

ALLAHABAD HIGH COURT

Chief Conservator of Forests

Vs

D.A. Lyall

Special Appeal No. 9 of 1960

(M.C. Desai, C.J., B.N. Nigam and R.A. Misra, JJ.)

10.04.1961. 22.09.1959

JUDGMENT

R.A Misra, J.

1. The question referred to the Full Bench for answer is, "Whether a Government servant on probation is to be deemed to be confirmed on the expiry of the period of his probation if no orders confirming him in his substantive post or extending his period of probation are passed by the competent authority ?"

2. It has arisen in a special appeal which has been preferred against a judgment of a learned single Judge of this Court, allowing the writ petition filed by the respondent Shri D.A. Lyall under Article 226 of the Constitution. The special appeal, was heard by a Bench of which two of us were members, and. as it was felt that the question is of importance and had once been referred and a larger Bench but could not be decided because of some reasons, which it is not necessary to state here, the matter has come up before the Full Bench.

3. The facts of the case in which this question, has been raised have been fully set out of the Judgment of the learned single Judge, may only be briefly touched again.

4. On the approval of the Public Service Commission, U.P. made in 1939, and, after necessary departmental training, Shri D.A. Lyall respondent was appointed an officiating Inspector in the Co-operative Department, U.P. on 25-4-1941, Shortly after, in June 1941, on his request, he was allowed to join Army service on a commissioned post where he served till 1947. Then on his application in. that behalf, he was selected for service in the Forest Department, U.P., in one of the vacancies reserved for War Service candidates.

By an order dated 18th March, 1947, the Registrar, Co-operative Societies, U.P. permitted him to join the Forest Department, retaining his position in the gradation list of the Inspectors Cooperative Societies intact. In fact, the respondent was confirmed as an Inspector in the Co-operative Department with effect from 1-10-1948 vide order No. C. 133/ESTT dated 17-1-1950. After being selected for service in the Forest Department the respondent underwent necessary training and was posted as an Assistant Conservator of Forests on probation for two years from

1-4-49.

The period of probation expired on 31-3-1953 but no orders for his confirmation on this post were passed. No orders were either passed within two years from 1-4-49 extending his period of probation. His lien on his permanent post as Inspector Co-operative Societies had already been suspended in 1951 by an order passed under rule 14(b) of the Fundamental Rules, since he was deputed to serve on a substantive post in the Forest Department. However, he was still serving as an Assistant Conservator, Forests in August 1953, when charges were framed against the respondent by the Chief Conservator of Forests, U.P. and he was asked to explain why he should not be removed from service. The explanation submitted by the respondent to these charges was found unsatisfactory and he was discharged from service of the Forest Department with effect from 23-2-1954. This order was communicated to him on 21-2-1954. The respondent made a representation against it to the U.P. Government and the order of discharge passed by the Chief Conservator of Forests, U.P., was set aside as appears from Notification No. 4418/XIV-486-50 read with 3130/XIV-48650, dated June 8, 1954 and G.O. No. 174C/XIIC dated January 11, 1956 (annexures-I and A respectively), but it was directed by the Government that the respondent be treated as having reverted to the Co-operative Department from February 24, 1954 and that disciplinary proceedings be taken against him de novo by placing him under suspension from the date of his reversion to the Co-operative Department. His period of probation was also extended up to 23-2-54, i.e. the date of his discharge from the Forest Department. In accordance with the above direction, of the Government, the Registrar, Co-operative Societies, U.P., placed Shri Lyall under suspension with effect from 24-2-1954 and towards fresh charges against him on 28-4-56. Shri Lyall filed his written explanation to these fresh charges and desired to cross-examine the witnesses who were expected to depose against him. He also filed a list of defence witnesses. The Deputy Registrar, Co-operative Societies, Kanpur was appointed to conduct the enquiry into the aforesaid charges against the respondent. There was some delay in the disposal of the charges because the evidence to support those charges was to come from the Forest Department, whereas the enquiry was being conducted by the Co-operative Department, and the Co-operative Department sought the assistance and co-operation of the Forest Department in the matter through the intervention of the Government.

