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

% **Judgment reserved on: 10 JANUARY 2022**
Judgment pronounced on: 18 JANUARY 2022

\+ W.P.(C) 7359/2006

J.S.ARORA ..... Petitioner

Through: Mr.Jatin Mongia and Mr.Akshit Mohan, Advs.

versus

D.V.C. & ORS. ..... Respondents

Through: Mr. J. K. Das, Sr. Adv. with Mr.Swetanketu Mishra, Adv. for respondent nos.1 & 2.
Mr. T. P. Singh, Sr. Central Govt. Counsel for respondent Nos. 3 & 4.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

1. The petitioner challenges the orders of 30 January 2004, 03 June 2004 and 04 April 2006. By the first order of 30 January 2004, the engagement of the petitioner as Director (HRD) in the **Damodar Valley Corporation**[1] on probation came to be terminated with immediate effect. By the order of 03 June 2004, the **Bokaro Power Supply Company Private Limited**[2] is stated to have offered the position of Head of

[1] Corporation

[2] BPSCL

Personnel and Administration to the petitioner. BPSCL is a joint venture entity formed by SAIL and the Corporation. Assailing the order of termination, the petitioner came to prefer W.P.(C) 20141/2005 before this Court. That petition was disposed of on 22 February 2006, with a direction to the Union – respondent to decide a representation that had been preferred by the petitioner aggrieved by his termination. Pursuant to the directions issued on that writ petition, the Union – respondent has proceeded to pass the order of 04 April 2006, noting that since the Corporation was an autonomous body which was governed by independent statutory regulations, no interference with the decision so taken was merited.

2. The facts on which there is no major dispute inter partes are as follows. The petitioner was granted appointment as Director (HRD) on 08 July 2003. His continuance as a probationer came to an end on 30 January 2004, upon the passing of the impugned order. The petitioner is stated to have preferred an appeal against that order of termination to the Chairman of the Corporation on 17 February 2004. It was during the pendency of that appeal that the respondents appear to have taken up a proposal for appointment of the petitioner as a Director in BPSCL. The petitioner asserts that initially he was offered the post of Director (Personnel) in BPSCL. However, the ultimate appointment letter which came to be addressed to the petitioner offered him the post of Head of Personnel and Administration as noted hereinbefore. The petitioner is, thereafter, stated to have made a representation to the Ministry of Power. It was this representation and the proceedings which ensued thereafter which fell for

notice and consideration by this Court in the writ petition which was preferred.

3. Reverting back to the period while the aforesaid representation before the Ministry of Power was pending, the petitioner has by way of a separate paper-book also placed on the record various internal communications and file notings as existing on the record of the Corporation. Those records bear out that on 10 August 2005, the Chairman of the Corporation constituted a four-member committee to examine the representation made and to look into the grievances which were raised by the petitioner. The terms of reference of that Committee are set forth in its report dated 05 September 2005. The terms of reference which would be of some relevance are extracted hereinbelow: -

> "1. To examine all facts regarding the process of appointment of Shri J.S. Arora as Director (HRD), DVC and reasons for his subsequent termination from DVC service in the light of representations made by Shri Arora against his termination and related references from MOP, GOI and others.
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> 2. To consider relevant rules and regulations in DVC as well as Govt. of India regarding such appointment and termination in DVC service and whether rules were properly followed in the instant case.
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> 3. Final observation / recommendation including action to be taken by DVC on the appeal of Shri Arora made to Chairman, DVC for his reinstatement.
>
> 4. To review and recommend the general appointment procedures to be adopted for similar appointments in future to avoid controversy."

