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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 17.10.2022

Pronounced on: 10.11.2022

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W.P.(C) 6708/2003

M/S.HINDUSTAN ANTIBIOTICS LTD. Petitioner

Through: Ms. Ranu Purohit, Ms. Aditi
Dani and Mr. Rohit Rathi,
Advocates

versus

SANDEEP GUPTA

..... Respondent

Through: Mr. Nitin Gupta, Advocate

CORAM:

HON'BLE MR. JUSTICE GAURANG KANTH

J U D G M E N T

GAURANG KANTH, J.

1. The Petitioner in the present Writ Petition is impugning the Award dated 17.01.2003 (“**Impugned Award**”) in I.D No.1023/1990 passed by the Court of Additional District & Sessions Judge: Presiding Officer: Industrial Tribunal No. III, Delhi titled as ‘***The Management of M/s Hindustan Antibiotics Ltd. v. Its workman Shri Sandeep Gupta***’. Vide the impugned Award, the learned Labour Court was pleased to hold that the workman, Sh. Sandeep Gupta has been illegally terminated w.e.f. 27.05.1990. The learned Labour Court further held that the Respondent is entitled to be treated as Medical Representative (probationer) from 26.05.1989

to 25.11.1989 and as Medical Representative Grade-II from 26.11.1989 onwards on regular basis in proper pay scale and allowances. Furthermore, the learned Labour Court also directed the Petitioner/Management to reinstate the Respondent in service with continuity and full back wages of a regular Medical Representative's and be treated as Medical Representative on regular basis.

The facts germane for the adjudication of the present Writ Petition are as follows:

2. On 26.05.1988, the Respondent/Workman was appointed as a Junior Medical Representative (Trainee)/Junior Agrovet Representative (Trainee) at Delhi on a consolidated stipend of Rs.1200/- per month vide letter dated 20.05.1998. Pertinently, the Letter of Appointment specifically stated that the training period will be for a period of 12 months and may be extended by further period of 12 months. Pursuant to that, on 27.05.1988, a Service Agreement was executed between the Petitioner as well as the Respondent.
3. Subsequently, on 10.07.1989, the Petitioner vide an order extended the training of the Respondent upto 26.11.1989 to enable him to improve his poor performance. It is the case of the Petitioner that sales performance of the Respondent was not up to the mark and he was also not able to reach the target set by the Petitioner for all Medical Representatives (Trainees).

4. On 16.08.1989, the Respondent in response to the order of the Petitioner dated 10.07.1989, vide its letter, *inter alia* demanded to be treated as a Probationer Medical Representative Grade II w.e.f. 26.05.1989. It is the case of the Respondent that his training automatically came to an end after the expiry of 12 months i.e., on 26.05.1989 and in terms of the appointment letter from that date onwards, he automatically became Probationer Medical Representative Grade-II, as there was neither an extension nor revival of the training period. Relevant part of the letter dated 16.08.1989 is reproduced hereunder:

“4. In my appointment order the 3rd sub para of para 2 reads as under:-

your training will automatically stand terminated at the end of 12 months period from the date of joining. There is no automatic extension or revival of the training period.

5. According to the above sub para, my training automatically came to an end on expiry of 12 months viz. on 26.5.1989 and in terms of the appointment order from that date onwards I automatically came a Probationer Medical Representative Gde.II until expiry of one year, there was neither any extension nor revival of the training period. Your office order under reference is dated 10th July, 1989 which has been conveyed to me under Delhi Branch letter dated 24.7.1989. In terms of the sub para quoted above, my training automatically came to an end on 26.5.1989 and the same could not be revived or extended thereafter. The effect is that from 26.5.1989 I am to be treated as Probationer Medical Representative Gde.II and am also entitled to all the benefits of the said post. Your office order under which reference has the effect of ex post facto extending the period

of training and is not in accordance with my appointment order.

6. It is, therefore, humbly submit that you may kindly cancel your office order dated 10.7.89 and treat me as a Probationer Medical Representative Gde.II with effect from 26.5.1989. A very early decision in the matter is solicited for. Unless immediate redressal is granted to me, I shall have no option but to knock the door of a court of law.”

5. Vide letter dated 04.10.1989, the Petitioner replied to the letter dated 16.08.1989 sent by the Respondent denying its claims and allegations as vague and baseless. The Petitioner vide its letter also requested the Respondent to improve his performance and meet the sales target and not indulge in covering up its poor performance by alleging vague and baseless allegations against its superiors.
6. The Respondent through Delhi Sales & Medical Representative Association on 22.10.1989 sent a demand notice to the Petitioner demanding treatment as regular Medical Representative Grade-II.
7. On 11.11.1989, the Petitioner again vide its order extended the training of the Respondent upto 26.05.1990 to enable him to improve his performance.
8. Further, on 01.02.1990, the Petitioner vide its order directed the Respondent to put in adequate efforts and take the guidance of his superiors to improve and achieve his sales and targets. It is relevant to note that the performance of the Respondent in the third quarter had become worse. Precisely for the month of October – December, the set target was fixed at Rs. 50,000/-.

