

(1958) 10 KAR CK 0009
In the Karnataka High Court
Case No : Writ Petition No. 305 of 1958

K. Ramachandra	Vs	APPELLANT
State of Mysore and Another		RESPONDENT

Date of Decision : 17-10-1958

Acts Referred:

Constitution of India, 1950 — Article 309, 311
Mysore Government Servants (Probation) Rules, 1957 — Rule 3, 6

Citation : AIR 1960 Kar 65 : (1960) 1 LLJ 210

Hon'ble Judges : S.R. Das Gupta, C.J;A. Narayana Pai, J

Bench : Division Bench

Judgement

S.R. Das Gupta, C.J.

(1) The Petitioner before us was by an order of the Government of Mysore dated 4th February 1957 appointed as Principal, B. Education. Training College, Gulbarga. The said order of appointment reads as follows:

"Sri Ramachandra M.A., M.Ed., Lecturer, Government Teachers College, Gulbarga, is appointed as Principal, B.Ed., Training College Gulbarga.

He will be on probation for one year with effect from the date he takes charge of the post."

The said B.Ed., Training College, Gulbarga was originally affiliated to the Osmania University. Prior to the appointment of the Petitioner as the Principal of the said College the 2nd respondent who was the Inspector of Schools, Gulbarga, was acting as Principal. On the 25th July 1956 the Government of Hyderabad issued a notification whereby the method of recruitment and qualification for the post of Principal, B.Ed., Training College was prescribed.

As the 2nd Respondent did not possess the prescribed qualifications for the said post the public Service Commission, Hyderabad issued advertisements on 27-8-56, inviting applications inter alia for the post of Principal, B.Ed., Training

College. The Petitioner applied for the said post and was selected by the Public Service Commission for the same. Before the actual appointment could be made the Reorganization of States took place as a result whereof Gulbarga, wherein the College was situate, was allotted to the State of Mysore. The Mysore Government thereafter on 4th February 1957 notified the aforesaid other appointing the Petitioner as Principal, B.Ed., Training College, Gulbarga.

(2) On 2nd March 1957 the Petitioner took charge of the said post and continued to act as such Principal. On 10-2-58 the said College was affiliated to the Karnatic University for one year from June 1957. On 12-8-58 the Government of Mysore issued three notifications relating to the post of Principal, B.Ed. Training College Gulbarga. By the first notification the period of probation of one year of the petitioner was extended by six months with effect from 1st March 1958.

By the 2nd notification, of the same date, he was discharged with immediate effect on grounds of unsuitability. By the 3rd notification, also of the same date, the 2nd respondent was appointed temporarily as Principal, B. Education. Training College with effect from the date he takes charge of the post. As the Petitioner before us is challenging the competency of the Government to pass the said notifications it would be necessary to set out the same. The said notifications read as follows.

"Education Secretariat Dated 12th August 1958 (Sravana 21 Saka Era 1880).

No. ED. 8 DGO. 57. Under Rule 4(1) of the Mysore Government Servants" (Probation) Rules, 1957, the period of probation of one year of Shri K. Ramachandra, M. A., M.Ed., Officiating Principal, B. Education., Training College, Gulbarga, is extended by six months with effect from 1-3-1958, as the question of his suitability of holding the said post has been under examination.

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Dated 12-8-1958 (Sravana 21, Saka Era 1880) No. Ed 8 DGO. 57. Under Rule 6 of the Mysore Government Servants" (Probation) Rules, 1957, Shri K. Ramachandra M. A., M.Ed., Principal, B. Ed., Training College, Gulbarga, is discharged with immediate effect on grounds of unsuitability.

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Dated 12-8-1958 (Sravana 21, Saka Era 1880) No. Ed. 8 DGO. 57. Shri Manik Rao, B. A., M. Ed., Inspector of Schools, Gulbarga, is appointed temporarily and until further orders as Principal, B. Ed., Training College, Gulbarga, with effect from the date he takes charge of the post

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(3) The Petitioner in this petition is praying for quashing the said orders of the Mysore State extending his probation, discharging his services and appointing the 2nd Respondent as the Principal in his place and for issue of appropriate writ or writs for that purpose. Several grounds were urged before us on behalf of the

petitioner in support of the petition.