4. Taking into consideration the entire record as it existed and culminated in the passing of the impugned order or termination, the Committee proceeded to record its conclusions in its report of 05

September 2005. While examining the issue of validity of termination of the probationary engagement of the petitioner, it proceeded to record as follows: -

> "1. Appointment was made by the Authority competent to do so as per the delegation.
>
> 2. Services of Shri Arora were terminated by the appointing authority on the basis of "Evaluation of work of Shri Arora" during probationary period.
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> 3. Shri Arora is said to have been verbally warned for his deficiencies in performance and advised to improve by the Secretary and Chairman, DVC. It is also said that he was cautioned in relevant files.
>
> But, it is ascertained that no written specific warning for his deficiencies/lapses in performance or advice for improvement was made to Shri Arora by the appointing authority.
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> Further, files reportedly containing caution for deficiencies in performance could not be traced."

5. The Committee took note of the stand of the Corporation that the petitioner had been verbally warned of his deficiencies and advised to improve his conduct by the Secretary as well as the Chairman. It, however, pertinently noted that it could not be ascertained whether any written warnings in respect of the deficiencies noticed or advice for improvement issued. The Committee further recorded that files which may have contained a written caution having been given to the petitioner, could not be traced. Proceeding further to deal with Clause 4 of the terms of reference as framed, the Committee recorded its conclusions in the following terms:-

> "The probationary term of 6 months was within the provisions under DVC SR. However, in consideration to the GOI Orders as well as usual practice followed in DVC and other PSUs, the Committee is of the view that there was a scope for review."

6. Similarly, insofar as Clause 3 was concerned, it recorded the following conclusions: -

> "The Committee after careful examination of the case and Legal opinion obtained in the matter (referred to hereinbefore), is of the view that there is merit for review and reconsideration of the representation of Shri Arora for a placement in DVC, as may be deemed fit."

7. Once the representation of the petitioner was taken cognizance of in the Ministry of Power, the same appears to have been transmitted to the Corporation for its comments. Upon being called to furnish the background pertaining to the impugned decision, the Secretary in terms of a Communication of 19 July 2004, apprised the concerned Ministry that the petitioner had been found to be inefficient in the discharge of his duties and functions as Direction (HRD). It was also noted that the petitioner had also failed to accede to the advice which was given to him by the Chairman as well as the Secretary and that no improvement had been noticed over the period of six months that he spent in service. The Secretary recorded that bearing in mind the overall interests of the Corporation, there was no justification to continue the appointment of the petitioner. It accordingly apprised the Ministry accordingly. The Court also takes notice of the fact that the issue relating to the termination of the services of the petitioner as a probationer was also duly considered by the Board of the Corporation. This is evident from the background note and opinion which was framed by the Chairman of the Corporation and which was placed for the consideration of the Board. The additional affidavit which has been filed by the petitioner encloses the note which was drawn up by the Chairman and appears at pages 692-694 of the paper-book. Concurring with the opinion and the

recommendation made by the Secretary, the Chairman came to recommend that it would not be appropriate to allow the extension of the probationary period and that it would, in fact, be detrimental to the interest of the Corporation. The aforesaid opinion as formed by the Chairman came to be accepted and approved by the Board. Once the Ministry was consequently informed of the decision taken by the Corporation, it proceeded to pass the order of 04 April 2006 which is also impugned in the present writ petition.

8. Assailing the action taken by the respondents, Mr. Jatin Mongia, learned counsel appearing for the petitioner, has addressed the following submissions. Mr. Mongia has firstly taken the Court through the terms of the letter of appointment and submitted that the termination of the petitioner was liable to be preceded by three months' notice or pay in lieu thereof in light of the Regulations framed by the Corporation. The Regulations which govern are admittedly titled as the **Damodar Valley Corporation Service Regulations, 1957**[3]. According to Mr. Mongia, prior to the passing of the impugned order of 30 January 2004, no notice as contemplated and provisioned for in the appointment letter was issued to the petitioner. Turning then to the provisions contained in Regulation 18, Mr. Mongia contended that the same clearly requires a probationer to give a notice of three months in case he chooses to resign or leave the services of the Corporation. Viewed in that backdrop, Mr. Mongia submits, that Regulation 12, to the extent that it confers an unfettered right on the respondents to terminate the services of a probationer without any notice,

