

(1998) 06 MP CK 0010
In the Madhya Pradesh High Court
Case No : M.P. No. 3277 of 1987 (J)

Bhura Lal Pagare

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 29-06-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Madhya Pradesh Government Servants (Temporary and Quasi Permanent Service)
Rules, 1960 — Rule 12

Citation : (2000) 2 MPJR 543

Hon'ble Judges : C.K. Prasad, J

Bench : Single Bench

Advocate : R.N. Roy in case No. 2 and 3, Mr. N.C. Jain, in case No. 1, N.S. Kale and Mr. Rohit Arya in case No. 4, Mr. P. Rusia and N.K. Shukla, in case No. 5, for the Appellant; Ravindra Shrivastava, Advocate in case No. 1 and 2, V.S. Shrotri, Advocate in case 3 and 4 and Mr. Ravish Agrawal, Advocate in case No. 5, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Prasad, J.

In all these writ petitions filed under Articles 226 and 227 of the Constitution of India, petitioners, who were members of the Subordinate Judicial Service and were posted as Civil Judge, Class II, pray for quashing of the separate orders passed by the State Govt. by which, on the recommendation of the High Court, services have been terminated by giving one months pay in lieu of notice. In the case of Bhurelal Pagare (M.P. No. 3277/85) and Satya Narayan Jhawar (M.P. No. 1033/86), the State Govt. has passed the orders in purported exercise of its powers under Rule 12-A of the M.P. Govt. Servant (Temporary & Quasi Permanent) Service Rules, 1960. Petitioners further pray for consequential relief, which they shall be entitled after quashing of the orders of termination. Satya Narayan Jhawar, petitioner in M.P. No. 1033/86 has also prayed for quashing of the order of the State Govt. whereby on recommendation of the High Court, after

the termination of this service as Civil Judge, Class II, his service has been returned to home (police Deptt.) of the State Govt. It may be mentioned here that this petitioner before his appointment as Civil Judge Class II was holding a confirmed appointment to the post of Asstt. Public Prosecutor. In M.P. No. 4564/92 (S.D. Banjare vs. State), writ petitioner died during the pendency of the writ petition and this writ petition is being prosecuted by his heir and legal representative.

Notwithstanding the voluminous pleadings, facts which are necessary for the decision of the present writ petitions are that all the petitioners were appointed as Civil Judges. Class II; temporarily and on officiating basis, on the recommendation of the Public Service Commission. After the training for 6 months, they were appointed on probation for 2 years excepting in the case of petitioner Panumati Sonchhatra, petitioner in W.P. No. 2429/95, in whose case, her training period was also extended and thereafter, she was appointed on probation for 2 years. Matter of confirmation of all the petitioners were placed for consideration before the Full Court during the period when the petitioners were under initial or extend period of probation and on consideration of the materials placed before it; either they were not found fit for confirmation or the Full Court on consideration of the materials resolved to postpone their cases for confirmation. This has happened within a period of 4 years from the dates of appointments of the petitioners on probation, but all the petitioners were allowed to continue in service beyond the period of 4 years from the date of their initial appointment on probation for 2 years. After the expiry of the period of 4 years, cases of the petitioners were placed for consideration on different dates before the Full Court in its meeting and on consideration of the materials placed before it, they were found unfit for confirmation and the High Court further resolved and recommended for termination of their services simplicitor. State Govt. in conformity with the recommendation of the High Court, terminated the services of the petitioners, resorting to exercise its power under Rule 12 of the M.P. Govt. Servant (Temporary & Quasi Permanent) Service Rules, 1960 (hereinafter referred as 1960, Rules) and by mentioning the said fact in the impugned orders in some of the writ petitions, whereas in some of the cases, repository of the powers has not been mentioned. However it is the stand of the State Govt. and the High Court in the writ petitions that the petitioners being not confirmed Civil Judges Class II, they have no right to the post and hence their services were terminated by giving one months notice. All the petitioners have served temporarily for 5 years continuously and have also worked on probation for period beyond 4 years from the dates of their initial appointment stand proved by the pleadings of the parties. It is common ground that service of the petitioners have been terminated without any enquiry and according to the stand of the stand of the State Govt. and the High Court, petitioners being not suitable for confirmation and they having not been confirmed, no enquiry is necessary before termination of their services.

In the case of S.D. Banjare, petitioner in M.P. No. 4564/92, it is worthwhile to

mention here that his service was terminated car or also, but he successfully challenged the same before the High Court on its Judicial side and the same was found to be bad by this Court and the order passed by this Court was upheld by the Supreme Court for different reasons Beena Tiwari and Another Vs. State of Madhya Pradesh and Another, , than assigned by the High Court. Thereafter, he was reinstated in service and again his service has been terminated by the impugned order by giving salary of one month in lieu of notice.

I have heard Shri R.N. Roy for the petitioners in M.P. No. 3277/85, 3606/92 and M.P. No. 4564/92, Shri N.(sic). Jain, Sr. Adv., for the petitioner in M.P. No. 1033/86, Shri N.S. Kale, Sr. Adv., for the petitioner in M.P. No. 4753/ and Shri N.K. Shukla for the petitioner in W.P. No, 2429/95.I have also heard Shri V.S. Shrotri and Shri Ravindra Shrivastava, Advocates who represented the High Court before me.

It is common ground that the petitioners have served as Civil Judges, class II temporarily for 5 years continuously. It is submission of the learned counsels for the petitioners that they having worked temporarily for 5 years continuously, they shall be deemed to be in quasi-permanent service In view of Rule 3-A of 1960 Rules. Rule 3-A of the Rules reads as follows :-

R.3-A. Government servant In respect of whom a declaration under clause (ii) of Rule 3 has not been issued but has been in temporary service continuously for five years in a service or post in respect of which such declaration could be made shall be deemed to be in quasi-permanent service unless for reasons to be recorded in writing the appointing authority otherwise orders.

