

**(2012) 12 RAJ CK 0022**  
**In the Rajasthan High Court**  
**Case No : Writ Petition No. 11901 of 2010**

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| Managing Director, Energetic Lighting (India) Pvt. Ltd.            | APPELLANT  |
| Vs                                                                 |            |
| Presiding Officer, Shops and Commercial Establishments and Another | RESPONDENT |

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**Date of Decision :** 10-12-2012

**Acts Referred:**

Factories Act, 1948 — Section 2(6)  
Industrial Disputes Act, 1947 — Section 2(s)  
Rajasthan Shops And Commercial Establishments Act, 1958 — Section 2, 2(5), 2(6), 28A

**Citation :** (2013) LabIC 1554

**Hon'ble Judges :** Mohammad Rafiq, J

**Bench :** Single Bench

**Advocate :** R.K. Kala with Rupin Kala, for the Appellant; Dharmendra Jain, for the Respondent

**Final Decision :** Allowed

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## Judgement

Mohammad Rafiq, J.—Petitioner, the Managing Director, Energetic Lighting (India) Pvt. Ltd., Gurgaon, has approached this court in the writ certiorari, challenging interim order dated 29-09-2009 passed by respondent Presiding Officer, Shops and Commercial Establishments, Jaipur City, Jaipur, and its final order dated 16-04-2010 passed in Case No. RSC 8/2008. Although in writ petition, petitioner seeks to also challenge validity of order dated 29-09-2009 by which preliminary objection of petitioners about maintainability of application before Prescribed Authority was rejected but validity of that order need not be examined because ultimately the main application itself was decided by order dated 16-04-2010 which order is assailed in present writ petition, therefore, the matter is being considered to adjudge validity or otherwise of the said order.

2. Factual matrix of the case is that petitioner Company is engaged in manufacturing of energy saving lamps in its factory premise at Gurgaon in the State of Haryana. Petitioner engaged respondent No. 2 Shri Santosh Bharti as

Regional Sales Manager for Rajasthan initially on probation for a period of six months, which was extendable for a further period, by order dated 05-04-2008. Petitioner company did not find the performance of respondent No. 2 to be satisfactory and therefore terminated his services vide order dated 04-11-2008 with effect from 05-11-2008 by invoking probation clause. Respondent No. 2 therefore filed a complaint before the Prescribed Authority u/s 28-A of the Rajasthan Shops and Commercial Establishments Act, 1958 (for short, "the Act of 1958"). Petitioner company contested the matter and filed reply thereto. A preliminary objection was raised in the reply that neither respondent No. 2 Santosh Bharti is a "workman" u/s 2(s) of the Industrial Disputes Act, 1947 (for short, "the Act of 1947") nor can he be termed an "employee" u/s 2(5) of the Act of 1958. In fact, respondent No. 2 was himself an employer u/s 2(6) of the Act of 1958 as such the complaint filed by him was not maintainable and was liable to be dismissed. Alternatively, it was submitted that even if respondent No. 2 is accepted to be an employee, then also petitioner was competent to terminate his services by giving him one day notice, considering that he was on probation, it was also contended that since factory premise where respondent No. 2 was engaged was situated in Gurgaon of the State of Haryana, therefore, if Factory Act was applicable to the petitioner establishment, the Act of 1958 was not applicable.

3. The preliminary objection raised by petitioner was rejected by the Prescribed Authority by order dated 19-09-2009. It was thereafter that the evidence of respondent No. 2 was adduced on affidavit and he was subjected to cross-examination by the representative of the petitioner. Affidavits of one Shri Manish Sarin, Manager & Head (HR) and Shri Anil Kumar, Manager (Accounts) were filed by petitioner and they were cross-examined by respondent No. 2. The Prescribed Authority vide impugned order dated 16-04-2010 allowed the application of respondent No. 2 and quashed his termination order dated 04-11-2008. In view thereof, petitioner has approached this court.

