

CASE NO.:
Appeal (civil) 307 of 1998

PETITIONER:
Mir Mohammad Khasim

RESPONDENT:
Union of India and Ors.

DATE OF JUDGMENT: 26/03/2004

BENCH:
Brijesh Kumar & Arun Kumar.

JUDGMENT:
JUDGMENT

BRIJESH KUMAR, J.

The controversy in this appeal relates to the question of deemed confirmation on successful completion of period of probation in the service and an order to that effect having been passed by the employer, whereafter nothing further was required to be done, except the formality of passing an order of confirmation.

The appellant was appointed as ASI in the police department of the State of Andhra Pradesh and was promoted as Deputy Superintendent of Police Category-3 in the year 1975. He was further promoted as Deputy Superintendent of Police Category-2 with effect from 1.3.1982. He was placed on probation. Sometime later his probation was terminated and he was reverted to his erstwhile cadre which was challenged by filing a writ petition in the High Court. The writ petition was allowed as a consequence thereof, an order was issued on 6.10.1989 declaring that the appellant had satisfactorily completed the period of probation with effect from 27.1.1987 in relaxation of Rule 7(e) of Andhra Pradesh Police Service Rules, 1966 (for short 'the A.P.P.S.Rules').

In the seniority list of the officers of the state police service dated 1.6.1989, he was placed at serial no.103. The names of the private respondents were placed at serial nos.118 and 125. The eligible candidates, for selection to the Indian Police Service, from the state police services, were due for consideration for which a selection was held on 5.1.1990 and the select list for 1989 was prepared but the name of the appellant did not appear in the list. The private respondents shown junior to the appellant in the seniority list were considered and selected. The appellant was not considered by the selection committee with a remark that he was not yet confirmed. This fact was verified by the Central Administrative Tribunal by perusing the record of the selection in question. As a matter of fact, there is no denial that the appellant was not considered for selection to the cadre of Indian Police Service on the ground that he was not confirmed. However, according to the appellant, he would be deemed to be confirmed in view of the order of the State Government dated 6.10.1989 saying that the appellant had satisfactorily completed the period of probation in the cadre of Deputy Superintendent of Police Category 2. The said order of the State Government is reproduced below :

"Home (Police.E) Department
G.O.Rt.No.3245 Dated 6th October, 1989

Read the following:-

- 1.G.O.Ms.No.39 Home (Police-E) dpt.
Dt.16.1.1982.
- 2.G.O.Ms.No.406 Home (Police-E),
dt.3.3.1983
- 3.G.O.Rt.No.2923, Home (Police-E),
dt.20.10.1984.
- 4.G.O.Rt.No.579 Home (Police-E) Dpt.
Dt.22.3.1982.

ORDER:

"Shri Mohd.Khasim, Asst.Commandant (DSP-Category-3) was appointed by transfer as Deputy Superintendent of Police, Category-2 in the G.O.1st read above and commenced probation with effect from 1-3-1982. His probation was terminated and he was reverted as Asst.Commandant, though equivalent cadre, which he held prior to his appointment as Deputy Superintendent of Police, Category-2, in the G.O.2nd read above. By virtue of High Court orders dated 10.10.1984 in W.P.M.P.No.1836 of 1984 in W.P.No.1398 of 1984 he was reappointment as Deputy Superintendent of Police category-2 by revoking the orders of termination of probation in G.O.3rd read above and allowed to continue that Balance of Training. The duty period from 3-3-1983 to 19-11-1984 was treated as duty in the cadre on Deputy Superintendent of Police, Category-2.

Under Rule 6(a) of A.P.Police services rules, he shall be on probation for a total period of one year on duty within a continuous period of two years. Rule 7(e) of the same rules, prescribes that a probationer has to pass the tests prescribed in rule & 7(a) at or before fifth half yearly examination held after his appointment as Deputy Superintendent of Police, Category-2. Shri Mohd.Khasim has passed the Departmental Test-D(i) in the examination held in September, 1986 and the result of the test was received in Government on 27.1.1987.

