

(2017) 03 BOM CK 0141
In the Bombay High Court
Case No : 4051 of 2001

The Principal

APPELLANT

Vs

(Dr.) Mrs.Reshmi Tyagi

RESPONDENT

Date of Decision : 23-03-2017

Acts Referred:

[Constitution of India](#), [Article 226](#) -
Power of High Courts to Issue certain writs
[Maharashtra Universities Act, 1994](#), [Section 59](#) - Right of appeal

Citation : (2017) 03 BOM CK 0141

Hon'ble Judges : G. S. Kulkarni

Bench : SINGLE BENCH

Advocate : Yashodeep Deshmukh, Mahesh Mishra, Amit T.Dubeyi, Ravi Thankaian, Sunil D. Dighe

Judgement

1. This petition filed under Article 226 of the Constitution of India challenges the judgment and order dated 29 June 2001 of the learned Presiding Officer, Bombay University and College Tribunal (for short "the Tribunal"), whereby the orders of termination dated 19.4.1999, of the petitioner, terminating the probationary appointment of respondent No.1 are quashed and set aside with a direction to reinstate the services of respondent No.1 with 50% backwages.

2. In nutshell the facts are : Petitioners are conducting a Arts, Science and a Commerce college at Mumbai. By a letter of appointment dated 10 September 1997, Respondent No.1 was appointed as a full time lecturer with effect from 4 September 1999 in the subject of Chemistry on purely temporary basis for one year up to 20 April 1998 and subject to the approval of the University of Bombay. The services were to be governed by the provisions of Bombay University Act, 1974 and the Statutes, Ordinances, Regulations and Rules of the University.

3. The Petitioners by a letter dated 19 March 1998 informed Respondent No.1 that University of Bombay has approved appointment of Respondent No.1 by a

letter dated 12 February 1998 as a FullTime Lecturer in Chemistry "on probation" basis from 4 September 1997.

4. The case of the Petitioners is that the appointment of Respondent No.1 being a probationary appointment, the assessment of performance was required to be undertaken. In this regard, the Petitioners have referred to letters dated 26 May 1998, 8 July 1998, 8 July 1998, 18 July 1998, 8 October 1998 as also the "form of assessment of work of college lecturers" as required to be maintained as per the University Statute 422 namely "Appendix - D2" for the academic year 1997-98 and 1998-99. The contents of these letters can be noted.

5. By letter dated 26 May 1998, the Petitioners informed Respondent No.1 that the self assessment of the work as submitted in Appendix D2 for the academic year 1997-98 showed that the teaching/practical performance is very poor and Respondent No.2 should improve the same. Similarly by letter dated 8 July 1998 this letter pertaining to S.Y.B.Sc., Respondent no.1 was informed in regard to negligence in the experiments which had caused a loss to the department and the institute. Respondent no.1 was given instructions to take adequate care in such matters in future. Another letter dated 8 July 1998 pertaining to T.Y.B.Sc, concern was in regard to gravimetric and volumetric solutions given to students of T.Y.B.Sc. without performing the analysis of the experiment before distributing it to the students. It was informed that this caused variations in the results of the students and the students do not get the correct results. Respondent No.1 was informed that it was her duty to check the solutions and take readings prior to the practicals. Further a letter dated 18 July 1998 the Petitioners informed Respondent No.1 of her being relieved from T.Y.B.Sc Chemistry Practical with effect from 18 July 1998 and was instructed to cooperate with the senior colleagues in the department in smooth and proper conducting of practicals. As regards letter dated 8 October 1998 of the Petitioners to Respondent No.1, it was in the nature of warning firstly in relation to the complaints of the students that Respondent No.1 was not preparing lessons and was unable to explain the topics properly as also Respondent No.1 was not solving queries of the students on the subject and secondly that inspite of earlier memos/warning, Respondent No.1 was not taking care to perform the exercises before giving solutions to the students and with the result, large quantity of chemical was wasted which was a loss to the college as also the whole schedule of practical was disturbed. In a letter dated 7 October 1998 of the Head of the Department of Chemistry addressed to the Principal of the College, the Head of the Department informed various complaints of the students in regard to the practicals being conducted by Respondent No.1.

