

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CM-477-C-2023 in/and
RSA-2674-2002 (O&M)
Date of Decision :10.02.2023

State of Haryana and others

...Appellants

Versus

Dr. Manmohan Pahwa

...Respondent

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Ms. Vibha Tewari, AAG, Haryana
for the appellant-State.

Mr. R.K. Malik, Senior Advocate with
Mr. Aditya Dassaur, Advocate for the respondent.

* * *

Harsimran Singh Sethi, J. (Oral)

CM-477-C-2023

Present application has been filed for fixing the actual date of
hearing in the main appeal.

Keeping in view the averments made in the application, which
are duly supported by an affidavit, application is allowed. Main appeal is
taken up for hearing today itself.

RSA-2674-2002

Present regular second appeal has been filed by the appellant-
State of Haryana against the judgment and decree of the trial Court dated
02.11.2001 by which, the suit filed by the respondent-plaintiff for setting
aside the order dated 19.03.1997 passed by the respondent-department by

which his services were terminated, was allowed as well as against the order dated 14.03.2002 passed by the Lower Appellate Court by which, the judgment and decree of the trial Court dated 02.11.2001 was upheld.

Certain facts need to be mentioned so as to appreciate the controversy in a correct perspective.

Respondent/plaintiff was appointed as Medical Officer Class-II on 01.05.1993 on adhoc basis and thereafter, the respondent/plaintiff competed for the post advertised by the Haryana Public Service Commission and ultimately was selected and joined on regular basis as HCMS-II on 12.04.1994. As per the appointment order, the respondent-plaintiff was to remain on probation for a period of two years, which could be extended by another period of one year. While on probation, the respondent/plaintiff was suspended on 09.08.1996 and ultimately while on probation vide order dated 19.03.1997, order of suspension was withdrawn and service of the respondent/plaintiff was dispensed with while he was on probation.

Aggrieved against the said order dated 19.03.1997 of dispensing the services of the respondent/plaintiff, he had filed a civil suit challenging the said order dated 19.03.1997 of dispensing his services on the ground that keeping in view the proviso to Rule 11(3) of the Haryana Civil Medical Services (Class-II) Rules, 1978 (in short, '1978 Rules') on the date when his services were dispensed with, he was to be treated as a confirmed employee and not on probation hence, order relieving the respondent/plaintiff from service by treating him to be on probation is bad being contrary to the 1978 Rules.

Notice was issued in the civil suit and appellant-State defended the order on the ground that keeping in view Rule 11 of the 1978 Rules as well as facts and circumstances of the present case, the respondent/plaintiff was on probation on 19.03.1997 hence, order dated 19.03.1997 relieving him from service during the period of probation is perfectly valid and correct.

After considering the facts and evidence which had come on record, the trial Court came to the conclusion that as the respondent/plaintiff was appointed as HCMS-II on 12.04.1994 and he was on probation for a period of 02 years though, extendable by period of one year but as no order was passed within a period of six months on the expiry of probation period of 02 years so as to extend the period of probation, the respondent/plaintiff is deemed to be confirmed in service keeping in view the Rule 11(2) of the 1978 Rules hence, relieving the respondent/plaintiff by treating him as a probationer was bad. Though, the order extending the period of probation was Ex.D-1 dated 06.11.1996, but the said order of extension was not accepted by the trial Court on the ground that only photocopy of the said order extending probation was produced and the same was passed after the six months of completion of 02 years. Vide judgment and decree dated 02.11.2001 of the trial Court, the suit was decreed and the impugned order dated 19.03.1997 was set aside with the direction to the appellant-department that respondent/plaintiff be reinstated in service with all consequential benefits.

Feeling aggrieved against the said order, appellant-State preferred an appeal before the Lower Appellate Court, which also came to

be decided on 14.03.2002 and the Lower Appellate Court while interpreting Rule 11(2) of the 1978 Rules has held that as there was no extension of the probation within a period of six months of the expiry of first two years period of probation, by deeming fiction, the respondent/plaintiff became a confirmed employee hence, he could not have been dismissed from service by treating him to be a probationer and the judgment and decree dated 02.11.2001 of the trial Court was upheld. Hence, the present regular second appeal by the appellant-State.

