

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

WRIT PETITION NO.5941 OF 2016

Shri Feroz s/o Ismail Khan	]	
Aged : 41 yrs. Occu : Advocate	]	
R/o Colonel Bagh, Near Mosque,	]	
New Shukrawari, Nagpur – 440032	].....	Petitioner.

Versus

1]	High Court of Judicature at Bombay	]	
	Through its Registrar General	]	
	Mumbai – 400 023	]	
		]	
2]	State of Maharashtra,	]	
	Through its Principal Secretary,	]	
		]	
	(a) Law & Judiciary Department	]	
	Mantralaya, Mumbai-32	]	
		]	
	(b) Industries, Energy & Labour	]	
	Department,	]	
	Mantralaya, Mumbai-32.	].....	Respondents.

Mr. S D Paithane a/w Mr. Aditya Raktade for the Petitioner.
Mr. P S Dani, Senior Advocate a/w Ms. Leena Patil for the Respondent No.1.
Mr. R S Sawant, AAGP for the Respondent Nos.2(a) and 2(b).

**CORAM : R. M. SAVANT &
REVATI MOHITE DERE, JJ.**
DATE : 22nd JUNE 2018

ORAL JUDGMENT [PER R M SAVANT, J] :-

1 Rule, having regard to the challenge raised, made returnable forthwith and heard with the consent of the learned counsel for the parties.

2 By the above Writ Petition the Petitioner takes exception to the order dated 07/08/2015 passed by the State Government by which order the Petitioner who was a probationer came to be discharged from service.

3 The factual matrix involved in the above Writ Petition can in brief be stated thus :-

Applications were invited for the post of Judge, Labour Court. The Petitioner applied for the said post. The Petitioner was selected and was issued an appointment letter 23/06/2011 appointing him as a Judge of the Labour Court. A notification in that regard also came to be issued. In terms of the Rules which were applicable, the Petitioner was to be on probation for a period of two years. The said probationary period commenced from 08/08/2011 and was to come to an end on 07/08/2013. Sometime in the year 2014 the Rules known as the Maharashtra Judicial Officers of the Labour Courts and Industrial Courts (Recruitment, Appointment and Disciplinary Action) Rules, 2014 were promulgated. In the context of the Petitioner, Rule 10 is relevant and the same is reproduced herein under for the sake of ready reference :-

“Rule 10 A person appointed to any of the posts mentioned in rules 4, 5 and 6 by nomination, shall be on probation for a period of two years, and shall not be confirmed, save and except on the recommendation of the High Court :

Provided that, the period of probation may be extended by the High Court from time to time, as it may deem fit..

During the period of probation and until expressly confirmed by a written order, the services of an appointee shall be terminated by the High Court by one month's notice without any reason being assigned therefore or by payment of salary in lieu of notice."

The said Rule therefore postulates that the Petitioner was to be on probation for a period of 2 years and the confirmation was only to be by a written order issued in that regard. The said Rule also postulates that the services of an appointee would be terminated by way of one month's notice without any reason or by payment of salary in lieu of notice. Since the probationary period of the Petitioner was to come to an end on 07/08/2013, the case of the Petitioner was placed before the learned Guardian Judge. The learned Guardian Judge opined that the Petitioner may be discharged from service by extending his probation till the date on which the Government order is served on him.. The matter was thereafter placed before the Probation Committee and it was decided that the probationary period of the Petitioner be extended for one year from 07/08/2013 to 07/08/2014. After completion of one year of the extended period of probation, the case of the Petitioner was once again put up before the learned Guardian Judge for his recommendation as regards continuation or otherwise of the Petitioner. The learned Guardian Judge reiterated his earlier recommendation that the Petitioner be discharged from service. The case of the Petitioner was thereafter placed before the Probation Committee who also recommended the discharge of the Petitioner. Thereafter the Petitioner's case was placed before the the Administrative Committee of

this Court. The Administrative Committee accepted the recommendation of the Probation Committee and decided to discharge the Petitioner from service. The decision of the Administrative Committee was accordingly communicated to the State Government. The State Government in turn has issued the letter of discharge dated 07/08/2015 which as indicated above is the subject matter of challenge in the above Writ Petition.