6. Further Appendix "D2" a form for assessment of work of college lecturers was maintained for the Academic year 1997-98 and 1998-99 which contains evaluation of the performance of Respondent No.1 in which at page 4 on a statement titled "Evaluation by the Head of the Department or the Seniormost in the Department or Principal" in items (III), (V), (VI) and (X) the performance is shown to be poor

and at item (VII), (VIII) and (IX) it has been shown to be average and the observation of the Principal dated 25 May 1998 on the evaluation of the Head of the Department was with a remark "below average". Further in the form "Appendix D2" for the academic year 1998-99 dated 23 March 1999 in item nos. III, VI and X the evaluation was shown to be poor, in respect of item no. V, it was shown to be average and in respect of item no. VII and IX, it was shown to be good. On this evaluation of the department, the observation of the Principal was with a remark "Not satisfactory".

7. The petitioner's case is that the letters dated 8 July 1998 and 18 July 1998 were not replied by respondent no.1 and only after the warning letter dated 8 October 1998, the Respondent No.1 submitted a reply dated 27 October 1998 in which the Respondent took the opportunity to reply to all the letters/memos of the Petitioners dated 26 May 1998, 8 July 1998. In this reply Respondent No.1 also raised a technical issue to state that "Appendix D2 form", is for confirmed teachers and what Petitioner's should have maintained was the form in Appendix D1. There was no specific denial of the contents of memos by respondent no.1, however respondent no.1 stated that her performance was proper and requested that the warning letter dated 8 October 1998 be withdrawn.

8. On the above background by a communication dated 19 April 1999 the petitioners terminated the probationary appointment of respondent No.1 in terms of letter of appointment issued to respondent No.1. The termination letter reads thus: "Madam, With reference to above letters, your appointment as a Lecturer in the Department of Chemistry, in this College stands terminated w.e.f. Monday, the 31st May, 1999 (A/N) under S.418(1) of Terms and Conditions of Service of Teacher No. Aff/Recog/457 of 1984 dt. 14.08.1984 of Bombay University Act, 1974. Sd/19.4.99 (Dr. S.G.A. Zaidi) PRINCIPAL sd/

9. Respondent No.1 being aggrieved by the above communication terminating her services approached the University and College Tribunal by filing an appeal under Section 59 of the Maharashtra Universities Act, 1994. The termination was challenged by Respondent No.1 inter alia on the principal ground that no show cause notice and inquiry was conducted before terminating her services. It was contended that the termination was mala fide without any reason and without following due process of law. It was the case of Respondent No.1 that the warning letters were issued on false ground. Respondent No.1 also contended that in the letter dated 27 October 1998 she had furnished a proper explanation in regard to all the memos issued to her. It was also contended that the order of termination casted a stigma on Respondent No.1.

10. Petitioners appeared before the tribunal in the Respondent's appeal as also filed their written statement inter alia denying the case of Respondent No.1 in the appeal. It was contended that Respondent No.1 was appointed on probation and during the course of the probation her performance was examined and assessed in accordance with the procedure, as also shortcomings in the performance of her duties were also informed to the respondent no.1 from time to time. It was

denied that the order of termination dated 19 April 1999 was punitive, casting any stigma on Respondent No.1. It was the case of the petitioners that neither the termination order, cast any stigma nor was it a case of misconduct or any action punitive in nature, but the same was in accordance with the terms and conditions of the service of Respondent No.1, as Respondent No.1 was terminated during probation, on account of unsuitability and unsatisfactory performance. The case of Respondent No.1 that a show cause notice was required to be issued or that the action in issuing the termination order is malafide, was denied by the petitioners in dealing with respondent no.1's case on merits in the written statement.

11. The learned Presiding Officer of the University Tribunal by the impugned judgment and order allowed the appeal of Respondent No.1 directing reinstatement. The impugned order proceeds on the premise that there were certain procedural irregularities in maintaining D1 and D2 form which pertained to the assessment of Respondent No.1's performance. The Tribunal also took into consideration the service record of Respondent No.1 prior to issuance of appointment letter namely, the earlier temporary appointment. As regards suitability of respondent no.1, the learned Presiding Officer took into consideration the qualification of Respondent No.1 and observed that a general rule would be that a person having good educational qualification would a good teacher.

