

(2013) 07 AHC CK 0205

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 56744 of 2012

Pritish Kumar Varadwaj

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 16-07-2013

Acts Referred:

Constitution of India, 1950 — Article 311

University Grants Commission Act, 1956 — Section 2, 26, 26(1), 26(1)(c), 26(1)(e)

Citation : (2013) 6 ADJ 754 : (2014) 1 AWC 506

Hon'ble Judges : Surya Prakash Kesarwani, J; Ashok Bhushan, J

Bench : Division Bench

Advocate : Saurabh Basu, for the Appellant; F.A. Ansari, Govind Saran, R.N. Singh, S.C. and S.S. Srivastava, for the Respondent

Final Decision : Allowed

Judgement

Ashok Bhushan, J.—The petitioner, who was working as Assistant Professor in the Indian Institute of Information Technology, Allahabad, has come up in this writ petition challenging the order dated 26.10.2012, passed by the respondent No. 4, by which the services of the petitioner has been terminated treating him to be a probationer. Counter and rejoinder-affidavits have been exchanged between the parties and with the consent of the learned counsel for the parties, the writ petition is being finally decided.

2. Brief facts giving rise to the writ petition are: Indian Institute of Information Technology, Allahabad (hereinafter referred to as the "IIIT, Allahabad") is a deemed University within the meaning of Section 3 of the University Grants Commission Act, 1956 (hereinafter referred to as the "Act, 1956"). The institute is being run by the Society namely: Indian Institute of Information and Technology, Allahabad. The Society has its registered Memorandum of Association and Rules. The Society has also framed Recruitment and Service Rules namely: Recruitment and Service Rules Indian Institute of Information Technology, Allahabad which were enforced with effect from November 18, 1999

duly approved by the Board of Governors of IIIT, Allahabad.

3. The petitioner was earlier appointed as a Faculty Associate vide order dated 11.7.2004 for a period of 3 years. On 3.9.2006, the post of Faculty Associate was converted/re-designated as Lecturer. The petitioner joined his service on 15.7.2004. The work and conduct of the petitioner was appraised and in the First Appraisal Report dated 3.5.2008, it was mentioned "performance appraisal over 4 years found quite satisfactory". In the same Office Memorandum, recommendation was made for continuation and consideration for Assistant Professor after award of Ph.D. Degree. In the 2nd appraisal report dated 9.8.2009, his tenure was extended for one more year. The petitioner was selected for appointment as Assistant Professor vide appointment letter dated 6.6.2010. The appointment of the petitioner was on probation for a period of one year from the date of joining. Petitioner continued to discharge his duties as Assistant Professor, satisfactorily without any blemish. By letter dated 16.5.2012, issued by the Director, IIIT-Allahabad, Faculty members were informed about the performance appraisal of Lecturers which was scheduled to be conducted on 25th and 26th June, 2012. The petitioner appeared before the Appraisal Committee on 26.6.2012. A letter dated 28.9.2012, was issued by the Director, IIT informing the petitioner that the Performance Appraisal Committee recommended "Performance very poor and unsatisfactory. He be discontinued from his services of the Institute with immediate effect". The Board of Management held its meeting on 29.6.2012, accepted the above recommendations and decided to terminate the services of the petitioner under Clause 10(i) of the Terms and Conditions of Service of the appointment letter issued on 6.6.2010. The petitioner was communicated that if he wish to submit any explanation, he may do so by 15.10.2012. Petitioner filed Writ Petition No. 56139/2012, challenging the letter dated 28.9.2012, which was entertained by this Court. The respondents contended before the Court that letter dated 28.9.2012, is only a show-cause notice to which a reply has to be there so that another order may be passed either in favour or against the petitioner. The Court granted time to the respondents to file a counter-affidavit by order dated 19.10.2012. The petitioner submitted his reply on 22.10.2012. One of the issue raised in the reply was that the petitioner's probation which was for a period of one year having not been extended, he shall be treated to be automatically confirmed. After receiving the reply of the petitioner dated 22.10.2012, the same was placed before a sub-committee who after considering the documents in detail gave a report that the explanation of the petitioner is not satisfactory, hence the decision taken by the Board of Management be not changed. The Board of Management in its meeting dated 23.10.2012, considered the report of the subcommittee, the show-cause notice dated 28.9.2012 and reply of the petitioner and decided to maintain its decision terminating the services of the petitioner and to implement the order of termination. The Director IIIT-Allahabad, vide its letter dated 26.10.2012, informed the petitioner about the said decision. Subsequently, a consequential letter dated 27.10.2012, was issued to the petitioner asking him to vacate the

official accommodation.