A plain reading of Rule 3-A of 1960 Rules clearly shows that a Government servant, who has been in temporary service for 5 years and in respect of whom declaration has been made shall be deemed to be in quasi-permanent service. However, it is the stand of the High Court that the aforesaid Rule has no application to the petitioners who are members of the Subordinate Judicial service. In view of the authoritative pronouncement of the Supreme Court in the case of Beena Tiwari and Another Vs. State of Madhya Pradesh and Another, , it is not necessary to dilate on this question at all. In the said case, the point projected before me; pointedly came up for consideration and on consideration of the aforesaid Rule, the Apex Court held as follows :-

10. In view of the above decisions of this Court, it must be held that both the Full Bench and the Division Bench were wrong in placing reliance upon R.3-A of the Rules. As the High Court did not confirm the appellants in Civil Appeal Nos. 59 and 60 of 1982 and the respondent in Civil Appeal No. 2860 of 1985, the question for their being deemed to be in quasi-permanent service does not arise. Further, as the question of confirmation was completely within the domain of the control of the High Court under Art. 235 of the Constitution, there was no necessity to read the words "competent authority" in place of the words "appointing authority," for R.3-A was inapplicable to the members of the

Subordinate Judicial Service. Moreover, as already noticed, there is a specific provision for termination of service of a judicial officer who is found by the High Court to be unfit for confirmation as provided in R. 16(5), M.P. Judicial Service rules.

(underlining Mine)

In view of the authoritative pronouncement of the Supreme Court in the case of Beena Tiwari, (supra) I do not have the slightest hesitation in holding that petitioners shall not be deemed to be in quasi-permanent service in view of Rule 3-A of 1960 Rules; as the said rule is inapplicable; notwithstanding the fact that they have served temporarily for 5 years continuously.

It is relevant here to state that the State Govt. for terminating the services of the petitioners in some of the case has referred to Rule 12-A of 1960 Rules, as repository of its power. Petitioners submission is that Rule 12-A of 1960 Rules being Inapplicable, this Itself will invalidate the Impugned orders, Learned counsel representing the High Court has not disputed the stand of the petitioners that Rule 12-A of 1960 Rules, Is Inapplicable to the petitioners but their stand is that the same Itself will not invalidate the Impugned orders. True It is that in some of the cases the State Govt. has Indicated Rule 12-A as repository of its power and projected to exercise the same in terminating the same in terminating the services of the petitioners. It is trite law that validity or Invalidity of an order is not dependant upon the provision of law referred to in the order; but the same squarely depends upon as to whether such power exists or not. Here, in the present case, it is the stand of the respondents that petitioners services have been terminated during their probation period and the same is permissible in law. This point shall be dealt with separately. However, I am of the considered opinion that the impugned orders shall not be deemed illegal or invalid only on the ground that in the impugned orders, reference of Rule 12-A of 1960 Rules has been made.

It is the assertion of the petitioners that they have worked on probation for period beyond 4 years. This has not been controverted by the respondents. In view of this, it is the stand of learned counsels of petitioners that petitioners shall be deemed to be confirmed employee in view of rule 24 of MP. Judicial Services (Classification, Recruitment & Conditions of Service) Rules, 1955. Petitioners having worked on probation for a period beyond 4 years is beyond pale of controversy, but it is the stand of the respondents that in the absence of any specific order of confirmation and further their cases for confirmation having been considered within the period of 4 years and they having either been found unfit for confirmation of consideration of materials placed before the High Court; or their confirmation was deferred, they shall not be deemed to be confirmed employees and their services can be terminated treating them to be unconfirmed employees on the ground of unsuitability.

In exercise of the power conferred under Article 309 of the Constitution of India,

the Governor of Madhya Pradesh has framed the M.P. judicial Services (Classification, Recruitment & Condition of Service) Rules, 1955. Rule 24 of the 1955 Rules which is relevant for the purpose, reads as follows :-

24(1) Every candidate appointed to the cadre shall undergo training for a period of six months before he is appointed on probation for a period of two years which period may be extended for a further period not exceeding two years. The probationers may, at the end of the period of their probation be confirmed subject to their fitness for confirmation and to having passed, by the higher standard, all such departmental examination as may be prescribed.

(2) During the period of probation, he shall be required to do magisterial work and acquire experience in office routine and procedure.

(3) If during the period of probation has not passed the prescribed departmental examinations, or has been found otherwise unsuitable for the service, the Governor may, at any time, thereafter, dispense with his service." Learned counsels for the petitioners submit that under Rule 24(1) of 1955 Rules, appointment has to be made on probation for a period of two years which period may be extended for a further period not exceeding 2 years and according to their submission, after expiry of a total period of 4 years from the date of initial appointment on probation, notwithstanding the absence of specific order of confirmation, petitioners shall be deemed to be confirmed employees. In support of the aforesaid submission, strong reliance has been placed on the decision of the Supreme Court in the case of Dayaram Dayal Vs. State of M.P. and another [OVERRULED], . It is the stand of the petitioners that Dayaram Dayal (supra) squarely covers the case of the petitioners and this Court is bound to follow the same and hold that the petitioners continuance in service beyond the period of 4 years is not on probation, but they shall be deemed to be confirmed employees. Hence, their termination of service by treating them as probationer is illegal. However, Shri Ravindra Shrivastava, counsel representing the High Court has taken an extreme stand that Judgment in Dayal's case (supra) is Judgment in per incuriam and therefore the same is not binding on this Court under Article 141 of the Constitution of India.

In my opinion, per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases, some part of the decision or some subject in the reasoning on which it is based is found on that count to be demonstratively wrong.

