

(2016) 06 GAU CK 0040
In the Gauhati High Court
Case No : WP (C) 5549 of 2010

Shri Lakhyajit Deka

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-06-2016

Acts Referred:

Citation : (2016) 5 GauLR 157 : (2016) 3 GauLT 488

Hon'ble Judges : Mr. Ajit Singh, C.J. and Mr. Suman Shyam, J.

Bench : Division Bench

Advocate : Mr. S. Dutta, Mr. B.C. Das, Ms. N. Ahmed and Mr. A. Goswami, Advocates, for the Appellant; Mr. P.K. Tiwari, Sr. Advocate, Mr. K.N. Balgopal, Mr. A. Chamuah, Mr. R. Biswas, Mr. M. Choudhary, Mr. A. Gogoi, Mr. R. Sharma, Mr. M. Choudhary and Mr. M.K. Misra

Final Decision : Dismissed

Judgement

Suman Shyam, J.— Heard Mr. S. Dutta, learned counsel for the petitioner. Also heard Mr. P.K. Tiwari, learned senior counsel assisted by Mr. M. Choudhury, learned counsel for the respondents.

2. This writ petition is directed against the judgment and order dated 31-08-2010 passed by the Central Administrative Tribunal (CAT for short) dismissing the Original Application No. 1 of 2010 thereby rejecting the challenge made by the petitioner to the order dated 16-12-2009 terminating his services .

3. The factual matrix of the case may be briefly noticed as follows:-

Pursuant to the advertisement dated 16/11/2006 issued by the Indian Institute of Entrepreneurship (IIE) inviting applications from intending candidates, inter-alia, for filling up the post of Accounts Officer, the petitioner had submitted his candidature and was selected and accordingly, appointment letter dated 20/11/2007 was issued to him. In the appointment order, it was mentioned that his appointment was purely temporary and that the petitioner would have to undergo a probation period for one year, which was liable to be extended at the

discretion of the appointing authority. The order of appointment further mentioned that during probation period, the petitioner's service was terminable at one months Notice from either side and that after satisfactory completion of the probation period, his services will be regularised.

4. The petitioner joined as Accounts Officer in the IIE on 20/12/2007, whereafter he was also allotted residential accommodation by his employer. On 11/07/2008, a faculty meeting was convened for discussing certain important issues which required the presence of the petitioner. However, on the said date, the petitioner remained absent on the pretext of illness of his wife. Taking exception to such unauthorized absence, a written explanation was called from the petitioner by the respondent No. 4. Not being satisfied with the explanation furnished by the petitioner, a memorandum of charge dated 15/07/2008 imputing misconduct on his part was issued to the petitioner and he was also placed under suspension pending initiation of departmental enquiry. Thereafter, by the memorandum dated 29/07/2008 additional charges was served upon the petitioner alleging negligence in discharge of official duties involving moral turpitude; unauthorized absence from duty without any prior intimation and also on the ground of having strained relationship with the co-workers and colleagues including reports of misbehaviour indulged by the petitioner.

5. Although, the petitioner had submitted his reply denying the said charges, yet, the same did not find favour with the authorities and by an order dated 08/08/2008, the services of the petitioner was terminated.

6. The petitioner challenged the order dated 08/08/2008 before the Central Administrative Tribunal (CAT) by filing OA No. 147/2008 and the learned Tribunal stayed the order of termination by the order dated 21/08/2008. As a result of the interim order dated 21/08/2008 passed by the CAT, the petitioner continued in service. However, since his initial period of probation for one year was coming to an end, hence, by the order dated 24/12/2008 the probation period of the petitioner was extended for a further period of six months with effect from 20/12/2008 to 19/06/2009. However, the petitioner was debarred from attending to any matter relating to accounts from 04/09/2008 until further orders. Again on 24/06/2009, the probation period of the petitioner was further extended for another six months with effect from 20/06/2009 to 19/12/2009. In the mean time, the respondent authorities had withdrawn the termination order dated 08/08/2008, as a result of which OA No. 147/2008 was disposed of as having been rendered in fructuous.