However, the Respondent was able to achieve a target of 1,889 sales in October. Further in November and December, he was able to achieve 308 and 24,969 respectively.

9. The Petitioner, on 22.05.1990, terminated the training of the Respondent in terms of the Appointment letter dated 20.05.1988 and the Service Agreement dated 27.05.1988. The Petitioner also sanctioned one month's stipend in lieu of one month's notice to the Respondent.
10. At this juncture, it is also relevant to note that Conciliation proceedings between the Petitioner as well as the Respondent were also going on before the Conciliation Officer on the point of termination of the Respondent. However, as the conciliation proceedings failed, the Delhi Administration vide its order No.F.24 (4376) I 90-LAB/38278-75 dated 04.10.1990, held that an Industrial dispute exists between the Petitioner/Management and Respondent/Sh. Sandeep Gupta and referred the matter to the Industrial Tribunal-III, Delhi for adjudication with the following question:

“Whether the services of Shri Sandeep Gupta have been terminated illegally and/or unjustifiably by the management and whether he is entitled to be treated as Medical Representative on regular basis and what directions are necessary in this respect.”

11. Accordingly, the Respondent filed a Statement of Claim dated 12.11.1990 before the Industrial Labour Court praying for the reference to be held in his favor and further a direction to the

Petitioner/Management to reinstate him in service with full backwages including his regularization as a full-fledged Medical Representative from the very first day of his appointment including all benefits and increments which might have accrued from time to time.

12. Subsequently, the Petitioner filed its Written Statement denying the claims made by the Respondent in its Statement of Claims. The Petitioner stated that the Respondent was appointed as a Junior Medical Representative (Trainee) whose training was extended twice to enable the Respondent to improve his poor performance. However, the performance of the Respondent remained worse and unsatisfactory even after 2 years of training, which was the maximum permissible period of training as per the appointment letter. As a result, the service of the Respondent was terminated w.e.f 22.05.1990. Hence, the workman is not entitled to reinstatement or backwages or any other similar kind of relief. Further, the Respondent filed a rejoinder to the Written Statement filed by the Petitioner denying all the claims.
13. Based on the pleadings of the parties, the learned Labour Court framed the following issues:

- “1. Whether the reference is bad in law and without the jurisdiction as alleged in the W.S. ?*
- 2. Whether Sh. Sandeep Gupta is a workman and Industrial Dispute exists between the parties ?*
- 3. Whether the reference is barred by the terms of settlement dated 23.5.88 as alleged in the W.S. ?*
- 4. Whether the cause of workman has been properly espoused and the Union of workman has locus standi?*

5. As per terms of reference.”

14. In order to substantiate their case, Respondent examined two witnesses. Respondent himself entered into the witness box as WW-1 and Mr. B.K. Mittra, Executive Office Bearer of Delhi Sales and Medical Representative Association was examined as WW-2. The Petitioner failed to lead any evidence and proceeded *ex-parte*.
15. The learned Labour Court vide an Award dated 13.01.1998, dismissed the Claim filed by the Respondent on the ground that the Respondent did not fall within the definition of “workman” as provided under the I.D. Act and further held that the reference made was not maintainable. Consequently, the Respondent filed a Writ Petition in W.P No. 5611/1998 and the same was allowed by this Hon’ble Court vide its order dated 24.05.2001 and the matter was remitted back to the learned Labour Court for reconsideration on merits.
16. The learned Labour Court vide the Impugned Award was pleased to hold that the workman, Sh. Sandeep Gupta has been illegally terminated w.e.f. 27.05.1990. The learned Labour Court further held that the Respondent is entitled to be treated as Medical Representative (probationer) from 26.05.1989 to 25.11.1989 and as Medical Representative Grade-II from 26.11.1989 onwards as Medical Representative Grade-II on regular basis in proper pay scale and allowances. Furthermore, the learned Labour Court also directed the Petitioner/Management to reinstate the Respondent in

service with continuity and full back wages of a regular Medical Representative and be treated as Medical Representative on regular basis.

17. Aggrieved by the same, the Petitioner preferred the present Writ Petition challenging the Impugned Award. This Hon'ble Court vide its order dated 21.10.2003 issued limited notice in the present matter on the question of *automatic confirmation* of the Respondent and *backwages*. It is also pertinent to note that with respect to the question of reinstatement, this Hon'ble Court has affirmed the Impugned Award with respect to granting reinstatement to the Respondent. Relevant part of the order of this Hon'ble Court dated 21.10.2003 is reproduced hereunder:

“CW 6713/2003

Issue notice to respondents confined to the question of whether the respondent could have been automatically confirmed and on the question of backwages as according to the learned counsel for the petitioner there is no averment by the respondent for unemployment in the affidavit of evidence, returnable on 12th February, 2004. In so far as the reinstatement is concerned, considering the fact that the letter of the petitioner dated 10th July, 1989 was issued only after the receipt of the registered letter from the respondent dated 3rd July, 1989 claiming dues as per completion of one-year training, the finding of the Tribunal is justified and furthermore there is an express clause in the appointment letter that the training will automatically stand terminated at the end of 12 months period and there is no automatic extension, interference with the finding of reinstatement is not warranted.