When questioned about the competence of a court exercising inferior jurisdiction to go into this question, Shri Shrivastava, representing the High Court went to the extent of saying that the High Court can ignore the same and in support of this submission, reliance has been placed on the decisions of the Supreme Court in the case of A.R. Antulay Vs. R.S. Nayak and Another, , and my attention has been drawn to the following passage from the said Judgment :-

183. By the point is that the circumstance that a decision is reached per incuriam, merely serves to denude the decision of its precedent value. Such a decision would not be binding as a judicial precedent. A co-ordinate Bench can disagree with it and decline to follow it. A larger Bench can overrule such decision. When a previous decision is so overruled it does not happen nor has the overruling Bench any jurisdiction so to do that the finality of the operative order inter partes, in the previous decision is overturned. In this context the word "decision" means only the reason for the previous order and not the operative order in the previous decision, binding inter-partes. Even if a previous, binding Inter-partes. Even if a previous decision is over-ruled by a larger Bench, the efficacy and binding nature, of the adjudication expressed in the operative order remains undisturbed inter-partes. Even if the earlier decision of the Five Judge Bench is per incuriam the operative part of the order can not be interfered within the manner now sought to be done.

(underlining mine)

In the case referred to above, the power of co-ordinate Bench or a larger Bench of the Supreme Court in relation to the Judgment rendered by the Supreme Court was under consideration and not that of the High court. In that view of the matter, the authority relied on in no way supports the submission of the learned counsel.

Salmond on jurisprudence 12th Edition by P.J. Fitzgerald, at pages 150, 151 has considered the effect of perincuriam Judgment in these words :-

Ignorance of statute A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute i.e., delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case (infra \$ 28), and for the Court of Appeal it was given as the leading example of a decision per incuriam which would not be binding on the court. The rule apparently applies even though the earlier court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such incuria as to vitiate the decision. Even a lower court can impugn a precedent on such grounds.

The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force.

Seervai in his Constitutional Law of India, Fourth Edition, Vol. 3 at pages 2676 and 2677 has written as follows :-

No judgment of our Sup. Ct. contains a full discussion of the circumstances under

which a judgment is not binding; but in *Jaisri Sahu v. Rajdevan Dubey, Venkatarama Aiyer J.* cited with approval a passage from Halsbury that judgments per incuriam were not binding on the Court of Appeal - though the incuriam there considered was of relevant judgments. But if "precedents which enunciate rules of law form the foundation of administration of justice under our system", it is well settled in the English doctrine of precedents that a judgment rendered in ignorance of a statute, or a rule having statutory force, which would have affected the result, is not binding on a court otherwise bound by its own decisions. In *London Street Tramways Co. v. London County Council* the House of Lords recognised that such a judgment was an exception to its ruling that the House of Lords was absolutely bound by its own judgments. The reason given for the exception was that in such a case the House had committed a mistake of fact and when in a subsequent case the mistake was pointed out, the House would not be bound by its earlier decision. The same exception was recognised by the Court of Appeal in the *Bristol Aeroplane Case* but the explanation given for the exception is more satisfactory :

It cannot.... be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own when that provision was not present to its mind. Cases of this description are examples of decision given per incuriam.

It is equally settled law that where the court has construed a statute, or a rule having statutory force, the judgment is binding on co-ordinate or subordinate courts however erroneous the construction may be, unless such a judgment falls within other exceptions to the binding authority of a judgment.

It is submitted that the law in India is the same, and the Sup. Ct. judgment rendered in ignorance of a relevant constitutional or statutory provision is not binding on any court in India. The Constitution and the laws are the law on the subjects covered by them; and the Sup. Ct. cannot be said to "declare the law" on those subjects be said to "declare the law" on those subjects if the relevant provisions are not present to its mind. The observations of Shah J. that-

The decision (of the sup. Ct.) was binding on the High Court, and the High Court could not ignore it because they thought that "relevant provisions were not brought to the notice of the (Supreme) Court".

do not lay down the proposition that if the Sup. Ct. had in fact overlooked the relevant provisions, its judgment would still be binding. Shah J. proceeded to show that the High Court mistakenly

thought that the relevant provisions had been overlooked, when in fact they had not been overlooked. If the observations are read to mean that even if the Sup. Ct. delivered a judgment in ignorance of the relevant constitutional or statutory provisions, the judgment would still be binding on subordinate courts, it is submitted that the observations would be clearly wrong and opposed to the total volume of authority on the binding force of precedents. The observations would

also be opposed to the obvious proposition that the Constitution and the laws bind every court in India, and that though the courts are free to interpret, they are not free to overlook or disregard the Constitution and the laws.

(underlining mine)

However, neither on principle nor on precedent I am inclined to accept the submission advanced on behalf of the High Court that a Court exercising inferior jurisdiction can impugn a precedent of the Supreme Court on the ground that the judgment rendered by the Supreme Court is per incuriam. Judgment rendered by the Supreme Court has a constitutional status and Art. 141 of the Constitution makes the law declared by the Supreme Court binding on all Courts within the territory of India. In my opinion, the decision of the Supreme Court is binding on the High Court and its binding effect under art. 141 of the Constitution as also under the doctrine of binding precedent cannot be whittled down on the principle of Judgment being rendered per incuriam. Reference in this connection can be made to the decision of the Supreme Court in the case of Ballabhadras Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, in which, it has been succinctly stated as follows :-

4. The first question is concluded by the judgment of this Court in Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon, . That case arose under the C.P. & Berar Municipalities Act, 1922. The right of a Municipality governed by that Act to levy u/s 66(1)(b) a tax on bales of cotton ginned at the prescribed rate was challenged by a taxpayer, this Court held that levy of tax on cotton ginned by the taxpayer in excess of the amount prescribed by Article 276 of the Constitution was invalid, and since the Municipality had no authority to levy the tax in excess of the rate permitted by the Constitution, the assessment proceedings levying tax in excess of the permissible limit were invalid, and a suit for refund of tax in excess of the amount permitted by Article 276 was maintainable. The decision was binding on the High Court and the High Court could not ignore it because the "relevant provisions were not brought to the notice of the Court.

