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

% ***Date of decision: 04 .05.2021***

\+ **W.P. (C) 1010/2019, CMs No. 852/2020, 4583/2019, 4584/2019 and 28312/2019**

PRADEEP KUMAR SINGH ..... Petitioner

Through: Mr. M.Shoeb Alam,
Mr. Amit K. Ranjan, Mr. Puspraj Singh Parihar and Mr. Mojahid Karim Khan, Advocates

versus

UNION OF INDIA & ANR ..... Respondents

Through: Mr. Sudhir Nandrajog, Senior Advocate with Mr. Kunal Sharma and
Mr. Shubhendu Bhattacharyya, Adv. for R-2

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. Petitioner herein lays a challenge to an order dated 29.12.2018 whereby, his services have been terminated on the ground of unsuitability during probation period from the post of General Manager (HR). A writ of Mandamus is sought directing Respondent No. 2 to reinstate the Petitioner with full back wages and consequential benefits from the date of termination along with the declaration that Clause 2(a) of the letter of appointment dated 22.07.2017 is not applicable to the Petitioner, being a permanent employee of Respondent No. 2.

Case of the Petitioner

2. Petitioner having completed Masters Degree in Science, two year Post Graduate Diploma in Personnel Management and L.L.B, joined Coal India Limited (hereinafter referred to as '**CIL**'), a Central Public Sector Enterprise (hereinafter referred to as '**CPSE**') in the year 1994 and rendered a long unblemished service therein for a period of 23 years. During the said period, he acquired further Degrees and obtained trainings in different Management and Administrative programmes, apart from vast experience in HR Department of Mines, Administrative Departments of Area Headquarters, Vigilance Departments of Headquarters, etc., details of which have been elaborated in the writ petition. Petitioner was an outstanding performer and performed his job with utmost dedication, which is reflected in his ACR dossiers.

3. While working in CIL, Petitioner came across an advertisement issued by Respondent No. 2/Central Electronics Limited (hereinafter referred to as '**CEL**'), another CPSE, for various Posts, including one Post of 'Executive Director/General Manager-HR' in Grade-E9/E8. Through the advertisement, applications were invited from candidates employed in Central/State Government, Autonomous Bodies, Public Sector Units/Government CPSEs through proper channel or on submission of 'No Objection Certificate', apart from employees of the private sector.

4. Being aware of the applicable Guidelines, provisions of the various OMs issued by DoPT/DPE, etc., whereby the Petitioner would be entitled to pay protection and other benefits like earned leave, superannuation benefits, gratuity, etc., including appointment on permanent absorption,

Petitioner applied for the Post of GM/ED (HR), through proper channel and furnished NOC, as required. On being recommended by a duly constituted Selection Committee, Petitioner was offered appointment, vide offer letter dated 22.07.2017.

5. As per the terms and conditions in the offer letter, Petitioner was entitled to pay protection along with Dearness Allowance and other admissible benefits, from time-to-time. Clause 2(a) of the letter stipulated that the Petitioner would be on probation for a period of one year or until confirmation, in writing and during the probationary period, his services were liable to be terminated, without notice and without assigning any reason whatsoever.

6. On receiving the offer letter from CEL, Petitioner submitted technical resignation to the erstwhile employer, i.e., CIL and on being relieved on 17.10.2017, joined CEL on 18.10.2017, as GM (HR). On 20.10.2017, Petitioner took charge as GM (HR) and was also given additional charge as Factory Manager.

7. Over the next couple of months, Petitioner, with his vast HR experience, helped in settling Bipartite and Tripartite Settlements with the Trade Unions, renewal of various statutory licenses, completion of long pending Departmental Promotion Committees, etc. With his efforts, industrial relations between workers and management improved, resulting in a harmonious and congenial environment. Attrition rate of man power substantially reduced and various long pending issues were resolved resulting in the net worth of CEL turning positive.

8. Besides dedicatedly executing the assigned administrative tasks, Petitioner was morally as well as duty bound to point out irregularities,

statutory violations related to labour license, contract labour deployment, wages to contractual workmen, double deductions of provident fund charges from the salaries of the employees, etc., and thus, raised these issues so that corrective measures could be taken. A Committee was formed by the CMD to look into the issues flagged by the Petitioner which confirmed the violations, in its report. However, this was the starting point of acrimony between the CMD and the Petitioner and a letter was issued on 06.01.2018 alleging non-performance on the part of the Petitioner. Petitioner continued to report the irregularities including suggesting a fresh roster for filling up backlog vacancies.

9. Subsequent thereto, on almost every issue, there was confrontation and the CMD resorted to issuing letters leveling allegations of delay, inaction and poor performance by the Petitioner. As the Petitioner believed in working dedicatedly and following the rule book, in contrast to the CMD, who would take decisions contrary to the Rules at his own whims and fancies, the two were always at crossroads and the CMD systematically and carefully planned and created documents to brand the Petitioner as a non-performer.

10. On 27.12.2018 Petitioner proceeded on sick leave and on 29.12.2018, he was served with termination order signed by the Company Secretary of CEL. On 05.01.2019, Petitioner represented against the illegal termination to the CMD and Board of Directors of CEL, however, getting no response he filed the present petition.

Contentions of the Petitioner

11. It is argued by Mr. Shoeb Alam, learned counsel for the Petitioner that the appointment of the Petitioner was on permanent absorption basis as per the OM dated 14.12.2012 issued by DPE, which clearly prescribes that all appointments in CPSEs will be on permanent absorption basis. Petitioner had applied as a serving employee of CIL, another CPSE, through proper channel with a No Objection Certificate from the erstwhile employer and his resignation from CIL is a 'technical resignation'. DoPT OM dated 17.08.2016 stipulates that resignation is to be treated as technical formality when a Government servant applies through proper channel for a post in the same or any other Department and on selection is required to resign the previous post for administrative reasons. In such cases benefit of past service, pay protection etc. has to be given. The minutes of the Selection Committee dated 02.06.2017 by which the Petitioner was selected clearly evidence that pay protection was granted to the Petitioner in consonance with Clause 2.4 of DoPT OM dated 17.08.2016. For the aforesaid two reasons, Petitioner was a appointed as regular and permanent employee of CEL and his services could not be terminated abruptly by a simple order of termination, without following the due process of law.

12. The Service Rules of CEL being "Recruitment procedure in Central Electronics Limited", published on 25.02.1976, do not prescribe probation, on appointment in CEL. The Advertisement, on the other hand, prescribed one year probation period with no stipulation of any extension, beyond one year or a requirement of confirmation, in writing. For the first time in the offer letter for appointment, a condition was introduced, by

incorporating clause 2(a), that the probation period could be extended until confirmation in writing. In the absence of Service Rules prescribing to the contrary, the terms of the advertisement will hold the field in so far as the service conditions of the Petitioner are concerned. A *fortiorari*, since the advertisement prescribed only one year probation, with no provision for extension and/or confirmation in writing, at the end of one year of probation, by afflux of time, services of the Petitioner are deemed to have been confirmed. Judgment of the Supreme Court in H.S. Bindra vs. State of M.P, **Civil Appeal No. 48 of 1963** is relied, where the Supreme Court held that period of probation implies a definite length of duration and must be specified in advance and probation for indefinite term is invalid.

13. It is settled law that the advertisement should unequivocally specify the terms and conditions of employment, the applicable rules and the procedure of selection. There cannot be uncertainty or ambiguity in the advertisement, leaving the terms of employment to the imagination of the prospective candidates. The Supreme Court in Renu vs. District & Sessions Judge, Tis Hazari, **(2014) 14 SCC 50**, emphasized the need to specify in the advertisement, number of posts, qualifications and eligibility criteria, schedule of recruitment process, Rules under which selection is to be made or the procedure in the absence of Rules, in the interest of transparency and to avoid arbitrariness and change of criteria of selection. Thus, the appointment letter in so far as it is contrary to or at variance with advertisement will have to give way to the stipulations in the advertisement and the latter part of Clause 2(a) in the appointment

letter to the extent it provides for extension of probation period and the requirement of confirmation in writing, shall not bind the Petitioner.