[3] 1957 Regulations

would not only by be illogical, but would also render that provision liable to be declared as ultra vires and arbitrary. Mr. Mongia then submitted that in terms of Regulation 6 any matter which is not provided for in the Regulations is to be governed by rules and orders that may be issued by the Union Government from time to time. Seeking to draw sustenance from Regulation 6, Mr. Mongia has pressed into aid the provisions made in an **Office Memorandum[4] of 11 March 2019**, issued by the Ministry of Personnel, PG & Pensions in the Union Government. According to Mr. Mongia, the aforesaid O.M. is, in fact, a compendium of the various policy decisions taken by the Union from time to time relating to the engagement of probationers, the assessment of their performance and the factors which would be relevant for the purposes of terminating the services of a probationer. Mr. Mongia has drawn the attention of the Court specifically to paragraphs 5 and 7 of the aforesaid O.M., which reads as follows: -

> "5. A probationer should be given an opportunity to work under more than one officer during this period and reports of his work may be obtained from each one of those officers. The probation reports for the whole period may then be considered by a Board of senior officers for determining whether the probationer concerned is fit to be confirmed in service. For this purpose, separate forms of report should be used, which are distinct from the usual Annual Performance Appraisal Report (APAR) forms. The probation period reports, unlike APAR, are written to help the supervising officer to concentrate on the special needs of probation and to decide whether the work and conduct of the officer during the period of probation or the extended period of probation are satisfactory enough to warrant his further retention in service or post. The probation period reports thus do not serve the purpose for which the APARS are written and vice versa. Therefore, in the case of all probationers or officers on probation, separate probation period reports

[4] O.M.

> should be written in addition to the usual APARs for the period of probation.
>
> 7. A probationer, who is not making satisfactory progress, should be informed of his shortcomings well before the expiry of the original probationary period so that he can make special efforts at self-improvement. This can be done by giving a written warning to the effect that his general performance has not been such as to justify his confirmation and that, unless he shows substantial improvement within a specified period, the question of discharging him would have to be considered. Even though this is not required by the rules, discharge from the service being a severe, final and irrevocable step, the probationer should be given an opportunity before taking the drastic step of discharge."

9. Referring to the provisions made in that O.M., Mr. Mongia contends that the Corporation was obliged, in law, to undertake a due assessment of the work and performance of the petitioner in order to evaluate whether the services rendered were satisfactory or would warrant the extension of the probationary period. Learned counsel has drawn the attention of the Court specifically to the requirement of the preparation of probation period reports to submit that safeguards had clearly been put in place in order to ensure that the services of the probationer are not arbitrarily dispensed with. It was further stressed that the O.M. aforenoted also mandates that when a probationer is not making any satisfactory progress, he should be informed of his shortcomings well before the expiry of the original probationary period and thus affording him an opportunity to make efforts towards self-improvement.

10. Mr. Mongia lays stress upon the fact that although the proposal of the Secretary does refer to the written cautions having been communicated and recorded on file, no such material has been placed by the respondents to

lend credence to that position. Mr. Mongia has taken the Court through the various orders passed in these proceedings, to submit that although the respondents repeatedly sought adjournments in order to produce the relevant records, no such records have been produced even though the present petition has remained pending for decades. Continuing further insofar as this aspect is concerned, Mr. Mongia submits that adverse inference is thus liable to be drawn against the respondents and it must be presumed that no such written warnings were even given to the petitioner or recorded.

