



2025:DHC:626



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 03rd February, 2025

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W.P.(C) 5204/2011

AMIT SHARMA

.....Petitioner

Through: Mr. R.K. Saini, Advocate.

versus

THE INSTITUTE OF CHARTERED

ACCOUNTANTS OF INDIA AND ORS

.....Respondents

Through: Ms. Surbhi Mehta, Mr. Kaustubh
Sinha and Mr. Abhishek Sinha, Advocates.**CORAM:****HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J.**

1. This writ petition is preferred on behalf of the Petitioner laying a challenge to impugned order dated 16.12.2010 terminating the services of the Petitioner. Writ of mandamus is sought for a direction to Respondent No.1/The Institute of Chartered Accountants of India ('ICAI') to reinstate the Petitioner with all consequential benefits as a confirmed employee.
2. Case of the Petitioner as set out in the writ petition is that Petitioner joined ICAI on 19.03.2008 as a Guest Faculty Member for imparting Information Technology Training to students studying Chartered Accountancy. On 23.06.2008, due to outstanding performance of the Petitioner, ICAI offered him appointment vide appointment letter dated 23.06.2008 against a permanent post of Executive Officer and Petitioner joined w.e.f. 30.06.2008 on probation for a period of one year, extendable by a period or periods at the discretion of the Management.



3. It is averred that one year of probation period ended on 30.06.2009 but no letter was issued extending the probation period. During the probation period, no memo/warning was issued to the Petitioner regarding his performance. Petitioner's ACR for the year 2008-09 did not contain any adverse remark against the Petitioner and it was recorded that his performance as faculty was satisfactory. Petitioner continued to work from 01.07.2009 to 16.12.2010 as Executive Officer to the satisfaction of the superiors and as recorded in his ACR for the year 2009-10, his performance was 'Good' and he was properly imparting ITT Training to the students.

4. It is further averred that during the probation period, Petitioner served ICAI at various places and in different capacities such as Executive Officer at ITT Lab, Pitampura; Centre In-charge, ITT Lab, Vishwas Nagar; Faculty, ITT Lab, Pitampura, etc. Despite satisfactory performance, services of the Petitioner were abruptly dispensed with in an illegal manner by a non-speaking order dated 16.12.2010 and that too, without assigning any reason, under Clause 4 of the appointment letter. Petitioner made a representation on 21.01.2011 to the President of ICAI but to no avail and Petitioner approached this Court.

5. At the outset, it needs to be noted that Mr. R.K. Saini, learned counsel for the Petitioner had categorically stated that the Petitioner is not calling upon the Court to either rule on the question whether there is 'deemed confirmation' in law or whether Petitioner was suitable or unsuitable for being confirmed and the only contention of the Petitioner is that exercise of power to terminate the services of the Petitioner in terms of Clause 4 of the appointment letter is *mala fide* and abuse of power with ulterior motive to punish the Petitioner for annoying some officers and this is substantiated by



the record. The argument is that the ACRs of the Petitioner for the periods 2008-09 and 2009-10 reflect that Petitioner's work was satisfactory and he was doing well which is reflected from the ACRs of the two years in question and in fact, Respondent No.3/Sh. H.K. Jain and Respondent No.2/Mrs. Indu Arora themselves gave a good report on the performance of the Petitioner in the ACR for the year 2009-10.

6. It is urged that there is a backdrop to the illegal termination order. One Sh. Jitendra Singh, Senior Executive Officer, sent an e-mail dated 08.09.2010 to Sh. H.K. Jain with a copy to Mrs. Indu Arora, pointing out that no bills were being submitted for utilisation of 90% of the money towards expenditure, in response to which Sh. H.K. Jain called upon the Petitioner to pay the money pertaining to a voucher from the Imprest Account of Ghazipur ITT Lab. Since this was a financial irregularity, Petitioner declined to do so and as learnt later, Sh. H.K. Jain himself drew the Imprest money, which he routinely did in respect of other vouchers. This annoyed Sh. H.K. Jain and he authored a letter dated 15.09.2010 making false allegations against the Petitioner. In furtherance thereto, he also rendered an adverse report dated 28.09.2010 in respect to the Petitioner and two other officers and Mrs. Indu Arora, the Additional Director, without application of mind and verification of facts and overlooking the good performance of the Petitioner, endorsed the letter. On purely false allegations, the impugned termination letter was issued. Mr. Saini laboured to take the Court through the two ACRs to show that Petitioner's performance was assessed as 'Good' by the Reviewing Officer and he agreed almost in all aspects with the Appraiser. Therefore, there was no justifiable reason for ICAI to issue the termination order instead of



confirming the services of the Petitioner.

