

**(1995) 08 PAT CK 0007**  
**In the Patna High Court**  
**Case No : C.W.J.C. No. 334 of 1995**

Murari Lal Kejriwal

APPELLANT

Vs

State of Bihar and Another

RESPONDENT

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**Date of Decision :** 30-08-1995

**Acts Referred:**

**Citation :** (1995) 08 PAT CK 0007

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## Judgement

Dharampal Sinha, J.—In this writ petition, the petitioner, Murari Lal Kejriwal, has made a prayer for issuance of a writ in the nature of writ of certiorari for quashing letter No. 13, 980 dated 14.12.1998 a copy of which is Annexure-1/A to this writ petition issued by the Respondent No. 2 the High Court of Judicature at Patna to the Government of Bihar for issuing necessary notification terminating the services of the petitioner, who was Additional District and Sessions Judge on probation and after amendment) for quashing a Notification No. 5293 dated 5th July, 1995 issued by the Department of Personnel Administrative Reforms, Government of Bihar, terminating the services of the petitioner with effect from 24.2.1995. in the light of recommendation of the High Court as contained in Annexure-1/A. There is also further prayer for issuing a writ in the nature of mandamus commanding the respondents not to interfere in day to day working of the petitioner as Additional District and Sessions Judge, Siwan, so that he may get consequential benefits of continuity of service, pay, promotion etc. By amendment the writ-petitioner has further sought a relief that Rule 15(5)(a), proviso of the Bihar Superior Judicial Service Rules; 1951 to be hereinafter referred as Rules be declared as ultra vires and violative of Articles 15 and 16 of the Constitution of India.

2. The back ground facts in the context of which the reliefs have been sought are as follows:

The petitioner was appointed on probation as Additional District and Sessions Judge by Respondent No. 1 (State of Bihar) by Notification No. 617 dated 30.4.1991 issued by the Department of Personel Administrative Reforms,

Government of Bihar and 31 other persons had also been appointed on probation under various notifications of the same date a copy of which is Annexure-1. The petitioner joined the post of Additional District and Sessions Judge at Arrah on 6.5.1991 in pursuance of that notification. After working as Additional District and Sessions Judge at Arrah for a little over two years he was transferred to Siwan where he joined on 11.6.1993.

The appointment of the petitioner along with others had been made under Article 233 of the Constitution of India read with Rule 5 of the Bihar Superior Judicial Service Rules, which inter alia provides for direct recruitment from the Bar on the recommendation of the High Court, Rule 15 provides for confirmation of those recruited from Bar and by promotion in the Bihar Superior Judicial Services.

The matter of confirmation of the petitioner along with other officers of his batch was considered by the Standing Committee of the High Court (Respondent No. 2) in its meeting held on 22nd and 24th, of February, 1994 and the Standing Committee took a decision to extend the period of probation of the petitioner for one year while other officers except one of his batch were confirmed. The case of the petitioner for confirmation was again placed before the Standing Committee at its meeting held on 1st and 2nd December, 1994; and the Standing Committee took a decision that the period of the petitioner will not be extended beyond 23.2.1995 and his services will be terminated thereafter. The decision of the Standing Committee was later placed before the Full Court in its meeting held on 3.12.1993 and the Full Court approved the decision of the Standing Committee and thereafter the impugned latter (Annexure-1/A dated 14.12.1994) was sent to the State Government requesting for issuing notification to terminate his services. After filing of his writ petition. Respondent No. 1 issued the other impugned order (Annexure-7) by which the petitioner's service has been terminated in the light of recommendation " made by Respondent No. 2 by the letter, Annexure-1/A.

3. The facts stated above are not in dispute. Mr. Narendra Prasad, learned Counsel for the petitioner has assailed the legality of Annexure-1/A by raising the following contentions: His first contention is that the period of probation prescribed by Rule 15 is only for one year for an officer, who is appointed on probation by direct recruitment from the members of the Bar and on expiry of the period of one year, the petitioner would have been automatically confirmed. According to him the Rule prescribed one year as the minimum period of probation, and it could be extended only by the State Government in consultation with the High Court as laid down in the proviso to Rule 15(1)(a); and as the State Government has not extended the period of probation of the petitioner in consultation with the High Court, he must be deemed to have been confirmed. His second contention in this regard is that the Standing Committee of the High Court is not competent to extend the period of probation, and only the Full Court could have extended the period of probation and so the extension itself was invalid. Thirdly, he has submitted that the petitioner was never

informed about the extension of probation period nor was he ever informed as to how his conduct and performance were to be considered to be such as would have made him suitable for confirmation.

According to his further contention in this regard the petitioner should have been given an opportunity to explain material was there against him, which stood in the way of his confirmation; and an enquiry ought to have been held to consider his suitability or otherwise for the post. Not giving of opportunity and not holding of enquiry, according to his submission, amounted to violation of Article 311 of the Constitution of India and of Civil Services (Classification" Control and Appeal) Rules, 1930. Learned Counsel contended that even during the period of probation, a probationer has some rights and of his rights are intended to be taken away, an opportunity must be given to him because termination of his service would have a civil consequence of depriving him of his means of livelihood. He further elaborated his part of his argument by referring to paragraph-2 of Annexure-1/A, in which mention has been made about consideration of his "Work and Conduct" and "over all performance and according to him consideration of all this and then deciding to determine the period of probation to a particular date (24-2-95) amounts to casting stigma and for this reason also it was necessary that opportunity should have been given to the petitioner to show that his work and conduct or performance was satisfactory and made him suitable for confirmation on the post. Learned Counsel for the petitioner also submitted in this connection that the petitioner was working honestly and his out-turn was satisfactory according to the yardstick fixed by the High Court relating to Out-turn and that the judgment and orders passed by the petitioner had not been set aside by the High Court to his knowledge. Learned Counsel for the petitioner has also cited some decisions in course of his argument and reference to those decisions shall be made below at the appropriate places.

