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

Date of Decision:- 06.02.2020

+ **LPA 364/2019**

MITUL GOEL

..... Appellant

Through: Mr. Uddhav Pratap and Mr. V. K. Kaushal, Advocates with Appellant in person.

versus

THE FOOD CORPORATION OF INDIA & ORS Respondents

Through: Mr. Anil Airi, Senior Advocate with Mr. Mudit Ruhella, Mr. A. Tiwari, Mr. Atif Rasul, Ms. Anjna Masih and Mr. Nikhil Kataria, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J (Oral):

1. The present letters patent appeal is directed against the judgment dated 12th April, 2019 passed in W.P.(C) 1135/2012 whereby the learned Single Judge has dismissed the writ petition filed by the appellant seeking quashing of the order discharging him from the service of the respondent - Food Corporation of India ('FCI').

2. Briefly stated, facts of the case are that the appellant joined the service of the respondent as Management Trainee. Vide order dated 22nd October, 2008 he was called upon to undergo training for one year. Consequent to

successful completion of training, vide offer of appointment dated 5th November, 2009, he was given regular appointment as Manager (QC) and posted in the Punjab region. While the appellant was still on probation, he, along with two officers was served with a memorandum dated 29th August, 2011, proposing to hold an enquiry against them under Regulation 58 r/w Regulation 50 FCI (staff) Regulations, 1971. Eventually, enquiry proceedings were initiated, the appellant participated in the same on two dates i.e. 14th November, 2011 and 3rd December, 2011, but thereafter, he was restrained from attending the same on the ground that he was no longer the employee of respondent-FCI. Thereafter on 4th January, 2012, appellant was served with the order dated 18th November, 2011 whereby he was discharged from his service with the respondent-FCI with immediate effect in terms of Regulation 15(3) of F.C.I. (Staff) Regulation, 1971 and Para (2) of his offer of appointment on the ground that he had not completed the probation period satisfactorily. The appellant was given one month's salary and allowances in lieu of 30 days of notice period.

3. Aggrieved with the aforesaid order, the appellant filed a writ petition, impugning the said order on several grounds. The appellant questioned the legality of the discharge order, contending that he should be deemed to have been confirmed on the post of Manager (QC), as there was nothing adverse reported against him during the probation period, particularly, since the period of probation was not extended beyond 19th November, 2010. The respondents on the other hand, brought to the notice of the Court that there were several vigilance cases/disciplinary proceedings pending against the appellant. It was also contended that notwithstanding the adverse probation

report in respect of the appellant, the termination by the competent authority was on the ground of non-satisfactory completion of probation period. The learned Single Judge after examining the record relating to appellant's performance, upheld the discharge order. The impugned order *inter alia* holds that the initial probation period of one year in terms of the appointment letter, commenced on 20th November, 2009 and ended on 19th November, 2010. Thereafter, since the appellant was not confirmed, his probation period continued and thus, the respondent was well within its rights to discharge him from service within two years of service rendered on the post in question, as a probationer.

4. The operative portion of the judgment of learned Single Judge reads as under:

“20. Out of nine disciplinary cases, eight were minor and one major vigilance case initiated against the petitioner in the said probation period of 2 years, four have been decided and five cases are still pending. Undisputedly, the penalty has been imposed upon the Petitioner in the four cases decided against him and he has not been exonerated, even in a single case. It reflects on the performance of the petitioner and it can be concluded, that the petitioner has not satisfactorily completed his probation period. Thus, he was liable to be discharged from the services of F.C.I. in terms of Regulation 15(3) of F.C.I. (Staff) Regulation, 1971 and Para (2) of his offer of appointment, which is reproduced as under:

“He will be on probation for a period of one year from the date of his joining which maybe further extended for a period not exceeding one year and in case of his unsatisfactory performance, he will be liable to be discharged from the service of the Corporation without assigning any reason by giving him a notice period of

30 days or pay and allowance in lieu thereof. However on satisfactory completion of the period of probation, he will be considered for confirmation to the post of Manager (QC)."

