

(1975) 01 DEL CK 0011

In the Delhi High Court

Case No : Civil Writ Appeal No"s. 557, 1395 and 1970 of 1971

A.N. Dhingra

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 24-01-1975

Acts Referred:

Citation : (1975) ILR Delhi 850

Hon'ble Judges : T.V.R. Tatachari, J;Prithvi Raj, J;Prakash Narain, J

Bench : Full Bench

Advocate : G.D. Gupta and B. Dutt, for the Appellant;

Judgement

Prakash Narain, J.

(1) This judgment will dispose of C.W. 1395 of 1970 and C.W. 557 of 1971, referred to a larger bench by our brothers, S. N. Shankar and H. L. Anand, JJ.

(2) Before proceeding to dilate on the contentions raised in the two petitions under Article 226 of the Constitution of India the facts of each case may be stated. Briefly, they are as under:- C.W. 1395 of 1970:

(3) The petitioner in this case entered Government service by being employed as Naib Nazir in the Court of Senior Sub Judge, Abbottabad in the North West Frontier Province (now in Pakistan). Fie was appointed with effect from May 29. 1937 on probation for a period of three months, evidenced by copy of telegram dated May 18, 1937 (Annexure Iii to the petition) and copy of office order dated May 18, 1937 (Annexure Iv to the petition). In the service book of the petitioner, however, there is an entry that he was "substantive (on probation)". The petitioner was selected for appointment after being successful in a test/examination held for recruitment to the post. Fie was confirmed as Naib Nazir with effect from July 20, 1938. During the period of probation there was no adverse remark made against or communicated to the petitioner. He could not be confirmed earlier, it is contended, as there were representations against his appointment and disposal of these representations and the appeals from the

orders passed on the representations took some time. The petitioner was confirmed with effect from July 20, 1938, only after final disposal of the representations, it is averred by the petitioner that some questions had even been raised in the Legislative Assembly of that province questioning the appointment. It is contended that all this delayed the passing of orders of confirmation.

(4) After partition of the country the petitioner migrated to India and was treated by the N.W.F.P. Government as having resigned his post. He was initially appointed as a Stenographer in the Ministry of Rehabilitation, Government of India in consonance with the policy of the Government to rehabilitate displaced Government employees. This was a fresh appointment. On representation by the petitioner that he was holding a lien on a permanent post while in Pakistan and had to migrate to India on account of disturbances, again in keeping with service was condoned and he was granted the benefit of continuity of service. On September 4, 1970 the petitioner was served with an office order that on his having attained the age of 58 years on the afternoon of September 4, 1970 he will retire from Government service with effect from that afternoon. The petitioner made representations against this order but to no avail. His contention was that he was entitled to the benefit of Fundamental Rule 56(c) and being a person who entered Government service on or before March 31, 1938 was entitled to remain in Government service till he attained the age of 60 years. The date of birth of the petitioner is not in dispute.

(5) C.W. 557 of 1971 : The petitioner in this case was employed as an Assistant in the Indian Council of Agricultural Research under the Ministry of Food & Agriculture, Government of India, at the time when he attained the age of 58 years on November 5, 1969. He originally entered Government service as a Clerk by being employed in the office of the Divisional Forest Officer, Hyderabad (Sind), now in Pakistan, on December 20, 1935. The appointment was on probation. According to the service book of the petitioner he was shown as "permanent (on probation)" till February, 1939. There is an entry dated February 9, 1939 which shows the petitioner as "permanent". The petitioner had migrated to India on the partition of the country and was absorbed in the service of the Government of India. He was granted the benefit of continuity of service so that his previous service in Hyderabad was to count for all purposes. As the petitioner has been retired from service with effect from the afternoon of November 5, 1969 he has filed the present petition challenging the order and contending that he is entitled to the benefit of Fundamental Rule 56(c). According to the petitioner, being a pre-March 31, 1938 entrant, he is entitled to remain in service till he attains the age of 60 years. The representations made by the petitioner against, the impugned order did not find favor with the appropriate authorities. Unlike the case of A. N. Dhingra, the petitioner has not produced his letter of appointment and relies primarily on the entries in the service book. In the case of Dhingra also, reliance is placed on the entries in the service book but we also have the benefit of having the appointment order on record.

(6) One other fact common in the cases of the two petitioners may also be noticed at this very stage. Both A. N. Dhingra and M. V. Malkhani were given annual increments according to the entries in their respective service books even for the period while they were being shown "on probation". In the case of Dhingra the date of the first increment is shown as May 19, 1938 while the confirmation is with effect from July 20, 1938. In the case of M. V. Malkhani the entries in the service book show him to be "permanent (on probation)" till the entry dated February 9, 1939 when he is shown as "permanent" but increment was given to him as per the entry dated January 18, 1938. It may be noted that though these entries in the two cases of getting increment are there while the petitioners were being treated "on probation", the actual orders sanctioning increment in the case of Dhingra were passed in 1939 and in the case of Malkhani in 1940.

(7) The two writ petitions came up for hearing before a bench of this Court. The question that arose for consideration was whether the petitioners in the two cases, who entered Government service prior to March 31, 1938 could be said to have also held a lien as on that date on any permanent post within the meaning of Fundamental Rule 9(13) so as to entitle them to remain in service till they attained the age of 60 years. The bench in its referring order comments on the absence of "any rule providing for a period of probation, its continuance and of confirmation on the expiry of the period. It has also been noticed that there is no rule fixing a maximum period of probation. It is observed that in both the cases the entries in the service book show appointment as "permanent (on probation)" or "substantive (on probation)" with effect from the dates of appointment, increments are given in salary even for periods pri

(8) After noticing several decisions and the contentions raised the bench observed that none of the decided cases were concerned with a situation like the one in the present cases, in that, in these cases the probation according to the letter of appointment in the case of Dhingra the petitioner in C.W. 1395 of 1970, was for a period of three months and in both the cases neither the contract of service nor the rules provided either for:

(A) extension of the period of probation, or

(B) power to extend it, or

(C) satisfaction of any condition before confirmation.

In this view of the matter it was felt that a reference to the decided cases was not very helpful inasmuch as in the cases cited either the rules provide for the power to extend the probation or contemplated the making of a confirmation order, or confirmation was made conditional on satisfaction in respect of the work of the servant or contained a prohibition against extension of probation beyond a certain limit. Accordingly, the bench was of the opinion that the questions that arose for consideration in both the cases were, to quote from the referring order, "of considerable importance and difficulty and may, on one reckoning, turn on

the examination of the basic concept of probation and, Therefore, be more properly dealt with by a larger bench." That is how the matter has come up before us.