11. Assailing the ultimate decision taken by the respondents in proceeding to terminate the probationary engagement of the petitioner, Mr. Mongia lays emphasis on the fact that the Committee's report of 05 September 2005 as well as the legal opinion which was submitted were not accorded any consideration at all by the respondents. Taking the Court through the conclusions which were recorded by the Committee, Mr. Mongia contends that it had been clearly found that no written warnings were traceable or found on the records. It was submitted that even the legal opinion which was submitted for the consideration of the competent authority, had opined that the termination of the petitioner would be unsustainable. It was further pointed out that the Committee itself had found that the circulars and officer memorandums issued by the Union Government did merit adoption and thus validating the stand of the petitioner here that the impugned orders are liable to be quashed in light of the provisions made in O.M. read with Regulation 6. It was lastly urged

that the services of the petitioner came to be terminated by the Secretary when, in fact, the competent authority would be the Chairman of the Corporation. This submission is addressed on the basis of an order of delegation of powers dated 18 December 1997 and in term of which Mr. Mongia would contend that it is the Chairman who is to be recognized as the competent authority for appointment and termination of the probationary services of a Director.

12. In support of the submissions aforenoted, Mr. Mongia has also relied upon the following decisions which are encapsulated in the written submissions which have been filed in these proceedings. Mr. Mongia firstly sought to draw sustenance from the decision of the Supreme Court in **State of Orissa and Anr. V. Ram Narayan Das**[5], the relevant part of which has been extracted in para 10 of the written submissions and is reproduced hereinbelow:-

> "10.Reference may also be made to the decision of the Hon'ble Supreme Court in ***State of Orrisa & Anr. Vs Ram Narayan Das [(1961) 1 SCR 606]*** where it was held as follows: *"Where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the employment."*

13. Placing reliance upon the decision of the Supreme Court in **V. P. Ahuja v. State of Punjab and Anr.**[6], it was submitted that even a

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[5] (1961) 1 SCR 606

[6] 2000 (3) SCC 239

probationer is entitled to the protection of Articles 14 and 16 of the Constitution and his services cannot be terminated arbitrarily or in a punitive manner. Reliance was then placed on the decision of the Supreme Court in **Dr. Mrs. Sumati P. Shere v. Union of India Ors.**[7], in support of the submission that a probationer must be informed of the tentative opinion with regard to his work and conduct in order to enable such an employee to improve and overcome deficiencies. Mr. Mongia places reliance upon the following principles as enunciated in that decision and are set out in the written submissions in the following terms: -

> "8. The Hon'ble Supreme Court while dealing with a similar issue in Civil Appeal bearing number 2192 of 1989 titiled as "***Dr. Mrs. Sumati P.Shere Vs Union of India & Ors" [(1989) 3 SCC 311]*** held as follows: *"We must emphasize that in the relationship of master and servant there is a moral obligation to act fairly. An informal, if not formal, give and take, on the assessment of work of the employees should be there. The employee should be made aware of the defect in his work and deficiency in his performance. Defect or deficiencies; indifference or indiscretion maybe with the employee by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, in our opinion it would be arbitrary to give a movement order to the employee on the ground of unsuitability."*

14. Mr. Das, learned Senior Advocate appearing on behalf of the Corporation, on the other hand submitted that the O.M. is clearly not applicable since the Corporation is an autonomous body where the terms and conditions of service of its officers and employees are governed solely by the provisions made in the 1957 Regulations. Turning to the O.M. itself, Mr. Das submitted that it is abundantly clear that the same stood restricted

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[7] (1989) 3 SCC 311

in its application to the Ministries and Departments of the Union Government and could not be said to extend or apply to autonomous corporations and bodies. Mr. Das submitted that the Secretary before proceeding to terminate the services of the petitioner had drawn up a detailed note recording his opinion with respect to the working of the petitioner and that the same would clearly establish that the decision to disengage the petitioner, was taken on a holistic assessment of his performance and abilities. It was submitted by Mr. Das that the report of the Secretary which exists on the record establishes that the decision to bring the probationary period of the petitioner to an end was taken on germane grounds and upon a fair evaluation of the work and conduct of the petitioner. Mr. Das then submitted that although the petitioner was offered an alternate post, the same for reasons best known to him was chosen not to be accepted. It was submitted that the aforesaid offer was made as a matter of grace and therefore clearly establishes the bona fides of the Corporation. It was further contended that the Chairman had independently assessed and evaluated the working and conduct of the petitioner before drawing up his recommendation for the consideration of the Board. According to Mr. Das, even the report of the Chairman would clearly establish that the termination was brought about solely upon a fair and unbiased assessment of the conduct of the petitioner and his ability to discharge the duties attached to the post occupied and held by him. Mr. Das further submitted that the petitioner held the responsible position of Director, HRD and by virtue of holding that post was placed in the head office and was reporting to the Secretary as well as the Chairman of the Corporation. Both those