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Notice, returnable on 12th February, 2004.

In the meanwhile, there will be stay of treatment of the respondent as a confirmed employee and payment of back wages.

Subject to the above conditions, the remaining part of the award granting reinstatement stands affirmed.”

SUBMISSIONS OF THE PETITIONER

18. The learned counsel for the Petitioner submitted its two fold submissions with respect to the issue of *automatic confirmation/deemed confirmation* and *backwages*.
19. The Petitioner initiated its arguments by stating that the story of the Respondent is a cock and bull story. With respect to the issue of *automatic confirmation/deemed confirmation*, learned counsel for the Petitioner submitted that the services of the Respondent were terminated as per the Service Agreement and the Respondent could not be considered as Medical Representative (Probationer) or there was no deemed confirmation.
20. It is the contention of the learned counsel for the Petitioner that the offer of appointment dated 20.05.1988 stated that the training period would be for a period of 12 months and thereafter maybe extended for 12 months. *Ergo*, in total the training period could be for a two years.
21. Ms. Ranu Purohit, learned Counsel for the Petitioner navigated this Court to the offer of appointment and submitted that Clauses 1 and 2 clearly stipulated that only on satisfactory completion of the training period, an offer would be made for regular appointment which had to be accepted along with furnishing bond

and would include 6 months' probation period and thereafter mandatory service for 3 years. Further Clause 3 stated that the services could be terminated during the training period, if the performance was not satisfactory.

22. She asserted that the reliance placed by the Respondent on Clause 2 to state that there was no automatic renewal of training period is misplaced. It is pertinent to note that the said clause only clarified that extension of training period after 1 year automatically could not be claimed as a right and had to be renewed specifically by the Petitioner. She further submitted that the said clause must also be read with the condition as stated in the appointment letter that *"the training period will be for a period of 12 months and may be extended by further period of 12 months"*. Thus, even if the letter of extension was not issued prior to the completion of 1 year (on or before 26.05.1989 in the present case), the trainee/Petitioner would continue to be a trainee for another period of 12 months and cannot be considered a probationer.
23. Ms. Purohit further argued that on completion of training, fresh offer was to be issued by the Petitioner which was to be accepted by the trainee and only then will the trainee become a Probationer and thereafter a Medical Representative (Grade II). Learned counsel emphasized that in the present case, there was neither an offer nor an acceptance.
24. Learned counsel for the Petitioner further argued that the contention of the Respondent that the Service Agreement dated

27.05.1998 amounts to offer of employment is completely incorrect and malafide. The Service Agreement specifically states that the Respondent would accept his appointment as a Junior Representative (trainee) and on completion of training if there is an offer by the Petitioner company, he would work for a further period of 3 years. Thus, the Service Agreement clearly provides that there has to be a separate offer after the completion of training. She further pointed out that the said Agreement is also not accompanied by any bond or surety, which is required only in case of appointment as Medical Representative (Grade II).

25. She further argued that Clause 3 of the Service Agreement clarified that during the period of training, services of the employee could be terminated anytime by the employer if the training was found unsatisfactory. In the present case, despite issuance of several reminder letters to make adequate efforts, the performance of the Respondent continued to deteriorate. The role of the Respondent as a trainee was to learn to approach prospective purchasers like medical practitioners, hospitals, government departments, chemist, distributors etc., under the guidance of Area Executive, Regional Manager and Divisional Manager to meet the given targets. However, no effort was made by the Respondent to achieve the targets set out. It is further submitted that a sales and marketing trainee would learn from practical field knowledge and not merely any prescribed curriculum and thus, the averment of the Respondent that

unnecessary sale targets were given is false as same targets were set for all trainees in order to evaluate their performance and progress.

26. Learned counsel further bolstered its submissions on the issue of automatic confirmation by relying on the judgments of the Hon'ble Supreme Court in *Jai Kishan v. Commissioner of Police*, 1995 Supp (3) SCC 364, *Karnataka State Road Transport Corporation & Anr. v. S. Manjunath*, (2000) 5 SCC 250 also reaffirmed in *B.S. Chopra v. Management of Karnataka Handloom Development Corporation Ltd. & Anr.*, 2006 (87) DRJ 76 (DB), *Krishnadevaraya Education Trust & Anr. v. L.A Balakrishna* (2001) 9 SCC 319, *Kalyani Sharp India Ltd. Labour Court No.1, Gwalior and Anr.*, (2002) 9 SCC 655.
27. With respect to the issue of *backwages*, learned counsel for the Petitioner submitted that the Respondent is not entitled to backwages. It is the contention of the learned counsel for the Petitioner that pursuant to the termination of his training period, the Respondent has been gainfully employed at M/s Ralson Remedies (P) Ltd. It is very evident from the earnings and ITR returns filed by the Petitioner.
28. *Lastly*, the learned counsel for the Petitioner submitted that the Petitioner Company has been declared sick since 1997 and the recruitment has been banned since the same year. Further, she submitted that the Petitioner Company is in acute financial crisis. Due to this, the salary of the employees was pending for 39

months from 2016-2020 which were cleared after receiving financial help from the Union Government. VRS was also introduced from September 2019 under which scheme 385 employees were relieved after paying their dues from the funds received from the Government. Thus, the Petitioner is unable to bear the financial burden.

