

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**CWP No. 14017 of 2016
Date of decision : 23.10.2018**

Nitin Malik

..Petitioner

versus

Haryana Vidhan Sabha and anr.

...Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. R.K. Malik, Sr. Advocate with
Mr. Bhupender Malik, Advocate
for the petitioner.

Mr. Hitesh Pandit, Addl. A.G. Haryana and
Mr. Ravi Pratap Singh, AAG, Haryana

RITU BAHRI, J.

In the present civil writ petition, the petitioner has sought quashing of order dated 05.07.2016 (Annexure P-3) whereby the services of the petitioners were terminated.

Pursuant to advertisement dated 24.03.2013, the Haryana Staff Selection Commission advertised one post of Deputy Secretary. The petitioner being eligible applied for the above said post. He was interviewed by duly constituted Selection Committee on 29.04.2013. The petitioner was selected and offered appointment as Deputy Secretary on 01.05.2013 (Annexure P-1) and he joined on 02.05.2013 (Annexure P-2) and vide impugned order dated 05.07.2016 (Annexure P-2), the services of the petitioner were terminated considering the petitioner on probation.

On notice, a written has been filed on behalf of respondent Nos.

1 and 2. In the written statement, the date of appointment and the date of

joining of the petitioner was admitted but it has been stated that the petitioner was not regularly attending the office since December, 2014 and remained absent without submitting any kind of leave and without intimation in the office. It has been admitted that the total period of probation including extension if any, shall not exceed three years as per proviso of Rule 10 (3) of Haryana Vidhan Sabha Secretariat Service Rules, 1981 (for short 'Rules 1981'). However, it has been stated that the petitioner has joined on 02.05.2013 and maximum period of three years was to expire on 01.05.2016 but the petitioner remained absent from duty for more than six months on various dates i.e 8th, 15th to 18th, 22nd to 24th, 29th to 31st December, 2014, 1st, 2nd, 5th, 6th, 8th, 12th, 13th, 15th, 16th, 20th, 22nd January, 2015, 4th and 05th February, 2015, 30th June, 2015 to 06th July, 2015, 5th August, 2015, 1st January, 2016 to 22nd April 2016.

Learned senior counsel for the petitioner submits that the maximum period of probation of three years came to an end on 03.05.2016, while the impugned order was passed on 05.07.2016. Learned counsel is relying upon Rule 10 of Rules 1981 as per which the the total period of probation, including extension, if any shall not exceed three years. Learned senior counsel submits that the petitioner for all intents and purposes was a regular employee of the department and was thus can only be issued charge sheet. The impugned order is therefore stigmatic in nature.

Learned senior counsel submits that if the absences from duty during probation were of recurring nature, affirmative action could have been taken much earlier without resorting to the charge of misconduct by passing instead an order of termination simpliciter during probation before

the end of three years without casting any stigma of a permanent character with which the petitioner would have to contend with for the rest of his life as a character certificate to all who may concern.

Learned senior counsel has referred to a judgment passed by Hon'ble the Supreme Court in a case of ***Jaswant PratapSingh Jadeja vs. Rajkot Municipal Corporation and another, 2007 (10) SCC 71*** wherein the petitioner was Major in the Army and he joined the respondent-Corporation as Vigilance Officer on or about 21.12.1999. He was put on probation for a period of six months and his probation period was extended till 31.12.2002. However, thereafter, after availing his leave, he did not join as he was suffering from ailments but he was served with a show cause notice dated 22.03.2003 asking him to show cause as to why his services should not be terminated for alleged misconduct of remaining absent from duty without prior leave. But vide impugned order, he was discharged from service. He filed appeal and intra court appeal against order of discharge, which were dismissed. However, Hon'ble the Supreme allowed the appeal and held that in the absence of any specific provision permitting extension of probation period, appellant deemed to have been confirmed on completion of initial period of probation. In para 11, 16, 17 18, 23 and 26, it has been observed as under:-

11. Before, however, we embark upon the legal questions, we must notice that the appellant had not been confirmed in his services from 1999 to 2003. The power of Commissioner of Municipality to appoint a person on temporary basis is governed by the statutory rules. It has not been shown before the High Court or before us as to under what provisions of law the period

of probation was extended from time to time. Applicability of the provisions of the Act is not in dispute. It may be true that such a contention was not raised before the High Court, but if under the statute, the period of probation could not have been extended, he will be deemed to have been confirmed on expiry of the period of probation.

