

(1998) 11 AHC CK 0106
In the Allahabad High Court
Case No : C.M.W.P. No. 119 of 1985

Umesh Chand Bhilwar

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 17-11-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226
Contract Act, 1872 — Section 23, 29
Prathma Bank (Staff) Service Regulations, 1980 — Regulation 10, 10(2), 10(2)(a), 17(1), 30
Regional Rural Banks Act, 1976 — Section 30

Citation : (1999) 2 AWC 943 : (1999) 2 LLJ 1093 : (1999) 1 UPLBEC 27

Hon'ble Judges : D.P. Mohapatra, C.J.; S.R. Singh, J.; G.P. Mathur, J

Bench : Full Bench

Advocate : Rajendra Prasad Singh, S.C. Budhwar and R.M. Suggi, for the Appellant; R.P. Goel and P.K. Singhal and S.C., for the Respondent

Final Decision : Allowed

Judgement

G.P. Mathur, J. on behalf of D. P. Mohapatra, C.J. also.

1. The petitioner, a Probationary Officer in a Bank, has challenged the order by which his services were terminated. There was a difference of opinion between the members of the division bench which heard the writ petition earlier. The Acting Chief Justice vide order dated 16.8.1993 directed that the writ petition be placed before a full bench and that is how the case has come before us for hearing.

2. The Parliament enacted the Regional Rural Banks Act (Act No. XXI of 1976) (hereinafter referred to as the Act) to provide for the Incorporation, regulation and winding up of Regional Rural Banks with a view of developing the rural economy by providing, for the purpose of development of agriculture, trade, commerce, industry and other productive activities in the rural areas, credit and other facilities, particularly to the small and marginal farmers, agricultural

labourers, artisans and small entrepreneurs and for matters connected therewith and incidental thereto. Prathma Bank, respondent No. 2. was established as rural bank in Moradabad in accordance with the provisions of the Act. Section 29 of the Act gives power to make the rules and Section 30 provides that the Board of Directors of a Regional Rural Bank may, after consultation with the Sponsor Bank and the Reserve Bank and with the previous sanction of the Central Government, make regulations to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of the Act. In exercise of the aforesaid powers Prathma Bank (Staff) Service Regulations, 1980 (hereinafter referred to as the Regulations) were made by the Board of Directors of respondent No. 2. Regulations 8 and 10 which are relevant for the decision of the writ petition are being reproduced below :

"8. Probation :

(1) Every Officer on his appointment in a post in the Bank shall be on probation for a period of two years which shall be extendable upto a period not exceeding one year.

(2) Every employee on his appointment in a post in the Bank shall be on probation for a period of one year which shall be extendable upto a period not exceeding six months.

(3) Where during the period of probation including the period of extension of probation. If any, the appointing authority is of the opinion that the Officer or employee is not fit for confirmation in the said post :

(a) in the case of direct appointee, the service may be terminated by one month's notice or payment of one month's emoluments in lieu thereof : and

(b) in the case of a promotee from the Bank's service, he may be reverted to the grade or cadre from which he was promoted,

* * * *

10. Termination of Service by notice :

(1) (a) An officer or employee shall not leave or discontinue his service in the Bank without first giving notice in writing to the Chairman of the Bank of his Intention to leave or discontinue the service.

(b) The period of notice required shall be :

(i) three months in the case of Officer, and

(ii) one month in the case of other employee.

(c) in case of breach by an officer or employee of the provisions of this sub-regulation, he shall be liable to pay to the Bank as compensation a sum equal to his pay for the period of notice required of him.

(d) He shall also be liable to refund the pay or allowances or both, if any, drawn by him while on training and make good the training expenses, incurred by the Bank or sponsor Bank for deputing him for training.

(e) In exceptional circumstances the payment of such compensation and refund may be waived by the Chairman, at his discretion.

(2) (a) The Bank may terminate the service of an :

(i) officer after giving him three months" notice or pay in lieu thereof ;

(ii) employee after giving him one month"s notice or pay in lieu thereof ;

(b) The power to terminate the service of an officer or employee shall be exercised by the Chairman.

(3) Nothing in sub-regulation (2) shall affect the right of the Bank :

(a) to retire or dismiss an officer or employee without notice or pay in lieu thereof in accordance with the provisions of Regulations 11 and 30 ; and

(b) to terminate the service of an officer or employee without notice or pay in lieu thereof on his being certified by a Medical Practitioner recognised by the Bank, to be permanently incapacitated for further continuous service in the Bank."

3. The petitioner was selected for the post of Probationary Officer in Prathma Bank, Moradabad (hereinafter referred to as the Bank). After completion of training, he was issued an appointment order on 23.4.1983 appointing him as Probationary Officer w.e.f. 10.4.1983. Since the terras of the appointment order have a bearing on the controversy raised in the case, the relevant part thereof is being reproduced below :

"01. Please refer to our letter No. PBHO/PD based on your performance during the training programme, we are pleased to appoint you as Probationary Officer w.e.f. 10.4.1983 on the following terms and conditions.

2. (omitted).....

3. The period of your probation shall initially be for a period of 2 (two) years from the date of your joining as probationary officer. This period shall be deemed extended unless and otherwise a letter of confirmation for confirming you in the Bank"s service is served upon you.

4. (omitted).....

5. You will be governed with the terms and conditions of the agreement dated, 04.08.1982 in addition to the terms and conditions of this letter.

6. (omitted).....

7. (omitted).....

8. During the period of your probation the Management may terminate your services without entering into any correspondence.

9. You will also be governed by Prathma Bank (Staff) Service Regulations, 1980 as are applicable for the officers of the Bank presently and any incorporation/change/alterations/ modifications made afterwards by the Bank in the same from time to time."

