

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No.1647/2017 & CM Nos. 7414-7417/2017**

% **22nd February, 2017**

RAJ KUMAR KAUSHIK Petitioner

Through: Mr. Santosh Kumar and Mr.
Abhinav Sharma, Advocates.

versus

THE BHARAT SCOUTS AND GUIDES & ANR. Respondents

Through: Mr. Santosh Krishnan and Mr.
Gaurav Agrawal, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. Disposal of the writ petition is on a demurer of the respondent no.1 that Bharat Scouts and Guides is State under Article 12 of the Constitution of India and that this aspect is not being decided in this writ petition.

2. By this writ petition under Article 226 of the Constitution of India, the petitioner seeks the relief of quashing of the office order dated 30.1.2017, and by which order the petitioner, who was on probation at the post of Deputy Director, has been reverted to the post of Assistant Director. By the self-same office order the petitioner has been transferred and has been asked to report for work at Gauhati.

3. Since quite a few aspects requiring decision will turn upon the impugned order dated 30.1.2017, the same is reproduced as under:-

“Ref. No. B.S.G./N.H.Q/ ADMN-2017/5946/2016-17 Dated 30/1/2017

OFFICE ORDER

Shri Raj Kumar Kaushik, Assistant Director was promoted as Deputy Director and posted at the Bharat Scouts & Guides, National Youth Complex, Gadpuri as per Order No.B.S.G./N.H.Q/ADMN-2015/3687/2014-15 dated 16.02.2015 of Chief National Commissioner, Bharat Scouts & Guides. He was assigned the duty of supervision of construction work undertaken by Bharat Scouts & Guides at National Youth Complex, Gadpuri and was made incharge of NYC, Gadpuri.

While working at NYC, Gadpuri as Deputy Director, he was issued a office memorandum No.ADMN-2015/4068/2014-15 dated 07.03.2015 for his indiscipline behavior at NYC Gadpuri during the visit of Hon’ble Chief National Commissioner. He left NYC, Gadpuri without informing the Hon’ble Chief National Commissioner and the Director who were at NYC, Gadpuri for a programme. He was warned that such behavior and attitude will be viewed seriously which will go against him and to be more cautious in future.

He has submitted a four page explanation to that memorandum abusing his higher officer i.e. the Director in an unparliamentary language instead of accepting his indiscipline and mistake. This reply was viewed by Chief National Commissioner very seriously stating that his explanation is not satisfactory and presumption made by him was totally wrong. He was issued one more warning letter.

He was issued an office Memorandum vide No. B.S.G./N.H.Q./ADMN-2015/3816/2015 dated 23.02.2015 informing htat the performance, attitude towards work and his discipline will be on observation for a period of one year and the officer need to show progress in his respective areas of work. He should submit monthly report of his performance to the Director on last working day of every month with effect from 1st March, 2015. He was also informed that if the performance is not found satisfactory, he can be reverted to his original post of Assistant Director.

As narrated above, Shri R.K.Kaushik was posted as Deputy Director at NYC Gadpuri, his Headquarters was therefore NYC Gadpuri. It was expected to him to have stayed at Gadpuri, it being his Headquarters. However, it was noticed that he never stayed at Gadpuri and kept on attending his duties from his residence in Delhi. He was therefore asked to explain as to why he has not been staying at Headquarters and further that he was advised to stay at Gadpuri, his Headquarters.

Shri R.K.Kaushik’s letter dated 13.03.2015 was received in this office in response to this office letter dated 07.03.2015. The contents and the language used by Mr. Kaushik was totally unwarranted. He tried to justify

saying that it is not necessary to stay at Headquarters which was ridiculous and un-act of indiscipline.

He was, therefore, issued a letter dated 06.04.2015 bringing to his notice that (a) he does'nt stay at Headquarters and (b) all his presumptions staying at Headquarters is not compulsory, was totally wrong. It was further made clear to him that his explanation and his behavior were not in line with the Staff Service Conduct Rules for BS&G officials and vide the same letter he was warned to be more responsible and stay at Headquarters. He was given a clear understanding that flouting and disobeying the orders of this office would amount an act of indiscipline and would be dealt with severely as per rules.

He was transferred and posted as Deputy Director of Scouts (Project) at National Headquarters, New Delhi on his request on compassionate ground by the Hon'ble Chief National Commissioner. He was asked to visit NYC, Gadpuri for 03 (Three) working days or on every working day or even on holidays in a week to supervise the construction work as per requirement. He was also directed to maintain a record of his movement at NHQ and mark the attendance at NYC, Gadpuri in the attendance register with time of reporting to and departing from NYC, Gadpuri. But he has neither visited Gadpuri as per the instructions nor maintained the record of movement at NHQ.

Under the above circumstances, it is felt that Shri Raj Kumar Kaushik during his probation period has not followed the instructions of the office order and also not worked according to his responsibilities. Thus during the probation period his attitude towards the work was not found appropriate, his behavior was indisciplined, his performance with reference to duties assigned to him was extremely unsatisfactory. He has also not submitted even a single performance report during his probation period as per the office order. His behavior during the probation period was found to be most arrogant and most indisciplined. He was thus found disobedient and adamant.