16. *If the satisfaction of the employer rested on the unsatisfactory performance on the part of the appellant, the matter might have been different, but in that case, from the impugned order it is evident that it was not the unsatisfactory nature and character of his performance only which was taken into consideration but series of his acts as well, misconduct on his part had also been taken into consideration therefor. It is one thing to say that he was found unsuitable for a job but it is another thing to say that he was said to have committed some misconduct.*

17. Mr. Gupta has placed strong reliance on **State of Punjab and Others v. Sukhwinder Singh [(2005) 5 SCC 569]** wherein a three Judge Bench of this Court was considering a case where the appellant, who was a Constable, before completion of his probation period of three years, absented from duties without seeking permission. The order of discharge in that case read as under :

"Constable Sukhwinder Singh No.644/ASR of this District is discharged from service w.e.f. 16.3.1990 under the Punjab Police Rules 12.21 as he is not likely to become an efficient police officer."

18. The Rule which was operating in that case being Rule 12.21 of the Punjab Police Rules reads as under :

"A constable who is found unlikely to prove an efficient police officer may be discharged by the Superintendent at any time within three years of enrolment. There shall be no appeal against an order of discharge under this Rule."

In a situation of that nature, this Court held :

*"In the present case neither any formal departmental inquiry nor any preliminary fact finding inquiry had been held and a simple order of discharge had been passed. The High Court has built an edifice on the basis of a statement made in the written statement that the respondent was habitual absentee during his short period of service and has concluded therefrom that it was his absence from duty that weighed in the mind of Senior Superintendent of Police as absence from duty is a misconduct. The High Court has further gone on to hold that there is direct nexus between the order of discharge of the respondent from service and his absence from duty and, therefore, the order discharging him from service will be viewed as punitive in nature calling for a regular inquiry under Rule 16.24 of the Rules. We are of the opinion that the High Court has gone completely wrong in drawing the inference that the order of discharge dated 16.3.1990 was, in fact, based upon the misconduct and was, therefore, punitive in nature, which should have been preceded by a regular departmental inquiry. There cannot be any doubt that the respondent was on probation having been appointed about eight months back. As observed in **Ajit Singh and Others etc. v. State of Punjab and Anr.** (supra) the period of probation gives time and opportunity to the employer to watch the work ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserves a right to dispense with his service without anything more during or at the end of the prescribed period, which is styled as period of probation. The mere holding of preliminary inquiry where explanation is called from an employee would not make an otherwise innocuous order of discharge or termination of service punitive in nature. Therefore, the High Court was clearly in error in holding that the respondent's absence from duty was the foundation of the order, which necessitated an inquiry as envisaged under Rule 16.24(ix) of the Rules.*

23. In this case, however, the period of probation as provided for under the statute had expired and his misconduct had been taken note of. Such misconduct was not founded only upon absence from duty, but also upon carelessness, negligence on the part of the appellant and lack of devotion amongst others.

*26. Yet again, in **Radhey Shyam Gupta v. U.P. State Agro Industries Corporation Ltd. and Anr.** [(1999) 2 SCC 21], a case on which counsel for both the parties relied upon, this Court held :*

*"The theory of 'object of the inquiry' was further emphasised by the Constitution Bench in **Jagdish Mitter v. Union of India**, That was a case of a temporary employee. The discharge from service was by way of an order 'simpliciter'. But there, an inquiry was held and the termination order was based on it as it stated on its face that it was 'found undesirable' to retain the employee and hence his services were being terminated. The order was held to be punitive*

on its face and was quashed. Gajendragadkar, J. (as he then was) discussed the earlier cases and held that in every case the purpose of the inquiry was crucial. If the inquiry was held 'only for the purpose of deciding whether the temporary servant should be continued or not', it could not be treated as punitive and that the motive operating in the mind of the authority was not relevant. But "the form in which the order terminating the service is expressed will not be decisive." It was held "what the Court will have to examine in each case would be, having regard to the material facts existing upto the time of discharge, is the order of discharge in substance one of dismissal?"

Therefore, the 'form' was not of importance but the 'substance' was.