21. The vigilance cases against the petitioner had brought disrepute to the employer Corporation. As far as adverse remarks in the probation report are concerned, the remarks of the counter signing officer are important whereby observed as "In view of the Vig. Profile, probation period may be extended further" which is attributable as "adverse." The position regarding reason for non-extension of probation period, it is explained that a vigilance case dated 12.08.2010 was pending against the petitioner during his probation period and thus assumed to be extended, though it could not be conveyed to the petitioner timely, due to delay by the administration. As per headquarter circular, dated 09.09.2011, vide which the circular dated 26.03.2001 has been reiterated as "Under any circumstances, it will not be treated that the official/ officer is deemed to have been confirmed for want of receipt of probation report." Thus, he cannot be treated as deemed to have been confirmed.

22. Late service of the discharge order, upon the petitioner, cannot be relied upon for seeking any relief by the petitioner. The discharge order dated 18.11.2011 had been issued from ZO (North) and after having it been routed through proper channel which underwent postal delay and he had acknowledged the same by 04.01.2012 and as such, in the meantime, he was paid salary for December 2011 by his local office.

*23. In case of **Suresh Chand Jain vs. Director General & Anr** decided by Double Bench of this Court in W.P.(C) 5603/2013 vide its judgment dated February 11, 2015 had referred the decision of the Supreme Court in case of **Abhijit Gupta vs. S.N.B. National Centre, Basic Sciences**: (2006) 4 SCC 469, wherein a similar letter was issued to the concerned employee intimating that his performance was unsatisfactory and therefore, he is not suitable for confirmation, negating the*

contentions raised by the employee that the termination on the ground of alleged misconduct was stigmatic, the Hon'ble Supreme Court held that the order of termination due to unsatisfactory performance is a termination "simpliciter" and not "punitive" in nature.

24. In view of above discussion and the aforesaid legal positions, it can be concluded that this issue is no more res integra, that an order of termination due to unsatisfactory performance of the probationer, cannot be ipso facto termed as „stigmatic" or „punitive" in nature. During the probation period, an employee has to be extra careful and diligent while discharging his assigned duties, so that he can successfully complete his probation period to get confirmation against the post he has been selected for and he does not give any chance or reason to his superiors to terminate his services. If during the period of probation, the performance of a probationer is not found satisfactory or suitable for a particular job, as per the assessment of the employer, he may be terminated from the service and such termination would be termed as termination „simpliciter" and cannot be held to be „punitive" in nature.

25. The petitioner joined at the regional office Punjab at Chandigarh on 20.11.2009 and probation period for the petitioner was one year. Admittedly, petitioner was not confirmed and in that case, he cannot claim, on the expiry of one year, he is deemed confirmed. On the contrary, if the order for extension of the probation is not issued, the probation is deemed extended. No doubt, the extension of probation cannot be more than the double of the probation period. In the present case, the petitioner was on probation from 20.11.2009, admittedly, neither conformation order has been issued nor period of probation is extended. In such case, it is deemed that the probation is extended. It is not in dispute that after joining on 20.11.2009, the petitioner continued to face the vigilance cases against him, during the probation period (one year). Furthermore, nine cases were continued during his extended period of probation. Out of nine disciplinary cases initiated against the petitioner in the probation period of 2 years, four have been decided and five cases are still pending

against the petitioner. The penalty has been imposed on the petitioner, in all the four cases mentioned above. Accordingly, as per the performance of the petitioner, it cannot be concluded that the petitioner has satisfactorily completed his probation period.

26. It is pertinent to mention here that the letter dated 22.10.2008 issued by respondent No. 2 to the petitioner, was for undergoing one year training. On successful completion of the training, the petitioner was given the regular appointment as Manager (QC) and posted in Punjab Region under the Administrative Control of respondent No. 3 vide letter dated 05.11.2009 on the expressly provided terms and conditions that the petitioner would remain on probation for a period of one year from the date of joining, which may be extendable for a further period, not exceeding one year. In case, probation period of one year is found to be unsatisfactory, the petitioner will be liable to get discharged from the service of the Corporation, without assigning any reason. It was made clear that on satisfactory completion of one year period of probation, the petitioner will be considered for confirmation to the post of Manager. Thus, his probation period of one year started from 20.11.2009 and ends on 19.11.2010. It can be ascertained that the probation period of the petitioner was not confirmed. Therefore, it was deemed extended.