(9) Before we proceed to examine the contentions raised, it is desirable to notice the relevant rules relied upon. These are Fundamental Rules 9(6), 9(13), 9(22), 9(28). 12, 12-A, 13, 14, 14-A, 26 and 56(c)(i) and (ii); and Supplementary Rule 2 (15). Dhingra has also relied on rules contained in N.W.F.P. Government Notification dated July 26, 1940 bearing No. 23084-F (Annexure I to the petition). The relevant Fundamental Rules read as under:-

"9(6).Duty-(a) Duty includes:-

(I)Service as a probationer or apprentice provided that such service is followed by confirmation and

(II)Joining time.

(b) A Government servant may be treated as on duty-

(I)during a course of instruction or training in India or

(II)in the case of a student, stipendiary or otherwise, who is entitled to be appointed to the service of Government on passing through a course of training at a university, college or school in India, during the interval between the satisfactory completion of the course and his assumption of duties.

9(12).Leave Salary means the monthly amount paid by Government to a Government servant on leave.

9(13).Lien means the title of a Government servant to hold substantively, either immediately or on the termination of a period or periods of absence, a permanent. post, including a tenure post to which he has been appointed substantively.

9(22).Permanent post means a post carrying a definite rate of pay sanctioned without limit of time.

9(28).Substantive pay means the pay other than special pay, personal pay or emoluments classed as pay the President under Rule 9(21) (a), (iii) to which a Government servant is entitled on account of a post .to which he has been appointed substantively or by reason of his substantive position in a cadre.

12. (A)Two or more Government servants cannot be appointed substantively to the same permanent post at the same time.

(B)A Government servant cannot be appointed substantively to two or more permanent posts at the same time.

(C)A Government servant cannot be appointed substantively to a post on which another Government servant holds a lien. 12-A. 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 acquired on any other post.

"13. Unless his lien is suspended under Rule 14 or transferred under Rule 14-B a Government servant holding substantively a permanent post retains a lien on that post :-

(A) while performing the duties of that post;

(B) while on foreign service, or holding a temporary post, or officiating in another post;

(C) during joining time on transfer to another post; unless basis transferred substantively to a post on lower pay, in which case his lien is transferred to the new post from the date on which he is relieved of his duties in the old post;

(D) subject to the exception in sub-rule (2) of Rule 97, while on leave other than refused leave granted after the date of compulsory retirement under rule 86 or corresponding other rules.

(C) while under suspension.

14. (A) The President shall suspend the lien of a Government servant on a permanent post which he holds substantively if he is appointed in a substantive capacity-

(1) to a tenure post or

(2) Omitted.

(3) provisionally, to a post on which another Government servant would hold a lien had his lien not been suspended under the rule.

(B) The President may at his option suspend "the lien of a Government servant on a permanent post which he holds substantively if he is deputed out of India or transferred to foreign service, or, in circumstances not covered by clause (a) of this Rule is transferred, in an officiating capacity to a post in another cadre and if in any of these cases there is reason to believe that he will remain absent from the post on which he holds a lien for a period of not less than three years.

(C) Notwithstanding anything contained in clause (a) or (b) of this Rule, a Government servant's lien on a tenure post may in no circumstances be suspended. If he is appointed substantively to another permanent post, his lien on the tenure post must be terminated.

(D) If a Government servant's lien on a post is suspended under clause (a) or (b) of this Rule the post may be filled substantively and the Government servant appointed to hold it substantively shall acquire a lien on it; provided that the arrangements shall be reversed as soon as the suspended lien revives.

(E)A Government servant's lien which has been suspended under clause (a) of this rule shall revive as soon as he ceases to hold a lien on a post of the nature specified in sub-clause (1) or (3) of that clause.

(F)A Government servant's lien which has been suspended under clause (b) of this Rule shall revive as soon as he ceases to be on deputation out of India or on foreign service or to hold a post in another cadre provided that a suspended "lien shall not revive because the Government servant takes leave if there is reason to believe that he will, on return from leave continue to be on deputation out of India or on foreign service or to hold a post in another cadre and total period of absence on duty will not fall short of three years or that he will hold substantively a post of the nature specified in subclause (1), (3) of clause (a). 14-A

(A)Except as provided in clause (c) and (d) of this Rule and Rule 97, a Government servant's lien on a post may in no circumstances be terminated even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post.

(B)Omitted.

(C)Notwithstanding the provisions of Rule 14(a), the lien of a Government servant holding substantively a permanent post shall be terminated while on refused leave granted after the date of Compulsory retirement under rule 86 or corresponding other rules, or on his appointment substantively to any of the offices referred to in sub-rule 97 or to the post of Chief Engineer of the Public Works Department or on his appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman or any other members of a State Public Service Commission.

(D)A Government servant's lien on a post shall stand terminated on his acquiring a lien in a permanent post (whether under the Central Government or a State Government) outside the cadre on which he is borne.

26.The following provisions prescribed the conditions on which service counts for increments in a time-scale :-

(A)All duty in a post on a time-scale counts for increments in that time-scale. Provided that, for the purpose of arriving at the date of the next increment in that time-scale, the total of all such periods as do not count for increment in that time-scale shall be added to the normal date of increment.

(B)(i) Service in another post, other than a post carrying less pay referred to in clause (a) of rule 15, whether in a substantive or officiating capacity, service on deputation out of India and leave except extraordinary leave taken otherwise than on medical certificate shall count for increments in the time-scale applicable to the post on which the Government servant holds a lien, as well as in the time-scale applicable to the post or posts, if any, on which he would hold a lien had his lien not been suspended.

(II) All leave except extraordinary leave taken otherwise than on medical certificate and the period of deputation out of India shall count for increment in the time-scale applicable to a post in which a Government servant was officiating at the time he proceeded on leave or deputation out of India and would have continued to officiate but for his proceeding on leave or deputation out of India. Provided that the President may, in any case in which he is satisfied that the extraordinary leave was taken for any cause beyond the Government servant's control or for prosecuting higher scientific and technical studies direct that extraordinary leave shall be counted for increments under clause (i) or (ii).