SUBMISSIONS OF THE RESPONDENT

29. The learned counsel for the Respondent while relying on the Impugned Award submitted that a fair reading of the Impugned Award shows that it is fair, unbiased and in accordance with the established principles of law. It is further submitted by the learned counsel for the Respondent that the appointment letter clearly stipulated that there will be no automatic extension of training and on expiry thereof, the workman will be a regular Junior Medical Representative- Grade II, though on probation for the initial six months. Mr. Nitin Gupta, learned counsel for the Respondent strenuously submitted that, this Hon'ble Court also vide its order dated 21.10.2003 has held that at the end of 12 months' period, there being no automatic extension, the award granting reinstatement stands affirmed. The training expired on 25.05.1989 and in light of this Hon'ble Court's order dated 21.10.2003, illegally extended for the first six months vide its letter dated 10.07.1989 and for another six months vide its letter dated 11.11.1989 by the Petitioner Company. He further submitted that

this extension was obviously illegal, in as much as by virtue of Clause 2 of the appointment letter, the workman became a Regular Junior Medical Representative-Grade II on expiry of the initial 12 months training with the rider of 6 months' initial probation period. This probation period expired during the said illegally extended six months training itself and, thus, on expiry of the said probation period the workman automatically became a confirmed Junior Medical Representative in terms of the appointment letter dated 20.05.1988 w.e.f 26.11.1989.

30. The Respondent further argued that, the Petitioner vide its letter dated 22.05.1990 terminated the training of the Respondent, though under illegally extended training period and they heavily relied upon this letter to show that the service of the Respondent/Workman was legally and validly terminated. However, it is pertinent to note that the Petitioner never issued any letter to the workman terminating his job as a Regular Junior Medical Representative-Grade II and if they had done so it would have amounted to illegal retrenchment under Section 25-F of the Industrial Disputes Act, 1947. Thus, in law the workman is deemed to be in continuous service under Section 25-B of the I.D Act.
31. Mr. Gupta, learned counsel for the Respondent bolstered its submissions by relying on the judgment of the Hon'ble Supreme Court in ***Pradeep S/O Rajkumar Jain v. Manganese Ore (India) Limited & Ors.*** reported as (2022) 3 SCC 683 and ***Bhartiya Seva***

Samaj Trust Tr. Pres. & Anr. v. Yogeshbhai Ambalal Patel & Anr. reported as (2012) 9 SCC 310.

32. With regard to the issue of backwages and compensation, the learned counsel for the Respondent vehemently argued that, the present case of the Respondent is squarely covered by the guidelines and principles as laid down by the Hon'ble Supreme Court in *Deepali Gundsu Surwase v Kreanti Junior* reported as (2013) 10 SCC 324. He further submitted that the present Industrial dispute has been pending since a decade and the Respondent being a family man had to survive on alternate employment at a lesser remuneration. Furthermore, learned counsel for the Respondent submitted that the Respondent for the first time was self-employed in his father's business only in the year 1995.

LEGAL ANALYSIS

33. This Court has given an anxious consideration to the rival arguments of both the parties and perused the documents placed on record. At the cost of repetition, it is reiterated that this Court is dealing with the limited question of law with respect to *automatic confirmation* of the Respondent as Medical Representative- Grade II and *backwages*.
34. Before moving further, its necessary to expound the legal position of '*deemed confirmation*' as summarized by this Hon'ble Court in the matter of *V.K Mittal and Ors. v. Registrar General, High Court of Delhi* reported as (2016) SCC OnLine Delhi 407:

“64. The legal position on ‘deemed confirmation’ can be summarised as under:

(a) If in the rule or order of appointment, a period of probation is specified and a 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. At the end of such probation he becomes merely qualified or eligible for substantive permanent appointment.

(b) There is the other line of cases where even though 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 presumption about continuation, beyond the period of probation, as a probationer stands negated by the fixation of a maximum time-limit for the extension of probation. In such cases the officer concerned must be deemed to have been confirmed.

(c) A third line of cases is where though under the rules maximum period of probation is prescribed, it 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.

(d) While there could be some other cases where the rules do not contemplate issuance of such a specific order in writing but merely require that there will not be any automatic confirmation or some acts, other than issuance of specific orders, are required to be performed by the parties. Even in those cases, there would be no ‘deemed confirmation’.”