(4) In the first place it was contended on behalf of the Petitioner that the appointment of the Petitioner was to a substantive permanent post, although he was to be on probation for one year. That according to the learned Advocate, means that during that year he will be on trial and if he has to be discharged then he must be discharged within that year. The learned Advocate contended that after the expiry of the year, unless so discharged, within that year. The learned Advocate contended that after the expiry of that year, unless so discharged, he remains in permanent employment and no further order of confirmation would be necessary for that purpose. That being so, the learned Advocate contended there was no scope for the Government to extend the said period of probation or to discharge him within that extended period.

(5) Secondly, it was contended before us by the learned Advocate for the Petitioner that the said orders of the Government in question are mala fide and should on that ground be quashed.

(6) Lastly, it was contended before of the petitioner that the Government Servants" (Probation) Rules, 1957 on the strength of which the Government passed its aforesaid orders were non-existent at the date when the said orders were passed. That being so, the said orders must be held to have been passed without any jurisdiction. These are the main grounds on which the Petitioner contended before us that the said orders of the Government should be quashed.

(7) I shall deal with the last of the said grounds urged before us first. It is that the Government in making the said orders purported to proceed under the Mysore Government Servants, (Probation) Rules, 1957 notified on 6th February 1958. Those Rules, as I shall presently show were repealed and were not in existence at the date when the said orders were passed. The Mysore Government Servants" (Probation) Rules, 1957 were made in exercise of the powers conferred by the Proviso to Art. 309 of the Constitution of India. The said rules were notified on 6th February 1958. Subsequent thereto and on the 1st March 1958 the Mysore Civil Services Rules 1958, were promulgated. The said rules were also made in the exercise of the powers conferred by the Proviso to Article 309 of the Constitution of India. In rule 3 of the said Rules it is provided that the various rules mentioned therein "and all other rules or orders made under any such rules, or under the proviso to Article 309 of the Constitution, and all other rules and orders made by any competent authority to the extent to which they apply to persons to whom these rules are applicable" were repealed. It was contended before us, and I accept that contention, that by virtue of the provisions of this rule probation rules which were made under the Proviso to Article 309 of the Constitution stood repealed. The learned Advocate General no doubt tried to contend before us that only such portion of the said probation rules which were covered by the Mysore Civil Service Rules stood repealed. In other words his contention was that to the extent to which the Mysore Civil Service Rules are applicable to a Probationer the probation rules stood repealed

and no more. I am unable to accept that contention. I have set out the material portion of the said rule. I have set out the material portion of the said rule. It is impossible on the language of the said rule. It is impossible on the language of the said rule to uphold the contention of Mr. Advocate General. The language used is:

"all other rules or orders made under any such rules, or under the proviso to Art. 309 of the Constitution, and all other rules and orders made by any competent authority to the extent to which they apply to persons to whom these rules are applicable are hereby repealed." In other words, if a person is governed by the Mysore Civil Service Rules, 1958 and if the earlier rules which applied to such persons would stand repealed. This seems to me to be the clear meaning of the rule. Applying the said interpretation to the present case, the result, would be that that part of the Mysore Government Servants" (Probation) Rules, 1957, which were applicable to a probationer, assuming that the petitioner inasmuch as the Mysore Civil Service Rules, 1958 are applicable to the probationers. The whole of the said probation rules, however, applied to probationers.

The whole of the said rules, therefore, stand repealed by the repealing rules of the Mysore Civil Services Rules, 1958. That being so, on the date when the Government purported to exercise its powers under the rules of the Probation Rules the said Rules were not in existence. The result is the Government had no power on that date to exercise its jurisdiction under the Mysore Government Servants" (Probation) Rules, 1957, the said rules having been repealed by the Mysore Civil Services Rules 1958 and therefore non-existent.