7. It was argued that while it is true that the termination order, on the face of it, is a termination simplicitor, however, on going behind the order, it would be evident to the Court that the order was motivated and *mala fide* and at the instance of Sh. H.K. Jain and hence punitive in nature. Relying on the judgment of the Supreme Court in **Anoop Jaiswal v. Government of India and Another, (1984) 2 SCC 369**, it was argued that the Court must lift the veil to see the real reason behind the impugned order as in a given case though the order of discharge may be non-committal, it cannot stand alone. Where the report/recommendation of the Superior Authority is the basis or foundation of the order, that should be read along with the order for the purpose of determining its true character. If on reading the two together, Court reaches a conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed, then it is inevitable that the order of discharge should fall to the ground, where the aggrieved officer has not been afforded a reasonable opportunity to defend himself as provided under Article 311(2) of the Constitution of India.
8. Reliance was also placed on the judgment of the Supreme Court in **Rajasthan High Court v. Ved Priya and Another, (2021) 13 SCC 151**, where the Supreme Court held that the entire objective of probation is to provide the employer an opportunity to evaluate probationer's performance and test his suitability for a particular post and such an exercise must not be treated lightly. The true test of suitability is actual performance of duties which can only be applied after candidate joins and starts working.
9. Learned counsel for the Respondent *per contra* argued that Petitioner was engaged as Executive Officer vide appointment letter dated 23.06.2008



and was placed on probation for a period of one year, which was extendable by a period or periods at the discretion of ICAI. The appointment letter clearly provided that until a written communication is issued by ICAI on satisfactory completion of the initial or subsequently extended period, it should not be presumed that probation period has been extended and that question of confirmation would be considered only on satisfactory completion of probation. Admittedly, no written communication was issued to the Petitioner confirming his services with the Institute and Petitioner continued to be on probation till his discharge.

10. It was further urged that Petitioner cannot claim setting aside of the termination order as he was never confirmed and there is no 'deemed confirmation' in law. As a probationer, services of the Petitioner could be terminated on ground of unsuitability for confirmation as the very purpose of placing an employee under probation is to consider whether his work is satisfactory so as to confirm him in the post. It is the right and prerogative of an employer to assess the work and performance of a probationer not just on the basis of ACRs but holistically on a host of factors, singularly or cumulatively, to determine if he is suitable or unsuitable for a job and discharge of a probationer cannot be termed as a punitive action or punishment. The impugned order reflects that this is a case of termination simplicitor of a probationer and neither punitive nor stigmatic and by virtue of powers exercised by ICAI under Clause 4 of the appointment letter of the Petitioner. Reliance was placed on the judgment of the Supreme Court in *Chaitanya Prakash and Another v. H. Omkarappa*, (2010) 2 SCC 623, and of this Court in *Suresh Chand Jain v. Director General & Anr.*, 2015 SCC OnLine Del 7424.



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11. It was explained that Petitioner's services were terminated as he was found unsuitable for confirmation of probation. Petitioner was not performing his duties satisfactorily. At times, he was spending money from the Imprest Account without preparing proper vouchers and was not releasing payments against the bills of the vendors on time. His behaviour with the students he taught as also the Faculty members was not up to the mark. There were many complaints that he was not taking classes regularly on the pretext of being involved in administrative matters. Verbal warnings were issued to the Petitioner followed by e-mails to improve his conduct and performance but there was no improvement. It is a settled law that the employer reserves the right to assess the overall suitability of a probationer and if he is not found suitable, services can be dispensed with without anything more during or at the end of the prescribed period of probation.

12. It was argued that insofar as the ACR for the year 2008-09 is concerned, the remark in the ACR clearly shows that Petitioner needed to acquire maturity level to work as a team with the peer group. In addition to taking classes, Petitioner was required to perform various other functions as In-charge of ITT Lab such as preparation of batchwise work schedule of Faculties/Lab Assistants, ensure proper maintenance of Computer Labs by Lab Assistants, maintenance of Imprest Account, timely forwarding of telephone bills, electricity bills, etc. The satisfaction of the Competent Authority in ICAI to confirm Petitioner's probation was not based on ACRs alone but on Petitioner's overall performance, his conduct with the peers, seriousness in work, etc. On a holistic examination of the work and conduct of the Petitioner during the probation period, Competent Authority found the Petitioner to be unsuitable for confirmation.



13. Coming to the alleged *mala fides* by Sh. H.K. Jain and/or the motive/foundation of the impugned termination order, learned counsel for ICAI argued that the allegations were misconceived and an after-thought to cover Petitioner's own lapses. Levelling allegations of *mala fide* by Sh. H.K. Jain is merely an excuse and lacks substantive merit.