As mentioned above, Mr. R.K.Kaushik was transferred to NTC, Pachmarhi as an additional man power was badly required as per the demand of Joint Director, NTC. He was relieved on 23.09.2016 and asked to join at NTC latest by 30.09.2016. However disobeying this office order, he did not join his place of new assignment even after enjoying legitimate joining time. He joined on 05.10.2016 and even thereafter he kept proceeding on leave without it getting duly sanctioned from the undersigned. He is still found in the habit of leaving the Headquarters i.e. National Training Centre, Pachmarhi without information and permission. It was reported that he even left the Headquarters without anybody's prior permission on 28.01.2017 evening.

For termination of the probation period (trial period) the work of an officer/employee has to be necessarily satisfactory. However, from what has been narrated in all the paras above, one would infer and come to the conclusion that the work of Mr. R.K.Kaushik during his probation period has been utterly unsatisfactory. The undersigned is, therefore, left with no option but to take a strict disciplinary action against him.

Mr. R.K.Kaushik is hereby reverted to the post of an Assistant Director and transferred to the post of Assistant Director, North Eastern Region at Guwahati, Assam. He is directed to get himself relieved from the post of Deputy Director of Scouts at NTC, Pachmarhi and join his new assignment immediately.

This takes an immediate effect and issues with an approval of competent authority.

Sd/-
(K. SUKUMARA)
DIRECTOR

To,
Shri Raj Kumar Kaushik
Dy. Director of Scouts
Bharat Scouts & Guides
National Training Centre
Pachmarhi-461881 (M.P)

Copy submitted to: Hon'ble Chief National Commissioner for kind information please.

Copy to:

1. Joint Director, BS&G NTC Pachmarhi to relieve Shri R.K. Kaushik with immediate effect not later than 31st January,2017.
2. All Joint Directors, BS&G.
3. All Deputy Directors, BS&G.
4. All Assistant Directors, BS&G.
5. Accounts Officer, BS&G.
6. All HODs, BS&G.
7. Personal File of Shri R.K. Kaushik.

4. (i) On behalf of the petitioner it is argued that the impugned order dated 30.1.2017 in fact is a punishment order because in the third last para of this order, before reverting the petitioner, it is observed that disciplinary action has to be taken, and once that is so, the impugned order is in the nature of punishment and hence the same could not have been passed without conducting enquiry proceedings against the petitioner.

(ii) On behalf of the petitioner, the next argument is that petitioner was appointed on probation for one year w.e.f 16.2.2015, and since there is no extension of the period beyond the period of one year of probation, petitioner is hence deemed to have been confirmed to the post of Deputy Director. A supplementary argument is also raised that the pay slip of the petitioner for the month of May 2016 shows the petitioner to be a confirmed employee at the post of Deputy Director and hence petitioner is to be taken as confirmed to the post of Deputy Director.

5. With respect to the first argument urged on behalf of the petitioner that the impugned order is stigmatic and in fact is in the nature of punishment, reliance is placed upon the judgments of the Supreme Court in the cases of *S. Sukhbans Singh Vs. State of Punjab AIR (1962) SC 1711*, and *Jaswantsingh Pratapsingh Jadeja Vs. Rajkot Municipal Corporation and Another (2007) 10 SCC 71* and it is accordingly argued that such an order could not have been passed without conducting enquiry against the petitioner.

6. The first aspect to be considered by the Court is whether the impugned order dated 30.1.2017 is stigmatic or that this order imposes a punishment upon the petitioner by not confirming the

petitioner to the post of Deputy Director and on which post petitioner was serving the probationary period.

7. I cannot agree with the argument urged on behalf of the petitioner that the impugned order is stigmatic inasmuch as it is settled law that if reasons are given for non-confirmation of a probationer, then the fact of mentioning of the reasons will not result in the order being termed as a stigmatic order. This aspect has been considered by me by referring to various judgments of the Supreme Court in the case recently decided being ***Gurvinder Singh Saini Vs. Director of Education and Ors. (2016) 10 AD Delhi 368.*** The relevant paras of this judgment read as under:-

5. That the probationer need not be confirmed in services and in fact if 'reasons' are given for terminating of services of a probationer, then, merely because the reasons may in some way show lack of efficiency or any other negative aspect as regards the employee, would not mean that services are terminated by a stigmatic order. The services of a probationer can be terminated by a non-stigmatic order is clear from the ratios of the judgments of the Supreme Court in the cases of ***Muir Mills Unit of NTC (U.P.) Ltd. Vs. Swayam Prakash Srivastava & Another (2007) 1 SCC 491, State of W.B. and Others Vs. Tapas Roy (2006) 6 SCC 453, Chaitanya Prakash and Another Vs. H. Omkarappa (2010) 2 SCC 623, Rajesh Kumar Srivastava Vs. State of Jharkhand and Others (2011) 4 SCC 447 and Abhijit Gupta Vs. S.N.B.National Centre, Basic Sciences & Others (2006) 4 SCC 469.*** All these judgments have been considered by me in the case of ***Rajeev Khurana Vs. Principal, Saraswati Bal Mandir & Ors.*** in W.P.(C) No.4968/2008 decided on 26.8.2013 wherein the relevant paras of the judgments of the Supreme Court in the aforesaid cases have been referred to in paras 2 to 6, and which paras 2 to 6 of the judgment in the case of ***Rajeev Khurana (supra)*** read as under:-