Notice of motion was issued and, thereafter, present regular second appeal was admitted and the execution of the decree of the Courts below was stayed.

Learned counsel for the appellant-State argues that the Courts below have not appreciated the facts in a correct perspective so as to arrive at a correct interpretation of Rule 11 of the 1978 Rules and the interpretation extended by the Courts below is rendered without considering the actual facts related to the present case. Learned counsel for the appellant-State submits that it is an admitted case that during the period of probation the respondent/plaintiff was suspended and he remained under suspension till his services were dispensed with vide order dated 19.03.1997 hence, giving benefit of proviso to Rule 11 (3) of 1978 Rules in favour of the respondent/plaintiff of deemed confirmation while under suspension was bad as no employee who was under suspension during the period of probation can be deemed to be confirmed employee by the operation of proviso to Rule 11(3) of 1978 Rules. Hence, judgment and decree of the Courts below are liable to be set aside.

Further argument of the learned counsel for the appellant-State is that it is an admitted fact that period of probation of the respondent/plaintiff was extended vide order dated 06.11.1996 at which time the respondent/plaintiff was under suspension which order was never challenged by the respondent-plaintiff at any given point of time and same was also not impugned in the suit, which fact has been ignored and not taken into account by the Courts below while granting deemed confirmation in favour of the respondent-plaintiff.

Learned counsel for the appellant-State further submits that keeping in view the facts and circumstances noticed hereinbefore, findings of the Courts below are perverse, keeping in view the evidence which had come on record and Rule 11 of the 1978 Rules has not been interpreted by the Courts below in a manner required, keeping in view the facts and circumstances of the present case, hence, the judgments and decrees of the Courts below are liable to be set aside.

Learned Senior counsel for the respondent/plaintiff argues that arguments which are being raised by the learned counsel for the appellant-State are liable to be rejected on the ground that Rule 11 of the 1978 rules has been taken into account by the Courts below and has been given a meaningful interpretation which reflects upon plain reading of the rule in question and once there was no order of extension of probation period after the period of six months on completion of first two years of probation, an employee is deemed to be confirmed on the ground that probation was completed satisfactorily by the employee concerned and as the order extending the period of probation was only passed in November, 1996

which period was beyond six months from two years of probation period as envisaged under rule 11(3) proviso of 1978 Rules hence, the interpretation given by the Courts below that the respondent/plaintiff was deemed to be a confirmed employee on the date when he was relieved on 19.03.1997 is in consonance with law and no order could have been passed by the employer by treating respondent/plaintiff on probation hence, the order passed by the Court below is liable to be upheld.

Learned Senior counsel for the respondent/plaintiff further argues that the services of the respondent-plaintiff were dispensed with as there were complaints against the respondent/plaintiff however, it was incumbent upon the department to enquire into those complaints and only thereafter take an appropriate decision but in the present case, order dated 19.03.1997 relieving the respondent/plaintiff from services was passed simpliciter, which is punitive in nature so as to cause prejudice to respondent/plaintiff hence, the said order cannot be sustained in view of the settled principle of law.

I have heard learned counsel for the parties and have gone through the record with their able assistance.

Certain facts, which have gone unrebutted, are that the respondent/plaintiff was appointed on regular basis after being selected by the Haryana Public Service Commission on 12.04.1994. Further it is conceded position that respondent/plaintiff was put on probation for a period of 02 years, which period was extendable by another period of one year. It is also a conceded position that on the date, when order dispensing the services of the respondent/plaintiff was passed, the maximum period of

probation prescribed under Rules 1978 i.e. 03 years, had not expired. The only question which needs to be adjudicated in the present case is whether in the facts and circumstances of the present case, keeping in view Rule 11 of the 1978 Rules, which deals with the probationer and the confirmation of the probationer, respondent/plaintiff is to be treated as deemed confirmed employee or not on the date when impugned order dispensing the services of the respondent-plaintiff dated 19.03.1997 was passed.