35. With respect to the issue of *automatic confirmation*, it is seen that the Respondent/ Sh. Sandeep Gupta was initially appointed on 26.05.1988 for a period of 12 months. In order to improve the

performance of the Respondent, the Petitioner vide an order dated 10.07.1989 extended his training for a period of 6 months i.e., upto 26.11.1989. The Petitioner again vide an order dated 11.11.1989 extended the training of the Respondent for a further period of six months i.e., upto 26.05.1990. Pertinently, the Petitioner also ordered the Respondent to put in adequate efforts to seek guidance of its superiors and to further achieve his sales targets.

36. It is the contention of the Respondent that his training automatically came to an end after the expiry of 12 months i.e., on 26.05.1989 and in terms of the appointment letter from that date onwards, he automatically became Probationer Medical Representative Grade-II, w.e.f 26.05.1989 to 25.11.1989, as there was neither an extension nor revival of the training period. He further contends that thereafter from 26.11.1989 onwards he was working as a confirmed Regular Medical Representative Grade-II.
37. Further, to appreciate the grievance projected on either side, it is quintessential to examine clearly the Letter of Appointment dated 20.05.1998 and Service Agreement dated 27.05.1988. Relevant part of the Appointment letter dated and Service Agreement dated 27.05.1988 is reproduced hereunder:

“Letter of Appointment

With reference to your application dated - and the subsequent interview held with the selection committee on 5.5.88 we are pleased to offer you the post of Junior Medical Representative (Trainee)/ Junior Agroveter Representative

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(Trainee). The training period will be for a period of 12 months and may be extended by further period of 12 months.

1. You will be paid a consolidated stipend of Rs.1200/- p.m. during the said period of training. If your performance during training period is satisfactory, you will be offered regular employment as Medical Representative Gr. I I/Field Representative Gr.II (Agrovet) in the scale of Rs. 190-15-235-20-475-25-550 plus allowances as per Company's rules and terms and conditions applicable to such appointments.

2. The Company offers you regular employment on your satisfactory completion of training period, you shall be required to accept the said offer. Such an offer will include a probation for 6 months and a bidding to serve the Company for a minimum period of 3 years inclusive of probation period.

Failure to accept offer of employment on successful completion of training period, shall entail you to pay to the Company liquidated damages to the extent of stipend for a period of 4 months. You are, therefore required to furnish a bond in the form prescribed by the Company, to be signed on a non-judicial stamp paper of the value of Rs.10/- to be borne by you in triplicate i.e. one original on Stamp Paper plus 2 copies on plain paper. In case the surety is unable to come personally and sign in the office of the Company, surety will be accepted, provided it is signed in the presence of a First Class Magistrate or Gazetted Officer of State or a Central Government Officer, duly identified and attested by him. Proforma for such bond agreement is enclosed herewith.

Your training will automatically stand terminated at the end of 12 months period from the date of joining. There is no automatic extension or revival of the training period.

3. Your services during training period are liable to be terminated without assigning any reasons at the discretion of the Company after giving one month's notice or making payment of stipend of one month in lieu of notice period.

- *In the opinion of the Company your progress in the training is not satisfactory.*
- *In the opinion of the Company you commit any offence involving moral turpitude.*
- *In the opinion of the Company you commit breach of any terms & conditions mentioned hereunder and on your part to be observed and performed.*
- *Any declaration/ certificate or any information furnished by you is false or incorrect in material particulars of in the opinion of the Company you have suppressed or willfully withheld material information.*
- *If you are declared medically unfit.”*

“Service Agreement

1. *That the employee accepts appointment as Junior Medical Representative (Trainee) for a period of 12 months from the date of appointment on the conditions mentioned in the offer letter No.PER/R-JMR-42 dated 20.5.88 and on completion of training an offer by the Company, he agrees to serve the Company for a further period of 3 years in the post of Medical Representative Grade-II/Field Representative Gr.II (Agrovet) or such other post as may be offered to him under the terms and conditions specified in such offer.*
2. *That if the employee leaves the Company during the training period, he shall pay to the Company, a sum equivalent to 4 months stipend at the rate last drawn.*
3. *That during the period of training, the services of the employee may be terminated by the employer for unsatisfactory performance and in that event the employer shall have no obligation to pay any damages or compensation to the employee or the employee is liable to pay any damages to the Company.”*

38. A clear reading of the Letter of Appointment palpably makes clear the following points:

- (i) The training period was initially for a period of 12 months which can be extended by a further period of 12 months.
- (ii) Clause 1 states that if the performance of the Respondent is found to be satisfactory, he will be offered a regular employment as Medical Representative Grade-II.
- (iii) Clause 2 of the Letter of Appointment states that in the event of the 'satisfactory completion' of the training period by the Respondent, he would then be offered a regular appointment by the Petitioner and that shall be accepted by him. Clause 2 states about three important words i.e., 'satisfactory completion', 'offer' and 'acceptance'.
- (iv) Clause 2 of the Appointment letter further says that training will automatically stand terminated at the end of 12 months period from the date of joining. Meaning thereby the training will automatically stands terminated after 12 months unless it is specifically extended. There cannot be any automatic extension or automatic revival of training.
- (v) Clause 3 states that the services of the Respondent could be terminated without assigning any reasons at the discretion of the company after giving a month's notice or making payment of stipend of month in lieu of notice

period *inter alia* if in the opinion of the company the progress of the Respondent was not satisfactory.