12. In assailing the impugned orders passed by the Tribunal, Mr. Deshmukh, learned Counsel for the petitioners, has made the following submissions : i) The appointment of respondent no.1 was, admittedly, an appointment on probation of two years, that is, for the academic years 1997-1998 and 1998-1999 and this was subject to assessment of performance of respondent no.1. Taking into consideration the assessments, the respondent no.1, by the communication dated 19 April 1999, the services of Respondent No.1 were simplicitor discharged. ii) There is nothing in the discharge letter dated 19/04/1999 casting any stigma on respondent no.1. iii) The termination simplicitor was in consonance with the letter of appointment and the requirement under the rules. iv) The termination being a simplicitor termination, it cannot be called to be a punitive action requiring the Departmental Enquiry to be held as alleged by the respondent no.1. v) The respondent no.1, at no point of time, had raised a grievance about the memos issued to her from time to time, except her reply to the memo dated 08/10/1998 in which the respondent no.1 tried to reply the earlier memos dated 08/07/1998 and 18/07/1998. vi) Respondent no.1 could never have urged about any fabrication or interpolation in the assessment report namely Form D2 maintained by the petitioners and in any case, by no stretch of imagination, one or two entries as objected in the said assessment report can be said to be any fabrication or interpolation or change the assessment conclusion in the report. vii) It is not the case of respondent no.1 that the other entries in Form D2 which assessed the performance of respondent no.1 to be average, could be objected by respondent no.1. viii) The petitioners had sufficient

material, namely, the memos, the assessment sheet in Form D2 for the respective academic years on the basis of which the Governing Body was within its powers to reach a conclusion that the probation of respondent no.1 ought not be conformed. ix) As regards the grievance of respondent no.1 that Form D2 was maintained and not Form D1, it is submitted that no prejudice whatsoever is caused to respondent no.1, inasmuch as, this would not obliterate the requirement of having a record for the purpose of assessment of the performance of respondent no.1. It is submitted that, in fact, providing Form D2 was more beneficial, inasmuch as, the entire information in regard to the assessment of respondent no.1's performance was informed to respondent no.1. x) It is submitted that in any case, even if Forms D1 and D2 are maintained, for the assessment of performance of a probationary appointee, no grievance can be made by the respondent no.1 if the same are taken into consideration to take a decision on the confirmation of probation or otherwise. xi) Respondent no.1 had no material to show that the performance of assessment, as undertaken, was without any basis or in that case, even the final decision would have no basis. xii) It is submitted that it would be completely the discretion of the management to undertake performance appraisal and there is no requirement of having several materials but even a meagre material would be sufficient material to take a decision to terminate an employee during the probationary period, by not confirming the probation. xiii) All the grievances which are raised by respondent no.1, are raised for the first time before the Tribunal and there is no material of any prior grievance in that regard as made by respondent no.1. In support of his submissions, learned Counsel for the petitioners has relied on the following decisions : i) Abhijeet Gupta Vs. S.N.B. National Centre, Basic Sciences and Others, (2006) 4 Supreme Court Cases 469 ii) Chaitanya Prakash and Anr. Vs. H. Omkarappa, (2010) 2 Supreme Court Cases 623 iii) Syed Azam Hussaini Vs. Andhra Bank Limited, 1995 Supp (1) Supreme Court Cases 557 iv) Registrar, Appellate Side, High Court, Calcutta & Ors. Vs. Jayanta Kumar Dasgupta & Ors. 2005 SCC OnLine Cal 171 : 205 3 CHN 52 : (2005) 5 SLR 197 (DB) : 2005 Lab IC 3783

13. On the other hand, Mr. Dighe, learned Counsel for respondent no.1, has made the following submissions : i) The petitioners have not followed the mandatory procedure as required under Statute 418 (1) of the Bombay University Statutes read with Statute 422, in terminating the services of respondent no.1. ii) It was mandatory for the petitioners to maintain form in Appendix D1 as Statute 422 would provide, namely "the form of six monthly report for submission during the period of probation and for conformation in service of the teachers." However, what was maintained by petitioners was a form in D2 which is a "Form for assessment of work of a College Lecturer" as required under Statute 422. iii) The assessment in the forms are mala fide. Also, there is tampering at some places and to this effect, observations are correctly made in the impugned Judgment. iv) The termination of respondent no.1 was to accommodate another person whom the management wanted to accommodate

and not for bona fide reason or on poor performance of respondent no.1. v) Form D1 as filled up by respondent no.1 on 16/04/1999, bears signature of the Principal dated 25/04/1999 and thus, the Governing Body did not have sufficient material before it to pass a resolution not to confirm the probationary appointment of respondent no.1. vi) The assessment of performance of respondent no.1 during the probation period was required to be done objectively. vii) In support of his submissions, Mr. Dighe has placed reliance of a decision in the case of State Bank of India and Others Vs. Palak Modi and Another., 2012 STPL (Web) 699 SC

14. On the above rival submissions, I have perused the relevant documents as placed on record, as also the impugned Judgment.