After careful consideration, under Rule 47 of A.P.State and Subordinate Service Rules, The Governor of Andhra Pradesh hereby relaxes Rules 7(e) of A.P.P.S. in favour of Sri Mohd.Khasim, Deputy Superintendent of Police, Category-2 and under Rule 26 of A.P.State and Subordinate Service Rules, Government hereby extend the probation of Sri Mohd.Khasim as Deputy Superintendent of Police, Category-2 up to and inclusive of 27.1.1987 and declares that he was satisfactorily completed his probation in the cadre of Deputy Superintendent of Police, Category-2 on the A.N.O.27.1.1987. (By order and in the name of the Governor of Andhra Pradesh)

Sd/-

P.V.Rangaiah Naidu,
Principal Secretary to Government"

(emphasis supplied)

The case of the appellant is that the rules do not require anything further to be done after successful completion of period of probation and before confirmation of the concerned employee. In such circumstances the confirmation would be deemed to have been done as after successful completion of the period of probation as it could not be treated to be impliedly extended any further.

The case of the respondent, however, is that in view of provisions contained under rules 6 and 7 particularly sub-rule (e) of Rule 7 of A.P.P.S. Rules, a further period of three years had yet to be completed as probationary period by the appellant with effect from 27.1.1987 in addition to a period of one year so as to be entitled for confirmation as Deputy Superintendent of Police Category 2. The period of three years with effect from 27.1.1987 would have been completed on 27.1.1990. Therefore, there was no occasion to consider the appellant for selection to the Indian Police Service in the year 1989. Rules 6 and 7 of the A.P.P.S.rules are quoted below:

"6(a) Probation \026 Every person appointed to a category in the service shall be on probation, for a total period of two years on duty within a continuous period of three years, if recruited direct; and for a total period of one year of duty within a continuous period of two years, if recruited by transfer or promotion. Every Deputy Superintendent of Police, Category-3 appointed to the post of Deputy Superintendent of Police, Category-2, shall be on probation for a total period of one year on duty within a continuous period of two years.

(b) A probationer in the category of Deputy Superintendent of Police, Category-2 or Category \026 3 shall be eligible to count, for purpose of his probation, the duty rendered by him in any post, the duties and responsibilities which are declared by a general or special order of the Government to be equivalent to those attached to the post of Deputy Superintendent of Police, Category-2 or as the case may be in Category 3.

(c) A probationer in the category of Deputy Superintendent of Police, Category-2 or Deputy Superintendent of Police, Category-3 shall not be eligible to draw the first increment until he passes the prescribed tests and satisfactorily completes the period of probation. The postponement of declaration of probation on account of non-passing of tests shall not however have the effect of postponing future increments after he has passed the prescribed tests.

7. Tests \026 (a) A person appointed to the service by direct recruitment shall pass at or before the fifth half-yearly examination held after his appointment, an examination in \026

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(b) Deputy Superintendent of Police,

Category-2 appointed from the post of Deputy Superintendent of Police, Category-3 shall, if he has not already passed, pass the tests prescribed in sub-rule (a) above, at or before the fifth half-yearly examination held after his appointment as Deputy Superintendent of Police, Category-2.

(c) Notwithstanding anything in the General Rules but subject to the exceptions specified in sub-rule (d) \026

(i) no person appointed by direct recruitment shall be declared an approved probationer unless and until he has passed the examination in all the subjects at or before the fifth half-yearly examination held after his appointment as specified in sub-rule (a);

(ii) if any such person has satisfactorily completed the prescribed period of probation and has been declared an approved probationer, he shall be deemed to have become a full member of the service on and from the date on which he has satisfactorily completed the period of probation;

(iii) if any such person fails to pass the examination in any of the said subjects as required by sub-rule (a) he shall, by order, be discharged from the service unless he is exempted from passing the examination in any such subjects or is given further time for passing the examination;

(d) if such a person has been exempted from passing the examination in all or any of the said subjects or has passed the said examination within the further period or periods allowed to him for passing the said examination, he shall be declared to have satisfactorily completed his probation, if otherwise found suitable for such declaration, and appointed a full member and shall count his service for increments on and from such date as may be determined by the State Government, but such date shall not be earlier than the date of the fifth half-yearly examination held after his appointment to the service.