4. We have heard Shri Shailendra assisted by Shri Saurabh Basu for the petitioner, Shri R.N. Singh, learned Senior Advocate assisted by Shri Govind Saran on behalf of the respondent Nos. 2, 3 and 4 and Shri R.B. Singhal, Assistant Solicitor General of India assisted by Shri Fuzail Ahmad Ansari for the Union of India.

5. Learned counsel for the petitioner in support of the writ petition contended that the action of the respondents in terminating the petitioner's service treating him to be a probationer on the basis of Appraisal Committee's report dated 26.6.2012 is unsustainable. He submits that the petitioner was appointed on probation for a period of one year by appointment letter dated 6.6.2010. He submits that regulations have been framed under the Act, 1956 namely: University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) Regulations, 2010. (hereinafter called the "Regulations, 2010"). He submits that according to the said regulations, which were published in the Gazette of India dated September, 18, 2010, the probation period of one year of the petitioner having not been extended, the confirmation of the petitioner on his post was automatic. He submits that the action of the respondents treating the petitioner as probationer is in breach of statutory Regulations, 2010. It is further submitted that the committee for appraisal of performance was not validly constituted. The appraisal report dated 26.6.2012, having been accepted by the Board of Management on 29.6.2012, the issuance of show-cause notice dated 28.9.2012, was an empty formality. The petitioner was not made aware at any point of time as to what was the basis for holding his performance as not satisfactory. It is submitted that without giving any sufficient opportunity, petitioner's services have been terminated. The report of the sub-committee was never communicated to the petitioner. When the Board of Management having already taken a decision to approve the recommendation for termination of the services of the petitioner's, all subsequent proceedings were farce and the Performance Appraisal Committee cannot be the basis for termination of the petitioner's services. The petitioner's reply dated 22.10.2012 has not been considered by the Board of Management and the termination casts a stigma on the petitioner.

6. Shri R.N. Singh, learned Senior Advocate, appearing on behalf of the respondent Nos. 2 to 4, refuting the submissions of the learned counsel for the petitioner contended that the petitioner having been appointed on probation by appointment letter dated 6.6.2010, continued to be on probation since no confirmation order was ever issued, hence it was within the power of the respondents to terminate the services of the petitioner treating him to be a probationer on appraisal of his work and performance. It is submitted that the termination of the petitioner who was a probationer is not stigmatic. He submits that unless an order of confirmation is issued, the petitioner shall continue to be

on probation and there is no concept of automatic confirmation. He submits that the Regulations, 2010 are not applicable. He further submits that the University Grants Commission (hereinafter referred to as the "Commission") has no jurisdiction to frame any regulations regulating the service conditions of the teachers and officers of the institute. It is submitted that u/s 26(1)(c) of the Act, 1956, Commission can make regulations specifying the terms and conditions of the services of the employees appointed by the Commission and there is no jurisdiction in the Commission to make any regulation for laying down the terms and conditions of the services of the teachers of the institute. It is submitted that the IIIT Allahabad in its meeting held on 15.11.2011, has adopted the University Grants Commission (Institutions deemed to be Universities) Regulations, 2010. It is submitted that the petitioner being still a probationer and his working having been assessed as unsatisfactory has rightly been terminated.

7. Learned counsel for the parties have placed reliance on various judgments which shall be referred to while considering their respective submissions in detail.

8. We have considered the respective submissions of the learned counsel for the parties and have perused the record.

9. The main issue which has arisen in this case is as to whether the petitioner was still continuing as a probationer on the date when he was terminated or he is to be treated to have successfully completed his probationary period and has become confirmed as Assistant Professor.

10. Before we consider the rival submissions on the aforesaid issue, it is relevant to note the statutory provisions governing the field including the Recruitment Rules framed by the Society as well as the terms and conditions of the appointment letter dated 6.6.2010.

11. As noted above, the Society has framed Recruitment and Service Rules Indian Institute of Information Technology, Allahabad, which were enforced w.e.f. 18.11.1999.

Rules 10.02, 10.03 and 10.03.01, which relate to probation are as follows:

10.02 Probation

All substantive appointments to posts under the Institute shall ordinarily be made on probation for a period of one year after which period the appointee, if confirmed, will continue to hold his office till the end of the month in which he attains the age of superannuation except when he leaves the appointment of his own or he is removed/dismissed from the service as a result of departmental proceedings according to the Rules in force in this regard.

