

PETITIONER:
STATE OF UTTAR PRADESH

Vs.

RESPONDENT:
AKBAR ALI KHAN

DATE OF JUDGMENT:
09/03/1966

BENCH:

ACT:

Constitution of India, Art. 311-Order terminating probation combined with order stopping promotion on the same findings and without complying with Art. 311--stoppage of promotion later withdrawn-whether order terminating probation vitiated or stands by itself.

U.P. Subordinate Revenue Executive Service (Tehsildars) Rules 1944, r. 12 and r. 14--scope of.

Probation-whether confirmation follows in the absence of express order.

HEADNOTE:

In April 1951, the respondent, who was a Naib Tehsildar in the U.P. Civil Service, was selected for permanent promotion to the post of Tehsildar and in accordance with Rule 12 of the Subordinate Revenue Executive Service (Tehsildars) Rules, 1944, was placed on probation for a period of two years. On April 29, 1953, it was reported that he had drawn excess travelling allowance in respect of certain journeys. After an enquiry into the matter and after an opportunity had been given to the respondent to show cause why his probation should not be terminated, by an order of the Governor dated August 13, 1957, the respondent was informed that his probation was terminated and he was reverted to the post of Naib Tehsildar. The order also stated that he was not to be considered for promotion for a period of seven years from the date of reversion. Upon the respondent submitting a Memorial to the Governor against this order, the Governor passed another order on December 1, 1958, cancelling that part of the earlier order which related to the stoppage of promotion of the respondent and confirming the termination of probation on the ground that the respondent "had during the probation not made sufficient use of his opportunities and had failed to give satisfaction".

The respondent then filed a petition under Article 226 challenging the orders of August 13, 1957, and December 1, 1958. This petition was allowed by the High Court on the ground that under Rule 12 of the 1944 Rules, the power to revert could be exercised either during or at the end of the period of probation and if no order was passed extending the period of probation, the respondent was deemed to have been confirmed in the new post; accordingly, the order terminating the probation was erroneous and the respondent's reversion being in the nature of a penalty imposed without conforming to the requirements of Article 311 of the Constitution, was liable to be quashed.

in appeal under the Letters Patent a Division Bench the High Court held that the respondent had not ceased to be a probationer on the expiry of the two-year probation period

and the order of the learned Single Judge could not therefore be sustained. It held, however, that the two parts of the order dated August 13, 1957. being based on the same finding could not be dissociated and since the Governor had passed an order terminating the probation and had simultaneously therewith imposed

822

upon the respondent punishment without complying with the requirements of Article 311. the entire order had to be set aside. The High Court held that the Governor by his later order sought to convert the earlier order of punishment into an order under Rule 14 (which provided for the termination of probation in certain circumstances including cases where the probationer failed to give satisfaction). But the Governor had no power an order of punishment retrospectively nor could he appropriate to himself the function of interpreting the earlier order and laying down that the order was made under Rule 14 and not an order of punishment. On appeal to this Court,

HELD : The High Court was in error in holding that the order made by the Governor determining the probation of the respondent infringed the protection of Article 311.

The Governor initially passed an order determining the probation and also passed an order stopping promotion. The latter part of the order which the Governor was incompetent to pass under Rule 14 did give rise to a justifiable grievance which the respondent could set up, but after that order was cancelled, the respondent had no cause for grievance. [828 F-G]

The order terminating probation was made under Rule 14 and continued to retain that character. The vice in the second part of the order did not either before or after it was cancelled affect the validity of the order terminating the respondent's probation. [828 H]

By terminating his probation no penalty was imposed on the respondent and it could not therefore be said that by passing the order of December 1, 1958, the Governor was seeking to convert the earlier order of punishment into an order under Rule 14 retrospectively. [828 G]

The High Court had rightly held that the respondent did not cease to be a probationer on the expiry of two years. The scheme of the 1944 Rules was that confirmation in the post which a probationer is holding does not result merely from the expiry of the period of probation and so long as the order of confirmation is not made the holder of the post remains a probationer. [825 H]

Unless the order of appointment states that at the end of the period of probation the appointee will stand confirmed in the absence of an order to the contrary or unless there is a service rule in that behalf, an express order of confirmation is necessary to give the probationer a substantive right to the post held by him. [826 B]

Chief Conservator of Forests, UP. Nainital v. D. A. Lyall: C.A. 259 of 1963 dated February 24, 1965; Sukhbans Singh v. The State of Punjab: A.I.R. 1962 S.C. 1711; and The Accountant General, Madhya Pradesh, Gwalior v. Beni Prasad Bhatnagar: C.A. 548 of 1962 dated January 23, 1964; referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 19 of 1965. Appeal by special leave from the judgment and order dated January 23, 1962 of the Allahabad High Court in Special

Appeal No. 532 of 1960.