4. Shri R.K. Kala, learned Senior Advocate, appearing on behalf of petitioner, has contended that respondent No. 2 was appointed in a senior position as Regional Sales Officer on probation on monthly salary of Rs. 14,000/-. His work consisted in distribution management and team management. Sales officers and sales in-charge used to report to the petitioner. He was performing supervisory and administrative managerial work. He was authorized to appoint a super stockiest to buy company products and to sell to distributors and retailers. He was responsible for collection of all payments in time and appointment of management team to promote sales of products and generate profits. Considering the nature of his duties, respondent No. 2 can be neither accepted as workman u/s 2(s) of the Act of 1947 nor an employee u/s 2(5) of the Act of 1958. He was rather employer in view of Section 2(6) of the Act of 1958, being member of administration. The Prescribed Authority has erred in law in rejecting preliminary objection about maintainability of application before it. In support of his arguments, learned senior counsel relied on judgment of this Court in Amrik

Singh v. Authority Appointed under shops & Commercial Establishments Act, Jaipur and others 1994 (1) WLC (Raj.) 760 and of the Supreme Court in S.K. Maini Vs. M/s. Carona Sahu Company Limited and others, .

5. Shri R.K. Kala, learned Senior Advocate appearing on behalf of petitioner further argued that appointment of respondent No. 2 was made on probation basis and his services were terminated admittedly before a letter of confirmation was given to him. His services were terminable by giving one day notice as per condition of appointment and since that condition in the letter dated 04-11-2008 was fulfilled whereby his services were terminated with effect from 05-11-2008, there was no further requirement of any service of notice or notice pay. It was contended that as per condition of this appointment the letter of offer of appointment dated 05-04-2008 and in continuity thereof vide letter of appointment dated 14-04-2008, the appointment was made on probation for a period of six months, which was extendable further if deemed necessary and it was specifically stipulated in the clause (6) of the letter dated 14-04-2008 that his services would be confirmed in writing during the period of probation and further that could be terminated forthwith without assigning any reason by giving one day notice by either side. Learned counsel in support of his arguments in this behalf has relied on the judgments- Mohd. Salman Vs. Committee of Management and Others, The Commissioner of Police, Hubli and Another Vs. R.S. More, Dr Amritlal Dharshibhai Jhankharia Vs. State of Gujarat and Another, : Dr Amritlal Dharshibhai Jhankharia Vs. State of Gujarat and Another, , JT 2001 (Supp.) (1) SC 567 and Municipal Corporation, Raipur Vs. Ashok Kumar Misra, .

6. Shri R.K. Kala, learned Senior Advocate, argued that services of respondent No. 2 were brought to an end by order of simplicitor termination on account of his performance not being found to the satisfaction of the management. He was not actually terminated for misconduct. Despite averments in reply to his application before the competent authority that the management reserves its right to initiate appropriate legal proceedings against respondent No. 2, his termination was made by invoking condition of his appointment letter which states that during probation period, his services can be terminated after giving one day notice on either side. It is argued that the Supreme Court and this court in catena of judgments have held that object of probation is to test suitability of an employee and if the employee is found unsuitable, the appointing authority would have certainly the power to terminate the services. Reasons mentioned in the order of termination are otherwise merely constitute motive and not the foundation of termination order. Despite number of warning letters and the remarks against the respondent No. 2 was still made on account of his unsatisfactory services. This is simplicitor termination and cannot be said to be stigmatic. Learned counsel, in support of this argument, relied on judgments of the Supreme Court in K.V. Krishnamani Vs. Lalit Kala Academy, , Abhujit Gupta Vs. S.N.B. National center, Basic Sciences and Others, S.P. Vasudeva Vs. State of Haryana and Others, Chaitanya Prakash and Another Vs. H. Omkarappa, Rajesh Kohli Vs. High Court of J. and K. and Another, Rajesh Kumar Srivastava Vs. State

of Jharkhand and Others, , Khazia Mohammed Muzammil Vs. The State of Karnataka and Another, and Bhattarak Yashkirti Sr. Hr. Sec. School Pratapgarh and its Principal v. State of Rajasthan and others, 2002 (4) WLC (Raj) 571: (2002 lab IC 3167 (Raj)).

7. Reliance has also been placed on judgment of a Division Bench of this court in Rajasthan State Road Transport Corporation Vs. Ramavtar Sharma, , to argue that termination of services of respondent No. 2 does not amount to retrenchment.

