
(1990) 10 PAT CK 0006
In the Patna High Court
Case No : C.W.J.C. No. 2046 of 1987

Pandey Madan Mohan Prasad Sinha

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 22-10-1990

Acts Referred:

Constitution of India, 1950 — Article 235, 311

Citation : (1991) 1 BLJR 363 : (1991) 1 PLJR 42

Hon'ble Judges : U.P. Singh, J;S.N. Sanyal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.B. Sanyal, J.—The petitioner, a probationary Munsif, having stood sixth in order of merit in the 14th Bihar Judicial Service Examination, joined the service as a Judicial Magistrate, Second Class, at Giridih, on 4.4.1974, pursuant to Government notification dated 15th March, 1974 (Annexure 4). He seeks issuance of writ of certiorari for quashing the order of termination of service dated 29th August, 1986, passed by the State Government, as contained in Annexure 1 as also the orders of rejection of his representation by the High Court dated 14th November, 1986 (Annexures 33 and 33/A) and for commanding the respondents to confirm him on the post of a Munsif with effect from the date of passing of the Departmental examination and/or on completion of two years of probation.

2. The petitioner, previous to his appointment as a Munsif on probation for two years, was a Research Assistant of the Harvard University project on Socio-Cultural aspects of Human Development from August, 1964, to January, 1986 and thereafter for some time he acted as a Lecturer and for sometime worked as an Auditor in Defence Accounts Department of the Government of India as well. After completion of his training, he was posted as a Munsif, Bermo, at Giridih, in May, 1976 and he was transferred to Patna as Munsif I in January, 1977. Thereafter, he was posted as Execution Munsif, Patna, from January, 1978 to

September, 1979. He passed the Departmental Examinations on 26.9.1977, one of the condition for confirmation, as required under Rule 24 of the Bihar Civil Service (Judicial Branch) Recruitment Rules, 1955.

3. The confirmation of the officers appointed as a result of the 14th Bihar Judicial Service Examination was taken up, as per petitioner's information, by the High Court sometime in 1978, but the petitioner confirmed. The petitioner and few others were not has averred that the District Judge, Patna, recommended his case for confirmation. It is said that the petitioner was communicated about the opinion of the District Judge, Hazaribagh, on his work and conduct for the year 1976-77, which was communicated to him on 5.5.1978 (Annexure 6) to the effect that his "outturn was poor". On 7th July, 1979, the petitioner filed a representation (Annexure 7) that he was unaware of the reasons for his non-confirmation and denial of his first increment, even though most of his batch-mate have been confirmed, and prayed for re-consideration of his case for confirmation, on 15th April, 1980, the Registrar of the High Court intimated the Accountant General, Bihar that the petitioner has been granted his first increment from 13.6.1976 (Annexure 8). It is said that on 17th January, 1983, the petitioner was communicated the remarks on his work and conduct for the year 1979-80 to the effect, Outturn poor, so was the quality of his orders" (Annexure 9). The petitioner appears to have filed a representation (Annexure 10) for expunction of the adverse remarks for the year 1979-80, on 3rd May, 1984, the Registrar of the High Court, asked the District and Sessions Judge, Sitamarhi, to communicate to the petitioner further remarks for his work and conduct for the year 1979-80 "should improve his image" (Annexure 11), on 12th August, 1985, the then District Judge, Hazaribagh, asked the petitioner, in the light of the direction received from the High Court, not to do any judicial work from the said date (Annexure 12).

The petitioner seems to have filed a representation on 22nd August, 1985 (Annexure 13) through the District Judge, Hazaribagh, contending, inter alia, whereas non-confirmed officers of the 15th Bihar Judicial Service Examination batch were asked to show cause in 1984 as to why the date of their confirmation should not be deferred, but the said opportunity was not extended to the petitioner. The result of the petitioners previous representation against his non-confirmation when was being awaited, suddenly on 12th August, 1985, all pending cases before him were withdrawn which paused great humiliation, even though the reasons for the same were not known to him. It has also been stated in the said representation that all that the petitioner knew about his service record is the communication dated 17.1.1983 regarding his work and conduct for the year 1979-80 to the effect:

Outturn poor, so was the quality of his orders" and the additional remarks for the year 1979-80 communicated to him on 3.5.1984 to the effected;

should improve his image.