4 On behalf of the Respondent No.1 i.e. the High Court of Bombay an affidavit in reply has been filed by the learned Registrar (Legal and Research). In the said affidavit in reply the Rules which are applicable have been referred to. It has been stated in the said affidavit in reply that sometime in the year 2013, the learned Registrar, Vigilance of this Court had made a surprise visit to the Court of the Petitioner and he also inspected certain proceedings of the Petitioner's Court. It is further stated that the learned Registrar, Vigilance thereafter submitted a report dated 03/07/2013 to the Hon'ble the Chief Justice. It has been stated in the said report that the Judicial Officer, Shri A. D. Kulkarni, 10th Labour Court, Bandra was on leave on 19/11/2012 and therefore the Petitioner was given charge of the said Court. It is stated in the report that an Application under Section 22 r/w Section 4 of the Workmen's Compensation Act for claiming compensation of Rs.8,67,640/- was pending before the said Court. It is stated in the said report that from the Roznama dated 08/11/2012 the said matter was kept for framing issues on

22/11/2012. The date “22” was erased and made to “19” and the said Roznama was not signed by the learned Judge. It is stated in the said report that on 19/11/2012 when the regular Judge was on leave, the said matter was taken on board by both the parties and on the same day, the said case was disposed of by the Petitioner after (i) framing issues, (ii) filing Affidavit, (iii) conducting cross examination, (iv) allowing production of documents, (v) hearing arguments and (vi) delivering the Judgment. It is further stated in the said report that on 15/04/2013, the Insurance Company had deposited the amount of Rs.7,26,138/- by cheque and the Petitioner passed an order on 25/04/2013 for distribution of the amount of compensation in the capacity of in-charge of the said Court. It is further stated in the said Report that again on 01/04/2013 and 02/04/2013 the Judicial Officer Shri A. D. Kulkarni, who was presiding over the 10th Labour Court, was on leave. It is stated in the said report that on 01/04/2013 the Petitioner passed an order of distribution of compensation of Rs.6,84,675/-. This we were informed is in another case concerning the Application under the Workmen's Compensation Act. It is further stated in the report that in the course of inspection, the learned Registrar, Vigilance found that while Shri A D Kulkarni was on leave and the charge was with the Petitioner, the Petitioner took up certain matters of that Court on priority and disposed them off by awarding compensation. It was also stated in the report that certain Advocates were giving assurance of quick disposal of cases through the Petitioner. There is also a reference in the

affidavit in reply to the decision making process resulting in the discharge of the Petitioner from service as a probationer.

5 Heard the learned counsel for the parties.

6 **SUBMISSIONS OF SHRI S. D. PAITHANE THE LEARNED COUNSEL APPEARING ON BEHALF OF THE PETITIONER :-**

- A] That the Petitioner's record during the probationary period was clean and without blemish as evidenced by the assessment of the Reporting Officer i.e. the President of the Industrial Court and as confirmed by the learned Guardian Judge;
- B] That nothing adverse was brought to the notice of the Petitioner during the probationary period;
- C] That the remark of the learned Guardian Judge to the effect that integrity of the Petitioner is doubtful has been made without any basis;
- D] That if the said remark was taken into consideration in the decision making process, then the Petitioner has been punished without being given any opportunity to show cause;

E] That the termination of the Petitioner is arbitrary as the criteria that has been applied for not confirming him has not been made known to him.