In order to appreciate the contention of both the parties, Rule 11 of the 1978 Rules, which is applicable in the facts and circumstances of the present case is reproduced for ready reference:-

“11. **Probation**:- (1) Persons appointed to the posts in the service remain on probation for a period of two years:

Provided that-

(a) any period after such appointment spent on deputation corresponding or a higher post shall count towards the period of probation;

(b) any period of officiating appointment shall be reckoned as period spent on probation, but no person who has so officiated shall, on the completion of the prescribed period of probation, be entitled to be confirmed unless he is appointed against a permanent vacancy.

(2) If, in the opinion of the appointing authority, the work or conduct of a person during the period of probation is not satisfactory, it may dispense with his service or extend his period of probation and thereafter pass such orders 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.

(3) On the completion of the period of probation of a person, the appointing authority may, if his work or conduct has, in its opinion, been satisfactory:-

(i) confirm such person from the date of his appointment, if appointed against a 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 satisfactory, if there is no permanent vacancy;

Provided that if neither of the above three decisions is taken within, six months of the expiry of the original or extended period of probation, if any, then at the expiry of the aforesaid six months period the officer concerned would be deemed to have satisfactorily completed his period of probation.”

A bare perusal of the above reproduced rule would show that as per Rule 11(1), an employee appointed will remain on probation for a period of two years.

As per Rule 11(2), if in the opinion of the appointing authority the work and conduct of the person during probation is not satisfactory, the service of the probationer can be dispensed with or probation period can be extended but maximum period of probation will not exceed three years and in such case the employer will retain the right to dispense with the services

of the probationer as it had upon completion of initial probation period of two years.

As per rule 11(3), if on completion of the original probation period of two years or the extended period of probation the appointing authority is of the opinion that work and conduct of the person during the probation was satisfactory, appropriate order will be passed so as to take any of the decision mentioned in Rule 11(3) (i) to (iii). As per proviso, in case no order is passed qua Rule 11(3) (i) to (iii) within a period of six months of expiry of original or extended period of probation, an employee concerned will be deemed to have satisfactorily completed period of probation.

The correct interpretation of the Rule 11 which deals with period of probation is that original period of probation is of two years and in case the employee's work and conduct is not satisfactory, the same can be extended but maximum period of probation will not exceed three years and as per proviso to Rule 11(3) in case on completion of original period of probation of two years of the extended period of probation appointing authority finds the work and conduct of an employee to be satisfactory and still no order is passed contrary to the opinion with regard to the work and conduct of an employee being satisfactory within a period of six months of completion of period of two years of extended period of probation, an employee is deemed to be confirmed in service.

This Court is required to answer as to whether in the facts and circumstances of the present case, the claim of the respondent-plaintiff that his case is covered under proviso to Rule 11(3) of the 1978 Rules qua

deemed confirmation when within a period of six months after completion of two years of period of probation he was suspended and whether suspended employee can be deemed to have been confirmed employee or not by application of the said proviso to Rule 11(3) of the 1978 Rules by treating that his period of probation was satisfactorily cleared.

It is a conceded position that vide order dated 09.08.1996 respondent/plaintiff was suspended from his service. The next question which arises is whether an employee, who has been put under suspension can claim that there is nothing adverse against him/her so as to extend the benefit of deemed confirmation as envisaged in Rule 11(3) proviso of 1978 Rules.

A bare perusal of Rule 11(3) would show that same relates to only a person whose work and conduct has been found to be satisfactory by the employer on completion of initial period of probation of two years and nothing adverse has come against the employee within a period of two years and six months of probation. The words in Rule 11(3) of 1978 Rules are that “where an appointing authority is of the opinion that conduct of the employee is “satisfactory” hence, the opinion of the employer under the rule has to be that there is nothing adverse against the employee concerned.