The services of the petitioner were terminated by the order dated 3.8.1985 which reads as under :

"You are hereby informed that your services are no longer required by the Bank. Therefore, your services are terminated from the Bank with immediate effect in terms of Regulation No. 10 (2) (a) of Prathma Bank (Staff) Service Regulations, 1980, read with Prathma Bank (Staff) Service Amendment Regulations, 1982. A cheque No. M/16 No. 411917 for Rs. 3,798 (Rupees three thousand seven hundred ninty eight only) being the salary of three months in lieu of three months notice is enclosed as per the requirement of the aforesaid regulation."

The petitioner seeks quashing of this order.

4. Sri S. C. Budhwar, learned senior counsel, has submitted that the services of the petitioner have been terminated by exercising power under Regulation 10 which empowers the Bank to terminate the services of a confirmed officer by giving him three months notice or pay in lieu thereof and such a Regulation which confers unbridled and unguided power on an employer is void u/s 23 of the Contract Act as being opposed to public policy besides being violative of Article 14 of the Constitution as held in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , West Bengal State Electricity Board and Others Vs. Desh Bandhu Ghosh and Others, ; O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others, and N. K. Agrawal v. Gurgaon Bank, : AIR 1988 SC 286, where an identical Regulation of a Rural Bank was held to be unconstitutional. Sri R. P. Goel, learned senior counsel for the Bank, has submitted that the petitioner was not a confirmed officer but was still on probation and his services had, infact been terminated in exercise of powers conferred by Regulation 8 (3) (a) which was perfectly valid.

5. In order to examine the contention raised, it is necessary to first consider the question as to what was the status of the petitioner when his services were terminated on 3.8.1985. Regulation 8 (1) provides that every officer on his appointment in a Bank shall be on probation for a period of two years which shall be extendable upto a period not exceeding one year. This shows that on appointment an officer can remain on probation for a period of three years but beyond that, the period of probation cannot be extended. Condition No. 03 of the appointment order of the petitioner provides that the period of probation shall initially be two years and this period shall be deemed extended unless a letter of confirmation for confirming him in bank"s service is served. It is not the case of the petitioner that any letter of confirmation was served upon him and

consequently the initial period of two years probation, which expired on 10.4.1985, shall be deemed to have been extended. The Regulations permit extension of period of probation by one year which means that the petitioner could have continued on probation till 10.4. 1986. The combined effect of the terms and conditions of the appointment order, Regulations and absence of a specific confirmation order is that the status of the petitioner on the date when his services were terminated on 3.8.1985 was that of a probationer and not of a confirmed officer.

6. Under service Jurisprudence, it is settled principle that if a person appointed on probation for a specific period is allowed to continue in service after expiry of period of probation, he does not acquire the status of a confirmed employee unless a specific order to that effect is passed. This question has been examined in considerable detail by a constitution bench in *State of Punjab Vs. Dharam Singh*, , where after noticing several earlier decisions it was held as follows in para 3 of the reports :

"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 has been reiterated in *State of Maharashtra v. V. R. Saboji Mahraj*, : AIR 1980 SC 42 ; *Dhanji Bhai v. State of Gujarat*. AIR 1986 SC 603 and *Shri Kedar Nath Bahl Vs. The State of Punjab and Others*, . In *Satya Narayan Athya Vs. High Court of M.P. and another*, , the services of the appellant who had been appointed on probation on 16.2.1980 were terminated on 5.8.1983. The service rule provided appointment on probation for a period of two years which could be extended for a further period not exceeding two years. While considering the question whether the appellant will be deemed to have been confirmed, it was held as follows :

".....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."

Therefore, the law is well-settled that a probationer does not acquire the status of confirmed employee merely because he has completed the period of probation. The function of confirmation is an exercise of judgment by the

confirming authority on the over all suitability of the employee for his permanent absorption in service and until that is done he continues to be on probation. An employee does not enjoy any greater right to confirmation if he is allowed to continue beyond the Initial period of probation.

7. The only exception to this principle is that where the service rules prohibit extension of period of probation beyond a certain fixed period and the employee is allowed to work by the employer beyond the aforesaid maximum period. In such a case, he may acquire the status of a confirmed employee. In *State of Punjab v. Dharam Singh* (supra), this situation was examined and it was held as under in para 5 of the reports :

"In the present case. Rule 6 (3) forbids extension of the period of probation beyond three years. Whereas, in the present case, the service rule 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."

This principle has been reiterated in *Om Parkash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow and Others*, The ratio of *State of Punjab v. Dharam Singh* (supra) has been explained by Hon^{ble} J. S. Verma, C. J. In a recent decision rendered in *Chief General Manager, State Bank of India and Another Vs. Bijoy Kumar Mishra*, in following words :

"In substance, *Dharam Singh* held that where the Service Rules permitted continuance in service as a probationer beyond a certain period, an express order of confirmation is necessary to give the employee a substantive right to the post, and the mere fact that he is allowed to continue in the post after the specified period of probation is not sufficient to hold that he should be deemed to have been confirmed ; but where the maximum period of probation is provided in the Service Rules and the employee is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he must be deemed to have been confirmed in the post by implication. It is significant that the effect of permitting the employee to continue in the post even on completion of the maximum period of probation without an express order of confirmation results in the only logical inference that he has been confirmed in the post by implication. In other words, for drawing such inference. It is necessary that the employer should allow the employee to continue on the post even after expiry of the maximum period of probation which is consistent only with the fact of his confirmation on the post. This Inference is drawn from the conduct of the employer which is consistent only with the fact of

confirmation of the employee. In short. It is a rule of evidence applied to the fact of the case because the continuance in employment after the maximum period of probation is consistent only with the confirmation, and that follows from the employer's conduct of permitting the employee to continue to work on that post after the maximum period of probation."

Similarly, in *Dayaram Dayal Vs. State of M.P. and another* [OVERRULED], after review of a number of earlier decisions. It was held that even though the maximum period for extension could lead to an indication that the employee is deemed to be confirmed, still special provision in such rules could negative such an intention.