7. On 04/09/2009, the petitioner had demanded payment of his salary and other pecuniary benefits relating to the period of suspension, which prayer having been rejected by his employer, the petitioner had once again approached the CAT by filing OA No. 223/2009. The said application was disposed of by the order dated 28/10/2009 with a direction upon the respondents to dispose of the representation filed by the petitioner by issuing a reasoned order. In the mean time, on 19/10/2009 the petitioner had received a notice from the Central

Bureau of Investigation (CBI) asking him to appear as a witness in connection with the investigation of a case registered against the respondent no. 3 i.e. incumbent in the office of Director of the IIE, Guwahati. Meanwhile, in compliance with the order dated 28/10/2009 passed by the CAT, the respondent no.4 had issued order dated 04/12/2009 rejecting the claim of the petitioner regarding payment of salary for the period during which he had remained suspended as well as for the period of termination of his services. Thereafter, on 16/12/2009, the respondent no. 4 had issued the impugned order terminating the service of the petitioner with immediate effect with a further direction to vacate the official accommodation. On 01/12/2009, the respondent no. 4 had also lodged an FIR against the petitioner, based on which Basistha PS Case No. 577/2009 had been registered by the Police.

8. Aggrieved by the order of termination dated 16/12/2009 as well as the order requiring him to vacate the official residence, the writ petitioner had approached the CAT for the third time by filing OA No. 01/2010 which was dismissed by the learned Tribunal by the impugned order dated 31/08/2010. The review application preferred by the writ petitioner before the CAT also stood dismissed by order dated 20/09/2010. Being undeterred by the aforesaid orders passed by the CAT, the petitioner has approached this Court by filing the instant writ petition challenging the order of termination dated 16/12/2009 as well as the order dated 31/08/2010 passed by the CAT.

9. From the materials on record, it is apparent that the impugned order has been assailed by the petitioner primarily on following points :-

(i) The order of termination is both stigmatic as well as punitive in nature and hence, the service of the petitioner could not have been terminated without conducting enquiry in the matter after giving opportunity to the writ petitioner of being heard.

(ii) The termination of service of a probationer not being a matter falling within the day to day functioning of the institute, the same was within the exclusive domain of the Executive Committee and the Director of the Institute i.e. the respondent no. 4 was neither competent nor authorised to issue the order of termination.

(iii) Notwithstanding the specific clause contained in the appointment order providing for one month's notice to be issued to the petitioner before terminating his services, no such notice was issued to him resulting into invalidation of the order dated 16/12/2009.

(iv) The petitioner was not put to sufficient notice as regards any deficiency in his performance during the probation period and hence, the plea of unsatisfactory service raised by the respondents was untenable in the facts and circumstances of the case.

10. Mr. Dutta, learned counsel for the petitioner submits that the order of

termination, in reality, is an order of dismissal issued by the respondent no 3 out of a sense of vengeance towards the petitioner since he had not only pointed out several financial irregularities committed by the said respondent but had also received summons from the CBI to appear as a witness in connection with the investigation conducted on such allegation. Mr Dutta submits that serious allegations, such as, cheating, extortion, misappropriation of Govt. money etc. has not only been levelled against the petitioner in the charge memo dated 29/07/2008 but also in the FIR dated 30/11/2009. That apart, various stigmatic statements casting aspersion on the moral character of the petitioner have also been made in the written statement filed by the respondents before the CAT. Therefore, the plea taken by the respondent that the order dated 16/12/2009 is an order simpliciter is clearly untenable on the face of the record.

11. Placing heavy reliance on the decision of the Supreme Court in the case of Dipti Prakash Banerjee (supra) Mr. Dutta submits that since the order of termination was actually founded on allegation of misconduct, therefore, the same amounts to dismissal and ought to have been preceded by an enquiry. Mr. Dutta submits that the order dated 16/12/2009 is in clear conflict with the law declared by the Supreme Court in the aforesaid decision and is liable to be interfered with. The learned counsel has also relied upon the following decisions in support of his aforesaid argument :-

(i) Dr. Mrs Sumati P. Shere v. Union of India reported in (1989) 3 SCC 311.