4. It is said that till 3.5.1984, the petitioner had only been communicated about his C.R. for 1976-77 and 1979-80 but on 5th August, 1985 (vide Annexure 27), the court asked the Commissioner and Secretary, Department of Personnel and Administrative Reforms, Government of Bihar, to terminate the service of the petitioner since he was not found fit for confirmation and the order of the court may be given effect to at an early date. This was immediately followed by withdrawal of all judicial work. On 22nd August, 1985, the petitioner filed a representation (Annexure 14) against the entries in his service records as well as withdrawal of all cases from his Court which appears to have been rejected on 12th December, 1985 and so communicated on 7th January, 1986, by the District Judge, on 2nd September, 1985, the State Government replied to the Court's direction (Annexure 28) expressing doubt whether "he can be thrown out of employment in such a summary manner, without recourse to departmental formalities" having continued in service for eleven years, on 5th March, 1986 (vide Annexure 29), the State Government was informed by the court that the confirmation matter of the petitioner was taken up on several occasions, but it was not found possible to confirm him and also for the reason:

...in course of inspection of Sitamarhi Judgeship in May, 1983, by an Hon'ble Judge of this Court, the conduct and antecedents of Sri Sinha at that station were reported to be very much undesirable and unbecoming of a judicial officer. Apart from the complaints touching his integrity with respect to his judicial work, serious complaints regarding his character and morality were also received. It was reported that he used to drink heavily and play "flush" in the town with different rich persons.

5. On 3rd April, 1986, the then District and Sessions Judge, Hazaribagh, informed the petitioner that he (the District Judge) had been directed to communicate a copy of the adverse remarks earned by him in his character roll. I would like to quote the entire letter (Annexure 15) of the District and Sessions Judge, Hazaribagh, since, it has relevance on the dispute before us:

I am directed to communicate you the copy of following adverse remarks earned by you in your character Roll.

Extract from C.R. of Hazaribagh "outturn was poor " for 1976-77. Extract from C.R. of Patna for "An officer of below average 1977-78. merit." Remark by court "should improve his image," Extract from C.R. of Patna for "outturns poor, so was the 1979-80. quality of his orders. Did not enjoy the confidence of the Bar and litigant. Integrity questionable." Extract from C.R. of Sitamarhi "Injunction order passed in for 1981-82. T.S. 81/79 was based on extraneous reasons." Remarks by the court "He did not enjoy good reputation as Execution Munsif, Patna." Further, in course of inspection of Sitamarhi Judgeship in May, 1983, by an Hon'ble Judge of this Court, the conduct and antecedents of Sri Sinha at that station were reported to be very much undesirable and unbecoming of a Judicial Officer. Apart from the complaints touching his integrity with respect to his judicial work, serious complaints regarding his character and morality were also

received. It was reported that he used to drink heavily and play Flush in the town with different rich persons.

6. On 9th of April, 1986 (vide Annexure 30), the State Government queried from the court whether:

(i) Without departmental proceedings and at least giving the petitioner to have his say in the matter, it would be justified and in accordance with law to terminate his service;

(ii) Whether the adverse remarks have been communicated to the petitioner or not and/or any show cause was asked giving him opportunity to explain, and

(iii) Whether on expiration of two years of his probation, there was any order of the court not to confirm him, and/or there is any order for extension of his probationary period.

On 13.6.1986, vide Annexure 31, the Registry wrote back to the Government that time and again, the matter of confirmation of the petitioner was considered by the court, "but the officer was not found fit for conformation in view of the adverse remarks on his record," and under Rule 31(3) of the Bihar Civil Service (Judicial Branch)(Training and Departal Examination) Rules, 1963, the officer is liable to be discharged from at any time at the discretion of the State Government in consultation with the High Court." His representation about adverse remarks earned for the year 1979-80 was rejected by the court and the same was communicated to him in time. The decision to recommend for termination of his service was taken by the court while again considering the question of his confirmation. "After that decision, the officer has been communicated the adverse material as obtaining on his service record against which the officer till now has made no representation." The very fact that officers junior to him were confirmed "must have indicated him his insuitability for confirmation "and" the court"s recommendation to terminate the services of Sri Pandey Madan Mohan Prasad Sinha should be deemed to be final".