8. Per contra, Shri Dharmendra Jain, learned counsel for respondent No. 2, argued that even though the respondent No. 2 was engaged as Regional Sales Manager in Rajasthan but his duties were neither managerial nor supervisory. He worked with petitioner from 14-04-2008 to 28-11-2008. Termination order issued on 04-11-2008 was served upon the petitioner on 28-11-2008 at 4.00 p.m. intending to terminate his services with effect from 05-11-2008. Neither petitioner was served with any charge-sheet nor any enquiry was made into allegations against him. No memo of explanation was ever served upon petitioner. He was never apprised of the fact as to why and how his work was not satisfactory. The termination order does not disclose any reason and therefore it is arbitrary and illegal. Petitioner did not either serve notice of one month on respondent No. 2 nor did it pay notice pay to him. While, the appointment of the petitioner was made by the Managing Director of petitioner company but his services have been terminated by order of the Head (HR), who was not competent. It was contended that respondent No. 2 was not paid salary from 01-10-2008 and petitioner also failed to pay total expenses incurred by respondent No. 2 for working of petitioner company for which he produced bills of Rs. 1,64,424/- during the period of April, 2008 to 28-11-2008. Petitioner company failed to make payment of those bills and when respondent No. 2 insisted for payment, they took annoyance and arbitrarily terminated his services.

9. Shri Dharmendra Jain, learned counsel for respondent No. 2, in support of his arguments, has relied on judgment of this court in M/s. Tourist Guide Service, Panch Batti, Jaipur v. Shri B.D. Harsha and another, S.B. Civil Writ Petition No. 114/1978, decided vide judgment dated 22-12-1989, and Division Bench judgment of this court with the same title, which upheld the afore-mentioned single Bench judgment vide judgment dated 03-07-1991 in D.B. Civil Special Appeal No. 34/1990. He contended that these two judgments were upheld even by the Supreme Court, it was held therein that even if an employee by virtue of his appointment exercises some managerial functions in relation to persons working under him, but that does not mean that he could not be treated as employee vis-a-vis management of the petitioner under clause (5) of section 2 of the Act of 1958.

10. Shri Dharmendra Jain, learned counsel for respondent No. 2, also relied on judgment of the Supreme Court in Sri Ganganagar Urban Co-operative Bank Ltd. Vs. Prescribed Authority and others, , and argued that the notice of one month or

notice pay in lieu thereof was mandatory requirement for dispensing with services of respondent No. 2. Other mode by which services of respondent No. 2 could be put to an end was on proof of misconduct after due enquiry which could be on adjudication of evidence and recording of finding. Shri Dharmendra Jain, learned counsel for respondent No. 2, also relied on Division Bench judgment of this Court in Indian Tourism Development Corporation Limited v. The Authority Appointed under the Rajasthan Shops & Commercial Establishments Act, 1958 and another, 1987 II RLR 387 to the same effect. Learned counsel also relied on judgment of the Supreme Court in Syed Azam Hussaini Vs. Andhra Bank Ltd., , and argued that services of even a probationary cannot be terminated in absence of material to show the existence of a reasonable cause.

11. Shri Dharmendra Jain, learned counsel for respondent No. 2 referred to the reply of the management to his petition before the competent authority and argued that therein mention was made that the workman failed to provide details of his business activities despite repeated requests, which amounted to misconduct. Since he failed to return the sample of articles provided by the company, this amounted to breach of trust and criminal misappropriation of the properties of the company and therefore the company reserves its rights to initiate appropriate legal proceedings against him. Learned counsel also referred to averments made in Para 8 of the affidavit of witness of management Shri Manish Sarin, wherein it is alleged that the respondent No. 2 has forged bills and misappropriated the samples of the company with regard to which an enquiry was pending against him. Reference was also made to the cross-examination of this witness where he stated that the respondent No. 2 was discharged from the service on account of allegations of misconduct contained in sub-clauses A to B of page No. 5 of the reply and further with regard to allegation in sub-paras C to D of Page 3 of the reply, a letter was written to the respondent No. 2, copy of which has not been produced before the competent authority. Shri Dharmendra Jain, learned counsel for the respondent No. 2 also referred to the statement of Anil Kumar another witness of the management who has stated that since the respondent No. 2 did not produce actual bills with regard to past transactions and failed to sell the goods of the company, he was suspended and that godown and office in the State of Rajasthan were closed down. He also alleged that the respondent produced forged bills before the company.