14. Heard learned counsels for the parties and examined their submissions.

15. The heart of the dispute in the present writ petition lies in interpretation of Clause 4 of the appointment letter dated 23.06.2008 and whether the services of the Petitioner as a probationer were terminated on account of *mala fides* of Respondents No.2 and 3. Law on various dimensions of probation and confirmation is fairly well-settled. It is no longer *res integra* that a probationer cannot, after expiry of probationary period, automatically acquire the status of a permanent employee, unless applicable rules expressly so provide, which means that there is no 'deemed confirmation' in service jurisprudence. In this context, I may refer one of the earliest judgments on the point of the Constitution Bench of the Supreme Court delivered in ***G.S. Ramaswamy and Others v. The Inspector General of Police, Mysore State, Bangalore, 1964 SCC OnLine SC 73***, relevant paragraph from which is as follows:

"8. It has further been urged on the basis of Rule 486 that as the petitioners had worked for more than two years on probation, they became automatically confirmed under the said Rule, and reliance is placed on the following sentence in Rule 486, namely, "promoted officers will be confirmed at the end of their probationary period if they have given satisfaction". The law on the question has been settled by this Court in *Sukhbana Singh v. State of Punjab* [1962 SCR 1711]. 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. This condition of giving satisfaction must be fulfilled before a promoted officer can be confirmed under this Rule and this condition obviously means that the authority competent to confirm him must pass an order to the effect that the probationary officer has given satisfaction and is therefore confirmed. The petitioners therefore cannot claim that they must be treated as confirmed circle inspectors simply because they have worked for more than two years on probation; they can only become confirmed circle inspectors if an order to that effect has been passed even under this Rule by the competent authority. The first contention therefore that the petitioners before us have an indefeasible right to promotion once their names are put in the eligibility list and that they are entitled to continue as circle inspectors thereafter if they have once been promoted, on temporary or officiating basis, cannot be sustained.”

16. Another Constitution Bench of the Supreme Court in ***State of U.P. v. Akbar Ali Khan, AIR 1966 SC 1842***, took the same view as follows:-

“6. The scheme of the Rules is clear : confirmation in the post which a probationer is holding does not result merely from the expiry of the period of probation, and so long as the order of confirmation is not made, the holder of the post remains a probationer. It has been held by this Court that when a first appointment or promotion is made on probation for a specified period and the employee is allowed to continue in the post, after the expiry of the said period without any specific order of confirmation he continues as a probationer only and acquires no substantive right to hold the post. If the order of appointment itself states that at the end of the period of probation, the appointee will stand confirmed 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 case, 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. See Chief Conservator of Forests, U.P. National v. D.A. Lyall [CA 259 of 1963 decided on Feb 24, 1965]; Sukhbans Singh v. State of Punjab [AIR 1962 SC 1711] and Accountant General, Madhya Pradesh, Gwalior v. Beni Prasad Bhatnagar [CA 548 of 1962, decided on Jan 23, 1964].”

17. In ***State of Punjab v. Dharam Singh, AIR 1968 SC 1210***, the Constitution Bench of the Supreme Court after examining the anatomy of the Rules in question, addressed itself to the effect of Rule 6(b) of the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961 wherein a period of three years was fixed, beyond which probation period could not be extended. The view taken by the Supreme Court was that once there was a maximum period of probation fixed by the Rules, beyond which probationary period could not be extended, then merely because an employee appointed to the post continues after completion of the maximum period, without an express order of confirmation, he cannot be deemed to continue as a probationer, but would have to be treated as a confirmed employee. In the said case, the Service Rules itself negated the principle that there is no deemed confirmation. Relevant paras are as under:-

“8. The initial period of probation of the respondents ended on October 1, 1958. By allowing the respondents to continue in their posts thereafter without any express order of confirmation, the competent authority must be taken to have extended the period of probation up to October 1, 1960 by implication. But under the proviso to Rule 6(3), the probationary period could not extend beyond October 1, 1960. In view of the proviso to Rule 6(3), it is not possible to presume that the competent



authority extended the probationary period after October 1, 1960, or that thereafter the respondents continued to hold their posts as probationers.

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. After such confirmation, the authority had no power to dispense with their services under Rule 6(3) on the ground that their work or conduct during the period of probation was unsatisfactory. It follows that on the dates of the impugned orders, the respondents had the right to hold their posts. The impugned orders deprived them of this right and amounted to removal from service by way of punishment. The removal from service could not be made without following the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and without conforming to the constitutional requirements of Article 311 of the Constitution. As the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 was not followed and as the constitutional protection of Article 311 was violated, the impugned orders were rightly set aside by the High Court."