8. Therefore, in absence of anything to the contrary in the service rule, the test is whether the rules provide for a maximum period of probation beyond which it cannot be extended and the employer has allowed the employee to continue to work on the post even after expiry of such maximum period. If that is so, the employee will acquire the status of a confirmed employee but not otherwise. As shown earlier, the petitioner was appointed on probation for two years on 10.4.1983 and the regulations contemplate extension of period of probation by one year beyond the initial period of two years. The services of the petitioner were terminated on 3.8.1985. well before the expiry of extended period of probation which would have expired on 10.4.1986. Thus, there is no escape from the conclusion that on the date when his services were terminated the status of the petitioner was that of a probationer and not of a confirmed officer.

9. Sri Budhwar has next submitted that the order dated 3.8.1985 (Annexure-5 to the writ petition) shows that the services of the petitioner have been terminated in exercise of power conferred by Regulation 10 (2) (a) and, therefore, the order cannot be justified as being one passed in exercise of powers conferred by Rule 8 (3) (a). In support of this submission, he has placed reliance on *L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt., and Commissioner, Safes Tax U. P., Lucknow v. M/s. Anoop Wines Khuldabad, Allahabad 1988 SCC 731* . We find no substance in the contention raised. It is well-settled principle that where an authority makes an order which is otherwise within its competence, it cannot fail merely because it purports to be made under a wrong provision of law, if it can be shown to be within its powers under any other provision ; a wrong label cannot vitiate an order which is otherwise within the power of the authority to make. See *Hukumchand Mills Ltd. Vs. The State of Madhya Bharat and Another* ; *P. Balakotaiah Vs. The Union of India (UOI) and Others*, and *Vice-Chancellor, Jammu Untversity v. D. K. Rampal*. AIR 1977 SC 1186. The case in hand is fully covered by the above principle and the authorities cited by Sri Budhwar do not lay down anything to the contrary.

10. Sri Budhwar has also urged that reference to Regulation 10 (2) (a) in the termination order shows that the appointing authority did not apply his mind to the facts which are relevant for formation of an opinion on the question whether the petitioner should be confirmed in service or not and consequently the

impugned order is liable to be struck down even if the status of the petitioner was that of a probationer. This contention requires consideration of the question as to who is a probationer. When the master-servant relationship was governed by the archaic law of hire and fire, the concept of probation in service Jurisprudence was totally absent. However, this concept came to acquire a certain connotation with the advent of security in public service and order of termination or removal from service became a subject-matter of judicial review. In order that an incompetent or inefficient employee is not foisted upon an employer, the concept of probation was devised. This is to guard against error of human judgment in selecting a suitable person for service. A new entrant is to be on test for some time before he is absorbed in service, or gets a light to take the post. The period of probation gives an opportunity to the employer to judge and observe the ability, competence, efficiency and work of an employee and if he is not found suitable for the post, the employer reserves a right to dispense with the services of an employee without anything more, during the period of probation. The discharge or termination of service of a probationer during the period of probation is normally not treated as punishment as the employee has no right to continue to hold such a post. The period of probation, therefore, furnishes an opportunity to the employer to observe the work of an employee and to make up his mind whether to retain the employee by absorbing him in regular service or dispense with his services. An employer may discharge a probationer if he does not find his competence, efficiency and integrity upto a particular level which in his opinion is required for the post being held by the probationer. However, these reasons are not sufficient on which action may be taken against a confirmed employee. The grounds which impel an employer to take a decision to terminate the services of a confirmed employee are far more serious and would always be more than sufficient on which a decision can be taken to discharge a probationer. Therefore, even assuming that the Chairman of the Bank while passing the impugned termination order did not apply his mind to the question whether the petitioner, who was a probationer, deserved to be confirmed or discharged from service, as contended by Sri Budhwar, the order cannot be said to have been vitiated on that ground as the decision to terminate the services of a confirmed employee is taken on far more serious grounds.

11. Sri Budhwar, has lastly urged that the petitioner had preferred an appeal before the Board against the termination order but the Chairman of the Bank, who had passed the termination order, was a member of the Board and participated in the meeting when his appeal was taken up for hearing and consequently the decision taken in the appeal was vitiated. The averments in this regard have been made in para 22 of the writ petition which are categorically denied in para 20 of the counter-affidavit. It is asserted that the Board consists of three Directors nominated by the Central Government, two Directors nominated by the State Government and three Directors nominated by the Sponsor Bank who are higher in rank to the Chairman who had passed the termination order. The petitioner has failed to place any material on record which

may show that the Chairman of the Bank had participated in the meeting of the Board. The members of the Division Bench which heard the writ petitioner earlier have also held against the petitioner on this point. Besides that, the petitioner never challenged the constitution of the Board when his appeal was taken up for consideration and submitted to its jurisdiction. It is not open to him to contend now that he did not get a fair hearing of the appeal on the ground that the Chairman of the Bank, who had passed the termination order, was also a member of the Board.

12. There is another aspect of the matter which deserves notice. The respondents have filed a copy of the letter written by the petitioner to the Chairman of the Bank on 31.7.1985 (Annexure-C.A.7 to the counter-affidavit) wherein he admitted that he had taken illegal money from the customers. He accepted his responsibility regarding the complaints made by forty-fifty persons to the Chairman at the time of opening of a new branch. In the letter, he clearly admitted that he had indulged in acts of corruption for which he was guilty and was feeling ashamed but promised that in future he would not commit any mistake. The Bank is a financial institution which rests on absolutely clean conduct and trust. A Rural Bank caters to the need of small and marginal farmers, agricultural labourers and village artisans, many of whom are Illiterate and are not familiar with banking business. A person who started making illegal money at the threshold of his career while he was still a probationer cannot repose confidence in his employer. If the appointing authority took a decision not to retain such as employee, it will not be a sound exercise of discretion to interfere with a simple order of termination of service which casts no stigma, while exercising jurisdiction under Article 226 of the Constitution.