In the present case, the said rule 11(3) of 1978 Rules will have no application for the reason that the respondent/plaintiff was suspended from service vide order dated 09.08.1996, which period falls within six months upon the expiry of the original period of probation of two years. Even during the initial period of probation of two years, there were complaints against the respondent/plaintiff hence, once the department

itself has suspended the respondent/plaintiff from service within a period of six months of completion of two years of probation, the Rule 11(2) of the 1978 Rules will come into operation rather than Rule 11(3) of the 1978 Rules. Proviso to Clause 11(3) of the 1978 Rules will only come into operation in case there is nothing adverse against the employee after the period of 02 years and six months of period of probation coupled with the fact that there is no adverse order/action by the employer against the probationer to suggest that the work and conduct of the probationer was not satisfactory. In the present case, facts are not such that within a period of 02 years and six months of probation period, there was no order by the authority so as to indicate that work and conduct of the respondent-/plaintiff was satisfactory as concededly the respondent/plaintiff was suspended and there were complaints against the respondent/plaintiff.

Courts below while recording the findings held that as there was no order extending the period of probation of the respondent-plaintiff after the period of two years and six months hence, it is deemed that the work and conduct of the respondent/plaintiff was satisfactory to be treated as deemed confirmation under Rule 11 (3) of the 1978 Rules but Courts below have failed to consider the relevant fact that where an employee, who is on probation and is also suspended whether his/her work and conduct can be treated as satisfactory so as to consider the claim under the proviso of Rule 11(3) so as to grant deemed confirmation under Rule 11(3) of the 1978 Rules.

In this case where respondent/plaintiff is under suspension, Rule 11(2) of the 1978 Rules will be applicable. A bare reading of Rule 11

of 1978 Rules show that Rule 11(3) of the 1978 Rules is qua an employee where employer is of the view that the work and conduct of the employee concerned is satisfactory. Nothing has been brought on record by the respondent/plaintiff to prove that any such indication was ever given by the department or any order was passed by the appellant-State qua respondent/plaintiff while he was in service that the services of the respondent/plaintiff were treated to be satisfactory on expiry of two years so as to be grant the respondent/plaintiff the benefit of proviso to Rule 11(3) of the 1978 Rules of deemed confirmation.

Rather facts are to the contrary. As there were complaints against the respondent/plaintiff of being involved in private practice even while on original period of two years of probation, the respondent/plaintiff was placed under suspension within two years and six months of start of probation period hence, the findings recorded by the Courts below by interpreting proviso to Rule 11(3) of 1978 Rules that after completing two years of probation as no order extending the probation was passed within period of 06 months after expiry of 02 years of probation, the same will result in deemed confirmation, is an incorrect interpretation of Rule 11(3) of 1978 Rules as relevant facts and circumstances of the present case have been ignored while recording the said finding.

If the interpretation as being given by learned counsel for the respondent-plaintiff is accepted, even an employee, who is under suspension will claim that as no order has been passed extending period of probation, his work and conduct is to be treated as satisfactory so as to claim benefit under Rule 11(3). While recording the finding that a probationer employee

is deemed confirmed under proviso to Rule 11(3) of 1978 Rules, a Court has to record a finding that not only the employer was satisfied qua work and conduct of probationer employee but finding is also to be recorded that there is nothing adverse against probationer so as to point out that there was no premise upon which it could be assumed that the employer was not satisfied with the work and conduct of the probationer. Proviso to Rule 11(3) granting deemed confirmation can only be brought into operation in case at the relevant time there is nothing against the probationer on record qua his work and conduct.

In the present case, it is a conceded position that within period of two years of probation, there were complaints against the respondent-plaintiff and upon completion of two years of probation, he was suspended which act on the part of the department clearly shows that according to department, work and conduct of the respondent-plaintiff was not satisfactory so as to confirm him. Hence. Rule 11(2) of the 1978 Rules will be applicable and not Rule 11(3), which is only applicable where an employer is satisfied qua the work and conduct of an employee upon completion of period of two years of probation of the extended period of probation. Hence, benefit being claimed by the respondent-plaintiff under proviso to Rule 11(3) of 1978 Rules is not admissible to the respondent-plaintiff, keeping in view the facts and circumstances of the present case which have been noticed hereinbefore hence, findings which have been recorded by the Courts below holding that despite the fact that respondent-plaintiff was under suspension, he will be deemed to be confirmed employee even during the suspension period, cannot be sustained or upheld.