10.03 Extension of Probation.

The appointing authority shall have the power to extend the period of probation of any employee of the Institute for such period as may be found necessary by not more than one year. Provided that if, it is not formally extended, he shall be

deemed to have continued on a temporary basis and that his services may then be terminable on one month notice or on payment of a month's salary in lieu thereof.

10.03.01 Confirmation of a Probationer

A probationer may be confirmed after he has successfully completed the period of probation including any extended period of probation. A formal order of confirmation shall be issued.

12. Petitioner was appointed on 6.6.2010. Copy of the appointment letter is filed as Annexure-5 to the writ petition. The terms and conditions of the appointment were attached to the appointment letter dated 6.6.2010. Condition No. 1 relates to probation which are as follows:

Terms and Conditions of Service of Dr. Pritish Kumar Varadwaj
at

Indian Institute of Information Technology, Allahabad or its Campus RGIT-Amethi
(A University Established under Sec. 3 of UGC Act, 1956 vide Notification No. F.9-4/99-U.3 Dated 4.8.2000 of the Government of India)

(A Centre of Excellence in information Technology)

13. Statutory Regulations 2010, on which much reliance has been placed by the learned counsel for the petitioner dated 30.6.2010, were framed by the Commission in exercise of the powers conferred under clause (e) and (g) of sub-section (1) of Section 26 of the Act, 1956. Regulations, 2010 were published in the Gazette of India on September 18, 2010. It is useful to note the source of making the regulations as has been mentioned in the regulation itself which to the following effect.

UNIVERSITY GRANTS COMMISSION

New Delhi-110002, the 30th June 2010

UGC REGULATIONS ON MINIMUM QUALIFICATIONS FOR APPOINTMENT OF TEACHERS AND OTHER ACADEMIC STAFF IN UNIVERSITIES AND COLLEGES AND MEASURES FOR THE MAINTENANCE OF STANDARDS IN HIGHER EDUCATION 2010

No. F.3-1/2009- In exercise of the powers conferred under clause (e) and (g) of sub-section (1) of Section 26 of University Grants Commission Act, 1956 (3 of 1956), and in pursuance of the MHRD O.M. No. F.23-7/2008-IFD dated 23rd October, 2008, read with Ministry of Finance (Department of Expenditure) O.M. No. F.1-1/2008-IC dated 30th August, 2008, and in terms of the MHRD Notification No. 1-32/2006-U.II/U.I(1) issued on 31st December, 2008 and in supersession of the University Grants Commission (Minimum Qualifications Required for the Appointment and Career Advancement of Teachers in

Universities and Institutions affiliated to it) Regulations, 2000, issued by University Grants Commission vide Regulation No. F.3-1/2000 (PS) dated 4th April, 2000, together with all amendments made therein from time to time, the University Grants Commission hereby frames the following Regulations, namely:.....

14. Clauses 1.2 and 1.3 which relate to the applicability of the regulation and the date of enforcement are as follows:

1.2. They shall apply to every University established or incorporated by or under a Central Act, Provincial Act or a State Act, every institution including a constituent or an affiliated College recognised by the Commission, in consultation with the University concerned under Clause (f) of Section 2 of the University Grants Commission Act, 1956 and every Institution deemed to be a University u/s 3 of the said Act.

1.3. They shall come into force with immediate effect.

Provided that in the event, any candidate becomes eligible for promotion under Career Advancement Scheme in terms of these Regulations on or after 31st December, 2008, the promotion of such a candidate shall be governed by the provisions of these Regulations.

Provided further that notwithstanding anything contained in these Regulations, in the event any candidate became eligible for promotion under Career Advancement Scheme prior to 31 December, 2008, the promotion of such a candidate under Career Advancement Scheme shall be governed by the University Grants Commission (Minimum Qualifications Required for the Appointment and Career Advancement of Teachers in Universities and Institutions affiliated to it) Regulations, 2000 notified vide Notification No. F.3-1/2000 (PS) dated 4 April, 2000, as amended from time to time, read with notifications and guidelines issued by the University Grants Commission (UGC) from time to time, in this regard.

15. Regulation 11 relates to period of probation and confirmation. Regulations 11.1, 11.2 and 11.3 which are relevant in the present case are as follows:

11.0 PERIOD OF PROBATION AND CONFIRMATION

11.1 The minimum period of probation shall be one year extendable by a maximum period of one more year in case of unsatisfactory performance.

11.2. The confirmation at the end of one year shall be automatic, unless extended for another year by a specific order, before expiry of the first year.