(underlining mine)

In the case of A.R. Antuley (supra) on which, strong reliance has been placed by the learned counsel for the High Court, in support of his submission, has considered the power of a co-ordinate Bench or a larger Bench of the Supreme Court in ignoring the judgment rendered by it, invoking the principle of per incuriam Judgment. Said Judgment, in no way can be read to mean that the power of the supreme Court can be exercised by the High Court. In fact, in the case of B.M. Laknani (supra) the Supreme Court has clearly ruled and stated very emphatically that the decision of the Supreme Court can not be ignored by the High Court applying the principle of per incuriam Judgment.

In the case of Cassell & Co. Ltd. Vs. Broome & Anr., (1972) AC 1027, this question was considered by the House of Lords and Lord Hailsham at page 1052

spoke as follows :-

But the decision of appeal did not stop at dismissing the appeal on these grounds. Whether or not they were encouraged by the zeal of plaintiff's counsel, they put in the forefront of their judgments the view that *Rookes Vs. Barnard* (1964) A.C. 1129 was wrongly decided by the House of Lords and was not binding even on the Court of Appeal. It was, so they said, arrived at *per incuriam*, and without argument from counsel.

Lord Hailsham further spoke at page 1054 as follows :-

The fact is, and I hope it will never be necessary to say so again that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decision of higher tiers, where decision manifestly conflict the decision in *Young Vs. Bristol Aeroplane Co. Ltd.*, (1944) K.B. 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously.

(underlining mine)

Lord Reid in his separate speech in the same case at page 1084 spoke as follows :-

It seems to me obvious that the Court of Appeal failed to understand Lord Devlin's speech, but, whether they did or not, I would have expected them to know that they had no power to give any such direction and to realise the impossible position in which they were seeking to put those judges in advising or directing them to disregard a decision of this House, That aberration of the Court of Appeal has made it necessary to re-examine the whole subject and incidentally has greatly increased the expense to which the parties to this case have been put.

Viscount Dilhorne, in the said case, at page 1107, observed as follows :-

To say that a decision of this House was given *per incuriam* is, to say the least, unusual and could be taken, though I cannot believe it was so intended as of a somewhat offensive character." Lord Diplock in his lucid speech, at page 1131 wrote as follows :-

my Lords, there is little that I should wish to add to what Lord Hailsham of St. Marylebone L.C. and my noble and learned friend, Lord Reid, have already said about the way the instant case was treated in the Court of Appeal, it is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary. When I sat in the Court of Appeal I sometimes thought the House of Lords was wrong in over-ruling me. Even since that time there have been occasions, of which the instant appeal itself is one, when, alone or in company. I

have dissented from a decision of the majority of this House. But the Judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted. The Court of Appeal found themselves able to disregard the decision of this House in *Rookes Vs. Barnard* by applying to it the label *per incuriam*. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal.

(underlining mine)

In Halsbury's Laws of England, Fourth Edition, Vol. 26, para 557 at page 26, the law on the subject has been summarised as follows :-

577. House of Lords decisions. The decisions of the House of Lords upon questions of law are normally considered by the House to be binding upon itself, but because too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the proper development of the law the House will depart from a previous decision when it appears right to do so, although it bears in mind the danger of disturbing retrospectively the basis upon which contract, property settlements and fiscal arrangements have been entered into and the especial need for certainty as to the criminal law. When a broad principle has been clearly decided by the House, the decision should not be weakened or frittered away by fine distinctions, and an erroneous decision of the House upon a question of law can be set right only by Act of Parliament. A decision of the House of Lords occasioned by members of the House being equally divided is as binding on the House and on all inferior tribunals as if it had been unanimous. Decisions of the House of Lords are binding on every court inferior to it. It is not open to the Court of Appeal to advise judges to ignore House of Lords decisions on the ground that they were decided *per incuriam* or are unworkable. But if there is no discernible ratio decidendi the Court of Appeal may adopt any reasoning which appears to it correct provided it supports the actual decision of the House.

(underlining mine)

On consideration of the aforesaid decision, I am of the opinion that the precedents of the English Courts now, definitely tilts towards the view that inferior Court is not free to overlook or disregard the decision of the Supreme Court on the principle of *per incuriam* Judgment.

Shri Kale, appearing on behalf of the petitioner has drawn my attention to a Judgment of the Andhra Pradesh High Court in the case of *Soloman Raju & ors. Vs. Accountant General, A.P.* (1983) LAB I.C. 230, wherein, it has been held as follows :-

In my considered opinion the view of Seervai can not be taken today to represent the law either in England or in India.

and further in paragraph 32, it has been held as follows :-

32. Our duty under Article 141 of the Constitution is only to do or die though not giving up the right to ask how or why.

In fact, the decision of the Supreme Court in B.M. Lakhani (Supra) has settled this question so far as Courts in India are concerned.

On principle also if one tends to ignore the Judgment of the Supreme Court leveling the same to be Judgment rendered in per incuriam, the same will lead to a dangerous trend. This will result into post-mortem of the Judgment of the Supreme Court and the binding effect of the Judgment, which the Constitution makers clearly have in their mind while enacting Art. 141 of the Constitution, shall be rendered meaningless. Art. 141 of the Constitution has been incorporated to avoid conflicts of authority and to secure certainty and uniformity in the administration of Justice. If this principle is permissible to be invoked by the High Court, in relation to the Judgment of the Supreme Court, in face of Art. 141 of the Constitution of India, for the parity of reasons the same shall apply to the Courts exercising inferior jurisdiction than that of the High Court.