authorities, Mr. Das would contend, thus had ample opportunity to assess the working of the petitioner personally and it was on that basis that they ultimately formed the opinion that his probation was liable to be brought to an end. It was also sought to be underlined that the assessments as undertaken by the Secretary as well as the Chairman were duly accepted by the Board of the Corporation and that consequently it would be incorrect to characterize the action taken as being either arbitrary or founded on malice.

15. Insofar as the submission with respect to the competence of the Secretary terminating the appointment of the petitioner is concerned, Mr. Das points out that the petitioner's offer of appointment was also penned by the Secretary. Viewed in that backdrop, it was submitted that it would be incorrect for the petitioner to assert now that the Secretary was not the competent authority. Referring to the report of the Committee and the legal opinion, Mr. Das submitted that the Committee report as well as the legal opinion as submitted were only recommendatory in character and were mere inputs which the Chairman was at best obliged to take into consideration. According to Mr. Das, those did not bind or restrain, the Secretary or the Chairman from independently evaluating and assessing the need for the continuance of the petitioner or in evaluating whether his continuance would benefit the organisation as a whole. According to Mr. Das, both those authorities had based their decision upon an independent evaluation of the ability and performance of the petitioner and ultimately came to conclude that the continuance of the probationary engagement of the petitioner would be unjustified.

16. Mr. Das further submitted that the absence of written warnings would not render the impugned orders invalid since, as is well settled, the confirmation or continuance of a probationer is essentially based on the subjective satisfaction of the competent authority. It was submitted that the record bears out that the petitioner in any case had been verbally informed on numerous occasions to improve his working and that bearing in mind the serious lapses in the discharge of his duties as were noticed by the Secretary, the termination of the petitioner as a probationer was clearly justified. Drawing the attention of the Court to the reliefs as framed, Mr. Das contended that the validity of Regulation 12 has not been called in question and thus the submissions made in that respect are liable to be outrightly rejected. Mr. Das lastly submitted that the petitioner had admittedly crossed the age of superannuation as fixed by the Corporation and, therefore, not only would the question of reinstatement not arise, no effective relief can also be granted to the petitioner. It is these rival submissions that fall for consideration.

17. The Court firstly deems it appropriate to deal with the submission of Mr. Mongia that since the termination was not preceded by three months' notice, it is liable to be quashed on this ground alone. It becomes pertinent to refer to the exact recitals as appearing in the appointment offer in this respect and which read thus: -

> "2. The terms of your appointment will be :-
> (b) Nature of appointment :Permanent, subject to successful completion of probation and confirmation. The appointment is subject to termination by giving three months' notice or three months

> 'pay on either side in lieu thereof. [DVC Service Regulation No.17(5) and 18]."

18. It becomes pertinent to note that the offer of appointment clearly specified that the petitioner was being appointed on a permanent basis subject to successful completion of probation and confirmation. It is relevant to note that Regulation 12 does not envisage the issuance of a notice prior to the termination of a probationer. That Regulation reads as follows: -

> "Regulation 12: - Unless otherwise provided in any individual contract all appointments except officiating appointments shall be on probation for such period as may be determined by the Corporation, during which time, the services of any employee can be terminated without notice."