15. It is not in dispute that the appointment of respondent no.1 under the appointment order dated 10/09/1997 was on probation. The probation was for two years as per the statutes of the University. The relevant statute for probation and confirmation is Statute No.418 which reads thus : " Probation and Confirmation 418 (1) A teacher shall, subject to the procedure prescribed for selection and appointment, be appointed, in the first instance, on probation for a period not exceeding 24 months from the date on which he joins duties after the expiry of which he shall 5 2012 STPL (Web) 699 SC be confirmed and informed accordingly in writing; or his services shall be terminated provided that at least one month's notice is served on him prior to the expiry of the period of probation or one month's Pay, D.A. and C.L.A. in lieu thereof, is paid to him. It shall not be necessary to assign any reason for terminating the services of a teacher on probation if it is held that he has not completed his probation satisfactorily. The Governing Body of the College may, in exceptional cases and for reasons to be recorded, reduce the period of probation and shall have the right to assess the suitability of a teacher for confirmation even before the expiry of the period of 24 months from the date of joining but not earlier than 9 months from that date on the basis of the assessment report justifying special consideration. (2) The Principal of the College shall maintain assessment report of a teacher on probation, in the form prescribed for the purpose by the University, as shown in Appendix "D1" for every six months and complete it at the end of each term of the academic year. The Principal shall send to the Chairman of the Governing Body, at least two months before the date of expiry of the period of probation, his assessment report with a definite recommendation. If a teacher is not to be confirmed at the end of the probationary period a confidential report justifying the recommendation should be attached and such cases be referred to the Chairman of the Governing Body for further action. The Governing Body shall be the deciding authority in such cases. (3) If the Governing Body terminates the services of a teacher on probation on the ground of reduction in workload or abolition of the post and if he is reappointed on probation in the same college or a college under the same Governing Body subsequently within a year, the period spent by a teacher on probation during the previous appointment(s) shall be counted towards the total

period of probation of 24 months. He shall be eligible for annual increment, condonation of break in service and confirmation, subject to satisfactory assessment report of his work in the college(s) in which he has served. (4) A teacher whose service is terminated during the period of probation on the ground of unsatisfactory assessment shall not be reappointed by the Governing Body." A perusal of the above statute would indicate that services of a probationary appointee can be terminated provided at least one month's notice is served on the appointee prior to the expiry of period of probation or one month's Pay, D.A. and C.L.A. in lieu thereof is paid. It also specifically provides that it shall not be necessary to assign any reason for terminating the services of a teacher on probation if it is held that he has not completed his probation satisfactorily. The Governing Body of the institution may, in exceptional cases, reduce the period of probation and shall have the right to assess the suitability of the teacher for confirmation even before the expiry of period of 24 months from the date of joining. Subclause (2) of Statute 418 also provides that Principal of college shall maintain assessment report of a teacher on probation, in the prescribed form in Appendix "D1" for every six months and complete it at the end of each term of the academic year. It provides that the Principal shall send to the Chairman of the Governing Body, at least two months before the date of expiry of the period of probation, his assessment report with a definite recommendation. It provides that if a teacher is not to be confirmed at the end of the probationary period a confidential report justifying the recommendation should be attached and such cases be referred to the Chairman of the Governing Body for further action. The Governing Body shall be the deciding authority in such cases.

16. In the case of Respondent No.1, assessment in the form Appendix "D2" was maintained by the Principal to assess the performance of respondent no.1. Statute 422 speaks about "Appendix D2". It would be appropriate to note as to what Statute 422 would prescribe. Statute 422 reads thus : " Assessment of Teacher's Work 422 "At the beginning of each term every teacher shall prepare his academic programme and submit it to the Principal through the Head of his Department, if any. At the end of the academic year the teacher shall prepare a report of the work done by him and submit it to the Principal through the Head of his Department, if any. The assessment report of the teachers shall be maintained by the Principal of the College in the forms as shown in Appendices "D1", "D2" and "D3" for the following purposes :A. (1) For submission of sixmonthly reports during the period of probation. (2) For confirmation in service of the teacher. B. (3) for assessment at the time of crossing the stage of Rs.1300/650 in the payscale of a Lecturer. C. (4) For consideration at the time of interview for a higher post. (5) For triennial assessment of the work of the teacher. (6) For other specific purposes. The adverse remarks as well as remarks of appreciation shall be brought to the notice of the teacher concerned by the Principal and in the case of the Principal by the Chairman of the Governing Body for their guidance. No Lecturer shall be permitted to cross the stage of Rs.1,300/650 in the revised payscale except on the recommendation of the

assessment committee which shall consist of the following persons : (1) The Principal of the College (convener), (23) Two nominees of the ViceChancellor for the college for a calender year. The assessment committee shall mark its recommendation in terms of the guidelines framed by the Executive Council from time to time." (emphasis supplied)