27. As discussed above, the petitioner had joined on 20.11.2009 and discharge from the services vide order dated 18.11.2011 i.e. within two years of the service rendered on the post of Manager(QC), on probation. It is not in dispute that during probation an employees without assigning any reason can be discharged from the service. In the present case, the track record of the petitioner under the post concerned here, had been negative. Thus, in any sense, he cannot claim that his probation period is completed on 09.11.2010. Moreover, the petitioner has received the salary for the services rendered by him as Manager (QC) in the probation period concerned.

28. In view of the above facts and observations, I find no merit in the present petition.”

5. Aggrieved with the aforesaid, the appellant has preferred this intra court appeal. We have heard the learned counsels for the parties. The challenge in the appeal is primarily on the ground that the learned Single Judge has erred in not accepting his contention regarding the confirmation of his service. The appellant's probation ended on 19th November, 2010 and since he continued to be in service thereafter, he should be treated to be a confirmed employee by implication. It is further argued that learned Single Judge has failed to appreciate that after the completion of the statutory period of probation of one year, in absence of any order formally extending his probation, it should be inferred that he was an employee confirmed. It is also argued that the order of discharge is punitive in nature and the appellant ought to have been afforded an opportunity of being heard, more so, when he had attended the enquiry proceedings. The discharge order is void, illegal and arbitrary, discriminatory and in violation of principles of natural justice. Since nothing adverse has been reported against him during the probation period, the probation report of the appellant is good and satisfactory, he is entitled to be confirmed on the post. In support of his submission, the learned counsel for the appellant relied upon the judgment of the Supreme Court in *State of Punjab vs. Dharam Singh AIR 1968 SC 1210*.

6. We have given due consideration to the contentions urged by the appellant. The central question in the present case relates to the concept of deemed confirmation of the services of a probationer. In order to determine whether appellant can be said to be confirmed by way of implication or not, perusal of the terms of offer of appointment is essential. The relevant clause relating to probation period governing his appointment reads as under:

*“2. He will be on probation for a period of one year from the date of his joining which may be further extended for a period not exceeding one year and in case of his unsatisfactory performance, he will be liable to be discharged from the service of the Corporation without assigning any reason by giving him a notice period of 30 days or pay and allowance in lieu thereof. **However on satisfactory completion of the period of probation, he will be considered for confirmation to the post of Manager (QC).***

3. His appointment in the Corporation is subject to the provisions of Food Corporation Act 1964 and the rules and regulations framed thereunder from time to time and also such orders and directions, as have been or may be issued by the Corporation from time to time.”

(Emphasis supplied)

7. The aforesaid condition of appointment contained in the offer, stipulates that the initial probation period stipulated is one year from the date of joining. This can be further extended for a period not exceeding one year. At the same time, the corporation reserved to itself the right to discharge an employee from service without assigning any reason, by giving him a notice for a period of thirty days, or pay allowance in lieu thereof in a case where the employee's performance is unsatisfactory. Further, what is germane is the stipulation that requires the respondent corporation to issue a formal confirmation to an employee after satisfactory completion of the period of probation.

8. In the instant case, the appellant was appointed on probation on 20th November, 2009. In terms of the letter of appointment, his initial probation period ended on 19th November, 2010. Thereafter, there has been no confirmation. The respondents have explained the reasons for not extending his probation period. The justification is that a vigilance case dated 12th