(ii) Chandra Prakash Shahi v. State of U.P. and others reported in (2000) 5 SCC 152.

(iii) R.K. Angousana Singh v. Sainik School Society and ors. Reported in 2006 (1) GLT 717.

(iv) Jaswantsingh Pratapsingh Jadeja v. Rajkot Municipal Corporation and another reported in (2007) 10 SCC 71.

(v) Parshottam Lal Dhingra v. Union of India reported in AIR 1958 SC 36;

(vi) State of Bihar v. Gopikishore Prasad reported in AIR 1960 SC 689

(vii) Jagadish Mitter v. Union of India reported in AIR 1964 SC 449;

(viii) Nehru Yuba Kendra v. Mehbub Alam Iascar, reported in (2008) 2 SCC 479.

12. By referring to a recent un-reported decision of the Supreme Court in the case of Ratnesh Kumar Choudhury v. Indira Gandhi Institute of Medical Sciences, Patna, Bihar and others, Mr. Dutta has strenuously argued that the Supreme Court had deprecated the action on the part of the authorities in terminating the services of a probationer by holding an enquiry behind his back and according to the learned counsel, the ratio of the decision of the Supreme Court would be squarely applicable in the facts of the present case as well.

13. Mr. Dutta, has further argued that by the notification dated 31/03/2006

issued by the Government of India, Ministry of Small Scale Industries, Udyog Bhawan, addressed to the respondent no.4, a two tier system of governance was introduced in the IIE, whereby the authority to run the institution was vested upon the Governing Council and the Executive council. IIE being an organisation under the Ministry of Micro Small and Medium Enterprises, Government of India, the instructions of the Central Government would have a binding affect upon the IIE. In such view of the matter, the respondent no. 4 was not vested with the power to terminate the petitioner's service. By referring to clause 5 of the appointment order, Mr. Dutta further submits that in view of the specific condition contained in the appointment order requiring one month's prior notice, the respondents could not have invoked the provision of Rule 5 of the CCS (Temporary Service) Rules, 1965, so as to dispense with such notice while terminating the petitioner's service.

14. Per contra, Mr. P.K. Tiwari, learned senior counsel for the respondents has argued that the order of termination dated 16/12/2009 was an order simpliciter as the perusal of the same would go to show that no stigma is attached to it. By referring to various decisions of the Supreme Court, more particularly, Chandra Prakash Sahi v. State of U.P. reported in (2000) 5 SCC 152 ; Radheshyam Gupta v. U.P. State Agro Industries Corporation Ltd. reported in (1999) 2 SCC 21 as well as Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and others reported in (1999) 3 SCC 60, Mr. Tiwari submits that the events prior to issuance of the order of termination may at best constitute the motive but not the foundation of the order of termination. According to the learned Senior Counsel, the respondents had merely acted as per the terms of the appointment order by discharging the petitioner during the probation period since his continuance in the department was thought to be unnecessary.

15. Refuting the plea of incompetence of the respondent no. 4 to issue the order of termination, Mr. Tiwari submits that the respondent no.4 being the appointing authority of the petitioner, he certainly had the power to issue the order of termination. By referring to the minutes of the 15th executive committee meeting of IIE held on 27/08/2008, Mr. Tiwari submits that under agenda item no. 8, the executive committee had duly authorised the Director of IIE to take suitable action in the matter as per law and rules and as such the contention raised by the petitioner is wholly without any basis. Mr.Tiwari further submits that the petitioner has been offered one month's salary in lieu of one month's notice prior to issuance of the order of termination. Since he had declined the same, the petitioner cannot now agitate the matter before this court.