12. It is argued that on the basis of all this evidence, learned competent authority, relying on the judgment of the Supreme Court in V.P. Ahuja Vs. State of Punjab and Others, has given categorical finding that the termination order of the respondent No. 2 was stigmatic and punitive as it was not preceded by disciplinary enquiry with opportunity of hearing to him. Learned counsel in support of his arguments has relied on the judgments of the Supreme Court in Sri Ganganagar Urban Co-operative Bank Ltd. Vs. Prescribed Authority and others, , Syed Azam Hussaini Vs. Andhra Bank Ltd., Mohan Lal Vs. Management of Bharat Electronics Ltd., , and Larger Bench judgment of Patna High Court in Rajendra Prasad Sah and Anil Kumar Ojha Vs. State of Bihar and Others, , and

judgments of Madras High Court in J. Nandhini Vs. The Deputy Commissioner of Labour (Appeals) and The General Manager, Greaves Ltd., and Miss T.N. Chandra Vs. South India Corp (Agencies) Ltd. and another , and judgments of this Court in M/s. Tourist Guide Services, Panch Batti, Jaipur v. Shri B.D. Harsha and another, Writ Petition No. 114/1978, decided on 22-12-1989, and in Indian Tourism Development Corporation Ltd. v. The Authority Appointed under the Raj. Shops & Commercial Establishments, 1987 II RLR (Raj) 387.

13. I have given my anxious and thoughtful consideration to rival submissions and perused material on record.

14. In order to decide the controversy involved in present matter, not only the nature of duties, which respondent No. 2 was required to perform, would be determinative but also nature of his appointment would be a significant factor. In reply to application before the competent authority, in preliminary objection following were detailed out as duties of respondent No. 2:--

... The claimant worked with the management as Regional Sales Manager, whose main functions were marketing business development channel sales, distribution management and team management, Sales Officers and sales in-charges used to report to the claimant only the claimant used to supervise and look after the working and functioning of the sales officers and sales in-charge. The claimant was performing supervisory work and administrative managerial work for the replying management.

15. Respondent No. 2, in his affidavit, has stated that though his designation was Regional Sales Manager, he neither had managerial nor supervisory work. He was initially appointed on probation but his probation was never extended. The removal order dated 04-11-2008 was served upon him at 4.00 p.m. on 28-11-2008 and he came to know that his services have been terminated with effect from 05-11-2008. Respondent No. 2 denied the suggestion that any sales officer or sales in-charge was working in his supervision.

16. Shri Manish Sarin, Management Head (H.R.) in his affidavit has however averred that duties of respondent No. 2 consisted in distribution management and team management. Sales officer and sales in-charge used to report to the petitioner. He was performing supervisory work and administrative managerial work. He was authorized to appoint a super stockiest to buy company products and to sell to distributors and retailers. He was responsible for collection of all payments in time and appoint management team to promote sales of products and generate profits. He was competent to obtain orders for supply of goods, also giving discount on the sales price. But this witness has stated that respondent No. 2 has produced various bills to claim payment but he did not procure any single order for sale of the goods of the company. He had taken samples from authorized sellers which he misappropriated and with regard to which an enquiry was pending. In the cross-examination, he admitted that a letter was sent to the respondent No. 2 about allegation of misconduct against

him. He also stated that no order in writing for extending period of probation was issued. Anil Kumar, another witness of the management, in his statement stated that the respondent No. 2 has produced various bills claiming payment from the company. When the details of the past transactions were demanded from him, he failed to produce the same on account of which he was placed under suspension and the office and godown in the State of Rajasthan were closed down.

17. In view of the discussion made above, following questions emerge for determination in the present case:--

Questions:--

(1) Whether respondent No. 2 would be an employee in the meaning of Section 2(5) of the Act?

