

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

rpa

WRIT PETITION NO.104 OF 2015

Sanjay Dinkar Bhate

.. Petitioner

Vs.

Principal Secretary,
Law & Judiciary Dept., Govt.
of Maharashtra, Mantralaya,
Mumbai & Anr.

.. Respondents

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Mr.R.S. Apte, Senior Advocate i/b. Mr.Sagar Ambedkar,
Advocate for the Petitioner.

Mr.V.P. Malvankar, AGP 'A' Panel for Respondent - State.

Mr.Amit B. Borkar, Advocate for Respondent No.2.

....

**CORAM : A.S. OKA &
A.P. BHANGALE, JJ.**

DATED : MARCH 25, 2015.

P.C. :

The petitioner was appointed as a District Judge by nomination on 10th April, 2008. The challenge in this petition under Article 226 of the Constitution of India is to the order dated 21st November, 2012, passed by the State Government by which the appointment of the petitioner who was on probation was terminated on the ground that the petitioner had not satisfactorily completed the period of probation.

2 The learned senior counsel appearing for the petitioner invited our attention to the provisions of the Maharashtra Judicial Services Rule, 2008 and in particular Rule 13. He pointed out that Sub-rule (1) of Rule 13 provides that all appointments to the service by nomination shall be on probation for a period of two years. He pointed out that the said period of probation can be extended further only by a maximum period of two years. He pointed out that the initial period of probation which was to expire after a period of two years was extended after the completion of the period of two years. He invited our attention to the impugned order. He pointed out that the impugned order was passed long after completion of four years from the date of initial appointment of the petitioner. He pointed out that the impugned order records that the period of probation was extended by the said order till the date of discharge. He urged that the period of probation could not have been extended beyond the period of four years and in the present case, the same has been done and, therefore, illegality has been committed. His submission is that the impugned order of discharge dated 21st November, 2012 is illegal and in fact the petitioner is deemed to have been confirmed on completing four years of service. Therefore, the petitioner could not have been removed without holding disciplinary inquiry. His second submission is

that during this period of four years and more, nothing adverse was communicated to the petitioner. No opportunity was granted to the petitioner to improve his performance. He submitted that even copies of Annual Confidential Reports (ACRs) were not furnished to the petitioner. He urged that if the copies of the ACRs would have been furnished, the petitioner could have made an attempt to improve himself even assuming that there was something lacking in his performance. He urged that while passing the order of discharge, reliance has been placed on a uncommunicated adverse remarks in the ACRs. He pointed out the manner in which the ACRs had been written. He pointed out that in the ACR of 2009-10 written on 25th April, 2012 by the learned Guardian Judge, nothing adverse was found about the integrity of the petitioner. But, in the ACR of 2nd April, 2012 written by Guardian Judge for the year 2010-11, the remark is that the integrity of the petitioner was found to be doubtful. He urged that there is no material on the basis of which the remark about the integrity and even other adverse remarks could have been written in the ACR. He pointed out that the manner in which the ACRs of the petitioner had been written. He pointed out the remarks of the reporting authority. He placed reliance of the decision of the Apex Court in the case

of ***State of Gujarat Vs. Suryakant Chunilal Shah***¹. He also placed reliance of the decision of the Apex Court in the case of ***Dev Dutt Vs. Union of India and Others***². He relied upon several decisions of the Apex Court on the issue of principles of natural justice. He relied upon a decision of the Apex Court in the case of ***Ishwar Chand Jain Vs. High Court of Punjab and Haryana & Anr.***³ He relied a the decision of the Apex Court in the case of ***High Court of M.P. through the Registrar and Others Vs. Satya Narayan Jhavar***⁴. He relied upon a decision of the Apex Court in the case of ***Pradip Vs. Union of India***⁵. Lastly, he relied upon a decision of the Apex Court in the case of ***Dr.Mrs.Sumati P. Shere Vs. Union of India***⁶. The learned counsel representing the High Court administration has also relied upon various decisions. He has placed before this Court a copy of the letter dated 6th August, 2011, addressed to the petitioner by the Registrar General informing him of the adverse remarks in the ACR of the 2008-09. He has placed on record a copy of the note which was placed before the Committee of this Court which recommended discharge of the petitioner.

1 (1999) 1 SCC 529.

2 (2008) 8 SCC 725.

3 AIR 1988 SC 1395

4 (2001) 7 SCC 161

5 Civil Appeal No.9082 of 2012

6AIR 1989 SC 1431.