11.3. Subject to this Clause 11, it is obligatory on the part of the university/the concerned institution to issue an order of confirmation to the incumbents within 45 days of completion of probationary period after due process of verification of satisfactory performance.

16. From the aforesaid, it is clear that there is substantial change in the rules regulating the probation. However, before we examine the scope and extent of Regulations 2010, it is necessary to consider the submissions of Shri R.N. Singh, learned Senior Advocate that Regulations, 2010 are not applicable on the petitioner and it is not within the jurisdiction of the Commission u/s 26(1)(e) and (g) of the Act, 1956. Section 26 of the Act, 1956 pertains to powers to make regulations. Section 26(1) sub-clauses (c), (e) and (g) of the Act, 1956 which are relevant in this case is quoted below:

26. Powers to make regulations.--(1) The Commission may, by notification in the Official Gazette, make regulations consistent with this Act and the rules made thereunder.--

(a).....

(b).....

(c) specifying the terms and conditions of service of the employees appointed by the Commission;

(d).....

(e) defining the qualifications that should ordinarily be required of any person to be appointed to the teaching staff of the University having regard to the branch of education in which he is expected to give instructions;

(f).....

(g) regulating the maintenance of standards and the co-ordination of work or facilities in Universities.

17. The submission of Shri R.N. Singh, learned Senior Advocate that the Commission has jurisdiction to make regulations with regard to the conditions of service of the employees of the Commission finds support from Section 26(1)(c) of the Act, 1956. There can be no question regarding the jurisdiction of the Commission to frame regulations regulating the conditions of service of its employees. Regulations, 2010 have been framed in exercise of statutory power under clause (e) and (g) of Section 26 of the Act, 1956. Section 26(1)(g) uses the words "regulating the maintenance of standards....."

"Regulating the maintenance of standards" empowers the Commission to take such measures which may facilitate maintenance of standards in a University. Providing security of services to the teaching faculties by way of providing that unless the probation is not extended on account of unsatisfactory performance, probationer shall be deemed to be confirmed after expiry of probation is a provision with an intent to bring uniformity in the rules pertaining to probation and to bring uniformity regarding confirmation of a probationer. Above provision is with an object to check the action of the Management to continue the teaching staff on probation beyond a reasonable period and is a measure for maintenance of standards and the submission of Shri R.N. Singh, learned Senior Advocate that

regulations are beyond Section 26(1)(g) of the Act, 1956 cannot be accepted. More so, the institute at no stage has challenged the Regulations, 2010 or its applicability. From Clause 1.2 of the Regulations, 2010 as quoted above, it is clear that regulations apply to every University including every institution deemed to be a University u/s 3 of the Act, 1956. Clause 1.3 of the Regulations, 2010 further provides that "Regulations shall come into force with immediate effect," The heading of the Regulations, 2010 includes "measures for the maintenance of standards in higher education". The heading of Regulations, 2010 also suggests that the regulations are made with an intent to achieve the object of maintaining standards in the University. Regulations by its statutory force are applicable in every deemed university including IIIT-Allahabad and the submission of Shri R.N. Singh, learned Senior Advocate that since it has not been adopted by the institute, same is not applicable cannot be accepted.

18. The respondents have treated the petitioner still under probation relying on the terms and conditions of the appointment letter dated 6.6.2010 and the Rules, 1999. The terms and conditions of the appointment letter dated 6.6.2010 contemplates confirmation by issuing a formal communication.

19. Clause 10.03 of the Rules, 1999, contemplates that even if probation is not formally extended, he shall be deemed to have continued on a temporary basis.

20. The Rules, 1999 further contemplates issuance of a formal order of confirmation. The terms and conditions of the appointment letter dated 6.6.2010, as well as the Rules, 1999 clearly supports the respondents contention that since no order of confirmation has been passed, petitioner continued to be a probationer. Had the matter ended there, there was no difficulty in accepting the submission of the respondents, but the consequence and effect of Regulations, 2010 which are statutory in nature cannot be ignored.

21. It is well-settled that the terms and conditions of service can be regulated by the executive orders in absence of statutory rules. The submission of Shri R.N. Singh, learned Senior Advocate that Regulations, 2010 are not applicable on the IIIT-Allahabad cannot be accepted. Statutory regulations, which have been framed by the Commission are to be followed by the Universities including the deemed University which is with a purpose and object and the action of the IIIT-Allahabad, in not following the statutory regulations cannot be justified and the action of the institute taken in breach of the statutory regulations has to be held to be unreasonable and arbitrary.