18. In **Samsher Singh v. State of Punjab and Another**, (1974) 2 SCC 831, a seven-Judge Bench of the Supreme Court was dealing with termination of services of probationers under Rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and Rule 7(3) of Punjab Civil Services (Judicial Branch) Rules, 1951. The law laid down by the Constitution Bench in **Dharam Singh (supra)** was approved but was distinguished because of the Rule in question in the said case, which



provided a probation period for two years, extendable from time to time, not exceeding three years and an Explanation to the Rule which stipulated that period of probation shall be deemed to have been extended if a Subordinate Judge is not confirmed on expiry of probation period. Relevant paragraphs are as under:-

“71. Any confirmation by implication is negated in the present case because before the completion of three years the High Court found prima facie that the work as well as the conduct of the appellant was unsatisfactory and a notice was given to the appellant on October 4, 1968 to show cause as to why his services should not be terminated. Furthermore, Rule 9 shows that the employment of a probationer can be proposed to be terminated whether during or at the end of the period of probation. This indicates that where the notice is given at the end of the probation the period of probation gets extended till the inquiry proceedings commenced by the notice under Rule 9 come to an end. In this background 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. 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 and that a probationer is not in fact confirmed till an order of confirmation is made.

72. In this context reference may be made to the proviso to Rule 7(3). The proviso to the rule states that the completion of the maximum period of three years' probation would not confer on him the right to be confirmed till there is a permanent vacancy in the cadre. Rule 7(3) states that an express order of confirmation is necessary. The proviso to Rule 7(3) is in the negative form that the completion of the maximum period of three years would not confer a right of confirmation till there is a permanent vacancy in the cadre. The period of probation is therefore extended by implication until the proceedings commenced against a probationer like the appellant are concluded to enable the Government to decide whether a probationer should be confirmed or his services should be terminated. No confirmation by implication can arise in the present case in the facts and circumstances as also by the meaning and operation of Rules 7(1) and 7(3) as aforesaid.”



19. In *Dayaram Dayal v. State of M.P. and Another*, (1997) 7 SCC 443, Supreme Court noted that there were two distinct line of cases which were emerging from the different judicial pronouncements. One line of judgments held that mere continuation of service beyond the probation period does not amount to confirmation unless it was so specifically provided. The other line is where in the Rules there is an initial probation with extension thereof, but a maximum period is also provided beyond which probation cannot be extended and here the employee will be deemed to be confirmed on completion of maximum period of probation.

20. In *Wasim Beg v. State of U.P. and Others*, (1998) 3 SCC 321, the Supreme Court identified three possible categories of cases and observed as under:-

“15. Whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant Service Rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In those cases where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary. This is the line of cases starting with State of Punjab v. Dharam Singh [AIR 1968 SC 1210 : (1968) 3 SCR 1], M.K. Agarwal v. Gurgaon Gramin Bank [1987 Supp SCC 643 : 1988 SCC (L&S) 347], Om Parkash Maurya v. U.P. Coop. Sugar Factories Federation [1986 Supp SCC 95 : 1986 SCC (L&S) 421 : (1986) 1 ATC 95], State of Gujarat v. Akhilesh C. Bhargav [(1987) 4 SCC 482 : 1987 SCC (L&S) 460 : (1987) 5 ATC 167].

16. However, even when the Rules prescribe a maximum period of probation, if there is a further provision in the Rules for continuation of such probation beyond the maximum period, the courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended. In this category of cases we can place Samsher Singh v. State of Punjab [(1974) 2 SCC 831 : 1974 SCC (L&S) 550] which was the decision of a Bench of seven Judges where the principle of probation not going beyond the maximum period fixed was reiterated but on the basis of the Rules which were before



the Court, this Court said that the probation was deemed to have been extended. A similar view was taken in the case of *Municipal Corpn. v. Ashok Kumar Misra* [(1991) 3 SCC 325 : 1991 SCC (L&S) 1046 : (1991) 16 ATC 927]. In *Satya Narayan Athya v. High Court of M.P.* [(1996) 1 SCC 560 : 1996 SCC (L&S) 338] although the Rules prescribed that the probationary period should not exceed two years, and an order of confirmation was also necessary, the termination order was issued within the extended period of probation. Hence the termination was upheld.