7. The petitioner filed a detailed representation against the entire adverse remarks extracted in Paragraph 5 of the Judgment on 28.8.1986 (Anuexure 26) running into thirty pages explaining also the delay in filing the representation within two months of the communication of ail the adverse remarks because of grave and serious illness.

8. On 29th August, 1986 the State Government passed the impugned order contained in Aunexure 1 to the effect that the services of the petitioner were no longer required from the afternoon of the 31st August, 1986, and the High Court was requested to get the order served upon the petitioner.

9. The petitioner again filed a representation against his termination of service on 1st September, 1986 (Annexure 32) explaining the reason why he could not file his representation against the composite adverse materials communicated to him and to reconsider the matter and a personal hearing be given to him. On

14th November, 1986, the Assistant Registrar I wrote back to the petitioner that his representations dated 28th August, 1986 and 1st September, 1986 have been rejected on merits, on the same date, the Registrar informed the District and Sessions Judge, Hazaribagh, that the petitioner be informed that his representation dated 28th August, 1986 has been rejected (Annexure 33/A and 33 respectively), which have been impugned in the present writ petition.

10. A counter-affidavit has been filed on behalf of the Court, wherein it has been asserted that the confirmation matter of the petitioner was taken up by the High Court several times, but in view of the adverse materials against him on the record, it was not found possible by the Court to confirm him in the rank of Munsif. The petitioner was not found fit for retention in service and such Judicial Officers who are not confirmed are liable to be discharged from service at any time at the discretion of the State Government in consultation with the High Court as required under Rule 31(3) of the Bihar Civil Service (Judicial Branch) (Training and Departmental Examination) Rules, 1963. The matter of confirmation of the petitioner was considered on 10.1.1979, 30.8.1979, 5.12.1979, 29.9.1981, 25.8.1982 and 19.6.1985 and every time he was found unfit for confirmation, even though officers junior to him were confirmed. In Paragraph 10 of the counter-affidavit, read along with Paragraph 5 of the supplementary counter-affidavit, it has been averred that the entire adverse materials on his record were conveyed to the petitioner after the recommendation was made to the State Government, against which the petitioner filed representations, which were considered by the High Court on merits and the same were rejected. The adverse materials which were considered while recommending dispensation of the service of the petitioner were those which have already been shown in Paragraph 5 of this judgment.

11. In reply to the counter-affidavit, on amongst others, the petitioner stated that he was not communicated the adverse materials nor he was allowed any opportunity to show cause against those remarks the court took a decision to terminate his service, save and except the adverse remarks for the years 1976-77 and 1979-89. It has been further stated that the District Judges from time to time sent favourable report to the High Court recommending his confirmation in service while he was posted at Patna and Sitamarhi.

12. There is no denial in the counter-affidavit as to the statement made in Paragraph 16 of the writ application, to the effect that while posted at Patna, the District Judge, Patna, recommended for the confirmation of the petitioner, nor the averments made in Paragraphs 21, 22 and 68 of the writ application that while he was posted at Sitamarhi East in September, 1979 the then District Judge, Sitamarhi, recommended, for his confirmation as also the succeeding District Judge, Mr. Nandkulyar, sent a special report recommending for his confirmation. The further statement made in Paragraph 68 of the writ petition to the effect that Mr. Justice S. Sarwar Ali, who was the Administrative Judge and had inspected Sitamarhi in March/ April, 1980 while the petitioner was posted at

Sitamarhi, did not report anything adverse against him. The petitioner left Sitamarhi in January, 1982, whereafter Mr. Justice H.L. Agrawal (as he then was) during an unofficial visit to Sitamarhi in the year 1983, heard complaints about the petitioner behind his back and recorded some adverse remarks in his character roll.

