

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2467 OF 2013

Sunil Kisan Bhojane)
of Mumbai adult, Indian Inhabitant,)
residing at Bhimashankar Colony,)
Dlapoli Road, Pimple, Burav,)
Dist.Pune -61.)...Petitioner

Versus

1. Maharashtra Tourism Development)
Corporation, having its office at CDO)
Hutment, Opp.Ugakshem (LIC), Madam)
Cama Road, Bombay-20)
2. The Joint Managing Director,)
Maharashtra Tourism Development)
Corporation, having his office at CDO)
Hutment, Opp.Ugakshem (LIC))
Madam Cama road, Bombay -20.)
3. The Managing Director,)
Maharashtra Tourism Development)
Corporation, having his office at CDO)
Hutment, Opp.Ugakshem (LIC), Madam)
Cama Road, Bombay – 20.)...Respondents

Mr.Saurabh S.Pakale i/b. Mr.A.R.Belge, for the Petitioner.

Mr.Kunal Bhanage i/b. Mr. L. M. Acharrya, for Respondent no.3.

**CORAM : ANOOP V. MOHTA &
G.S. KULKARNI, JJ.**

Reserved on : 5th July,2016.
Pronounced on : 15th July,2016

JUDGMENT: (Per G.S.Kulkarni, J.)

1. Rule returnable forthwith. By consent of parties and at their request taken up for final hearing.

2. By this petition under Article 226 of the Constitution of India, the Petitioner who was appointed on probation by Respondent No.1 on the post of Senior Clerk, has prayed that communication dated 31 January 2013 of the Respondents terminating his services be quashed and set aside and that the Petitioner be reinstated on the post of senior clerk with continuity of service and full back wages.

3. In brief the facts are :-

By an appointment order dated 1 August 2011 the Respondent No.1 appointed the Petitioner on the post of a senior clerk. Clause 8 of the appointment order provides that the appointment was for

a period of one year on probation. Further clause 9 provides that during the probationary period if the work of the Petitioner is found to be unsatisfactory, the appointment would be terminated.

4. The case of the Petitioner is that he accordingly joined services on 11 August 2011 on probation for a period of one year which expired on 10 August 2012. That the Petitioner was not issued any termination order at the expiry of one year. Thus, as per the service Regulations of the Respondents, he becomes a regular and permanent employee of the Respondents on completion of one year of probationary service, that is with effect from 11 August 2012. He was continuously and regularly working and his work was satisfactory as nothing adverse was recorded against him. Having completed one year of satisfactory service on probation, the services of the Petitioner could not have been terminated by the impugned order dated 31 January 2013, without following the mandatory provisions under the Service Rules namely of holding an inquiry. This order of termination was assailed by the Petitioner by filing a departmental appeal /representation dated 4 February 2013, however, no action was taken by the Respondents. The Petitioner has thus filed the present petition.

5. The principal contention as urged on behalf of the Petitioner is that on completion of one year from the date of his appointment, the

Petitioner ceased to be a probationary employee and had become a permanent employee of Respondent No.1.

6. In pursuance of notice issued by this Court, the Respondents have appeared and filed a counter of Shri.Sanjay Dhekane, Senior Manager (Legal), opposing the Writ Petition. The case of the Respondents is that the Employees Service Regulations of Respondent no.1 do not specify any rule for automatic confirmation of an employee upon expiry of the probation period as prescribed in the rules or specified in the appointment order. It is contended that in the absence of any such Rule, there is no legal entitlement for the Petitioner to raise a plea of automatic confirmation or permanency on expiry of probation period. It is contended that as recorded in the termination order, the services of the Petitioner were found to be unsatisfactory and, therefore, the services were terminated. It is further contended that the Petitioner has in fact admitted about his unsatisfactory performance in his representation dated 4 February 2013 "Exhibit C" to the petition. It is denied that the termination is as and by way of punitive action and that the Rules under Chapters IX to XIII applicable to permanent employees, are not applicable to the Petitioner, as termination of the Petitioner is purely on unsatisfactory performance during the probation period. The Respondents have denied the Petitioner's contention that the Petitioner

had become a regular and permanent employee of Respondent no.1 on completion of probationary period.

7. In support of the petition, the learned Counsel appearing for the Petitioner has relied on the Employees' Service Regulations of Respondent No.1 and more particularly, Regulation 9 in Chapter III which pertain to probation. It would be useful to extract the said Regulations which read thus:-

“
CHAPTER – III
APPOINTMENT, PROBATION, ETC.

8.

9. **Probation :**

i) Every person appointed in or promoted to a permanent vacancy shall, before his confirmation in the post, be required to undergo probation for six months provided that the stipulated period of probation may be reduced in the case of promotees by the Managing Director, at his discretion or, for reasons to be communicated, in writing, or extended by him for such further period not exceeding six months, again for reasons to be communicated, in writing.

ii) For the purpose of confirmation, increment and privilege leave, the period of probation shall be deemed to have commenced from the first day of calendar month, in cases where the employee join duty on or before the 15th of that month, and from the first day of the following calendar month, in case where the employee joins duty on or after the 16th of that month.”

The learned Counsel for the Petitioner relying on the above Regulation contends that every person appointed on a permanent vacancy is required to undergo probation for six months before he is confirmed on the post and that the probation can be extended by the Managing Director at his

own discretion for a further period not exceeding six months only in case of promotees. It is thus submitted that the Petitioner had become a permanent employee on completion of period of one year from the date of appointment and/or had attained a status of deemed permanency. In support of his contention, the learned Counsel for the Petitioner has placed reliance on the following decisions:-

- (i) *M.K.Agarwal Vs. Gurgaon Gramin Bank and Others, (1987(Supp) Supreme Court Cases 643.);*
- (iii) *Wasim Beg Vs. State of U.P and others, ((1998)3 Supreme Court Cases 321).*

8. On the other hand, the learned Counsel for the Respondents submits that the Petitioner is not correct in contending that the Petitioner had attained deemed permanency after completing one year of probation. It is submitted that Regulation 9 (supra) uses the word “confirmation” and thus indicates that a definite act is required to be performed by Respondent No.1 that is to issue a confirmation order appointing the probationer as a permanent employee. It is submitted that the Regulation 9 does not contemplate automatic confirmation on the expiry of the probation period.