(e) No person appointed as Deputy Superintendent of Police, Category-2, from the post of Deputy Superintendent of Police, Category-3 shall be declared an approved probationer in Category-2 unless and until he has passed the examination in all the subjects at or before the fifth half-yearly examination held after his appointment as specified in sub-rule (b). Such a person shall, render a further satisfactory service of three years before he is confirmed as Deputy Superintendent of Police, Category-2

besides the period of probation prescribed in rule 6."

According to the learned counsel for the respondent the appellant on successful completion of one year's period of probation and clearing the tests would be declared as an approved probationer whereafter alone one has to undergo further period of three years probation before becoming entitled for confirmation in service. By means of order dated 6.10.1989 he was declared only as an approved probationer w.e.f. 27.1.1987, therefore, as per rule 7(e) a further period of three years would be counted from 27.1.1987 which period would be completed on 27.1.1990, therefore, there was no occasion to submit that appellant could be deemed to have been confirmed any time before 27.1.1990. It is further submitted that there is no automatic confirmation unless a specific order is passed confirming an employee. To further strengthen the latter submission it is pointed out that no maximum period of probation has been provided under the Rules in this case on expiry whereof, it could be claimed that there would be automatic confirmation of the appellant nor it has been provided that the period of probation could not be extended beyond what is provided under rules 6 and 7. Therefore, even after four years probationary period the appellant would only be treated to have been continued on probation, unless specifically an order of confirmation was passed.

Ms.K.Amareshwari, learned senior counsel appearing for respondent no.3 further submits that the whole reading of the order dated 6.10.1989 granting relaxation to the appellant would show that the relaxation was provided only in so far it related to duration of period within which written tests were required to be cleared by a probationer. Rule 7(a) of the A.P.P.S.Rules provides for clearing the prescribed tests at or before the 5th half yearly examination held after his appointment, while clause (b) of rule 7 provides that those who have been promoted from Deputy Superintendent of Police Category 3 to category 2, in case they had already not passed the tests prescribed in sub-rule (a) at or before the 5th half yearly examination held after his appointment, shall do so accordingly on their appointment to category 2; the appellant cleared the prescribed tests much after a period of two and half years, namely, only in the examination held in September, 1986 the result of which was declared on 27.1.1987. It is submitted that the relaxation has been granted to the appellant only in respect of the period of time during which he was required to clear the tests. In this connection, our attention has been drawn to the order dated 6.10.1989 where in the last but one paragraph of the order it is mentioned that the appellant had to pass the prescribed tests at or before 5th half yearly examination held after his appointment but the appellant had passed the tests in September, 1986. Therefore, the contention is that the order of relaxation pertains to the period of time which has been extended in clearing the paper and not in respect of the period of three years of probation which has further to be undergone over and above the period of one year of probation as provided under rule 6(a) of the A.P.P.S.Rules. It is further submitted that the appellant could be declared as an approved probationer only after he had successfully completed one year's period of probation under rule 6(a) and had cleared the written tests at or before the 5th half yearly examination and in view of latter part of clause (e) of rule 7 of the A.P.P.S.Rules he has to complete a further satisfactory service of three years before

confirmation besides the period of probation prescribed in rule 6.