4. A second line of the argument of the learned Counsel for the petitioner is that, part of Rule 15(1)(a) is, which provides, that an officer shall not be confirmed unless he is found suitable in every respect is itself ultra vires Article 14 of the Constitution of India because it gives unguided and very wide power to the High Court to indefinitely delay the matter of confirmation of a probationer. According to his submission, if the petitioner would have been told about his unsuitability for the post just after expiry of one year, he could have tried for an alternative job; but his period of probation was prolonged for more than three and half years and the termination of service after such a long period is arbitrary and so violative of Article 14 of the Constitution of India.

5. His last argument is that the High Court had no power to terminate the services of the petitioner, who had been appointed by the Governor as provided under Article 233 of the Constitution of India, and the Government while issuing Annexure-7 on 5.7.1995 had no power to effect termination of his services retrospectively with effect from 23.2.1995, and so Annexure-7 is legally un-

sustainable and has to be quashed.

6. In reply to the contention of the learned Senior Advocate, Sri Basudeo Prasad, senior counsel for the Respondent No. 2, has contended that the entire argument of the learned Counsel for the petitioner is misconceived and misplaced. According to his submission, the Standing Committee of the High Court have complete control and direction over the sub-ordinate courts as would appear from Rule-2 of Part 1 of the General Rules of the Patna High Court Rules, and it is the Standing Committee, which have been exercising all sorts of control on behalf of the High Court over all the subordinate courts except in the matters which have been specified to be dealt with by the Full Court in meeting, and only by way of abundant caution the decision of the Standing Committee about not continuing the period of probation of the petitioner after 23.3.1995 was placed before the Full Court in its meeting and after approval by the Full Court, the communication (Annexure-1/A) was sent by the High Court to the State Government which, according to settled law had to act in the matters of Judicial Officers on the recommendation of the High Court. Learned Counsel further submitted that the argument regarding illegality in the matter of extension of probation period, as advanced by the counsel for petitioner, is of no avail to the petitioner, for the simple reason that if the extension is held to illegal, the period of probation would continue so long as the petitioner was not confirmed and he could not be confirmed unless he was found suitable in every respect as has been provided in the second clause of Rule 15(D)(a).

7. Sri Basudeo Prasad further contended that the principles of natural justice or provisions of Article 311. of the Constitution of India have no application at all in the case of probationer, whose suitability for the post has to be considered before he is confirmed on the post and prior to his confirmation he has no lien on the post. According to him the provisions of Civil Services (Classification, Control and Appeal) Rules, 1930 are also not applicable, nor was any enquiry relating to his conduct legally needed when services of the petitioner, who was still probationer, was terminated when Respondent No. 2 found him unsuitable for holding the post. Further contention of the learned Counsel for the respondent No. 2 was that only because there was mention in Annexure-1/A that the "work", "Conduct" and "Performance" of the petitioner were considered by the High Court while taking the decision not to continue his period of probation, it cannot be said that some sort of stigma was attributed to the petitioner. According to him for consideration of the matter as to whether any probationer (in this case the petitioner) was not suitable for the post, it was necessary for the competent authority, namely, the High Court to examine his "Work", "Conduct" and "Performance" and such examination for the purpose of considering suitability is not stigmatic. He also contended that when the Rule itself lays down an officer shall not be confirmed unless he is found suitable in all respect, it is misconceived to argue, as has been argued by the learned Counsel for the petitioner, that the petitioner would be deemed to have been confirmed on the expiry of the period of one year. He also contended that as the Rule 15(1)(a)

stands, there is nothing inherently wrong in the Rule and mere giving of power to extend period of probation or laying down the Rule not to confirm unless found suitable cannot be amount to granting of arbitrary or unbridled power. In this case there has been no arbitrariness in the application of the Rule in the case of the petitioner, according to his submission. He also contended that no mala fide exercise of power has been alleged by the petitioner and no facts have been stated in the writ petition to show any discrimination, though there is vague reference about it. On these submissions, learned Counsel for the Respondent No. 2 submits that this writ application is absolutely devoid of merit.

8. In view of the contentions raised and the stand taken by the parties, the following points arise for decision in this case:

First whether Rule 15 of the Rules relating to confirmation as contained in the Bihar Superior Judicial Service Rules is ultra vires and violative of Article 14 of the Constitution of India as contended by the learned Counsel for the petitioner ?

Secondly, whether the impugned documents (Annexure-1/A and (7) can be held to be legally un-sustainable on any of the grounds contentions raised by the learned Counsel for the petitioner?

Thirdly, whether the termination order (Annexure-7) issued on 5th July, 1995 could be given retrospective effect so as to be operative from 24.2.1995, the date which was mentioned in Annexure.

9. As regards the first point the relevant rule which contains provision relating to confirmation is Rule 15, which reads as follows:

15(1)(a) A member of the Service appointed under Clause (a) of Rule 5 shall be on probation for a period of one year and shall not be confirmed unless he is found to be suitable in every respect for appointment to the service.