17. The other line of cases deals with Rules where there is no maximum period prescribed for probation and either there is a Rule providing for extension of probation or there is a Rule which requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of the employee. In these cases unless there is such an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period. In this line of cases one can put *Sukhbans Singh v. State of Punjab* [AIR 1962 SC 1711 : (1963) 1 SCR 416 : (1963) 1 LLJ 671], *State of U.P. v. Akbar Ali Khan* [AIR 1966 SC 1842 : (1966) 3 SCR 821 : (1967) 1 LLJ 708], *Kedar Nath Bahl v. State of Punjab* [(1974) 3 SCC 21], *Dhanjibhai Ramjibhai v. State of Gujarat* [(1985) 2 SCC 5 : 1985 SCC (L&S) 379] and *Tarsem Lal Verma v. Union of India* [(1997) 9 SCC 243 : 1997 SCC (L&S) 1149], *Municipal Corpn. v. Ashok Kumar Misra* [(1991) 3 SCC 325 : 1991 SCC (L&S) 1046 : (1991) 16 ATC 927] and *State of Punjab v. Baldev Singh Khosla* [(1996) 9 SCC 190 : 1996 SCC (L&S) 1210]. In the recent case of *Dayaram Dayal v. State of M.P.* [(1997) 7 SCC 443 : 1997 SCC (L&S) 1797 : AIR 1997 SC 3269] (to which one of us was a party) all these cases have been analysed and it has been held that where the Rules provide that the period of probation cannot be extended beyond the maximum period there will be a deemed confirmation at the end of the maximum probationary period unless there is anything to the contrary in the Rules.”

21. A three-Judge Bench of the Supreme Court in *High Court of M.P. through Registrar and Others v. Satya Narayan Jhavar*, (2001) 7 SCC 161, declined to accept the principle of automatic or deemed confirmation and held as follows:-

“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.”

22. This view was followed by the Supreme Court in **Registrar, High Court of Gujarat and Another v. C.G. Sharma, (2005) 1 SCC 132**, holding that a probationer remains a probationer unless confirmed on the basis of his work evaluation and that once there is no stipulation in the Rules prescribing maximum period of probation, there is no question of automatic or deemed confirmation. Relevant paragraphs are as under:-

“26. A large number of authorities were cited before us by both the parties. However, it is not necessary to go into the details of all those cases for the simple reason that sub-rule (4) of Rule 5 of the Rules is in pari materia with the Rule which was under consideration in the case of State of Maharashtra v. Veerappa R. Saboji [(1979) 4 SCC 466 : 1980 SCC (L&S) 61] and we find that even if the period of two years expires and the probationer is allowed to continue after a period of two years, automatic confirmation cannot be claimed as a matter of right because in terms of the Rules, work has to be satisfactory which is a prerequisite or precondition for confirmation and, therefore, even if the probationer is allowed to continue beyond the period of two years as mentioned in the Rule, there is no question of deemed confirmation. The language of the Rule itself excludes any chance of giving deemed or automatic confirmation because the confirmation is to be ordered if there is a vacancy and if the work is found to be satisfactory. There is no question of



confirmation and, therefore, deemed confirmation, in the light of the language of this Rule, is ruled out. We are, therefore, of the opinion that the argument advanced by learned counsel for the respondent on this aspect has no merits and no leg to stand. The learned Single Judge and the learned Judges of the Division Bench have rightly come to the conclusion that there is no automatic confirmation on the expiry of the period of two years and on the expiry of the said period of two years, the confirmation order can be passed only if there is vacancy and the work is found to be satisfactory. The Rule also does not say that the two years' period of probation, as mentioned in the Rule, is the maximum period of probation and the probation cannot be extended beyond the period of two years. We are, therefore, of the opinion that there is no question of automatic or deemed confirmation, as contended by the learned counsel for the respondent. We, therefore, answer this issue in the negative and against the respondent."

23. In ***Kazia Mohammed Muzzammil v. State of Karnataka and Another, (2010) 8 SCC 155***, the Supreme Court was dealing with the Rule, which contained a negative command that the period of probation shall not be less than two years. This period could be extended by a specific order by half of the said period but on completion of the probation period, suitability of the probationer was to be considered. If found suitable then order was to be issued confirming the employee but if found unsuitable, then either the period should be extended or the competent authority could discharge the probationer. After examining several judgments on the issue, the Supreme Court held as follows:-

"46. On a clear analysis of the above enunciated law, particularly, the seven-Judge Bench judgment of this Court in Samsher Singh [(1974) 2 SCC 831 : 1974 SCC (L&S) 550] and the three-Judge Bench judgments, which are certainly the larger Benches and are binding on us, the courts have taken the view with reference to the facts and relevant rules involved in those cases that the principle of "automatic" or "deemed confirmation" would not be attracted. The pith and substance of the stated principles of law is that it will be the facts and the rules, which will have to be examined by the courts as a condition precedent to the application of the dictum stated in any of the line of cases aforementioned.