16. By referring to the condition no. 16 of the order of appointment, Mr. Tiwari submits that as per the said clause, relevant rules and orders issued by the Government of India from time to time would be applicable on the writ petitioner. The petitioner being in temporary service, the provisions of the CCS (Temporary Service) Rules, 1965 will be applicable in his case. As such, there was no

illegality in terminating the service of the petitioner by offering him one month's salary in lieu of the notice period. In support of the aforesaid argument, Mr. Tiwari has relied upon the decisions of the Supreme Court in the case of *Union of India v. Arun Kumar Roy* reported in AIR 1986 SC 737 and *Municipal Corporation of Delhi v. Premchand Gupta* reported in (2010) 10 SCC 115.

17. Refuting the argument made on behalf of the petitioner to the effect that no opportunity was given to the writ petitioner to remove his deficiencies in service and to improve his performance during the probation period, the learned senior counsel for the respondents submits that the petitioner himself had annexed as many as six such letters issued by the respondents in his original application filed before the Tribunal and, therefore, the said plea was wholly without any basis. The learned senior counsel has produced the original records connected with the case to contend that the petitioner had been put to notice on a number of occasions asking him to improve his performance and / or devotion to duty but such reminders / notices had failed to evoke the desired response from the writ petitioner.

18. As regards the objection raised by the writ petitioner regarding the pleadings contained in the written statement filed in connection with the IA making allegations against the petitioner casting aspersion on his moral character, Mr. Tiwari submits that those statements had been made in rebuttal of the averments made in the Original Application filed by the writ petitioner and the same cannot be relied upon to supplement the order dated 16/12/2009. In support of his aforesaid argument, Mr. Tiwari has relied upon the decision of the Supreme Court in the case of *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences* and another reported in (2002) 1 SCC 520 as well as *Union of India and others v. A. P. Bajpai and others* reported in (2003) 2 SCC 433, *Municipal Committee, Sirsa v. Munshi Ram* reported in (2005) 2 SCC 383.

19. We have considered the rival submissions made by and on behalf of the parties and have also examined the materials available on record including the original records produced by the departmental counsel.

20. There is no dispute about the fact that by the order dated 20/11/2007, the petitioner was appointed as Accounts Officer in the IIE, Guwahati on temporary basis and was put on probation initially for a period of one year with effect from 20/12/2007 i.e. his date of joining the post. However, on completion of the said period of one year, his probation period was further extended till 19/06/2009 and thereafter, till 19/12/2009. Therefore, on the date on which the petitioner was discharged from service by the impugned order dated 16/12/2009, he was still under probation.

21. The law is well settled that the service of a probationer can be terminated in terms of the contract by giving one month's notice. In the case of *Parshotam Lal Dhingra v. Union of India* reported in AIR 1958 SC 36, the Supreme Court had held that during the period of probation an employee is taken on trial and

therefore, such appointment is of transitory character. The appointee does not acquire any substantive right to the post and his service would be terminable at any time during the probation as per the terms of the contract. Following the interpretation given to Article 311 of the Constitution in the case of Parshotam Lal Dhingra, a Constitution Bench of the Supreme Court in Jagdish Mitter v. Union of India, AIR 1964 SC 449, has held that the tenure of probationer is of a precarious nature and his service can be terminated by one month's notice without assigning any reason either under the terms of contract which expressly provides for such termination or under the relevant statutory provision. In such cases, the employer has two options, either to discharge him purporting to exercise the power under the contract or to dismiss the temporary employee by issuing an order of dismissal. If a temporary servant or probationer is discharged on being found that his services were not satisfactory there would be no necessity to comply with the mandate of Article 311. If on the other hand, the power is used to dismiss a temporary servant, he could legitimately invoke the protection of Article 311(2) of the Constitution. The law laid down in the case of Jagdish Mitter (supra) has had been reiterated in a number of subsequent decisions of the Supreme Court and we do not consider it necessary to burden this judgment of ours by referring to each of those decisions.