14. The appointment process starts with publication of advertisement and once the selection process starts terms of the employment/service as advertised cannot be altered and particularly to the detriment of the employee. Reliance is placed on the judgments of the Supreme Court in A.P. Public Service Commission vs. B. Sarat Chandra, **(1990) 2 SCC 669** and K. Manjusree vs. State of A.P., **(2008) 3 SCC 512** for the proposition that rules of the game cannot be changed in the midst of the game.

15. Without prejudice to the above, the order is also illegal as neither any order extending the probation period beyond one year was issued by CEL nor was he informed of the assessment which led to the impugned decision terminating his service.

16. The impugned action of termination is *malafide* and a result of the personal vendetta of the CMD, on account of the fact that Petitioner pointed out several statutory and procedural violations in CEL, relating to labour licenses, deployment of labour, change of grades of executive without seeking Presidential approval, financial irregularities, etc. Once the deficiencies and irregularities were highlighted by the Petitioner, the CMD started issuing letters alleging non-performance, which was completely contrary to the records reflecting the tremendous work done by the Petitioner. The Supreme Court in Prabodh Sagar vs. Punjab SEB, **(2000) 5 SCC 630** has held that the expression *'malafide'* is not meaningless jargon and has its connotations.

Contentions of CEL

17. Mr. Sudhir Nandrajog, learned Senior counsel for CEL/ Respondent No.2, at the outset, argues that the present petition cannot be entertained as it is a settled law that an assessment of an employee based on his performance during probation cannot be reviewed in judicial proceedings and only procedural violations or decision-making process is subject to judicial scrutiny. An independent Board of CEL has assessed the performance of the Petitioner during probation on various parameters and found him unsuitable for confirmation and this assessment cannot be questioned and/or reassessed in writ proceeding, which is what the Petitioner is calling upon this Court to do.

18. The discharge of the Petitioner on account of non-confirmation of probation was in terms of Clause 2(a) of the offer of appointment letter dated 22.07.2017, which was accepted by the Petitioner without any protest, vide email dated 25.07.2017. The letter was never challenged in any Court of law prior to the order of termination impugned herein and only because his services have been terminated, Petitioner is laying a challenge to its validity, as an after-thought.

19. Letter dated 22.07.2017 clearly envisaged a probation period of one year, extendable further until confirmation in writing. It further provided that the services of the Petitioner were liable to be terminated during the probationary period, without notice and without assigning any reason. In view of this, Petitioner cannot adopt a position that at the end of one year probation period, he was deemed to be a confirmed employee and his services were not liable to be terminated abruptly as a probationer, that too without due process of law.

20. The contention of the Petitioner that in terms of OM dated 14.12.2012, appointment of the Petitioner is on permanent absorption basis is misconceived. Appointments in CPSEs are made either on regular basis or on deputation or on contract. Law does not contemplate continuity of service, on being appointed in a CPSE through direct recruitment, while serving in another CPSE. In any event Petitioner was appointed on probation and question of permanent absorption would have arisen only on satisfactory completion of probation.

21. Reliance of the Petitioner on the DoPT OM dated 17.08.2016 which defines technical resignation, is misplaced as the same applies only to a Government servant, which the Petitioner is not. Petitioner is misreading the advertisement as a mere eligibility criteria of minimum two years experience in the immediate lower scale of the post advertised or equivalent position for employees working in PSUs/Government Organizations cannot imply that the appointment was a promotion or that the benefits of technical resignation, wherever applicable, should accrue to the Petitioner. Likewise, the Petitioner cannot place reliance on the DPE OM dated 01.02.2017 as the same is applicable to cases of resignation, compulsory retirement, removal and dismissal as a result of Disciplinary Proceedings and entitles an employee to superannuation benefit scheme. Benefit of pay protection was given to the Petitioner at the time of joining to ensure that his basic pay in CEL does not fall below the pay drawn by him in previous organization and this by itself cannot lead to a conclusion that the Petitioner had joined CEL after technical resignation with CIL.

22. The allegations of bias and *malafides* leveled by the Petitioner against the CMD are completely baseless. Termination of the service of the Petitioner is an outcome of a transparent system of periodical reviews, followed by circulation of action points of the reviews. Several letters were written to the Petitioner, in terms of action points, communicating the areas where he had failed to perform. As an illustration, when the Petitioner joined in September 2017, he was required to complete the sixth monthly KRA evaluation by first week of November, 2017, however, the same was not completed even by March, 2018, despite repeated reminders. Similarly, specific tasks and duties assigned such as finalization of DPCs for the year 2017, review of manpower requirements, special drive for SC/ST recruitment, training need evaluation, etc., assigned to the Petitioner did not achieve the desired result and the Petitioner was a non-performer despite several opportunities to better his performance.

23. The allegations of the Petitioner that CEL was non-compliant with the statutory obligations under labour legislations, etc., and/or that the Petitioner was instrumental in implementation of various strategic decisions or achieving various goals, single handedly, as averred and argued are completely fallacious. Petitioner is trying to take credit of tasks accomplished with the efforts of various officers and employees in the organization as a team. There were no violations related to labour licenses, deployment of contractual workers and payment of wages or deduction of provident fund from the salaries of employees, as alleged. It is a matter of record that a Committee was formed to look into the issues, but no report was rendered by the Committee and therefore the

contention of the Petitioner that this report was the cause of bias of CMD is baseless. Petitioner never completed the work assigned within required timelines, including preparation of the roster for promotion and the same had to be executed through a Committee formed by the Board of CEL comprising of senior officials and the Petitioner as the Secretary of the Committee.

24. There is no illegality in the action of CEL in terminating the Petitioner on account of unsatisfactory probation and no show cause notice was required, in law. It is a termination simplicitor and not by way of punishment pursuant to a disciplinary action requiring a Disciplinary Enquiry. The order is not punitive or stigmatic. The Supreme Court in Parvendra Narayan Verma vs. Sanjay Gandhi P.G.I. of Medical Sciences and Ors., **AIR 2002 SC 23** held that whether an order of termination is punitive or not can be determined by seeing whether prior to the termination there was (a). a full scale formal enquiry; (b). allegation involving moral turpitude of misconduct and (c). the allegations culminated into a finding of guilt. In the absence of any one of the three factors, termination order cannot be held to be punitive. Impugned order by its reading is neither punitive nor stigmatic.

25. It is for the employer to judge the suitability of a probationer based on the assessment of work and conduct and this satisfaction and assessment, based on several factors is not open to judicial review in a writ petition. The Supreme Court in T.C. Pillai vs. The Indian Institute of Technology, Guindy Madras, **AIR 1971 SC 1811** held that suitability does not depend merely on excellence or proficiency in work. There are

many factors which enter into consideration for confirming a person on probation which could be his attitude or tendency displayed.

26. I have heard learned counsel for the Petitioner and learned Senior Advocate appearing for the CEL.

27. After traversing the entire gamut of facts and hearing the learned counsels for the parties, in my view, at the heart of the dispute is the applicability of Clause 2 (a) of the offer letter of appointment dated 22.07.2017. To decide this strenuous challenge Court needs to examine the said clause, which is as under :-

> *"2(a). You will be on probation for a period of one year or until such time thereafter when confirmation is intimated in writing. During the probationary period, your services shall be liable to be terminated without notice and without assigning any reason whatsoever. During the probation you may leave the Company's service after giving one month's notice in writing. The period of probation can be extended at the discretion of the competent authority. "*

28. Reading of the contents of the aforesaid clause makes it palpably clear that it prescribed a probation period of one year extendable till confirmation in writing. What emerges from its plain reading is that there was no maximum period of probation prescribed and one year could be extended until the Competent Authority issued an order of confirmation, on satisfactory completion of probationary period.