19. As is evident from a reading of that Regulation, the services of a probationer are liable to be determined by the Corporation at any time and without notice. It is this Regulation, which governs the engagement and termination of the services of a probationer. The Regulation, in unambiguous terms, leaves the Corporation not only free to determine the period of probation, it also confers the unfettered right to terminate the services of a probationer at any time during that period without notice. Though needless to state, it may be clarified that the observations as entered in this context hereinabove, are not to be understood as the Court holding that the termination of a probationer can be whimsical or arbitrary.

20. Regulation 18, on the other hand, stipulates the period of notice which an employee on resignation or when working as a probationer is liable to submit before the appointment is permitted to be surrendered or the resignation accepted. That Regulation reads as follows: -

> "Regulation 18: In no circumstances shall resignation of an employee whose conduct is under enquiry be accepted without the sanction of the authority competent to dismiss him. Subject to this the resignation of an employee, including an employee on probation, shall ordinarily require three months' notice provided that a month's notice shall be adequate in the case of employees to whom the Industrial Disputes Act, 1947, and the Industrial Disputes (Amendment) Act, 1953 apply and in the case of temporary appointments for less than a year."

21. The Court find itself unable to accept the contention of Mr. Mongia who had asserted that an obligation corresponding to that placed upon an employee must also be recognized to operate upon the respondents while terminating the services of a probationer. As was noted hereinbefore, Regulation 12 does not engraft any provision for a notice preceding the termination of a probationer. The Court finds no justification to hold that the stipulations contained in Regulation 18 must also be read into Regulation 12. The unambiguous language of Regulation 12 clearly merits the rejection of this contention. Regulation 12 also cannot be interpreted as requiring the issuance of a prior notice since that would not only do violence to its plain meaning and content, it would also essentially amount to the Court rewriting the provision itself. The recitals with respect to notice as appearing in the appointment letter of the petitioner are liable to be read in the context of Regulations 17 and 18 which were duly noticed and juxtapose that recital. The question of whether Regulation 12 conflicts with Regulation 18 clearly does not merit consideration at all since there is no challenge to that provision in this writ petition. The submission that Regulation 12 is ultra vires would also, consequentially, merit rejection for the same reason.

22. That takes the Court to the submission of Mr. Mongia based on Regulation 6 and the O.M. In order to evaluate and assess the soundness of this submission, it would be apposite to refer to Sections 59 and 60 of the Damodar Valley Corporation Act, 1948. Section 59 empowers on the Union Government to frame rules. That provision reads as follows: -

> "59. Power to make rules. The Central Government may, by notification in the official Gazette, make rules to provide for all or any of the following matters, namely: -
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> (1) the salaries and allowances and conditions of service of members, ;
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> (2) the functions and duties of the members;
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> (3) the dams or other works or the installations which may be constructed without the approval of the Corporation;
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> (4) the forms of the budget, the annual report and the annual financial statements and the dates by which copies of the annual financial statements shall be made available to the participating Governments;
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> (5) the manner in which the accounts of the Corporation shall be maintained and audited;
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> (6) the appointment of an Advisory Committee; and
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> (7) the punishment for breach of any rule made under this Act."

23. The power to frame Regulations stands vested in the Corporation in terms of Section 60 of that Act. Section 60 is extracted hereinbelow: -

> "60. Power to make regulations.
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> (1) The Corporation may, with the previous sanction of the Central Government, by notification in the Gazette of India, make regulations for carrying out its functions under this Act.
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> (2) In particular and without prejudice to the generality of the foregoing power, in such regulation the Corporation may make provision for--
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> (a) making of appointments and promotions of its officers and servants;

> (b) specifying other conditions of service of its officers and servants;
> (c) specifying the manner in which water rates and charges for electrical energy shall be recovered;
> (d) preventing the pollution of water under its control;
> (e) regulating the taking out of fish from the water under its control;
> (f) regulating its proceedings and business;
> (g) prescribing punishment for breach of any regulation.
>
> (3) All regulations made under sub- sections (1) and (2) shall, as soon as possible, be published also in the Official Gazettes of the State Governments."