22. Regulation 11 of the 2010 Regulations, prescribes that the minimum period of probation shall be one year extendable by a maximum period of one year in case of unsatisfactory performance. It further provides that the confirmation at the end of one year shall be automatic, unless extended for another year by a specific order, before expiry of the first year. It has been further made obligatory on the part of the institution to issue an order of confirmation to the incumbents within 45 days of completion of probationary period. The petitioner was

appointed on 6.6.2010. The 2010, Regulations were enforced on 18.9.2010. The period of probation of the petitioner was never extended by the respondents, nor it is the case of the respondents that at any point of time the probationary period was extended. The one year period of probation thus came to an end on 6.6.2011, and even after enforcement of 2010, Regulations, the one year period came to an end before 18.10.2011. The probation period having not been extended, the confirmation of the petitioner at the end of one year is automatic.

23. A Five Judges' Bench of the Apex Court in *State of Punjab Vs. Dharam Singh*, had occasion to consider Rule 6 of the Punjab Educational Service (Provincialised Cadre) Class III Rules (1961). Rule 6 provides that the total period of probation including extension, if any shall not exceed three years. The High Court held that three years period having expired, the respondents were deemed to be confirmed in their posts and could not have been terminated treating them to be on probation. The termination order was set-aside by the High Court. The State of Punjab filed an appeal. Dismissing the appeal filed by the State of Punjab following was laid down by the Apex Court in paragraphs 2, 3, 5, 6, 8 and 9 which are quoted below:

2. The High Court found that the respondents were officiating in permanent posts against permanent vacancies as contemplated by Rule 6(1) and that on the coming into force of the rules, they must be deemed to have held their posts under Rule 6(1) on probation in the first instance for one year from October 1, 1957. The correctness of these findings is not disputed by the appellants. The High Court also held that in the circumstances of these cases, on the completion of three years' period of probation on October 1, 1960, the respondents must be deemed to have been confirmed in their appointments. The appellants attack this finding. They submit that in the absence of formal orders of confirmation the respondents must be deemed to have continued in their posts as probationers. In the alternative, they submit that on completion of three years' period of probation, the respondents must be deemed to have been discharged from service and reemployed as temporary employees. We are unable to accept these contentions.

3. This Court has consistently held that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his post as a probationer only, in the absence of any indication to the contrary in the original order of appointment or promotion or the service rules. In such a case, an express order of confirmation is necessary to give the employee a substantive right to the post, and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation it is not possible to hold that he should be deemed to have been confirmed. This view was taken in *Sukhbans Singh Vs. State of Punjab*, at pp 424-426 : (AIR 1962 SC 1711 at pp. 714-715), *G.S. Ramaswamy and Others Vs. Inspector-general of Police, Mysore*, at pp.

288-289 : (AIR 1966 SC 175 at pp. 179-180), Accountant General, Madhya Pradesh, Gwalior v. Beni Prasad Bhatnagar, Civil Appeal No. 548 of 1962, D/23-1-1964 (SC). D.A. Lyall v. The Chief Conservator of Forests, U.P., Civil Appeal No. 259 of 1963. D/24-2-1965 (SC) and State of Uttar Pradesh Vs. Akbar Ali Khan, at pp. 825-826 : (AIR 1966 SC 1842 at pg. 1845). The reason for this conclusion is that where on the completion of the specified period of probation the employee is allowed to continue in the post without an order of confirmation, the only possible view to take in the absence of anything to the contrary in the original order of appointment or promotion or the service rules, is that the initial period of probation has been extended by necessary implication. In all these cases, the conditions of service of the employee permitted extension of the probationary period for an indefinite time and there was no service rule forbidding its extension beyond a certain maximum period.

5. In the present case, Rule 6(3) forbids extension of the period of probation beyond three years. Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication.

6. The employees referred to in Rule 6(1) held their posts in the first instance on probation for one year commencing from October 1, 1957. On completion of the one year period of probation of the employee, four courses of action were open to the appointing authority u/s 6(3). The authority could either (a) extend the period of probation provided the total period of probation including extensions would not exceed three years, or (b) revert the employee to his former post if he was promoted from some lower post, or (c) dispense with his services if his work or conduct during the period of probation was unsatisfactory, or (d) confirm him in his appointment. It could pass one of these orders in respect of the respondents on completion of their one year period of probation. But the authority allowed them to continue in their posts thereafter without passing any order in writing under Rule 6(3). In the absence of any formal order, the question is whether by necessary implication from the proved facts of these cases, the authority should be presumed to have passed some order under Rule 6(3) in respect of the respondents, and if so, what order should be presumed to have been passed.