13. Mr. Shyama Prasad Mukherji, learned senior Advocate appearing on behalf of the petitioner, contended that:

(i) The petitioner should be deemed to have been confirmed after completion of two years period of probation, i.e., 15.3.1976, or from the date of his parsing the departmental examination on 26.9.1977, as no adverse remarks in the meantime was communicated to him;

(ii) In the facts and circumstances of this case, the termination of the probation of the petitioner is by way of punishment and, therefore, the petitioner was entitled to the protection of Article 311 of the Constitution of India?

(iii) Rule 24 of the Bihar Civil Services (Judicial Branch) Recruitment Rules, 1955, does not provide for extension of the probationary period;

(iv) The action of the High Court in recommending to the State Government adverse materials for termination of the service of the petitioner prior to the communication of the adverse materials against him, which weighed with the court, is violative of the principles of natural justice;

(v) The consideration of the representation of the petitioner after decision to terminate his service is illegal and unjustified.

(vi) If the 15th Bihar Judicial Service Examination appointees, some of whom were not confirmed, were asked to show cause why the date of their confirmation should not be deferred in the year 1984, the court's, failure to do so in the case of the petitioner, is discriminatory;

(vii) The confirmation matter of the petitioner ought to have been taken up by the High Court in accordance with Rule 24 of the Bihar Civil Service (Judicial Branch) Recruitment Rules, 1955, immediately after the expiration of two years, and not after four years of service. Had it been taken up in time, the petitioner would not have suffered the ordeal;

(viii) In any view of the matter, the decision of the court to terminate the service of the petitioner was taken (vide Annexure 27) on 5.8.1985 on uncommunicated materials, which were communicated to the petitioner only on 3.4.1986 (Annexure 15), and that too, at the instance of the State Government.

14. The State was represented by Mr. Rahmani, Standing Counsel No. III and Mrs. R. Usha. According to the contention of the learned Counsel for the State, in view of Rule 24 of the Bihar Civil Service (Judicial Branch) Recruitment Rules, 1955 (hereinafter referred to as the "Recruitment Rule") and Rules 31 of the Bihar Civil Service (Judicial Branch)(Training and Departmental Examination)

Rules, 1961, (hereinafter referred to as the "Departmental Examination Rules)", there is no bar in extending the period of probation nor there is any question of implied or automatic confirmation. A probationer Munsif, according to learned Counsel, is entitled to confirmation on fulfilment of three conditions, namely:

- (i) two years of completed service;
- (ii) passing of the Departmental Examination; and
- (iii) the recommendation of the High Court for his confirmation.

On non-fulfilment of and one of the conditions, a probationer Munsif is not entitled to confirmation But there may be automatic extension or his probation till such time the probationer Munsif is confirmed or his probation is terminated. Rule 31 of the Departmental Examination Rules requires that before recommendation for confirmation, of a probationer, the District and Sessions Judge under whom he has been trained, must find him fit to be confirmed, having regard to the mastery of law, practice of evidence and procedure and his industry and general efficiency and the District Magistrate and Collector and the settlement officer under whom he has undergone training in theoretical and practical Revenue or Survey papers submits a report. The report of the District Judge will be forwarded to the High Court and the report of the Executive authorities under whom the officer is trained, should send the same to the State Government in its turn will forward the same to the High Court. Rule 31(3) of the Departmental Examination Rules further provides that if an officer is not confirmed for being appointed on permanent basis, he would be liable to be discharged at any time in consultation with the High Court.

15. In the instant case, it is said, the service record of the petitioner being found unsatisfactory, the court, in spite of consideration of the case of the petitioner at several sittings, did not find it possible to confirm him. It is said that if the petitioner continued for a long period as a probationer, he was allowed to do so to improve himself and the same cannot weigh against the court. The rule under consideration, according to the learned Counsel for the State, comes under the ordinary normal rules that without an express order of confirmation, the Government servant could not be taken to have been confirmed in the post, to which he is appointed temporarily at the end of probationary period. Learned Counsel also submitted that the order of termination did not cast any stigma on the officer and can, by no means be termed as termination by way of punishment, entitling him to the procedure contemplated by Article 311(2) of the Constitution.