"2. Petitioner was appointed on a probation for a period of two years in terms of the appointment letter dated 3.9.1997 and was terminated within the first year of service by the letter dated 30.4.1998. Though there are

various reasons given for considering the termination of services of the petitioner as a probationer, and which includes the issue of direction to the petitioner to improve his teaching practices, I may note that it is settled law that principles of natural justice have not to be followed before terminating the services of the probationer. This is so held by the Supreme Court in the judgment reported as ***Muir Mills Unit of NTC (U.P.) Ltd. Vs. Swayam Prakash Srivastava & Anr. (2007) 1 SCC 491.*** In this judgment the Supreme Court has held that if the termination order says that the performance is unsatisfactory, even then, it cannot be said that the order is stigmatic. Paras 44 to 46 of the said judgment read as under:

“44. Also in the case of *Registrar, High Court of Gujarat and Anr. v. C.G. Sharma* it was observed that an employee who is on probation can be terminated from services due to unsatisfactory work.

45. This Court's decision in the case of *P.N. Verma v. Sanjay Gandhi PGI of Medical Sciences* can be referred to in this context, where it was held by this Court that, the services of a probationer can be terminated at any time before confirmation, provided that such termination is not stigmatic. This Court in *State of Madhya Pradesh v. Virendera Kumar Chourasiya* also has held that in the event of a non-stigmatic termination of the services of a probationer, principles of *audi alteram partem* are not applicable.

46. We are also of the view that the award of the Labour Court is perverse as it had directed grant of back wages without giving any finding on the gainful employment of respondent No.1 and held that the discontinuance of the services of a probationer was illegal without giving any finding to the effect that the disengagement of respondent No.1 was in any manner stigmatic. The decision in the case of ***MP State Electricity Board v. Jarina Bee (Smt)*** (supra), this Court held that payment of full back wages was not the natural consequence of setting aside an order of removal. In the instant case, though the termination was as far back as in 1983, the Industrial Adjudicator has not given any finding on unemployment. This Court in a recent case of ***State of Punjab v. Bhagwan Singh*** (2002)9SCC636 has held that even if the termination order of the probationer refers to the performance being “not satisfactory”, such an order cannot be said to be stigmatic and the termination would be valid.”

3. The Supreme Court in the judgment in the case of ***State of W.B. and Others Vs. Tapas Roy (2006) 6 SCC 453*** has held that where the discharge order mentions instances of unauthorized absence of the probationer and concluding that he was not interested in training and had no respect for discipline, making of such remarks in the termination order cannot be said to make the termination order a stigmatic one. Paras 4,5 7 and 8 of the judgment in the case of ***Tapas Roy (supra)*** read as under:-

“4. The High Court allowed the writ petition holding that Rule 10 of the Rules did not apply in the facts of the case. It was also of the view that the statement, quoted below; in the order of discharge casts a stigma on the respondent. Since no opportunity of hearing had been

granted to the respondent, therefore, the order could not be sustained. The decision of the Tribunal was, accordingly, set aside and the appellants were given liberty to take appropriate action against the respondent on the same grounds in accordance with law.

5. The particular passage from the order of discharge which the High Court found to be stigmatic reads as follows:

“I am convinced that he is not likely to make an efficient constable and is unsuitable for the Police Department. His frequent unauthorised absence from training centre also indicates his lack of interest in training and his scant respect for discipline.”

7. The order of discharge has, as we have already indicated, set out several instances of the respondent absenting himself unauthorisedly from the training centre. These facts have been relied upon for the purpose of concluding that the respondent was not interested in the training and had no respect for discipline. This conclusion was a ground for holding that the respondent was unsuitable for the Police Department.

8. The High Court was of the view that Rule 10 of the Rules did not apply to orders which were stigmatic. As has already been held by this Court in *Pavanendra Narayan Verma v. Sanjay Gandhi Post Graduate Institute Medical Sciences* 2002(92)FLR349(SC) that in order to constitute a stigmatic order necessitating a formal inquiry, it would have to be seen whether prior to the passing of the order, there was an inquiry into the allegations involving moral turpitude or misconduct so that the order of discharge was really a finding of guilt. If any of these three factors are absent, the order would not be punitive. We have also held that a stigma in the wider sense of the word is implicit in every order of termination during probation. It is only when there is something more than imputing unsuitability for the post in question, that the order may be considered to be stigmatic. In our view, the language quoted earlier in the discharge order, cannot be said to be stigmatic as it neither alleges any moral turpitude or misconduct on the part of the respondent nor was there an inquiry as such preceding the order of discharge. The order has been passed strictly in terms of Rule 10 of the Rules. We are, accordingly, of the view that the appeal must be allowed. It is, accordingly, allowed and the impugned order is set aside.” (underlining added)