17. A perusal of Statute 422 would indicate that at the beginning of each term, "every teacher" shall prepare his / her academic programme and submit to the Principal through the Head of the Department. Thereafter at the end of the academic year, the teacher shall prepare a report of the work done by him and submit it to the Principal through the Head of the Department. It provides that the assessment report of the teachers are required to be maintained by the Principal of the college in the forms as shown in Appendices "D1", "D2" and "D3" which is for submission of sixmonthly reports during the period of probation and for confirmation in service of a teacher, as relevant for the purposes of the present case.

18. A cumulative reading of Statute 418 and Statute 422 makes it clear that for the purpose of assessment of performance of a probationer, form in Appendix "D2" can also become relevant. Statute 418 though prescribes the requirement of Form "D1" in subclause (2) for such assessment, however Statute 422 provides assessment report of the teachers to be maintained by the Principal of the college in the form in Appendices "D1", "D2" and "D3" for the purpose of assessment "during the period of probation and for confirmation in service of the teacher" as clauses (1) and (2) of Statute 422 would provide. This shows that there is nothing illegal for an institution to assess the performance by maintaining form Appendix D2.

19. In the present case, as the record would indicate, the petitioners had maintained the assessment of respondent no.1 in the form in Appendix "D2" which is meant for assessment for the work of College Lecturer. This was maintained for both the academic year 19971998 and 19981999. What is relevant is that the entire information in the various columns in Form "D2" for both the assessment years has been filled up by respondent no.1 and accordingly after filling up the said information, Respondent No.1 has endorsed her signature on the said form. For the academic year 19971998, the form as filled up by respondent no.1 is dated 23/03/1999. After this, form in Appendix "D2" was filled up by respondent no.1, in the columns as provided on the last page the same are filled up by the Head of the Department under the title "Evaluation by the Head of the Department" which is the assessment of respondent no.1's performance and containing assessment remarks. During the course of hearing of this petition, learned Counsel for petitioner was called upon to produce the originals before the Court as the Tribunal having considered the originals of these forms, have made certain observations. A perusal of the originals of these forms for both the assessment years shows that as regards the evaluation for the assessment year 19971998, the performance of respondent no.1 has been

shown to be "average" and at four places, it has been shown to be "poor". This is the assessment of the Head of the Department. This assessment is considered by the Principal with a remark "below average".

20. Similarly, in the assessment form for the academic year 19981999, at three places, the performance is shown to be "good", at one place, it is shown to be "average" and at three places, it has been shown to be "poor". This evaluation is made by the Head of the Department with an endorsement of the Principal as "not satisfactory" which is dated 12/04/1999.

21. The contention as urged on behalf of respondent no.1 is that in the column of evaluation as made by Head of the Department for the academic year 19971998, though there is no dispute about the three clear entries showing "average" performance, but at four places it is seen that there is some overwriting in the column of "average" and cancelling the "average", a tickmark has been made in column 4 as "poor". Similarly in the evaluation in the Form "D2" for the academic year 19981999, although there are three clear entries in the column "good" and one entry as "average", at three places, the "average" entry has been cancelled and there are tickmarks made in the column "poor" by Head of the Department. Learned Counsel for respondent no.1 does not dispute the remarks of the Principal that the performance is noted to be "not satisfactory", as also this assessment is made on 12/04/1999 that is before the meeting of the Governing Body.