It was further held :

*"We shall now refer to a different type of cases where a departmental inquiry was started, then dropped and a simple order of termination was passed. In **State of Punjab v. Sukh Raj Bahadur**, the charge memo was served, reply given and at that stage itself, the proceedings were dropped and a termination order was passed. The High Court felt that the object of departmental inquiry, being to punish the employee, the order of termination must be treated as punitive. This was not accepted by a three Judge Bench consisting of Justice Shah (as he then was) who had laid down in Madan Gopal's case the principle of 'object of the inquiry'. This Court reversed the High Court judgment and held that neither Madan Gopal's case nor Jagdish Mitter's case applied. This was because in the case before them the inquiry did not go beyond the stage of the explanation. No findings were given and no inquiry report was submitted as in the above two cases. In that case (i.e. Sukh Raj Bahadur) this Court felt that the decision in **A.G. Benjamin v. Union of India (Civil Appeal No. 1341 of 1966 dated 13-12-1966)** (SC) Reported in (1967) 1 Lab LJ 718 was more direct. In Benjamin's case, a charge memo was issued, explanation was received and an Enquiry Officer was also appointed but before the inquiry could be completed, the proceedings were dropped stating that :*

"departmental proceedings will take a much longer time and we are not sure whether after going through all the formalities, we will be able to deal with the accused in the way he deserves._ There also the order was held not to be punitive. Following the above case, this Court in Sukh Raj Bahadur's case stated that the position before them was similar to what happened in Benjamin's case and concluded as follows :

"the departmental inquiry did not proceed beyond the stage of submission of a charge-sheet followed by the respondent's explanation thereto. The inquiry was not preceded with, there were no

sittings of any inquiry officer, no evidence recorded and no conclusion arrived at in the inquiry"

Learned senior counsel has further referred to a judgment of Hon'ble the Supreme Court in a case of ***Karanataka Sate Road Transport Corporation and another v. S.Manjunath, 2000(2) SCT 810*** wherein also it has been held that on expiry of maximum period prescribed for probation, if the employee is allowed to continue, it carried presumption of automatic confirmation and after that the employee cannot be discharged as the probationer for his unsatisfactory work and conduct. For that purpose, he will have to be given a proper charge sheet and opportunity to rebut the same.

On the other, learned State counsel contended that the petitioner was habitual absentee and was given memo's so many times to explain his position in respect of his absence from duty without any intimation or submitting leave but the petitioner was not serious about his responsibility towards his service. The petitioner was warned twice on 22.07.2015 and 18.11.2015. The ACR of the petitioner for the year 2014-15 was also graded as 'Below Average'. Thus, his probation period was extended so that he could improve his performance but he has not improved the performance and remained absent from duty thereafter as well. On the assurance given by the petitioner, his extension period was again extended for six months. He was issued charge sheet under Rule 7 of Haryana Civil Services (Punishment and Appeal) Rules, 1987 on 25.05.2016 and served to the petitioner on 31.05.2016. The petitioner was required to submit his reply on 10.06.2016 but he has not submitted his reply and sought extension of time for filing the reply. He was granted extension up to 21.06.2016 but he

did not file his reply up to 04.07.2016 and the respondents passed the order of termination on 05.07.2016.

Learned State counsel has referred to instructions dated 10.07.1995 (Annexure R-1) wherein it has been stated in case of delay in taking of decision caused at the level of the administrative department, it cannot be interpreted to lead in favour of the concerned employees. The operating part of the instructions read as under:-

“It is therefore, clarified that where during probation work, conduct and/or integrity of an employee has been unsatisfactory, the said employee is not entitled to complete his probation successfully. Mere delay in passing a timely order cannot lead to an interpretation in favour of the employee. It has also been decided that in all such cases strict disciplinary action should be taken against officers/officials found responsible for suppression of the matter resulting in non-passing of the order in time.”

Learned State counsel has referred to judgment of Hon'ble the Supreme Court of India in a case of ***Head Master, Lawrence School Lovedale vs. Jayanthi Raghu and anr, 2012 AIR (SC) 1571*** wherein respondent No. 1 was appointed on the post of Mistress w.e.f 01.09.1993. In the appointment letter, it was written that she would be on probation for a period of two years which may be extended for another one year. In November, 1995, some allegations were levelled against her and on 18.06.1997, an order of termination was passed against her. She filed an appeal against this before the High Court, which was allowed on the ground

that the order of termination is stigmatic in nature and has been passed without holding any enquiry . However, the School filed an appeal before Hon'ble the Supreme Court which was allowed and it was held that the order of termination did not cast any stigma. In para 10, 11, 12, 13 21 and 23, it has been observed as under:-