4. The Supreme Court in the judgment reported as *Chaitanya Prakash and Anr. Vs. H. Omkarappa* (2010) 2 SCC 623 has again held that there is no need for following the principles of natural justice while terminating the services of a probationer and even if the termination order refers to the unsatisfactory service of the probationer, the order is not stigmatic. Paras 18 and 21 of this judgment read as under:-

“18. It is no longer *res integra* that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In this connection, we make a reference to the decision of the decision of the Supreme Court in *Abhijit Gupta v. S.N.B. National Centre, Basic Sciences* (supra), wherein also a

similar letter was issued to the concerned employee intimating him that his performance was unsatisfactory and, therefore, he is not suitable for confirmation. We have considered the ratio in light of the facts of the said case and we are of the considered opinion that the basic facts of the said case are almost similar to the one in hand. There also, letters were issued to the concerned employee to improve his performance in the areas of his duties and that despite such communications the service was found to be unsatisfactory. In the result, a letter was issued to him pointing out that his service was found to be unsatisfactory and that he was not suitable for confirmation, and, therefore, his probation period was not extended and his service was terminated, which was challenged on the ground that the same was stigmatic for alleged misconduct. The Supreme Court negated the said contention and upheld the order of termination.

21. In **Abhijit Gupta** (Supra.), this Court considered as to what will be the real test to be applied in a situation where an employee is removed by an innocuous order of termination i.e whether he is discharged as unsuitable or he is punished for his misconduct. In order to answer the said question, the Court relied and referred to the decision of this Court in **Allahabad Bank Officers Assn. v. Allahabad Bank** (1996) 4 SCC 504; where it is stated thus:

“14. ...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.”

5. In the case of **Rajesh Kumar Srivastava Vs. State of Jharkhand and Ors. (2011) 4 SCC 447** Supreme Court has held that while taking a decision to terminate the services of the probationer, no notice is required to be given to the probationer nor is the probationer required to be given any opportunity of hearing. Para 10 of the said judgment reads as under:-

“10. The aforesaid decision to release him from service was taken by the Respondents considering his overall performance, conduct and suitability for the job. While taking a decision in this regard neither any notice is required to be given to the Appellant nor he is required to be given any opportunity of hearing. Strictly speaking, it is not a case of removal as sought to be made out by the Appellant, but was a case of simple discharge from service. It is, therefore, only a termination simpliciter and not removal from service on the grounds of indiscipline or misconduct. While adjudging his performance, conduct and overall suitability, his performance record as also the report from the higher authorities were called for and they were looked into before any decision was taken as to whether the officer concerned should be continued in service or not.”

6. In the case of **Abhijit Gupta Vs. S.N.B.National Centre, Basic Sciences & Ors. (2006) 4 SCC 469** the Supreme Court has held that even

when a termination order of a probationer referred to earlier letters which called the probationer a person of “perverted mind” and “dishonest, duffer having no capacity to learn” yet, the order would not be stigmatic one, and merely that if such an order was read by a prospective employer would prejudice the probationer’s future employment, the same is not a correct test to determine the termination order as stigmatic. Paras 4,5,8,10,13, 15,16 and 17 are relevant which read as under:-

“4. On 20th November 1995 the appellant was served with a letter informing him that his performance during the probationary period was "far from satisfactory" and that it had been observed that he lacked drive, imagination and initiative 'in the performance of his duties'. He was informed that, despite being told time and again to improve performance in the said areas, but with no effect. He was advised to improve "in order to enable us to consider your case for confirmation favourably". He was issued several such letters drawing his attention to the fact that his services left much to be desired. His probationary service came to be extended from time to time, the last such extension being granted till 9th April 1998. Finally, by the letter dated 7.4.1998 the petitioner was informed that his service was "unsatisfactory in the areas of drive, initiative, promptness and leadership" and that despite advised verbally and through letter, what were deficiencies in his work he had shown no improvement. His attendance, office work and attention to the academic work and the affairs of the guest house were also unsatisfactory. The first respondent, therefore, said "your performance, ability and capability during the period of probation has been examined and your service during the period of probation is found to be unsatisfactory and hence you are considered unsuitable for the post you have to. The governing body is of the view that your performance was unsatisfactory and you are not suitable for confirmation". For these reasons the appellant's probationary period was not extended on the expiration of his probation period on 9th April 1999.

5. The appellant challenged the order of termination of his service on the ground that it was a stigmatic termination by way of punishment for alleged misconducts. The learned single Judge of the High Court allowed the writ petition and quashed the order of termination and directed re-instatement of the appellant with full back- wages. The Division Bench of the High Court, however, allowed the letters patent appeal and held that the letter dated 7th April 1998 was not stigmatic and that it was a legitimate exercise of assessment of probationer's service by the employer, and, therefore, there was no scope for judicial interference therewith. In this view of the matter, the Division Bench allowed the appeal, set aside the judgment of the learned single Judge and dismissed the writ petition. Hence, this appeal.