Provided that the period of probation may be extended by the State Government, in consultation with the High Court.

(b) when such a member is confirmed in the service, the period spent on probation shall be counted towards leave, pension or increments in the relevant time scale.

(2) promoted officers appointed against substantive vacancies in the cadre shall forth with be confirmed in the service.

The last part of Rule 15(1)(a), which provides that "a probationer shall not be confirmed unless he is found to be suitable in every respect for appointment to the service" has been assailed by the learned Counsel for the petitioner on the ground that this gives unbridled and unfettered power to the High Court, in exercise of which probation period of any Additional District and Sessions Judge can be indefinitely extended. According to him the High Court may indefinitely delay the matter of confirmation of a probationer and a situation may arise when service of an Additional district Judge on probation is terminated on the ground

of being unsuitable after many years of his joining of the Service and then he would be of no where and he cannot get any other suitable Government job as he will become over age. I do not think that this argument has any merit and it has to be rejected for more reasons than one. First, it seems to be based on a hypothetical fear that the period of probation of an Additional District Judge under this rule will be indefinitely extended. In this case it is obvious from the pleading that the question of confirmation of the petitioner has been considered along with other officers of his batch by the High Court on two occasions and on the first occasion the High Court (Respondent No. 2) while confirming other officers of his batch decided to refer the matter of confirmation of two officers including the petitioner and it also appears to be admitted that the matter of confirmation was again considered after some time and the High Court on the second occasion formed an opinion about suitability of the petitioner and took a decision not to continue his period of probation after specified date and on the basis of that decision Annexure 1/A was issued to the Government.

10. Secondly any rule giving wide power to such an august authority as the High Court or the Government by itself cannot make a rule unconstitutional or arbitrary, and any action, in exercise of that power, if arbitrary and unconstitutional can be quashed for that reasons but not the rule itself. In my opinion learned Counsel for the Respondent No. 2 had been right in contending that mere giving of wide power by any of statutory rule to any authority in such a matter as confirmation cannot make the Rule un-constitutional, but if in exercise of that power any arbitrary or otherwise illegal notion of any sort is done, only the action that resulted by exercise of that power has to be set aside.

11. Thirdly, there is no likelihood that a high level authority, which is empowered to take decision in the matter of confirmation of an officer on probation will indefinitely and un-necessarily extend the period of probation of any officer on probation. If the over all performance of the officer would disclose that he is not suitable, he cannot in the interest of the Service, be allowed for a long period to continue on probation, for even during probation he will be discharging some duties, which, if discharged by the officer, is not suitable, cannot be satisfactorily done. In the instant case, as already noticed above, the High Court through its Standing Committee considered the case of the petitioner for confirmation at least on two occasions by the 2nd December, 1994, and the petitioner had joined on the post of Additional District and Sessions Judge on 6.5.1991, and the completed the prescribed one year period of probation on 6.5.1992, and after the second consideration it took the decision that his period of probation should come to its end by 23.2.1995. In the context of all this, I do not think that the argument of the learned Counsel for the petitioner based only on imaginary apprehension of possibility of extension of period of probation for long or indefinite period can be accepted.

12. Now coming to the second point for decision, I may mention at the very outset that the contention of the learned Counsel for the petitioner relating to

automatic confirmation on expiry of the period of probation of one year, which according to him is the maximum period, is based on incorrect and erroneous interpretation that is sought to be put by him on the provisions of Rule 15(1)(a) of the Rules.

13. When the first part of the rule stipulates that a member appointed under Clause (a) of Rule 5 shall be on probation for a period of one year, and thereafter it also lays down in the second part that he shall not be confirmed unless he is found suitable in every respect, it is necessarily implied that the minimum period for which the person appointed in the Service should be kept on probation has been prescribed by the rule as one year and his suitability for confirmation in the service has to be considered only after watching his "Work", "Conduct" or Performance, for that period. The proviso to that section empowers the State Government to extend the period of probation after consultation with the High Court, but that extension, which is mentioned in the proviso, in my opinion, is referable to that period of one year, which is provided in the first part of Rule 15(1)(a). If interpretation that is sought to be put by the learned Counsel for the petitioner is accepted, the second part of the rule, which mandatorily prohibits confirmation of any Additional District Judge unless he is found to be suitable in every respect for appointment to the Service will become redundant and in-operative, and it will be against an established principle of interpretation.

To me it appears that correct and proper interpretation of the Rule 15(1)(a) would be that an Additional District Judge on appointment must necessarily be on probation for a minimum period of one year unless this minimum period is extended under the proviso by the State Government in consultation with the High Court by any further period and after assessing the "work" I Conduct and "Performance" of the officer for one year and in case of any extension as contemplated by the proviso, for the extended period) the decision relating to his suitability for his appointment to the Bihar Superior Judicial Service has to be taken; but despite lapse of that period he cannot stand automatically confirmed, for he cannot be confirmed unless he is found suitable as the second part of the Rule 15(1)(a) enjoins. It is also necessarily implied by that rule that if an officer is not found suitable after assessing his "Conduct", "Performance" etc. for the aforementioned period, a decision about his suitability may be taken after making assessment of his work and conduct for any further period beyond the period prescribed by the rule, which is the minimum. The rationale for the rule enjoining that a member appointed to the service under Rule 15(1)(a) "shall be on probation for one year appears to be that decision about suitability and confirmation shall not be taken without observing his conduct, temperament and other relevant factors for any shorter period, which would be inadequate or insufficient; otherwise there may be possibility of the decision taken in the matter of confirmation being wrong or improper. Watch for a minimum period of one year appears to be must under the first part of the rule, as it stands at present, and if that period of one year would also not seem to be sufficient to the High Court and the State Government and if they would think that performance

of a member of the Service be watched for a longer period, the same could be extended under the proviso to the rule.