August, 2010 was pending against the appellant during his probation period. Since there was an adverse remark in the probation report, the counter signing officer observed that *“in view of viz. profile, probation period may be extended further”*. The probation period, therefore, by a deeming provision, stood extended. This could not be conveyed to the appellant due to some administrative delay. The respondents have also relied upon the circular dated 26th March, 2001, wherein it specifically stipulated that *“under any circumstances, it will not be treated that the official/officers is deemed to have been confirmed for want of receipt of probation report”*. The learned Single Judge observed that *it is not in dispute that after joining on 20.11.2009, the petitioner continued to face the vigilance cases against him, during the probation period (one year). Furthermore, nine cases were continued during his extended period of probation. Out of nine disciplinary cases initiated against the petitioner in the probation period of 2 years, four have been decided and five cases are still pending against the petitioner. The penalty has been imposed on the petitioner, in all the four cases mentioned above.* Since, in the assessment of the respondent-Corporation, the performance of the appellant was not found satisfactory or suitable for the job, he was discharged from the service.

9. In our considered opinion, the contention of the appellant is ex facie meritless, in as much, as, the respondent had sufficient and good reasons for discharging the appellant from service on account of unsatisfactory performance.

10. With respect to the appellant’s contention that he should be deemed to be confirmed employee by way of implication, we find the same to be

completely misconceived. The legal position on deemed confirmation is no longer *res integra* and contrary to what is sought to be contended by the Appellant. This Court in the case of ***V.K.Mittal vs. Registrar General, Delhi High Court (2017) 3 SLR 418*** has held that if in the Rule or order of appointment, the period of probation is specified and a power to extend probation is also conferred and the officer is allowed to continue beyond the prescribed period of probation, he cannot be deemed to be confirmed. At the end of such probation he becomes merely qualified or illegible for substantive permanent appointment. Similar views have been expressed by the Supreme Court in the case of ***Durgabai Deshmukh Memorial Sr. Sec. School vs. J.A.J Vasu Sena and Another (2019) SCC OnLine SC 1075***, wherein the Court considered its earlier decision in the case of ***State of Punjab vs. Dharam Singh(supra)*** relied upon by the appellant herein, and observed as under:

“51. It emerges from the consistent line of precedent of this Court that where the relevant rule or the appointment letter stipulates a condition precedent to the confirmation of service, there is no deemed confirmation of service merely because the services of a probationer are continued beyond the period of probation. It is only upon the issuance of an order of confirmation that the probationer is granted substantive appointment in that post. Rule 105(2) stipulates the satisfaction of the appointing authority as a condition precedent to the issuance of an order of confirmation. The argument advanced by the learned counsel for the first respondent that there is a deemed confirmation upon the continuation of service beyond the expiry of the period of probation is negated by the express language of Rule 105(2). In this view, the continuation of services beyond the period of probation will not entitle the probationer to a deemed confirmation of service. The High Court has erred in holding that there is a deemed confirmation where

the services of a probationer are continued beyond the expiry of the probationary period.

52. It was briefly urged by Mr. Yashobant Das, learned Senior Counsel appearing on behalf of the appellants that the Division Bench of the High Court failed to follow a judgment of a coordinate Bench of the High Court in Veena Sharma. In that case, a termination order was issued to an Upper Division Clerk during the period of her probation. Contending that her termination was not in accordance with the letter of appointment and that her services were deemed to be confirmed, the case of the employee reached the High Court. The appointment letter expressly stated that a letter of confirmation shall be issued upon the expiry of the probationary period. Justice Dipak Misra (as he then was) rejected the contention that Rule 105 of the 1973 Rules stipulated a deemed confirmation of service on the grounds that there is no fixed period of probation and that the work and conduct of the employee must be proved to be satisfactory.

53. In the present case, the Division Bench of the High Court adverted to the decision in Veena Sharma and distinguished it on the ground that the appointment letter stipulated the requirement of an express letter of confirmation. Further, the argument urged on behalf of the appellant cannot be accepted as the facts of that case are distinguishable for the principal reason that no interpretation of the exemption stipulated for minority institutions in the proviso was involved.