(C)(i) If a Government servant, while officiating in a post or holding a temporary post on a time scale of pay is appointed to officiate in a higher post or to hold a higher temporary post, if he is re-appointed to the lower post, or is appointed or re-appointed to a post on the same time-scale of pay, count for increments in the time-scale applicable to such lower post. The period of officiating service in the higher post which counts for increment in the lower post is, however, restricted to the period during which the Government servant would have officiated in the lower post but for his appointment to the higher post. This clause applies also to a Government servant who is not actually officiating in the lower post at the time of his appointment to the higher post, but who would have so officiated in such lower post or in a post on the same time-scale of pay had he not been appointed to the higher post. (ii) If a Government servant on reversion from an ex-cadre post to the parent cadre is appointed to a post on a scale lower than that of the ex-cadre post but not on the same time-scale as the post held at the time of his transfer to the ex-cadre post, the service rendered on the higher scale in the ex-cadre post shall count for increments in the time-scale applicable to the cadre post subject to the same conditions as are laid down for cases falling under provision (I) (iii) to Rule 22.

(B) Foreign service counts turn increment in the time-scale applicable to-

(I) the post in Government service on which the Government servant concerned holds a lien as well as the post or posts, if any, on which he would hold a lien had his lien not been suspended.

(II) the post in Government service in which the Government servant was officiating immediately before his transfer to foreign service, for so long as he would have continued to officiate in that post or a post on the same time-scale but for his going on foreign service, and

(III) any post in the parent cadre on a lower of pay to which that Government servant is appointed on reversion from the ex-cadre post subject to the fulfillment of the conditions mentioned in provision (1) to Rule 22.

(C) Joining time counts for increment-

(I) if it is under clause (a) or clause (c) of Rule 105, in the time-scale applicable to the post on which a Government servant holds a lien or would hold a lien had

his lien not been suspended as well as in the time-scale applicable to the post, the pay of which is received by a Government servant during the period; and

(II) if it is under clause (b) of Rule 105 in the time-scale applicable to the post/ posts on which the fast day of leave before commencement of the joining time counts for increments.

Explanation.- Further purposes of his rule, the period treated as duty under sub-clause (b) of clause of Rule 9 shall be deemed to be duty in a post if the Government servant draws pay of that post during such period." 56(c) A ministerial Government servant who entered Government service on or before the 31st March, 1938 and held on that date- (i) A lien or a suspended lien on a permanent post, or

"(II) a permanent post in a provisional substantive capacity under clause (d) of Rule 14 and continued to hold the same without interruption until he was confirmed in that post shall be retained in service till the day he attains the age of sixty years."

S.R.2(15). Probationer means a Government servant employed on probation in or against a substantive vacancy in the cadre of a department."

(10) Only relevant rule of the N.W.F.?. Government relied upon is Rule 9 which reads:

"9(1) A Government servant who entered service before the 1st April, 1939, shall retire when he has attained the age of 60 years. Provided that a Government servant appointed before the 1st April, 1936, may continue in service until he has qualified for the maximum pension admissible under these rules, or until he has attained the age of 65 years, which event occurs first ; Provided further : hat such continuation in service after attaining the age of 60 years shall be conditional upon the physical and mental fitness of the Government servant concerned. (2) A Government servant entering service on or after 1st April, 1939, shall retire when he has attained the age of 55 years."

(11) The propositions which arise for consideration are :-

(A) Whether the absence of any specific rule or term in the contract of service authorising the extending of the period of probation in a case where at the time of the initial appointment a period of probation is specified results in automatic confirmation on the expiry of the period of probation so mentioned:

(B) Whether the entries in the service book showing initial appointment as "Permanent (on probation)" or "substantive (on probation,)" can be construed to mean that a Government servant held a lien on a permanent post within the meaning of Fundamental Rule 9(13) from the date of initial appointment on successful completion of the probation;

(C) Whether grant of increments prior to the confirmation results in creating a lien in favor of the Government servant; and

(D) Whether the appointment of the petitioners could in the circumstances of their respective cases be regarded as permanent or substantive from the very day they entered service respectively in North West Frontier Province or Hyderabad (Sind) so as to attract Fundamental Rule 56(c).

Before we proceed to examine the four propositions formulated above we may dispose of one contention, on behalf of one of the petitioners. It was urged in the case of A. N. D Singra that he was recruited under and was governed by the N. P. Rules notified earlier. Under Rule 9 he had a right to continue in service till he attained the age of 60 years. These Rules not having been repealed still apply to his case and so, making the petitioner retire on attaining the age of 58 years was in contravention of the said Rules. The said Rules are claimed to have been saved by virtue of the provision of Section 18(1) of the Indian Independence Act, 1947 enacted by the British Parliament and continued in operation by Articles 313 and 372 of the Constitution of India. The contention is that inasmuch as the said N.W.F.P. Rules continue to be in force and applicable to the petitioner, by retiring him on his attaining the age of 58 years, a statutory right vesting in him has been infringed. The argument has no force. Section 18(1) of the Indian Independence Act speaks of an Act of Parliament, Order-in-Council, Order, Rule, Regulation or other instrument passed or made before the appointed day operating otherwise than as part of law of British India or the Dominion of India and Pakistan. What is provided is that reference therein to India or British India shall in so far as the context permits be construed as reference to the new Dominions taken together or taken separately. Therefore, the rules of N.W.F.P., even if the same are covered by the terms Rules mentioned in section 18(1) would refer to service under or in the North West Frontier Province and not anywhere else. Those rules could not by any stretch of imagination be regarded as rules having force in any province of the Dominion of India. This aspect becomes clear on a reading of sub-section (3) of Section 18 which lays down that save as otherwise expressly provided in the Act, the law of British India and if the several parts thereof existing immediately before the appointed day shall, in so far as applicable and with necessary adaptations, continue as law of each of the new dominions; and the several parts thereof until other provision is made etc. The Rules of N.W.F.P. therefore, remained in force in N.W.F.P. but not in any part of the Dominion of India. Article 313 is obviously not attracted because the continuance of the laws that it envisages are laws governing an All India service of a service or post under the Union or a State. Similarly, Article 372 speaks of laws in force in a territory of India immediately before the commencement of the Constitution. The N.W.F.P. Rules were not a law in force in the territory of India immediately prior to January 26, 1950. Apart from this A. N. D Singra was appointed as a new entrant in the service of the Central Government of India on migration from Pakistan. He, accordingly, was governed by the rules of service governing posts and service under the Union. The N.W.F.P. Rules were not personal rules which the petitioner brought with him on migration to India. Indeed, the claim made in the petition is that he is governed by Fundamental

Rule 56(c). A. N. Dhingra, Therefore, cannot be heard to plead that he has a right to be retained in service till he attains the age of 60 years by virtue of Rule 9 of the N.W.F.P. Rules.