8. Heavy reliance was placed on ***Dipti Prakash Banerjee v. Satyendra Nath Bose National center for Basic Sciences, Calcutta and Ors.*** [1999]1SCR532 ,where this Court held that the termination of

service of the employee in similar circumstances amounted to misconduct. We may mention here that it is common ground that while the matter was pending before the learned single Judge, sometime in the year 2005, the appellant attained the age of superannuation. The learned Counsel for the appellant contended that in the letter dated 7.4.1998 there is reference to certain earlier letters in which the appellant had been called a person of "perverted mind" and "dishonest, duffer having no capacity to learn". A reading of all the letters referred to in the letter of 7.4.1998 would clearly make out a case of allegations of misconduct against the appellant, in the submission of the learned Counsel.

10. In *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and Anr.* (2002)ILLJ690SC 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* (1958)ILLJ544SC and *Dipti Prakash Banerjee* (supra) the Court observed (vide 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.”

13. In the case of the appellant before us, the record in uncertain terms makes it clear that every time the appellants attention was drawn to his deficiencies and he was repeatedly advised to improve his behavior, conduct and discharge of work. True, that in some of the letters there was intemperate language used (the appellant was also equally guilty of doing that). Notwithstanding the intemperate language, we are unable to accept the contention of the appellant's counsel that the letter dated 7.4.1998 indicates that the appellant was being charged with the misconduct and, therefore, being removed from service. Read as a whole, the letter gives the impression that the removal of the appellant from service was only because the respondents, after giving a long rope to the appellant, had come to the conclusion that the appellant's service was unsatisfactory and there was no hope of his improvement.

15. The learned Counsel for the appellant, however, strongly contends that the "stigma" cast on the employee may not be confined to his personal character but may also affect his capacity to work. The test, learned Counsel for the appellant submitted, is that, if what is stated in the order of termination is read by a future employer, it prejudices the future employment of the employee. In the face of the law laid down in the judgment just referred, we are unable to accept this as the correct test.

16. In **Ravindra Kumar Misra v. U.P. State Handloom Corporation Ltd. and Anr.** (1988)ILLJ73SC this Court pointed out that in a large corporation administration is bound to be impersonal and in regard to public officers assessment of service has got to be in writing for purposes of record, though it cannot be assumed that such an assessment recorded and the order of termination made with reference to that record would automatically take a punitive character.

17. The High Court has carefully considered all the circumstances placed before it and arrived at the conclusion that the respondent's work was under observation during the probationary period and that he was given repeated opportunities to improve his performance for which purpose his probation was extended from time to time. The fact that the authority did not find him fit for confirmation was also brought to his notice several times and yet he was given opportunities of improving by extending his probationary service. The High Court has correctly found that the letter dated 7.4.1998 was not punitive in nature and stated, albeit in prolix fashion, that the service of the appellant were unsatisfactory. The High Court points out, and we agree, that detailed reference to all other correspondence was not necessary, but it did not reflect any malice or bias. Finally, as this Court pointed out in P.N. Verma's case (*supra*) "a termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, does not ipso facto become stigmatic" (emphasis is mine)"

6. It is seen that termination of the petitioner was by a non-stigmatic order of termination dated 25.11.1997, and therefore, the petitioner cannot argue that services of the petitioner were terminated by a stigmatic order. In fact, ratios of the judgments of the Supreme Court show that even if reasons are given showing as to why the services are not satisfactory, and which may result in some sort of observations as to lack of potential or character of a probationary employee, even then, such language has been held by the Supreme Court to be not stigmatic. This is clearly stated in the judgment in the case of **Tapas Roy** (*supra*) wherein the Supreme Court has said that in a wider sense stigma is implicit in an order of termination during probation but it is only when something is more than imputing unsuitability for the post in question that order may be considered as stigmatic. In that case, it was also observed that the probationer was guilty of frequent unauthorised absence from training centre and which indicates his lack of interest in training and his scant respect for discipline and which observations have been held by the Supreme Court to be not stigmatic.

7. In the case of **Chaitanya Prakash and Another** (*supra*), Supreme Court has relied upon the observations made by it in an earlier judgment in the case of **Allahabad Bank Officers Association and Another Vs. Allahabad Bank and Others** (1996) 4 SCC 504 wherein it was stated that expressions like "want of application", "lack of potential"

and "found not dependable" would not be sufficient to attract the charge that they are stigmatic. I therefore hold that the petitioner has been terminated from services by a non-stigmatic order."

8. A reading of the aforesaid paras of the judgment in the case of ***Gurvinder Singh Saini (supra)*** shows that Supreme Court in its various judgments has held that giving reasons of unsuitability for non-confirmation of a probationer with reference to his conduct would not make the order to be a stigmatic order. Also, Supreme Court has in the case of ***Muir Mills Unit of NTC (U.P.) Ltd. Vs. Swayam Prakash Srivastava & Another (2007) 1 SCC 491*** has held that there is no need of following the principles of natural justice before non-confirming the services of a probationary employee. In fact, the Supreme Court in the judgment in the case of ***Pavanendra Narayan Verma v. Sanjay Gandhi P.G.I. of Medical Sciences and Another (2002) 1 SCC 520*** observed that no doubt the factum that the language of the termination of the services of a probationer giving reasons including misconduct would affect his future services with another employer, however, for that reason only that such language prejudices the future employment of the employee, yet such language giving reasons for non-confirmation of a probationary, cannot be read that the order of non-confirmation of a probationary employee is a stigmatic order.