5. While the correspondence was continuing on the subject between the two departments and the Government, the respondent filed a writ petition in this Court under Article 226 of the Constitution on 23-12-1957 in which he prayed that a direction, writ or order in the nature of the certiorari be issued against the Registrar, Co-operative societies cancelling his order of suspension as well as further proceedings taken thereafter against the appellant. He further prayed that a writ, direction or order in the nature of mandamus be issued against the Chief Conservator of Forests, U.P. requiring him to give him a posting in the U.P. Forest Service in the alternative, he prayed for a suitable writ direction or order against the Registrar, Co-operative Societies, U.P. Lucknow, and the Deputy Registrar, Co-operative Societies, U.P., Bareilly and the State of U.P. requiring them to conduct a proper enquiry into the charges levelled against him in so far as they could be re-agitated against him.

6. The learned single Judge who heard the writ petition held that the order reverting the respondent to the post of Inspector of Co-operative Societies and the subsequent order of the Registrar, Co-operative Societies, suspending him from service was invalid. He further held that the proceedings being taken against the respondent by the Registrar, Co-operative Societies, were

without jurisdiction. In the result he quashed the order of reversion, the order of suspension, and the disciplinary proceedings which were being taken against the respondent by the Registrar, Co-operative Societies.

7. Aggrieved by the aforesaid judgment of the learned Single Judge, the Chief Conservator of Forest, U.P., the Registrar, Co-operative Societies the Deputy Registrar Co-operative Societies and the State of U.P., who were the opposite parties in the writ petition of the respondent, have filed a special appeal, out of which this reference arisen.

8. The respondent's case was that on 28th April, 1956, when the Registrar, Co-operative Societies framed charges against him in accordance with the directions of the Government, he respondent had ceased to be in the service of the Co-operative Department and that from 1st April, 1951 the date on which his period of probation expired, he was a confirmed Assistant Conservator of Forests under the Forest Department; hence the action of the Registrar, Co-operative Societies, in suspending the respondent from service and conducting an enquiry into the charges against him, was without jurisdiction. On behalf of the appellants it was contended that the respondent had been confirmed as an Inspector of Co-operative Societies on 1st October, 1948, that his lien had only been suspended in that post since he was permitted to serve in the Forest Department and being still in service in that department, he was amenable to the jurisdiction of the Registrar, Co-operative Societies. It was further contended that as no orders confirming the respondent as an Assistant Conservator of Forests had been passed by a competent authority, he did not acquire the status of a confirmed servant in the Forest Department.

9. Relying on rule 12A and relevant parts of rule 14 of the Financial Handbook, Volume II quoted below,

"12A. Unless in any case it be otherwise provided in these rules, a government servant on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired on any other post".

"14. (a) The lien of a government servant on a permanent post which he holds substantively shall be suspended if he is appointed in a substantive capacity :

(1) to a tenure post, or

(2) to a permanent post outside the cadre on which he is borne, or

(3) Provisionally, to a post on which another government servant would hold a lien had his lien not been suspended under this rule", and by reference to the facts of the case, the learned single Judge held,

(1) That the lien which the petitioner held on the post of the Inspector of Co-operative Societies had been suspended :

(2) That the post which the petitioner held in the Forest Service was a permanent post, and

(3) That his appointment thereto was in a substantive capacity.

He further held that because of the suspension of the petitioner's lien on the post of Inspector of Co-operative Societies, his appointment in the Forest Service was in a substantive capacity on a permanent post. In his opinion "once the lien of a government servant is suspended on any post, because he has been substantively appointed if another permanent post, the concerned government servant does not possess any lien on his old post which is indeed suspended",. Lastly, he was of opinion that "once a lien is suspended though it may not have terminated nevertheless for all practical purposes it does not exist." In view of the above reasoning, it appears the learned Judge was of opinion that the respondent's connections with the Co-operative Department, where he held it permanent post had completely ceased on the date when he was charge-sheeted by the Registrar, Co-operative Societies.

10. On the question whether the respondent acquired the status of a confirmed servant in the Forest Department on the expiry of the period of probation of two years on 1st April, 1951, or that his period of probation should be deemed to continue even after that in spite of the fact that his period of probation, had not been extended by any order passed within two years from the date of his appointment in the forest department, the learned single Judge held that there was never any order extending the period of probation and that because his probation came to an end on 31st March, 1951, he would no longer be on probation after that. Regarding the other part of this contention, the learned single Judge held that during the interval which elapses after the expiry of the period of probation and before any orders for his confirmation are passed, he would be deemed to be "a quasi-permanent servant" and that in such "a condition the government servant, though he may not be permanent in his post possesses has (sic) a claim to continue in his post which claim is often known by the expression "lien" ".