29. Before adverting to the judicial pronouncements with respect to probation and confirmation, it is necessary to deal with the prime contention of the Petitioner that the clause itself was invalid and not applicable. The contention is premised on the ground that Recruitment

Rules in question do not prescribe probation and the advertisement only stipulated one year probation and thus the clause 2(a) permitting extension of probation beyond one year until confirmation in writing, is extraneous and contrary to the Rules and the advertisement and invalid.

30. I have carefully examined the Recruitment Rules applicable to the Petitioner, a copy of which has been annexed by the Petitioner along with an application filed during the pendency of the petition to place on record additional documents. There is merit in the contention of the Petitioner that the Recruitment Rules do not envisage probation on appointment. In so far as the advertisement is concerned, having perused the same, I tend to agree with the Petitioner that a period of one year probation has been stipulated in para 8 of the General Instructions for candidates selected in Grade E-6 and above. Relevant para is as under :-

> *"The selected candidates in Grade E6 and above, will be on probation for a period of one year and candidates below Grade E6 will be on probation for two years."*

31. However, this by itself cannot persuade the Court to accept the contention that Clause 2(a) is invalid and cannot be read as a part of terms and conditions of the offer of appointment of the Petitioner. Letter dated 22.07.2017, by its bare perusal was an 'offer' of appointment, detailing the terms of appointment therein. This is amply clear from the Subject, the opening paragraph and para 11 of the letter. The subject reads as under :-

> *"Subject-Offer of appointment for the post of General Manager [HR]"*

32. The opening paragraph and para 11 respectively read as follows :-

> *"with reference to your application and the subsequent interview on June 02, 2017, we have the pleasure in offering you the post of General Manager [HR] on the following terms and conditions :"*

> *"11. Please acknowledge the receipt of this letter and if you are willing to accept the appointment on the terms and conditions stated above, you should inform the Asstt. General Manager (HRD) on or before August 23, 2017 and report for duty as soon as possible but not later than October 23, 2017. In case the company does not receive your acceptance of the offer of appointment by August 23, 2017 then this offer will be treated as cancelled."*

33. CEL offered appointment to the Petitioner enumerating the service conditions in terms of pay scale, tenure of service, place of posting, etc., including Clause 2(a) specifying the condition with respect to probationary period. Petitioner was required to acknowledge the receipt of the letter and acceptance of all the terms mentioned in the letter. Thus, it cannot be said that the terms specified in the letter were imposed on the Petitioner and being an offer, it was open to the Petitioner to accept or not to accept appointment on such terms. Petitioner admittedly accepted the offer, on the terms and conditions specified in the offer letter, without any demur, protest or reservation. In fact as pointed out by CEL, he reverted by email dated 25.07.2017 by stating as follows :-

> *"..Thanks for giving me the opportunity for serving your esteemed organization. I am confirming that I accept your Offer of Employment as GM (HR) in your organization and will submit my joining very soon."*

34. In this view of the matter, it is not open to the Petitioner to even contend that Clause 2(a) of the offer of appointment letter would not govern the terms and conditions of his service or that the probation period could not be extended with a further stipulation of requirement of confirmation in writing.

35. Even otherwise, this contention cannot be sustained. The Recruitment Rules are admittedly silent on the probation period. As far as the advertisement is concerned, while it did mention that period of probation would be one year but it was conspicuously silent on the issue of extension of the period and did not provide that one year would be the maximum period of probation and that the probationer would stand automatically confirmed on expiry of the probation period of one year. Thus, the stipulation in the appointment letter is neither contrary to nor in conflict with the Recruitment Rules or the advertisement and at the cost of repetition, once the appointment letter was accepted by the Petitioner without a demur and not challenged until his services were terminated, this Court is unable to uphold this contention of the Petitioner.

36. The judgement in Central Inland Water Transport vs. Brojo Nath Ganguly, **(1986) 3 SCC 156** has been relied on to argue that insertion of Clause 2(a) in the appointment letter was beyond the control of the Petitioner and he had no option but to accept it as he had unequal bargaining power qua the CEL. In my view, the concept of unequal bargaining power cannot be imported by the Petitioner in the present case. In every process of direct recruitment, after a candidate is recommended for appointment, an offer letter of appointment is issued detailing the terms and conditions of his/her employment. Opportunity is

given to the prospective employee to accept the offer letter with its terms and conditions after carefully weighing the pros and cons. Having accepted the offer letter and having worked as a probationer for over a year, the Petitioner cannot be heard to say that he accepted the appointment out of any compulsion or on account of unequal bargaining power. Therefore the judgment in Prabodh Sagar (supra) would not help the Petitioner.

37. Before proceeding to deal with the contention of the Petitioner that on expiry of one year of probation, by efflux of time, Petitioner is deemed to be a confirmed employee and his services could not be ended abruptly, I may refer to the law as developed through judicial pronouncements on probation and confirmation.

38. Starting from one of the earliest judgments on the point, I may refer to judgment of the Constitution Bench of the Supreme Court in G.S. Ramaswamy vs. The Inspector General of Police, Mysore State, Bangalore, **AIR 1966 SC 175**, where the Court held that, a probationer cannot, after the expiry of probationary period, automatically acquire the status of a permanent servant, unless the Rules expressly so provide. Therefore, even if the probationer continues to act in the post for more than the initial period of probation, he cannot acquire permanency merely by efflux of time. Relevant para reads as under :-

> *"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 [SCR (1962) SC 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."

39. Another Constitution Bench of the Supreme Court in State of U.P. vs. 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] ."

40. In State of Punjab vs. 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 negatived 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."

41. In Samsher Singh vs. State of Punjab and Anr., **(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 paras are as under :-

"71. Any confirmation by implication is negatived 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."

42. In Dayaram Dayal vs. State of M.P. and Anr. **(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 that 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, the employee will be deemed to be confirmed on completion of maximum period of probation.

43. In Wasim Beg vs. State of U.P. and Ors., **(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 Bahlv. 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."

44. A three-Judge Bench of the Supreme Court in High Court of M.P. vs. 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."

45. This view was followed by the Supreme Court in Registrar, High Court of Gujarat and Anr. vs. 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 paras 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."

46. In Kazia Mohammed Muzzammil vs. State of Karnataka and Anr., **(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 aforenoticed.

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."

47. A Division Bench of this Court in V.K. Mittal and Ors. vs. Registrar General, High Court of Delhi and Ors., **(2016) SCC Online Del**

407, had the occasion of considering the concept of deemed confirmation and after referring to several judgements of the Supreme Court, the Division Bench summarized the legal position in the following words :-

> *"64. The legal position on "deemed confirmation" can be summarised as under:*
>
> *(a) If in the rule or order of appointment, a period of probation is specified and a power to extend probation is also conferred and the officer is allowed to continue beyond the prescribed period of probation, he cannot be deemed to be confirmed. At the end of such probation he becomes merely qualified or eligible for substantive permanent appointment.*
>
> *(b) There is the other line of cases where even though there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The presumption about continuation, beyond the period of probation, as a probationer stands negatived by the fixation of a maximum time-limit for the extension of probation. In such cases the officer concerned must be deemed to have been confirmed.*
>
> *(c) A third line of cases is where though under the rules maximum period of probation is prescribed, it requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired, and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.*
>
> *(d) While there could be some other cases where the rules do not contemplate issuance of such a specific order in*

writing but merely require that there will not be any automatic confirmation or some acts, other than issuance of specific orders, are required to be performed by the parties. Even in those cases, there would be no 'deemed confirmation'.