8. The initial period of probation of the respondents ended on October 1, 1958. By allowing the respondents to continue in their posts thereafter without any express order of confirmation, the competent authority must be taken to have

extended the period of probation up to October 1, 1960 by implication. But under the proviso to Rule 6(3), the probationary period could not extend beyond October 1, 1960. In view of the proviso to Rule 6(3), it is not possible to presume that the competent authority extended the probationary period after October 1, 1960, or that thereafter the respondents continued to hold their posts as probationers.

9. Immediately upon completion of the extended period of probation on October 1, 1960, the appointing authority could dispense with the services of the respondents if their work or conduct during the period of probation was in the opinion of the authority unsatisfactory. Instead of dispensing with their services on completion of the extended period of probation, the authority continued them in their posts until sometime in 1963, and allowed them to draw annual increments of salary including the increment which fell due on October 1, 1962. The rules did not require them to pass any test or to fulfil any other condition before confirmation. There was no compelling reason for dispensing with their services and re-employing them as temporary employees on October 1, 1960, and the High Court rightly refused to draw the inference that they were so discharged from services and re-employed. In these circumstances, the High Court rightly held that the respondents must be deemed to have been confirmed in their posts. Though the appointing authority did not pass formal orders of confirmation in writing, it should be presumed to have passed orders of confirmation by so allowing them to continue in their posts after October 1, 1960. After such confirmation, the authority had no power to dispense with their services under Rule 6(3) on the ground that their work or conduct during the period of probation was unsatisfactory. It follows that on the dates of the impugned orders, the respondents had the right to hold their posts. The impugned orders deprived them of this right and amounted to removal from service by way of punishment. The removal from service could not be made without following the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and without conforming to the constitutional requirements of Article 311 of the Constitution. As the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 was not followed and as the constitutional protection of Article 311 was violated, the impugned orders" were rightly set aside by the High Court.

24. Reliance has been placed by Shri R.N. Singh, learned Senior Advocate appearing on behalf of the respondents Nos. 2 to 4 on the judgment of the Apex Court in *Rajesh Kumar Srivastava Vs. State of Jharkhand and Others*, . The Apex Court in the said case laid down that the person is placed on probation so as to enable the employer to adjudge his suitability for continuation and confirmation in service. The appellant before the Apex Court was terminated, who had challenged the termination order. In the said case there was no dispute that the appellant was working as a probationer which fact has been clearly noted in paragraph 9 of the judgment which is to the following effect:

9. The records placed before us disclose that at the time when the impugned order was passed, the appellant was working as a Probationer Munsif. A person is placed on probation so as to enable the employer to adjudge his suitability for continuation in the service and also for confirmation in service. There are various criteria for adjudging suitability of a person to hold the post on permanent basis and by way of confirmation. At that stage and during the period of probation the action and activities of the probationer (appellant) are generally under scrutiny and on the basis of his overall performance a decision is generally taken as to whether his services should be continued and that he should be confirmed, or he should be released from service. In the present case, in the course of adjudging such suitability it was found by the respondents that the performance of the appellant was not satisfactory and therefore he was not suitable for the job.

25. Since in the above case, there was no dispute as to whether the appellant had completed the probation or was still on probation, the said case does not help the respondents. Further reliance has been placed by Shri R.N. Singh, learned Senior Advocate on the judgment of the Apex Court in High Court of High Court of Madhya Pradesh thru. Registrar and Others Vs. Satya Narayan Jhavar, .

26. In the said case the Apex Court had occasion to consider Rule 24 of the M.P. Judicial Service (Classification, Recruitment and Conditions of Service) Rules, 1955. Rule 24 has been quoted in paragraph 10 of the judgment which is to the following effect:

10. To appreciate the point in issue, it would be useful to refer to Rule 24 of the Rules which runs thus:

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

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

(3) If during the period of probation he has not passed the prescribed departmental examinations, or has been found otherwise unsuitable for the service, the Governor may, AT ANY TIME, THEREAFTER, dispense with his services.

(Emphasis added)

27. In paragraph 11 of the aforesaid judgment, the Apex Court noted three lines of cases on the question of deemed confirmation. After considering several relevant cases while interpreting Rule 24 of the Rules, the Apex Court came to the conclusion that Rule 24 cannot be read as providing for deemed confirmation after the end of the period of probation. Paragraphs 11 and 35 of the said

judgment are quoted below:

11. The question of deemed confirmation in service jurisprudence, which is dependent upon language of the relevant service rules, has been subject-matter of consideration before this Court times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. Other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry order of termination has not been passed. The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned has passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.