In support of the aforesaid contentions, the learned counsel appearing on behalf of the Petitioner Shri S D Paithane sought to place reliance on the following Judgments :-

- a] *Samsher Singh V/s. State of Punjab and another; (1974) 2 SCC 831;*
- b] *Ratnesh Kumar Choudhary v/s Indira Gandhi Institute of Medical Sciences, Patna, Bihar and others; AIR 2016 SC 467.*
- c] *Registrar General, High Court of Gujrat and another v/s. Jayshree Chamanlal Buddhibhatti; (2013) 16 SCC 59*
- d] *I. R. Coelho (Ead) by Lrs. V/s. State of Tamil Nadu & ors; (2007) 2 SCC 1.*

7 **SUBMISSIONS OF SHRI P. S. DANI, THE LEARNED SENIOR COUNSEL APPEARING ON BEHALF OF THE RESPONDENT NO.1:-**

- i] That the Petitioner came to be discharged from service as he was not found to be suitable for continuation;
- ii] That the decision to discharge the Petitioner from service has been

taken by considering the entire material on record and by assessing the suitability of the Petitioner on the said basis;

- iii] That the remark of the learned Guardian Judge in the ACR for the year 2012-2013, if at all, can be said to be motive and not the foundation of the said order;
- iv] That the termination of the Petitioner's services is by way of a discharge simpliciter on account of his unsuitability;
- v] That the employer is entitled to discharge the probationer if he does not desire to go into the allegations against such a probationer, by passing an order of discharge simpliciter.

In support of the aforesaid contentions the learned Senior Counsel Shri P S Dani sought to place reliance on the following Judgments :-

- i] ***Gujarat Steel Tubes Ltd. V/s. Gujarat Steel Tubes Mazdoor Sabha;***
AIR 1980 SC 1896;
- ii] ***State Bank of India & ors. v/s. Palak Modi & Anr.;***
(2013) 3 SCC 607;

8 We have heard the learned counsel for the parties and we have considered the rival contentions.

9 The question that arises is whether the discharge of the Petitioner, who was a probationer, from service is punitive in nature and therefore in violation of the principles of natural justice on the ground that the Petitioner has not been given an opportunity to show cause. To answer the said issue the facts in the instant case would have to be looked at.

It would now be necessary to refer to the Annual Confidential Reports of the Petitioner for the relevant period (gist of which is as under) :-

(I)	<u>From 06/01/2012 to 31/03/2012</u> <u>(Report dated 10/07/2013 of the President, Industrial Court, Maharashtra, Mumbai)</u>
	Behaviour was said to be “Good”. Reputation was said to be “Good”. Judicial ability was said to be “Satisfactory and Good”. The Net Result was “B” Good.
	REMARKS OF THE GUARDIAN JUDGE
	The learned Guardian Judge agreed with the remark of the learned President, Industrial Court, Maharashtra Mumbai and his assessment.

(II)	<u>From 01/04/2012 to 31/03/2013</u> <u>(Report dated 29/05/2013 of the President, Industrial Court, Maharashtra, Mumbai)</u>
	Behaviour was said to be “Good”. Reputation was said to be “Good”. Judicial ability was said to be “Good and Good in respect of all four aspects”. The Net Result was “B” Good.
	REMARKS OF THE GUARDIAN JUDGE

The learned Guardian Judge agreed with the remark of the learned President, Industrial Court, Maharashtra Mumbai and his assessment.

(III)	<u>From 01/04/2013 to 31/03/2014</u> <u>(Report dated 01/05/2014 of the President, Industrial Court, Maharashtra, Mumbai)</u>
	Behaviour was said to be “Cordial”. Reputation was said to be “Good”. Judicial ability was said to be “Good”. The Net Result was “B+” Positively Good.
	REMARKS OF THE GUARDIAN JUDGE
	The learned Guardian Judge partly agreed with the remark of the learned President, Industrial Court, Maharashtra Mumbai and his assessment. But has endorsed a remark on the ACR as follows :- “doubtful about Integrity”

Hence in so far as ACR for the year 2013-2014 is concerned, though the learned Guardian Judge has accepted the overall grading given by the learned President of the Industrial Court, he has endorsed the following remark on the ACR “doubtful about integrity”. This probably was on the basis of the report of the inspection dated 03/07/2013 which was submitted by the learned Registrar, Vigilance of this Court and which must have been drawn to the attention of the learned Guardian Judge being the In-charge of the judiciary in so far as the Judges of the Labour Courts and the Industrial Courts are concerned. The facts also disclose that since the Petitioner's probationary period was coming to an end In August 2013, the Petitioner's case was taken up for consideration namely whether to confirm him or discharge him. In the said context the comments of the learned Guardian Judge were elicited. The learned Guardian Judge recommended that the Petitioner should be