54. The High Court relied on the Constitution Bench judgment of this Court in Dharam Singh to hold that upon the expiry of the probationary period, the first respondent is deemed to be confirmed in service. In Dharam Singh this Court interpreted Rule 6⁴⁰ of the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961. The Rules stipulated that the period of probation shall be one year and the total period of probation shall not exceed three years. The Court granted relief to the claimants as their services were continued beyond three years and the relevant rules and the appointment letter did not stipulate the issuance of any order of confirmation. The Court

held thus:

*“9. Immediately upon completion of the extended period of probation on October 1, 1960, the appointing authority could dispense with the services of the respondents if their work or conduct during the period of probation was in the opinion of the authority unsatisfactory. Instead of dispensing with their services on completion of the extended period of probation, the authority continued them in their posts until sometime in 1963, and allowed them to draw annual increments of salary including the increment which fell due on October 1, 1962. **The rules did not require them to pass any test or to fulfil any other condition before confirmation.** There was no compelling reason for dispensing with their services and re-employing them as temporary employees on October 1, 1960, and the High Court rightly refused to draw the inference that they were so discharged from services and re-employed. In these circumstances, the High Court rightly held that the respondents must be deemed to have been confirmed in their posts. **Though the appointing authority did not pass formal orders of confirmation in writing, it should be presumed to have passed orders of confirmation by so allowing them to continue in their posts after October 1, 1960.**”*

(Emphasis supplied)

*55. In Dharam Singh, the Constitution Bench held that the continuation of the services of a probationer beyond the maximum period of probation would amount to a deemed confirmation of service **only in** the absence of a stipulation in the relevant rule requiring the probationer to pass a test or fulfill any other condition. In the present case, Rule 105(2) stipulates the satisfaction of the appointing authority as a condition precedent to the issuance of an order of confirmation. The High Court has thus failed to notice the distinguishing features which emerge from the judgment of this Court in Dharam Singh.*

56. In the view that we have taken, the High Court has erred in concluding that the case of the first respondent falls within the

second category of cases enumerated in Satya Narayan Jhavar. Rule 105(2) stipulates the satisfaction of the appointing authority as a condition precedent to the issuance of an order of confirmation. Admittedly, no order of confirmation was issued by the appointing authority. The case of the first respondent falls squarely within the third category of cases enumerated in Satya Narayan Jhavar wherein though the rules prescribe a maximum period of probation and the probationer is continued beyond the expiry of the probationary period, the substantive appointment of the probationer is subject to a specific act on the part of the appointing authority of issuing an order of confirmation. In the absence of an order of confirmation, the first respondent did not acquire the status of a confirmed employee.

57. In the present case, the first respondent served as a probationer for nearly five years. Rule 105(1) permits the appointing authority to extend the period of probation with the prior permission of the Director. The proviso stipulates that no prior approval of the Director is required for the extension of the probationary period by the appointing authority of a minority institution. The amending history of the provision shows that prior to the amendment in 1990, no prior approval of the Director was required. By virtue of the Amending Rules 1990 the prior approval of the Director was made mandatory, save and except for extensions in the case of minority institutions, for the grant of any extension in the probationary period. The absolute discretion vested with the appointing authority of an institution was made subject to the prior approval of the Director.

58. The power vested in the Director serves as a check on the absolute discretion of the appointing authority to extend the probationary period. The power vested in the Director, however, to approve a request of the appointing authority is not unbridled. Rule 105(1) stipulates that the services of a probationer may be terminated without notice during the period of probation where the services of the probationer are not “in the opinion of the appointing authority, satisfactory”. Rule 105(2) stipulates that an order of confirmation may be issued if, in the opinion of the appointing authority, the performance of the probationer is

satisfactory. The discretion of the Director must be exercised objectively on the basis of the material produced by the appointing authority bearing on the performance of a probationer.

59. The prior approval of the Director, save and except for minority institutions, is mandatory and must be complied with as a condition precedent for the valid exercise of the power to extend the period of probation. The Director is required to assess the determination of the appointment authority and based on that assessment, to decide whether to approve an extension of the probationary period. The provision which mandates that the prior approval of the Director shall be sought before extending the period of probation ensures that the appointing authority may not extend the probationary period without legitimate reason. The extension of the probationary period by the appointing authority, save and except for minority institutions, without the prior approval of the Director is impermissible in law.