(8) It should also be mentioned that both the Mysore Government Servants" (Probation) Rules, 1957 and the Mysore Civil Services Rules, 1958 were made in exercise of the powers conferred by the Proviso to Article 309 of the Constitution. Those rules, therefore, would form conditions of service of persons to whom they are applicable. The Mysore Government Servants" (Probation) Rules 1957 would form the conditions of service of persons appointed on probation. The said rules being abolished and substituted by the Mysore Civil Service Rules, 1958, the conditions of service as mentioned therein were no longer operative. A discharge under those conditions is not permissible. The result, therefore, is in any view of the matter the said orders of the Government were made without jurisdiction and are liable to be quashed.

(9) In view of my aforesaid decision, it would be unnecessary for me to deal with other subsidiary contentions urged on behalf of the Petitioner relating to the Mysore Government Servants" (Probation) Rules, 1957, viz., that the said probation rules are invalid, that they do not apply to the Petitioner and that even if they apply there cannot be any extension with retrospective effect.

(10) I shall now take up the first ground urged on behalf of the Petitioner, viz., that the petitioner was in permanent employment although he will be on trial for one year and is liable to be discharged within that year. Mr. Advocate General

appearing for the State strenuously argued before us that the petitioner was not a permanent employee but was appointed on probation for one year, and that after that year, if he qualifies himself, an affirmative act has to be done by the State before he could be made a permanent employee. In other words, the Government has to make an order of confirmation before he could be made a permanent employee of the State and if no such order of confirmation was made the Petitioner would continue to be a probationer.

(11) In my opinion, it is not possible to hold that the Petitioner in this case after the period of one year had expired continued to be a probationer. It is true that the Petitioner was to be on probation for one year. That, in my opinion, means that he is liable to be discharged within that year but continues in his service he would do so only as a permanent employee. It seems that the learned Advocate General, when he advanced the aforesaid argument viz., that the continuance of the Petitioner would be as Probationer, he had the Mysore Government Servants' (Probation) Rules, 1957 in his mind. But as I have material date. The learned Advocate General could not point out any provision of the Mysore Civil of the Petitioner, empowering the Government to extend the period of probation; nor does the order of appointment by virtue of which the petitioner held his office enable the Government to extend the period of probation.

I have set out the order of appointment. It would appear from the said order that the Petitioner was appointed as Principal B. Ed. Training College, Gulbarga. That was his substantive appointment to a permanent post. The order no doubt also mentions that he will be on probation for one year. But it does not follow therefrom that even after the expiry of one year he will continue to be on probation or period of probation. There is nothing in the said order to warrant the conclusion that period of probation will continue even after one year and so long as the Petitioner is not confirmed or that the Government would be entitled to extend the said period of probation at its own pleasure. It cannot therefore be said that the Petitioner was on probation on the date he was discharged from service. I am, therefore, of the opinion, that the contention of Mr. Venkataranga Iyengar viz., that the continuance of the Petitioner after the period of one year was that of a permanent employees should prevail.

The petitioner, therefore, is entitled to all the protection guaranteed by the Constitution. The same view was taken by the Allahabad High Court in the case of Dr. Kanshi Ram Anand Vs. The State of U.P. and Another, . In that case Mr. Justice Mehrotra held that the petitioner before his Lordship who was appointed in a permanent post, but on probation, and had completed his prescribed period of probation and had served for one year thereafter, cannot be said to be a probationer although no order of confirmation was passed. I am, therefore, of the opinion that even on this ground the orders extending the period of probation or discharging the petitioner should be quashed.

(12) The learned Advocate for Respondent No. 2 relied on the observations of their Lordships of the Supreme Court in the case of Parshotam Lal Dhingra Vs.

Union of India (UOI), , in support of his contention that the service of a person appointed to a permanent post of probation can be terminated at any time. The particular observations on which he relied are as follows:

"It is, therefore, quite clear that appointment to a permanent post in a Government service, either on probation or on an 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 my opinion, these observations, if read with other observations of their Lordships both preceding and subsequent thereto would show that what their Lordships meant was that appointment to a permanent service on probation can be terminated at any time during the period of probation. This appears to be so from the following observations of their Lordships made in the said case:

"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 so appointed on trial is found unsuitable and his service is terminated by notice.