*"10. Before we proceed to appreciate whether the interpretation placed on the Rule is correct or not, it is apposite to refer to certain authorities in the field. In **Sukhbans Singh v. State of Punjab, AIR 1962 SC 1711**, the Constitution Bench has opined that a probationer cannot, after the expiry of the probationary period, automatically acquire the status of a permanent member of the service, unless of course, the rules under which he is appointed expressly provide for such a result.*

*11. In **G.S. Ramaswamy and Ors. v. Inspector-General of Police, Mysore, AIR 1966 SC 175** another Constitution Bench, while dealing with the language employed under Rule 486 of the Hyderabad District Police Manual, referred to the decision in Sukhbans Singh (supra) and opined as follows :-*

"It has been held in that case that a probationer cannot after the expiry of the probationary period 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. Therefore even though a probationer may have continued to act in the post to which he is on probation for more than the initial period of probation, he cannot become a permanent servant merely because of efflux of time, unless the Rules of service which govern him specifically lay down that the probationer will; be automatically confirmed after the initial period of probation is over. It is contended on behalf of the petitioners before us that the part of r. 486 (which we have set out above) expressly provides for automatic confirmation after the period

of probation is over. We are of opinion that there is no force in this contention. It is true that the words used in the sentence set out above are not that promoted officers will be enable or qualified for promotion at the end of their probationary period which are the words to be often found in the rules in such cases; even so, though this part of r. 486 says that "promoted officers will be confirmed at the end of their probationary period", it is qualified by the words "if they have given satisfaction". Clearly therefore the rule does not contemplate automatic confirmation after the probationary period of two years, for a promoted officer can only be confirmed under this rule if he has given satisfaction."

12. In **State of Uttar Pradesh v. Akbar Ali Khan, AIR 1966 SC 1842**, another Constitution Bench ruled that if the order of appointment itself states that at the end of the period of probation, in the absence of any order to the contrary, the appointee will acquire a substantive right to the post even without an order of confirmation. In all other cases, in the absence of such an order or in the absence of such a service rule, an express order of confirmation is necessary to give him such a right. Where after the period of probation, an appointee is allowed to continue in the post without an order of confirmation, the only possible view to take is that by implication, the period of probation has been extended, and it is not a correct proposition to state that an appointee should be deemed to be confirmed from the mere fact that he is allowed to continue after the end of the period of probation.

13. In **State of Punjab v. Dharam Singh, AIR 1968 SC 1210**, the Constitution Bench, after scanning the anatomy of the Rules in question, addressed itself to the precise effect of Rule 6 of the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961. The said Rule stipulated that the total period of probation - including extensions, if any, shall not exceed three years. This Court referred to the earlier view which had consistently stated

that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his post as a probationer only in the absence of any indication to the contrary in the original order of appointment or promotion or the service rules. Under these circumstances, an express order of confirmation is imperative to give the employee a substantive right to the post and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation, it is difficult to hold that he should be deemed to have been confirmed. When the service rules fixed a certain period of time beyond which the probationary period cannot be extended and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. It is so as such an implication is specifically - negated by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it.

*21. It is worth noting that the use of the word "if" has its own significance. In this regard, we may usefully refer to the decision in **S.N. Sharma v. Bipen Kumar Tiwari and others, (1970) 1 SCC 653** In the said case, a three-Judge Bench was interpreting the words "if he thinks fit" as provided under Section 159 of the Code of Criminal Procedure, 1898. It related to the exercise of power by the Magistrate. In that context, the Bench observed thus :-*

"The use of this expression makes it clear that Section 159 is primarily meant to give to the Magistrate the power of directing an investigation in cases where the police decide not to investigate the case under the proviso to Section 157(1), and it is in those cases that, if he thinks fit, he can choose the second alternative. If the expression "if he thinks fit"

had not been used, it might have been argued that this section was intended to give in wide terms the power to the Magistrate to adopt any of the two courses of either directing an investigation, or of proceeding himself or deputing any Magistrate subordinate to him to proceed to hold a preliminary enquiry as the circumstances of the case may require.

Without the use of the expression "if he thinks fit", the second alternative could have been held to be independent of the first; but the use of this expression, in our opinion, makes it plain that the power conferred by the second clause of this section is only an alternative to the power given by the first clause and can, therefore, be exercised only in those cases in which the first clause is applicable."

23. 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. 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. 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 (supra) and, therefore, the principle of deemed confirmation is not attracted.