22. Having considered the forms maintained in Appendix "D2" as regards the performance of respondent no.1 for academic years 19971998 and 19981999, it can be clearly seen that the Principal has made the observations of the performance being "below average" and "not satisfactory" for these respective academic years. Also, the contention of respondent no.1 of interpolation in the remark "average" as made by the Head of the Department cannot be accepted. This is for the reason that for the first academic year (19971998), there were three clear entries of "average performance" and there are four entries of "poor" performance. Even if the submission on behalf of respondent no.1 is to be accepted that the "average" remark (tickmark) was cut and entries were made in the column of "poor", this would not assist the respondent no.1. It can be very well seen that though at some places, "average" has been cancelled and initialed and there are tickmarks in the column "poor", it would not obliterate the clear entries of "average" performance made in the other columns, on which there is no dispute of any cancellation or interpolation. Thus these contentions of respondent no.1 would not take away the effect of the observations of the Principal who noted performance of Respondent No.1 as "below average". Same would be the case in regard to the remarks as for the subsequent academic year 19981999 where there is an entry of one clear average performance and in about 3 entries there is cancellation in the "average" column with the initials and tickmarks in the column "poor". This cannot be termed as interpolation as the Head of the Department thought it appropriate not to maintain the performance

as "average" but mark it as "poor". In any case, this would not take away the effect of the remarks/observations of the Principal that the performance was "not satisfactory". I was required to examine this issue and make the above observations as the entire thrust of the submissions of Mr. Dighe, learned Counsel for respondent no.1, was on these two forms and to examine the issue of perversity in the findings of the Tribunal, which I find none on this aspect.

23. In my clear opinion, there was sufficient material in Form Appendix "D2" as maintained for both these academic years that the performance of respondent no.1 was not satisfactory. The submission that there is interpolation and fabrication as urged on behalf of respondent no.1, also cannot be accepted as there is no material on record to support this contention. It is also not the case that "excellent" or "very good" remarks were cut/struck off to make Respondent No.1 performance as average or poor.

24. The next contention as urged on behalf of respondent no.1 is that there was an illegality on the part of the petitioners in not maintaining Form "D1" and maintaining Form "D2" and therefore, the decision taken by the Governing Body on the basis of Form "D2" cannot be accepted. This submission, in my opinion, lacks merit. As noted above, Statutes 418 and 422 can both be relevant for the purpose of assessment of performance of a probationer. Statute 422 contemplates requirement of both the forms namely Form in Appendix "D1" and Form in Appendix "D2". In the present case, assessment in form Appendix "D2" was maintained which is admittedly filled up by respondent no.1 for both the academic years namely academic years 1997-1998 and 1998-1999, and was thereafter evaluated by the Head of the Department and the consequent remarks of the Principal that the performance is "below average" and "not satisfactory" respectively and were placed before the Governing Body. Though Form "D1" was not maintained but what was maintained by the petitioners was assessment in Form "D2", this would not render the action of termination as an illegality. In fact, in both the academic years, Form "D2" was filled up by respondent no.1. She had no grievance in that regard. Even Statute 422 contemplates Form "D2" to be maintained which is a form for assessment of work of College Lecturer whereas Form "D1" is a form which is required to be filled up by the concerned teacher who is appointed on probation. This form is also required to be filled up by the Lecturer and countersigned by the Principal. Form D2 appears to be a consolidated form requiring the employee to furnish all the details of the performance for the academic term as also providing for evaluation by the management.

25. In my opinion, the petitioners making the assessment by having the assessment of the performance of respondent no.1 by maintaining form in Appendix "D2" and not by maintaining Form "D1" would not amount to any illegality so as to render the decision of the Governing Body not to confirm the services of respondent no.1, as an illegal decision. At the most nonmaintaining of form Appendix D1 but maintaining form in Appendix "D2", can be said to be

some irregularity, on the part of the Petitioners, which may be due to the overlapping provisions in Statute 418 and 422 as noted above. Even respondent no.1 at the relevant time had no grievance in as much as, the entire information in Form Appendix "D1" was required to be filled up by the employee, whereas in form in Appendix "D2" the information is filled up by the employee and there are columns of assessment of the performance by the management, at two levels, one at by the Head of the Department and thereafter by the Principal. It cannot be overlooked that when Statute 418 and 422 provide for particular forms as noted above, it only aids and assists maintaining a record of performance during the probation period of the concerned appointee.

26. In the present case, the assessments as made in Form Appendix "D2" for the two academic years was placed before the Governing Body and the decision not to confirm Respondent No.1 was taken. It is not a case that there was no assessment of respondent No.1's performance or that there was no material before the Governing Council about the performance of Respondent No.1. The record indicates that there was sufficient material before the Governing Council to consider the same and take a decision, whether the probationary appointment of respondent no.1 needs to be continued or discharged. Respondent no.1, however, found it convenient to raise technical objection that Form Appendix "D1" ought to have been prepared and not Form Appendix "D2". For the reasons as set out above, these contentions, as urged on behalf of respondent no.1, are without any substance and are required to be rejected.