discharged from service. The Petitioner's case was thereafter placed before the Probation Committee and thereafter before the Administrative Committee of this Court which took a decision to extend the period of probation of the Petitioner from 07/08/2013 to 07/08/2014. Resultantly the Petitioner's probationary period was accordingly extended. At the end of the extended period, the Petitioner's case was once again taken up for consideration for confirmation or otherwise. The views of the learned Guardian Judge were once again elicited. The learned Guardian Judge reiterated his earlier recommendation that the Petitioner be discharged from service. The case of the Petitioner was thereafter put up before the Probation Committee which consists of 3 Hon'ble Judges of this Court. The Probation Committee endorsed the recommendation of the learned Guardian Judge. The matter was thereafter put up before the Administrative Committee which Committee consists of 5 Senior most Hon'ble Judges of this Court. The Administrative Committee took a decision to discharge the Petitioner from service. The facts disclose that the entire material qua the Petitioner was placed before the Probation Committee as well as the Administrative Committee. It is on the basis of the said material that the suitability of the Petitioner for continuance was considered by the Probation Committee as well as the Administrative Committee and a considered decision was taken to discharge the Petitioner from service.

10 It is in the aforesaid factual background that the judgments cited

on behalf of the Petitioner would have to be considered. In so far as the judgment of the Apex Court in *Samsher Singh's case* (supra). The Apex Court in the said case was concerned with the termination of services of two Judicial Officers who were also appointed on probation. In the said case the Punjab Civil Services (Judicial Branch) were in contention. Rule 9 of the said Rules provided that where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of the unsatisfactory record or unfavourable reports implying the unsuitability for service the probationer shall be apprised of the grounds of such proposal, and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the appointment. In the said case, the Apex Court held that if the services of a probationer are terminated on the basis of a report based on misconduct then it violates Article 311 of the Constitution of India. The Apex Court also adverted to the judgment in *Champaklal G. Shah Vs. Union of India* reported in (1964) 5 SCR 190 wherein it was held that a preliminary inquiry to satisfy that there was reason to dispense with the services of a temporary employee has been held not to attract Article 311 of the Constitution of India.

In *Ratnesh Kumar Choudhary 's case* (supra), the issue was the termination of services of a probationer. The services of the probationer were terminated on the basis of a report which contained comments on his

behaviour, knowledge of working, his conduct, his mis-behaviour, imposition of earlier punishment and disobedience shown by him to his seniors. It is in the said context that the Apex Court held that the Division Bench of the Delhi High Court had erred in holding that no departmental enquiry was required to be held on the ground that it was only an enquiry to find out the necessary qualification for the post of Chest Therapist. The Apex Court observed that the factual score been so, the said analysis would have been treated as correct, but unfortunately the exposition of factual matrix is absolutely different.

In *Jayashree Chamanlal Buddhhatti's case* (supra) a preliminary inquiry was held against the Respondent Buddhhatti. The charges were not informed to her and she was not given an opportunity of hearing in respect thereof. It is in the facts of the said case the Apex Court held that the principles of natural justice were violated and accordingly set aside the order of termination.

In *I. R. Coelho (Dead) by Lrs' case* (supra), the issue that was referred to the 5 Judges Bench of the Apex Court was whether on or after 24-4-1973 when the basic structure doctrine was propounded, is it permissible for Parliament under Article 31-B to immunise legislations from being struck down for violation of fundamental rights by inserting them into the Ninth Schedule and, if so, what is its effect on the power of judicial review of the Courts. The

5 Judge Bench of the Apex Court in the process of adjudication of the said issue referred to two of its earlier decision i.e. *The State of West Bengal v/s. Anwar Ali Sarkar* reported in *(1952) SCR 284* and *Kathi Raning Rawat v/s. State of Saurashtra* reported in *(1952) SCR 435* wherein it was held that equality and arbitrariness are sworn enemies, once belongs to the rule of law in a republic, while the other to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment.