16. For proper appreciation of the points involved in this writ petition, I would like to quote Rule 24 of the Recruitment Rules and Rule 31 of the Departmental Examination Rules, which read as hereunder:

Rule 24,--A candidate appointed to the post of Munsif otherwise than on a temporary basis shall be appointed on probation in the first instance but will be

eligible for confirmation as a Munsif subject to the conditions that-

- (i) he has completed two years of service from the date of his first appointment;
- (ii) he has passed such tests as may from time to time be prescribed; in the Departmental Examination Rules, and
- (iii) he is recommended by the High Court for such confirmation.

Rule 31.--A probationer will be eligible for confirmation and appointment as a permanent Munsif as provided under Rules 24 and 26 respectively of the Civil Service (Judicial Branch) Recruit-Rules, 1955:

Provided that before recommending a probationer for confirmation or for appointment, the High Court will obtain and consider reports from-

- (i) the District and Sessions Judge under whom he has been trained as to his fitness to be so confirmed or appointed having regard to his mastery of law and practice of evidence and procedure, and his industry and general efficiency, and
- (ii) the District Magistrate and Collector and the settlement officer or the Officer Incharge of the training (if the probationer has undergone a theoretical and practical revenue or survey training) under whom he has been trained as to his industry and his proficiency in the work in which he has been trained by them.

(2) The report referred to in Sub-rule (1) from the District and Sessions Judge shall be sent by him direct to the High Court and the reports from other authorities shall be sent to the State Government which shall forward the same to the High Court.

(3) An officer who is not confirmed or appointed on a permanent basis as Munsif would be liable to be discharged from service at any time on consultation with the High Court.

17. On a conjoint reading of the two rules, I have no difficulty to hold that there was no automatic confirmation of the petitioner on expiration of two years completion of probationary period. Under Clauses (ii) and (iii) of the Recruitment Rules, it is provided that the candidate has to pass the departmental examination, and it may be possible that the candidate may not pass all the departmental examinations within the said period, and does so in a longer period. Further, there must be a positive recommendation by the High Court for the confirmation of the officer. Theory of automatic confirmation is thus wholly excluded by the rule governing the confirmation of a Munsif-probationer. Further, if the officer is not confirmed or appointed on permanent basis by the High Court, he would be liable to be discharged by the State Government at any time in consultation with the High Court. This also excludes the theory of implied confirmation.

18. In the case of State of Punjab Vs. Dharam Singh, , which has been strongly relied upon by Mr. Mukherji, Senior Advocate for the petitioner, the concerned

rule provided for maximum period of probation, including extension. Dharam Singh was allowed to continue without an order of confirmation beyond the fixed period of extension and it was in those circumstances under the concerned rule, it was held that by necessary implication, he must be regarded to have been confirmed. In the case of Samsheer Singh Vs. State of Punjab and Another, , it was held that where the total period of probation, including extension, was limited to three years, the explanation to Rule 5(1) provided that the period of probation shall be taken to have been extended if a subordinate is confirmed on the expiry of the period of probation, and, as a matter of fact, before the completion of three years, the High Court gave a notice to Shamsheer Singh as to why his services should not be terminated. So far as Bihar Rules 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.