On consideration of the submission made by learned senior counsel for the respondent, we find it difficult to read the order of relaxation, in the manner sought to be read by the respondent. It is no doubt true that according to rule 6 a promotee officer has to complete initially a period of one year's probation before he could be declared as an approved probationer. The other requirement is of clearing the tests as prescribed under rule 7(a). A further period of three years satisfactory service is to be completed before being confirmed in service as provided under latter part of clause (e) of rule 7. But it is not possible to confine the order of relaxation to the period of clearing the tests and not in respect of requirement of further period of three years, besides one year's period under rule 6(a). In the last but one paragraph of the order dated 6.10.1989 there is a mention of the fact that the appellant had cleared the tests in the examination held in September, 1986 result of which was received by the Government on 27.1.1987. In the next paragraph thereafter there is a mention of relaxation of rule 7(e) of the A.P.P.S.Rules and rule 26 of the A.P.State and Subordinate Service Rules. The order further goes on to say that the period of probation of the appellant was extended thereby up to and inclusive of 27.1.1987. After mentioning the above facts the order declares that the appellant has satisfactorily completed his probation in the cadre of Deputy Superintendent of Police category 2. As indicated earlier, there is a specific mention of relaxation of "rule 7(e)" and "under rule 26" of A.P.State and Subordinate Service Rules. Therefore, it cannot be said that relaxation of rule 7(e) is limited to first part of the said clause and it does not cover the latter part. As a matter of fact the requirement of clearing the tests in five half yearly examinations is provided in rule 7(b) and not in clause (e) of rule 7. What is not provided in rule 7(b) or elsewhere but only in sub-rule (e) is contained in the latter part which provides for three years further satisfactory service besides the period of probation prescribed in rule 6. The appellant was appointed as Deputy Superintendent of Police category 2 on 1.3.1982 and the declaration of satisfactory completion of period of his probation is with effect from 27.1.1987. It is a period of near about 5 years. We find it difficult to restrict the relaxation provided in rule 7(e) to only the first part of it ignoring the latter part and there seems to be no reason to do so. The declaration which the order of relaxation contains is that the appellant had satisfactorily completed his probation in the cadre of Deputy Superintendent of Police category 2. A vain effort has been made to say that maybe the appellant may not have completed one year's period of initial probation under rule 6, therefore, there could not be any declaration of satisfactory completion of the period of three years after period of one year in rule 6. We have not been able to appreciate the said submission as declaration of satisfactory completion of period of probation under rule 7(e) is without any strings and noticeably the said declaration of satisfactory completion of period of probation is in the cadre of Deputy Superintendent of Police category 2. We, therefore, find no merit in the submission that the order of relaxation may be interpreted so as to confine it only to the time taken in clearing the tests. It is also to be noticed that the order dated 6.10.1989 does not declare the appellant as an "approved probationer" as tried to be submitted. A bare reading of the order shows that it relates to satisfactory completion of period of probation in the cadre of Deputy

Superintendent of Police category 2 without any restriction of any kind.

Shri Rakesh Dwivedi, learned senior counsel appearing for the private respondents submits that the order granting relaxation of service rules must be construed strictly. It is submitted that the order dated 6.10.1989 should be read as a whole and in doing so it would be clear that the relaxation is under rule 26 of the A.P.State and Subordinate Service rules. That is to say in regard to the period of more than five half yearly examinations in clearing the tests taken by the appellant. In support of strict construction of the orders providing for relaxation from rules, reliance has been placed upon a decision of this Court in Suraj Prakash Gupta & Ors. vs. State of J & K & Ors., reported in (2000) 7 SCC 561. Our attention has also particularly been drawn to paragraph 28 of the decision where it is observed that there can be no relaxation of basic or fundamental rules of recruitment. In that context reference to another decision of this Court, Keshav Chandra Joshi vs. Union of India, 1992 Suppl. (1) SCC 272 was made, where relaxation from the rule requiring consultation with the Public Service Commission was not accepted as such a condition was treated to be mandatory. This case would not be applicable to the case in hand. Learned senior counsel for the private respondents has also submitted that rule empowering an authority to relax the conditions of service etc. cannot be so wide as to grant any kind of relaxation whatsoever. It is submitted that rule 47 has been worded in very wide terms and vests the authority with very wide powers. In connection with the above submission, suffice it to observe that the order of relaxation was passed on 6.10.1989. It was never put under challenge. Neither by the present private respondents nor by anyone else. Even during the proceedings before the Tribunal no such ground about the validity of rule 47 of the A.P.State and Subordinate Rules was put in issue. We do not think it will be appropriate to entertain the plea about the validity of rule 47 at this stage. The other respondents have also not come forward with the case that rule 47 is bad for vesting very wide powers in the authority or that the order of relaxation is bad having gone beyond the scope of rule 47. If at all, such a plea may better be examined in any other appropriate case. Presently, we find that it is beyond the scope of this appeal. Learned senior counsel for the appellant has submitted that the validity of the rule has already been upheld by this Court in a case reported in AIR 1977 SC p.451, Government of Andhra Pradesh & Ors. vs. Shri D.Janardhana Rao & Anr., We, however, leave this point at this without going further into the matter.