22. For the purpose of the deciding as to whether an order of termination is in essence, an order of dismissal or not, the test laid down by the Supreme Court in the case of Jagdish Mitter (supra) is that - does the order cast aspersion or attach stigma to the employee when it purports to discharge him? It would, therefore, be necessary to refer to the true meaning of the term "stigma".

23. In P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edition, Vol, IV), the word 'stigma' has been defined as "a mark of infamy, a disgrace or reproach attached to any one". Quoting the Webster's New World Dictionary, the Supreme Court had explained the word 'Stigma' in the case of Kamal Kishore Laxman v. Pan American World Airways reported in (1987) 1 SCC 146 to mean that it is something that detracts from the character or reputation of a person, a mark, sign etc. indicating that something is not considered normal or standard. Similar observations from the legal Thesaurus as well as Webster's 3rd New International Dictionary had also been quoted in the said judgement.

24. Now reverting to the facts of the present case, from a perusal of the record, we find that number of communications had been issued to the petitioner conveying the displeasure of his employer about the manner in which he was performing his duties. Such communications carried sufficient indications that the employer was not satisfied with the performance of the petitioner affording him sufficient opportunity to improve his performance of duty, which he had failed to do. It was towards the end of the extended probation period that the Administrative Officer of the IIE, Guwahati had put up a note before the Director of the Institution, which reads as follows :-

"With reference to Director's Note No. F (PF)/42/98-99/2206 dated 10.11.2009,

the case of Shri Lakhyajit Deka in the matter of his confirmation along with his service profile so far is given below:

1. Appointment:

In pursuance to an advertisement dated 16.11.2006 in The Assam Tribune for filling up a vacant post of Account Officer in IIE an interview was held on 20/11/07 and Sri Lakhyajit Deka (herein after referred to as Sri Deka) participated in the selection process and he was selected by the Selection Committee and he was appointed on Probation vide this Office's Letter No. IIE/f/(65)/97-98/6993 dated 20/11/07 and his appointment was purely on temporary basis. He joined in I.I.E. on 20/12/07.

2. Performance:

"The following tasks were given to Sri Deka during his probationary period and the evaluation of the same could reasonably be done by analysing the data appended below:

(A) First task:

After his joining, an important task was given to him. He was entrusted with the responsibilities of finalization of accounts of the Institute i.e. Indian Institute of Entrepreneurship for the financial year 2007-2008 and the same was to be completed by April/ May 2008.

Result:

Could not be completed by Sri Deka till August, 2008, however, it was completed later on by Accounts section staff after few corrections on both Income & Expenditures as pointed by the third party auditors.

(B) Second Task:

Thereafter on 09.09.08, Shri Deka, was entrusted with certain works to be completed by visiting Central Public Works Department (CPWD) vide this office's Letter No. IIE/F(PF)/57/2007-08/1146 dated 09.09.08. The works entrusted to Sri Deka was very important and that pertains to his department. A huge amount of advances were paid to CPWD since 1993 on account of various projects/ construction works done at Indian Institute of Entrepreneurship, Guwahati, against which Expenditure Statement of each project and Utilization Certificates were to be obtained from CPWD. Sri Deka was to find out the actual amount of money lying unspent with the CPWD.

Result:

Sri Deka vide his letter 22.09.08 explained that he could not get anything done at CPWD Office even though he has been given all the files related to CPWD to carry out his works.

(C) Third Task:

Sri Deka was also asked to follow up the matter of payment receivable from NSIC to IIE, and he was detailed for the job vide Office Note dated 01.04.09.

Result:

Sri Deka vide his letter dated 02/04/09 informed this Office that he had visited the NSIC prior to the office note of the Director vide note dated 01/04/09 and had took up the matter with the concerned officer of the NSIC and he also stated that the NSIC has assured that the sum receivable from them shall be remitted on or before 31st March 2009. However, the said receivable sum had not been received on or before 31st March, 2009.

(D) Fourth Task:

(i) Thereafter vide letter No. F(16)/2009-10/271 dated 04.05.09, Shri Deka was entrusted with the work of physical verification of Library Books and Periodicals and to submit report on or before 04.06.09.