65. In the present case Rule 8(a) of the 1972 Rules makes it evident that confirmation is not automatic. Also, there being no maximum period of probation, the mere completion of the initial period of probation would not automatically lead to a confirmation. However, since the Petitioners have placed considerable reliance on the minutes of the Selection Committee and the letters written to them by the Deputy Registrar (Estt) about their successful completion of probation, it requires examination whether those documents do bear out a "deemed confirmation" of the Petitioners."

48. Another Division Bench of this Court in the case of Medical Council of India vs. Sangeeta Sharma and Ors. **2019 SCC OnLine Del 8276** held as under :-

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

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

23. In fact, the present case squarely falls within clause (a) of para 64 of V.K. Mittal (supra). As per V.K. Mittal (supra), upon expiry of the initial probation period, respondent 1 merely became eligible for consideration for confirmation to the post of Secretary, MCI, or extension of her probation. She cannot be heard to say that she stood "deemed confirmed". Thus, in view of the aforesaid decisions in Head Master, Lawrence School, Lovedale (supra) and V.K. Mittal (supra), we find that respondent 1 did not acquire the status of a deemed confirmed employee."

49. From a conspectus of the various judgments aforementioned and close reading of the legal position summarized in V.K. Mittal (supra) and to the extent it is relevant to the present case, the position in law that emerges is that if in a rule or an order of appointment a probation period is specified with power to extend probation and the probationer is

allowed to continue beyond the prescribed period of probation, he cannot be deemed to be confirmed and at the end of the probation period he merely becomes qualified or eligible for substantive appointment. The exception to the rule is where there is a provision for initial probation and extension thereof but a maximum period of extension is provided, in which case the presumption about continuation beyond the probation period as the probationer stands negatived. This is however subject to a caveat where the rule or the appointment letter requires a specific act on the part of the employer to issue a confirmation order, in writing, and in such case until an order of confirmation is passed, the probationer cannot be deemed to have been confirmed, merely because the probation period has ended by efflux of time.

50. In the present case, the appointment letter clearly stipulated a probation period of one year with power of extension until an order of confirmation was passed, in writing. The stipulation makes it evident that confirmation is not automatic and therefore merely completion of one year of probation period cannot lead to a conclusion of deemed confirmation. The appointment letter did not prescribe that the Petitioner shall stand confirmed at the end of one year probation period, by afflux of time nor was a maximum period of probation stipulated. The Rules as noted above are conspicuously silent on probation. There was nothing in the advertisement even remotely indicating a maximum period of probation or that the probationer would stand automatically confirmed at the end of one year. Contrary to the stand of the Petitioner the appointment letter mandates that confirmation has to be in writing, leading to only one conclusion that at the end of one year, if the

performance of the probationer was not found satisfactory, CEL had the power and prerogative to extend the probation and when found suitable an order in writing confirming the probationer was required to be issued.

51. In V.K. Mittal (supra) the Division Bench was dealing with Rule 8(a) of the Delhi High Court Establishment (Appointment and Conditions of Service) Rules, 1972 which is as under:-

> *"Appointment to post specified in Schedule II other than the post of Registrar-cum-Secretary to Hon'ble the Chief Justice may be substantive or on probation or on officiating, temporary or adhoc basis. Any appointment other than substantive appointment may be terminated at any time without assigning reasons. Probation shall ordinarily be of one year's duration. Expiry of the period of probation shall not result in automatic confirmation."*

52. Having examined the Rule and the judgments on probation and confirmation, the Division Bench observed as follows:-

> *"55. What emerges from a reading of the 1972 Rules is that:*
> *(a) although the period of probation is normally one year there is no maximum period of probation provided; and*
>
> *(b) the mere completion of a period of probation does not result in an automatic confirmation.*
>
> *xxx xxx xxx*
>
> *65. In the present case Rule 8(a) of the 1972 Rules makes it evident that confirmation is not automatic. Also, there being no maximum period of probation, the mere completion of the initial period of probation would not automatically lead to a confirmation. However, since the Petitioners have placed considerable reliance on the*

minutes of the Selection Committee and the letters written to them by the Deputy Registrar (Estt) about their successful completion of probation, it requires examination whether those documents do bear out a "deemed confirmation" of the Petitioners.

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68. One important fact requires to be noticed at this stage. The conversion of the 25 temporary posts of PS to permanent ones took place in fact on 7-8-2007 and not 25-7-2007. By that date, the DR PSs had also "successfully" completed their probation. Thus if one were to accept the Petitioners' contention that the letter of a Deputy Registrar communicating the completion of probation was sufficient for inferring confirmation, then there were as on the date of conversion of the posts of PSs into permanent ones, two sets of confirmed PSs. However, the correct legal position would be that under the 1972 Rules, there had to be separate decision taken and a separate order of confirmation issued by the competent authority i.e. the Chief Justice. This is also the reason why this was placed as a separate agenda item for the decision of the Selection Committee on 3-3-2009. The court is informed by the learned Senior counsel for the High Court that this has been the practice in the High Court and there is no reason to view it differently as far as the PSs are concerned. This order of confirmation i.e. appointing them "substantively" as PSs took place only by the order dated 28-3-2009 effective 20-3-2009.

69. It was not incumbent on the Chief Justice to have issued the orders of confirmation only because the recommendation of the Selection Committee in respect of the promotee PSs had been accepted. The completion of probation is one aspect but confirmation on the post is another. If for taking a conscious decision as to the latter aspect, the Chief Justice was required to keep in view the

possible competing claims of the DRs who had also by then "successfully" completed their probation, it cannot be said that the Chief Justice was acting arbitrarily. One important aspect to be borne in mind at this stage was the effect this would have on the arranging of their inter se seniority in the cadre of PSs. At this stage i.e. 7-8-2007, Rule 5-A had not been recommended by the Selection Committee to be repealed. That happened later on 17-2-2009. All this happened at the instance of only the promotee PSs and without any notice to the DR PSs whose interest were being adversely affected by such a decision. This was what prompted the case of confirmation of the entire lot of PSs to be placed before the Selection Committee on 3-3-2009. This also reinforces the position that there was no deemed confirmation of either set of PSs only upon completion of their probation and that it required a separate decision and a consequential order of the Chief Justice in that regard.

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87. To summarise the conclusions:

(a) The fact that the recommendations made on 21-2-2007 by the Selection Committee on the representation of the Petitioners was accepted by the Chief Justice on 28-2-2007 and the subsequent recommendation at the meeting on 19-7-2007 was accepted on 25-7-2007 did not ipso facto mean that a decision by the Chief Justice had been taken to confirm the promotee PSs from either 17-2-2007 or 25-7-2007.

(b) Under the 1972 Rules, there had to be a separate decision taken and a separate order of confirmation issued by the competent authority i.e. the Chief Justice. This has been the practice in the High Court and there is no reason to view it differently as far as the PSs are concerned. This order of confirmation i.e. appointing the

Petitioners and Respondents 2 to 14 "substantively" as PSs took place only by the order dated 28-3-2009 effective 20-3-2009.

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(d) Under the 1972 Rules there is no scope for a "deemed confirmation" of the Petitioners as PSs. Their contention that they should be held to have been deemed to be confirmed as PSs on 17-2-2007 or at the latest 25-7-2007 is rejected."