13. The writ petition, therefore, lacks merit and is hereby dismissed.

R. Singh, J. (Dissenting)

14. I have the advantage and privilege of going through the judgment prepared by my esteemed brother G. P. Mathur, J. I am sorry that I have dissent from brother Mathur in his conclusions drawn on some of the vital Issues involved as well as the order proposed to be passed in the case.

15. The facts as are necessary to unfold the controversy and to appreciate the questions involved herein may be short-listed and they are that the petitioner was amongst the few chosen to undergo training for the post of Probationary Officer in Prathma Bank (hereinafter referred to as the "Bank") and he was accordingly informed vide letter No. PBHO/PD/ 3159/PO/82 dated 21.6.1982. The letter embodied a stipulation that on satisfactory completion of training, the petitioner would be appointed Probationary Officer in the Bank. On successful completion of the training, the petitioner was appointed Probationary Officer with effect from 10.4.1983 uide letter dated 23.4.1983 in the pay scale of Rs. 690-40-970-EB-1,050-50-1.300-60-1,420/and his substantive salary in the said scale was pegged at Rs. 690 attended with other allowances as per Bank Rules.

The period of probation as manifested in the appointment letter was two years from the date of Joining as Probationary Officer. The appointment letter encapsulated a further stipulation that the period of probation "shall be deemed extended unless otherwise a letter of confirmation" was served to the petitioner. Concededly, the petitioner was governed by Prathna Bank (Staff) Service Regulations. 1980 (in Short the "Regulations") framed u/s 30 of the Regional Rural Banks Act, 1976 and adopted by the Board of Directors of the Bank at their meeting held on 17.7.1980 at Moradabad and enforced with effect from 1st August, 1980. The service of the petitioner was terminated from the Bank with immediate effect vide letter dated 3.8.1985 issued in terms of Regulation 10 (2) (a) of the Regulations read with the Piathma Bank (Staff) Service Amendment Regulations. 1982. A Cheque No. M/16 No. 411917 for Rs. 3,798 being the salary of three months in lieu of three months" notice, was attended with the order of termination in observance of the requirement of the Regulations. Appeal preferred against the said order met the fate of dismissal uide order dated 16.10.1985. It is these orders-which are the cynosure of impugment in the instant petition.

16. Sri S. C. Budhwar, learned counsel appearing for the petitioner canvassed that the petitioner was treated as confirmed in the service of the Bank by the appointing authority as otherwise the appointing authority would have resorted to termination by Invoking the powers under Regulation 8 (3) (a) of the Regulations. The appointing authority, submitted Sri Budhwar, by its conduct, would be deemed to have confirmed the petitioner in the service of the Bank. In opposition, Sri R. P. Goel, learned counsel, appearing for the respondent-Bank tried to counteract the submissions by urging that the petitioner was never confirmed and his probation endured even after 10.4.1985 and there was no question of automatic confirmation in that confirmation to a post in the service of the Bank would not come about unless the same is given in writing ; the provisions of Regulation 10 (2) (a) of the Regulations being ultra vires were not available for exercise of" power thereunder and. therefore, submitted the learned counsel, the appointing authority would be deemed to have exercised the power of termination vested in it by Regulation 8 (3) (a) of the Regulations ; and mere fact that the services of the petitioner were terminated in the purported exercise of power under Regulation 10 (2) (a) of the Regulations would not vitiate the order which was otherwise justifiable on the dint of the provisions contained in Regulation 8 (3) (a) of the Regulations.

17. Answer to the questions aforesated would depend upon the provisions contained in the regulations and the conduct of the employer as discussed hereinafter.

18. In State of Punjab Vs. Dharam Singh, , 3 Constitution Bench of the Supreme Court has held that where 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 the initial

order of probation would be deemed to have been extended. Rule 6 (3) of the relevant service rules in the above case reads as under :

"6 (3) On the completion of the period of probation the authority competent to make appointment may confirm the member in his appointment or if his work or conduct during the period of probation has been in his opinion unsatisfactory, he may dispense with his services or may extend his period of probation by such period as he may deem fit or revert him to his former post. If he was promoted from some lower post.

Provided that the total period of probation including extension, if any, shall not exceed three years."

In the context of the relevant service rule, the Court held as under :

"In the present case Rule 6 (3) forbids extension of the period of probation beyond three years. Whereas in the present case, service rules fix 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"

19. In *Om Prakash Maurya v. U. P. Co-operative Sugar Factories Federation* 1986 SCC 95, there was a controversy as to whether the service of the appellant therein was governed by the U. P. Co-operative Societies Employees Service Regulations, 1975, or the U. P. Cooperative Sugar Factories Federation Service Rules, 1976. The Regulations visualised that the probationary period of an employee could not be extended beyond the maximum period of two years. Rule 5 of the Rules on the other hand prescribed that every employee would be appointed on probation for such period as the appointing authority might specify and this period of probation could be extended by the appointing authority from time to time. In other words, the Rules did not envisage any limit on extension of probationary period of an employee albeit Rule 6 of the Rules provided that upon satisfactory completion of probationary period, an employee would be eligible for confirmation. Placing reliance on Rule 5 of the Rules, it was urged for the respondents that since there was no order of confirmation, the appellant's probationary period stood extended and. therefore, he could be relegated at any time to his substantive post. The Apex Court held as under :

"It is true that Rule 5 of the Federation Service Rules does not place any restriction on the appointing authority's power to extend the probationary period, it may extend the probationary period for an unlimited period and in the absence of confirmation order, the employee shall continue to be on probation for

indefinite period. It is well-settled that where appointment or promotion is made on probation for a specified period and the employee is allowed to continue in the post after expiry of the probationary period without any specific order of confirmation, he would be deemed to continue on probation provided the rules do not provide contrary to it. If Rule 5 applies to the appellant, he could not acquire the status of a confirmed employee in the post of Commercial Officer and he could legally be reverted to his substantive post."