Result:

Sri Deka did not submit any report in the stipulated time neither any explanation was given assigning reason for delay in submitting the said report.

(ii) Due to non completion of the above referred task by Sri Deka the Director issued another letter vide letter No. F(16)/2009- 10/730 dated 19.06.09 to Shri D.K. Gogoi and he was directed to probe into the matter of delay in submission of report.

Result:

Shri D.K. Gogoi informed that an incomplete report was submitted by Shri Deka firstly to him then to Dr. S.K. Saikia during the absence of the Director on 29.06.09. But the said report was returned to Shri Deka as it was not addressed to any one and seemed to be incomplete.

(iii) Even after return of the Director, Sri Deka did not submit any report to the Director and Sri Deka was asked to explain the reasons of delay vide Memo No. F(16)/2009-10/903 dated 03.07.09.

Result:

In reply to the aforesaid Memo Shri Deka on 06.07.09 submitted a verification report dated 29.06.09 which, however, had been treated as an unsatisfactory report since not prepared properly and not duly signed by Sri Deka.

(E) Fifth Task:

Thereafter vide Office Order No. M (117) 2009/1176 dated 28.07.09, Shri Lakhyajit Deka was directed to go to Ziro in Arunachal Pradesh to collect some information as detailed thereon. Shri Deka was to leave for Ziro by 29.07.09 and he was also advised to take guidance from Shri Shantanu Mohan Deka, Asstt.

F.M. on 31.07.09.

Result:

Sri Deka did not go to Ziro in Arunachal Pradesh on the pretext of back pain and submitted an application seeking leave for one day. However, he was advised by his Doctor to take rest for 20 (twenty) days.

Period of Probation:

Sri Deka was initially appointed on probation for a period of one year, which, however, had been extended vide Office Order No. F(PF)/57/07-08/1705 dated 24.12.2008 and (ii) vide No. F(PF)/57/07-08/818 dated 24.06.2009 for another six months with effect from 20.06.09 to 19.12.2009.

The above note is placed before The Hon^{ble} Director for his kind perusal and decision thereof as regard the confirmation of Sri Lakhyajit Deka, AO (on Probation).

Administrative Officer

Director "

25. Taking cognizance of the aforesaid note put up by the Administrative Officer, the respondent no. 4 had recorded his observations in the file recommending discharge of the petitioner. The observations of the respondent no. 4 would be relevant for the purpose of appreciating the contentious issues raised in this proceeding and the same is, therefore, quoted herein below :-

"The office note dt. 16.12.09 placed before me is for perusal and to take decision as regard the confirmation of Shri Lakhyajit Deka, Accounts Officer (on probation).

I have closely perused the entire office note placed before me and I have found that Shri Deka has got enough opportunity to prove his talent to satisfy the appointing authority, which, however, failed to capitalize. The Appointing Authority had extended Shri Deka's probationary period by one (1) year so that he could prove his mettle but in vain.

Be that as it may, the Appointing Authority is not satisfied with the performance and services rendered by Shri Deka. Hence, the undersigned being his appointing authority has decided to dispense with the services of Shri Lakhyajit Deka, Accounts Officer (on probation) forthwith giving him one month salary in lieu of notice. So he is hereby released/ discharged from his service forthwith.

Sri Deka is hereby asked to vacate residential accommodation provided by this office on or before 7.01.2010 from the receipt of notice. Let appropriate notices be prepared and served upon him forthwith.

For further action of AO."

26. Based on the note dated 16/12/2009 of the respondent no. 4, the order of termination dated 16/12/2009 was issued. The said order is quoted herein below for ready reference :-

"Indian Institute of Entrepreneurship (An Organisation of the Ministry of Micro, Small and Medium Enterprises, Govt. of India) Lalmati, Basistha Chariali, Guwahati-29, Assam

No. F(PF)/57/2007-08/2383

Date : 16/12/09

Notice

Under Sub-Rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965.

