

(2014) 12 CAL CK 0091

Calcutta High Court

Case No: Writ Petition No. 17045 (w) of 2014

Ramkrishna Mallick

APPELLANT

Vs

Central Warehousing
CorporationRESPONDENT

Date of Decision: Dec. 8, 2014**Acts Referred:**

- Central Sales Tax Act, 1956 - Section 10A(1), 8

Hon'ble Judges: Harish Tandon, J**Bench:** Single Bench**Advocate:** Tapan Ray, Advocate for the Appellant; Soumya Majumdar and Dibyendu Chatterjee, Advocate for the Respondent

Judgement

Harish Tandon, J.

The petitioner was promoted to the post of Executive Engineer (Civil) from the post of the Assistant Engineer with effect from 8th August, 2011 and was kept in probation for a period of one year. Undisputably Central Warehousing Corporation (Staff) Regulations 1986 is applicable and both the parties have interpreted the provisions therein in their own manner. Admittedly the petitioner was put on probation and was reverted back to his original post by memo dated 15.04.2014 as the authority did not find the performance of the petitioner at the promotional post satisfactorily.

2. According to the petitioner, Regulation 10 thereof provides the maximum period of probation of two years and the petitioner having kept at the promotional post beyond the said maximum period shall be treated as deemed confirmation to such post and cannot be reverted back to his original post without taking recourse to recognize procedure applicable to the confirmed employee.

3. By refuting the aforesaid contention, the respondent says that unless the petitioner is confirmed by an order or upon recording satisfaction over his

performance, he shall remain as probationer, even if, he is allowed to continue beyond the maximum period provided for probation. The petitioner heavily relied upon Regulation 10 thereof which is also relied upon by the respondents but in addition thereto, he relied upon a definition of the "regular employees" given under Regulation 2 (n) of the said Regulation. It would be apposite to quote the aforesaid regulations to address the issue raised in the instant writ petition which runs thus:

"2 (n) "Regular Employee" means an employee who has been declared to have completed the period of probation to the satisfaction of the appointing authority.

10. Probation:

(i) Every person regularly appointed to any post either by direct recruitment or by promotion shall be on probation for a minimum period of one year from the date of assumption of charge.

(ii) The Appointing Authority may, in its discretion, extend the period of probation up to a further period not exceeding one year.

(iii) During the period of probation, an employee directly recruited shall be liable to be discharged from the service without assigning any reason by giving him a notice of one month or pay in lieu thereof. A departmental candidate appointed to any higher post through direct recruitment shall during the period of probation be liable to be reverted to the original post held by him prior to such appointment, without any notice and without assigning any reason.

(iv) During the period of probation, an employee promoted to higher post from a lower post shall be liable to be reverted to the lower post without notice and without assigning any reason.

(v) Where an employee has rendered continuous temporary or officiating or ad-hoc service or continuous service in the post on deputation immediately preceding his regular appointment to such post, the period of service so rendered, may be counted against the period of probation, if the appointing authority so directs. This will, however, not affect the seniority, which will be governed by the normal rules of seniority in the grade."

4. From the plain and simple reading of the aforesaid provisions, a person regularly appointed to any post by promotion shall be on probation for a minimum period of one year from the date of assumption of charge which is extendable by the appointing authority up to a further period not exceeding one year. The appointing authority is also given power to revert the employee to the lower post during the period of probation without giving any notice or providing any reason. The dispute which arose as the petitioner was allowed to remain in the promotional post beyond the period of two years and, thereafter, have been reverted back to the lower post by the appointing authority upon issuing the memorandum dated 15.04.2014.