47. There can be cases where the rules require a definite act on the part of the employer before an officer on probation can be confirmed. In



other words, there may a rule or regulation requiring the competent authority to examine the suitability of the probationer and then upon recording its satisfaction issue an order of confirmation. Where the rules are of this nature the question of automatic confirmation would not even arise. of course, every authority is expected to act properly and expeditiously. It cannot and ought not to keep issuance of such order in abeyance without any reason or justification. 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 it is difficult to attract the application of this doctrine.

48. *However, there will be cases where not only such specific rules, as noticed above, are absent but the rules specifically prohibit extension of the period of probation or even specifically provide that upon expiry of that period he shall attain the status of a temporary or a confirmed employee. In such cases, again, two situations would rise : one, that he would attain the status of an employee being eligible for confirmation and second, that actually he will attain the status of a confirmed employee. The courts have repeatedly held that it may not be possible to prescribe a straitjacket formula of universal implementation for all cases involving such questions. It will always depend upon the facts of a case and the relevant rules applicable to that service.*

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51. *The language of Rule 5(2) is a clear indication of the intent of the framers that the concept of deeming confirmation could not be attracted in the present case. This Rule is preceded by the powers vested with the authorities under Rules 4 and 5(1) respectively. This Rule mandates that a probationer shall not be deemed to have satisfactorily completed the probation unless a specific order to that effect is passed. The Rule does not stop at that but furthermore specifically states that any delay in issuance of order shall not entitle the probationer to be deemed to have satisfactorily completed his probation. Thus, use of unambiguous language clearly demonstrates that the fiction of deeming confirmation, if permitted to operate, it would entirely frustrate the very purpose of these Rules. On the ground of unsuitability, despite what is contained in Rule 5, the competent authority is empowered to discharge the probationer at any time on account of his unsuitability for the service or post. That discharge has to be simpliciter without causing a stigma upon the probationer concerned. In our view, it is difficult for the Court to bring the present case within the class of cases, where “deemed confirmation” or principle of “automatic confirmation” can be judiciously applied.”*



24. It is thus palpably clear that there is no concept of 'deemed confirmation' of a probationer and merely by expiry of one year probation period, Petitioner was not a confirmed employee, a fact his counsel candidly admits. It is equally settled that an employee can be confirmed at the end of initial or the extended probation period only upon rendering satisfactory service and on being found 'suitable' by the employer. The first question that arises in the present case is whether termination of the Petitioner is termination simplicitor or punitive as alleged by counsel for the Petitioner. Counsel for the Petitioner is right in his submission that the mere form of an order discharging a probationer may not always be indicative of the reason for termination and where the form of a discharge order is a mere camouflage, Courts can lift the veil to ascertain its true character. If the Court finds that the order *albeit* seems simplicitor discharge order but is in reality a cloak for punishing the employee and thus punitive, Court can interfere and quash the order. To this extent, reliance was rightly placed on the judgment of the Supreme Court in *Anoop Jaiswal (supra)*.

25. Coming to the impugned order of termination dated 16.12.2010, it is clear that Petitioner's discharge is termination simplicitor and the order cannot be termed as stigmatic. In Clause 4 of the appointment letter, it was clearly stated that Petitioner will be on probation of one year from the date of joining, which may be extended further at the discretion of the Management. It was also stipulated that the services of the Petitioner were liable to be terminated at any time without assigning any reason thereof. Clause 4 of the appointment letter was invoked by ICAI on finding that Petitioner's work and conduct was not satisfactory during the probation period and the impugned termination order was issued. There is no dispute



that this power existed in the Management by virtue of terms and conditions of the appointment of the Petitioner. For ready reference, Clause 4 is extracted hereunder:-

“4. You will be on probation of one year from the date of joining, which may be extended further by a period or period or periods at the discretion of the Management. During the period of probation, including any extension thereof or at the end thereof, your services are liable to be terminated at any time without assigning any reason therefor by giving you a simple one month notice or one month's salary in lieu thereof. In the event of your resigning from the services of the Institute during the period of probation including any extension thereof, you will be required to give atleast one month's clear notice of your intention to resign or one month's salary in lieu thereof. Until a written communication is issued by the Management on satisfactory completion of the initial or subsequently extended probation period, it should be presumed that the probation period has been extended. The question of your confirmation in the services of the Institute would be considered only on satisfactory completion of probation.”