(2) Whether on expiry of probation period of six months petitioner would be deemed confirmed in absence of any specific written order of confirmation?

(3) Whether despite averments in reply to the petition filed before the competent authority and admissions made by witnesses of employer that some allegations touching upon the conduct of employee were made, could service of the respondent employee be brought to an end by invoking the probationary clause in his appointment order?

18. I shall now seek to decide all above referred three question in the stated order.

Whether on expiry of probation period of six months petitioner would be deemed confirmed in absence of any specific written order of confirmation?

19. Condition No. 6 of the letter of appointment order, which relates to probation, reads as under:--

6. Probation-You will be on a probation period for six months which may be extended further if deemed necessary. On successful completion of aforesaid period to our satisfaction, your appointment will be confirmed in writing, during the period of probation (Original/Extended) your services are liable to be terminated forth with without assigning any reason. During the probation period your services can be terminated by giving one day notice by either side.

20. Aforesaid condition clearly indicates that the appointment of the respondent No. 2 would be on probation for a period of six months, which may be extended further, if deemed necessary. On successful completion of aforesaid period to the satisfaction of the management, his services were required to be confirmed in writing, either during the period of probation or during the extended period of probation. However, at the same time it was mentioned that his services were liable to termination forthwith without assigning any reason and further that even during the probation period, his services would be terminated by giving one day notice on either side.

21. The Supreme Court in *Mohd. Salman Vs. Committee of Management and Others*, , held that where a person is appointed as a probationer and a period of probation is specified, it does not follow that at the end of the said period of probation he obtains confirmation automatically. unless the terms of appointment clearly indicate that confirmation would automatically follow at the end of the specified period or there is a specific service rule to that effect, expiration of the probationary period does not necessarily lead to confirmation, it was also observed by the Supreme Court that as provided in terms of the appointment letter of the appellant in that case, at the end of the period of probation an order confirming service was required to be passed. No such confirmation order was passed, hence it was held that the appellant's service was rightfully terminated.

22. In *The Commissioner of Police, Hubli and Another Vs. R.S. More*, , the relevant rule empowered the appointing authority to extend the probation up to prescribed limit. The rule further provided that in absence of a specific order to that effect, mere expiry of prescribed or extended probation period would not entitle the probationer to confirmation, in such circumstances, the Supreme Court held that continuation in service after extended period, did not, in absence of requisite specific order, entitle the employee to claim deemed confirmation.

23. In *Rajasthan Financial Corporation (supra)*, the initial appointment was probation for one year and it was further extended for about nine months but before expiry of extended probation period, services of the employee were terminated. The Supreme Court held that even after expiry of probation period, status of employee would be that of probationer. Termination without notice or enquiry, was held to be justified.

24. In *Municipal Corporation, Raipur Vs. Ashok Kumar Misra*, , services of probationer were terminated after expiry of initial period of probation. The Supreme Court held that where rules empowered the appointing authority to extend probation beyond the prescribed period, continuance in service even after the initial period of probation, in absence of any express order of confirmation, would amount to extension of probation period, in such a situation, termination after initial period of probation would amount to termination of probationary service. Mere expiry of initial period of probation would not automatically result in deemed confirmation and express order of confirmation is necessary.

25. Stipulation in the appointment order of the respondent No. 2 does not indicate any intention of deemed confirmation on expiry of probation period put at the same time, provides for extension of probation period after initial probation of six months. However, what has been stated in the appointment order is that on satisfactory completion of aforesaid period of probation, appointment would be required to be confirmed in writing. There is thus no intention of automatic confirmation. There is admittedly no order of confirmation in writing. Aforequoted condition of the appointment order clearly stipulates that even after expiry of original probation period or extended period, a written order was required to be issued for confirming the appointment of the respondent No.

2, which in the present case was not issued.

Whether respondent No. 2 would be an employee in the meaning of Section 2(5) of the Act?