19. The petitioner's service record, apart from his outturn of works is ameread with entries relating to his conduct in the discharge of judicial duties and the last straw on the camel's back was the observation of one of the Hon'ble Judge, who visited Sitamarhi in May, 1983, in absence of the petitioner, to petitioner's bad association reflecting on his conduct. The High Court in its administrative side, as would be apparent from the counter-affidavit and Annexure "27", took decision on 5.8.1985 not to confirm him on the basis of materials available on his service record. Annexure 15 constitutes the entire material which has been reproduced in Paragraph 5 of the judgment. These materials were communicated on 3.4.1986 to the petitioner and also forwarded to the State. Till 5.8.1985, when the court took the decision not to confirm him, he was only communicated his character roll upto 1979-80, and that too, not in its entirety. On 5.5.1978, he was communicated of the remarks in his character roll for the period 1976-77 "Outturn poor." He was not at all communicated of the remarks earned for the year 1977-78 i.e. "should improve his image" (uncommunicated). The entry for the year 1979-80 was communicated to the petitioner in two instalments, on 5.5.1978 what was intimated to him was "outturn poor," against which the petitioner filed his representation (Annexure 7). On the 17th January, 1983 another, part of the remarks of 1979-80 was communicated to him "outturn poor, so was the quality of his orders" (Annexure 9). But the court did not communicate the other part, namely, "Did not enjoy the confidence of the Bar and litigant. Integrity questionable. "Extracts of C.R. of 1981-82 that he passed Injunction order in Title suit No. 81 of 1979 on the basis of extraneous reasons, and the court's remarks" he did not enjoy good reputation as Execution Munsif, Patna, and his conduct-was undesirable and unbecoming of a Judicial Officer, noted in May, 1983, could be known to him only after the decision not to confirm him had been intimated by the court to the State. Court's discretion not to

confirm the petitioner, therefore, is founded upon both communicated or uncommunicated materials. His representations were rejected not before the final decision of the court to terminate his service was taken on 13.6.1986 (Annexure 31), but sometime only on 14.11.1986 (Annexures 33 and 33/A).

20. It was the State Government which queried on 2.9.1985 (Annexure 28) whether after eleven years of service, such a summary measure could be taken against him and whether the materials which formed the basis of the High Court was communicated to him. The then Registrar, High Court, wrote back to the Government on 5.3.1986 (Annexure 29) that "Apart from the complaint touching his integrity with respect to his judicial work, serious complaints regarding his character and morality were also received." Therefore, the State Government asked to give effect to the court's recommendations made in their letter dated 5.8.1985. It is unfortunate for the court that even on that date, the materials which formed the basis of such a decision were not communicated to the petitioner in order to enable him to file an effective representation, what to speak of giving of a show cause notice as afforded to the candidates of 15th Bihar Judicial Service Examination while deferring their confirmation. On 3.4.1986, the court only performed a ritual and or formality by communicating the material which formed the basis of their earlier decision dated 5.8.1985. The petitioner's representation as against the composite material was certainly delayed, but the petitioner put forward adequate reasons for such a delay. Even the President of the Bihar Judicial Service Association, Hazaribagh District Unit, communicated a resolution dated 7.5.1986 of the Hazaribagh. unit of the Association that the petitioner had been shifted to Ranchi Hospital with serious health hazards and is in need of immediate financial help and requested their Association President, Justice S. Wasiuddin, to take up the matter with the High Court and raise funds to help him immediately. This was again repeated by one of the members of the Executive Committee at Hazaribagh on 13th May, 1986 (Annexure 24).

21. It. is not denied in the counter-affidavit that on 18th of June, 1986, the petitioner sent a representation to the Registrar of the High Court (Annexure 25), explaining his serious health condition and further informing that he has been discharged from the Hospital only on 7.6.1986 but has been advised one month complete bed rest. He sought for permission to visit Sitamarhi in order to enable him to look into the papers of Title Suit No. 81 of 1979, which is stated to be decided on extraneous consideration as mentioned in his confidential report of the year 1981-82. Ultimately he prayed for three months time to file an effective representation after he visits Sitamarhi and is afforded opportunity to collect information from there f Annexure 25). Unfortunately, for the petitioner, on 13th June, 1986 itself (Annexure 31), the Registry communicated to the State Government that the decision taken by the High Court is final in all respects and the State Government must give effect to the decision of the High Court by terminating the service of the petitioner id view of the jurisdiction, exercised by the High Court under Article 235 of the Constitution of India. This was followed

by the impugned order of termination dated the 29th August, 1986 passed by the State Government (Annexure 1).

22. The Registry ought to have waited to take stern stance, when a month before Bihar Judicial Service Association on 7.5.1986 and 13.5.1986 (Annexure 24) passed a resolution as to his physical condition to give a chance to file proper representation to the entries in his service record. Curiously, court rejected the representation of the petitioner {Annexure 26) dated 28.8.1986 and the representation dated 1.9.1986 (Annexure 32) almost after three months of the termination of his service on 14.11.1986 (Annexure 33 and 33/A) but his representation dated 18.6.1986 (Annexure 25) remained undisposed of, even though that was sent two months before his termination of service by the State Government.