14. So in view of the reasons indicated above, the argument of the learned Counsel for the petitioner about automatic confirmation on expiry of the period of one year is rejected and his interpretation of the Rule 15(1)(a), which would have the effect of rendering the second part of the rule, which mandatorily prohibits confirmation unless found suitable, ungatory and does violence to an important part of a rule, must also be rejected.

15. In this connection it may be noticed that while advancing the argument of automatic confirmation, the learned Counsel for the petitioner sought to rely on two decisions one in the case of Pandey Madan Mohan Prasad Sinha Vs. State of Bihar and Others, and the other in the case of State of Gujarat Vs. Akhilesh C. Bhargav and Others, . In the first of these two cases, it appears that the petitioner, who had been appointed as probationer munsif, had been told after 11 years of continuous service that he was not fit for confirmation and his services had been terminated. In that case a Division Bench of this Court had come to the conclusion that in the facts and circumstances of the case the termination of the petitioner's service was by way of punishment and therefore, the petitioner was entitled to the protection of Article 311 of the Constitution of India. Even in that case the theory, of automatic confirmation that was propounded on behalf of the petitioner was negatived by the Court, which observed "that" So far as Bihar Rule concerning service of the petitioner is concerned, it makes it abundantly clear that a probationer cannot be automatically confirmed in absence of a recommendation by the High Court to the said effect. In Bihar Civil Service, Judicial Branch, the ordinary and normal rule is that without an express order of confirmation, the Munsif will not be taken to have been confirmed, when appointed on probation. The first submission is thus rejected." Obviously, therefore, this decision is at no avail to the petitioner and it rather goes against his contention with regard to automatic confirmation. In the other case, of course the Court had come to the conclusion that the concerned officer Akhilesh Chandra Bhargav who had joined Indian Police Service as probationer would be deemed to have been confirmed after expiry of certain period. But that conclusion of the Court was based on the fact that the probation rules, which governed the Police Officer-probationer, provided initial period of probation for two years and did not provide any optimum period of probation and there were Administrative instructions, which provided that safe for exceptional reasons, the period of probation should not be extended by more than one year and that no member of the service should by convention, be kept on probation for more than double the normal period i.e. four years. The concerned officer Akhilesh in that case had already completed four years and the rules of probation, which had been supplemented by the Administrative instruction laid down in a way the maximum period of probation for four years except the exceptional cases. Thus, Administrative instructions were considered to be supplementing the probation rules and were to in any way inconsistent with or contrary to those rules.



Obviously in the instant case it is not only that there is no Administrative instruction of the kind applicable in the instant case; but there is also contrary rule Rule 15(1)(a) second part, which has laid down mandatorily that there can be no confirmation unless found suitable in every respect. In my opinion, ratio of none of the two cases supports the contention that there would be automatic confirmation of the writ-petitioner after expiry of the period of one year or for any longer period.

16. Another argument of the learned Counsel for the petitioner was that it was only the State Government, which could extend the period of probation in consultation with the High Court and since the same has not been done, the petitioner must be deemed to have been confirmed, is also absolutely without merit. I have already noticed that the proviso to Rule 15(1)(a) which empowers the State Government to extend, in consultation with the High Court, the period of probation, will have the effect of extending the period of one year of probation as presently prescribed generally for probationer Additional District Judge, and it has nothing to do with automatic confirmation or question of confirmation of any particular officer.

17. The argument that the Standing Committee of the High Court is not competent to extend the period of probation and only a Full Court could have extended the period of probation, in my opinion it is also devoid of merit. The relevant Rules of the High. Court Rules, 1916 as amended up-to-date read as follows:

2. The standing Committee shall be charge with the control and direction of the Subordinate courts, so far as such control and direction are exercised otherwise than judicially.

3. The Standing Committee shall have power, without reference to the Judges generally:

(i) to dispose of all correspondence within its own Department urgent in this nature and not of general importance;

(ii) to make recommendations for promotion of Subordinate Judges to the rank of Additional District and Sessions Judge and Sessions Judges to the rank of District and Sessions Judges, and their initial posting on probation or appointment:

(iii)(a) to exercise the powers exercisable by the Court under the Code of Criminal Procedure, 1973.

(b) to make recommendation to the Government for the vesting of special powers under any special Act.

(iv) to pass orders of transfer of District and Sessions Judges and Additional District and Sessions Judges;

(v) to make recommendations for the deputation of officers of Bihar Judicial

Service or Superior Judicial service to posts under the Government of India, Government of Bihar or other State Government or to Foreign Service; (vi) to issue orders regarding the promotion of Munsif;

(vii) to pass orders of suspension, initiation of departmental proceedings against members of the Superior Judicial Service and Subordinate Judicial Service, and consequential orders in the said proceedings other than that of dismissal from service;

(viii) to issue Circular orders and General Letters to the Subordinate courts;

(ix) to dispose of any matter which might have been dealt with by the Judge in charge of the Administrative Department, but which he has referred to the Committee for their opinion;

(x) to make recommendation to the State Government for compulsory retirement of any Judicial Officer of any rank;

Provided that notice of the decision of the Standing Committee shall be circulated to the Full Court within ten days from the date of the decision and if any member of Full Court desires, within three weeks of the decision, the matter to be discussed at a meeting of the Full Court then no action will be taken till the decision at such a meeting; and

(xi) to dispose of any matter referred to it by the Full Bench which might have been dealt with by the Full Court.