53. In Medical Council of India (supra), the Division Bench was again confronted with the same proposition, where the relevant part of the appointment letter was as under:-

"1. You will be on probation for a period of one year from the date of joining the post. The probation period may be extended at the discretion of the appointing authority. During the probation period, the appointment will be liable to termination without assigning any reasons on one month's notice period and thereafter on three month's notice or pay with allowances in lieu thereof. Continuance in the service after the probation period is subject to satisfactory performance……"

54. Contention of the Petitioner/MCI, assailing an order passed by the Central Administrative Tribunal allowing the Original Application, holding that at the end of the probation period Respondent became a deemed confirmed permanent employee and directing re-induction of Respondent No. 1 therein, was as under:-

"12. Ld. Senior Counsel for the petitioner submits that the terms of offer of appointment dated 08.03.2011 did not stipulate that the probationer would stand automatically

confirmed upon the expiry of her probation period of one year. He submits that the Recruitment Rules did not provide for any maximum period of probation, beyond which it was not permissible for MCI to extend the probation period. There is no obligation cast on the petitioner MCI to pass an express order, extending the probation of the respondent, failing which she would be deemed to be confirmed. Thus, merely because respondent 1 completed one year period of probation before she was terminated, and there was no express order intending her probation, it does not lead to the conclusion that she acquired the status of a deemed confirmed employee. In this regard, ld. Senior counsel has placed reliance on Head Master, Lawrence School, Lovedale vs. Jayanthi Raghu And Anr. (2012) 4 SCC 793 and VK Mittal vs. Registrar General, Delhi High Court, (2017) 3 SLR 418.

13. Mr. Singh points out that in terms of respondent No. 1's offer of appointment, MCI was entitled to extend the period of probation of an appointee at its own discretion. He submits that the non-confirmation of respondent-1 after one year of probation period, was an implied extension of her probation. Thus, he submits that respondent 1 was still on probation when her services were terminated vide office order dated 30.03.2012. Ld. Senior Counsel referred to the Rules i.e., MCI Recruitment (Amendment) Rules, 2003, for appointment to the post of Secretary, MCI to submit that appointment to the post of Secretary, MCI was subject to one-year period of probation under the recruitment rules itself."

55. The Division Bench held that the decision of the Central Administrative Tribunal was laconic as the rules did not envisage automatic or deemed confirmation. Relevant observations of the Division Bench have been extracted in the earlier part of the judgment and

reference at this stage is additionally made to para 18 of the judgment as under:-

> *"18. Having heard learned counsels and considered the facts of the case as well as the decisions relied upon, we are of the opinion that the view taken by the Tribunal is laconic in as much, as, the Rules and the terms governing the service of respondent 1 are abundantly clear to conclude that the service of respondent 1 was not confirmed, or deemed to have been confirmed, by the petitioner-MCI. She continued to remain on probation when her services were terminated, and the termination is a simplicitor termination and non-stigmatic."*

56. Reliance was placed by the Division Bench on several judgments of the Supreme Court, most of which have been alluded to above in the present judgment and are not being repeated to avoid prolixity, except to refer to the judgment in Head Master, Lawrence School, Lovedale vs. Jayanthi Raghu, **(2012) 4 SCC 793** on which also the Division Bench placed reliance and the relevant para is as under:-

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

57. In view of the aforesaid the contention of the Petitioner that merely by the expiry of probation period of one year, Petitioner was deemed to be a confirmed employee, cannot be accepted by this Court. The mere stipulation of one year probation period cannot lead to an inference that on its expiry the Petitioner would be deemed confirmed and the only interpretation that can be given to the stipulation in the appointment letter is that the Petitioner was to remain on probation even after expiry of the one year period until a confirmation order was issued, in writing. Had the intent of the employer been otherwise, the appointment letter would have categorically provided a maximum period of probation, beyond which there could be no extension, which certainly is not the case here. This Court therefore holds that the Petitioner cannot be treated as a confirmed employee of CEL.

58. Petitioner contended that he had, by his dedicated work contributed immensely towards achieving many a milestones in CEL and has taken pains to dedicate several pages in the writ petition to point out his achievements. Some of these, as noted earlier, allegedly include creating a congenial and harmonious environment by negotiating with the workmen, expediting DPCs and preparing rosters for promotions, ensuring payment of salaries of the workmen, expediting statutory compliances as well as working towards making the net worth of CEL positive. Succinctly put the argument of the Petitioner is that the Petitioner, on account of his competency, knowledge, vast experience and hard work, was suitable to be continued as GM (HR) with CEL and there was no reason or cause to have terminated his services on the ground of

unsuitability. Pithily put, Petitioner calls upon this Court to examine his suitability to the post.

59. It is the settled law that where the form of an order discharging a probationer is a mere camouflage, Courts can lift the veil and go behind the order to ascertain its true character. If the Court finds that the order although seems like, in form, as an order simplicitor discharging the probationer and determining the employment, but in reality, is a cloak for an order of punishment, Court can interfere and if the facts and circumstances so demand, quash the order. In Anoop Jaiswal vs. Govt. of India, **(1984) 2 SCC 369,** the Supreme Court held that even though the order of discharge may be non-committal, it cannot stand alone and the cause for the order cannot be ignored. The recommendation behind the order which is the basis or foundation should be read along with the order to determine the true character. If on reading the two together, the Court reaches the conclusion that the alleged act of misconduct was a cause of the order and that but for the incident of misconduct, the order would not have been passed, then it is inevitable that the order of discharge should fall to the ground and the employee must be given a reasonable opportunity to defend himself.

60. In Parvendra Narayan Verma (supra), the Supreme Court considered the question whether the order of termination on the ground of unsatisfactory probation was punitive and stigmatic and if so whether it could be sustained without a full scale departmental enquiry. Relying on the earlier judgments of the Supreme Court in V.P. Ahuja vs. State of Punjab, **(2000) 3 SCC 239**, Krishnadevaraya Education Trust vs. L.A. Balakrishna, **(2001) 9 SCC 319**, H.F. Sangati v. Registrar General, High

Court of Karnataka **(2001) 3 SCC 117** and Samsher Singh (supra), the Supreme Court held as under:-

> *"19. Thus some courts have upheld an order of termination of a probationer's services on the ground that the enquiry held prior to the termination was preliminary and yet other courts have struck down as illegal a similarly worded termination order because an inquiry had been held. Courts continue to struggle with semantically indistinguishable concepts like "motive" and "foundation"; and terminations founded on a probationer's misconduct have been held to be illegal while terminations motivated by the probationer's misconduct have been upheld. The decisions are legion and it is an impossible task to find a clear path through the jungle of precedents.*
>
> *20. As observed by Alagiriswami, J. in S.P. Vasudeva v. State of Haryana (1976) 1 SCC 236 : 1976 SCC (L&S) 12] SCC, at p. 240 : (SCC para 5)*
>
> *"After all no government servant, a probationer or temporary, will be discharged or reverted, arbitrarily, without any rhyme or reason. If the reason is to be fathomed in all cases of discharge or reversion, it will be difficult to distinguish as to which action is discharge or reversion simplicitor and which is by way of punishment. The whole position in law is rather confusing."*
>
> *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 any one*

of the three factors is missing, the termination has been upheld.

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25. In Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd. [(1999) 2 SCC 21 : 1999 SCC (L&S) 439] a full-scale inquiry was held into the allegations of bribery against a temporary employee. The Court set aside the termination because it found that the report submitted was not a preliminary inquiry report but it was in fact a final one which gave findings as to the guilt of the employee.

26. In Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta [(1999) 3 SCC 60 : 1999 SCC (L&S) 596] the termination order itself referred to three other letters. One of the letters explicitly referred to misconduct on the part of the employee and also referred to an Inquiry Committee's report, which report in its turn had found that the employee was guilty of misconduct. The termination was held to be stigmatic and set aside.