(12) Reverting now to the four propositions which arise for consideration in the two cases it will be advantageous to keep in view certain basic aspects about posts, vacancies and appointments. Posts may be tenure posts, permanent posts or temporary posts. Vacancies in such posts may be permanent vacancies or temporary vacancies. Appointments can be made either in permanent capacity or temporary capacity or substantive capacity or on fixed tenure or on ad hoc basis. When an appointment is made with the intention of trying out an appointee on a particular post in order to find out his fitness to fill that post he may be appointed on probation. Some times an officiating chance is given to a person in a lower post by appointing him in an officiating capacity in a higher post in order to find out his suitability to fill the higher post. In such a case the person so appointed can be said to be, literally speaking, "on probation". Such a contingency would not arise in fresh recruitment to a post. In the case of fresh recruitment, appointment is made either in a permanent capacity or in a substantive capacity or in a temporary capacity. In the first two kinds of appointment an element of trial may be introduced by appointing a person on probation. That is what is envisaged by Supplementary Rule 2(15). The contention of the petitioners is that Dhingra was appointed substantively and Malkhani was appointed in permanent capacity to permanent posts despite the entries in their respective service books that they were "on probation" and despite it being so mentioned in the appointment order issued to Dhingra and that on a reading of the various rules their appointments were in substantive or permanent capacity attracting the provisions of F. R. 9(13). The first point, Therefore, that requires consideration is whether during the period when the petitioners were treated as being on probation they had a right to the post they held or in the parlance of the service rules they held a lien on their respective posts. It is not in dispute that the posts to which the petitioners were appointed were permanent posts within the meaning of F. R. 9(22) and that no one else held lien on those posts. In order to appreciate the contention of the petitioners an examination of the basic concept of probation may be desirable.

(13) In Parshotam Lal Dhingra Vs. Union of India (UOI), , S. R. Das, C. J. observed:

" AN appointment to a permanent post in Government service on probation means, as in. the case Of a person appointed by a private employer, that the servant so appointed is taken on trial. The period of probation may in some cases be some fixed period, e.g. for six months or for one year or it may be expressed simply as "on probation" without any specification of any period. Such an employment on probation, under the ordinary law of master and servant, comes to an end if during or at the end of the probation the servant was appointed on trial is found unsuitable and his service is terminated by a notice."

It was further observed after noticing the nature of an officiating appointment:

"IT is, Therefore, quite clear that appointment to a permanent post in a Government service either on "probation or on officiating basis, is from the very nature of such employment, itself of a transitory character and, in the absence of any special contract or specific rule regulating the conditions of the service, the implied term of such appointment, under the ordinary law of master and servant, is that it is terminable at any time. In short, in the case of an appointment to a permanent post in a Government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complaint, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time. Likewise, and appointment to a temporary post in a Government service may be substantive or on probation or on an officiating basis".

Earlier, the learned Chief Justice had observed that:

" THE appointment of a Government servant to a permanent post may be substantive or on probation or on an officiating basis. A substantive appointment to a permanent post in public service centres normally on the servant so appointed a substantive right to the post and he becomes entitled to hold a lien" on the post."

(14) As noticed in the referring order of the bench "the term "probationer" in its ordinary dictionary meaning connotes the employment either of a fresh entrant to service on test or of an existing officer to a higher post on test and is tantamount to suspension of final appointment to an office until "a person temporarily appointed has by his conduct proved himself to be fit to fill it and the probation has been equated to "a period of testing". In the Master of Servant, Volume I, Law of Service in India, Barwell and Kar, have referred to a very early case of *Wechsler v. Jehnston & Hoffman* (Calcutta Original Side Suit 455 of 1928) , which is unreported, in which Remfry J. while dealing with the question as to the nature of a probationary service, equated it to offer of goods on approval under the Sales of Goods Act and relied on a number of judgments of English Courts in which it was held that the prospective buyer during the period of approval was a bailee of the goods with an option to buy. On the basis of the discussion by the author, the author came to the following conclusion]as to the true meaning and effect of a probation for a certain specified period:

" COMPARING the two kinds of contract, the one offering employment to a person "on probation" and the other offering to take goods "on approval" we see them to have in some sense certain common factors, in that the servant in the one case and the goods in the other are taken on trial, usually for a specified time, otherwise for a reasonable time; and that if the man survives the period of trial, he passes into the permanent service of the other on a agreed salary or wage, while in the other case the property in the goods will pass to the prospective buyer, If. by the end of the period mentioned or within a reasonable

period, the latter approves them."

There can be no doubt, Therefore, that "probation" connotes a period of trial. On successful completion of the probation the employee is confirmed in the appointment held by him. Obviously, the purpose of putting an employee on probation is to find out his suitability to hold the post substantively or permanently in the sense that he thereafter gets a right to hold the post. The fitness or suitability has to be judged at the time of confirmation and not, unless any specific rule or term of contract of service so provides, as on the date of the original appointment. If the employee is not found suitable either during the period of probation or on completion thereof he is not retained in service and the service is terminated by notice. It would be a contradiction in terms if it is said that an employee is on probation, namely, is on trial for being retained in service and yet during this period he has a right to hold the post to which he has been appointed on probation. It has been contended that when a person is appointed on probation for a fixed term he has a right to hold the post for the term of probation mentioned in the order of appointment. Support for this contention is sought from certain observations in the case of Parshotam Lal Dhingra where in paragraph 11 of the judgment Das, C. J. observed: "Likewise an appointment to a temporary post in a Government service may be substantive or on probation or on an officiating basis. Here also, in the absence of any special stipulation or any specific service rule, the servant so appointed acquires no right to the post and his service can be terminated at any time except in one case, namely, when the appointment to a temporary post is for a definite period." The right to the post that the learned Chief Justice is speaking of here is a tenure appointment to a temporary post and not an appointment on probation to a temporary post.