In pursuance of sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965, I hereby give notice to Sri Lakhyajit Deka, Accounts Officer (on probation) son of Late Bipul Ch. Deka presently residing at I.I.E. Offers Flat No. 103, Rajdhani Apartment, R.G. Barua Road, Guwahati- Assam and permanent resident of village Kumaranichiga Taluk, Barbaruah, District ? Dibrugarh, Assam that his services has been terminated forthwith. Sri Lakhyajit Deka is hereby requested to receive one month average pay in lieu of notice.

Guwahti

Date : 16/12/09

Sd/-

(K. Ahmed)

Director

To

Shri Lakhyajit Deka, (Accounts Officer on Probation),

IIE, Guwahati-781029

CC.

1. Accounts Section.
2. Office Order File.
3. Personal File.

Sd/-(K. Ahmed)

Director "

27. From a reading of the order dated 16/12/2009 as well as the notes put up in the record, it is apparent that there is no stigma cast on the petitioner nor is the

order dated 16/12/2009 a punitive order. It is no-doubt true that the respondents had earlier served a charge memorandum upon the petitioner on 15/07/2008 which was followed by the memorandum dated 29/07/2008 containing additional charges. However, it is also true that neither any enquiry proceeding was conducted in respect of the said charges nor have the respondents recorded any finding as regards the truth of the said allegations.

28. In the case of Dipti Prakash Banerjee(supra), the order of termination served upon the probationer was evidently based on findings of the enquiry committee holding the behaviour of the appellant as "reprehensible" wherein he was found to be guilty of inefficient performance of duty, irregular attendance, rude and disorderly behaviour and wilful insubordination. The enquiry committee had also recommended that the appellant be punished on the basis of such finding. The order of termination had a clear reference to the report of the enquiry committee. It was in such fact-situation that the Supreme Court had held that the order of termination was stigmatic in nature as the same was founded on allegation of misconduct. In the case in hand, although certain allegations were levelled against the petitioner by the charge memos dated 15-07-2008 and 29-07-2008, yet, as has been noticed above, no enquiry proceeding was initiated by the respondents for establishing those charges. The noting in the file, as mentioned above, also does not make any reference to any allegation but merely indicates the poor performance of the duty assigned to him during the probation period, as the reason for discharge from service. As such, the ratio laid down in the case of Dipti Prakash Banerjee(supra), in our opinion, would not have any application in the facts and circumstances of the present case.

29. Even in the case of Ratnesh Kr. Choudhury (supra),unlike the case in hand, the services of the appellant were terminated on the basis of an investigation carried out by the Vigilance Department which had submitted a report stating that his appointment was illegal. The investigation was initiated on the basis of a complaint made by a member of the Legislative Assembly alleging that the appellant did not possess the requisite qualification and was appointed to the post of "Chest Therapist". It was in such factual backdrop that the Supreme Court had held that the ex parte enquiry held behind the back of the delinquent employee containing the stigmatic remarks being the basis of the order of termination, the same was founded on such stigmatic remarks and was not the motive. The Supreme Court has held that stigma had been cast in view of the report received by the Central Vigilance Commission, which was ex parte and when that was put to the delinquent employee, the holding of a regular enquiry was imperative.

30. In the case of Benjamin (AG) v. Union of India (supra), the Constitution Bench of the Supreme Court had observed that a formal departmental enquiry dropped against the appellant before it could be completed would not impose a stigma on the employee.

31. What, therefore, follows from the aforementioned authorities is that unless

an order of termination is based on allegations of misconduct, the same cannot be termed as an order of dismissal but will have to be treated as an order of termination simpliciter. If the employer conducts an enquiry to find out the truth as regards such allegation and acts on the basis of the finding reached by such enquiry held behind the back of the probationer, the order of termination would be "founded" on such allegation and would be deemed to be stigmatic, in which case the employee would be entitled to invoke Article 311(2) of the Constitution.