On collation of the two provisions, however, the Supreme Court came to the conclusion that the services of the appellant therein were regulated by the U. P. Co-operative Societies Employees Service Regulations, 1975, which visualised that the probationary period of an employee could not be extended beyond the maximum period of two years and accordingly, held as under :

"In the instant case the order of appointment promoting the appellant to the post of Commercial Officer merely indicated that his probationary period could be extended and he could be reverted to the post of Office Superintendent without any notice. Stipulation for extension of probationary period in the appointment order must be considered in accordance with the proviso to Regulation 17 (1) which means that the probationary period could be extended for a period of one year more. Indisputably on the expiry of the appellant's initial probationary period of one year, the appointment authority extended the same for another period of one year which also expired on September 4, 1982. During the period of probation appellant's services were neither terminated nor was he reverted to his substantive post instead he was allowed to continue on the post of Commercial Officer. On the expiry of the maximum probationary period of two years, the appellant could not be deemed to continue on probation instead he stood confirmed in the post by implication. The appellant acquired the status of confirmed employee on the post of Commercial Officer and the appointing authority could not legally revert him to the lower post of Superintendent."

20. In *State of Gujarat Vs. Akhilesh C. Bhargav and Others*, , the Supreme Court, reckoned with the question as to the effect of continuance of an I.P.S. Officer (appointed on 4.7.1969 and discharged vide order dated 9.4.1974) beyond the period of probation. It was contended for the officer that in the absence of an order of extension, he should have - been treated as a confirmed officer of the cadre at the end of the probationary period and for the State, it was contended that no order of extension of probation was necessary to be made as the process of confirmation was not automatic and even if the two year period as provided in Rule 3 (1) of the Indian Police Service (Probation) Rules, 1954 had expired, confirmation would not ipso facto follow. While the probation Rules prescribed an initial period of two years of probation, they did not provide any optimum period of probation. But administrative Instructions issued within the executive powers under the Constitutional scheme bridges the gap and visualised that save for exceptional reasons, the period of probation should not be extended by more than one year and no member of the service should, by convention, be kept

under probation for more than double the normal period i.e., four years.

The Supreme Court held :

"We are of the view that the rules read with instructions create a situation as arose for consideration by this Court in the case of State of Punjab Vs. Dharam Singh, . The Constitution Bench of this Court in that case interpreted the Punjab Educational Service (Provincialised) Cadre) Class III Rules and found that there was a maximum limit of three years beyond which the period of probation could not be extended. When an officer appointed initially on probation was found to be continuing in service beyond three years without a written order of confirmation, this Court held that it tantamounts to confirmation. In view of what we have stated above, we are in agreement with High Court about the combined effect of the rules and instructions. We hold (hat the respondent stood confirmed in the cadre on the relevant dale when he was discharged."

21. M. K. Agarwal v. Gurgaon Gramin Bank. : AIR 1988 SC 286, was a case, the petitioner of which was appointed as Branch Manager on probation w.e.f. 16.10.1978. The period of probation was one year in the first instance with the power to the Bank to extend the probation for a further period of six months at the end of which the probationer was either to be confirmed if he was found suitable or. If otherwise, discharged from service. Eighteen months" period representing the outer-most limit of permissible probation expired sometime in April, 1980. The officer was not discharged, nor an express order of confirmation made. The services were terminated vide order dated 27.8.1982 by invoking and relying upon the provisions of Regulation 10 (2) (a) of Gurgaon Gramin Bank (Staff) Service Regulations, 1980, a provision similar to the one. we are concerned with here in this case. The Supreme Court held as under :

"The period of probation was one year, in the first Instance. The employer could extend it only for a further period of six more months. The limitation on the power of the employer to extend the probation beyond is months coupled with the further requirement that at the end of it the services of the probationer should either be confirmed or discharged render the inference inescapable that if the probationer was not discharged at or before the expiry of the maximum period of probation. then there would be an confirmation as there was no statutory indication as to what should follow in the absence of express confirmation at the end of even the maximum, permissible period of probation. In cases, where, as here, these conditions coalesce, it has been held, there would be confirmation by Implication."

22. The principle aforestated, has been reiterated in Chief General Manager, State Bank of India and Another Vs. Bijoy Kumar Mishra, , wherein the effect of permitting an employee to continue in the post even on completion of the maximum period of probation without an express order of confirmation has been explained as under :

"It is significant that the effect of permitting the employee to continue in the post

even on completion of the maximum period of probation without an express order of confirmation results in the only logical inference that he has been confirmed in the post by implication. In other words, for drawing such inference, it is necessary that the employer should allow the employee to continue on the post even after expiry of the maximum period of probation which is consistent only with the fact of his confirmation on the post. This inference is drawn from the conduct of the employer which is consistent only with the fact of confirmation of the employee, in short, it is a rule of evidence applied to the fact of the case because the continuance in employment after the maximum period of probation is consistent only with the confirmation, and that follow from the employer's conduct of permitting the employee to continue to work on that post after the maximum period of probation."