39. Hence from the reading of the appointment letter, there are 3 eventualities that can happen after the 12 months training period:

- (i) In the event of 'successful completion' of training period, the Petitioner will offer an appointment to the Respondent. If the Respondent accepts the said offer, he will be confirmed as a regular employee of the Petitioner. If the Respondent does not accept the offer of employment, he will be liable for damages.
- (ii) If the Employer is not satisfied with the performance of the Respondent during his training period, however, still he feels that there is scope of improvement, the employer can extend the training period by 12 more months.
- (iii) If the Employer is not satisfied with the performance of the Respondent during his training period, he can end the training period after 12 months without any offer of appointment/extension of training period.

40. Further, from the combined reading of Clauses 1, 2 and 3 of the Service Agreement makes it clear that the Respondent would be initially employed as a Junior Medical Representative (Trainee) for a period of 12 months on the conditions mentioned in the Letter of Appointment dated 20.05.1988. Further on completion of training, there has to be an 'offer' by the Petitioner/ Company which has to be accepted by the Respondent and only then he

would be eligible to serve the Company for a further period of 3 years in the post of Medical Representative Grade-II. It also makes it clear that the services of the Respondent may be terminated if his performance is unsatisfactory.

41. Hence in order to get a confirmation as a Junior Medical Representative (Trainee), there has to be 'satisfactory completion' of the training period followed by 'offer of appointment' by the Petitioner and 'acceptance of appointment' by the Respondent.
42. The Hon'ble Supreme Court in the matter of ***Karnataka SRTC v. S. Manjunath***, reported as (2000) 5 SCC 250 was dealing with a similar issue and held that:

“10. This Court had an occasion to review, analyse critically and clarify the principles on an exhaustive consideration of the entire case-law in two recent decisions reported in Dayaram Dayal case [(1997) 7 SCC 443 : 1997 SCC (L&S) 1797] and Wasim Beg case [(1998) 3 SCC 321 : 1998 SCC (L&S) 840] . One line of cases has held that if in the rule or order of appointment, a period of probation is specified and a 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 the expiry of the initial or extended period of probation. This is because at the end of probation he becomes merely qualified or eligible for substantive permanent appointment. The other line of cases are those where even though 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 Constitution Bench which dealt with the case reported in State of Punjab v. Dharam Singh [AIR 1968 SC 1210 : 1968 Lab IC 1409] while distinguishing the other line

of cases held that the presumption about continuation, beyond the period of probation, as a probationer stood negated by the fixation of a maximum time-limit for the extension of probation. Consequently, in such cases the termination after expiry of the maximum period up to which probation could be extended was held to be invalid, inasmuch as the officer concerned must be deemed to have been confirmed.

11. The principles laid down in Dharam Singh case [AIR 1968 SC 1210 : 1968 Lab IC 1409] though were accepted in another Constitution Bench of a larger composition in the case reported in Samsher Singh v. State of Punjab [(1974) 2 SCC 831 : 1974 SCC (L&S) 550] the special provisions contained in the relevant Rules taken up for consideration therein were held to indicate an intention not to treat the officer as deemed to have been confirmed, in the light of the specific stipulation that the period of probation shall be deemed to be extended if the officer concerned was not confirmed on the expiry of his period of probation. Despite the 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. Hence, it was held that a probationer in such class of cases is not to be considered confirmed, till an order of confirmation is actually made. The further question for consideration in such category of cases where the maximum period of probation has been fixed would be, as to whether there are 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, and such stipulation was found wanting in Dayaram Dayal case [(1997) 7 SCC 443 : 1997 SCC (L&S) 1797] .

12. The decision in Wasim Beg case [(1998) 3 SCC 321 : 1998 SCC (L&S) 840] also purported to classify these type of cases into three categories, on a review of the entire gamut of law. It was observed therein as follows: (SCC pp. 328-29, paras 15-17)

“15. Whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant service rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In those cases where the rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless rules provide to the contrary. This is the line of cases starting with State of Punjab v. Dharam Singh [AIR 1968 SC 1210 : 1968 Lab IC 1409] , M.K. Agarwal v. Gurgaon Gramin Bank [1987 Supp SCC 643 : 1988 SCC (L&S) 347 : AIR 1988 SC 286] , Om Prakash Maurya v. U.P. Coop. Sugar Factories Federation [1986 Supp SCC 95 : 1986 SCC (L&S) 421 : (1986) 1 ATC 95] , State of Gujarat v. Akhilesh C. Bhargav [(1987) 4 SCC 482 : 1987 SCC (L&S) 460 : (1987) 5 ATC 167] .