It is obvious from Rule 2 that the Standing Committee has been charged with the control and direction of the subordinate courts of all respects except that control and direction which has to be exercised judicially.

18. Rule 15 specifies the matters on which decision has to be taken by the Judges at a meeting of the Full Court. Rule 15 of the High Court Rules reads as follows:

15.1. On the following matter decision shall be taken by the Judges at a meeting of the Full Court:

(i) All appointments which by law are to be made by the High Court and which are not otherwise expressly provided for by the rules in this Chapter.

(ii) All recommendations for the dismissal from office of Judicial Officer.

(iii) Proposal for designation Advocates as Senior Advocates u/s 16(2) of the Advocates Act, 1961.

(iv) Matters relating to the service conditions, facilities and amenities of the Judges of the Court.

(v) Constitution of Rule Committee u/s 123 of the New CPC nominating Judges for the Rule Committee.

(vi) Consideration of matters relating to the Chief Justice Conference.

(vii) High Court Calender.

2. The following on which Judges have to be consulted, may be disposed of by circulation of files, except in a case where a meetings is called in accordance with Sub-rule (11) of Rule 14:

(i) Proposed changes in the law where the proposition emanates from the Government or, in other cases, where a committee or any Judge of the Court considers that action is called for.

(ii) The Administrative Report yearly submitted to Government when passed by the Judges of the Standing Committee.

(iii) Rules which when published will have the force of law.

(iv) Subjects connected with the relations between the Supreme Court and the High Court.

It is obvious that the matter relating to confirmation of Additional District Judges or for that matter if any Judicial Officer is not specifically mentioned in Rule 15. Rule 2 quoted above appears to give a wide and general and plenary power of control and Rule 3 appears to enumerates some specific matters, but without in any way affecting the general control and discretion given to the Standing Committee by Rule 2.

19. I may notice here that the learned Counsel for the petitioner made a submission that the subordinate courts referred to in Rule 2 means only staff of the Subordinate courts and not officers. This narrow interpretation of the expression of "Control and direction of the Subordinate courts", in my opinion, is absolutely incorrect. Article 235 of the Constitution of India speaks about the control and supervision over subordinate court and Rule-2 has given general control and direction over to Subordinate courts and so it means and includes control and direction over the Judicial Officers of the Subordinate court also.

20. It is admitted position that the Standing Committee had taken up the matter of confirmation of the petitioner along with the officers of his batch on the first occasion and the Standing Committee then took a decision to confirm some other officers of the batch of the petitioner. It was not said in the argument that the Standing Committee had no power to confirm the other officers of the petitioner's batch. If the Standing Committee had power to confirm and the Standing Committee had in fact taken a decision that several other officers should be confirmed, certainly it had also the power to take a decision that a particular officer is to fit to be confirmed. The argument that the Standing Committee had no power to extend the period of probation hardly needs consideration, because whether the extension was legal, the writ-petitioner in either case would have continued on probation, or, in view of the Rule 15(I)(a), he could not be confirmed unless found suitable.

21. Now before taking up other contentions of the learned Counsel for the petitioner assailing the validity or legality of Annexure-1/A and Annexure-7, it may be noticed that Annexure-7 is the consequential order issued by the State Government in the light of recommendation made in Annexure-1/A and this is obvious from the Contents of Annexure-7, which reads as follows:

The recommendation (ANUSHANSHA) referred to in Annexure-7, also refers to in Annexure-1/A, which reads as follows:

Letter No : 13960 dated 14.12.1994

To,

The Secretary to the Govt. of Bihar, Dept. of Personnel and A.R. Patna.

Sir,

I am directed to say that Sri Murari Lal Kejriwal was appointed as an A.D.J. on probation under personnel Dept. Notification No. 6177 dated 30.4.1991. The matter of confirmation in the Bihar Superior Judicial Service was earlier considered by the Court, but as he has not been found fit for confirmation, his probation period was extended till 23.2.1995.

Subsequently, on examination of some of the judgments and orders delivered by Sri Kejriwal and having considered his work and conduct, as well as, also his over all performance as an officer of the Superior Judicial Service, the Court have been pleased to decide not to extend his probation period beyond 23.2.1995 and to terminate his services as an A.D.J. with effect from 24.2.1995 (forenoon).

I am, therefore, to request you to issue necessary notification terminating the service of Sri Kejriwal, A.D.J. (on probation) presently posted as Sub Judge at Siwan after obtaining orders of the State Govt. in this regard at least a week before 23.2.1995.