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28. Therefore, whenever a probationer challenges his termination the court's first task will be to apply the test of stigma or the "form" test. If the order survives this examination the "substance" of the termination will have to be found out.

29. Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the

language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job."

61. The Supreme Court then examined the facts of the case before it where the language used in the termination order was "*work and conduct has not been found to be satisfactory*". Having examined the impugned termination order before it, the Supreme Court held as under:-

"31. Returning now to the facts of the case before us. The language used in the order of termination is that the appellant's "work and conduct has not been found to be satisfactory". These words are almost exactly those which have been quoted in Dipti Prakash Banerjee case [(1999) 3 SCC 60 : 1999 SCC (L&S) 596] as clearly falling within the class of non-stigmatic orders of termination. It is, therefore safe to conclude that the impugned order is not ex facie stigmatic.

32. We are also not prepared to hold that the enquiry held prior to the order of termination turned this otherwise innocuous order into one of punishment. An employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. A charge-sheet merely details the allegations so that the employee may deal with them effectively. The enquiry report in this case found nothing more against the appellant than an inability to meet the requirements for

the post. None of the three factors catalogued above for holding that the termination was in substance punitive exists here."

62. In this context, I may refer to the principles with respect to discharge of a probationer which were laid down by the Constitution Bench of the Supreme Court in Parshotam Lal Dhingra vs. Union of India, **AIR 1958 SC 36** and as summarized by the Supreme Court in State of Bihar vs. Gopi Kishore Prasad, **AIR 1960 SC 689** as follows:-

"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)

63. Examining the facts of the present case on the touchstone of the principles enunciated by the Supreme Court on the subject, this Court is of the view that the impugned order of termination is neither stigmatic nor punitive. It is nobody's case that the Petitioner had indulged in any act amounting to a misconduct or misdemeanor and even today before this Court the stand of CEL is that the Petitioner was a non-performer and did not execute the work assigned to him within the required timelines. While the Petitioner has taken pains to highlight his achievements and contributions which in his perception took the Corporation to a positive net worth, learned Senior Advocate for CEL has attempted to illustrate delays in making rosters, holding DPCs and has also taken a stand that in most of the targets and goals achieved, Petitioner had worked as a team with other officers and employees and cannot take the entire credit.

64. In my view, reading of the pleadings and the arguments made can only lead to a conclusion that the impugned order, in its form and substance cannot fall into the category of a punitive order as there are no

allegations of misconduct or moral turpitude and the order was neither preceded by any investigation or informal enquiry. The impugned order is an order of discharge simplicitor of a probationer on account of unsatisfactory probation. The purpose of placing an employee under probation casts an obligation on the employer to consider whether his work is satisfactory making him suitable for the post. The employer after assessing the work of the probationer may come to a conclusion based on non-performance, conduct, temperament and a host of other factors, singularly or cumulatively, that the probationer is unsuitable for the job and must be discharged. This cannot amount to a punishment if it is an order of discharge simplicitor and found to be so on lifting of the veil. The order impugned herein cannot be termed as punitive.

65. I cannot agree with the contention of the Petitioner that the order is stigmatic. As can be seen from a mere reading of the order that it seeks to terminate the services of the Petitioner on ground of unsuitability and there is not even an iota of stigma cast upon the Petitioner, for any other prospective employer to even infer that the services were terminated for any other cause. In Parvendra Narayan Verma (supra), the Supreme Court observed that generally when a probationer is terminated it means that the probationer is unfit for the job but a simple termination cannot be held to be stigmatic. In Medical Council of India (supra), the Division Bench while examining a somewhat similar order of termination of a probationer concluded that it was a simple order of discharging a probationer and could not be treated as a stigmatic order.

66. Once it is found that the order of termination of the Petitioner is neither punitive nor stigmatic, the question that arises is whether this

Court can determine the 'suitability' of the Petitioner and come to a conclusion contrary to the determination by the Competent Authority in this regard. In State of Punjab vs. Sukhwinder Singh, **(2005) 5 SCC 569**, a three-Judge Bench of the Supreme Court held that the decision to discharge a probationer during probation is taken by the appointing authority or administrative heads of various departments, who are not judicially trained people. The superior authorities in the departments have to take work from an employee and they are the best people to judge whether an employee should be continued in service and made a permanent employee or not, having regard to his performance, conduct and overall suitability for the job. A probationer is on test and has no right to the post. In the present case, the concerned authorities in CEL have assessed the performance of the Petitioner to judge his suitability for the post in question. Admittedly, letters were written to the Petitioner pointing out the alleged deficiencies or delay in carrying out the tasks entrusted to him. Petitioner has placed on record some of his responses, rebutting the contents of those letters and on the contrary attributing the non-performance and non-achievement of targets to the Management. It is not the domain of this Court in a judicial review to sit in assessment over the performance of the Petitioner. Looking into the nature of shortcomings and deficiencies pointed out by the Respondent, this Court has no expertise or mechanism to judge the performance of the Petitioner so as to conclude that he is suitable to be confirmed as GM(HR). The decision to terminate the services of the Petitioner is purely a *bonafide* attempt by the superior officers to ascertain whether the Petitioner could be retained in service or not based on his performance and the impugned

order does not, in my view, call for any interference. Supreme Court in Oswal Pressure Die Casting Industry, Faridabad vs. Presiding Officer and Anr. **(1998) 3 SCC 225**, while allowing an appeal against the judgement of the High Court, against an Award of the Labour Court, held that it was not open to the High Court to sit in appeal over the assessment made by employer of the performance of the employee. It was further held that once it was found that the assessment made by the employer was supported by some material and was not *malafide*, it was not proper for the High Court to interfere and substitute its satisfaction with the satisfaction of the employer. The relevant para is as under:

> *"6. From the letter of appointment it is quite clear that the respondent was appointed on probation. The High Court was also inclined to take that view and for that reason it did not uphold that part of the award of the Labour Court whereby it was held that Section 25-F of the Industrial Disputes Act applies to the facts of the case. The High Court did not agree with the finding of the Labour Court that the order of termination was not an order of discharge simpliciter as it was stated in it that "you are not found fit to confirm" and, therefore, it was necessary to hold a departmental enquiry. It, however, held that it was necessary for the appellant to produce material to show that the respondent's performance was not satisfactory and as no such material was produced the order of termination was bad. We find, as disclosed by the award of the Labour Court, that the appellant had examined two witnesses, Satish Dudeja and Om Prakash to prove that his work was not satisfactory. It was, therefore, not correct to say that no evidence was led by the appellant to prove that the work of the respondent was not satisfactory. Both the witnesses had clearly stated that he was found negligent in his work and because of his negligence he had met with an accident in the factory*

premises. It was not the case of the respondent that the action of the employer was mala fide. The Labour Court had also not held that the satisfaction of the Management was vitiated by mala fides. It had struck down the order of termination on the ground that it was stigmatic and, therefore, it could not have been passed without holding a domestic enquiry. ***The High Court rightly did not accept that finding. What the High Court failed to appreciate was that it was not open to it to sit in appeal over the assessment made by the employer of the performance of the employee. Once it was found that the assessment made by the employer was supported by some material and was not mala fide it was not proper for the High Court to interfere and substitute its satisfaction with the satisfaction of the employer. The High Court was also wrong in holding that in order to support its satisfaction it was necessary for the appellant to produce some reports or communication or other evidence to show that performance of the respondent was below the expected norms.*** *We find that the whole approach of the High Court was wrong and, therefore, the order passed by it will have to be set aside. We, therefore, allow this appeal, set aside the judgment and order passed by the High Court and also the award passed by the Labour Court and hold that the impugned termination order was validly passed by the appellant."* (emphasis added)