23. In *Wasim Beg Vs. State of Uttar Pradesh and Others*, , Supreme Court examined the question whether an employee at the end of probationary period automatically gets confirmation in the post and explained the legal position as under :

"Whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant service Rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In these cases where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary. This is the line of cases starting with *State of Punjab Vs. Dharam Singh*, ; *M. K. Agrawal u. Gurgaon Gramin Bank and others* : 1987 Suppl SCC 643 ; *Om Prakash Maurya u. V. P. Cooperative Sugar Factories Federation. Lucknow and others* 1986 SCC 95 ; *State of Gujarat Vs. Akhilesh C. Bhargava and Others*,

"However, even when the Rules prescribe a maximum period of probation, if there is a further provision in the Rules for continuation of such probation beyond the maximum period, the Courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended. In this category of cases, we can place *Samsher Singh Vs. State of Punjab and Another*, , which was the decision of a Bench of seven Judges where the principle of probation not going beyond the maximum period fixed was reiterated but on the basis of the Rules which were before the Court, this Court said that the probation was deemed to have been extended. A similar view was taken in the case of *Municipal Corporation, Raipur Vs. Ashok Kumar Misra*, . In *Satya Narayan Athya Vs. High Court of M.P. and another*, . although the Rules prescribed that the probationary period should not exceed two years, and an order of confirmation was also necessary, the termination order was issued within the extended period of probation. Hence the termination was

upheld.

"The other line of cases deals with Rules where there is no maximum period prescribed for probation and either there is a Rule providing for extension of probation or there is a Rule which requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of the employee. In these cases unless there is such an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period. In this line of cases one can put Sukhbans Singh v. State of Punjab. 1963 (1) SCR 46 : State of Uttar Pradesh Vs. Akbar Ali Khan, : Shri Kedar Nath Bahl Vs. The State of Punjab and Others, ; Dhanjibhai Ramjibhai Vs. State of Gujarat, ; Tarsem Lal Verma v. Union of India,, 1997 (9) SCC 243 : Municipal Corporation, Raipur v. Ashok Kumar Misra (supra) and State of Punjab Vs. Baldev Singh Khosla, . In the recent case of Dayaram Dayal Vs. State of M.P. and another [OVERRULED], (to which one of us was a party) all these cases have been analysed and it has been held that where the Rules provide that the period of probation cannot be extended beyond the maximum period there will be a deemed confirmation at the end of the maximum probationary period unless there is anything to the contrary in the Rules."

24. In the instant case, the petitioner was appointed vide letter dated 23.4.1983 as Probationary Officer in the Bank with effect from 10.4.1983. Initial period of probation expired on 10.4.1985. Though the period of probation was "extendable" upto a period not exceeding one year, but no express order was passed extending the statutory period of probation for any period not exceeding one year : nor was any express order passed confirming the petitioner in the service. In this situation, the question that arises for consideration is whether confirmation in the post by Implication could logically be inferred and if so whether such inference could be drawn before expiration of the one year period upto which the probation was extendable.

25. Regulations 8 (1) and 8 (3) of the Prathma Bank (Staff) Service Regulations, 1980 provide as under :

"8 (1). Every Officer on his appointment in a post in the Bank shall be on probation for a period of two years which shall be extendable upto a period not exceeding one year."

x x x x x "(3) Where during the period of probation including the period of extension of probation, if any, the appointing authority is of the opinion that the Officer or employee is not fit for confirmation in the said post.

(a) in the case of direct appointee, the service may be terminated by one month's notice or payment of one month's emoluments in lieu thereof; and

(b) in the case of a promotee from the Bank's service, he may be reverted to the grade or cadre from which he was promoted."

26. Regulation 9 provides as under :

"Confirmation : An Officer or employee shall be confirmed in the service of the Bank, if in the opinion of the appointing authority, the officer or employee has satisfactorily completed his probation."

27. Regulation 10 (2) reads as under :

"10 (2) (a) The Bank may terminate the service of an :

(i) officer after giving him three months" notice or pay in lieu thereof :

(ii) employee after giving him one month"s notice or pay in lieu thereof ;

(b) The power to terminate the service of an officer or employee shall be exercised by the Chairman."

28. Regulation 30 (1) and (2) being relevant are also quoted below ;

"30. Penalties.--(1) Without prejudice to the provisions of other regulations an officer or employee who commits a breach of these regulation or who displays negligence, inefficiency or Indolence, or who knowingly does anything detrimental to the Interests of the bank or in conflict with its instructions or who commits a breach of discipline or is guilty of any other act of misconduct, shall be liable to the following penalties :

a) reprimand ;

(b) delay or stoppage of increment or promotion ;

(c) degradation to a lower post or grade or to a lower stage in his incremental scale ;

(d) recovery from pay of the whole or part of any pecuniary loss caused to the Bank by the officer or employee ;

(e) Removal from service which shall not be a disqualification for future employment.

(2) No officer or employee shall be subjected to the penalties referred to in clauses (b), (c). (d). (e) or (f) of sub-regulation (1) except by an order in writing signed by the Chairman and no such order shall be passed without the charge being formulated in writing and given to the said officer or employee so that he shall have reasonable opportunity to answer them in writing or in person, as he prefers and in the latter case his defence shall be taken down in writing and read to him ;

Provided that the requirements of this sub-regulation may be waived, if the facts on the basis of which action is to be taken have been established in a Court of law or Court Martial, or where the officer or employee has absconded or where it is for any other reason impracticable to communicate with him or where there is difficulty in observing them and the requirements can be waived without injustice

to him. In very case where all or any of the requirements of this sub-regulation are waived, the reasons for so doing shall be recorded in writing."