3 We have given careful consideration to the submissions. As far as the first submission of the learned senior counsel appearing for the petitioner based on deemed confirmation is concerned, the issue has been dealt with by the Division Bench of this Court in the case of ***Smt.S.B. Khandelwal Vs. State of Maharashtra & Anr.***⁷ The same argument based on the plea of deemed confirmation was considered by the Division Bench. It was held that any delay on account of procedural actions to issue a certificate of satisfactory completion of probation period does not entitle a judicial officer appointed by nomination to claim deemed confirmation. On this aspect, it will be necessary to make a reference to a decision of the Apex Court in the case of ***High Court of M.P. Vs. Satya Narayan Jhavar (Supra)*** which is relied upon by the petitioner. In the said decision, the Apex Court considered the provisions of Rule 24 of Madhya Pradesh Judicial Service (Classification Recruitment and Conditions of Service) Rules, 1955. In paragraph 35, the Apex Court held thus:

“35.....

It is too well settled that an order of confirmation is a positive act on the part of the employer which the employer is required to pass in accordance with the Rules governing the question of

⁷Writ Petition No.2511 of 2009, decided on 15th November, 2010

confirmation subject to a finding that the probationer is in fact fit for confirmation. This being the position under sub-rule (1) of Rule 24, it is difficult for us to accept the proposition, broadly laid down in the case of Dayaram Dayal and to hold that since a maximum period of probation has been provided thereunder, at the end of that period the probationer must be held to be deemed to be confirmed on the basis of the judgment of this Court in the case of Dharam Singh.”

4 Rule 24 of the Madhya Pradesh Judicial Service Rules provides that a Judicial Officer shall be appointed on probation for a period of two years which period may be extended for a further period not exceeding two years. Perhaps the said decision is pressed into service by the learned senior counsel appearing for the petitioner in the light of an observation made in paragraph 38 of the Judgment. It is merely a passing observation of the Apex Court that if the Full Court would have considered the suitability of the probationer for confirmation while the probation period was continuing, the matter might have stood on a different footing. However, in the earlier part of paragraph 38, the Apex Court held that mere continuance of a probationer after considering his case for continuation

during the probation period and finding him unsuitable for confirmation by the decision of the Full Court, by no stretch of imagination can be considered to be confirmation by implication.

5 The second argument is based on non-communication of the Annal Confidential Reports which have been relied upon for coming to a conclusion that the petitioner has not satisfactorily completed the period of probation. On this aspect, the law is laid down by the Apex Court in the case of ***High Court of Judicature at Patna Vs. Panday Madan Mohan Prasad Sinha & Ors.***⁸. In paragraph 6 of the said decision, the Apex Court has observed thus :

6.....

As regards a probationer, the law is well settled that he does have a right to hold the post during the period of probation. The position of a probationer cannot be equated with that of an employee who has been substantively appointed on a post and has a right to hold that post. An order terminating the services of a probationer can be questioned only if it is shown that it has been passed arbitrarily or has been passed by way of punishment without complying with the requirements of Article 311 (2) of the

8 (1997) 10 SCC 409.

Constitution. Since a probationer has no right to hold the post on which he has been appointed on probation, he cannot claim a right to be heard before an order terminating his services is passed. The obligation to communicate the adverse material to a person before taking action against him on the basis of the said material is a facet of the principles of natural justice. But principles of natural justice has no application in the case of termination of the services of a probationer during the period of probation since he has no right to hold the post. It is, therefore, not possible to hold that there is an obligation to communicate the adverse material to a probationer before a decision is taken on the basis of the said material that he is not fit for being retained in service. Such material can be relied upon to show that such a decision does not suffer from the vice of arbitrariness and is not capricious. In this context it may be mentioned that even with respect to persons who have been substantively appointed on a post and have a right to hold that post, it has been held that the failure to communicate the adverse remarks in the service record would not vitiate the order of compulsory retirement. (See : *Union of India v. M.E. Reddy and Baikuntha Nath Das v. Chief Distt. Medical Officer.*)

(Underlines added)

6 Thus, the petitioner cannot find fault with the impugned order on the ground that adverse material was not

communicated to him before the decision was taken on the basis of the said material that he is not suitable to remain in judicial service. The Apex Court reiterated the well known principle that a probationer has no right to hold the post on which he has been appointed on probation and, therefore, principles of natural justice are not applicable, and he is not entitled to be heard before he is discharged. Thus, the argument based on non supply of Annual Confidential Reports has no basis.