67. The next contention of the Petitioner is that since CEL is a Central Public Sector Enterprise, the appointment of the Petitioner was on a permanent absorption basis and being a permanent employee, his services could not be terminated abruptly by the impugned order, without following the due process of law, entailing a full-fledged enquiry. Reliance was placed on DPE OM dated 14.12.2012 to strengthen the

argument. In order to examine the said contention I may extract hereunder the relevant para of the DPE OM dated 14.12.2012:-

> *"3. All appointments in CPSEs are on permanent absorption basis. In rare and exceptional cases employees are appointed on deputation. Only in cases where a person from Government service, including Defence services, joins a CPSE on a permanent absorption basis, there is a need to protect his/her emoluments (Basic Pay + Grade Pay + DA). Pension, if any, drawn on account of service rendered in Government is regulated as per DoPT orders. As per Annex-IV (iv) referred to in para 12 of DEP O.M. dated 26.11.2008* ***(Annex-III),*** *which relates to 2007 pay revision of IDA employees, all deputationists shall have to draw their parent cadre pay and allowances. All those who join a CPSE on deputation after 26.11.2008 cannot opt for CPSE pay scales, and have to draw their parent cadre pay and allowances, and are governed by the provisions contained in DPE O.M. dated 26.11.2008 and 08.06.2009* ***(Annex-IV)****. However, an exception has been made in the case of CVOs and other Officers on deputation to the Vigilance Department of CPSEs who have been given the option to draw CPSE pay scale, allowances and other benefits vide DPE O.M. dated 03.12.2010* ***(Annex-V)****.*
>
> *The standard terms & conditions for those joining on deputation may be seen at* ***Annex-VI.*** *Officers of the level of Joint Secretary and above are not entitled for deputation duty allowance* ***(Annex-VII)****."*

68. There is no doubt that all appointments in CPSEs are on a permanent absorption basis and only in rare cases, appointments are on deputation. But what cannot be lost sight of is the fact that the Petitioner was appointed on probation for a period of one year until confirmed in

writing and during the probationary period his services were liable to be terminated without notice and without assigning any reason whatsoever. Para 2(a) of the offer letter of appointment has been extracted above. It cannot therefore, be said that the Petitioner was permanently absorbed with CEL on the day of his appointment, as alleged, since the appointment was subject to a caveat of satisfactory completion of probation. Certainly, if the Petitioner would have satisfactorily completed probation and was found suitable, an order of confirmation would have followed. Only after confirmation the Petitioner would have been a 'permanently absorbed' employee of CEL. Thus, this contention of the Petitioner is untenable in law.

69. There is yet another facet of the argument of the Petitioner. It is contended that the Petitioner was employed with CIL where he rendered 23 long years of dedicated and unblemished service and had applied for appointment with CEL through proper channel and after a No Objection Certificate from CIL and thus the resignation from CIL was a 'technical resignation'. In support the Petitioner highlights the Minutes of the Selection Committee where it was specifically directed that he would be entitled to pay protection with CEL. DoPT OM dated 17.08.2016 is pressed to highlight the meaning and definition of 'technical resignation'. Concisely, the argument is that the appointment with CEL, after technical resignation from CIL, was a substantive, regular and permanent appointment and thus the order terminating his services, randomly and abruptly, without due process of law, treating him as a probationer, cannot be sustained in law.

70. 'Technical resignation' has been defined in the OM dated 17.08.2016 issued by the DoPT as hereinunder:-

> *"2.1.1 As per the Ministry of Finance OM No. 3379-E.III (B)/65 dated the 17th June, 1965, the resignation is treated as a technical formality where a Government servant has applied through proper channel for a post in the same or some other Department, and is on selection, required to resign the previous post for administrative reasons. The resignation will be treated as technical resignation if these conditions are met, even if the Government servant has not mentioned the word "Technical" while submitting his resignation. The benefit of past service, if otherwise admissible under rules, may be given in such cases. Resignation in other cases including where competent authority has not allowed the Government servant to forward the application through proper channel will not be treated as a technical resignation and benefit of past service will not be admissible. Also, no question of benefit of a resignation being treated as a technical resignation arises in case of it being from a post held on ad hoc basis."*

71. In this context, I may also refer to the following para from DoPT OM dated 26.12.2013:-

> *"In case where a Government servant applied for post in the same or the other departments through proper channel and on selection, is required to resign the previous posts for administrative reasons ,the benefit of past service, if otherwise admissible under rules, is given treating the resignation as a "Technical Formality." Resignation submitted for other reasons or if competent authority has not allowed him to forward his application through proper channel is a resignation and benefit of past service will not be admissible."*

72. That benefit of pay protection is available on appointment to another post on technical resignation from the erstwhile post is clear from a reading of para 2.4 of the DoPT OM dated 17.08.2016 as under:-

> *"**2.4 Pay Protection, eligibility of past service for reckoning of the minimum period for grant of Annual Increment***
>
> *In cases of appointment of a Government servant to another post in Government on acceptance of technical resignation, the protection of pay is given in terms of the Ministry of Finance OM No. 3379-E.III (B)/65 dated 17th June, 1965 read with proviso to FR 22-B. Thus, if the pay fixed in the new post is less than his pay in the post he holds substantively, he will draw the presumptive pay of the pay he holds substantively as defined in FR-9(24). Past service rendered by such a Government servant is taken into account for reckoning of the minimum period for grant of annual increment in the new post/ service/ cadre in Government under the provisions of FR 26 read with Rule 10 of CCS (RP) Rules, 2016. In case the Government servant rejoins his earlier posts, he will be entitled to increments for the period of his absence from the post."*

73. Reading of the relevant provisions alluded to above obviates any doubt that the resignation tendered by the Petitioner to CIL was a technical resignation. Petitioner has placed on record the letters requesting for grant of No Objection Certificate for appearing in the interview pursuant to the advertisement issued by CEL as well as the letter forwarding his case for No Objection Certificate. Parties are ad-idem that the Petitioner had applied with CEL through proper channel and the No Objection Certificate was furnished while applying. A perusal

of the Minutes of the Selection Committee fortifies the stand of the Petitioner that pay protection was granted to him and this is not denied by CEL, even today before this Court. The response of CEL to the ground of technical resignation, broadly, is that the DoPT OM dated 17.08.2016 does not apply to the Petitioner as it is only applicable to Government servants. This contention of CEL is misconceived as the concept of technical resignation applies to the movement of officers from one PSU to another also and in this context, I may rely on a judgment of the Division Bench of this Court in Indraprastha Power Generation Company Ltd. vs. Savinder Kaur in **LPA 51/2018 decided on 04.09.2018** wherein, the Respondent had filed a writ petition before the learned Single Judge seeking retention of lien. The Respondent therein, while working as Deputy Manager (HR) in IPGCL, had applied for the post of AGM (HR) in M/s Pawan Hans Limited, a CPSE, in response to an advertisement, through proper channel and after receiving a No Objection Certificate. Upholding the claim of the Respondent for retention of lien with IPGCL the Division Bench had affirmed the position that movement from IPGCL to Pawan Hans Limited would be treated as technical resignation. Relevant para of the judgment is as under:-

> *"8. The contention of the appellant company is that IPGCL and Pawan Hans Ltd. are two distinct legal entities and not a Department of the Government is not acceptable as Pawan Hans Ltd. being a Public Sector Undertaking having shareholding of the Central Government, forms part of the Central Government and cannot be treated as one to be an Independent Company. The respondent shifted her job from one government department to another government department and*

hence, the rules and regulation applicable to the Central Government employees will be applicable in the present case."