In the facts and circumstances of the present case, Rule 11(2) of 1978 Rules will be applicable and total period of probation will be 03 year. Since on the date when the services of the respondent-plaintiff were dispensed with he was under suspension and yet to complete three years of service, the order relieving the respondent/plaintiff by order simpliciter during the probation is valid.

Another argument raised by the learned Senior counsel appearing for the respondent-plaintiff is that the impugned order relieving the respondent-plaintiff from service by treating him on probation cannot be sustained as concededly there were complaints against the respondent-plaintiff, which were enquired into though, not proved still he has been relieved during the period of probation hence, once there were complaints, the order passed against the respondent-plaintiff is to be treated punitive in nature and stigmatic and the same is liable to be set aside.

Learned Senior counsel for the respondent-plaintiff further submits that despite the above mentioned facts qua the complaints, if the department still wanted to rely upon those complaints, then it was incumbent upon the respondent-department to hold an enquiry into those allegations and action could have only be taken in case allegations are proved against the respondent-plaintiff.

The question which arises is whether once there are complaints against the probationer, the department is supposed to hold an enquiry to enquire into the allegations alleged or the order can be passed simpliciter after arriving at a particular conclusion as envisaged under Rule 11 (2) of the 1978 Rules.

Said question has already been answered by Hon'ble Supreme Court of India more than once and the same is no longer res integra.

In **Civil Appeal No.2868-2012** titled as **Head Master Lawrence School Lovedale vs. Jayanthi Raghu and another** decided on 16.03.2012 wherein service of an employee who was on probation was terminated without holding an enquiry into the allegations, the Hon'ble Supreme Court of India held that the probationer will only get the status of deemed confirmation after completing maximum period of probation and prior to that even if, there are some allegations, it is not incumbent upon the authority concerned to hold an enquiry before arriving at a conclusion qua dispensing of service of the probationer. Relevant paragraphs of the judgment are as under:-

“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 (1986) 3 SCC 91 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.

24. In the result, the appeal is allowed and the judgment and order passed by the High Court are set aside to the extent that the first respondent had acquired the status of confirmed employee and, therefore, holding of enquiry is imperative. As far as the conclusion recorded by the Division Bench that no stigma was cast on the respondent is concerned, the same having gone unchallenged, the order in that regard is not disturbed. The parties shall bear their respective costs.”

In **Civil Appeal No. 8933-34 of 2017** titled as **Rajasthan High Court vs. Ved Priya and another** decided on 18.03.2020 the Hon'ble Supreme Court of India held that umbrella of Article 311 of the Constitution of India is only admissible to a confirmed employee and not to a probationer. In the said case, where the probationer, who was a Judicial Magistrate was dismissed on the basis of complaints of misdemeanour and corruption, the Hon'ble supreme Court of India, after considering the relevant law on the said subject held as under:-

“26.Since Respondent No.1 has failed to establish that the High Court intended or has actually punished him for any defined misconduct, it stands crystallized that the object of the High Court on the administrative side was to verify the suitability and not enquire into the allegations against the first respondent. Independently also, we do not find that the foundation was the allegations but it was based upon a holistic assessment of the respondent’s service record. Even taking an effectsbased approach, Page | 14 we do not feel that the order of non-confirmation or the preceding circumstances would prejudice the respondent, meriting a higher procedural requirement.”