26. Petitioner urges that his services were terminated due to *mala fides* of Respondents No.2 and 3 and to establish this plea, essentially places reliance on an e-mail dated 15.09.2010 sent by Respondent No.3 to the Petitioner. Having perused the contents of the e-mail, all that is discernable is that by this e-mail, Respondent No.3 was pointing out the deficiencies and shortfalls in the work and conduct of the Petitioner so that he could improve. It was brought to the notice of the Petitioner that his behaviour towards the students and the faculty was not correct and many students were making complaint with respect to his behaviour. Students were also reporting that Petitioner was not taking classes and was directing other faculties to take his classes on the pretext that being the Centre In-charge, he had administrative work to handle. The e-mail notes that Respondent No.3 had counselled the Petitioner on many earlier occasions and had directed him to ensure that classes are taken regularly. It was also brought to the notice of the Petitioner



that he was reportedly leaving the campus without any information and without informing of his whereabouts. In this context, Respondent No.3 called upon the Petitioner to explain his work and conduct with a direction to change his behaviour towards the students, faculty and Lab Assistants. This Court is unable to read anything in the e-mail which may appear to be actuated by any *mala fide*.

27. It is certainly the power and prerogative of an employer to assess the work and conduct of an employee not only for the purpose of confirmation on probation but also with the objective that the employee improves. Purpose of placing an employee on probation is to ascertain if the work is satisfactory and no employee can claim that only because he is asked to perform the job he is employed for, the act of the employer becomes *mala fide* and the consequent discharge order becomes punitive.

28. In the counter affidavit, ICAI has explicitly stated that the performance and conduct of the Petitioner, on an overall assessment, was not suitable for confirmation. It is stated that Petitioner was not maintaining the computer labs, vouchers, Imprest account, etc. apart from not taking the classes regularly and behaving rudely with the students and the faculty, which is substantiated by e-mail dated 15.09.2010 sent by Respondent No.3 to the Petitioner calling upon him to improve his work and conduct. However, there was no improvement and Petitioner was discharged on probation. Much was agued by learned counsel for the Petitioner that his ACRs did not reflect that his work was unsatisfactory and thus, there was no basis to terminate the services of the Petitioner. Firstly, while assessing the suitability of an employee for confirmation on probation, ACR, is one of the criteria and it is always open to the employer to take a holistic view of the



over-all conduct, behaviour and performance on the basis of day-to-day working in the establishment. In the ACR for the period 2008-09, there is an endorsement that Petitioner needed to acquire maturity level to work as a team with the peer group. In the ACR for the period 2009-10, various qualities have been assessed and no doubt, there is no adverse remark, however, the complaints against the Petitioner pertaining to his working in the Institute and his behaviour towards the faculty and the students are equally a matter of record and even today, Petitioner is unable to controvert the contents of the complaints. On a holistic view of the conduct and performance of the Petitioner, Competent Authority in ICAI judged his suitability to confirm his services and in my view, the order is neither punitive nor *mala fide*. In ***Abhijit Gupta v. S.N.B. National Centre, Basic Sciences and Others, (2006) 4 SCC 469***, a similar letter as the e-mail dated 15.09.2010 was issued to the employee concerned pointing out that his performance was unsatisfactory but when the performance did not improve, his probation was not extended and services were terminated and the termination order was upheld by the Supreme Court. A similar issue arose in ***Chaitanya Prakash (supra)*** and relevant passages from the said judgment are as follows:

“19. In *Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd.* [(2003) 3 SCC 263 : 2003 SCC (L&S) 262] also the employee concerned was kept on probation for a period of two years. During the course of his employment he was also informed that despite being told to improve his performance time and again there was no such improvement. His shortfalls were brought to his notice and consequently by order dated 16-1-1997 his services were terminated, wherein also a reference was made to his unsatisfactory service. In the said decision, the Supreme Court has held that on the basis of a long line of decisions it appears 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.

20. In *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical*



Sciences [(2002) 1 SCC 520 : 2002 SCC (L&S) 170] , this Court had the occasion to determine as to whether the impugned order therein was a letter of termination of services simpliciter or stigmatic termination. After considering various earlier decisions of this Court in para 21 of the aforesaid decision it was stated by this Court thus: (SCC p. 528)

“21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if anyone of the three factors is missing, the termination has been upheld.”