74. In view of the above, it cannot be held that only because the Petitioner resigned from a CPSE to be appointed in another CPSE, it would not be treated as a technical resignation. While this argument of CEL is unacceptable, however, it cannot inure to the advantage of the Petitioner to conclude that merely because his resignation with CIL is a technical resignation, he should be treated as a permanent employee with CEL at the threshold of his initial appointment. This argument of the Petitioner has to be rejected for twofold reasons. First and foremost, the Petitioner was appointed as a probationer subject to confirmation. This point has been elaborately discussed above. Secondly, there is no law under which an employee confirmed in a post, appointed to another post, after submitting technical resignation, carries the benefit of confirmation to the latter post. Concededly in the present case, Petitioner had applied for appointment with CEL, through the process of direct recruitment and his appointment as GM (HR) was a fresh appointment, with different terms and conditions and different nature of job. It was for this reason that the Petitioner was placed on probation to adjudge his suitability for confirmation, which was never challenged by the Petitioner. Therefore, the mere fact that the Petitioner came through proper channel is not sufficient to hold that he would be treated as a confirmed/permanent employee of CEL on appointment. Learned counsel for the Petitioner has

not been able to show any law enabling this Court to hold in his favour and on the contrary the DoPT OM dated 24.09.1992 provides as under:-

> *" If a Government servant is appointed to another post by direct recruitment either in the same department or a different department, it may be necessary to consider him for confirmation in the new post in which he has been appointed by direct recruitment irrespective of the fact that the officer was holding the earlier post on a substantive basis. Further confirmation in the new entry grade becomes necessary because the new post may not be in the same line or discipline as the old post in which he has been confirmed and the fact that he was considered suitable for continuance in the old post (which was the basis for his confirmation in that post) would not automatically make him suitable for continuance or confirmation in the new post, the job requirements of which may be quite different from those of the old post.*

The same principle has been reiterated and reaffirmed in a recent DoPT OM dated 11.03.2019 as under:-

> *(A) DIRECT RECRUITMENT TO ANOTHER POST IN SAME OR DIFFERENT DEPARTMENT*
>
> *" If a Government servant is appointed to another post by direct recruitment either in the same department or a different department, it may be necessary to consider him for confirmation in the new post in which he has been appointed by direct recruitment irrespective of the fact that the officer was holding the earlier post on a substantive basis. Further confirmation in the new entry grade becomes necessary because the new post may not be in the same line or discipline as the old post in which he has been confirmed and the fact that he was considered suitable for continuance in the old post (which was the basis for his confirmation in that post) would not*

automatically make him suitable for continuance or confirmation in the new post, the job requirements of which may be quite different from those of the old post."

75. Learned counsel for the Petitioner has relied on the judgments of the Supreme Court in Renu (supra) and K. Manjusree (supra) as well as A.P. Public Service Commission (supra) to urge that rules of the game cannot be changed once the game has started. The argument is based on the assumption of the Petitioner that the appointment letter prescribing that CEL will have the power to extend probation until confirmation in writing is extraneous to the advertisement issued for appointment. This Court has in the earlier part of the judgement held that Clause 2(a) in the appointment letter is not contrary or extraneous to the advertisement, besides the fact that the offer letter of appointment was accepted by the Petitioner with open eyes along with all the terms and conditions mentioned therein. There is thus no change in the rules of the game in the midst of the game and therefore, the judgments are of no avail to the Petitioner.

76. After carefully perusing the pleadings of the parties and hearing the arguments, this Court has not been able to discern any malice or *malafide* in the impugned action, as alleged by the Petitioner. In the detailed counter affidavit filed, CEL has rebutted and controverted the averments made by the Petitioner regarding his sole contributions in achieving certain tasks as well as the allegations that he had flagged issues resulting in a report against the CMD, which prompted the Management to terminate his services. In the counter affidavit, it is elaborately explained that the Petitioner delayed preparation of the rosters for carrying out

promotions, failed to perform his duties as regards the work related to online ACRs delayed the deadlines to meet the MOU targets, etc., which are shortcomings related to work and cannot be held to be actuated by malice. The Supreme Court in Ratnagiri Gas & Power (P) Ltd. vs RDS Projects Ltd., **(2013) 1 SCC 524**, held that law casts a heavy burden on the person alleging *malafide*s to prove the same on the basis of facts that are either admitted or satisfactorily established and/or logical inferences are deductible from the same. This particularly gains importance, when a person alleges malice in fact, in which case, it is obligatory for the person making such allegations to furnish particulars and not vague and general allegations. Relevant paras are as follows:

> *"25. Even otherwise the findings recorded by the High Court on the question of mala fides do not appear to us to be factually or legally sustainable. While we do not consider it necessary to delve deep into this aspect of the controversy, we may point out that allegations of mala fides are more easily made than proved. The law casts a heavy burden on the person alleging mala fides to prove the same on the basis of facts that are either admitted or satisfactorily established and/or logical inferences deducible from the same. This is particularly so when the petitioner alleges malice in fact in which event it is obligatory for the person making any such allegation to furnish particulars that would prove mala fides on the part of the decision-maker. Vague and general allegations unsupported by the requisite particulars do not provide a sound basis for the court to conduct an inquiry into their veracity.*
>
> *26. The legal position in this regard is fairly well settled by a long line of decisions of this Court. We may briefly refer to only some of them:*

26.1. In State of Bihar v. P.P. Sharma [1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192] this Court summed up the law on the subject in the following words: (SCC p. 260, paras 50-51)

> *"50. 'Mala fides' means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith, if it is in fact done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or contrary to the requirements of the statute, or the basis of the circumstances contemplated by law, or improperly exercised discretion to achieve some ulterior purpose. The determination of a plea of mala fide involves two questions, namely, (i) whether there is a personal bias or an oblique motive, and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.*
>
> *51. The action taken must, therefore, be proved to have been made mala fide for such considerations. Mere assertion or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. If it is established that the action has been taken mala fide for any such considerations or by fraud on power or colourable exercise of power, it cannot be allowed to stand."*
> *(emphasis added)*

26.2. We may also refer to the decision of this Court in Ajit Kumar Nag v. Indian Oil Corpn. Ltd. [(2005) 7

SCC 764 : 2005 SCC (L&S) 1020] where the Court declared that allegations of mala fides need proof of high degree and that an administrative action is presumed to be bona fide unless the contrary is satisfactorily established. The Court observed: (SCC p. 790, para 56)

> *"56. ... It is well settled that the burden of proving mala fide is on the person making the allegations and the burden is 'very heavy'. (Vide E.P. Royappa v. State of T.N. [(1974) 4 SCC 3 : 1974 SCC (L&S) 165]) There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in Gulam Mustafa v. State of Maharashtra [(1976) 1 SCC 800] (SCC p. 802, para 2): 'It (mala fide) is the last refuge of a losing litigant.'""*

77. Before parting with the present petition, I may note that in the present petition, the Petitioner has only sought the relief of quashing the termination order and further directions to reinstate him with back wages and consequential benefits *qua* CEL. Petitioner has not sought any relief *qua* his lien with CIL and in fact, CIL is not even a party in the present petition. However, since this Court has held that the resignation tendered by the Petitioner with CIL for joining as GM(HR) with CEL is a technical resignation, it would be unjust to the Petitioner if he is not given the liberty to exercise his rights flowing out of the technical resignation with CIL, more particularly as he has been terminated on probation and within the permissible Lien period. Accordingly, liberty is granted to the

Petitioner to seek his rights and remedies flowing out of his technical resignation with CIL, in accordance with law, if so advised.

78. For all the aforesaid reasons, the writ petition is dismissed with all pending applications.

79. No orders as to costs.

JYOTI SINGH, J

MAY 04, 2021
Yo/yg