O. P. Rana, for the appellant.

823

M. K. Ramamurthi, D. P. Singh, R. K. Garg and S. C. Agarwal, for the respondent.

The Judgment of the Court was delivered by

Shah, J. The respondent Akbar Ali Khan was appointed in July 1942 a Naib Tahsildar in the United Provinces Civil Service and was confirmed in that post on November 1, 1943. In April, 1951, the respondent was selected for permanent promotion to the post of Tahsildar and was placed, in accordance with r. 12 of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944, on probation for a period of two years. On a report dated April 29, 1953 from the Accountant General of U.P. that the respondent had drawn excess travelling allowance in respect of certain journeys, the State Government directed the Deputy Commissioner, Hardoi to hold an inquiry after taking into consideration the explanation of the respondent. On September 27, 1956 the Government of U.P. directed that the respondent be apprised of the grounds for holding an inquiry and that he be given an opportunity to show cause why his probation be not terminated. The explanation submitted by the respondent with the comments of the Deputy Commissioner, the Commissioner of the Division and the Board of Revenue were forwarded to the Government. On August 13, 1957 the respondent was informed that the Governor of U.P. agreeing with the Board had ordered that the probation of the respondent be terminated, and that he be reverted to the post of Naib Tahsildar. It was further recited that the respondent should not be considered for promotion for a period of seven years from the date of reversion. The respondent submitted a memorial to the Governor on October 12, 1957. After considering the memorial the Governor passed an order cancelling that part of the order which related to the stoppage of promotion of the respondent, and confirmed the termination of probation, because in the view of the Governor the respondent "had during the probation not made sufficient use of his opportunities and had failed to give satisfaction".

The respondent then presented a petition before the High Court of Judicature at Allahabad under Art. 226 of the Constitution challenging the orders dated August 13, 1957 and December 1, 1958, on the grounds that on the expiry of the period of probation the respondent must be deemed to have been confirmed as a Tahsildar and that since the respondent was subject to punishment without affording him opportunity to render his explanation in respect of the charge against him, the order was invalid. In the view of Tandon, J., under r. 12 of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944, power to revert could be exercised either during or at the end of the period of probation, and if no order was passed extending the period of probation the respondent could not on the expiry of the period for which he

824

was originally appointed any longer be regarded as on probation. The learned Judge accordingly held that the order terminating the probation of the respondent was erroneous and his reversion being in the nature of a penalty imposed without conforming to the requirements of Art. 311 of the Constitution was liable to be quashed.

In appeal under the Letters Patent against the order of Tandon, J., quashing the orders dated August 13, 1957, and December 1, 1958, the High Court following their earlier

judgement in Chief Conservator of Forests, U.P., Nainital v. D. A. Lyall(1) held that the order passed by Tandon, J., that the respondent had ceased to be a probationer on the expiry of two years could not be sustained. But the High Court held that the two parts of the order dated August 13, 1957, were based on the same finding recorded in the letter of the Board of Revenue and could not be dissociated, and since the Governor had passed an order terminating the probation and had simultaneously therewith imposed upon the respondent punishment without complying with the requirements of Art. 311 of the Constitution, the entire order was liable to be set aside. The High Court observed :

"By this letter (dated December 1, 1958), therefore, the Government, for the first time made an attempt to convert that order of punishment contained in the letter dated 13th August, 1957, into an order under Rule 14 of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944. We do not think that, by putting down this view in this subsequent letter dated 1st December, '1958, the character of the original order passed on 13th August, 1957, could be retrospectively altered. When that order was passed on 13th August, 1957, it was..... an order of punishment."

In the view of the High Court the Governor by his later order sought to convert the earlier order of punishment into an order under r. 14 of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944, but the Governor had no "power to convert an order of punishment retrospectively into an order under rule 14, nor could he appropriate to himself the function of subsequently interpreting the earlier order and laying down that the order was an order under the rule and not an order of punishment. With special leave the State of Uttar Pradesh has appealed to this Court. It is necessary in the first instance to refer to the relevant rules of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944. By r. 12 it is provided :

"Every listed candidate on appointment in or against

(1) (1961] A. L. J. It. 458.