* * * * *

"Thus, where a person is appointed to a permanent post on probation, the termination of his service during or at the end of his probation will not ordinarily and by itself be a punishment, for the Government servant so appointed has no right to continue to hold such post any more than a servant employed on probation by a private employer is entitled to do so."

The observations of their Lordships on which the learned Advocate relied were not meant to apply to a case where, as at present the employee had ceased to be a probationer and was in a permanent employment of the Government.

(13) I now come to the remaining contention of the Petitioner, viz., that the orders of the Government were mala fide. Mr. Venkataranga Iyengar contended before us that it is clear from the circumstances of this case that the order dismissing the Petitioner and appointing the very same person who did not possess the required qualifications are mala fide. In the first place he drew our attention to the fact that on the same day three orders came to be passed by the Government viz., (a) Order extending the period of probation of the petitioner, (b) order discharging him & (c) order appointing the 2nd Respondent in his place. He contended that the period of probation of the Petitioner was extended by six months only for the purpose of discharging him, and for the purpose of appointing the 2nd Respondent, who was moving heaven and earth to get himself re-appointed to the said post of Principal. He drew our attention to the statement in Paragraph 7 of the affidavit affirmed by the Petitioner in support of his petition wherein it has been stated that the 2nd Respondent who was a native of Gulbarga and was influential and had the ear of the Members of the

Legislative Assembly was making herculean efforts to somehow have himself appointed in the post of the Principal.

This statement and the other statement made in the said affidavit, viz., that the 2nd Respondent did not possess the prescribed qualification were not denied by the State in its counter affidavit filed on its behalf. On the other hand it was admitted by the Government in its said post and the Government in order to achieve that end had adopted the procedure mentioned in this case, viz., to extend the period of probation of the Petitioner retrospectively and thereafter to discharge him and to reappoint the 2nd Respondent to that post, all such orders being notified on the same date.

(14) The next circumstance on which Mr. Venkataranga Iyengar relied in support of his contention was that the Government after discharging the petitioner reappointed the very same person who was not fit for the job, not having possessed the necessary qualifications for the same. In paragraph 2 of the affidavit filed by the Petitioner in support of his contentions it was stated that as the 2nd Respondent did not possess the prescribed qualification for the point the appointment of the Petitioner was made through the Public Service Commission after due advertisement. This averment has not been denied by the State; nor has it been denied by the 2nd Respondent, although the said Respondent challenged the validity of the said advertisements as it contravened the charter of the Osmania University in essential particulars to which the said College was affiliated.

(15) The next circumstance on which Mr. Venkataranga Iyengar relied in support of his present contention was that a Committee appointed by the Karnatak University Dhawar, to which the said B.Ed., Training College was subsequently affiliated for the inspection of the Teachers Training College, Gulbarga, reported that therefore Petitioner at the date of the inspection satisfied the conditions prescribed by the Karnatak University. The said report was passed by the Senate and Syndicate of the Karnatak University and was sent to the Government. The Director of Public Instruction also on 6-5-58 recommended to the Government the Petitioner's case for confirmation. The Government nevertheless chose to make the said order of discharge of the Petitioner. It was pointed out to us that the Government in the face of these circumstances could not bona fide come to the said decision. On these materials the learned advocate for the Petitioner strongly urged before us that a case of mala fide has been made out.

(16) The circumstances mentioned above undoubtedly go a long way to support the Petitioner's contention on this point. The said contention is further strengthened by the manner in which the aforesaid allegations of the Petitioner has been sought to be met by the Government. The Petitioner in his affidavit, affirmed in support of his petition, had clearly stated that he has been reliably informed, and believe the information to be true, that the Director of Public Instruction in Mysore has recommended his case for confirmation. In the counter affidavit filed on behalf of the State by one Mr. Mohamed Ahamed, Secretary to

the Government of Mysore in the Department of Education, all that was stated in answer to the said recommendation of the Director of Public Instruction relates to official correspondence between two authorities of the Government, the deponent seeks leave of the Court to refrain from traversing this allegation.