60. Rule 105(1) of the 1973 Rules, by stipulating a maximum permissible period of probation of two years, draws a balance between the interests of the appointing authority in extending the period of probation to ensure the quality of education and the interests of probationers in their services not being extended on probation ad nauseum. The continuation of the services of a probationer beyond the period permissible under the 1973 Rules defeats the salutary purpose underlying the limit stipulated on the period of extension that may be effected in the probationary period. Upon the expiry of the period of probation, the appointing authority is required by law to either confirm the services of the probationer or terminate their services. The continuation of the services of a probationer by the appointing authority under Rule 105 of the 1973 Rules beyond the maximum permissible period of probation, constitutes a violation of law. Though as we have held, there is no provision for deemed confirmation, the conduct of the management may result in other consequences, including a decision in regard to whether the recognition of a school which consistently violates the law should be withdrawn.”

(Emphasis supplied)

11. Though the decision in *Durgabai Deshmukh Memorial Sr. Sec. School vs. J.A.J Vasu Sena and Another (supra)* is in the context of Rule 105 (1) of Delhi School Education Rules, 1973, however the position of law enunciated by the Supreme Court relating to deemed confirmation is relevant to the facts of the present case. Further, this Court, in the case of *Medical Council of India vs. Sangeeta Sharma and Anr. 2019 SCC OnLine Del 8276*, authored by one of us, (Vipin Sanghi, J.) had the occasion to consider a similar question. Dealing with the case law on this subject, it was held as under:

“19. In *Head Master, Lawrence School, Lovedale (supra)*, the respondent/probationer was appointed on the post of a Mistress in the Petitioner School. It was stipulated in her letter of appointment that she would be on probation for a period of two years which may be extended for one year, if necessary. An order of termination simplicitor was passed against the respondent-probationer. The said termination order was assailed before the High Court and was set-aside by the Id. Single Judge. The LPA preferred against the said order was also dismissed. The appeal preferred against the judgment of the Division Bench of the High Court was ultimately allowed by the Supreme Court, wherein it was held that the status of confirmation of employment had to be earned and conferred. The Supreme Court held that there was nothing in the terms of the letter of appointment from which it could be construed that after the expiry of the period of probation, the probationer could have been treated as a deemed confirmed employee. Had the rule making authority intended that the probationer would be entitled for automatic confirmation upon the expiry of the period of probation, the recruitment rules would have been couched in such specific language. Supreme Court further went on to hold that confirmation of employment does not occur with efflux of time. An affirmative or positive act

is the requisite by the employer to confirm a probationer which had not been done in the present case. The Supreme Court considered several earlier decisions in this judgment. The relevant excerpts of *Head Master, Lawrence School, Lovedale* (supra) read as follows:

*“11. To appreciate the rivalised submissions raised at the Bar, we have carefully perused the letter of appointment and on a plain reading of the same, it is apparent that the first respondent was appointed as a Mistress in the School on probation for a period of two years with a stipulation that it may be extended by another year. **There is nothing in the terms of the letter of appointment from which it can be construed that after the expiry of the period of probation, she would be treated as a deemed confirmed employee.** In this factual backdrop, the interpretation to be placed on Rule 4.9 of the Rules assumes immense significance.*

12. The said Rule reads as follows:

“4.9 All appointments to the staff shall ordinarily be made on probation for a period of one year which may at the discretion of the Headmaster or the Chairman in the case of members of the staff appointed by the Board be extended up to two years. The appointee, if confirmed, shall continue to hold office till the age of 55 years, except as otherwise provided in these Rules. Every appointment shall be subject to the conditions that the appointee is certified as medically fit for service by a Medical Officer nominated by the Board or by the Resident Medical Officer of the School.”

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16. In G.S. Ramaswamy v. Inspector General of Police [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 [AIR 1962 SC 1711] and opined as follows: (G.S. Ramaswamy case [AIR 1966 SC 175], AIR p. 179, para 8)

“8. ... 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 appointed 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 Rule 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 eligible 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 Rule 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.”