5. It is admitted by both the parties that immediately upon issuing the order for promotion, the petitioner assumed the charge and, therefore, there is no difficulty in saying that the period of probation should be counted from 8th August, 2011. Though the petitioner says that he was never communicated about the extension of period of probation but the record would suggest that the petitioner was granted two extensions of six months each discernible from the orders placed before this Court. The petitioner improved his case taking aid of the stand of the respondents that since the maximum period of two years are provided under Regulation 10 thereof, the petitioner was admittedly allowed to continue beyond the said period and, therefore, acquired the status of the confirmed employee. By laying emphasis on sub-regulation 1 and 2 of Regulation 10, the petitioner says that once the maximum period of probation expires and the employee remains in the promotional post and discharged his duties, he should be treated as a deemed confirmed employee and reversion to the lower post by taking aid of sub-regulation 4 of Regulation 10 is illegal, invalid and is liable to be quashed and set aside.

6. The dispute hinges on the interpretation of the aforesaid provisions which provides the maximum period of probation without any express provision in Regulation 10 that unless the employee is confirmed by express or implied conduct of the appointing authority taking aid of the definition of the "regular employees" engrafted under Regulation 2 (n).

7. The learned Advocate for the respondent submits that it conceived of two important ingredients firstly; recording of the satisfaction on the performance of the probationer secondly; declaration about the successful completion of probation period.

8. Before proceeding further, this Court feels that the definition assigned to "temporary employee" in Regulation 2 (o) is to be looked into. The temporary employee means "an employee on probation on initial appointment".

9. Their appears to be a divergent views on the issue where the employee is treated as deemed confirmed to the post by applying deeming fiction. The exposition of law on the above subject requires to be looked into which are laid down in several judgments rendered by Supreme Court in case of Vidya Dhar Pande -v- Vidyut Grih Siksha Samiti & Ors; reported in (1998) 4 SCC 734, the Managing Committee appointed the headmaster on probation for a period of one year and such appointment was directed to be governed by Rules and Regulations laid down by the Education Department of Madhya Pradesh State Government in respect of recognized schools in the State. The Rules therein provides an initial period of probation for a term of one year extendable to two years. The Rules further provides that after two years service, unless the appointing authority otherwise directs, if the incumbent is continued in his appointment, he shall be deemed to have been confirmed in that appointment. It is held that once an incumbent is allowed to remain in the promotional post beyond the maximum period of probation, he would

be deemed to be confirmed to such post and subsequent termination by treating the incumbent as probationer is illegal and against the said statutory Rules.

10. In case of [Municipal Corporation, Raipur Vs. Ashok Kumar Misra,](#) the Supreme Court was interpreting Rule 8 of Madhya Pradesh Government Servants' General Conditions of Service Rules which provides that a person, appointed in service by direct recruitment, shall, ordinarily, be placed on probation for such period as may be prescribed extendable for a further period not exceeding one year. The note appended thereto clearly says that in absence of extension of the period of probation, if the probationer is neither confirmed nor discharged from service, shall be deemed to have continued in service subject to the condition that the service can be terminated on expiry of the notice of one calendar year given in writing by either side, the Court held:

"6. Exercise of the power to extend the probation is hedged with the existence of the rule in that regard followed by positive act of either confirmation of the probation or discharge from service or reversion to the substantive post within a reasonable time after the expiry of the period of probation. If the rules do not empower the appointing authority to extend the probation beyond the prescribed period, or where the rules are absent about confirmation or passing of the prescribed test for confirmation of probation then inaction for a very long time may lead to an indication of the satisfactory completion of probation. But in this case Rule 8 expressly postulates otherwise. The period of probation is subject to extension by order in writing for another period of one year. Passing the prescribed examinations and successful completion of probation and to make an order of confirmation are condition precedent. Mere expiry of the initial period of probation does not automatically have the effect of deemed confirmation and the status of a deemed confirmation of the probation. An express order in that regard only confers the status of an approved probationer. We are of the view that note to sub-rule (2) read with sub-rule (6) of Rule 8 manifests the legislative intent that confirmation of the probation of the respondent would be made only on successful completion of the probation and the passing of the prescribed examinations. It is not the respondent's case that he passed all the examinations. He shall be deemed to be continued on probation. Before confirmation the appointing authority is empowered to terminate the service of the probationer by issuing one calendar month's notice in writing and on expiry thereof the service stands terminated without any further notice. Within three months from the date of expiry of original two years period of probation and within one year's period, the order of termination was made. In this view the question of conducting an inquiry under the Classification, Control and Appeal (Rules) after giving an opportunity and that too for specific charges does not arise. The High Court, therefore, committed manifest error of law in decreeing the suit. By an interim order passed by this Court, the respondent received a sum of Rs. 5000 from the appellant. The appellant shall not recover the same from him. The appeal is accordingly allowed. The judgment and