Heard learned counsel for the parties.

The question for consideration before this Court would be firstly whether the petitioner has completed his probation period and secondly, if he has completed his probation period, can the respondents rightly terminated the services of the petitioner after expiry of probation period?

Reference at the very outset can be referred to Rule 10 (3) of Rules 1981, as the services of the petitioner are governed by these Rules.

Rule 10(3) reads as under:-

3. On the completion of the period of probation of a person, the appointing authority may:-

(a) If his work and conduct has, in its opinion, been satisfactory:-

(i) confirm such person from the date of his appointment, if appointed against permanent vacancy

(ii) confirm such person from the date from which a permanent vacancy occurs, if appointed against a temporary vacancy: or

(iii) declare that he has completed his probation satisfactorily if there is no permanent vacancy: or

(b) If his work or conduct has in its opinion, been not satisfactory:-

(i) dispense with his services, if appointed by direct recruitment, revert him to his former post or deal with him in such other manner, as the terms and conditions of previous

appointment permit, if appointed otherwise: or

(ii) extended his period of probation and thereafter pass such order, as it could have passed on the expiry of the first period of probation:

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

After this, the Government has passed instructions dated 10.07.1995, the operative part of the instructions reads as under:-

“It is therefore, clarified that where during probation work, conduct and/or integrity of an employee has been unsatisfactory, the said employee is not entitled to complete his probation successfully. Mere delay in passing a timely order cannot lead to an interpretation in favour of the employee. It has also been decided that in all such cases strict disciplinary action should be taken against officers/officials found responsible for suppression of the matter resulting in non-passing of the order in time.”

In the present case, Rule 10 (3) of Rules 1981 read with clarification dated 10.07.1995 makes it abundant clear that no doubt the maximum period for probation is for three years but if the work and conduct of an employee has been found to be unsatisfactory, than the said employee is not entitled to complete his probation successfully. Mere delay in passing a timely order cannot lead to an interpretation in favour of the employee. In the present case, the petitioner was offered appointment letter by the respondent-department on 01.05.2013 and was given so many time, as he was habitual absentee and his leaves were even written by his various colleagues of the petitioner that he was unable to attend the office on the

aforesaid dates due to urgent work and he will submit leaves as and when he joins his duty. Even his pay for the month of February, 2015 was stopped by the orders of the Secretary. He was issued various memo's and the petitioner was warned twice on 22.07.2015 and 18.11.2015. The ACR of the petitioner for the year 2014-15 was also graded as 'Below Average'. Thus, his probation period was extended so that he could improve his performance but he has not improved the performance and remained absent from duty thereafter as well. He was issued charge sheet under Rule 7 of Haryana Civil Services (Punishment and Appeal) Rules, 1987 on 25.05.2016 and served to the petitioner on 31.05.2016. The petitioner was required to submit his reply on 10.06.2016 but he has not submitted his reply and sought extension of time for filing the reply. He was granted extension up to 21.06.2016 but he did not file his reply up to 04.07.2016 and the respondents passed the order of termination on 05.07.2016.

The judgments referred to by learned counsel for the petitioners cannot be applied to the facts of the present case, as in the present case, the work and the conduct of the petitioner was not found satisfactory and the ACR of the petitioner for the year 2014-15 was also graded as 'Below Average'. He was given extension so that he could improve his work and conduct. The Rule 10(3) of Rules 1981 read with instructions dated 10.07.1995 (Annexure R-1) makes it abundant clear that if work and conduct of an employee is not found to be satisfactory, his services can be dispensed with. The competent authority has to pass an order of confirmation of service of an employee, as prescribed in the Rules and the confirmation is not automatic after 03 years of service of an employee. The

competent authority has to pass an order after completion of probation of 03 years that whether the employee is to be retained in service or not. As per instructions dated 10.07.1995 (Annexure R-1), mere delay in passing a timely order cannot lead to an interpretation in favour of the employee. The impugned order cannot be set aside only on the ground that the petitioner had completed three years of probation and he was to be thus treated as a regular employee. The Competent Authority as per Rule 10(3) of Rule 1981 has to pass an order of confirmation, which in the present case has not been done, keeping in view the work and conduct of the petitioner, who was a regular absentee.

In view of the discussion made above, no ground is made out to interfere in the impugned order dated 05.07.2016 (Annexure P-3).

The writ petition is dismissed.

23.10.2018

G Arora

(RITU BAHRI)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

Yes