In such a situation, even though the law is declared by the Supreme Court, its status shall be in a fluid state, and it shall be difficult for anybody to speak about the status of Law on a particular subject. Thus the submission advanced, if accepted will tend to cause irreparable damage and make the position of law uncertain. I am of the considered opinion that it is not permissible for any Court, which obviously includes the High Court, but not the Supreme Court, to depart from the Law laid down by the Supreme Court, to depart from the Law laid down by the Supreme Court by calling its decision as per incuriam. Decision rendered by the Supreme Court is binding on Subordinate Courts, however erroneous the construction may be. In fact, a Court exercising inferior jurisdiction cannot call a judgment of the Supreme Court to be erroneous. To many, it may sound frustrating to say but I say emphatically the if inferior Court is allowed to disobey a judgment of the Superior Court, the entire legal system shall collapse. Judicial system can work and can work alone if someone is allowed to have the last word and if that last word once spoken is loyally accepted. Judges are under an oath to uphold the constitution and the law, hence it is my duty in face of Art. 141 of the Constitution to do or die and accept the Judgment loyally. Hence, I lack competence to term the Judgment of the Supreme court in Dayaram Dayal (supra) as in per incuriam decision.

In Dayaram Dayal (supra), the Supreme Court after referring to its earlier decisions came to the conclusion that from the decided authorities two line of cases emerge and in fact, there is no real conflict between the two sets of decision. In one line of cases, it has been held that if in the rule or the order of appointment a period of probation is specified and the power to extend probation is also specified and the officer is continued beyond the prescribed period of probation he can not be deemed to be confirmed and there is no bar on the power of termination of the officer after the expiry of initial period of probation. Other line of cases taken note of by the Supreme Court in Dayaram Dayal (supra) are

those cases where while there is provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation and in such circumstance, after expiry of the said period officer must be deemed to have been confirmed. After considering Rule 24 of 1955 Rules and authorities on the question, the Supreme Court in *Dayaram Dayal* (supra) held as follows :-

18. It is, therefore, clear that the present case is one where the Rule has prescribed an initial period of probation and then for the extension of probation subject to a maximum, and therefore the case squarely falls within the second line of cases, namely, *Dharam Singh's* case and the provision for a maximum is an indication of an intention not to treat the officer as being under probation after the expiry of the maximum period of probation. It is also significant that in the case before us the effect of the rule fixing a maximum period of probation is not whittled down by any other provision in the rules such as the one contained in *Samsher Singh's* case or in *Ashok Kumar Mishra's* case. Though a plea was raised that termination of service could be effected by serving one month's notice or paying salary in lieu thereof, there is no such provision in the order of appointment nor was any rule relied upon for supporting such a contention.

(underlining mine).

In the case of *Wasim Beg Vs. State of Uttar Pradesh and Others*, , the Supreme Court broadly found two sets of authorities dealing with the question in the following words :-

15. whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant Service Rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In those cases where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary. This is the line of cases starting with *State of Punjab Vs. Dharam Singh*, ; *M.K. Agarwal Vs. Gurgaon Gramin Bank and Others*, ; *Om Parkash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow and Others*, ; *State of Gujarat Vs. Akhilesh C. Bhargav and Others*, .

However, even when the Rules prescribe a maximum period of probation, if there is a further provision in the Rules for continuation of such probation beyond the maximum period, the Courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended. In the category of cases we can place *Samsher Singh Vs. State of Punjab* and *Another*, which was the decision of a Bench of Seven Judges where the principle of probation not going beyond the maximum period fixed was

reiterated but on the basis of the Rules which were before the Court, this Court said that the probation was deemed to have been extended. A similar view was taken in the case of *Municipal Corporation, Raipur Vs. Ashok Kumar Misra*, . In *Satya Narayan Athya Vs. High Court of M.P. and another*, although the Rules prescribed that the probationary period should not exceed two years, and an order of confirmation was also necessary, the termination order was issued within the extended period of probation. Hence the termination was upheld.

The other line of cases deals with Rules where there is no maximum period prescribed for probation and either there is a Rule providing for extension of probation or there is a Rule which requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of the employee. In these cases unless there is such an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the probationary period. In this line of cases one can put *Sukhbans Singh Vs. State of Punjab*, , *State of Uttar Pradesh Vs. Akbar Ali Khan*, , *Shri Kedar Nath Bahl Vs. The State of Punjab and Others*, , *Dhanjibhai Ramjibhai Vs. State of Gujarat*, and *Tarsem Lal Verma v. Union of India*,, 1997 (9) SCC 243 , *Municipal Corporation, Raipur Vs. Ashok Kumar Misra* (supra) and *State of Punjab Vs. Baldev Singh Khosla*, . In the recent case of *Dayaram Dayal Vs. State of M.P. and another [OVERRULED]*, (to which one of us was a party) all these cases have been analysed and it has been held that where the Rules provide that the period of probation cannot be extended beyond the maximum period there will be deemed confirmation at the end of the maximum probationary period unless there is anything to the contrary in the Rules.

Counsels representing the parties have drawn my attention to the Judgments rendered by the Supreme Court, which have been referred by it in the cases of *Dayaram Dayal* and *Wasim Beg* (supra), in support of their respective submissions. In my opinion, it would be futile to refer to these decisions as on consideration of these decisions, Supreme Court rendered the two decisions referred to above.

From a reading of the Judgments of the Supreme Court in *Daya* (supra) and *Wasim Beg* (supra), principle deducible are as follows :-

- (i) If in the rule or the order of appointment, a period of probation is specified and the power to extend probation is also specified and the officer is continued beyond the prescribed period of probation; he can not be deemed to be confirmed after the expiry of initial period of probation;
- (ii) If there is a rule, which requires a specific act on part of the employer either by issuing an order of confirmation or any similar act; in such cases unless there is such an order of confirmation or any similar act; the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period;
- (iii) If in the rule, maximum period of probation is prescribed but there is further

provision in the Rules for continuance of such probation beyond the maximum period, there will be no deemed confirmation and the probation period will be deemed to be extended;

(iv) If the Rules provide for a maximum period of probation beyond which probation cannot be extended, at the end of the probationary period, there will be deemed confirmation of the employee.