11. In coming to these conclusions, the learned single Judge referred to the provisions of Rules 14, 15 and 16 of the U.P. Forest Service Rules, 1952, which are analogous to some of the rules of the Deputy Inspector of Schools Service Rules, 1944, and also referred to two of his earlier decisions, *Bipat Prasad Sonekar v. State of Uttar Pradesh*¹, and *S.N. Sagar v. State of Uttar Pradesh*², The case, 1959 All LJ 79 : (AIR 1959 Allahabad 536) (supra) related to the Education Department and rule 14 of the U.P. Forest Service Rules is similar to rule 17 of the Deputy Inspector of Schools Service Rules of 1944 and likewise rule 16 of the U.P. Forest Service Rules, is identical to rule 19 of those rules. In this case the question for decision was whether after the expiry of the period of probation originally fixed, was it open to the Government to extend the period of probation by an order passed subsequently.

The learned single Judge held that the servant in that case would not be deemed to be on probation after the expiry of the period of probation and that the Government had no power under rule 17 of the Deputy Inspector of Schools Service Rules, 1944, to extend the period of probation retrospectively. The case of Civil Misc. Writ No. 1956 of 1937, D/-7-1-1959 (All.) (supra) involved the interpretation of rules 22 and 23 of the U.P. Civil Services (Executive Branch) Rules, 1941, and rule 55 of the Civil Services (Classification, Control and Appeal) Rules, which are identical to the relevant rules of the U.P. Forest Service Rules.

There also the learned single Judge was called upon to decide whether the period of probation can be extended retrospectively after its expiry. The period of probation in that case was also of two years which expired and had not been extended within those two years. The learned single Judge held that the rule, no doubt, lays down that the period of probation shall be two years and it

can be extended but the order granting extension must specify the date up to which it is done and that it should appear at any time during or at the end of the probation indicating that the officer has not made sufficient use of the opportunities afforded to him during the period of probation. According to the learned judge, the of probation, which is a period of trial, is thus a fixed period and though it can be extended in appropriate cases, it has nevertheless to be a fixed period and not continue indefinitely.

12. On behalf of the respondent, reliance was also placed on a Bench decision of this court reported in *State of U.P. v. Dr. Kanshi Ram Anand*,³. In this case Dr. Kanshi Ram Anand, who held the degree of M.B.B.S., was appointed to the State Medical Service on probation for two years, which expired on the 19th June, 1951. No formal orders were passed confirming him on the Post and he continued to serve on it until August, 1954. During the period of probation, he had appeared before the State Medical Board and he was found fit for appointment in spite of the fact that he suffered from stammer.

He was required to appear before the State Medical Board again on 3rd July, 1954, and on this occasion the Board considered him "to be completely and permanently incapacitated for further service on any account in consequences of impediment of speech and to have lost all earning capacity." As a consequence of this report, the State Government discharged Dr. Kanshi Ram Anand from service with effect from the date of the relief.

After unsuccessfully agitating the matter before his department and then before the Government the respondent preferred a writ petition which was allowed by a learned single Judge of this Court and the order of discharge was set aside. On appeal, the order passed by the learned single Judge was affirmed by a Bench. The leading judgment was delivered by Mootham, C.J. interpreting rules 18 clause (i), 19 and 20 of the United Provinces Public Health Service Rules, quoted in that Judgment and reproduced below.

"(i) Recruits directly appointed shall be on probation for two years and will draw a pay at Rs. 200 per mensem during the first year and Rs. 215 per mensem on completion of the first year of service. On confirmation they shall be placed at the Rs. 230 stage of the time-scale pay for further entrants laid down in Rs. 210 Temporary or officiating service shall count towards probation.

(ii)

19. The services of a probationer may be dispensed with by the Government at any time during, the period of probation or at its end. The Government may also extend the period of probation in the case of any particular member for any further period up to one year.