If the first paragraph of this letter is read with the pleading vide paragraph 3 (i) of the counter-affidavit, it will appear that the Standing Committee of the High Court had considered the case of confirmation of the petitioner along with other officers of his batch in its meeting held on 22nd and 24th February, 1994 and at that time the period of probation of the petitioner was extended for a period of one year. The second paragraph of Annexure-1/A, read with the counter-affidavit vide paragraph (3) (ii) would show that the Standing Committee in its meeting held on 1st and 2nd December, 1994 considered his case for confirmation and having considered his "Work" and "Conduct" and "also over all performance" took a decision that the probation period of the petitioner will not be extended beyond 23.2.1995. It further appears from paragraph 3 (iii) of the counter-affidavit that the decision of the Standing Committee was placed before the Full court in its meeting held on 3.12.1994, which approved the decision of the Standing Committee and then this impugned letter dated 14.12.1994 (Annexure-1/A) was issued.

22. Now one of the arguments of the learned Counsel for the petitioner was that the petitioner was never informed about the extension of the period of probation, nor was he ever informed as to how his conduct and performance was not satisfactory and what was there that made him unsuitable. According to the learned Counsel, the petitioner should have been given opportunity to explain what material was there against him that stood in the way of his confirmation and that enquiry should have been held to consider his suitability or otherwise. In my opinion, all this argument seems to be misconceived. There is no rule that information should be given to a probationer by the concerned authority when the authority were considering the matter of his suitability for confirmation. There is no rule or principle of natural justice, which demands giving of information to a probationer about extension of the period of probation or giving him opportunity to convince the authority about his suitability.

Assessment about suitability for confirmation of an officer appointed on probation is necessarily a one-sided affair for the authority, who is empowered to consider about the suitability, and no participation of the officer on probation in course of making such assessment is required. Of course, if the authority considers that some query is needed to be made in relation to any work which has been done by the officer on probation during the period of probation such query may be made. But the probationer-officer cannot claim as a matter of right that he should be given any information about his work being done in course of assessment of suitability or any opportunity to explain to the authority any aspect, which the authority thinks would stand in the way of holding him suitable for confirmation.

23. I think the arguments of the learned Counsel for the petitioner based on alleged violation of principles of natural justice or of mandatory provisions of Sub-section (2) of Section 311 or Rule of Civil Service (Classification, Control and Appeal) Rules, 1930 are all misconceived, in view of the settled position of law in this regard as would appear from some of the decisions cited during the course of argument by the learned Counsel for the petitioner himself. The decision in the case of Parshotam Lal Dhingra Vs. Union of India (UOI), of course laid down that the provisions of Article 311(2) of the Constitution of India would apply not only to a person holding permanent post also to a person, who holds a temporary post. Certainly this decision did not say that the provisions of the aforementioned Article would apply to an officer on probation. And this decision definitely laid down the principles that every termination of service would not amount to dismissal or removal, and termination from, from service in terms of specific rule regulating the condition of service will not tantamount to infliction of punishment.

If misconduct, negligence, inefficiency or other disqualification are taken into consideration for terminating the service and on account of any such reasons, punishment or termination of service is given, then of course provision of Article 311 and Principles of natural justice also may come into play. But if a rule

empowers to any authority to terminate the service of any post-holder and in exercise of that rule termination is effected not by way of punishment, but innocuously then there would be no question of application of the principles of natural justice or violation of the provisions of Article 311(2) of the Constitution of India.

24. A Constitution Bench of the Supreme Court in the case of *Samsher Singh Vs. State of Punjab and Another*, has also made the following observation on this aspect.

63. No abstract proposition can be laid down that when the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it on never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar, reason without a proper enquiry and without his getting a reasonable opportunity as showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution.

64. Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any Rules governing a probation in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsustainable for the job and hence must be discharged. No punishment is involved, in this. The authority may in some cases be of the view. that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection. In *The State of Bihar Vs. Gopi Kishore Prasad*, it was said that if the Government proceeded against the probationer in the direct way without casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way punishment. Instead of taking the easy course, the Government chose the more difficult one of starting proceedings against him and branding him as a dishonest and incompetent officer.

65. The fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment.

Of course on the facts and circumstances of that case, it was held that termination of service of both the concerned officers, Samsher Singh and Ishwar Chandra Lal, who were in Punjab Civil Service (Judicial Branch) and whose services had been terminated as by way of punishment. But can it be held that

termination of the service of the writ petitioner of this case by way of punishment or was it innocuous termination for the reason that he was not found suitable for appointment to the Service.

25. Obviously in this case Annexure-1/A does not contain any thing to show that the petitioner was held guilty of any misconduct negligence or corrupt practice on the basis of which the High Court had taken the decision to terminate his period of probation. To be sure its contents indicate that some judgments and orders delivered passed by the writ-petitioner had been considered and his work and conduct as also his over all performance as officer of the Superior Judicial Service was taken into consideration and then the decision not to extend his probation period was taken. But the examination of Judgments and orders and assessment of his work, conduct or performance as an officer in my opinion, seem to have been done for the purpose of considering whether or not he was suitable for confirmation. The expression of the Court had been pleased to decide not to extend his probation period beyond 23.2.1995" would indicate that the Court while making the decision had kept in mind the earlier extension of the period of probation. As the pleadings show on an earlier occasion the matter of confirmation of this petitioner had been taken up with the officers of his batch and at the time he was not confirmed and obviously the High Court wanted to watch the work, conduct and performance of the petitioner for some further period, and it eventually decided not to further extend the period of probation beyond the certain date. In my considered opinion, there is nothing to indicate that any punishment was imposed or any stigma was given in this impugned letter, Annexure-1/A.