Further, the same question of law was again answered by Hon'ble Supreme Court of India while passing order in **Civil Appeal No.7901-2002** titled as **State of U.P and others vs. Ashok Kumar** decided on 13.12.2005 wherein, it has been held that where the order passed against the probationer is an order simpliciter, then even if, the said order is based upon some complaints, the same cannot be treated as violative of principles of natural justice or the same cannot be treated as punitive in nature so as to give any cause of action to the probationer. Relevant paragraph of the judgment is as under:-

“6.The order of termination simpliciter as referred above does not disclose any stigma. Whether a complaint is the motive leading to the termination simpliciter or it is the foundation of the termination order has been considered by this Court and held consistently by this Court that when there is no inquiry resulting in the termination order the

complaint is the motive of the order of termination on the other hand whether the complaint leads to the inquiry resulting the termination order it is the foundation of the order of termination. This Court in a recent decision in the case of [State of Haryana and Anr. v. Satyender Singh Rathore](#), . After discussing the various decisions of this Court held in paragraph 9 of the judgment as under :

"9. We find the High Court did not consider the question of stigma or the effect of any enquiry held before the order of termination was passed. The question whether the enquiry purportedly held provided the motive or the foundation was required to be considered by the High Court in detail. That has not been done. The question whether the termination of service is simpliciter or punitive has been examined in several cases e.g. [Dhananjay v. Chief Executive Officer](#), Zilla Parishad, Jalna, , and [Mathew P. Thomas v. Kerala State Civil Supply Corporation Ltd.](#), . An order of termination simpliciter passed during the period of probation has been generating undying debate. The recent two decisions of this Court in [Dipti Prakash Banerjee v. Satyendra Nath Bose National center for Basic Sciences](#), , and [Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences](#), , after survey of most of the earlier decisions touching the question observed as to when an order of termination can be treated as simpliciter and when it can be treated as punitive and when a stigma is said to be attached to an employee discharged during the period of probation. The learned counsel on either side referred to and relied on these decisions either in support of their respective contentions or to

distinguish them for the purpose of application of the principles stated therein to the facts of the present case. In the case of Dipti Prakash Banerjee (supra) after referring to various decisions it was indicated as to when a simple order of termination is to be treated as "founded" on the allegations of Page 2460 misconduct and when complaints could be only as a motive for passing such a simple order of termination. In para 21 of the said judgment a distinction is explained thus: (SCC pp. 71-72)

"21. If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

From a long line of decisions it appears to us that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination

either is thin or overlapping. It may be difficult either to categorise or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service."

Keeping in view the settled principle of law noticed hereinbefore, the argument of the learned Senior counsel for the respondent-plaintiff that once in the preliminary enquiry, the complaints against the respondent-plaintiff are found to be incorrect, it was incumbent upon the respondent to hold a regular enquiry qua the said allegations before taking any action against the respondent/plaintiff, cannot be accepted.

Further, in view the judgment of the Hon'ble Supreme Court of India in **Civil Appeal No.672-2001** titled as **Mathew P. Thomas vs. Kerala State Civil Supply Corpn. Ltd and others** decided on 19.02.2003 wherein, it has been held that even if, there were complaints against the employee concerned still the employer was well within its right to pass an order of termination during the period of probation and it is the discretion of the employer to take disciplinary action or to discharge the probationer simpliciter without holding any enquiry into the charges. Relevant paragraphs of the judgment are as under:-

"10.Paras 1 to 3 of the show-cause notice reflect about the unsatisfactory performance of the duty of the appellant. Paras 4 and 5 of the show-cause notice were not taken into consideration in passing the order of termination of services as is evident from the termination order although reference is made to the show-cause notice. The last para of the show-cause

notice also indicates that the action was proposed in terms of clause 2 of the order of appointment, namely, terminating the services during probationary period. The order of termination of services refers to relevant clause in the order of appointment and explanation given by the appellant to the show-cause notice. The last paragraph of the said order shows that his explanation was found unsatisfactory. The appellant had wrongfully recommended acceptance of bad stock not once but several times; as such it was held that his services have been unsatisfactory. Hence, the order of termination was passed. From this order of termination, it is clear that the respondents did not rely on paras 4 and 5 of the show-cause notice. The Division Bench in the impugned judgment, after perusal of the files observed that the appointing authority had abandoned those charges and concentrated only on the lapses committed by the appellant in wrongfully recommending acceptance of bad stock. We have no good reason to differ with this finding recorded by the Division Bench after perusal of the relevant files and records. Even otherwise, paras 4 and 5 of the show- cause notice stand withdrawn as per the direction given by the High Court. This being the position, no prejudice is caused to the appellant to complain that High Court has exceeded its power to judicial review when such a deletion of paras 4 and 5 from the show- cause notice is to the benefit and advantage of the appellant. This also protects the appellant from any adverse affect when he seeks employment elsewhere and prospective employer may not have any ground to take adverse view of the alleged misconduct contained in paras 4 and 5 of the show-cause notice.