(15) Reliance was also placed on some observations of Das Gupta, J. in *The Management of the Express Newspapers (Private) Ltd. Madurai Vs. The Presiding Officer, Labour Court, Madurai and Another*, to contend that a person appointed on probation for a specific period has a right to the post for that period and his services cannot be terminated during the period of probation. No such broad proposition can be laid down. In paragraph 12 of the report the Supreme Court was dealing with the contention that once the period of six months of probation expired the service of the employee automatically stood terminated on the expiry of the period of probation. This contention was negatived and it was held that the employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is not confirmed. In this context it was observed that without anything more an appointment or probation for six months gives the employer no right to terminate the service of an employee before six months had expired except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. The case before the Supreme Court was not of a Government servant but of an industrial worker. The Court, in our view, did not lay down any rule of general application. particularly with regard to service under the Government, that during the

specified period of probation an employee has a right to the post. Indeed, while observing that during the period of probation the employer had no right to terminate the services of an employee before the expiry of the period of probation it was held that the service of such an employee could be terminated for misconduct or other sufficient reasons. In the case of Government service" if misconduct is alleged the protection of Article 311 of the Constitution would be available but it would not be available if there were other sufficient reasons short of misconduct. The reliance on this decision, Therefore, does not advance the argument in case of Government servants appointed on probation that they had a right to the post during the period of probation. In its very nature appointment made on probation means that the employee is on trial and till confirmation either by a specific order or by operation of rules or terms of contract of service he cannot have a right to hold the post and during the period of probation services are liable to be terminated for unsuitability at any time by notice. This being the nature of service on probation we now proceed to examine specific propositions arising in this case.

(16) The first proposition to be examined arises out of the. situation where there is no specific rule or term in the contract of service authorising the extending of the period of probation fixed initial];. It is urged that in. the absence of any such rule or condition of service period of probation cannot be deemed to have been extended till such time as orders of confirmation are passed and. indeed, there would be automatic confirmation or "deemed confirmation" on. the expiry of the period of probation specified at the time of appointment.

(17) In Sukhbans Singh Vs. State of Punjab, the petitioner was selected for appointment as an Extra Assistant Commissioner and was so appointed in accordance with Rule 22 of the relevant rules. This rule enabled the Government to extend the period of probation. It was common ground that the period of probation was not extended. The question that arose for consideration was as to what was the position of the petitioner after the expiry his initial probationary period as fixed by the Rules. It was contended that inasmuch as the period of probation was not attended despite there being power to do so, the expiry of the period of probation envisaged by the Rules, resulted in automatic confirmation. It was held that a probationer cannot automatically acquire the status of a permanent member of a service, unless of course the rules under which he is appointed expressly provide for such a result. There is no rule or term in the contract of service in the present cases giving power to extend the period of probation, but in our view the result would still be the same as in the case of Sukhbans Singh . In that case there was power which was not exercised. In the present cases there is no power to extend the period of probation. In either case the result would be that when the period of probation fixed initially expires the Government servant continues to be on probation till he is confirmed by an order to that effect. The observations In the Management of Express Newspapers (Private) Ltd."s case relied upon, have already been discussed by us above. It does not follow from this decision that there is automatic confirmation on the

expiry of the period of probation. Indeed, it was held to the contrary in the above case.

(18) In *G.S. Ramaswamy and Others Vs. Inspector-general of Police, Mysore*, also the contention was about automatic on expiry of the period of probation of two years. The contention was negated. It is urged that the ratio of this decision would not be attracted as in terms Rule 486 of the relevant rules in that case provided that

" PROMOTED officers will be confirmed at the end of their probationary period if they have given satisfaction".

It was held that till satisfaction is recorded there could be no confirmation and so, the mere expiry of two years did not result in confirmation. The contention here is that there is no such rule applicable in the case of the petitioner Dhingra and so, on the expiry of three months he stood automatically confirmed. The fallacy in the contention is on account of a misconception about the concept of probation on which we have already dilated above. Probation implies putting a person on trial which means confirmation on satisfaction. The existence or the non-existence of a rule providing for the pre-condition of satisfaction regarding performance of an employee is immaterial. In the case of *Ramaswamy* also there was no specific power given for extending the period of probation but it was held that there could be no automatic confirmation on the expiry of the probation period and the employee continued to be on probation till orders of confirmation were passed.

(19) The referring bench has noticed three unreported decisions of the Supreme Court which may now be considered. The first one is *Narain Singh Ahluwalia v. The State of Punjab* and another, Civil Appeal No. 492 of 1963, decided on January 29, 1964. The bench noticed that from the judgment it is not clear whether there was any rule which provided for the order of confirmation being passed or there being a bar to the period of probation being extended but the contention of automatic confirmation on the expiry of the probationary period of one year was dispelled. Next in *D. A. Lyall v. The Chief Conservator of Forests, U.P. and others*, Civil Appeal No. 259 of 1963, decided on February 24, 1965 the Supreme Court in the context of Rule 16 of the U.P. Forest Service Rules which bars the confirmation of a probationer amongst other things, till he has passed all the tests prescribed by the Rules and the Governor is satisfied that he is fit for confirmation in other respects, held that the rule barred automatic confirmation. In the case of *Accountant General, Madhya Pradesh, Gwalior, v. Beni Prasad Bhatnagar*, Civil Appeal No. 548 of 1962, decided on January 23, 1964, also, the argument about automatic confirmation was dispelled despite there being no specific power for ordering extension of probationary period. All these cases, in our view, proceed on the same principle, namely, that whether there is a rule or not the very concept of probation implies satisfactory completion of the probationary period and despite absence of rule probation would continue, unless specifically barred, till confirmation.

(20) In State of Uttar Pradesh Vs. Akbar Ali Khan, , there was a specific rule allowing period of probation to be extended and confirmation was to be on passing a departmental examination and reports about fitness for, confirmation. This decision Therefore, is not very relevant for the propositions mooted before us.