23. In the counter-affidavit of the respondents, there is no whisper that pursuant to Annexure 25, the petitioner was granted time to collect information from Sitamarhi, since he was then posted at Hazaribagh, to file an effective representation, as all matters touching his conduct related to his stay at Sitamarhi. There is no denial by the High Court that Mr. Justice S. Sarwar Ali, who was the Inspecting Judge of Sitamarhi, during his inspection sometime in April, 1980 found anything adverse against the petitioner as the confidential report does not bear any adverse remarks for the year 1980-81. But it is said that Mr. Justice H.L. Agrawal (as he then was) who was on an unofficial visit to Sitamarhi, the adverse comments against the petitioner were brought to his notice sometime in May, 1983, more than one year after the petitioner was transferred from Sitamarhi to Hazaribagh (his date of transfer from Sitamarhi is said to be January, 1982).

24. It was the duty of the Registry to bring all these facts to the notice of the Court exercising administrative jurisdiction and there was time enough to defer the implementation of its decision because any decision taken on uncommunicated adverse report and without disposal of the representation preferred and pending, is unwarranted in law.

25. It has been held in the case of Guridial Singh Fijji v. State of Punjab and Ors. AIR 1922 SC 1600 that a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstance leading to the report. Such an opportunity is not an empty formality; its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. In the said case, the adverse reports were communicated, as against which the explanation offered, was undisposed of, when the person was denied the promotion for non-issuance of integrity certificate.

26. In the instant case, there is not only non-communication of the adverse

report which weighed with the High Court, but his representation were considered long after the final decision was taken to terminate his services. The principle laid down in *Fijji's case* (supra) was not followed.

27. Learned Counsel for the State is not justified in contending that prior to 5.8.1985, the High Court's direction to terminate the services of the petitioner, the latter had at least been communicated the adverse remarks of 1976-77 on 5.5.1978, the adverse remarks for the year 1979-80 on 3.5.1984, which entries were enough to justify court's decision. This contention is fallacious for the reasons the order does not purport to rely on those two entries alone, the termination did not immediately follow the said two entries, the court's decision not to confirm him relies heavily upon. What was found of him by one of the Hon'ble Judges in the year 1983 at Sitamarhi (Annexure 29). Lastly Court arrived at its satisfaction on adverse remarks communicated and uncommunicated. The opinion was thus formed on admissible and inadmissible materials. In administrative law, if the discretionary power has been exercised or even be allowed to be influenced by consideration not lawfully permitted, a Court will conclude that the power has not been validly exercised, and it is so here.

28. Before I part with this question. I would like to observe that for various reasons communication of adverse remarks are delayed and many a cause ends up in litigation. I would do no better than to reiterate the observation of the Apex Court in the case of *Amar Kant Choudhary Vs. State of Bihar and Others*, , which reads as follows:

In order to avoid such a contingency, the Government may consider the introduction, of a system in which the officer who has to make entries in the confidential roll may be required to record his remarks in the presence of the officer against whom remarks are proposed to be made after giving him an opportunity to explain any circumstance that may appear to be against him with the right to make representation to higher authorities against any adverse remarks. This course may obviate many times totally baseless remarks being made in the confidential roll and would minimise the unnecessary suffering to which the officer concerned will be exposed, Another system which may be introduced is to ask the officer who records confidential remarks to serve a copy of such remarks on the officer concerned before confidential roll is submitted to the higher authorities so that his representation against the remarks may also reach the higher authority shortly after the confidential roll is received. This would curtail the delay in taking action on the representation.

29. It is now almost settled law that a probationer is also entitled to the procedural safeguards contemplated under Article 311(2) of the Constitution of India provided the Government servant is able to establish by materials on record that the order is, in fact, passed by way of punishment. The language or the form of the order may be deceptive, therefore, not decisive. In a given case, the Government servant may succeed in making out a *prima facie* case that the order was by way of punishment. The recommendation, which is the basis or

foundation of the order should be read along with the purpose of determining the character of the order. If on reading the two together, the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and but for the incident, it would not have been passed, then it is inevitable that the order of discharge should fall to the ground when the servant has been afforded a reasonable opportunity to defend himself, as provided under Article 311(2); See *Anoop Jaiswal Vs. Government of India and Another*, .