7 The learned senior counsel appearing for the petitioner tried to make a capital of the alleged inconsistency in the ACRs written by the learned guardian judge on 2nd April, 2012 and on 25th April, 2012. We have perused the said ACRs. The ACR written on 25th April, 2012 is of the year 2009-2010, wherein judicial ability of the petitioner has been described as “Mediocre”. The learned Guardian Judge has made detailed observations about the quality of judgments, the language and the capacity to marshal evidence. It is observed that the quality of judgments is below average. The learned Guardian Judge has recorded reasons for not agreeing with the net result assigned by the Reporting Officer, and he has given grading of 'C' below average. The other ACR dated 2nd April, 2010 is of the year 2010-2011. The

remarks against all the three columns are differently worded than the ACR of 2009-2010. The knowledge of law and procedure has been assessed as "below average". The quality of judgments is assessed as "below the mark". It was observed that there was a distinct scope for improvement. Against the column no.2, the Guardian Judge has recorded that the reputation of the petitioner and integrity was doubtful. He has agreed with the remark of the Reporting Officer that the integrity does not appears to be absolutely above board. The two ACRs written in April, 2012 are for different years. The manner in which the said ACRs have been written shows that the learned Guardian Judge has carefully considered the entire record of the learned Judge of the relevant years. On the basis of the material on record of the relevant years that he has written the ACRs. The manner in which the said ACRs are written in April 2012 shows a very conscious application of mind by the learned Guardian Judge on the basis of the material placed before him.

8 In the ACR of the petitioner of the year 2008-09 it is observed that his Judgments were cryptic and reasoning was found to be inadequate. This remark has been communicated to the petitioner. This remark has been accepted by the learned Guardian Judge. In the ACR written

by the Reporting Officer on 30th April, 2010, it is specifically observed that there is a scope for improvement in marshaling and appreciation of the evidence. He has expressed a hope that with the passage of time, the petitioner would improve the same. He has specifically stated that instructions in this regard have been given to him. He has stated that while writing judgments arising out of offences related to sexual abuse, the petitioner had disclosed the identity of the victims. It is recorded that instructions have been also given even on this aspect. Therefore, at least at two stages, the petitioner was communicated the deficiencies in his performance. On 14th March, 2011, an order of extension of probation period was issued to the petitioner. Even this order shows that the concerned authorities did not accept that the petitioner had completed the probation period satisfactorily. Thus, the petitioner was put to notice that he needs to improve.

9 The ACRs of the learned Judge were placed before the Committee of four Judges of this Court along with the service record of the petitioner. The Committee recommended that the petitioner has not satisfactorily completed the probation period. At this stage, it will be necessary to make a reference in a decision of this Court in the case of ***Girish Satyanarayan Shukla Vs. High Court of***

Judicature at Mumbai & Anr.⁹ It will be necessary to consider what is held by this Court in paragraph 23. This Court was dealing with a challenge to the order of discharge passed against a Judicial Officer who was on probation. In paragraph 23, this Court observed thus:

“23.....

It is true that there is nothing placed on record to show that the ACRs were communicated to the Petitioner. In fact, the learned Counsel for the High Court administration stated that the practice of communicating the remarks in the ACRs was started on the basis of the decision taken by the Administrative Judges in the meeting on 5th January, 2010. However, in the present case, there is no question of complying with the principles of natural justice. As the impugned order is neither punitive nor stigmatic, the same would not vitiate on the basis of the alleged violation of the principles of natural justice. The Apex Court has held that misconduct of a probationer may be a motive for passing an order of termination and such order does not become bad. While considering the case of a judicial officer for confirmation, what is required to be considered is not only his judicial performance but also the manner in which he has conducted himself. In the present case, we are satisfied that the order is not at all punitive and

9 Writ Petition No.96/2007, decided on 4th August, 2014.

is based on consideration of the overall performance of the Petitioner. He was found unsuitable to continue as a judicial officer. There was material to come to the said conclusion. The order cannot be said to be a stigmatic based on any misconduct or misdemeanor. Moreover, as is permissible in law, the period of probation of the Petitioner was extended by a period of one year with a view to give him an opportunity to improve his performance."

(Underlines added)

10 After having perused the Annual Confidential Reports annexed to the writ petition by the petitioner himself, we find that there was a material available to come to a conclusion that the petitioner's performance was not up to the mark and he had not satisfactorily completed the period of probation. At least on two occasions, the petitioner was informed about the deficiencies. By extending the period of probation for two years, an opportunity was granted to the petitioner to improve himself. We must note here that there is no specific grievance made in the petition that order of discharge is stigmatic or that it is based on no material. We must note here that though in ACRs written by the learned Guardian Judge, there is some observation about the doubtful integrity of the petitioner, the impugned order does not

become bad. At the highest, it can be said that the said remark may be a motive for passing an order of discharge.