26. Adverting now to the question whether respondent No. 2 would be an employee in the meaning of Section 2(5) of the Act, it must be noted that Section 2(5) defines an "employee" to mean a person wholly or principally employed in, or in connection with any establishment and includes an, apprentice but does not include a member of the employers' family; it also includes any clerical or other staff of a factory or industrial establishment, who falls outside the purview of the Factories Act, 1948. Contrarily, Section 2(6) of the Act defines "employer" to mean a person having charge of or owning or having ultimate control over the affairs or an establishment and includes the manager, agent or other person acting in the general management or control of an establishment.

27. In the present case, the appointment letter of the respondent No. 2 designates him as "Regional Sales Manager (Rajasthan)". Definition of "employee" in Section 2(5) of the Act, does not exclude the manager or for that matter, the Sales Manager wholly or principally employed in, or in connection with any establishment, but excludes a member of the employers' family, if he is indicated in such a position. Definition of "employee" in Section 2(5) of the Act is an inclusive definition, which includes any clerical or other staff of a factory or industrial establishment who falls outside the purview of the Factories Act, 1948, and therefore, the respondent No. 2 must be held to be an employee in the meaning of Section 2(5) of the Act. This issue has been decided against the petitioner by Division Bench of this court in M/s. Tourist Guide Service, *supra*. Though, the definition of "employer" u/s 2(6) of the Act includes the manager, agent or other person acting in the general management or control of an establishment, who may be "having charge of or owning or having ultimate control over the affairs or an establishment". Respondent No. 2 in his capacity as Regional Sales Manager (Rajasthan) is not shown to have any charge of or owning or having ultimate control over the affairs of an establishment, or otherwise also he is not shown to have been acting in the general management or control of establishment. He was at the ground level merely working as Regional Sales Manager. He had no one else to control, rather he was controlled by his senior management.

28. Contention that respondent No. 2 was not a "workman" u/s 2(s) of the Industrial Disputes Act, 1947, does not make any difference because what is required to be seen for the present purpose is whether he falls within the purview of an "employee" u/s 2(5) of the Act of 1958. Cited judgment of this court in Amrik Singh, *supra*, cannot be applied to the facts of the present case because in that case the employee was working as security officer and was discharging the duties of distribution work amongst other employees as well as participating in meetings of management and helped the authority to entertain the guests and take decisions. No such evidence has been adduced in the

present case.

29. In *S.K. Maini Vs. M/s. Carona Sahu Company Limited and others*, the Supreme Court rather held against the case of the respondent No. 2 in the present case because in that case it was held that nature of duties, not designation, would be important to determine whether or not, a workman is employee doing more than one duties and functions for the purpose of Section 2(s) of the Act of 1947 and in deciding so, main duties of an employee and not some works incidentally done by such an employee, would be decisive.

30. Although, even otherwise, in the present case, the respondent No. 2 was Regional Sales Manager (Rajasthan), was wholly or principally employed in, or in connection with the establishment, therefore he must be held to be an employee within the meaning of Section 2(5) of the Act.

Whether despite averments in reply to the petition filed before the competent authority and admissions made by witnesses of employer that some allegations touching upon the conduct of employee were made, could service of the respondent employee be brought to an end by invoking the probationary clause in his appointment order?

31. The crucial question that has to be decided is whether despite averments in reply to the petition filed before the competent authority and admissions made by witnesses of employer that there were some allegations levelled against conduct of respondent No. 2, could still his services be brought to an end by invoking the probationary clause in his appointment order?

32. In *K.V. Krishnamani Vs. Lalit Kala Academy*, wherein services of the appellant who was on probation, were found to be not satisfactory and his services were terminated, it was held by the Supreme Court that reasons mentioned by the employer in its counter would only constitute foundation for termination of services and termination without enquiry was valid. The Supreme Court held that the very object of the probation is to test suitability, and if probationer is not found suitable, the appointing authority certainly has power to terminate his services. Reasons mentioned constituted motive and not foundation for termination of service. In *Abhujit Gupta Vs. S.N.B. National center, Basic Sciences and Others*, services of probationer were found unsatisfactory in the areas specified in the order of termination. The question before the Supreme Court was whether the order of termination was simplicitor or punitive and stigmatic, said order made reference to earlier letters, in which the probationer had been called a person of "perverted mind" and "dishonest, duffer having no capacity to learn". The Supreme Court held that despite use of such intemperate language, the order read as a whole, indicated that the reason of termination was the absence of hope for his improvement. The reference to earlier letters, although unnecessary, did not reflect any malice or bias. The Supreme Court further held that apprehension of the probationer that the said order if read by a prospective employer, might prejudice the said probationer's future employment,