35. In the case on hand, correctness of the interpretation given by this Court to Rule 24 of the Rules in the case of Dayaram Dayal (supra) is the bone of contention. In the aforesaid case, no doubt, this Court has held that a maximum period of probation having been provided under sub-rule (1) of Rule 24, if a probationer's service is not terminated and he is allowed to continue thereafter it will be a case of deemed confirmation and the sheet anchor of the aforesaid conclusion is the Constitution Bench decision of this Court in the case of Dharam Singh (supra). But, in our considered opinion in the case of Dayaram Dayal (supra), Rule 24 of the Rules has not been interpreted in its proper perspective. A plain reading of different sub-rules of Rule 24 would indicate that every candidate appointed to the cadre will go for initial training for six months whereafter he would be appointed on probation for a period of 2 years and the said period of probation would be extended for a further period not exceeding 2 years. Thus, under sub-rule (1) of Rule 24 a maximum period of 4 years" probation has been provided. The aforesaid sub-rule also stipulates that at the end of the probation period the appointee could be confirmed subject to his fitness for confirmation and to his having passed the departmental examination, as may be prescribed. In the very sub-rule, therefore, while a maximum period of probation has been indicated, yet the question of confirmation of such a probationer is dependent upon his fitness for such confirmation and his passing of the departmental examination by the higher standard, as prescribed. It

necessarily stipulates that question of confirmation can be considered at the end of the period of probation, and on such consideration if the probationer is found suitable by the appointing authority and he is found to have passed the prescribed departmental examination then the appointing authority may issue an order of confirmation. It is too well-settled that an order of confirmation is a positive act on the part of the employer which the employer is required to pass in accordance with the Rules governing the question of confirmation subject to a finding that the probationer is in fact fit for confirmation. This being the position under sub-rule (1) of Rule 24, it is difficult for us to accept the proposition, broadly laid down in the case of Dayaram Dayal (supra), and to hold that since a maximum period of probation has been provided thereunder, at the end of that period the probationer must be held to be deemed to be confirmed on the basis of the judgment of this Court in the case of Dharam Singh (supra).

28. In the above case, the Apex Court interpreted Rule 24. Rule 24 of the Rules did not contain any concept of automatic confirmation, rather it contains a stipulation that after the end of the probation period, incumbent has to be confirmed subject to their fitness and having passed all such departmental examinations as may be prescribed. Rule 24 of the Rules stipulates a positive order of confirmation, hence it did not admit any concept of deemed confirmation. Regulation 11 of 2010 Regulations contains entirely a different statutory scheme. Regulation 11 of the 2010 Regulations stipulates automatic confirmation after expiry of period of probation, thus the said judgment of the Apex Court in the case of High Court of Madhya Pradesh through Registrar (supra) has no application.

29. Another judgment relied on by Shri R.N. Singh, learned Senior Advocate, is the case of Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, . In the said case the Apex Court was considering the question as to when the termination during the probation can be held to be stigmatic. The proposition in that regard was laid down in paragraph 29 of the judgment which is to the following effect:

29. Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationers appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationers appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job.

30. Thus, the above case also does not support the contention of the

respondents that that petitioner was continuing under probation.

31. Another case relied on by Shri R.N. Singh, learned Senior Advocate appearing for the respondent Nos. 2 to 4 is Rajesh Kohli Vs. High Court of J. and K. and Another, . In the said case, probationer was terminated by the High Court of Jammu & Kashmir which recommended for termination of his services. Rule 15 of the Jammu & Kashmir Higher Judicial Service Rules came up for consideration which rule has been quoted in paragraph 3 of the judgment. Paragraph 3 of the judgment is quoted below:

3. At this stage, it is required to be mentioned that in terms of the Jammu & Kashmir Higher Judicial Service Rules, the total period of probation for a judicial officer after his initial appointment could be for three years for when he is initially appointed, at the first instance his probation period is given as two years and thereafter the same could be extended by another one year. In this connection, reference could be made to Rule 15 of the Jammu & Kashmir Higher Judicial Service Rules which provides as follows:

15. Probation.--(1) All persons shall on appointment to the service in the substantive vacancies be placed on probation. The period of probation shall, in each case, be two years; provided that the period for which an officer has been continuously officiating immediately prior to his appointment may be taken into account, for the purpose of computing the period of probation.