11 There is another important issue which needs to be considered. We are dealing with a case of a Judicial Officer who was on probation. While considering the case of a judicial officer for confirmation, apart from the judicial performance of the concerned judge, it is necessary to consider the manner in which he has conducted himself. There is a material on record to come to a conclusion that the petitioner is not suitable to continue.

12 There is something more serious. Today morning we had invited attention to the learned senior counsel appearing for the petitioner to the averments made in the petition. We had granted an opportunity to the petitioner to consider his position.

13 We have already pointed out the contents of the Annual Confidential Reports written by the learned Guardian Judge for the years 2009-10 and 2010-11. The ACRs were written by His Lordship Justice Dr.D.Y. Chandrachud (as he is then was who is now the Chief Justice of a High Court). It will be material to note how the said ACRs written by the

learned Judge have been described in paragraph 97. In paragraph 97 the petitioner has stated thus :

“97. The remarks of guardian judge in the ACRs of 2009-2010 and 2010-2011 with respect to judicial ability of petitioner are vague, confused, ambiguous & definitely not of guiding nature. He has not commented on the parameters specifically framed and asked by the High Court. Judicial ability of a judicial officer can not be decided on a subjective satisfaction of an individual judge. A Judicial ability has to be tested on judicial parameters framed and approved by full house of High Court.”

14 Apart from the confidential reports written by the learned Guardian Judges, the petitioner has commented upon the manner in which the Reporting Officers have written the ACRs. In paragraph 84, while referring to the Reporting Officer (who was the Principal Judge and now a sitting Judge of this Court), the petitioner has stated that :

“84.....

He does not categorically say that the reputation of officer is bad and integrity is doubtful. In spite of asking he does not quote any specific instances. There is not even complaint leave apart any proof, evidence or material. This shows the remarks are not based on any objective observance of judicial officers. They are born out.

of personal pique. Hence, they are required to be discarded."

(Underline added)

15 In paragraph 92, the Petitioner has found fault with the learned Principal Judge of the City Civil Court at Mumbai for imposing only a minor penalty on a member of the staff. In paragraph 96 he went to extent of stating that the Reporting Officer (The Principal Judge) has not written the confidential report for the year 2010-11 fairly and correctly, and it is full of falsehood. In paragraph 99, he has contended that there is an inordinate delay in reviewing the ACRs by the learned Guardian Judge and, therefore, the very purpose of writing the ACRs is lost. In one of the paragraphs and in particular paragraph 116, the petitioner has observed thus:

"116.In the light of above revelation a question is bound to crop up that why the reporting officer has written such false confidential report of petitioner. The answer is his grudge against petitioner. Furthermore the said reporting officer is from the cadre of Metropolitan Magistrate. Therefore, he has acted as judicial officer in Mumbai only. Prior to being elevated as principal judge he had tenure as judge in city civil court only."

(Underlines added)

16 We must note here that the reference in paragraph 116 is to a sitting learned judge of this Court. While referring to various judicial orders passed by himself, the petitioner himself has given an illustration that while deciding a Sessions case, he directed the Director General of Police and Commissioner of police to conduct an inquiry with respect to the proposal for grant of President's Gallantry Award to certain police officers.

17 We are not referring to all the allegations made in the petition, but suffice to say that the allegations made by the petitioner against the sitting judges of this Court are not only irresponsible but the same are contemptuous. In fact, this Court would have been justified in initiating an action under the Competent of Court Act, 1971 against the petitioner. Without considering the fact whether the petitioner deserves mercy, we have decided to show mercy to the petitioner.

18 The petition has been filed after about two years from the date of the impugned order. We already observed that while considering a case of judicial officer for the confirmation of probation, apart from his judicial ability, what is required to be considered is the manner in which he has

conducted himself. We have already quoted the averments made by the petitioner in this petition.

19 Suffice is to say that the petitioner has no case on merits. We deprecate the manner in which the averments have been made in this petition and the manner in which reckless allegations have been made by the petitioner against some of the sitting judges of this Court. But, we refrain ourselves from taking any further action against the petitioner.

20 The Petition is accordingly rejected.

(A.P. BHANGALE, J.)

(A.S. OKA, J.)