9. We have heard the learned Counsel for the parties and with

their assistance we have gone through the relevant documents as placed on record and the Employees' Service Regulations in question.

10. We may note that a perusal of the appointment order dated 1st August 2011 issued in favour of the Petitioner in clause 8 records that the appointment of the Petitioner was initially on probation for a period of one year. This clause further provides that during the probation period apart from the casual leave no other leave would be permissible. Further clause 9 of the appointment order provides that Respondent No.1 would be within its authority to terminate the services of the petitioner, if it is found that the performance of the Petitioner is not satisfactory during the probationary period. The impugned termination order dated 31 January 2013 which also includes names of other probationary employees recites that the work of these employees was found to be unsatisfactory during the probation period and accordingly, the services of the Petitioner and the said employees are terminated. The Petitioner on receiving this termination order submitted a representation / appeal to the Managing Director of Respondent No.1 dated 4 February 2013. The contents of the representation are significant, wherein Petitioner states that if there is any mistake or any irregularity in the performance of his duties during the probationary period, that may be condoned and that henceforth the Petitioner would be more careful. It is further stated by the Petitioner that

because the Petitioner was unwell he was required to take unpaid leaves. It is, therefore, recorded that on these issues sympathetic consideration be made and a fresh opportunity be given to the Petitioner to be in the service of Respondent No.1.

11. Be that as it may the question however, remains as to whether taking into consideration the regulation 9 of the Employees' Service Regulations (supra) , the contention as urged on behalf of the Petitioner that the Petitioner had achieved deemed / automatic confirmation, can be sustained.

12. A plain reading of Regulation 9 (supra) makes it clear that Respondent No.1 is required to undertake/perform an act of confirming an employee who is appointed on probation, as Rule 9(i) categorically uses the words "*before his confirmation in the post*". Further Regulation 9(ii) states that "*for the purpose of confirmation*", period of probation shall be deemed to have commenced from the first day of calender month in cases where the employee joins duties on or before 15th of that month and from the first day of the following calender month in case the employee joins duties on or after 16th day of that month.

13. Apart from Regulation 9, the definition of permanent employee as defined in Regulation 5 also needs to be considered.

Regulation 5(i) defines “permanent employee” as under:-

“5. Definitions :

(i) “Permanent Employee” means a person, who has been confirmed in a permanent vacancy, on satisfactory completion of the probation prescribed in Regulation 9(i).”

The definition of “permanent employee” thus makes the position clear that the employee would be a permanent employee only when he has been confirmed in the permanent vacancy on satisfactory completion of probation and not otherwise. In the present case admittedly there is no order issued by Respondent No.1 confirming the Petitioner on permanent vacancy, on satisfactory completion of probation as prescribed in Regulation 9(i) read with Regulation 5(i). In the absence of an order confirming the Petitioner, the assumption that the Petitioner's performance was satisfactory during the probationary period cannot be accepted. The Petitioner also cannot sustain the submission that the Petitioner has attained the status of deemed / automatic confirmation on the expiry of probation period. If the interpretation as suggested by the Petitioner is attributed to the above Regulation, the same would go contrary to the plain meaning of Regulation 5(i) read with Regulation 9(i) and (ii) as noted above. We are therefore of the clear opinion that the Petitioner's contention of the Petitioner achieving automatic /deemed confirmation, is without any merit.

14. As regards the Petitioner's reliance on the decisions as

referred above, there can be no quarrel on the proposition of law as laid down in those decisions considering the facts of those cases and the Regulations which fell for consideration of the Court. In this context the position in law is clear as laid down in the decision of the Supreme Court in the case “*Kazia Mohammed Muzzammil Vs. State of Karnataka & Anr., ((2010)8 Supreme Court Cases 155)*” where their Lordships have held that there can be “deemed confirmation” after an employee has completed maximum probation period provided under the rules, the appointee's entitlement and conditions of service are placed at parity with the confirmed employee and that there would be no “deemed confirmation” and at best after completion of maximum probation period, provided under the rules governing the employee, the employee becomes eligible for being confirmed in his post. His period of probation remains in force till a written document of successful completion of probation is issued by the competent authority. It is further held that each case is required to be decided upon its own facts and relevant Rules in force and that it may be the cumulative effect of these two basics that would determine the application of the principle of law to the facts of this case.

15. Thus adverting to the facts of the present case, we are of the clear opinion that applying the rules in question namely Regulation 9 read with Regulation 5(i) of the Employees' Service Regulations of Respondent

No.1 it is clear that there cannot be any automatic confirmation. Moreover on a conjoint reading of both these Regulations, it is quite apparent that a definite act on the part of Respondent No.1 is required to be undertaken namely assessment of performance and on recording of its satisfaction, issuance of an order of confirmation. These essential ingredients are completely absent in the present case. The Petitioner was admittedly not issued an order confirming his services nor any other definite act was performed on the part of Respondent No.1 to place the services of the Petitioner at par alongwith regularly appointed candidates.

16. In view of the above discussion, we find no merit in the Writ Petition. Writ Petition is accordingly rejected. No order as to costs.

(G.S.KULKARNI, J.)

(ANOOP V. MOHTA, J.)