(2) The Governor may in consultation with the Court, at any time extend the period of probation; provided that the total period of probation shall not ordinarily exceed three years. An order sanctioning such extension of probation shall specify whether or not such extension shall count for increment in the time-scale.

(3) If it appears to the appointing authority at any time during or at the end of the period of probation or extended period of probation, as the case may be, that a probationer has not made sufficient use of his opportunities or has otherwise failed to give satisfaction, his service may be dispensed with immediately.

(4) A person whose services are dispensed with shall not be entitled to any compensation.

32. After completion of initial period of two years of probationary period, case of the petitioner was placed before the Full Court which resolved that services of the petitioner having been not found satisfactory, probation is not extended. The Apex Court in the said case held that the Officer shall be deemed to be continued on probation. Following has been laid down in paragraphs 16, 17, 18 and 19 which are quoted below:

16. Since the Rules permits probation to be extended for another one year and since there was no order of confirmation passed by the respondents confirming his service, the petitioner would be deemed to be continuing on probation immediately after his expiry of the initial two years of probation. In this regard,

we may refer to Satya Narayan Athya Vs. High Court of M.P. and another, , in which a judicial officer was not given any confirmation letter even after the completion of his two years" of probation period. The rules in the said case provided for the extension of initial two years of probation period for a further period of two years.

17. This Court in Athya case (supra) held at paras 3 and 5 that: (SCC pp. 561-62)

3.... A reading thereof would clearly indicate that every candidate appointed to the cadre shall undergo training initially for a period of six months before he is appointed on probation for a period of two years. On his completion of two years of probation, it may be open to the High Court either to confirm or extend the probation. At the end of the probation period, if he is not confirmed on being found unfit, it may be extended for a further period not exceeding two years. It is seen that though there is no order of extension, it must be deemed that he was continued on probation for an extended period of two years. On completion of two years, he must not be deemed to be confirmed automatically. There is no order of confirmation. Until the order is passed, he must be deemed to continue on probation.

5. Under these circumstances, the High Court was justified in discharging the petitioner from service during the period of his probation. It is not necessary that there should be a charge and an enquiry on his conduct since the petitioner is only on probation and during the period of probation, it would be open to the High Court to consider whether he is suitable for confirmation or should be discharged from service.

(emphasis supplied)

18. During the period of probation an employee remains under watch and his service and his conduct is under scrutiny. Around the time of completion of the probationary period, an assessment is made of his work and conduct during the period of probation and on such assessment a decision is taken as to whether or not his service is satisfactory and also whether or not on the basis of his service and track record his service should be confirmed or extended for further scrutiny of his service if such extension is permissible or whether his service should be dispensed with and terminated. The services rendered by a judicial officer during probation are assessed not solely on the basis of judicial performance, but also on the probity as to how one has conducted himself.

19. The aforesaid resolution taken by the Full Court on its administrative side clearly indicates that the matter regarding his confirmation or otherwise or extension of his probation period for another one year was considered by the Full Court but since his service was not found to be satisfactory on consideration of the records, therefore, the full Court decided not to confirm him in service and to dispense with his service and accordingly recommended for dispensation of his service. On the basis of the aforesaid recommendation of the High Court, an order was passed by the Government of Jammu and Kashmir dispensing with the

service of the petitioner.

33. Rule 15 of the Jammu & Kashmir Higher Judicial Service Rules which fell for consideration before the Apex Court was not akin to Regulation 11 of the 2010, Rules which is up for consideration in the present case. The said case of Rajesh Kohli (supra) also does not help the respondents in this case.

34. In view of the foregoing discussions, we are of the view that the petitioner has to be treated to have been confirmed in service after completion of one year's probation which probation was not extended. By virtue of Regulation 11 of 2010 Regulations the action of the respondents in terminating the services of the petitioner treating him to be only a probationer cannot be sustained. The respondents terminated the services of the petitioner on the basis of performance appraisal dated 26.6.2012, treating him to be only a probationer.

35. Petitioner, as noted above, could not be treated to be continuing as probationer on the date when the order of termination was passed, he having become confirmed by virtue of Regulation 11 of the 2010, Regulations.

36. We having come to the conclusion that the order of termination of the petitioner's services on 26.10.2012, being unsustainable on the ground that the petitioner was no longer a probationer, we find it unnecessary to enter into various other submissions raised by the learned counsel for the petitioner.

37. In the result, the writ petition is allowed.

38. Order dated 26.10.2012, and all consequential actions are set-aside. Petitioner shall be entitled for all consequential benefits. Parties shall bear their own costs.