was not the correct test to determine the nature of termination. The Supreme Court rejected the contention of probationer that his termination was stigmatic and not simplicitor. In *S.P. Vasudeva Vs. State of Haryana and Others*,<sup>32</sup> the Supreme Court held that the order of reversion of a person, who had no right to the post, does not show *ex facie* that he was being reverted as a measure of punishment and does not cast any stigma on him. The courts cannot normally go behind that order to see if there were any motivating factors behind that order.

33. In *Chaitanya Prakash and Another Vs. H. Omkarappa*, also the Supreme Court held that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be (sic) The probationer in that case was time and again informed during the probation period about his deficiencies and was given ample opportunities to improve them. Enough precautions were taken by the appellants to see that the respondent improved his performance and such an opportunity was provided to him. The probationer instead of taking any advices, rather wrote back rudely in an intemperate language. The employer held that the probationer was not suitable for confirmation and terminated his services. It was held that termination order would still be simplicitor and not stigmatic.

34. In *Khazia Mohammed Muzammil Vs. The State of Karnataka and Another*, where a probationer was discharged from service on the ground of unsuitability during probation period, the Supreme Court held that the order was *prima facie* not stigmatic unless he is able to show circumstances supported by cogent material on record that termination in effect was stigmatic and intended to overreach process of law. The purpose of probation is to judge that employee is capable of satisfactory performance of his duties before confirmation is conferred on him. In *Rajesh Kohli Vs. High Court of J. and K. and Another*, also it was held by the Supreme Court that reference to unsatisfactory service in the order of termination would not be termed as stigmatic.

35. A Division Bench of this Court in *Bhattarak Yashkirti Sr. Hr. Sec. School*, (2002 Lab IC 3167 (Raj)) (supra) held that merely because of use of unsatisfactory work and conduct, order cannot be held to have become premature or stigmatic. There was no requirement in such case to hold inquiry or to comply with principles of natural justice. Probationer has no right to hold post. Merely because he has been allowed to work one month more beyond prescribed period of probation, he cannot be deemed confirmed since confirmation requires a positive act.

36. Facts in the present case clearly indicate that the petitioner has been able to show that the respondent No. 2 even after his engagement as Regional Sales Manager in the State of Rajasthan was not able to procure any supply and purchase orders, his performance was found to be unsatisfactory and therefore he was not confirmed and his services were terminated invoking probation clause.

37. In view of the position of law emerging from the judgments referred to

supra, it cannot be said that there was total absence of material to prima facie show the existence reasonable cause for adjudging the respondent No. 2 not suitable. It cannot therefore be said that a full-fledged enquiry was required or an opportunity of hearing should have been given to the respondent No. 2. A probationer does not have a right to hold the post, if his services are terminated on being found unsatisfactory. Reference to the fact that respondent No. 2 did not return the sample or articles provided by the company and submitted forged bills to claim reimbursement and on that basis he was given notice, would merely constitute motive and not the foundation of termination order. Thus the order of termination of the respondent No. 2 must be held to be simplicitor and not stigmatic or punitive. Those averments cannot therefore be held to have constituted foundation for termination because the respondent No. 2 was still a probationer and was not confirmed in service by a positive act on the part of the employer. Since the order of confirmation would require a positive act even as per stipulation contained in condition No. 6 of the letter of appointment, the employer was very much entitled to take a view about the working of the respondent No. 2 in arriving at the conclusion about his overall performance. In making such decision, the petitioner was not required to hold a full-fledged disciplinary enquiry or to separately provide him an opportunity of hearing. This question is therefore answered against employee respondent No. 2 and in favour of petitioner employer. In view of foregoing discussion, the writ petition succeeds and is therefore allowed. The impugned order is set aside. There shall be no order as to costs.