16. However, even when the rules prescribe a maximum period of probation, if there is a further provision in the rules for continuation of such probation beyond the maximum period, the courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended. In this category of cases we can place Samsher Singh v. State of Punjab [(1974) 2 SCC 831 : 1974 SCC (L&S) 550] which was the decision of a Bench of seven Judges where the principle of probation not going beyond the maximum period fixed was reiterated but on the basis of the Rules which were before the Court, this Court said that the probation was deemed to have been extended. A similar view was taken in the case of Municipal Corpn. v. Ashok Kumar Misra [(1991) 3 SCC 325 : 1991 SCC (L&S) 1046 : (1991) 16 ATC 927] . In Satya Narayan Athya v. High Court of M.P. [(1996) 1 SCC 560 : 1996 SCC (L&S) 338] although the Rules prescribed that the probationary period should not exceed two years.

and an order of confirmation was also necessary, the termination order was issued within the extended period of probation. Hence the termination was upheld.

17. The other line of cases deals with rules where there is no maximum period prescribed for probation and either there is a rule providing for extension of probation or there is a rule which requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of the employee. In these cases unless there is such an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period. In this line of cases one can put *Sukhbans Singh v. State of Punjab* [AIR 1962 SC 1711 : (1963) 1 LLJ 671] , *State of U.P. v. Akbar Ali Khan* [AIR 1966 SC 1842 : (1967) 1 LLJ 708] , *Kedar Nath Bahl v. State of Punjab* [(1974) 3 SCC 21] , *Dhanjibhai Ramjibhai v. State of Gujarat* [(1985) 2 SCC 5 : 1985 SCC (L&S) 379] and *Tarsem Lal Verma v. Union of India* [(1997) 9 SCC 243 : 1997 SCC (L&S) 1149] , *Municipal Corpn. v. Ashok Kumar Misra* [(1991) 3 SCC 325 : 1991 SCC (L&S) 1046 : (1991) 16 ATC 927] and *State of Punjab v. Baldev Singh Khosla* [(1996) 9 SCC 190 : 1996 SCC (L&S) 1210] . In the recent case of *Dayaram Dayal v. State of M.P.* [(1997) 7 SCC 443 : 1997 SCC (L&S) 1797] (to which one of us was a party) all these cases have been analysed and it has been held that where the rules provide that the period of probation cannot be extended beyond the maximum period there will be a deemed confirmation at the end of the maximum probationary period unless there is anything to the contrary in the rules.”

43. Further, this Hon’ble Court reiterated the same in the matter of ***B.S Chopra v. Management of Karnataka Handloom Development Corporation Ltd. & Anr.*** reported as **2006 (87) DRJ 76** and held that:

“8. In The High Court of Madhya Pradesh and Ors. v. Satya Narayan Jhavar (2001) (7) SCC 161 (vide para 11) the Supreme Court observed:—

“The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject-matter of consideration before this Court, times without number in various decisions and there are three lines of cases on this point. 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. 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. The last line of cases is where, though under the rules the 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.”

44. In the present case, after the completion of one-year period of training on 26.05.1989 by the Respondent, there cannot be an *automatic confirmation/deemed confirmation* of the Respondent as a Medical Representative (Probationer) and later as a Junior Medical Representative Grade II. In order to be appointed as a Junior Medical Representative (Probationer), the Petitioner/Company upon 'satisfactory completion' of the training period of 12 months, had to send an 'offer' to the Respondent which had to be accepted by the Respondent, which was a pre-requisite to the appointment as Junior Medical Representative (Probationer). The Petitioner/Company rather sent an extension order for a period of 6 months in order to improve his performance, though on 10.07.1989 after the completion of 12 months training period on 25.05.1989 and later another extension letter dated 11.11.1989. Subsequently, after the completion of 2 years training by the Respondent, the contract of the Respondent was discontinued with effect from 25.05.1990 in terms of the Letter of Appointment and Service Agreement.
45. It is pertinent to note here that as per the Letter of Appointment dated 20.05.1988, it has clearly been mentioned that the training period may be extended for a further period of 12 months. It is nowhere mentioned that the extension letter is to be issued prior to the expiry of the training period. The Petitioner issued the extension letter dated 10.07.1989 extending the training period for 6 months, i.e. upto 26.11.1989. The extension letter sent by the

Petitioner to the Respondent would not in any way mean as if the Respondent had been working first as a Junior Medical Representative (Probationer) w.e.f. 26.05.1989 to 25.11.1989 and later as a regular Junior Medical Representative Grade-II from 26.11.1989 onwards.

46. It is also not out of place to mention that the Respondent was time and again reminded to improve his performance which is also evident from the letter dated 10.07.1989, 04.10.1989, 11.11.1989 and 01.02.1990. However, the performance showcased by the Respondent has only been worse. The Respondent had also not been able to achieve the sales targets set out by the company as per Clause 4 of the Letter of Appointment.
47. The Hon'ble Supreme Court in the matter of ***Kalyani Sharp India Ltd. v. Labour Court No. 1, Gwalior, reported as (2002) 9 SCC 655***, held as under:

“6. The order of employment itself clearly sets out the terms thereafter which makes it clear that the facility of providing training to him could be put to an end at any time without assigning any reason whatsoever and his services could be regularised only on satisfactory completion of his training. If these clauses are read together, it is clear he was under probation during the relevant time and if his services are not satisfactory, the same could be put an end to. It is clear that the respondent had been appointed as a Trainee Service Technician and for a period he had to undergo the training to the satisfaction of the appellant and if his work was not satisfactory during that period the facility could be withdrawn at any time and he would be regularised only on completion of his training. Thus the respondent's services were terminated before expiry of the probationary period. In

such a case, question of issue of notice before terminating the service as claimed by the respondent does not arise...”