82 5

a substantive vacancy shall be placed on probation. The period of probation shall be two years,"

By r. 13 it is provided that every listed candidate whether appointed in a substantive vacancy or not, shall be required to pass such tests in departmental subjects and the languages of the Province and to undergo such training as the Governor may from time to time prescribe. Rule 14 provided :

"If it appears at any time during or at the end of the period of probation that a person appointed- on probation has not made sufficient use of his opportunities or has failed to pass the departmental examination completely or if he has otherwise failed to give satisfaction, he may be reverted to his substantive appointment :

Provided that the Board may extend. the period of probation to three years. An extension beyond this period shall require the sanction of the Governor. Every extension whether granted by the Board or the Governor

shall specify the exact date up to which it is granted."

Rule 15 provided for confirmation of a probationer at the end of the period of probation if he had passed the departmental examination for tahsildars completely, and the Commissioner reported that he was fit for confirmation and that his integrity was unquestionable.

The respondent was posted as a Tahsildar, and placed on probation for two years. The initial period of probation was liable to be extended by the Board of Revenue or by the Governor. There is no rule that on the expiry of the period of probation the probationer shall be deemed to have been confirmed in the post which he is holding as a probationer. If a probationer was found not to have made sufficient use of his opportunities or had failed to pass the departmental examination "completely" or if he had otherwise failed to give satisfaction he may be reverted to his substantive appointment : again confirmation in the appointment at the end of the period of probation could only be made if the probationer had passed the departmental examination for tahsildars "completely" and the Commissioner reported that he was fit for confirmation and that his integrity was unquestionable. It is common ground in this case that the respondent had not passed the departmental examination before 1955. He had therefore not qualified himself for confirmation.

The scheme of the rules is clear : confirmation in the post which a probationer is holding does not result merely from the expiry of the period of probation, and so long as the order of confirmation is not made, the holder of the post remains a probationer. It has been held by this Court that when a first appointment or promotion is made on probation for a specified

2Sup. CI/66-7

826

period and the employee is allowed to continue in the post, after the expiry of the said period without any specific order of confirmation he continues as a probationer only and acquires no substantive right to hold the post. If the order of appointment itself states that at the end of the period of probation the appointee will stand confirmed in the absence of any order to the contrary, the appointee will acquire a substantive right to the post even without an order of confirmation. In all other cases, in the absence of such an order or in the absence of such a service rule, an express order of confirmation is necessary to give him such a right. Where after the period of probation an appointee is allowed to continue in the post without an order of confirmation, the only possible view to take is that by implication the period of probation has been extended, and it is not a correct proposition to state that an appointee should be deemed to be confirmed from the mere fact that he is allowed to continue after the end of the period of probation. See Chief Conservator of Forests, U.P. Nainital v. D. A. Lyall(1) : Sukhbans Singh v. The State of Punjab(2) and The Accountant General, Madhya Pradesh, Gwalior v. Beni Prasad Bhatnagar(3).

The ground on which Tandon, J., decided the petition cannot therefore be sustained. But the High Court held that the respondent had been subjected to reduction in rank in violation of the guarantee under Art. 311 of the Constitution. In the view of the High Court the order dated August 13, 1957, determining the probation and withholding promotion for a period of seven years from the date of reversion being a composite punitive order, could not be

made by the Governor without giving to the respondent reasonable opportunity of showing cause against the action proposed to be taken in regard to him. That view is strongly pressed upon us for acceptance. The proceeding against the respondent, it is true, commenced on a report which charged him with having submitted travelling allowance bills in respect of journeys not performed by him. But it is clear from the letter dated September 27, 1956, that the inquiry made against the respondent was only for the purpose of affording him an opportunity to show cause why his "probation should not be terminated forthwith." The Governor of U.P. after considering the explanation submitted by the respondent, by order dated August 13, 1957, terminated the probation of the respondent, and further directed that he should not be considered for promotion for a period of seven years from the date of reversion. The second part of the order, it appears, was not given effect to, for even before December 1, 1958 the respondent was posted as an officiating Tahsildar. By the second order dated December 1, 1958, the Governor of U.P. cancelled the stoppage

(1) C.A. 259 of 1963 decided on Feb. 24, 1965. (2) A.I.R. 1962 S.C. 1711

(3) C.A. 548 of 1962 decided on Jan. 23, 1964.