20. A probationer shall be confirmed in his appointment when -

(a) he has completed the prescribed period of probation and

(b) the Government are satisfied that (i) he is sufficiently acquainted with all local enactments relating to public health, municipal and organization, the administrative work of local bodies, and the relations of those bodies to the various departments of the

Government; (ii) be in otherwise fit for confirmation, (c) All confirmations under this rule shall be notified in the Government Gazette.", the learned Chief Justice held that :-

"a recruit directly appointed (such as was the respondent) is appointed to a permanent post on probation. The period of probation is ordinarily two years but may in the case of any particular member - the use of the word 'member in R. 19 is significant - be extended for any farther period up to one year, and during the period of probation the services of the member may be dispensed with at any time. There is no provision for the probationary period exceeding three years and in no case, in my opinion, can a member on probation after the expiry of that period or such reasonable time thereafter as is necessary for the Government to decide whether on a review of Ills work during the probationary period his services should be dispensed with.

"Rule 20 states the conditions subject to which a probationer shall be confirmed. It imposes a duty on the Government to confirm the probationer in the circumstances therein stated, and that duty is one which the Government has to perform if at all, at the expiration of the period of probation.

"In the present case the Government did not confirm the respondent at the end of his period of probation. He admittedly was allowed to continue in Government service for three more years. In such circumstances it appears to me that there are only two possibilities, that respondent's further employment must be either permanent or temporary. I am disposed to think that the former view is the better, and that if the Government does not exercise its right under Rule 19 to dispense with a member of the service during or at the end of his period of probation, but retains him in its employment, it must be deemed to have confirmed him in his appointment. It is not however necessary for me to express a final opinion on this point for, whichever be the correct view, a second question arises."

The other learned Judge, who constituted the Bench; concurred with the result proposed by the learned Chief Justice, and did not express any opinion on the interpretation of the above rules. The State appeal was dismissed because of non-compliance with the requirements of Article 311 of the Constitution in discharging the respondent from service. On the question whether the respondent in that case acquired the status of a confirmed servant automatically on the expiry of the period of probation and that his probationary period did not continue thereafter, the learned Chief Justice also, as quoted above, did not express his final opinion because he himself observed' "It is not however necessary for me to express a final opinion on this point for, whichever be the correct view, a second question arises," though he seemed inclined to hold that the probationary did not extend beyond the date of its expiry.

13. Having considered the arguments addressed by the parties and the available case law on the subject, we are of opinion that confirmation to a Government post occupied by a probationary servant is not a right which accrues to him automatically on the expiry of the period of probation. He acquires the status of a confirmed Government servant on that post only as a result of an affirmative order passed in that behalf by the competent authority. The period of probation of a

Government servant whether prescribed by rules or by an order, is a period of trial which affords an opportunity to the authority empowered to confirm him, to observe the performance of the servant on the post occupied by him and to make up its mind on the expiry of the said period whether the servant concerned is fit to be confirmed on the post or not. The competent authority may, if it feels satisfied caller that the servant is qualified to be confirmed and also if the rules permit, confirm him on the post even before the expiry of the period of probation. It may also extend the period of probation (if the extension is permitted by the Rules) before the expiry of the period of probation. It is, however, no bound by any rule to decide before the expiry of the period of probation whether to confirm him or watch his work and conduct for a further period and extend the period of probation. The very fact that Government servant is on probation for a certain, period means that the confirming authority has a right to watch his work and conduct for the whole of the period of probation and then to decide whether to confirm him or to extend the period of probation in order to watch his work and conduct for a further period or to terminate his service. It is entitled to wait till the expiry of the whole of the period for watching his work and conduct to the fullest extent and then to consider whether he should be confirmed or not. It is entitled to receive reports about his work and conduct from officers immediately superior to him and to take a reasonable time to make up its mind. It is not bound by any rule to decide immediately, i.e. without the passage of any time, after the expiry of the period of probation, whether to confirm him or to terminate his service or to extend the period of probation. Some time must naturally be taken in deciding what to do, and since it has a right to use the whole of the period of probation for watching his work and conduct, it follows that some time must elapse before it passes an order confirming him or terminating his service or extending the period of probation. In other words, from the mere lapse of the period of probation it cannot be assumed that the servant has been confirmed, such an assumption would mean curtailment of the period of probation, which is not permitted. It is practically impossible to pass an order of termination of service or extending the period of probation the moment the prescribed period of probation expires, and unless it is passed before the expiry of the prescribed period of probation (which means that the prescribed period of probation is curtailed) it will be practically impossible to terminate his service or extend the period of probation. If within a reasonable time the authority does not pass an order confirming trim or extending his period of probation or terminating his service it will still not lead to the assumption that he has been confirmed, his remedy would simply be to apply for a mandamus calling upon the authority to pass an appropriate order within a certain time.