21. In Abhijit Gupta [(2006) 4 SCC 469 : 2006 SCC (L&S) 826] this Court considered as to what will be the real test to be applied in a situation where an employee is removed by an innocuous order of termination i.e. whether he is discharged as unsuitable or he is punished for his misconduct. In order to answer the said question, the Court relied and referred to the decision of this Court in Allahabad Bank Officers' Assn. v. Allahabad Bank [(1996) 4 SCC 504 : 1996 SCC (L&S) 1037] where it is stated thus: (Abhijit Gupta case [(2006) 4 SCC 469 : 2006 SCC (L&S) 826] , SCC p. 475, para 14)

“14. ... As pointed out in this judgment, expressions like ‘want of application’, ‘lack of potential’ and ‘found not dependable’ when made in relation to the work of the employee would not be sufficient to attract the charge that they are stigmatic and intended to dismiss the employee from service.”

22. In our considered opinion, the ratio of the abovereferred decisions are squarely applicable to the facts of the present case. The respondent was time and again informed during the probation period about his deficiencies and was given ample opportunities to improve them. Therefore, enough precautions were taken by the appellants to see that the respondent improved his performance and such an opportunity was provided to him. But such advices and opportunity were totally misplaced as the respondent considered the same as unnecessary encroachment and interference in his work and wrote back rudely in an intemperate language.

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26. We have perused the relevant records and on the basis of the same we are of considered opinion that the appellants informed M/s Spices Trading Corporation Ltd. on being specifically asked by the said Company about the performance of the respondent and consequently it was informed that his service was terminated due to unsuitability, which is a fact. If, they



would have not intimated the same to the Company despite their specific query then they would have been suppressing the material fact. In our considered opinion the aforesaid aspect does not in any manner support the case of the respondent.”

29. The Supreme Court in *State of Bihar v. Gopi Kishore Prasad, 1959 SCC OnLine SC 40*, summarised the principles laid down in *Parshotam Lal Dhingra v. Union of India, 1957 SCC OnLine SC 5*, as follows:-

“6.

(1) Appointment to a post on probation gives to the person so appointed no right to the post and his service may be terminated, without taking recourse to the proceedings laid down in the relevant rules for dismissing a public servant, or removing him from service.

(2) The termination of employment of a person holding a post on probation without any enquiry whatsoever cannot be said to deprive him of any right to a post and is, therefore, no punishment.

(3) But, if instead of terminating such a person's service without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct, or inefficiency, or for some similar reason, the termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career. In such a case, he is entitled to the protection of Article 311(2) of the Constitution.

(4) In the last mentioned case, if the probationer is discharged on any one of those grounds without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge, it will amount to a removal from service within the meaning of Article 811(2) of the Constitution and will, therefore, be liable to be struck down.

(5) But, if the employer simply terminates the services of a probationer without holding an enquiry and without giving him a reasonable chance of showing cause against his removal from service, the probationary civil servant can have no cause of action, even though the real motive behind the removal from service may have been that his employer thought him to be unsuitable for the post he was temporarily holding, on account of his misconduct, or inefficiency, or some such cause.”

(emphasis added)

30. Having considered the pleadings and the impugned order in light of the aforementioned judgments, the inevitable conclusion is that the



impugned order in its form and substance does not fall in the category of an order which can be termed as actuated by *mala fides* and/or punitive. It is an order of discharge simplicitor of a probationer on account of unsatisfactory probation. The objective of placing an employee under probation is for the employer to consider whether his work is satisfactory to make him suitable for the post. Employer may, after assessing the work of a probationer, come to a conclusion based on non-performance, conduct, temperament and a host of other factors that the probationer is unsuitable and deserves to be discharged.

31. It is fairly well-settled that determination of ‘suitability’ of a probationer is the domain of the employer and Court cannot enter in this arena unless, as noted above, the order is punitive on lifting the veil. Once it is found that assessment made by the employer is supported by some material and is not *mala fide*, High Court cannot sit as an Appellate Forum and substitute its satisfaction with the satisfaction of the employer. [Ref.: ***State of Punjab and Others v. Sukhwinder Singh, (2005) 5 SCC 569***].

32. Petitioner was appointed vide appointment letter dated 23.06.2008 and is bound by the terms and conditions mentioned therein. Clause 4 clearly provided that probation of one year was extendable at the discretion of the Institute and that question of confirmation would be considered only on satisfactory completion of probation. Competent Authority in ICAI examined the suitability of the Petitioner but came to a conclusion that he was unsuitable for confirmation and accordingly, discharged him from the service of ICAI exercising power under Clause 4. It bears repetition to state that the order of termination is an order of discharge simplicitor with no stigma and on lifting the veil, this Court is unable to agree with the



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Petitioner that there was any *mala fide* in passing the order. Impugned order warrants no interference by this Court.

33. Writ petition is, accordingly, dismissed.

JYOTI SINGH, J

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