decree of the High Court is set aside and that of the trial court and the first appellant court are confirmed. But in the circumstances parties are directed to bear their own costs."

11. By interpreting the language employed in the relevant Rule relating to the initial period of probation and the maximum period thereof with the condition that the decision on successful completion/extension of period of probation should be taken in time and an order to be issued, the Apex Court in case of [Director \(Production\), Heavy Engineering Corporation and Others Vs. Jagannath Prasad](#), held that there cannot be a deemed confirmation as a conscious decision of the appointing authority is required. While interpreting the provision of Punjab State Co-operative Service (Clause III) Rules 1958, the Apex Court in case of *State of P -v- B. C...* held that when the Rules provide a positive act of confirmation by the appointing authority, there is no possibility of deemed confirmation if the employee is allowed to remain in the post beyond the maximum period of probation.

12. However, in case of [Dayaram Dayal Vs. State of M.P. and another \[OVERRULED\]](#), the Supreme Court made a distinction between an employee who continued after the maximum period of probation and the Rule does not envisage any positive act of the appointing authority for confirmation and a case where the maximum period of probation provided in the Rules and confirmation by the appointing authority, the Court held that in former case, the principle of deemed confirmation shall apply but in later case, unless the employee is confirmed, he remains probation, even after, the maximum period of probation is provided under the rules.

13. The ratio laid down in *Dayaram Dayal* (supra) did not find approval to the three bench decisions rendered in case of [High Court of Madhya Pradesh thru. Registrar and Others Vs. Satya Narayan Jhavar](#), and stand overruled. It is laid down that where a service Rule or the letter of appointment provides the period of probation and the said period can be extended by the authority to such period as there is no maximum period of probation is incorporated, the Officer, if allowed to continue beyond the extended period, cannot assume deemed confirmation. Even in case where the maximum period of probation is prescribed but requires a specific action of the authority for confirmation, and the maximum period of probation has expired, since the order of confirmation was not passed, the employee cannot be treated to be deemed confirmed employee. However, the position is different where the statutory Rules provides the maximum period of extension and the employee is allowed to continue upon expiration thereof, the principle of deemed confirmation shall be attracted. It would be apposite to quote Paragraph 11 which runs thus:

"11. 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 that 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 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."

14. In a recent judgment rendered in case of [Head Master, Lawrence School Lovedale Vs. Jayanthi Raghu and Another,](#) the Court held that if a positive act of confirmation is the requirement of the Rules, it negates the principle of deemed confirmation. The Court held that each case is to be judged on the basis of the relevant Rules depending upon the expressions and the languages employed therein as the interpretation is dependent upon the text and the context in these words:

"32. In RBI v. Peerless General Finance and Investment Co. Ltd. it has been held as follows: (SCC p. 450, para 33)

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

33. Keeping the said principle in view, we are required to appreciate what precisely the words "if confirmed" contextually convey. Regard being had to the tenor of the Rules, the words "if confirmed", read in proper context, confer a status on the appointee which consequently entitles him to continue on the post till the age of 55 years, unless he is otherwise removed from service as per the Rules.

34. It is worth noting that the use of the word "if" has its own significance. In this regard, we may usefully refer to the decision in *S.N. Sharma v. Bipin Kumar Tiwari*. In the said case, a three-Judge Bench was interpreting the words "if he thinks fit" as provided under Section 159 of the Code of Criminal Procedure, 1898. It related to the exercise of power by the Magistrate.