(21) In SMe of Punjab v. Dharain Singh, 1968 (2) S.L.R. 247(3) of the relevant Rules prohibited extension of period of probation beyond three years, ft was held in this situation that if an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without , express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason for this rule was that extension of probation by implication is negated by the service rules forbidding extension of the probationary period beyond the maximum period fixed by it. In such a ease, it was held, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication. Dealing with the specific rules in question, namely. Rules 6(1) & (3) it was observed that "the employees referred to in that rule held their post in the first instance on probation for one year commencing from October 1, 1957. On completion of the one year period of probation by the employee four courses of action were open to the appointing authority under rule 6(3). The authority could either (a) extend the period of probation provided the total period of probation including extensions would not exceed three years, or (b) revert the employee to his former post if he was promoted from some lower post, or (c) dispense with his services if his work or conduct during the period of probation was unsatisfactory, or (d) confirm him in his appointment. It could pass one of these orders in respect of the respondents on completion of their one year period of probation. But the .authority allowed them to continue in their posts thereafter without passing any order in writing under rule 6(3). In the absence of any formal order, the question arose whether by necessary implication from the proved facts of these cases, the authority should be presumed to have passed some order under rule 6(3) in respect of the respondents, and if so, what order should be presumed to have been passed. "Sub-rule (3) or rule 6 laid down that on completion of the period to probation the authority competent to make appointment may confirm the employee in his appointment or if his work or conduct during the period of probation has been in his opinion unsatisfactory he may dispense with his services or may extend his period of probation by such period as he may deem fit or revert him to his former post if he was promoted from some lower post, provided that the total period of probation including extensions shall not exceed three years. It was in the context of this rule and inasmuch as the maximum period of probation allowed by the rule had expired that the inference of confirmation by implication was held attracted. In terms the ra,tio of the judgment is not attracted to the facts of the present petitions. However, it may be advantageous to note certain observations in paragraph 2

and 3 of the report which have been relied upon by the learned counsel for the petitioners.

(22) A contention had been made in the alternative, that on completion of three years' period of probation, inasmuch as no orders confirming the employees had been passed nor were their services terminated, they must be deemed to have been discharged from service and re-employed as temporary employees. This contention was negatived. Bachawat, J. then went on to observe that the Supreme Court had consistently held that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his post as a probationer only, in the absence of any indication to the contrary in the original order of appointment or probation or the service rules. In such a case an express order of confirmation is necessary to give the employee a substantive right to the post, and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation, it is not possible to hold that he should be deemed to have been confirmed. Reliance was placed on the decisions in the cases of *Sikhbans Singh*, *G. S. Ramaswamy*, *Beni Prasad Bhatnagar*, (C.A. 548 of 1962) . *D. A. Lyall* and *Akhar Ali*. The learned Judge further observed that in all these cases the conditions of service of the employee permitted extension of the probationary period for an indefinite time and there was no service rule forbidding its extension beyond a certain maximum period. We were taken through all these cases and can only say that some of these cases do have a condition of service permitting extension of probationary period but others do not. For example, in *Beni Prasad's* case there is no such power nor is any such power referred to in *Narain Singh's* case. Be it as it may. in the view that we have taken, the existence or non-existence of the power is immaterial, as is the existence or non-existence of the condition of passing tests or recording of satisfaction.

(23) In *State of Haryana and others v. Rajindra Sareen*, 1972 S.L.R. 12 on a construction of sub-rule (3) of Rule 10 of the relevant Rules it was held that on completion the period of probation either an order ending the period of probation had to be passed or employee had to be confirmed or if he is a promotee he had to be reverted. There was also a bar under the rules that probationary period shall not exceed beyond three years. If an employee on probation was not confirmed despite expiry of the maximum period but was, on the other hand, allowed to continue to hold the post, he was held to have been confirmed by implication. The ratio of the decision does not really apply to the facts of the present cases. In any case, there is no observation in the case as to what would happen if no order of extension of probation is passed on the expiry of the initial period of probation but the maximum period provided by the Rules had not expired.

(24) Reliance was placed on a decision of the Assam and Nagaland High Court in

Shankar Lal Mehra v. Chief Engineer, N. F. Riy. und others 1970 S.L.R. 536. The petitioner in this case was appointed as Senior Draftsman in a temporary post on a probationary period of one year whereas he continued to work for five years without being confirmed. A plea of automatic confirmation was raised in this case. In the decision of the Full Bench the learned Chief Justice observed that the relevant rule provided that all appointments will be made on probation for one year and that it did not specifically lay down that the period of probation can or cannot be extended. It was thus held that there is no rule for extending the said period and that in the absence of a rule giving power to extend the period of probation the period specified by the relevant rule, namely of one year cannot be extended and the employee became confirmed automatically on the expiry of the period of one year. No reasoning for this conclusion has been given nor has any precedent been relied upon. K. C. Sen, J. also endorsed the opinion of the learned Chief Justice and observed that the rule specifying the period of probation for one year does not say that the authorities have any power either to extend the period of probation or not to do so. and in that view of the matter there would be automatic confirmation. In our respectful opinion the decision cannot be regarded as laying down the correct law. Indeed, it is contrary to the rule enunciated by a catena of authorities starting from Parshotam Lal Dhingra's case. In our view the Full Bench of the Assam and Nagaland High Court has read a negative rule in a positive rule which is not warranted. We would, Therefore, hold that the absence of a rule or term in the contract of service authorising extending of the period of probation does not result in automatic confirmation on the expiry of the period of probation mentioned in the order of appointment unless there is a rule or a condition to the contrary. Indeed, the decisions of the Supreme Court in Parshotam Lal Dhingra & Dharam Singh fortify me in coming to the conclusion that in the absence of a rule or condition of service to extend the period of probation, unless there is some other provision in the rules or conditions of service to the contrary, an employer has inherent power to extend the period of probation. It is an auxiliary power to the power to appoint on probation. Not passing of orders of confirmation on the expiry of the period of probation in such a case does not result in attracting the fiction of "deemed confirmation" by mere expiry of the specified period of probation.

(25) In Prasanta Mohapatra Vs. State of Orissa, the bench of the Orissa High Court was called upon to consider whether reversion to the lower rank before expiry of the period of temporary appointment for a fixed period to officiate in a higher post attracted Article 311(2) of the Constitution where there was nothing in the appointment order permitting such premature termination. It was held that the reversion was illegal as the appointment was for a fixed period and the employee had a right to the post for that period. This decision does not help in resolving the points raised in the cases before us and so, reliance on it is misplaced. In Rajendra Sareen Vs. The State of Haryana and Others, , the bench followed the decision in Parshotam Lal Dhingra in observing that in the absence of any special contract the substantive appointment to a permanent post gives

the servant so appointed a right to hold the post until under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years of service or the post is abolished and his service cannot be terminated except by way of punishment for misconduct, etc. Once it is held that the servant has acquired the status of a permanent Government servant his subsequent transfer to a post, whether that post is permanent or temporary would not derogate from his status and rights as such. The bench was not dealing or concerned with appointments made on probation. This decision also, Therefore, is of little avail in resolving the point in issue.