Further, on a close reading of the Judgment of the Supreme Court in Dayal's case (supra) clearly shows that the provision prescribing initial period of probation and then for extension of probation subject to the maximum "is an indication of an intention not to treat the officer as being under probation after the expiry of the maximum period of probation." Therefore, in my opinion, a situation may arise, besides the four which are deducible from Dayal's and Wasim's cases, in which, although the maximum period of probation has been fixed and there is no further provision under the rules for continuation of such probation beyond the maximum period, still after the expiry of the said period an employee shall not deemed to be confirmed on account of some positive act or conduct of the employer. In my opinion, indication of an intention to treat an officer as being under probation after the expiry of maximum period of probation is another situation which emerges from Dayal's and Wasim's case itself. Deemed confirmation of an employee after the expiry of the maximum period of probation, even in the absence of existence of any special rule, is not a rule of universal application. This seems recognised by the Supreme Court in the case of Chief General Manager, State Bank of India and Another Vs. Bijoy Kumar Mishra, , wherein it has been held as follows -

8. It is obvious that the decision in Dharam Singh can have no application in a case where the employee was absent from duty from a date much prior to the expiry of the maximum period of probation and remained absent even thereafter for a long time. There was no occasion in such a case for the employer to allow the employee (respondent) to continue to work on the post after expiry of the maximum period of probation because he was absent and was not working on the post at the time of the expiry of the period of probation. Deemed confirmation results from the conduct of the employer in permitting continuance in service after the expiry of the maximum period of probation fixed by the rules. When there is no such conduct of the employer, the very foundation for the argument of deemed confirmation and reliance on Dharam Singh is not existent. In our opinion, this discussion alone is sufficient to indicate that the High Court has misread Dharam Singh to grant relief to the respondent. However, we may refer to some later decisions also to indicate that this is the correct position in law.

(Underlining mine)

From the reading of the aforesaid passage of the Judgment of the Supreme Court it is clear that even after the expiry of the maximum period of probation, deemed

confirmation may not be inferred from the conduct of the employer. It is relevant here to state that the Judgments rendered by the Supreme Court in the case of Bijoy Kumar Mishra (supra) was on consideration of its 7 Judges Bench decision in the case of Samsher Singh Vs. State of Punjab and Another, and after such consideration, it has been held as follows -

A Seven Judge Bench in Samsher Singh Vs. State of Punjab and Another, at p. 853, held that the provision regarding the maximum period of probation was directory and not mandatory and the decision in Dharam Singh was construed as under -

In Dharam Singh's case he was allowed to continue without an order of confirmation and therefore the only possible view in the absence of anything to the contrary in the/Service Rules was that by necessary implication he must be regarded as having been confirmed.

There can thus be no doubt that the deemed confirmation which is inferred from the employer's conduct is permissible only when it follows from the positive act of the employer permitting the employee to continue to work on the post even after completion of the maximum period of probation permitted under the Service Rules since no other inference is possible in such a situation from the employer's conduct of continuing to take work from the employee after that period.

(Underlining mine)

On the strength of the authority of the Supreme Court, I don not have the slightest hesitation in holding that even in the case where maximum period of probation is prescribed, deemed confirmation has to be inferred from the conduct of the employer and in case conduct or act shows to the contrary deemed confirmation cannot be inferred.

Learned counsel for the petitioners contend that the conduct of the employer in permitting them to continue in service after the expiry of maximum period of probation fixed by the Rules, is a conduct which results into deemed confirmation. It is common ground that the petitioners continued beyond the maximum period of probation fixed by the Rule, but it is the stand of the respondents that no conduct much less any positive act of the employer suggest deemed confirmation of the petitioners. It is emphasised that the conduct and the positive act of the employer clearly show that in fact it never intended to confirm the petitioners. It is beyond any controversy that the case of confirmation of the petitioners were placed for consideration before the expiry of the maximum period of probation and they have either been found unfit for confirmation but have been allowed, to continue or on consideration of the materials, the Full Court resolved to postpone their confirmation. In my considered opinion the resolution of the High Court finding the petitioners unfit for confirmation or postponing their cases for confirmation are indication of a conduct and a positive act of the employer against the inference of deemed

confirmation. Here in the present case, the positive act of the employer; permitting the employees to continue to work on the post after completion of the maximum period on probation, clearly shows that they were allowed to continue on probation itself.

Here, I must answer an ancillary submission of the learned counsel for the petitioners that the resolution of the Full Court postponing the case of confirmation of the petitioners will not amount to any consideration, so as to judge the conduct of the employer. There are cases and cases in which the employer comes to the conclusion that the employee has not established his suitability so as to confirm him but at the same time, the employer has not come to the conclusion that such employees are unsuitable to the post in other words, they are not too good for confirmation or too bad for termination of the employment, in such circumstance, cases of such employees are postponed. This, in my opinion, is consideration of cases for confirmation of the employees and I do not find any substance in the submission of learned counsel for the petitioners.

Learned counsels for the petitioners projected before me, with concern, that in case this line of reasoning is accepted i.e. even after the expiry of the maximum period of probation, still employees can be treated as on probation by positive act or conduct of the employer, shall lead to disastrous consequences as the employer may continue an employee on probation till perpetuity. It is suggested that the employer may resort to a device that their cases are considered for confirmation regularly, but not confirmed for long years even after the expiry of the maximum period of probation, which shall make such employees probationers till perpetuity. In my opinion, apprehension of the petitioners is more imaginary than real. Cases of confirmation are considered by the Full Court and it is difficult to believe that a Constitutional authority like High Court shall charter such course. But even if I assume in favour of the petitioners that it is possible to be done; and an employee is kept on probation without any justification for a period longer than required, same shall be subject to Judicial review by this Court on the Judicial side and superior Court also. I am not inclined to take into consideration the possible abuse of powers by a Constitutional functionary to cloud my reasoning. Taking into consideration the conduct and positive act of the employer, I am not inclined to hold that the petitioners shall be deemed to be confirmed in view of Rule 24 of 1995 rules and this point is answered against the petitioners. Thus the decision in Dayal's case (supra), on which strong reliance has been placed as also Wasim's are clearly distinguishable.