9. In view of the judgments of the Supreme Court cited in the case of ***Gurvinder Singh Saini (supra)*** it is therefore held that there is no requirement of following the *audi alteram partem* rule before an order is passed of non-confirmation in probation of a probationary employee, and that giving of reasons which may make an employee inefficient or unsuitable or showing his misconduct etc would not result in the order of termination of a probationer as a stigmatic one.

10. The judgment of the Supreme Court relied upon by the petitioner in the case of ***Jaswantsingh (supra)*** in the facts of its case held the order to be stigmatic, however, the said judgment cannot be said to be laying down the ratio which is in violation of the five judgments of the Supreme Court which are referred to in the judgment passed by this Court in the case of ***Gurvinder Singh Saini (supra)***, and which judgments of the Supreme Court have held that giving of reasons which show unsuitability, misconduct and other negativities of a probationer will not result in the order of non-confirmation of services of a probationer as a stigmatic order.

11. The next aspect to be considered is that whether petitioner should be deemed to be confirmed as a probationer on completion of one year. The relevant Rule of the respondent no.1/employer in this

case is Rule 11 of the Staff Service (Conduct) Rules and which reads as under:-

“11. *Confirmation*

All appointment shall be made on probation for atleast one year.

After satisfactory completion of the period of probation the person concerned will be confirmed in his/her post on the recommendation of the Director.”

12. Even a cursory reading of the aforesaid Rule 11 shows that there is no language in the same of automatic confirmation of a probationer after one year. In fact, the Rule requires that there has to be a recommendation of the Director of the respondent no.1/employer for confirmation of the probationer to his job. Whether or not there is deemed confirmation depends upon the language of different specific rules of the organization and the present Rule 11 of the respondent no.1/employer in my opinion does not provide the position of deemed confirmation of a probationer after one year of service as a probationer. The law in this regard is laid down by the Supreme Court in its recent judgment in the case of ***Head Master, Lawrence School, Lovedale Vs. Jayanthi Raghu and Another (2012) 4 SCC 793*** wherein the Supreme Court speaking through Hon’ble Mr. Justice Dipak Misra has held that if there is a specific condition to be fulfilled and an order to be passed before confirmation of a probationer, then without such order being passed, there is no deemed confirmation. The relevant paras of the

judgment of the Supreme Court in the case of ***Head Master, Lawrence School, Lovedale (supra)*** are paras 25 to 31 and 37 to 39 and which paras read as under:-

25. It is apt to note here that the Learned Counsel for both the sides have heavily relied on the decision in *High Court of M.P. v. Satya Narayan Jhavar*. In the said case, the three-Judge Bench was considering the effect and impact of Rule 24 of the Madhya Pradesh Judicial Service (Classification, Recruitment and Conditions of Services) Rules, 1955.

26. It may be mentioned that the decision rendered in *Dayaram Dayal v. State of M.P.*, which was also a case under Rule 24 of the said Rules, was referred to the larger Bench. In *Dayaram Dayal*, it had been held that if no order for confirmation was passed within the maximum period of probation, the probationer judicial officer could be deemed to have been confirmed after expiry of four years period of probation.

27. After referring to the decisions in *Dharam Singh, Sukhbans Singh* and *Shamsher Singh* and other authorities, the three-Judge Bench expressed thus:

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

28. After so stating, it was further clarified as follows:

“37. Ordinarily a deemed confirmation of a probationer arises when the letter of appointment so stipulates or the Rules governing service condition so indicate. In the absence of such term in the letter of appointment or in the relevant Rules, it can be inferred on the basis of the relevant Rules by implication, as was the case in *Dharam Singh*. But it cannot be said that merely because a maximum period of probation has been provided in Service Rules, continuance of the probationer thereafter would ipso facto must be held to be a deemed confirmation which would certainly run contrary to Seven Judge Bench judgment of this Court in the case of *Shamsher Singh* and Constitution Bench decisions in the cases of *Sukhbans Singh*, *G.S. Ramaswamy* and *Akbar Ali Khan*.

29. Regard being had to the aforesaid principles, the present Rule has to be scanned and interpreted. The submission of Mr. Viswanathan, learned senior Counsel for the Appellant, is that the case at hand comes within the third category of cases as enumerated in para-11 of *Satya Narayan Jhaver*. That apart, it is urged, the concept of deemed confirmation, ipso facto, would not get attracted as there is neither any restriction nor any prohibition in extending the period of probation. On the contrary, the words "if confirmed" require further action to be taken by the employer in the matter of confirmation.

30. On a perusal of Rule 4.9 of the Rules, it is absolutely plain that there is no prohibition as was the rule position in *Dharam Singh*. Similarly, in *Om Prakash Maurya*, there was a restriction under the Regulations to extend the period of probation. That apart, in the rules under consideration, the said cases did not stipulate that something else was required to be done by the employer and, therefore, it was held that the concept of deemed confirmation got attracted.