29." The expression "extendable upto a period not exceeding one year" used in Regulation 8 (1) of the Regulations suggests that Initial period of probation statutorily fixed is capable of being extended for a period not exceeding one year. Extension of initial period of probation upto the maximum "extendable" period of one year may be allowed by one stroke of pen or it may be done even by means of separate orders for specified durations subject to the condition that the total period of extension does not exceed one year. The term, "if any" suffixed to the expression "period of extension of probation" used in Regulation 8 (3) of the Regulations is eloquent of the intention of the framers of the Regulations that extension of probationary period is not a matter of presumption. If at all extension is to be allowed, it must be done in writing so that the probationer may know his status and make improvement in his performance in order to earn permanency and avoid termination of his service under Regulation 8 (3) of the Regulations. The language in which the related provisions of the Regulations are formulated suggests that extension of probationary period is not to be inferred or presumed merely because no express order of confirmation was passed at the end of initial period of probation. On the other hand, there are judicial pronouncements to the effect that in the absence of anything to the contrary, expressed or implied, contained in Service Rules/ Regulations, confirmation may be inferred from the conduct of the employer and attending circumstances in a given case. Nothing in the Staff Service Regulations inhibits, expressly or impliedly, drawing of the inference from the conduct of the employer that the probationer has been confirmed in the post by implication. In my opinion, the stipulation that the period of probation "shall be deemed extended unless otherwise a letter of confirmation for confirming you in the Bank's service is served upon you" contained in the appointment letter is void for uncertainty in that extension of period of probation beyond the outer-limit statutorily prescribed is impermissible. The said clause in the appointment letter enables the appointing authority to extend the probation indefinitely and thereby overreach the statutory limitation on extension of probationary period. In my opinion, therefore, the clause aforesaid is hit by Section 29 of the Contract Act besides being liable to be ignored as an addition of meaningless surplusage in the service contract.

30. The expression "shall be confirmed" used in Regulation 9 suggests that the provision is mandatory in nature and an obligation is enjoined on the appointing authority to confirm the probationer if in its opinion the probationer has satisfactorily completed the period of probation. The principle of law is that when a power is ceded to an authority that it may be exercised for a particular purpose or for the benefits of a particular person under certain specified circumstances and it is shown that these particular circumstances exist under which it was contemplated that the power should be exercised, then an obligation is enjoined upon the authority to exercise the power. Similarly if the object for which the

power is conferred, is in order to give a right, then there would be a duty cast on the authority to whom the power is given to exercise it for the benefit of the party to whom the right is given when required on his behalf (See Legislation and Interpretation by Jagdish Swarup, 2nd Edn. pages 324-25). Formation of any adverse opinion by the appointing authority on the question as to satisfactory completion of probation by the probationer is open to judicial review by this Court under Article 226 of the Constitution on ground of mala fides and/or arbitrariness. In fact, the expression "shall be confirmed, if in the opinion of the appointing authority, the officer or employee has satisfactorily completed his probation" is intended to provide security in service and it cannot be repudiated that security of service in public employment is a facet of fundamental rights guaranteed by Articles 14 and 21 of the Constitution and is based on public policy. It is true that confirmation under Regulation 9 of the Regulations implies exercise of judgment by the confirming authority on the over-all suitability of the employee for permanent absorption in the service, but regard being had to the Regulations 8 and 9 and the authorities discussed above. I am of the considered view that if the Probationer is allowed to continue beyond the optimum period of probation, confirmation in the service may be inferred from the conduct of the employer for it is not the requirement of the Regulations that confirmation of an officer in the service of the Bank would come about only on a written order being passed in that regard by the appointing authority. The legal position fairly well-settled is that in the absence of anything to the contrary contained in the relevant Service Rules/ Regulations, confirmation of an officer or employee in the service may be Inferred from the conduct of the employer if the employee is allowed to continue even after expiration of the maximum period of probation. In other words, if the services of a probationer governed by the Regulations are not terminated under Regulation 8 (3) during or at the end of the period of probation and the same is not extended by a written order, then there would be an implied confirmation.

31. Assuming that by virtue of the enabling provision contained in Regulation 8 (2) of the Regulations coupled with the terms of appointment as contained in the appointment letter visualising deemed extension, the probation is deemed to have been extended for a period of one year during which period the services of the petitioner were terminated, the question that arises for consideration is. can the order of termination passed by relying on, and invoking, the provisions of Regulation 10 (2) (a) of the Regulations be sustained? in *L. Hajartmal Kuthiala v. Income Tax Officer* AIR 1061 SC 200, the Supreme Court held that if a particular action is valid under one section, it cannot be rendered invalid merely because reference was made to another section, and further that it makes no difference if the two empowering provisions are in the same statute. The decision aforesaid was explained in *C.S.T. v. Anoop Wines* 1988 SCC 731 , in the following words :

"It is not a question of sustaining jurisdiction by reference to a wrong section as was done in the case of *L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt.,* , where this Court held that if a particular action is

valid under one section, it cannot be rendered invalid because reference was made to another section, and it makes no difference if the two empowering provisions are in the same statute. But this principle will have no application where in a penal action no notice was given or resort to such a provision was made to the delinquent of the offending party."

32. Regard being had to the allegations made against the petitioner and the fact that his services were terminated under Regulation 10 (2) (a), it can be inferred that the termination was based on the alleged delinquency of the petitioner and hence the decision aforesaid would apply to the facts of this case. Further Regulation 8 (3) (a) enables the appointing authority to terminate the services of a direct appointee during the period of probation including the extended period of probation, if any. on the requisite opinion being formed that the probationer "Is not fit for confirmation in the post" whereas no such pre-requisite condition needs be satisfied for exercise of power by the appointing authority under Regulation 10 (2) (a) of the Regulations and hence the order of termination passed in exercise of power under Regulation 10 ([2) (a) of the Regulations cannot, in my opinion, be sustained with reference to the power to terminate the services of a probationer under Regulation 8 (3) (a) of the Regulations. The provisions of Regulation 10 (2) (a) having been held ultra vires, the appointing authority cannot turn round and say that its order is sustainable with reference to the provisions contained in Regulation 8 (3) (a). The premises under which powers under the two provisions aforesaid are exercisable being altogether different, the order passed under Regulation 10 (2) (a) cannot be sustained with reference to Regulation 8 (3) (a) of the Regulations. M. K. Agrawal (supra) is a direct authority in support of the view that I am taking. The present is not a case where the power could be said to have been exercised rightly, though with reference to a wrong provision of law. The services of the petitioner have been terminated by taking aid of a provision which enabled the appointing authority to terminate the services of a confirmed employee even in the absence of any impelling ground. The order impugned herein cannot be sustained merely because the ground which impel the employer to take a decision to terminate the services of a confirmed employee are far more serious. It is not a case of termination of service on the ground of misconduct being established at the departmental enquiry.