We pointed out to the learned Advocate General at the time he argued this case on behalf of the State that this attitude of the Government was not a fair attitude to take. During the course of the hearing, however, two further affidavits were filed by the said Mr. Mohamed Ahmed dealing with the said contention and trying to explain the reason why the Government did not take into account the recommendation made by the Director of Public Instruction. In the first affidavit affirmed on 7th October 1958 it was alleged that the Director of Public Instructions who made the recommendation for confirmation on 6-5-1958 was the Deputy Secretary, Education in Hyderabad prior to integration and wrote the letter dated 9-8-1956 to the Public Service Commission, Hyderabad; and was Secretary, Education, Mysore from 1-11-1956 to January 1958 and thereafter was appointed Director of Public Instruction. It is not at all clear even from these averments as to what exactly the deponent meant to say.

In other words the deponent did not even at this stage come out with a clear case on this point, except referring to the letter dated 9-8-1956 said to have been written by the present Director of Public Instruction. Mr. Advocate General, however, in the course of his arguments sought to explain the said averments by saying that in the letter dated 9-8-1956 this person who is now the Director of Public Instruction had made incorrect statements. In the said letter the said person, Deputy Secretary as he then was, stated that he was forwarding a requisition form for recruitment to the post of Principal, B.Ed. Training College, Gulbarga, to the Secretary, Public Service Commission, Hyderabad Division, and Mr. Advocate General drew our attention to a portion of the said letter wherein it was stated that since the B.Ed Training College is affiliated to the Osmania University, the qualifications laid down for the post are as per the rules of the University.

But he contended that the rules of Osmania University required additional qualifications for the post of a Principal, namely that in addition he must have at least five years administrative experience. He, therefore, contended that the said person was making an incorrect statement when he said that the qualifications mentioned in the requisition form were as per rules of the Osmania University. That being so, the Government did not pay any attention to the recommendation of this person although he was the Director of Public Instruction.

(17) This contention, in my opinion, is wholly without any substance and is an alterthough. It is amply met by the fact that prior to the said letter, on 25th July 1956 the Government of Hyderabad had issued a notification wherein, amongst others it laid down the method of recruitment and qualifications for the post of Principals of B. Ed. Training Colleges. Qualification mentioned in the said requisition form, is the same as is prescribed in the notification dated 25th July

1958 of the Government of Hyderabad. It is idle to suggest that the Director of Hyderabad. It is idle to suggest that the director of Public Instruction made any false representation in the said form. In the said letter dated 9th August 1956 it was also mentioned that the post is newly created and the qualifications and the method of recruitment therefore are as proposed by the Chief Secretary, General Administration Department, Hyderabad Detention., through his letter No. 469/GAD/112/SRG 55, dated 26-5-1956 addressed to the Secretary, Public Service Commission, Hyderabad Dn. It is thus clear that in his said letter the said Deputy secretary, now the director of Public Instruction was referring to the qualifications and method of recruitment as proposed by the Chief Secretary in the letter addressed to the Secretary, Public Service Commission and all that it is said was that these qualifications and method of recruitment are as per rules of the University. It is impossible to hold that there was any misrepresentation made in this letter.

(18) It was in the next affidavit filed by the same Mr. Mohamed Ahmed that the case of the Government on this point was more clearly made out. It was stated that in that letter dated 9-8-56 the Deputy Secretary had stated that the form for recruitment in the post of the Principal and the qualifications laid down for the post are as per rules of the University. In the said affidavit, for the first time, another reason was put forth, for which the Government is said to made by the Director of Public Instruction. It was stated that the question of affiliation of the College to the Karnataka University was considered by the Government and one of the conditions imposed by the University was that the post of Principal should be filled up by a suitable person and the decision was taken by the Government on 22-1-1958 to sanction the affiliation of the College subject to the said condition.