26. Learned Counsel for the petitioner relied upon the decision reported in Anoop Jaiswal Vs. Government of India and Another, in which termination of service of Anup Jaiswal, who was taken a probationer officer of the Indian Police Service, was held to be illegal on the ground of not allowing him reasonable opportunity and as violative of the provision of Article 311(2) of the Constitution of India. But it was held, in the facts and circumstances of that case, that the termination of his service was founded on an alleged misconduct that he was a ring leader in the incident in which the petitioner and other officers of his batch, who were on probation training could not punctually attend a P.T. (Physical training) exercise, the venue of which was initially fixed in an open field, but, due to rains, had to be shifted later to a Gymnasium Hall where the petitioner and others could appear only after some delay and not at the time fixed by the Director. So, .I do not think that ratio of this decision can be of any avail to the writ-petitioner of this case.

27. I my notice here some other decisions (not already referred to above), which have been cited by the learned Counsel for the petitioner during course of his argument. The first of the decisions relates to the case of Hindustan Antibiotics Ltd. Vs. The Workmen and Others, , but that was a case arising out of industrial dispute and I do not think that the decision has any relevance in this case. The

other decision, while was referred to in course of argument is reported in 1975 (1) SCC 833. The High Court of Punjab and Haryana and Ors. v. The State of Haryana and Ors.. This decision appears to settle down once for all the principles that in the matter of confirmation of Judicial Officers, the Governor has to act in conformity with the decision of the High Court and not of the State Government and it is the High Court, which alone has superintendence and control over the subordinate Courts in view of the provisions of law contained in Article 235 of the Constitution of India. It may be noticed here that even in the Samsher Singh's case (supra) the Apex Court took the view that it was wrong on the part of the High Court of Punjab to make request to the Director of vigilance for holding enquiry about the alleged misconduct of a Judicial Officer, for the reason that the members of the Subordinate Judiciary look up to the High Court not only for discipline but also for dignity. The request made by the High Court to the Director of vigilance was held to be in this regard of Article 235 of the Constitution of India.

28. In the instant case respondent No. 2 (the High Court) had considered the matter of confirmation and then a request was made by the impugned letter Annexure-1/A to issue notification in accordance with the suggestion recommendation made in the letter and the respondent No. 1 (the State of Bihar) thereafter issued the notification (Annexure-7) (already quoted above) was issued in confirmity with the recommendation made. All this obviously seem to be in accordance with the principles settled in that regard by the decisions of the Apex Court.

29. Learned Counsel for the petitioner further cited a decision reported in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, . After going through this judgment. I find that the issue raised therein and the principles decided can have no application at all to the facts of the instant case. In that decision a Rule/Rule-9(i), by which the Corporation had been empowered to terminate the service of permanent employee without giving any reason and only by giving notice was held to be unsustainable in law, and the Corporation was held to be "State" and the Rule was struck down both on the ground that it was opposed to Public Policy and it was violative of Article 14 of the Constitution of India in as much as it had given power to terminate the services of permanent employees only by giving notice any paying emoluments equivalent to there months basic pay and this was arbitrary and illegal.

30. The decision in the case of D.K. Yadav Vs. J.M.A. Industries Ltd., , cited by the learned Counsel for the petitioner no doubt indicates that the principles of natural justice are applicable not only is quasi-judicial action but also to Administrative actions, but that case was in the field of labour law and it was held in the context of a Rule (of Certified Standing Orders) which had provided for automatic termination of service any employee if he remained absent without sanctioned leave for a period of more than 8 days that the principles of natural justice should be followed and opportunity should be given to the concerned



employee to explain his absence before this service can be taken to be automatically terminated by declaration of the impugned Rule of the Certified Standing Orders, In this case nothing of the sort, that was an issue in that decision involved.

31. Another contention of the learned Counsel was that because of the termination of the service of the writ-petitioner even during probation, there is necessarily adverse civil consequence on him as he stands deprived of the pay, dearness allowance etc. which constituted his emoluments when he was working as Additional District and Sessions Judge, and so the principles of natural justice demanded that he should have been given opportunity to show that he was suitable for the post and deserved to be confirmed. I do not think that this contention of the learned Counsel for the petitioner can be accepted. As already noticed above the law contemplates two types of termination; one type of termination, which is by way of punishment, stands on a different footing in the eye of law. In such termination by way of punishment, even if it is made when an officer is on probation and not holding temporary or permanent post the law requires that before termination order is passed an opportunity should be given to the concerned officer to explain the facts and circumstances, which constitute the ground on which the termination is intended to be based.

But when the termination is innocuous and termination order is issued in exercise of power given to the concerned authority by a Rule or Contract of service without any intention to inflict any punishment or disqualification for further, there is no requirement of complying with the principles of natural justice, which themselves may in certain circumstances become subject to the law or statutory rules, which may, in appropriate cases, provide that no notice need be issued. This position seems to be indicated in various decisions including the earliest one, which has been cited above, namely, in the case of P. L. Dhingra.

32. In the case of Union of India and Another Vs. Tulsiram Patel and Others, . It was observed vide paragraph 97 that "though the two rules of natural justice, namely, *nemo iudex in causa sua* and *audi alteram partem* have now of definite meaning and connotation in law and their content and impositions are well understood and firmly established, they are none-the-less not statutory rules. Each of these rules yield to and changes with the exigencies of different situations. "Again in paragraph 101 an Hon"ble Judge of the Constitution Bench observed that" not only therefore can be principles of natural justice be modified but in exceptional case they can even be excluded."