827

or promotion and only confirmed the order in so far as it related to termination of probation. We are unable to agree with the High Court that the first limb of the order dated August 13, 1957, was punitive in character. The inquiry against the respondent was held for the purpose of determining his probation. Under r. 14 of the Subordinate Revenue Executive Service (Tahsildar) Rules, 1944, the Governor is authorised to revert a person appointed on probation, if it appears at any time that the person has not made sufficient use of his opportunities or has failed to pass the departmental examination completely or has otherwise failed to give satisfaction. An officer who has submitted travelling allowance bills in respect of journeys not undertaken by him may not unreasonably be regarded as one who "has failed to give satisfaction". It cannot be assumed merely because an inquiry is directed to ascertain whether a person appointed on probation has failed to give satisfaction, that it is intended to hold an inquiry with a view to impose punishment against that person. Inquiry against the respondent which was commenced for ascertaining whether he should be continued on probation or whether his probation should be terminated, did not change its character merely because the Governor made an order which he could not make in that inquiry. There is nothing to show that the scope of the inquiry was at any time extended. The order withholding promotion was one which the Governor was in the inquiry incompetent to pass, and apparently the order was not given effect to, and when presumably his attention was drawn to the irregularity that part of the order was cancelled.

The High Court assumed that in the circumstances of the case under r. 14 no inquiry could be made against the respondent before termination of probation and that the Governor held an inquiry under r. 55(3) of the Civil Services (Classification, Control and Appeal) Rules, and in making that inquiry the State authorities did not act in conformity with the rules and the constitutional safeguards. But the assumption made by the High Court cannot be accepted. In our judgment the inquiry was commenced under r. 14 of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944, and never lost that character. Reversion to a sub-

stantive appointment can be directed under r. 14 in the conditions mentioned therein, and for ascertaining the existence or otherwise of those conditions, the appointing authority may hold some inquiry. Mere holding of an inquiry is therefore not a ground for holding that the order which followed as a result of the inquiry was not made under r. 14.

The High Court also held that inquiries under r. 14 of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944, and r. 55(3) of the Civil Services (Classification, Control and Appeal) Rules which apply to the Provincial Services apply to different

82 8

situations. Rule 55(3) at the material time dealt with probationers. and provided :

"This rule shall also not apply where it is proposed to terminate the employment of a probationer whether during or at the end of the period of probation, or to dismiss, remove or reduce in rank a temporary government servant, for any specific fault or on account of his unsuitability for the service. In such cases, the probationer or temporary government servant concerned shall be apprised of the grounds of such proposal, given an opportunity to show cause against the action to be taken against him, and his explanation in this behalf, if any, shall be duly considered before orders are passed by the competent authority."

Clauses (1) & (2) deal with the dismissal, removal or reduction in rank of a member of a Service, but those clauses are expressly made inapplicable by the first sentence of cl. (3) of r. 55 to termination of employment of a probationer and by the second part the, procedure to be followed in the inquiry for determination of probation is prescribed. Rule 14 of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944, confers power upon the appointing authority to terminate probation in certain eventualities. Under that rule an inquiry may be made, if the appointing authority, thinks it fit to do so and to such an inquiry r. 55(3) which primarily, deals with the procedure to be followed before an order is passed determining probation may apply.

We are therefore of the view that the High Court was in error in holding that the order made by the Governor determining the probation of the respondent infringed the protection of Art. 311. The Governor initially passed an order determining the probation and also passed an order stopping promotion. The latter part of the order which the Governor was incompetent to pass under r. 14 did give rise to a justifiable grievance which the respondent could set up but after that order was cancelled the respondent had no cause for grievance. It cannot be said that by terminating the probation any penalty was imposed : and if that be the correct view the opinion expressed by the High Court that by passing the order dated December 1, 1958 the Governor was seeking to convert the earlier order of punishment into an order under r. 14 of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944 retrospectively, cannot be accepted. The order terminating' probation was made under r. 14 and continued to retain that character. The vice in the second part of the order did not either before or after it was cancelled affect the validity of the order terminating the respondent's probation.

829

We think that the respondent was ill-advised in prosecuting the petition even after he had been appointed an officiating Tahsildar.

The appeal is allowed and the order passed by the High Court set aside. The petition filed by the respondent must be dismissed. In the circumstances of the case, we direct that there will be no order as to costs throughout.

Appeal allowed.

830

JUDIS