11 Hence what flows from the aforesaid judgments of the Apex Court is that if the termination is on account of misconduct which is alleged against a probationer, then the principles of natural justice would have to be complied with as the misconduct is then the foundation of the order of discharge.

12 At this stage it would be relevant to refer to the judgments of the Apex Court in *Gujarat Steel Tubes Ltd.'s case* (supra) and especially paragraph 54 thereof :-

“54 On the contrary, even if there is suspicion of misconduct, the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal

but termination simpliciter, if no injurious record of reasons or punitive cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge. We need not chase other hypothetical situations here.”

in *Palak Modi's case* (supra) and especially paragraph 25 thereof

25 The ratio of the above noted judgments is that a probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post held by him. If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice.

A useful reference could be made to the judgment of the Apex Court in *Rajesh Kohli v/s. High Court of Jammu and Kashmir and anr.* reported in *(2010) 12 SCC 788* and especially paragraph 18 thereof which for the sake of ready reference is reproduced herein under :-

18 During the period of probation an employee remains under watch and his service and his conduct is under scrutiny. Around the time of completion of the probationary period, an assessment is made of his work and conduct during the period of probation and on such assessment a decision is taken as to whether or not his service is satisfactory and also whether or not on the

basis of his service and track record his service should be confirmed or extended for further scrutiny of his service if such extension is permissible or whether his service should be dispensed with and terminated. The services rendered by a judicial officer during probation are assessed not solely on the basis of judicial performance, but also on the probity as to how one has conducted himself.

Hence what flows from the aforesaid judgments is that if an enquiry is held for judging the suitability of a probationer or for his further continuation in service or for confirmation, and such an enquiry is the basis for taking decision to terminate his service, then the action of the Competent Authority cannot be castigated as being punitive and that the services rendered by a judicial officer during probation are assessed not solely on the basis of judicial performance but also on the probity as to how one has conducted himself. Hence the manner in which the Judicial Officer has conducted himself would also be a relevant consideration at the time of considering his case for confirmation or otherwise.

13 In so far as the instant case is concerned, the remark of the learned Guardian Judge can only be said to be an input for the Probation Committee and thereafter the Administrative Committee. Both the Probation Committee as well as the Administrative Committee have taken the decision to discharge the Petitioner on the basis of the entire material which was placed before them and not solely on the basis of the remark. In so far as the remark

of the learned Guardian Judge is concerned, it is required to be noted that no explanation has called for neither any enquiry was held against the Petitioner. The facts which have been referred to in the earlier part of this judgment are the facts which have been uncovered during the inspection of the Court of the Petitioner which was carried out by the learned Registrar, Vigilance of this Court. The modality by way of inspection is not any enquiry into a misconduct. As held by the Apex Court in *Gujarat Steel Tube's* case (supra) that even if there is suspicion of misconduct, the master may say that he does not wish to bother about it and may not go into his guilty but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Hence the employer has got the leverage of not continuing an employee with whom he is not happy with rather than holding an enquiry.

14 In the instant case as indicated herein above no preliminary enquiry or even an explanation was called for from the Petitioner, it is on the basis of the assessment of the over all suitability of the Petitioner, that the decision was taken to discharge the Petitioner from service. The judgments of the Apex Court sought to be relied upon by the Petitioner involve an enquiry or report without giving an opportunity to the probationer. In our view, therefore, the said judgments do not further case of the Petitioner in any manner. The decision having been taken at two levels i.e. by the Probation

Committee and thereafter the Administrative Committee can be said to be a considered decision and therefore cannot be said to be arbitrary as sought to be contended by the learned counsel for the Petitioner.

15 In that view of the matter, we do not find any merit in the above Writ Petition. The same is accordingly dismissed. Rule discharged with parties to bear their respective costs.

16 Since the Petitioner has not been paid, the notice pay as contemplated by Rule 10 of the said Rules, we direct the Respondents to see to it that the notice pay is paid to the Petitioner within four weeks from date.

[REVATI MOHITE DERE, J]

[R.M.SAVANT, J]