35. In that context, the Bench in *S.N. Sharma* observed thus: (SCC p. 656, paras 5-6)

"5. ... The use of this expression makes it clear that Section 159 is primarily meant to give to the Magistrate the power of directing an investigation in cases where the police decide not to investigate the case under the proviso to Section 157(1), and it is in those cases that, if he thinks fit, he can choose the second alternative. If the expression "if he thinks fit" had not been used, it might have been argued that this section was intended to give in wide terms the power to the Magistrate to adopt any of the two courses of either directing an investigation, or of proceeding himself or deputing any Magistrate subordinate to him to proceed to hold a preliminary enquiry as the circumstances of the case may require.

6. Without the use of the expression "if he thinks fit", the second alternative could have been held to be independent of the first; but the use of this expression, in our opinion, makes it plain that the power conferred by the second clause of this section is only an alternative to the power given by the first clause and can, therefore, be exercised only in those cases in which the first clause is applicable."

36. In *State of T.N. v. Kodaikanal Motor Union (P) Ltd.* the Court, while interpreting the words "if the offence had not been committed" as used in Section 10-A(1) of the Central Sales Tax Act, 1956, expressed the view as follows: (SCC p. 101, para 19)

"19. ... In our opinion the use of the expression "if" simpliciter, was meant to indicate a condition, the condition being that at the time of assessing the penalty, that situation should be visualised wherein there was no scope of committing any offence. Such a situation could arise only if the tax liability fell under sub-section (2) of Section 8 of the Act."

37. Bearing in mind the aforesaid conceptual meaning, when the language employed under Rule 4.9 is scrutinised, it can safely be concluded that the entitlement to continue till the age of superannuation i.e. 55 years, is not absolute. The power and right to remove is not obliterated. The status of confirmation has to be earned and conferred.

38. Had the rule-making authority intended that there would be automatic confirmation, Rule 4.9 would have been couched in a different language. That being not so, the wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed confirmed employee after expiry of three years of probationary period as that would defeat the basic purpose and intent of the Rule which clearly postulates "if confirmed". A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed.

39. The Division Bench has clearly flawed by associating the words "if confirmed" with the entitlement of the age of superannuation without appreciating that the use of the said words as a fundamental qualifier negatives deemed confirmation. Thus, the irresistible conclusion is that the present case would squarely fall in the last line of cases as has been enumerated in para 11 of Satya Narayan Jhavar and, therefore, the principle of deemed confirmation is not attracted."

15. In the present case, Regulation 10 of the said regulations provides a minimum period of one year from the date of assumption of charge as the probation period which is extendable, in the discretion of the appointing authority, to a further period not exceeding one year. It is further discernible from the aforesaid provision that the employee promoted to the higher post may be reverted to the lower post without notice and without assigning any reason during the period of probation. The aforesaid provision should be read along with the definition assigned for the regular employee and to assume such character, there should be a declaration relating to the satisfaction of the appointing authority about the performance of the said employee during the period of probation. The initial period of probation was extended on two occasions and the petitioner was all along treated to be on probation and subsequently reverted to the original post from which he was promoted. Since the declaration on satisfactory performance of a probationer is sine qua non to treat the employee as regular employee which is opposed to a definition assigned for temporary employee who is essentially a probationer, the requirement as would be envisaged is the specific act of the employer to treat the employee as confirmed. The confirmation is a positive act of the appointing authority which is a declaration of satisfactory performance of an employee during the period of probation and, therefore, it is not a case where the principle of deemed confirmation can be applied.

16. This Court, therefore, does not find any arbitrariness illegality and/or irregularity in reverting the petitioner to the post from which he was promoted.

17. The writ petition, therefore, fails.

18. However, there shall be no order as to costs.

19. Urgent photostat certified copy of the judgment, if applied for, be given to the parties on priority basis.