What is a reasonable period within which the authority must pass an order one way or another is a question of fact depending upon the circumstances and need not be considered here because the respondent never sought a mandamus calling upon the confirming authority to pass an order in respect of confirmation. If a Government servant cannot be presumed to have been confirmed the moment the period of his probation expires without an order extending it or terminating his service being passed he cannot be presumed (to have been confirmed) at any subsequent stage also without an express provision to that effect. In the absence of a provision in the contract or rules of service he cannot be presumed to have been confirmed after the lapse of any time since the expiry of the period of probation.

14. Confirmation does not depend upon mere passage of time; it depends upon the Government servant being found to be fit for confirmation. What is required is a finding, express or implied, that he is fit to be confirmed. If after the expiry of the period of probation an order simply

confirming him is passed it may be implied to contain a finding that he is found fit to be confirmed. From no other circumstance such a finding can be implied and without it no confirmation can come into existence. It cannot be disputed that mere expiry of the period of probation does not lead to the inference of fitness for confirmation; the confirming authority must actually judge him to be fit.

15. So far we have dealt with the general aspect. In this particular case there is one more reason for our rejecting the doctrine of automatic confirmation and it is that Rule 16 of the U.P. Forest. Service Rules requires certain conditions to be fulfilled before a person is confirmed on the post of Assistant Conservator of Forests. It reads as follows :

"16(a) A person on probation shall not be confirmed in his appointment unless-

(i) he has completed the prescribed period of probation;

(ii) he has passed all the tests prescribed in rule 15 or has been exempted from passing such tests; and

(iii) the Governor is satisfied that he is fit for confirmation in other respects.

(b) If the period of probation of a person is extended on account of failure to pass the examination prescribed in rule 15 the confirmation shall take effect on passing the examination, from the first day of the month following that in which the examination is held."

Mere expiry of the period of probation is not enough for confirmation; the person must have passed all prescribed tests and he must have been found to be fit to the satisfaction of the Governor. The existence of these conditions is quite inconsistent with the doctrine of automatic confirmation.

16. In *State of Punjab v. S. Sukhbans Singh*⁴, the respondent Sukhbans Singh, who was a permanent Tehsildar, was promoted to a post in the Punjab Provincial Civil Service and was appointed on probation for eighteen months on 31st May, 1945. He was reverted to his permanent post on the 20th May, 1952. No orders admittedly had been passed in this period either confirming him on the higher post or extending his period of probation. The respondent filed a writ petition under Article 226 of the Constitution and a learned single Judge of that Court granted a direction that the State of Punjab should forbear from putting into execution the order reverting him to his permanent post without complying with the provisions of Article 311 of the Constitution. On an appeal by the State of Punjab, a Bench of that Court repelled the respondent's contention

"that as the petitioner was not removed from the higher service immediately on the completion of the probationary period of 18 months and as he was allowed to continue in his appointment several years thereafter without an express order extending the period of probation, it must be assumed that he was appointed substantively to the Provincial Civil Service on the conclusion of the period of probation."

It was further found that there was no rule which enabled the Court to hold that the probationary period had ripened into a permanent appointment by efflux of time. Their Lordships did not subscribe to the proposition that as soon as the servant became qualified for substantive appointment, he must be deemed to have been automatically confirmed. Lastly, their Lordships held that the respondent in that case

"could not acquire the status of a permanent member of the service automatically and that he could have acquired this status only if the competent authority had chosen to perform a positive or an affirmative act."