27. Taking into consideration the entire material as placed on record, there is much substance in the submissions as urged on behalf of the petitioners. It is a well settled principle of law that an employee who has been appointed on probation would not have an absolute legal right to demand confirmation of the probation. A decision to confirm the services is required to be taken on the basis of the performance rendered by the probationary appointee. If the performance is not satisfactory, then the employer has all the right to form an opinion that such probationary appointee is not suitable for confirmation and the probation in that event need not be extended and the services can be terminated. Thus, on the premise that the appointee on probation would not have a legal right to the post and when the employer, on coming to a conclusion that the performance is unsatisfactory and that the employee is not suitable, the employer would be entitled to discharge / simplicitor terminate the services of the probationary appointee.

28. In the present case, the termination order dated 19/04/1999 clearly shows that it is an order of a simplicitor discharge of the services of respondent no.1. There is nothing in the termination order which can be said to cast any stigma on respondent no.1 requiring the need of a domestic enquiry being undertaken by following the principles of natural justice. The law in this regard is well settled. (See Oil and Natural Gas Commission and Ors. Vs. Dr. Md. S. Iskendar Ali AIR 1980 SC 1242).

29. It is well settled, as also the rules in the Statute 418 and 422 would contemplate that before a probationary appointee is confirmed, there is an obligation on the employer to consider whether the work of the probationer is satisfactory or whether the probationary appointee is suitable for the post. The petitioners had maintained a performance appraisal in Form Appendix "D2". Not only that, but as regards performance of respondent no.1, time to time memos were issued and more particularly, the memo dated 26/05/1998 by which respondent no.1 was informed that the teaching performance is very poor as also in the memos dated 08/07/1998, 18/07/1998 and 07/10/1998 and the warning dated 08/10/1998. All these memos came to be replied only by respondent no.1 a common letter 27/10/1998. A perusal of the respondent no.1 reply does not show that she has seriously disputed these memos. Considering all these documents it cannot be said that there was no material for petitioners to come to a conclusion to hold respondent no.1 not suitable and not confirmed the probationary appointment.

30. It is surely not a case of a punitive termination, inasmuch as, there is nothing on record to show that the termination has preceded by some kind of formal enquiry into any allegation of misconduct culminating into a finding of guilt and that, in fact, under the garb of simplicitor termination, there is a punitive action taken against respondent no.1. Learned Counsel for petitioner, in this regard, is justified in relying on the decision of Supreme Court in the case of Abhijeet Gupta (supra) wherein their Lordships have upheld termination and the conclusions of the High Court observing that the respondent worker was under observation during the probationary period and was given opportunities to improve the performance and ultimately, the authority did not find the employee fit for confirmation, in such a case, it cannot be said that the termination is punitive in nature.

31. In Sumati P. Shere (Dr.) Vs. Union of India, (1989) 3 SCC 311 : 1989 SCC (L & S) 471 : (1989) 11 ATC 127 considering the decision in Parshotam Lal Dhingra Vs. Union of India, 1958 SCR 828 : AIR 1958 SC 36 and Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences, (1999) 3 SCC 60 : 1999 SCC (L & S) 596 Their Lordships made the following observations in para nos.10, 11, 12 and 14. "10. In Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and Anr., (2002) 1 SCC 520 : 2002 SCC (L & S) 170 this Court considered what should be the best to determine whether a letter of termination of service was termination simpliciter or stigmatic termination. After referring to a number of authorities including the judgment in Parshotam Lal Dhingra v. Union of India and Dipti Prakash Banerjee the Court observed (vide SCC p. 527 para 19): ...Courts continue to struggle with semantically indistinguishable concepts like motive" and "foundation"; and terminations founded on a probationer's misconduct have been held to be illegal while terminations motivated by the probationer's misconduct have been upheld. The decisions are legion and it is an impossible task to find a clear path through the jungle of precedents." (emphasis in original)

11. Having observed thus, the Court formulated the judicial test to determine as to on which side of the fence the case lay, in the following words (vide SCC p. 528, para 21):

"21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct (c) which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld."