Learned counsels for the petitioners submit that termination of services of the petitioners, without any enquiry is in violation of Article 311 of the Constitution of India. Article 311 (2) prohibits dismissal or removal from service without enquiry. In view of my answer to the aforesaid question, it is not necessary to dilate on this question any longer. Petitioners are probationers and in case it is found that their probation has been terminated not on account of any misconduct or by way

of punishment and have been terminated on the ground of unsuitability to the post, no enquiry contemplated under Article 311 of the Constitution is required to be held. However, to overcome this legal position, petitioners contend that termination of their services is by way of punishment and the same is not permissible without any enquiry. In support of this submission, reliance has been placed by the petitioners on a decision of the Supreme Court in the case of Ishwar Chand Jain Vs. High Court of Punjab and Haryana and Another, and my attention has been drawn to the following passage from paragraph 4 of the Judgment, which reads as follows -

Shri P.P. Rao, learned counsel for the appellant, challenged the findings of the High Court and urged that since the High Court resolved to terminate the appellant's services on the basis of the inquiry report submitted by a learned Judge of the High Court, the constitutional protection available to the appellant under Art. 311 (2) of the Constitution, and the principles of natural justice had been violated.

Passage referred to above records the submission of the counsel but the same has not been answered in the said case; which shall be evident from subsequent passage from the same paragraph itself. Authority relied on by the petitioners is thus clearly distinguishable. In *Inshwar Chand* (supra) on fact the Supreme Court found that the High Court had no material, for coming to the conclusion that the appellants work and conduct was unsatisfactory during his probationary period. Same reads as follows -

On the other hand, Dr. Y.S. Chitale appearing for the High Court submitted that the resolution of the High Court did not cause any stigma to the appellant and the inquiry held by the High Court was merely to judge his suitability for the service. The appellant was not entitled to the constitutional protection of Art. 311 (2) of the Constitution nor he was entitled to any opportunity of hearing before taking the decision for terminating the appellant's probationary period. We do not consider it necessary to deal with these rival submissions as in our opinion the High Court had no relevant material in coming to the conclusion that the appellant's work and conduct was not satisfactory during his probationary period.

(underlining mine)

Another authority on which strong reliance has been placed by the petitioners is the Judgment of Supreme Court in the case of *Jarnail Singh and Others Vs. State of Punjab and Others*, and my attention has been drawn to paragraph 32 of the said Judgment, which reads as follows -

32. The position is now well settled on a conspectus of the decisions referred to hereinabove that the mere form of the order is not sufficient to hold that the order of termination was innocuous and the order of termination of the services of the probationer or of an ad hoc appointee is a termination simpliciter in accordance with the terms of the appointment without attaching any stigma to

the employee concerned. It is the substance of the order i.e. the attending circumstances as well as the basis of the order that have to be taken into consideration. In other words, when an allegation is made by the employee assailing the order of termination as one based on misconduct, though couched in innocuous terms, it is incumbent on the Court to lift the veil and to see the real circumstances as well as the basis and foundation of the order complained of in other words, the Court, in such case, will lift the veil and will see whether the order was made on the ground of misconduct, inefficiency or not. In the instant case we have already referred to as well as quoted the relevant portions of the averments made on behalf of the State respondent in their several affidavits alleging serious misconduct against the petitioners and also the adverse entries in the service records of these petitioners, which were taken into consideration by the Departmental Selection Committee without giving them any opportunity of hearing and without following the procedure provided in Art. 311 (2) of the Constitution of India, while considering the fitness and suitability of the appellants for the purpose of regularising their services in accordance with the Government Circular made in October, 1980. Thus the impugned order terminating the services of the appellants on the ground that "the posts are no longer required" are made by way of punishment.

Yet, another decision on which reliance has been placed is the decision of the Supreme Court in the case of Anoop Jaiswal Vs. Govt. of India & Anr. (AIR 1984 SC 626) and my attention has been drawn to the following paragraph of the said Judgment -

12. It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employees.

I do not have the slightest hesitation in accepting the proposition that the form of the order is not decisive to ascertain the nature of the order i.e. whether it is by way of punishment or simplicitor and this Court may dwell upon the facts and circumstances of the case and on such an enquiry, may come to the conclusion that the order of termination is not simplicitor but in reality a cloak for an order of punishment. In case it is found to be so, an enquiry under Article 311 of the Constitution is necessary even in relation to employees who are on probation. Power of the High Court to cut the veil and ascertain the real purpose of termination of service is unquestionable but the meats of the matter is; is it so ? Respondents have placed on record entries made in the Annual Confidential Reports of the petitioners as also other reports. Entries made in the Annual Confidential Report were taken into consideration by the High Court merely to Judge their suitability for continuance in the services and the materials do

suggest that the work and conduct of the petitioners were not satisfactory during the probationary period. In my opinion, petitioners services have been terminated on account of unsuitability to the post and not by way of punishment; hence no enquiry under Article 311 of the Constitution was necessary.

Learned counsels for the petitioners have drawn my attention to the assertions made in the writ petitions, to contend that the materials do suggest that they are fit to be confirmed. I am afraid, I cannot act as Court of appeal against the decision of the High Court. Entries made in the Annual Confidential Reports of the petitioners do suggest that their work and conduct were not satisfactory. It is on consideration of relevant materials and meticulous examination or appraisal of the weight of the material is not called for by me.