It was further stated that while making the recommendation the Director of Public Instruction overlooked the fact that the Government had accepted the condition imposed by the Karnataka University. This reason put forward for the first time in this affidavit affirmed during the course of the hearing, seems to be equally frivolous. As I have already mentioned that sometime in March 1958 the Enquiry Committee appointed by the Karnataka University for the Inspection of the Teachers Training College, Gulbarga, visited the said College and thereafter made its report recommending the case of the Petitioner. I have also mentioned that the said report was passed by the Senate and the Syndicate of the Karnataka University and was sent to the Government. I fail to see how in the face of all these it could possibly be contended that the Government did not accept the recommendation of the Director of Public Instruction because it had sanctioned the affiliation of the College subject to the condition imposed by the Karnataka University that the post of Principal should be filled up by a suitable person.

(19) These facts and circumstances support the contention of Mr. Venkataranga Iyengar that the orders in question were passed mala fide. In view, however, of

the fact that these orders are liable to be quashed on the other grounds which I have mentioned it is unnecessary for me to express any final opinion on this point.

(20) The result, therefore, is that there will be an order quashing the orders of the Government dated 12th August 1958, extending the period of probation of the Petitioner and discharging him. As a consequence of this order, the order of the Government of the said date appointing the 2nd Respondent to the post of Principal, B. Ed. Training College, Gulbarga, must also be quashed and we make an order accordingly. The Petitioner will get costs of this petition. Advocate's fee is certified at Rs. 100/-

Narayana Pai, J. :

(21) The contention on behalf of the Government has been that they have merely enforced a right under the contract of service and that so long as such a right existed in them by virtue of contract its exercise is not open to challenge in Court on any grounds, much less on grounds of mala fides. From the text of the impugned orders it is clear that the Government purported to act only under the provisions of the Government Servants (Probation) Rules, 1957. The substantial question, therefore, is whether the Probation Rules did or did not form the conditions of service or terms of the contract of service between the Government and the petitioner.

(22) The Probation Rules were framed under the proviso to Art. 309 of the Constitution, and were published in February 1958. On the 1st of March 1958 the Government promulgated the Mysore Civil Service Rules, 1958, to come into force on 1st April 1958. Rule 3 comprised in those Rules repealed the various Rules specifically mentioned therein and

"all other rules or orders made under any such rules, or under the proviso to Art. 309 of the Constitution and all other rules and orders made by any competent authority to the extent to which they apply to persons to whom these rules are applicable." The learned counsel for the petitioner has contended that the Probation Rules stood repealed by virtue of the said Rule 3 in the new rules promulgated on 1st March 1958. The clear language of the repealing rule supports this contention. The learned Advocate General, however, contends that the repeal of the prior rules must be limited to the extent to which they deal with the subjects covered by the new rules, and for the purpose he relies upon the words; "to the extent to which those rules apply to the persons to whom these rules are applicable."

The governing factor in this sentence is the person to whom the rules apply. It is impossible to spell out from this language that the governing factor is the subject dealt with by the rules. On a plain reading of the repealing rule, it is clear that if the old rules apply to persons to whom the new rules are applicable, the old rules stood automatically repealed in their application to the said persons. They would be in force only in respect of other persons if any to whom they may be

applicable. What is done away with is the application of the old rules to the persons to whom the new rules apply and not the application of the old rules to the subjects dealt with by the new rules. It is not denied that the new rules apply to the petitioner. Consequently the interpretation on behalf of the petitioner has to be accepted.

(23) We have, therefore, to look elsewhere to ascertain the contractual right which the Government profess to have exercised. The only available document for ascertaining the terms of the contract is the order of appointment. No doubt, the appointment was made subject to relevant service rules. But, no provision of any service rule bearing on the controversy other than the Probation Rules having been pointed out to us, we are confined to the terms of the order of appointment alone, to decide whether the petitioner is a permanent Government servant, as contended by him, or only a probationer, as contended by the learned Advocate-General. On the answer to this question depends the competence or otherwise of the orders impugned in this petition.

(24) If the petitioner is only a probationer, then, as the learned Advocate-General contends, he could be discharged in accordance with the conditions of service appropriate to the position of a probationer without any scope for the position of a probationer without any scope for the petitioner to complain against his discharge. Reliance has been placed on the following observations of the Supreme Court in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, :

"It is, therefore, quite clear that appointment to a permanent post in a Government Service, either on probation or on an 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 terminate at any time."