17. In State of U.P. v. Akbar Ali Khan [AIR 1966 SC 1842] another Constitution Bench ruled that: (AIR p.

1845, para 6)

“6. ... 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.”

18. 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.

19. In *Dharam Singh* [AIR 1968 SC 1210] (AIR p. 1212, para 5) 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.

20. In *Samsher Singh v. State of Punjab* [(1974) 2 SCC 831 : 1974 SCC (L&S) 550] the seven-Judge Bench was dealing with the termination of services of the probationers under Rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and Rule 7(3) of the Punjab Civil Services (Judicial Branch) Rules, 1951. In the said case, the law laid down by the Constitution Bench in *Dharam Singh* [AIR 1968 SC 1210] was approved but it was distinguished because of the language of the relevant rule, especially the Explanation to Rule 7(1), which provided that every Subordinate Judge, in the first instance be appointed on probation for two years and the said period may be extended from time to time either expressly or impliedly so that the total period of probation including extension does not exceed three years. The Explanation to the said Rule stipulated that the period of probation shall be deemed to have been extended if a Subordinate Judge is not confirmed on the expiry of the period of probation. Be it noted, reliance was placed on the decision in *Dharam Singh* [AIR 1968 SC 1210].

21. The larger Bench discussed the principle laid down in *Dharam Singh* case [AIR 1968 SC 1210] and proceeded to State as follows: (*Samsher Singh* case [(1974) 2 SCC 831 : 1974 SCC (L&S) 550], SCC pp. 852-53, para 70)

“70. ... In Dharam Singh case [AIR 1968 SC 1210] the relevant rule stated that the probation in the first instance is for one year with the proviso that the total period of probation including extension shall not exceed three years. In Dharam Singh case [AIR 1968 SC 1210] he was allowed to continue without an order of confirmation and therefore the only possible view in the absence of anything to the contrary in the service rules was that by necessary implication he must be regarded as having been confirmed.”

22. After so stating, the Bench referred to Rule 7(1) and came to hold as follows: (Samsheer Singh case [(1974) 2 SCC 831 : 1974 SCC (L&S) 550], SCC p. 853, para 71)

*“71. ... the Explanation to Rule 7(1) shows that the period of probation shall be deemed to have been extended impliedly if a Subordinate Judge is not confirmed on the expiry of this period of probation. This implied extension where a Subordinate Judge is not confirmed on the expiry of the period of probation is not found in Dharam Singh case [AIR 1968 SC 1210]. This Explanation in the present case does not mean that the implied extension of the probationary period is only between two and three years. **The Explanation on the contrary means that the provision regarding the maximum period of probation for three years is directory and not mandatory unlike in Dharam Singh case [AIR 1968 SC 1210] and that a probationer is not in fact confirmed till an order of confirmation is made.**”*

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27. After referring to the decisions in Dharam Singh [AIR 1968 SC 1210], Sukhbans Singh [AIR 1962 SC 1711] and Samsheer Singh [(1974) 2 SCC 831 : 1974 SCC (L&S) 550] and other authorities, the three-Judge Bench expressed thus: (Satya Narayan Jhavar case [(2001) 7 SCC 161 : 2001 SCC (L&S) 1087

: (2001) 7 SCC 161 : AIR 2001 SC 3234], SCC p. 169, para 11)

*“11. The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the 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 the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the 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 requires 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 has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.**”*

(emphasis supplied)

20. This Court in *V.K. Mittal* (supra) culled out law on deemed

confirmation of employment upon successful completion of probation period, as follows:

“64. The legal position on “deemed confirmation” can be summarised as under:

(a) If in the rule or order of appointment, a period of probation is specified and a power to extend probation is also conferred and the officer is allowed to continue beyond the prescribed period of probation, he cannot be deemed to be confirmed. At the end of such probation he becomes merely qualified or eligible for substantive permanent appointment.