31. Having so observed, we are only required to analyse what the words "if confirmed" in their contextual use would convey. The Division Bench of the High Court has associated the said words with the entitlement of the age of superannuation. In our considered opinion, the interpretation placed by the High Court is unacceptable. The words have to be understood in the context they are used. Rule 4.9 has to be read as a whole to understand the purport and what the Rule conveys and means.

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37. Bearing in mind the aforesaid conceptual meaning, when the language employed under Rule 4.9 is scrutinised, it can safely be concluded that the entitlement to continue till the age of superannuation, i.e., 55 years, is not absolute. The power and right to remove is not obliterated. The status of confirmation has to be earned and conferred.

38. Had the rule making authority intended that there would be automatic confirmation, Rule 4.9 would have been couched in a different language. That being not so, the wider interpretation cannot be placed on the Rule to infer that the probationer gets the status of a deemed

confirmed employee after expiry of three years of probationary period as - that would defeat the basic purpose and intent of the Rule which clearly postulates "if confirmed". A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed.

39. The Division Bench has clearly flawed by associating the words 'if confirmed' with the entitlement of the age of superannuation without appreciating that the use of the said words as a fundamental qualifier negatives deemed confirmation. Thus, the irresistible conclusion is that the present case would squarely fall in the last line of cases as has been enumerated in paragraph 11 of *Satya Narayan Jhaver* and, therefore, the principle of deemed confirmation is not attracted.”

13. I therefore cannot agree with the arguments urged on behalf of the petitioner of deemed confirmation of the petitioner after one year in service. Reliance placed upon by the petitioner on the judgment of the Supreme Court in the case of *S. Sukhbans Singh (supra)* in fact goes against the petitioner because this judgment also holds that there is no automatic confirmation of a probationer. The relevant paras of this judgment are paras 9 to 13 and which read as under:-

“9. It is common ground that the period of probation of the appellant was not extended by the Governor in exercise of the power conferred upon him by one of the provisos to Rule 22. The question to be first considered is what was the position of the appellant after the expiry of his probationary period of eighteen months? Upon this point the learned single Judge, after quoting the observation of Khosla, J. in another case said:

"Thus according to this Court a man who is on probation does not merely because his probation continues for more than the period prescribed by the rules becomes a permanent servant of the States, but if the periods of probation is unduly prolonged or the confirmation is unduly delayed, confirmation will be assumed. In the present case the petitioner was recruited to the Provincial Civil Service with effect from the 31st May,

1945 and he continued to work as an officer of the service upto the 17th May, 1952. According to the rules the period of probation was eighteen months and there is no indication that his period of probation was by order of the Governor extended....." I am, therefore, of the opinion that the petitioner was not on probation as is submitted by the State."

10. Then the learned Judge went on to observe:

"No rule has been cited and I do not know of any which would show that a person who has been recruited by the Public Service Commission can after having been in service for seven years or so be reverted merely on the ground that he is officiating."

If the learned Judge meant by all this that a probationer must be deemed to have been confirmed in his post by sheer lapse of time we think, with respect, that he was in error. A probationer cannot, as rightly pointed out by the Division Bench, automatically acquire the status of a permanent member of a service, unless of course the rules under which he is appointed expressly provide for such a result. The rules governing the Provincial Civil Services of Punjab do not contain any provision whereby a probationer at the end of the probationary period is automatically absorbed as a permanent member of the Civil Service. What happens to such a person is clearly set out in Rule 24 *cit sup*. Under the aforesaid rule such a probationer is merely qualified for substantive permanent appointment. Reading Rules 23 and 24 together it would appear that where a probation is not reverted by the Government before the termination of his period of probation he continues to be probationer but requires the qualification for substantive permanent appointment.

11. It has been held by this Court in *Parshotam Lal Dhingra v. Union of India* that Article 311 makes no distinction between permanent and temporary posts and extends its protection equally to all Government servants holding permanent or the temporary posts or officiating in any of them. But the protection of Article 311 can be available only where the dismissal, removal or reduction in rank is sought to be inflicted by way of punishment and not otherwise. One of the tests laid down in that case for determining whether the termination of service was by way of punishment or otherwise is whether under the Service Rules, but for such termination, the servant has the right to hold the post.

12. Reliance is placed upon Rule 24 of the Punjab Civil Service Rules and it is said that since it qualifies a probationer for being absorbed in a substantive-permanent appointment it gives him a right and the reversion of such a person deprives him of that right and thus amounts to punishment. The provisions of Article 311(2) are said to be attracted to the situation and where, as here, they have not been complied with the reversion must be regarded as illegal.

13. This argument assumes that a probationer who continues to be such without being reverted after the expiry of the period of probation has a

legal right to be confirmed or to be treated as if he were confirmed. The rule in question says no more than this that at the end of the probationary period the probationer, unless reverted or absorbed in a substantive post will be eligible for being made permanent. In other words it mean that he will continue to be a probationer unless he is reverted or absorbed in a permanent post. But the very fact that a person is a probationer implies that he has to prove his worth his suitability for the higher post in which he is officiating. If his work is not found to be satisfactory he will be liable to be reverted to his original post even without assigning any reason. It would, therefore, not be correct to say that a probationer has any right to the higher post in which he is officiating or a right to be confirmed. A probationer being merely made eligible for being absorbed in a permanent post is in no better position.”