(26) It has been contended that since the petitioners in the two cases before us were appointed to permanent posts and were appointed in substantive/permanent capacity, as is borne out by the entries in the relevant service books, they must be regarded as having a right to hold their respective posts on the ratio of the decision in Parshotam Lal Dhingra followed in numerous other decisions and specifically adverted to in Rajendra Sareen's case noticed above. The contention, in other words, is that such appointments created a lien in favor of the petitioners within the meaning of F.R. 9(13) as the posts to which they were appointed were permanent posts within the meaning of F. R. 9(22), the pay drawn by the petitioners was substantive pay within the meaning of F.R. 9(28) and no one else was or could be appointed to" these posts within the meaning of F.R. 12. Inasmuch as during the so called period of probation and all through the petitioners held the posts to which they were appointed, the provisions of F.Rs. 13, 14 and 14A did not come into play and the entries in the service books show that the appointments as entered were in consonance with F.R. 12 A and so the petitioners held a lien on the posts to which they were appointed even during the so called period of probation. Support is sought by a reading of S.R. 2(15) and F.R. 9(6). It is also contended that confirmation when shown to have been effected means upholding the appointment as made originally, i.e. in a permanent/substantive capacity. In our view the arguments have no force. The confirmation as and when made does not tantamount to approving the appointments as originally made but giving approval to the employee holding the post from the date of confirmation in a permanent/substantive capacity. The petitioners were probationers within the meaning of S.R. 2(15) and F.R. 9(6) would be attracted, as the reading of the Rules itself shows, because the appointment were followed by confirmation. The service as a probationer is counted as duty provided such service is followed by confirmation. Logically, it would mean that if a probationer is not confirmed the period spent by him in service would not be counted as "duty" with the meaning of F.R. 9(6). In my view, the entries in the service books of the petitioners do not mean what the petitioners would like us to hold, namely, that from the very inception they were appointed in permanent/substantive capacity so as to create a lien in their favor on the posts to which they were respectively appointed. Indeed, a careful reading of the various columns in the service books negatives the contention on behalf of the petitioners.

(27) The service book has several columns. The first column gives the name of the appointee. The heading of the second column reads as under :-

"WHETHER substantive or officiating and whether permanent or temporary".

The third column reads : "If officiating, here state the substantive appointment or whether counts for pension etc". The fourth column is to indicate pay in substantive appointment. The fifth column is to indicate additional pay for officiating chance and the sixth column is for filling in other emoluments falling under the term "pay". The seventh column is for date of appointment, the eighth column for the signatures of the Government concerned, the ninth column for the signatures and designation of the head of office attesting the entries, the tenth column for date of termination of appointment, the eleventh column is for giving reasons for termination and it is mentioned that these reasons may be such as promotion, transfer, dismissal etc. The twelfth column is again for signatures of head of office or other attesting officer and the thirteenth column is for nature and duration of leave taken. In these cases we are concerned with entries in the second, fourth, and eleventh columns. The main argument in the two cases is based on the entry in the respective second columns of the service books of the two petitioners. A. N. Dhingra has been shown as "substantive (on probation)" while Malkhani has been shown as "permanent (on probation)". The mere use of the words substantive in one case and permanent in the other has led the two petitioners to contend that they were appointed from the very start in that capacity and the respective departments treated them as such by making the entries. The argument has to be rejected on the very face of it as the petitioners are ignoring the words indicating that they were on probation. Apart from this a careful reading of the heading of column 2 would show that the two types of appointments contemplated are substantive as against officiating and permanent as against temporary. There is no column in the respective service books to indicate appointments on probation. So, obviously, when substantive was written in the case of Dhingra and permanent was written in the case of Malkhani what was meant to be conveyed was that Dhingra was not being appointed in an officiating capacity but in the other capacity indicated in the column, i.e. in a substantive capacity. "In other words he was substantive as opposed to officiating. Similarly, in Malkhani's case the appointment was permanent as opposed to temporary appointment. In neither case can the entries be read to connote that, in the case of Dhingra he was appointed in substantive, capacity from the very beginning so as to hold a lien on a post or, in the case of Malkhani he was a permanent employee having a lien on the post from the very beginning. The entries in the respective service books have to be read as a whole and if meaning is to be given to the entries as made the only possible interpretation has to be the one given by us above. It is not possible to read the words "substantive" and "permanent" divorced from the words "on probation". In this sense the substantive or permanent appointments may well be said to be regular appointments to substantive or permanent posts in the case of the two petitioners as respectively shown in their service books. This aspect is

clarified by actual confirmation taking place in the case of the two petitioners and in subsequent entries Dhingra being shown as substantive and Malkhani being shown as permanent without the suffix of "on probation".

(28) It has been urged that there is a distinction between a person being a probationer within the meaning of S.R. 2(15) and a person being on probation. Reference was made to the audit instructions given under F.R. 9(6) in the compilation of Fundamental and Supplementary Rules and support was also sought from certain observations of this court rendered by Deshpande, J. in *Shri Jiwan Dass v. Municipal Corporation of Delhi*, 1971(2) S.L.R. 277. Apart from the fact that audit instructions cannot supplant the law, in our view, these instructions do not advance the case of the petitioners. The audit instructions relied upon by the petitioners are given on page 27 of Chaudri's Compilation of the Fundamental Rules, Volume I, corrected up to August 31, 1971. It is mentioned in these instructions that the term "probationer" does not cover a government servant who holds substantively a permanent post in a cadre and is appointed "on probation" to another post. No person appointed substantively to a permanent post in a cadre is a probationer, unless definite conditions of probation have been attached to his appointment, such as the condition that he must remain on probation pending the passing of certain examinations. It is further stated that the status of a probationer is to be considered as having the attributes of a substantive status except where the rules prescribe otherwise and the above instructions are to be taken as complementary, and not as mutually exclusive. Explaining this, it is stated that taken together, they contain the essence of the test for determining whether a Government servant should be regarded as a probationer or as merely on probation irrespective of whether he is already a permanent Government servant or is merely a Government servant without a lien on any permanent post. While a probationer is one appointed in or against a post substantively vacant with definite conditions of probation a person on probation is one appointed to a post (not necessarily vacant substantively) for determining his fitness for eventual substantive appointment to that post. Thus, a distinction has been made between an employee being a "probationer" and being "on probation". Deshpande, J. laid down the correct legal propositions to be as follows :-

(I) A substantive appointment to a permanent post need not necessarily mean a permanent appointment to a permanent post though it would be presumed to be so unless stated to the contrary.