(b) There is the other line of cases where even though 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 presumption about continuation, beyond the period of probation, as a probationer stands negated by the fixation of a maximum time-limit for the extension of probation. In such cases the officer concerned must be deemed to have been confirmed.

(c) A third line of cases is where though under the rules maximum period of probation is prescribed, it requires 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 has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.

(d) While there could be some other cases where the rules do not contemplate issuance of such a specific order in writing but merely require that there will not

be any automatic confirmation or some acts, other than issuance of specific orders, are required to be performed by the parties. Even in those cases, there would be no 'deemed confirmation'."

(emphasis supplied)

21. Thus, whenever a person is appointed as a probationer for a specified period, he does not automatically stand confirmed upon the expiry of such probation period, unless the maximum period of probation is prescribed and the person is allowed to continue even after the expiry of such maximum period of probation. Unless and until the relevant recruitment rules or the terms of appointment specifically provide for either deemed confirmation - by providing for a maximum period of probation, or confirmation is effected by passing an order to that effect, merely because the express probation period has expired, it cannot be said to confer on the probationer the status of deemed confirmed.

22. In the present case, the probationer-respondent 1 was appointed as the Secretary, MCI vide appointment letter dated 08.03.2011. The appointment letter stipulated that she will work on probation for a period of one year from the date of her joining on the said post i.e., from 25.03.2011. As per the appointment letter, the MCI was given the discretion to extend the probation period without providing for a specific maximum period of probation beyond which, respondent 1 would have stood deemed confirmed. Pertinently, even the Rules do not specify any maximum period of probation beyond which respondent no. 1 would have been deemed confirmed. Thus, we hold that respondent 1 could not be said to have become a deemed confirmed employee of the petitioner, when the Rules or the terms of appointment letter did not specify, firstly, a maximum period of probation or, secondly, no order confirming the services of respondent 1 had been passed.

23. In fact, the present case squarely falls within clause (a) of para 64 of *V.K. Mittal* (supra). As per *V.K. Mittal* (supra), upon expiry of the initial probation period, respondent 1 merely

became eligible for consideration for confirmation to the post of Secretary, MCI, or extension of her probation. She cannot be heard to say that she stood “deemed confirmed”. Thus, in view of the aforesaid decisions in *Head Master, Lawrence School, Lovedale* (supra) and *V.K. Mittal* (supra), we find that respondent 1 did not acquire the status of a deemed confirmed employee.”

12. Therefore, there cannot be any disagreement on the proposition of law that there cannot be any automatic confirmation on the expiry of the period of probation. The terms of the appointment or the recruitment rules have to be examined to come to the correct conclusion. Since the relevant clause in the letter of appointment stipulates an affirmative and positive act on the part of the employer to confirm the probationer, we cannot hold that the appellant was confirmed by way of implication, as there is no order confirming him on the said post. The judgment in the case of *State of Punjab vs. Dharam Singh (Supra)*, does not apply to the facts of the present case. In the said case, the Constitution Bench held that the continuation of services of a probationer beyond the maximum period of probation would amount to a deemed confirmation of service only in the absence of a stipulation in the relevant rule requiring the probationer to pass a test or fulfil any other condition. In the instant case, as noted above, there is a necessary stipulation in the letter of appointment that requires a positive act on the part of the employer to confirm an employee.

13. We also do not find any merit in the contention of the appellant that the order discharging appellant is stigmatic. There is not even an iota of stigma cast upon the appellant in the discharge order. Further, the order of discharge merely notes that appellant’s performance is unsatisfactory. This cannot *ipso facto* be stigmatic or punitive in nature. The Supreme Court in the case of

Pavanendra Narayan Verma vs. Sanjay Gandhi PGI of Medical Sciences, (2002) 1 SCC 520 has held as under:

“29. Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job.”

14. Keeping the aforesaid observations in mind we are unable to find the discharge order to be stigmatic, as it does not impute something over and above mere unsuitability of the appellant for the job.

15. We, therefore, do not find any merit in the appeal and the same is dismissed with no order as to costs.

SANJEEV NARULA, J

VIPIN SANGHI, J

FEBRUARY 06, 2020

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