32. Applying the test as enunciated above, we find that in the present case an objective assessment of the performance of the petitioner was made by his employer before the end of the extended period of probation. The services of petitioner having been found to be unsatisfactory, he was discharged by the impugned order dated 16/09/2009. In the case of *Kamal Nayan Mishra v. State of M.P.* reported in (2010) 2 SCC 169, the Supreme Court has held that the probationer does not have any substantive right to hold the post and is not entitled to protection under Art. 311. His services can be dispensed with during or at the end of the probation period if found unsatisfactory or unfit for appointment. For the foregoing reasons we are of the opinion that the order dated 16/12/2009 is an order of termination simpliciter and the employer has issued the same by invoking clauses 4 and 5 of the order of appointment.

33. As regards the contention of the petitioner regarding the allegations made in the FIR as well as pleading contained in the written statement filed before the CAT in connection with the OA, we find that such averments had been made only to rebut the allegations made in the OA. Law is well settled that an affidavit cannot be relied upon to improve or supplement an order. Likewise, the purpose of lodging an FIR being merely to put the criminal investigation machinery in motion, the same cannot also in any way be termed as stigmatic to any person named therein. This is for the simple reason that mere lodging of an FIR does not establish the correctness of the allegations made therein, which is the subject matter of investigation by the Police. As such, the first point stands decided against the writ petitioner and in favour of the respondents.

34. Coming to the next question raised by the petitioner regarding violation of clause 5 of the condition of appointment on the ground of non-issuance of one month's prior notice, we find that the respondents had offered one month's salary to the petitioner in lieu of notice but the same was declined by the petitioner. It is not in dispute that the petitioner was in a temporary employment and was serving the probation period. As such he was not holding lien over the post as it was not a substantive appointment to that post. Such being the position, in view of clause 16 of the order of appointment, there can be hardly any doubt that the CCS (Temporary Service) Rules, 1965 would be applicable in the case of the petitioner. Again, in the case of *Oriental Insurance Co. Ltd. v. T. Mohammed Raisul Hassan* reported in (1993) 1 SCC 553, the Supreme Court while dealing with a similar clause in the appointment order, had observed that the breach of the said clause could at best enable the employee recover one

month's salary but the non-service of one month's notice would not invalidate or vitiate such termination. Therefore, viewed from any angle, the submissions of Mr. Dutta on the above point does not merit acceptance by this court.

35. The next point urged by the petitioner is as regards the competence of the respondent no. 4 i.e. the Director of IIE to issue the order of termination. As has been noted above, the respondent no. 4 is the appointing authority. That apart, as per the resolution adopted against agenda item No. 8 in the minutes of the 15th meeting of the Executive Committee of the IIE held on 27/08/2008, the Director had been duly empowered to take suitable decision in the matter as may be permissible under the law. On the contrary, there is nothing on record to show that the Governing Council or the Executive Council had disapproved the decision of the respondent No. 4 to discharge the petitioner during the probation period. We, therefore, do not find force in the submission of the learned counsel for the petitioner on this point as well.

36. The next point raised by the petitioner is as regards non-issuance of sufficient warnings to the petitioner giving him an opportunity to improve his performance. As has been noted above, a scrutiny of the records goes to show that a number of notices had already been issued to the petitioner requiring him to improve his performance as well as devotion to duty. However, despite such warnings, the petitioner has failed to suitably respond to the requirement of the employer. In the case of Dr. Shere (Supra), the Supreme Court had observed that if the employer wishes to remove the employee from service what was proper and necessary that he should be told in advance that his work and performance are not up to the mark. There was no need for the employer to conduct a regular enquiry in such cases. We also find from the record that the employer had made an objective assessment of his performance before the end of the extended probation period. Therefore, we are unable to accept the submission of the learned counsel for the petitioner on this point .

37. For the reasons stated herein above, we are of the opinion that the Tribunal was justified in passing the impugned order dated 31/08/2010 dismissing the OA on the grounds mentioned in therein. In the result, this writ petition is held to be devoid of any merit and the same is accordingly dismissed.

38. We, however, make no order as to costs.