The moot question which arises for consideration is about the effect of the order of granting relaxation to the appellant from rule 7(e) and the consequences which flow from the said order. According to the appellant on successful completion of period of probation nothing further is required to be done before confirming the officer. All that was required had been accomplished since the appellant had cleared the tests as required under rule 6(b) as well as has undergone the period of probation which has been considered to be successful completion of period of probation as per rule 7(e). That being the position the appellant shall be deemed to have been confirmed. Whereas Ms.K.Amareshwari, learned senior counsel for the respondent no.3 submits that unless an order of confirmation is passed the appellant cannot be deemed to have been confirmed. It is further pointed out that the rules do not

prescribe any maximum period of probation nor any provision says that it shall not be extended beyond any given period of time. In such circumstances, it is submitted, the law is settled that there will be no automatic confirmation unless such an order is passed. In our view, there cannot be any dispute about the proposition that where no maximum period of probation is provided there would be no automatic confirmation of the employee on expiry of period of probation unless an order is passed in that regard. In such cases it is taken that the period of probation continues unless and until an order of confirmation is passed. Our attention has been drawn to a decision in the case of Commissioner of Police, Hubli & Anr. vs. R.S. More, (2003) 2 SCC p.408. In this case the appointing authority was empowered to extend the period of probation up to certain prescribed limit but there was a further provision that mere expiry of the prescribed period or extended period of probation would not entitle the probationer to claim satisfactory completion of his probation. Hence he would continue to be under probation and it would not be treated as deemed confirmation. In connection with this case it may be observed that the rule itself provided for extension of period of probation and thereafter that completion of period of probation or extended period of probation will not automatically entitle the employee deemed to have been confirmed unless a specific order in that regard is passed. Hence the above decision would not be of any help to the respondent. It may further be observed that in the matter of period of probation and confirmation it would always depend upon the language of the rule on the point. A reference has also been made to a decision of this Court in the case of High Court of M.P. through Registrar & Ors. vs. Satya Narayan Jhavar, reported in (2001) 7 SCC 161, more particularly to paragraph 11 of the judgment which we beneficially quote as under :

"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."

According to the learned senior counsel for the respondent, the appellant falls in first category as well as last namely where no maximum period of probation is prescribed as well as where along with successful completion of period of probation he has also to achieve some other accomplishment as in the present case to clear prescribed tests in five half yearly examinations.

It may be pointed out that it is nobody's case that the appellant is entitled to be deemed to have been confirmed in view of any condition that the period of probation is not extendable beyond a certain limit in which event an employee is deemed to have been confirmed. We feel that on this point a Constitution Bench decision of this Court in *State of Punjab Vs. Dharam Singh*, 1968 (3) SCR p.1, providing that if an employee is continued after maximum period of probation which under the rules cannot be extended any further the employee shall be deemed to have been confirmed, continues to hold the field. But the case in hand is not claimed to form the second category of cases as quoted in para 11 of the decision in the case of *Satya Narayan Jhavar* (supra).