14. The argument of the counsel for the petitioner relying upon the pay-slip of May 2016 to show the petitioner is confirmed is a misconceived argument inasmuch as no doubt the pay-slip of May 2016 shows petitioner as confirmed in the post of Deputy Director, however, the finance department showing that petitioner is confirmed will not be equivalent of complying with the requirement of Rule 11 which requires that for confirmation there must be an order passed by the Director of respondent no.1/employer, and admittedly, no order has been passed by the Director of respondent no. 1/employer for confirming the petitioner to the post of Deputy Director with the respondent no.1/employer.

15. At this stage, I may observe that no doubt in the second last para of the impugned order dated 30.1.2017 the expression found is that “strict disciplinary action” should be taken against the petitioner,

however, use of such language is a misnomer because really what is meant by the expression “strict disciplinary action” is nothing but non-confirmation of the probationer/petitioner to the post of Deputy Director with the respondent no.1/employer.

16. The impugned order dated 30.1.2017 notes that as against the petitioner there were three charges, showing petitioner’s unsatisfactory services for his non-confirmation to the post of Deputy Director and on which post the petitioner was working on probation. The first charge against the petitioner is that when the petitioner was posted during the period of probation at National Youth Complex (NYC) at Faridabad, as per the service rules he was required to stay in the complex of the respondent no.1/employer at Faridabad, but the petitioner instead of staying at the complex of the respondent no.1/employer at Faridabad stayed at Delhi. The second aspect of dissatisfactory service of the petitioner stated in the impugned order was that even when the petitioner on account of compassionate grounds got transferred from NYC Gadpuri to New Delhi, he was to visit NYC Gadpuri for three times a week and for such visits he was to maintain a detailed record with regard to the dates of his visits and the timings of his visits, but the petitioner did not do so. The third aspect of dissatisfactory service of the petitioner is that the petitioner was

posted on 5.10.2016 at Pachmarhi, M.P, and during the period of posting and till passing of the impugned order, he without getting sanctioned leaves, yet for many days took leaves and left his place of posting at Pachmarhi.

17. On the first aspect of why petitioner during his visit at NYC Gadpuri did not stay at NYC Gadpuri, counsel for the petitioner claims that staying “at station” in the facts of the present case and as per the understanding of the petitioner of the rules of the respondent no.1/employer would mean not staying at the place of posting, but since Faridabad was in the National Capital Region (NCR) petitioner could stay anywhere in the NCR. I put a specific query to counsel for the petitioner to show me any service rule that station means NCR because if the contention of the petitioner is correct then petitioner who is posted at Faridabad can stay anywhere in NCR and even at Noida or Gurgaon or Delhi or other satellite towns of Delhi, and to which query counsel for the petitioner had no answer that as per the service rule of respondent no.1/employer station means NCR.

18. On the second aspect of petitioner not maintaining the records of three days of visits per week at NYC Gadpuri when the petitioner was posted at New Delhi, again counsel for the petitioner is neither able to point out to me anything in the writ petition nor any

document to show that petitioner had maintained the record of his three days visits per week to NYC Gadpuri including the timings thereof. Obviously, petitioner is a recalcitrant employee who, in spite of being transferred from NYC Gadpuri to Delhi on compassionate grounds, yet petitioner continued with his indisciplined ways by not going to NYC Gadpuri and which fell within the scope of his duties.

19. On the third aspect of the petitioner of leaving his place of posting at Pachmarhi without sanctioning of leaves, once again the admitted case of the petitioner as per para 6(xvii) of the writ petition is that he had applied for leaves which were ‘illegally’ not sanctioned i.e there is no dispute that petitioner unilaterally went on leaves without the leaves being sanctioned.

20. Once the petitioner has led no valid challenge to the three aspects and reasons given for non-confirmation of his probation, the impugned order dated 30.1.2017 reverting the petitioner from the post of Deputy Director as a probationer to the post of Assistant Director cannot be faulted with.

21. Also, transfer being an incident of service, and nothing being found in the writ petition or any argument being raised before me as to why the transfer order is illegal, hence the petitioner cannot question the transfer order, and on which aspect in any case no

argument whatsoever was urged before this Court to question the transfer order and the arguments of the petitioner only were to challenge his reversion as probationer from the post of Deputy Director to the post of Assistant Director.

22. I may note that petitioner who had to comply with the impugned order dated 30.1.2017 by reporting at Gauhati has admittedly till date not reported at Gauhati and in fact the petitioner has only vaguely pleaded of his being seriously not well and for not reporting at Gauhati, and which aspect again not only shows the complete indiscipline of the petitioner, but also the fact that petitioner insists on taking the services with the respondent no.1/employer on his own terms, and thus with respect to such a person who is guilty of repeated acts of indiscipline, no discretionary powers under Article 226 of the Constitution of India can be exercised by this Court.

23. In view of the above, I do not find any merit in the writ petition, and the same is therefore dismissed, leaving the parties to bear their own costs. Since the writ petition is disposed of, all pending applications stand disposed of accordingly.

FEBRUARY 22, 2017/ib

VALMIKI J. MEHTA, J