26-A. It is then half-heartedly contended by the learned counsels for the petitioners that action of the High Court in recommending termination of the services of the petitioners simplicitor is malafide and on this ground alone impugned orders of termination be set aside. Any order actuated by malafide renders the same invalid. However, excepting a vague assertion, no specific act of malafide has been pleaded. It is easy to allege malafide but difficult to prove. Here in the present case, I find that there is no mention of actual malafide and by whom and for what reason. Institutional malafide is unknown to law and in the state of the pleading, I am not inclined to accept the allegation of malafide against a constitutional authority like the High Court. It is to be borne in mind that the decision, which has found the petitioners unfit for confirmation and for termination of their services have been taken by the Full Court in its meeting. Hence, this half-hearted submission of malafide has no substance and is accordingly rejected.

To put the record straight, Shri N.K. Shukla, appearing on behalf of the petitioner Panumati Sonchatra, petitioner in W.P. No. 2429/95 has contended that 6 months training period as provided under Rule 24 (1) of 1955 Rules cannot be extended; but has been extended in her case. It is common ground that the period of training of this petitioner was extended beyond the period of 6 months. Period of training of this petitioner was extended for a further period of 6 months from 18.1.1991 and thereafter, she was appointed on probation for a period of 2 years. Petitioner did not challenge the extension of the period of training at that time, accepted the same and thereafter got appointment on probation for 2 years. Petitioner did not raise any grievance about the same within a reasonable time and seeks to question the same after termination of her service. At such a distance of time and for the reasons stated above, I am not inclined to go into this question at this stage.

An additional submission has been made by Shri R.N. Roy, appearing on behalf of petitioner in M.P. No. 4565/92 and his contention is that the respondents cannot be permitted to treat the petitioner, still on probation in the face of the Judgment of the Supreme Court in the case rendered between the parties. It is worthwhile to mention here that the services of this petitioner was terminated earlier also,

but he successfully challenged the same before the High Court on its Judicial side (reported in 1985 MPLJ 36) and the order passed by this Court was upheld by the Supreme Court, for reasons different than assigned by the High Court. In his case (reported in Beena Tiwari and Another Vs. State of Madhya Pradesh and Another, the Supreme Court in paragraph 13 has held as follows -

13. As regards the respondent in Civil Appeal No. 2860 of 1985, although he succeeded before the Full Bench on a technical plea based on Rule 3-A of the Rules which is not applicable, we are of the view that the High Court had justification for not confirming the respondent. It, however, appears from the records that the respondent has improved much and indeed, the report for the period from 24.10.1985 to 31.3.1986 shows that his performances for the said period were satisfactory. The subsequent report for the period from 1.4.1986 to 31.3.1987 also shows that on the whole his performances were satisfactory. Accordingly, we are not inclined to interfere with the order of the Full Bench.

After saying so, the Supreme Court directed that for a period of 3 years this petitioner shall be under a close watch. This finding is incorporated in para 16 of the Judgment, which reads as follows -

16. So far as Civil Appeal No. 2860 of 1985 is concerned, we affirm the order of the Full Bench quashing the impugned order of termination of services of the respondent, but not the reasons for such quashing and direct that for a period of three years the respondent shall be under a close watch.

High Court in the case of this petitioner has rendered the Judgment on 24.4.1985 and the petitioner was reinstated in service vide order dated 1985 with effect from 28.11.1981, Supreme Court rendered its Judgment in his case on 18.12.1987. According to return of respondent No. 2 i.e. High Court, matter of confirmation of this petitioner was placed for consideration before the Full Court in its meeting held on 2/3-5-1987, 23/24.4.1988, 21/22.4.1990 and 27/28.4.1991, but he was not found fit for confirmation as Civil Judge, Class II. However, he was allowed to continue in service. Thereafter, his matter of confirmation was placed before the Full Court on 1st, 2nd and 3rd May, 1992 and the Full Court did not find him fit for confirmation and further resolved to terminate his service simpliciter by giving him one month's salary in lieu of notice. Petitioner was appointed temporarily as Civil Judge, Class II by order dt. 15.7.1976 and on completion of training he was posted as regular Civil Judge, Class II by order dated 12.4.1978. In view of the Judgment of the Supreme Court, he was to be kept under close watch for a period of 3 years. Respondents did not terminate his probationary period within a period of 3 years for which, he was to be kept under a close watch under the orders of the Supreme Court.

I am of the opinion that conduct and positive act of the respondents in continuing this petitioner in service beyond the period of 3 years; after the Judgment of the Supreme Court results in his deemed confirmation. Once it is held so, his services cannot be terminated without any enquiry and I have no

option than to hold that termination of his service is in violation of Art. 311 of the Constitution of India. Accordingly, order dt. 18.6.1992 passed by the State Govt. terminating the services of this petitioner by giving him one months pay in lieu of notice, on the recommendation of the High Court can not be sustained and has to be quashed.

As stated earlier, petitioner has died during the pendency of the writ petition and the same is being pursued by his legal representative. Hence the direction for reinstatement in service of the petitioner is a physical impossibility and cannot be granted. However, his heirs shall be entitled to all arrears of emoluments from the date of termination of service the original petitioner till the date of his death and they shall also be entitled to all consequential benefits in accordance with law. Order of termination of service of this petitioner has been found to be bad for infraction of Article 311 of the Constitution of India, still on account of death of the employee, I am not inclined to give any liberty to the respondents to hold departmental enquiry afresh.

In the result, I do not find any merit in any of the Writ Petitions, excepting MP. No. 4564/92 and they are accordingly dismissed. However, for the reasons aforesaid, M.P. No. 4564/92 is allowed, impugned order is set aside with the directions aforementioned. In the facts and circumstances however, there shall be no order as to costs.