12. It referred to Dipti Prakash Banerjee (supra) and pointed out that in Dipti Prakash Banerjee (supra) the termination letter expressly made reference to an earlier letter which had explicitly referred to all the misconducts of the employee and a report of an inquiry committee which had found that the employee was guilty of misconduct and so the termination was held to be stigmatic and set aside. Finally, this Court said that whenever a probationer challenges his termination the court's first task will be to apply the test of stigma or the "form" test. If the order survives this examination the "substance" of the termination will have to be found out. What this Court further observed in para 29 is crucial and of great relevance: 9SCC pp. 52930_

"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 probationer's 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 probationer's 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."

14. The real test to be applied in a situation where an employee is removed by an innocuous order of termination is: Is he discharged as unsuitable or is he punished for his misconduct? In Allahabad Bank Officers' Assn. and Anr. v. Allahabad Bank, (1996) 4 SCC 504 : 1996 SCC (L & S) 1037 this Court was considering a challenge to a compulsory retirement and formulated a practical test to answer the question posed above. This Court (vide para 17) observed that if the order of compulsory removal from the service casts a stigma in the sense that it contains a statement casting aspersion on his conduct or his character, then it can be treated as an order of punishment but not if it merely amounts to highlighting the unsuitability of the employee. As pointed out in this judgment, expressions like "want of application", "lack of potential" and "found not

dependable" when made in relation to the work of the employee would not be sufficient to attract the charge that they are stigmatic and intended to dismiss the employee from service."

32. In *Chaitanyprakash and Another (supra)*, Their Lordships, following the principles as laid down in *Abhijeet Gupta (supra)*, upheld the termination when the probationary appointee was informed during the probation period about the deficiency and the performance being unsatisfactory during the probation period, such termination was justified.

33. The above discussion would lead me to conclude that the respondent no.1 being a probationary appointee, could not have claimed any legal right to the post. The petitioners, taking into consideration the performance of respondent no.1, have issued an order of discharge simplicitor or a simplicitor termination without casting a stigma, in such an event the respondent no.1 cannot question the order of termination so as to label such an action as punitive, requiring an inquiry to be conducted before initiating such an action. It is well settled that in case of a probationary appointment, the employer has every right to bring cessation of the employment of a probationary without assigning any reason. This is also borne out by Statute 418 as in the present case. As regards the probationary appointment, employer would be justified not to extend the period of probation or confirm the probationary and / or terminate the services of the probationary on or before the expiry of the period of probation. These are the complete prerogatives of an employer in case of a termination which is without any stigma and when it is not a punitive action as per the test as laid down by the Supreme Court in the case of *Abhijeet Gupta (supra)*. The suitability of the probationary was a matter in the absolute discretionary domain of the petitioners in the present case. There was sufficient material available with the petitioners to take a decision discharging the services of respondent no.1 and not continuing the probation. No reason for such termination was required to be given. Such right to discharge the services of respondent no.1 cannot be curtailed in the absence of any material to show that the order of discharge simplicitor was ostensible and in reality what was meant was a punishment to be awarded to respondent no.1.

34. A perusal of the impugned order clearly demonstrates that the above well-established principles are completely overlooked by the learned Presiding Officer of the Tribunal. The learned Presiding Officer has, in fact, completely misinterpreted the information as contained in Form "D2". It has also misdirected itself to the real requirement of the assessment of performance as reflected in the petitioners requiring to maintain the assessment in Forms "D1" and "D2". It has also misdirected itself that Statute 422 would not require assessment and / or maintaining of Form "D2" even for a probationary appointee. As regards the suitability of respondent no.1, the Tribunal has taken into consideration the prior adhoc appointment of respondent no.1 for some period between September 1994 to April 1995, this certainly could not have been

a consideration, as what was being assessed was the performance of respondent no.1 for the academic years 1997-1998 and 1998-1999 under the appointment order in question. These observations and findings as recorded by the Tribunal, if tested on the above clear position in law and the mandate of the said statutes of the University are required to be held as perverse, and thus cannot be sustained to uphold reinstatement and setting aside, of the termination of respondent no.1. In any case, order of termination is of the year 1999. About 17 years have already passed there was an interim stay operating in favour of the petitioners.

35. Resultantly, the petition needs to succeed. It is allowed in terms of prayer clause (a) which reads thus : "(a) That a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order and direction to be issued calling for the records and proceedings of Appeal No.24 of 1999 on the file of the Hon"ble Mumbai University and College Tribunal at Mumbai and after perusing the same, quash and set aside the order passed by the Hon"ble Tribunal on 29th June, 2001."

There shall be no order as to costs.