner was not employed under any All India and Central Services.

10. It has been held in the judgment dated 1st July, 2010 in W.P.(C) No. 1433/1992 titled ***Central Government Employees Consumer Cooperative Society Ltd. Workers Union Vs. UOI*** that the employees of Kendriya Bhandar are not civil servants or government employees.

11. The counsel for the petitioner has contended that the discretion to extend the probation could have been exercised only prior to 16th July,

2010 and not thereafter. I am unable to agree. The term of appointment of the petitioner required a positive act of confirmation and till the said positive act takes place, the petitioner would remain on probation and the probation could be extended at any time. The Supreme Court in ***Rajesh Kohli Vs. High Court of J&K*** (2010) 12 SCC 783 reiterated that if a rule permits probation to be extended, in the absence of an order of confirmation, the employee would be deemed to be continuing on probation. It was further held that during probation the employee is to be assessed not only on the basis of performance but also on the probity and conduct. Similarly in ***Dhanjibhai Ramjibhai Vs. State of Gujarat*** (1985) 2 SCC 5 it was held that there is no right in the probationer to be confirmed merely because he had completed the probation of two years and that no distinction can be drawn between a probationer who has completed the normal span of two years and a probationer whose services are terminated sometime later after he has put in further period of service. It was held that it is possible that during the initial period the confirming authority may be unable to reach a definite conclusion on whether to confirm or terminate the service and such candidate may be allowed to continue beyond the

initial period of two years in order to allow the confirming authority to arrive at a definite opinion. Moreover, in the present case, no unreasonable time is found to have elapsed between the date of expiry of the first instance of two years of probation and the sanction of the competent authority for extension of probation. It cannot be lost sight of that the order impugned is merely of sanction and which also conveys that the proposal for extension of probation was mooted prior thereto.

12. Before parting with the case, I may clarify that the aforesaid order has been made without in any manner advertent to the question whether the remedy of a writ petition at all is available to the employees of the respondent No.2 Kendriya Bhandar or not and the present order be not treated as this Court having adjudicated on the said aspect.

13. There is no merit in the petition. The same is dismissed. No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

MAY 18, 2011
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