(II) The appointment of a person as a probationer can be said to be a substantive appointment to a permanent post but it would not be presumed to be a permanent appointment to a permanent post inasmuch as the services of such a person can be terminated during the period of probation.

(III) Therefore the distinction between a permanent appointment and an appointment on probation is this. Though both the appointments may be made substantively to a permanent post, the permanent appointee gets a title or a

right to hold a post but the probationer does not get such a title or right to hold a post. Therefore, while a permanent appointee as well as a probationer may be substantively appointed to a permanent post it is only to the former but not the latter who gets a title to hold the post."

With respect we are in agreement with what our learned brother has stated but would like to amplify the position in the context of the entries made in the case of the petitioners in their respective service books. A substantive appointment to a permanent post need not necessarily mean a permanent appointment to a permanent post creating a right in the appointee to the post. For example when a rider is attached to the appointment that the employee is to be probation, it is only on confirmation that the rider is removed and the employee becomes permanent in the sense of holding a lien on the post. Then again sometimes the term "substantive" in appointments is used to connote regular appointments as distinguished from ad hoc appointment. Similarly, a permanent appointment to a permanent post, as distinguished from a temporary appointment to a permanent post, does not mean that the person appointed has a lien on the post if there is a rider attached to the permanent appointment, like the person being appointed on probation. The audit instructions relied upon are not relevant because they speak of appointment to a permanent post in a cadre. It is not shown here that the posts to which the two petitioners were respectively appointed were permanent posts in any cadre as distinguished from permanent posts not forming part of a Cadre. If the petitioners contend that they were probationers within the meaning of S. R. 2(15) and can take advantage of F. R. 9(6) they could be regarded as having acquired a lien on the posts only on confirmation. If, on the other hand, they were merely "on probation" then it is only on successful completion of the period of probation, which completion is marked by the order of confirmation being passed, that they could be said to have acquired a lien on the post. The contention seems to be that inasmuch as the petitioners did not hold substantively a permanent post prior to the initial appointment they cannot be regarded as persons "on probation" and must be regarded as "probationers" within the meaning of S.R. 2(15). It is not necessary to dilate further on this aspect as either way the petitioners do not get a right to the post till they are confirmed. Answering the second proposition, we, accordingly, hold that the entries in column 2 of the respective service books of the petitioners have to be read as a whole and read in that manner the entries cannot mean that either of the petitioners held a lien on a permanent post within the meaning of F. R. 9(13) from the date of initial appointment. Both the petitioners respectively acquired lien on the posts only on confirmation and when they were no longer shown in the entries in the service books as being "on probation".

(29) This brings us to the consideration of the third aspect as to whether the grant of increments prior to confirmation results in creating a lien in favor of the Government servant. As noticed earlier, both the petitioners were granted increments in the time scale even for the period they were respectively shown as being on probation in the service book. Factually, the increment was sanctioned

subsequently with retrospective effect. Therefore, it cannot be urged that having been given increment for service during the period of their probation they must be treated as being substantive/permanent employees because no increment can be given to an employee on probation. Apart from this inasmuch as the period of probation is followed by confirmation, the period of service while on probation had to be treated as a period spent on duty within the meaning of F.R. 9(6) and there was nothing wrong in giving increment for those periods. There is, Therefore, no force in the contention that giving of increments shows absence of probation. Indeed, right to hold the post which under F.R. 9(13) is called a lien on the post is a concept quite distinct from a person getting increment in the time scale. Coming now to the fourth proposition, we may deal with the individual cases of Dhingra and Malkhani.

(30) DHILIGRA'S case is that he would have been confirmed earlier but for the objections to his appointment already adverted to earlier and so, he should be deemed to be confirmed when his three month's period of probation expired. The argument is self-destructive. Indeed, the representations made by Dhingra show that he always considered himself as not having been confirmed till the actual date of confirmation. The case may be a hard one but the fact remains that he does not satisfy the two pre-conditions to attract F.R. 56(c). In order to get the benefit of the rule so that he could remain in service till he attained the age of 60 years, Dhingra had not only to enter service prior to March 31, 1938 but also acquire a lien on a permanent post by that date. Although he entered service on May 20, 1937 he did not acquire a lien on the post till July 20, 1938. Therefore, the second pre-condition not being fulfilled he cannot claim that he is entitled to be retained in service till he attains the age of 60 years.

(31) In Malkhani's case the position is similar to that of Dhingra. There is no proof of Malkhani having acquired a lien on a permanent post prior to March 31, 1938. It is urged that there is a mistake in the entry in the service book if one looks at the entries in the service book of one N. R. Chelaramani. Reliance has been placed on a gradation list as on July 1, 1947 in which Chelaramani is shown junior senior to Malkhani, the latter having entered service on December 20, 1935 and Chelaramani having entered service on November 1, 1936. All the same Chelaramani was given the benefit of F.R. 56(c) but the petitioner Malkhani was not given that benefit. Chelaramani is alleged to have passed the departmental examination on September 11, 1940. It is urged that Chelaramani being junior to the petitioner, Malkhani, it must be assumed that Malkhani was confirmed prior to March 31, 1938, particularly as Chelaramani is treated to have acquired lien on his post prior to the crucial date. It may be noted that both Malkhani and Chelaramani were employed in provinces which are no longer part of India. They came to India as evacuees and were absorbed in service here. The respective service books were received from the Government of their parent services. It is on the basis of the entries in those service books that Chelaramani was given the benefit of F.R. 56(c) but Malkhani was not given. At this point of time and in the absence of full material it cannot be said

how Chelaramaney was treated as a person having a lien on a permanent post as on March 31, 1938 despite being junior to the petitioner when the latter was still shown as on probation in the service book till after March 31, 1938. In any case, these entries were known to the petitioner and he cannot be heard to complain now that the entry regarding his being on probation should be ignored. We are not impressed, Therefore, that because Chelaramaney was given the benefit of F.R. 56(c) the petitioner would also be entitled to it merely on the basis of the gradation list of 1947.

(32) The result of the above discussions is that neither of the petitioners can be regarded as having held a lien on a permanent post as on March 31, 1938 and so, the second pre-condition not being present in their cases they cannot claim the benefit of F.R. 56(c). The petitions are, accordingly, dismissed with costs. Counsel's fee Rs. 300.00 .

(33) As both the petitions were argued together only one set of counsel's fee would be taxable.