* * * * *

"Thus where a person is appointed to a permanent post in a Government service on probation, the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment, for the Government servant so appointed has no right to continue to hold such a post any more than the servant employed on probation by a private employer is entitled to do."

(25) The natural meaning of an appointment on probation which is well accepted is that during the period of probation a person is on trial. He has to prove his merit or his suitability for the post. In other words, the appointment on probation may be described as a provisional engagement which may or may not result in absorbing the employee into the permanent employment of the employer. Relying upon certain observations contained in *State of Punjab Vs. S. Sukhbans Singh*, , the learned Advocate-General has contended that before a probationer can be said to have entered the permanent employment of his employer some positive or affirmative act on the part of the employer is necessary. According to

him, there must be a specific order of confirmation and unless such an order is passed a person appointed as probationer will continue as probationer and nothing more. From the mere fact that probation means a period of trial, it cannot be stated as a proposition of law that this period of trial can be left indefinite at the pleasure of one party to the contract without the concurrence of the other party to the contract.

To a considerable extent the foundation for the learned Advocate-General's argument is the definition contained in rule 2 of the Probation Rules, according to which a probationer is said to continue as a probationer until confirmed. Likewise in support of the power to extend the period of probation, the learned Advocate-general has done no more than refer once again to the Probation Rules. If those rules did exist and were in force, then they would have been the terms of the contract with which the employee may be said to have concurred. It is difficult to accept that in the absence of a specific term of the contract it is open to any party by a mere appeal to unspecified rules said to be comprised in what is described as common law governing the relationship of master and servant to contend that the master can on his own extend a period of probation.

Normally, wherever there are rules regulating the conditions of service of probationers, there is a rule empowering the matter to extend the period of probation and very often another rule restricting the exercise of such power to a specified period, generally not exceeding half the length of the probationary period originally agreed to or stipulated. This practice itself suggests that a power to extend the period of probation is a matter of contract. Of course, the law does not exclude a term being implied in a contract provided that such implication is based on a reasonable inference of concurrence of both the parties to the contract. When there is an express term in the contract, no term can be implied so as to destroy the express term.

(26) Considered in the light of these principles there is no alternative in this case but to conclude that the only period of probation stipulated in the contract of service is what is stated in the order of appointment, viz., one year, without any power to the Government to extend the same. When after the expiry of one year the petitioner was continued in service, he cannot still be described as a mere probationer. If he is not a probationer, the only other alternative is to hold that he is a permanent Government servant, because the order of appointment does not state that his appointment itself was temporary and it is conceded the appointment was in respect of a substantive and permanent post.

(27) This conclusion arrived at on a discussion of principle is supported by a decision of the Allahabad High Court reported in (Lala) Paras Ram Vs. Smt. Noor Jahan Begum and Another, . In that case also there was a specific period of 2 years fixed for probation. No orders of confirmation were passed for a period of about 7 years; nor was there any order extending the period of probation. The contention that the appointee in question was only probationer was rejected. There were, however, rules of service in that case which empowered the

government to extend the period of probation up to one year. His Lordship held that even if in the absence of an order extending the period of probation it can be deemed to have been extended, such an extension could not have been for a period in excess of the maximum permitted having elapsed the appointee in question has to be held to be a permanent employee.

In the absence of any rule, therefore, in the instant case empowering the Government to extend the period of probation, the result would be that on the expiry of the period of probation the petitioner must be held to have been continued in service as a permanent government servant.

(28) According to the principle set out in the observations of their Lordships of the Supreme Court in Dhingra's case *Parshotam Lal Dhingra Vs. Union of India (UOI)*, extracted above, the right to terminate the service of the petitioner, without complying with the guarantees contained in Article 311 of the Constitution, could have been exercised only during or at the end of the period of probation. That not having been done, it is impossible for the Government to contend that they still had the right to terminate the services of the petitioner in the manner they have done.

(29) I, therefore, agree with the order proposed by the learned Chief Justice.

(30) Orders quashed.