33. In the context of all the aforesaid principles, when an officer on probation has not been considered suitable for confirmation for appointment in the facts and circumstances of the case. I do not think that only because he is suffering because of termination and has adverse civil consequence on him, he must have been necessarily given an opportunity to convince the High Court about his suitability before termination order could be validly passed. When the petitioner had not yet got any lien on the post of Additional District Judge and has not,

therefore acquired right to hold that post, which right could have been acquired by him only after he would have been confirmed, the fact of his suffering due to loss of pay and other emoluments, which he was previously, before termination, drawing, in my opinion, cannot constitute a legitimate ground to invoke the writ jurisdiction in this Court. His suffering will be some thing corresponding to what in law of tort is called "domnum sine injuria" and as action in the field of law is not maintainable for a damage, which is caused without any "injuria" or infringement of any legal right, there can be no action to invoke the writ jurisdiction for the suffering, which has resulted without any sort of infringement of any legal right of the petitioner.

34. So, in view of what I have stated above, the contentions raised by learned Counsel for the petitioner on the ground of violation of the principles of natural or of the provisions of Article 311(2) of the Constitution of India or to the Rules of Classification Rules are untenable.

35. As regards the contention of the learned Counsel for the petitioner, that the petitioner was working honestly or that his out turn was satisfactory, according to the yard stick fixed by the High Court relating to the performance of officers of his rank, or that the judgments and orders passed by the petitioner were not set aside by the Supreme Court and so there could be no reason why he was not held suitable in my opinion, is also misconceived and misplaced. The petitioner may feel that he was working honestly and sincerely, and had given good out turn and passed good judgments and orders but this self assessment of the petitioner is of no consequence. The assessment of suitability for the post was in the domain of the High Court and so the High Court alone could have made the assessment about his suitability and he self appraisal of the writ-petitioner is not at all relevant. So, I reject this contention also.

36. Thus, after considering carefully the pleadings of the parties and the contentions raised, I am definitely of the opinion that the impugned Annexure-1/A and the consequential order Annexure-7 issued in the light of Annexure-1/A are sustainable in law, and none of the arguments advanced or ground taken by the learned Counsel" for the petitioner assailing their legality or validity can be accepted.

37. Now coming "to the last point for decision, namely, the date from which the termination of the service of the writ petitioner can be legally said to be operative. In this regard it may be recalled that Annexure-1/A contained a decision of the High Court, that the period of probation of the writ petitioner should not be continued beyond 23.2.1995, and his Services should be terminated with effect from forenoon 23.2.1995, Annexure-7 also shows that it purported to have terminated the services of the writ petitioner with effect from 24.2.1994 as had been recommended by the High Court in letter No. 6177 dated 30.4.1991 (Annexure-1/A). The contention of the learned Counsel for the petitioner is that since the State Government was the appointing authority and the appointment made in accordance with the provision of Article 233 of the

Constitution of India read with the Rule 5(1)(a) of the Rules of 1951 the termination could be effected only by the State Government and it could be operative only when the State Government issued the notification, Annexure-7 dated 5th of July, 1995. In other words his contention is that the termination order (Annexure-7) could be legally operative only with effect from the date on which this notification was issued on 5th of July, 1995 and not with effect from the date 24.2.1995 as has been mentioned in both the impugned Annexure-1/A and 7.

38. On this point I think that the contention of the learned Counsel for the petitioner is correct. The appointing authority is the State Government and notification of his appointment has been issued vide Annexure-1 by the State Government purporting to be under the orders of the Governor of the State of Bihar. So, it is only the appointing authority, namely, the State Government, which could have terminated his probation period and the termination could not be made effective by the State Government from any date prior to the date on which such termination order was issued. Annexure-1/A contained only the recommendation for terminating the services with effect from 24.2.1995 (forenoon). In last para of Annexure-1/A, it may be mentioned, there was a request to issue necessary notification regarding termination "at least a week before 23.2.1995". But if for some reasons notification relating to termination could not be issued prior to 24.2.1995 and it could be issued only on 5th July, 1995, it could not have been operative from 24th February, 1995, a date earlier than that on which the notification could be issued by the State Government. To be sure the State Government in such a matter could be expected to act in consultation with the High Court or rather according to the recommendation of the High Court but if due to the Assembly Election or for any reason there was delay in issuing notification and it could not be issued "a week before 23.2.1995" as requested by the High Court, I think the termination order could be made operative only with effect from the date on which it was issued i.e. with effect from 5th of July, 1995 and not with effect from 24.2.1995, which is the date mentioned in Annexure-7. And so in my opinion only the clause "dinank 24.2.1995 ke purwahan se" (DINANK 24.2.1995 KE PURWAHAN SE) which makes the termination effective from a retrospective date is legally unsustainable.

39. In view of my findings given above, the relief sought for by the petitioner for quashing of Annexure-1/A and which of Annexure-7 cannot be granted. But the termination order as contained in Annexure-7 shall be operative not with effect from 24.2.1995 but with effect from 5th of July, 1995 and only the aforesaid clause of it that make it operative from 24.2.1995 is quashed. The petitioner shall be paid his salary and other emoluments which he had been drawing previously as Additional District and Session Judge on probation from 24.2.1995 to 4th of July, 1995.

40. This writ petition accordingly stands disposed of with aforementioned directions and observations.

Onkar Narain Asthana, J.

41. I agree.