Learned senior counsel for the respondent, rightly points out that the case of the petitioner may fall in the first and the third category of employees as indicated in para 11 of *Jhavar's* case quoted above. That is to say the rules do not prescribe any maximum period of probation beyond which it cannot be extended and that along with successful completion of period of probation the employee has also to pass the required tests. We feel, given by itself, without any further facts the appellant would not be entitled to claim deemed confirmation but for the fact that an order passed by the competent authority dated 6.10.1989 intervenes which makes a declaration that the appellant has satisfactorily completed the period of probation. As discussed in detail, in the earlier part of the judgment the relaxation has been given in regard to the period taken in clearing the examination as well as in regard to rule 7(e) latter part of which provides that three years further period of satisfactory probation in addition to one year period as provided under rule 6. The relaxation is therefore, from both the requirements, in that background the question which thus arises for consideration is, in such circumstances there would be deemed confirmation of the employee or not. In our view, this is a category of cases other than those three mentioned in paragraph 11 in the case of *Satya Narayan Jhavar* (supra). The logic behind not treating a probationer deemed to be confirmed on completion of period of probation is that unless there is an order of confirmation he would be taken to be continuing on probation. But here we are faced with a situation where the state government itself has given a declaration that the appellant has satisfactorily completed the period of probation in the cadre of Deputy Superintendent of Police category 2. That being the position it cannot be said that despite the above said order dated 6.10.1989 the appellant could still be treated to be continuing on probation only for the reason that

no specific order of confirmation has been passed. It will rather be self-contradictory in terms. The inconsistency cannot co-exist. Either the employee has successfully completed the period of probation or he may still be in the process of successful completion of probation even though the period may run beyond the period prescribed for the purpose. After successful completion of the period of probation and any other condition or requirement as may be prescribed under the rules nothing else is required to be done and the only corollary to follow is that with successful completion of period of probation the incumbent would be deemed to have been confirmed. It would have been a different matter if the appellant had only successfully completed the period of probation but had not yet cleared the tests as prescribed under rule 6(b) because in that case there was yet another hurdle to be crossed but as seen in the discussion held earlier, the appellant has satisfied both the conditions namely, successful completion of period of probation as well as he cleared the tests as prescribed under the rules. Both the conditions having been complied with and a declaration to that effect having been made under the orders of the State in relaxation of the rules nothing else remained to be done. At this stage it may also be observed that in the case of Dayaram Dayal vs. State of M.P., (1997) 7 SCC 443, apart from the condition of completion of period of probation the condition regarding clearing of the prescribed departmental examinations was overlooked. It was, therefore, found that mere completion of period of probation was not enough without passing prescribed departmental examination. Thus, the observation made in the case of Satya Narayan Jhavar (supra) in relation to the case of Dayaram Dayal (supra) that it does not lay down the correct law will have no effect, so far the present case is concerned. In view of the discussion held above, the position that clearly emerges is that in absence of the order dated 6.10.1989 granting relaxation to the appellant in respect of rules 6(a) and 7(e) the appellant would not have been in a position to claim the benefit of deemed confirmation. But once that relaxation has been granted and he is taken to have cleared the tests in time and it was declared that he would successfully complete the period of probation no other formality had to be undergone, thus he would inevitably be deemed to be confirmed. In this view of the matter, the appellant was unreasonably put out of the consideration for selection to the cadre of Indian Police Service for the year 1989.

Ms.K.Amareshwari, learned senior counsel appearing for the respondent submitted that the Central Administrative Tribunal had held that the question of confirmation in the state services could not be considered by it, therefore, the matter may either be remanded to the Central Administrative Tribunal or the appellant may be allowed to seek his remedy regarding confirmation before the State Services Tribunal. We feel that the whole matter is before us and all the parties have made their submissions relating to all aspects of the matter. We don't think it would be an appropriate case for remanding it to any Tribunal at this late stage when the appellant has already retired from service. However, this point has not been further pursued by the learned senior counsel for the respondent and we feel rightly.

In the result, the order passed by the Central Administrative Tribunal is set aside and the respondents are directed to consider the case of the appellant for selection to the Indian Police Service for the year 1989 and in case he is

selected he shall be entitled to notional promotions and financial benefits only without affecting the position of the private respondents in any manner whatsoever, which shall be continued to be maintained treating their selection for Indian Police Service in the year 1989.
Parties to bear their own costs.

JUDIS