17. In *R. Venkatapathy v. Deputy Inspector General of Police, Western Range, Coimbatore*⁵, which was an appeal against an order passed by a learned Single Judge dismissing the appellant's writ petition, a contention was advanced on behalf of the appellant that as soon as the period of probation came to an end, the appellant automatically became a full member of the service. The Bench consisting of P.V. Rajamannar, C.J. and Panchapakesa Ayyar, J. repelled this contention. Their Lordships held that it is one thing to say that the period of probation had come to an end on a particular day but it was another thing to say that the period of probation in the case of Government servant was found satisfactory and he was admittedly full member of the service. In the opinion of their Lordships, before the latter could be done, there should have been a finding by the concerned superior officer that his probation has been found to be satisfactory. Proceeding further, their Lordships held :-

"Necessarily the determination of this question can only be taken up after the period of probation has come to an end. It is idle to contend that the superior officer has no right even to come to a conclusion whether the probation has been satisfactory and whether he is entitled to be admitted as a full member of the service."

18. With respect we find ourselves in complete agreement with the opinion expressed in the decisions of the Punjab High Court and the Madras High Court noted above and we are unable to agree with the opinion of the learned single Judge of our Court expressed in his two decisions that the Government cannot extend the period of probation retrospectively. Equally we do not agree with the learned single Judge that the Government servant at any stage acquires a status of a "quasi-permanent" servant. He can be either a probationary servant or a confirmed servant if so made by the authority concerned. The status "quasi permanent" as described by the learned single Judge is, in our opinion, not envisaged by any rule, law or precedent.

19. We have already noticed that in the Bench decision reported in AIR 1958 Allahabad 844 (supra), the learned Chief Justice did not give his final opinion on the question referred to us for answer and that the other learned Judge, who constituted the Bench, did not express himself at all on this aspect of the matter.

20. No statutory law, rule of the Forest Department or for the matter of that any rule of any oilier department, has been shown to us on behalf of the respondent to support the proposition that the probationary service of a Government servant ripens automatically into a permanent service only as a result of the expiry of the period of probation.

21. We have referred earlier to Rule 16 of the U.P. Forest Service Rules requiring a person to

pass all prescribed tests or being exempted from passing them before he is confirmed. Under rule 15, the respondent was required to pass a test in Hindi before he could be eligible for confirmation on his post. Admittedly, he has failed to pass the required Hindi test. It is not suggested on his behalf that he had been exempted from passing that test. On account of his failure to fulfil this condition, if for no other reason, he was not eligible for confirmation as an Assistant Conservator of Forests even if the period of probation had expired without any order extending it or terminating his service.

22. On behalf of the respondent, it was argued that his services with the Co-operative Department should be deemed to have terminated because in April 1952, when he was asked to revert to that department, he intimated to the Government through the Forest Department that he would not like to revert to the post in the Co-operative Department. We do not see any force in this argument. As noted above, his lien in the Co-operative Department was only under suspension. It had never been terminated. In our opinion his services with the Co-operative Department did not come to an end merely on the expression of the respondent's desire not to return to his post in that department because he was at that time serving in the Forest Department. In order to hold that the respondent's service with the Co-operative Department should have been deemed to have ceased, his reply that he would not like to return to that department should have been followed up by an order of the competent authority of the Co-operative Department terminating the respondent's lien in that department. No such order was passed. Mere intimation in that behalf on the part of the respondent could not have the effect of terminating his service in the Co-operative Department where he held a permanent post and would be deemed to be in the service of the Co-operative Department when charge-sheeted in 1956. It may very reasonably have been interpreted by the Co-operative Department to mean that he did not want to revert to the department at that time but would like to continue in the Forest Department till he was confirmed but did not want his lien in the Co-operative Department to be terminated till such confirmation.

23. As a result of the discussion and findings given above, our answer to the question referred to us is that a Government servant on probation is not to be deemed to be confirmed on the expiry of the period of his probation, if the orders confirming him in his substantive post or extending his period of probation are passed by the competent authority and that the orders confirming the officer, terminating his appointment, or extending the period of probation may be passed even after the expiry of the period of probation provided the decision is based on the work and conduct during the period of probation.

Answer accordingly.

Cases Referred.

- 11959 All LJ 79 : (AIR 1959 All 536)
- 2Civil Misc. Writ No. 1956 of 1957, D/-7-1-1959 (All)
- 3AIR 1958 All 844
- 4AIR 1957 Pun 191
- 5AIR 1958 Mad 216