33. Lastly Sri S. C. Budhwar contended that the original order of termination merged in the appellate order and lost its independent existence. The appellate order, proceeds the submission, having been passed in breach of natural justice cannot be sustained and if it is quashed, the original order too will go with the appellate order and cannot survive even if it is held to be otherwise a valid order of termination of the petitioner's services. That the doctrine of merger is attracted to the facts of the present case admits of no doubt in view of the pronouncement of the Supreme Court in the case of S.S. Rathore Vs. State of Madhya Pradesh, . In Sita Ram Goel Vs. The Municipal Board, Kanpur and Others, , it was held, firstly, that the principle of merger applicable to decree of

Court would not apply to orders of departmental tribunals, and. secondly, that the original order of dismissal of an employee from service would be operative on its own strength and would not gain greater efficacy by the subsequent order of dismissal of appeal or revision. S. S. Rathore has, however, overruled *Si(a Ram Gael*. A Constitution Bench of the Supreme Court considered the question of merger in the case of *Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd.*, and held :

"It is obvious that when an appeal is made, the appellate authority can do one of three things, namely (i) it may reverse the order under appeal, (ii) it may modify that order, and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. In law the appellate order of confirmation is quite as efficacious as an operative order of reversal or modification."

34. In *Somnath Sahu Vs. The State of Orissa and Others*, a three Judges Bench of the Supreme Court has held that in the case of a service dispute the original order is merged in the appellate order and it is the appellate order which is operative and capable of enforcement.

35. If the doctrine of merger as explained above is anything to go by, then the original order of termination cannot survive if the appellate order is quashed on consideration of merit. In case, however, where the appellate order is an order of reversal or modification as distinguished from an order of affirmance or where the appeal is dismissed not on merit but on some technical ground of limitation or maintainability, etc. or dismissed on merit but in breach of natural justice and the appellate order is quashed necessitating an order of remand to the appellate authority, then in that event the original order of termination can be upheld on consideration of merit, but in view of my finding that the original order of termination is bad in law, the appellate order of affirmance would not add any strength to the illegal order passed by the original authority, and. In the circumstances, there is no need to remit the matter to the appellate authority for decision of appeal afresh by excluding participation herein of the disciplinary authority who passed the original order of termination. In this view of the matter, the question whether the appellate order is vitiated due to violation of any rule of natural justice, as submitted by Sri S. C. Budhwar, is only of an academic moment. But it would be apt and proper to deal with it.

36. *Coopan v. Wilson*, (1937) 2 KB 309, was a case where a police sergeant was dismissed by Chief Constable of Liverpool and his appeal against the dismissal was rejected by the Watch Committee in the Chief Constable was present. It was held that the presence of the Chief Constable whose mind was made up in advance and who was in effect the respondent to the appeal, was fatal to the validity of the Watch Committee's decision. Lord Justice Scott, said ; "The risk that a respondent may influence the Court is so abhorrent to English notions of

justice that the possibility of it or even the appearance of such a possibility is sufficient to deprive the decision of all Judicial force, and to render it a nullity."

37. The principle is that subject to statutory exceptions, "persons who had once decided a question should not take part in reviewing their own decision" on appeal (See D. D. Basu on Administrative Law, Second Edition pp. 233-234). In De Smith's Judicial Review of Administrative Action, Fourth Edition, page 260, the effect of participation in appeal against own decision is stated thus : "The general common-law rule, applied in administrative as well as Magisterial law. Is that one who has made a decision having a judicial flavour must not participate or indeed give the impression of participating in such an appeal." in other words, a person having bias in favour of or against a party should not take part in the decision of the dispute and the prohibition extends to all cases where such a bias is likely to arise. Dominant test in such matters is "reasonable suspicion" or "real likelihood." De Smith in his "Judicial Review of Administrative Action, (1980)" at page 262. has observed that a real likelihood of bias means at least substantial possibility of bias. In R. v. Simdertand Justice 1924 (1) KB 357. It has been held that the Court will have to judge the matter as a reasonable man would judge any matter in the conduct of his own business. In R. u. Susses Justices 1924 (1) KB 256 , it has been indicated that answer to the question whether there was a real likelihood of bias depends not upon what actually was done but upon what might appear to be done. In Halsbury Laws of England, 4th Edn. Vol. 2 para 551, it has been indicated that the test of bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias. The same principle has been accepted by the Supreme Court in Manak Lal Vs. Dr. Prem Chand, The Supreme Court has laid down the test as under ;

"The test is not whether in fact, a bias has affected the judgment ; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice must not only be done, but must also appear to be done."

38. The appellate order, if judged on the anvil of the principles aforesaid, cannot be sustained for the simple reason that the disciplinary authority, who passed the original order of termination, participated in the meeting of the Board in which the decision was taken to uphold the order of termination and reject the appeal. Baidyanath Mahapatra Vs. State of Orissa and Another, lends support to the view I am taking. The appellate order is, therefore, liable to be quashed on this ground as well. The original order of termination which merged in the appellate order, in the circumstances, cannot survive. The writ petition, therefore, commands itself to be allowed.

39. The writ petition succeeds and is allowed and the impugned orders dated 3.8.1986 and 16.10.1985 are quashed. The petitioner shall be reinstated with 40% of the back-wages subject to the condition that the employer shall have the option to hold disciplinary enquiry in respect of the alleged misdemeanour of the

petitioner and terminate his services on proved misconduct, if any, in accordance with Regulation 30 of the Regulations.