30. In the instant case, the petitioner was allowed to continue for 11 years, when on 5-8-1985, suddenly the cases were withdrawn from his file and steps were taken for termination of his service by refusing confirmation. The Court, is, therefore, left with an impression that the report about his conduct in the year 1980-81 and his antecedent and morality reported by H.L. Agrawal, J. sometime in May, 1983 must have greatly weighed in arriving at the said decision. I say so, because in Annexure 29, the letter dated 5.3.1986, the report of May, 1983 by an Hon"ble Judge of this Court as to the conduct and antecedent of the petitioner was emphasised reflecting on his character and morality. This would be evident from the aforesaid Annexure. The petitioner had no reasonable opportunity to explain the said materials collected by this Court behind his back. This was disclosed to him after the decision to terminate his service was taken. He applied for three months time in view of his serious illness to the representation after collection of materials to prepare his defence, which opportunity was never provided. His representation was considered after the drop scene of the episode fell, it is, no doubt, true, in certain circumstances negligence and inefficiency may influence the employer to terminate the service of a probationer, under contract of his service. In a given case, even if some preliminary inquiry is held but without further pursuing the same, the contract of service can be resorted to, by simply terminating the service. This may not amount to punishment merely because the employer decides to make some inquiry into those allegations; See *Oil and Natural Gas Commission and Others Vs. Dr. Md. S. Iskender Ali*, . But right from *Parshotam Lal Dhingra Vs. Union of India (UOI)*, , as also in the case of *The State of Orissa and Another Vs. Ram Narayan Das*, and lately in the case of *Shamsher Singh v. State of Punjab*, (supra), it has been left to the Court to determine and discern whether the order of termination and non-confirmation is really by way of punishment, since, neither the form of the order nor holding of some inquiry is conclusive. If the order of termination is snught to be founded on misconduct, its objective is manifest.

In the instant case, till the year 1979-80, the court did not recommend the termination of service of the petitioner, but his case of confirmation was considered and deferred from time to time and only when materials started pouring in as to his character, morality integrity and antecedent, the court rose up inasmuch as, the cases withdrawn from his Court and the State Government was told after 11 years of continuous service that the petitioner was not fit for confirmation and his service should be terminated. If this is not by way of punishment, what else it is. It has been rightly observed in *Anup Jaiswal's* case

(supra), that the Court is required to look at the recommendation as well as the materials upon which it is founded for the purpose of determining the character of the order.

31. For all the reasons aforesaid, i.e., the decision to terminate the services of the petitioner on the basis of uncommunicated remarks entered in the character roll, pendency of one of the representations on the date of recommendation for termination of his service was communicated to the State Government, disposal of representations on merit after the passing of the order of termination, not giving of an opportunity to file effective representation after collection of information at Sitamarhi, where the petitioner met his water-loo, treating him not equally with those whose confirmation was deferred and were accorded opportunity to show cause in that regard, entries in the character roll casting serious aspersions as to his integrity and character, which formed the basis of the action taken, entitling him to the protection of Article 311(2) of the Constitution of India, persuade me to hold that the discretion vested in the Court was improperly exercised. The order of termination of service of the petitioner as contained in Annexure 1 as well as the order dated 14th November, 1986 (Annexures 33 and 33/A), rejecting the representations of the petitioner dated 28th August, 1986 and 1st September, 1986, are quashed.

32. The writ petition is, accordingly, allowed. It will, however, be open to the respondents, if they are so advised, either to hold departmental inquiry or to proceed for compulsory retirement of the petitioner in accordance with law, if in their opinion, he has ceased to be useful; See C.D. Ailawadi v. Union of India and Ors. 1990 LIC 1211.

33. In the circumstances of the case, there will be no order as to costs.

U.P. Singh, J.

34. I agree.