48. This Court is of the opinion that both the Letter of Appointment and the Service Agreement provided for a specific act by the Petitioner Company and that upon ‘satisfactory completion’ of the training period by the Respondent, he would be given an offer which shall be required to be accepted by the Respondent, which clearly has not been the case herein. Hence, the Rules do not provide for any automatic confirmation/deemed confirmation to the Respondent. Further, this Court deems it appropriate at this juncture to state that the Respondent cannot claim the appointment as a regular Medical Representative Grade-II as a matter of right/entitlement. Furthermore, the Respondent, cannot after the expiry of the training period automatically acquire the status of a permanent/regular employee, unless the rules or Letter of Appointment or Service Agreement expressly provides. It is also pertinent to note here that merely because the Petitioner/Company sent the extension letter dated 10.07.1989 and not before the initial ending of the 12 months training period on 26.05.1989, the Respondent cannot automatically become a regular employee by efflux of time. Neither the Letter of Appointment nor the Service Agreement contemplates an automatic confirmation after the expiry of the training period on 26.05.1989.

49. Before proceeding to deal with the issue of *backwages*, this Court deems it profitable to refer to the decision of this Hon'ble Court in the matter of ***Roy Brothers v. Presiding Officer***, reported as **2004 SCC OnLine Del 963**, wherein this Court enunciated the principles of law for granting full backwages:

“14. The above enunciated principles of law clearly indicated that grant of full back wages may not be an automatic relief wherever the order of dismissal is set aside by the Labour Court. The determination of this question should invite proper application of mind by the Labour Court. Such application of mind should inter alia cover the following aspects:

(a) One who claims, must plead and at least prima facie show to the satisfaction of the forum, its entitlement for such a relief (Cujus est commodum ejus est onus).

(b) Actus curiae neminem gravabit-The pendency of cases before the Courts should prejudice none of the parties to the lis. Presumption of a fact would normally be not permissible. The fact should be established by leading at least primary evidence by the party on whom onus lies.

(c) The scheme of the Industrial Disputes Act with particular reference to Section 11-A and 17-B of the Act no-way indicates the legislative intent or otherwise justify, drawing of an inference, either in favour or against the workman and/or the employer. It will be unfair to presume that a workman would be deemed to be employed during the interregnum period (date of his termination to date of his reinstatement) or that he remained unemployed during this period. Initial onus is on the workman which shifts upon the management where the workman specifically pleads such a claim and leads some evidence by way of affidavits and/or documents to establish that the workman was unemployed despite his efforts during that period. Then the management must prove by cogent evidence that workman was gainfully employed

during the relevant period and thus, should be denied back wages.

(d) In the modern times, normal human conduct should be taken into consideration that an unemployed person would obviously make attempt to gain employment even at a lesser salary/benefits which he was receiving during the course of his employment.

This concept of natural human behaviour founded on reasonable probabilities should be understood in its correct perspective as a mere relevant consideration and not a determining factor much less raising any presumption rebuttable or otherwise against the workman.

(e) Lastly, the Court must satisfy itself and give due reasons with reference to the evidence on record, for accepting or denying claim of back wages.”

50. Further, this Court deems it appropriate to reiterate that, this Hon’ble Court vide its order dated 21.10.2003, had stayed the treatment of the respondent as a confirmed employee and payment of back wages.

51. From the evidence on record, it seems that the respondent has been gainfully employed somewhere and hence is not entitled to any back wages. Pertinently, the yearwise details of income of the respondent clearly proves that he was working somewhere.

52. The Hon’ble Supreme Court in the matter of ***Kendriya Vidyalaya Sangathan v. S.C. Sharma***, reported as **(2005) 2 SCC 363** has held that:

“16. Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was a natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person

to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

53. Even otherwise, the Petitioner has been declared sick since 1997 and the recruitment has been banned since the same year, any relief of award of **full back wages** would place an impossible burden on the Petitioner/Company. Hence this Court is of the considered view that the respondent is not entitled for any back wages.
54. In view of the detailed discussion herein above, the impugned Award is set aside partly. This Court is of the considered view that the respondent is not entitled for any automatic confirmation as neither the Letter of Appointment nor the Service Agreement contemplates an automatic confirmation after the expiry of the training period on 26.05.1989. Further the respondent is not entitled for any back wages as directed by the learned Labour Court. The impugned Award dated 17.01.2003 is modified to the above extent.
55. In terms of the above, the present writ petition is partly allowed.
No orders as to costs.

GAURANG KANTH, J.

NOVEMBER 10, 2022

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