11. An order of termination simplicitor passed during the period of probation has been generating undying debate. The recent two decisions of this Court in [Deepti Prakash Banerjee vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and others \[\(1999\) 3 SCC 60\]](#) and [Pavanendra Narayan Verma vs. Sanjay Gandhi PGI of Medical Sciences and another \[\(2002\) 1 SCC 520\]](#), after survey of most of the earlier decisions touching the question observed as to when an order of termination can be treated as simplicitor and when it can be treated as punitive and when a stigma is said to be attached to an employee discharged during period of probation. The learned counsel on either side referred to and relied on these decisions either in support of their respective contentions or to distinguish them for the purpose of application of the principles stated therein to the facts of the present case. In the case of [Deepti Prakash Banerjee \(supra\)](#), after referring to various decisions indicated as to when a simple order of termination is to be treated as "founded" on the allegations of misconduct and when complaints could be only as motive for passing such a simple order of termination. In para 21 of the said judgment a distinction is explained, thus: -

"21. If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did

not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

From long line of decisions it appears to us whether an order of termination is simplicitor or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simplicitor falling in one or the other category, based on misconduct as foundation for passing the order of termination simplicitor or on motive on the ground of unsuitability to continue in service. If the form and language of the order of termination simplicitor of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simplicitor or punitive. In cases where the services of a probationer are terminated by an order of termination simplicitor and the language and form of it do not show that either it is punitive or stigmatic on the face of it but there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other words, the facade of the termination order may be simplicitor but the real face behind it is to get rid of services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simplicitor to find out what

in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from service on the foundation of his misconduct.

12. In the present case, even on earlier occasions when the appellant failed to perform his duties properly during probation period he was warned to improve and continued in the service. If he was to be removed from service on the allegations of misconduct at that time itself the respondents could have removed him from service. This is also a circumstance to indicate that his order of termination was simplicitor. Therefore, having regard to the particular facts and circumstances and in view of what is stated above we have no good reason to disagree with the impugned order.”

Keeping in view the facts of the present case coupled with the settled principles of law stated hereinbefore, jurisdiction as exercised by the respondent-department while passing order dated 19.03.1997 is as per law and the same is also in consonance with Rule 11 of 1978 Rules.

Once, it is conceded that respondent-plaintiff had not completed maximum period of probation of three years up to the date of passing the impugned order dated 19.03.1997, he was to be treated as probationer in the facts and circumstances of the present case, which have been noticed hereinbefore hence, the findings, which have been recorded by the Courts below that on the date when the impugned order dated 19.03.1997 was passed by the respondent-department, the respondent-plaintiff was deemed to have successfully completed the period of

probation and should deemed to be considered as a confirmed employee as per 1978 Rules is contrary to the facts, rules governing the service as well as the settled principles of law noticed hereinbefore.

Keeping in view the above, the judgments of the Courts below dated 02.11.2001 and 14.03.2002 are not only perverse to the facts and evidence on record but also contrary to the settled principles of law noticed hereinbefore and hence, cannot be sustained and accordingly are set aside.

Keeping in view the findings recorded in the present appeal, respondent/plaintiff was still on probation at the time when his services were dispensed with. The suit filed by the respondent/plaintiff seeking a declaration that order dated 19.03.1997 dispensing his services be treated as null and void, is dismissed and the findings recorded in this order hereinbefore, be treated as part of the order dismissing the suit filed by the respondent/plaintiff as the same are not being repeated for the sake of brevity and the present regular second appeal is accordingly allowed in above terms.

February 10, 2023
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(HARSIMRAN SINGH SETHI)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No