24. A comparison of Sections 59 and 60 of the Act would establish that the Union Government stands conferred with the jurisdiction to frame rules governing the salaries, allowances and conditions of service of members only. The power to specify conditions of service for officers and servants and their appointment are subjects which stand exclusively reserved to be governed by Regulations that may be framed by the Corporation itself.

25. It is thus abundantly clear that the Act does not envisage any role being played by the Union Government with respect to a subject other than that relating to salaries, allowances and conditions of service of the Secretary, the Financial Advisor and members of the Corporation. The appointment of officers and employees, their promotion and other terms and conditions of service are left to be determined by the Corporation itself. The Court has been unable to find any provision made under the Act or the Regulations framed thereunder, which may specifically grant a power to the Union Government to either supplement the terms and conditions otherwise

specified by the Corporation or which may mandate an automatic application or adoption of rules or orders that may be framed or issued by the Union Government concerning its employees from time to time.

26. Insofar as Regulation 6 is concerned, it would be appropriate to reproduce the same hereinbelow in order to assess the merit of the submission which was addressed by Mr. Mongia. Regulation 6 reads thus: -

> "Regulation 6: - Any matter not provided for in these Regulations shall, until requisite provisions in that behalf are made in these Regulations, be dealt with and disposed of, as far as may be, in accordance with the rules and orders issued from time to time by the Central Government in relation to similar matters."

27. From a plain reading of Regulation 6, it is evident that rules and orders which may have been framed by the Union Government would stand attracted in respect of matters which are not provided for independently in the Regulations. Those rules and orders which may be issued by the Union Government are envisaged to bridge the gap and operate to the extent that they deal with a subject matter which is not provided for in the Regulations. At the outset, it becomes pertinent to bear in mind that the engagement or appointment of officers and servants on probation is not a subject which is left untouched by the 1957 Regulations. The subject of appointment and confirmation is directly governed by Regulation 12.

28. What Mr. Mongia, however, sought to contend was that the O.M. would stand attracted by virtue of Regulation 6, since they do not independently lay in place provisions relating to assessment and appraisal of the performance of a probationer. On a fundamental plane, the

acceptance of that submission would clearly militate against the scheme underlying Sections 59 and 60 of the Act. It would essentially amount to this Court recognizing a right inhering in the Union Government by extension to rule on the conditions of service of officers and servants of the Corporation even though the Act statutorily confines the exercise of that power to the Secretary, Financial Advisor and members. When Regulation 6 speaks of a *"matter not provided for"* in the Regulations, it is principally providing for the adoption and application of a rule framed by the Union Government with respect to the service conditions of its officers or employees which has not otherwise been dealt with under the Regulations. However, that rule or order must primarily and fundamentally be concerned with a term or condition of service and be one which has not been provisioned for under the Regulations. In the considered opinion of this Court, Regulations 6 does not envisage the application of general advisories or instructions which may be issued by the Union Government from time to time. The O.M. at best only encompasses certain guiding principles to aid the appointing authorities of the Union Government while dealing with probationers and assessing their work. Those norms or words of counsel are essentially concerned with the aspect of exercise of power. They cannot possibly be recognised as constituting a term or condition of service. The guidelines as embodied in the O.M., unless specifically adopted by the Corporation, cannot be held to mandatorily apply on the basis of Regulation 6 as contended by Mr. Mongia. The above is in addition to the evident fact that the O.M. was marked for the guidance of Departments and Ministries of the Union Government and does not on its own indicate the same being

extended in its application to autonomous organizations and bodies that may function under the Union.

29. The next submission of Mr. Mongia which merits consideration was that since the Committee as well as the Board of the Corporation had themselves tested the action of termination based on the principles contained in the O.M.'s issued by the Union Government, a failure to adhere to the same rendered the impugned action wholly arbitrary and illegal. It becomes important to note that the Committee had only recommended the adoption of the guidelines so as to avoid challenges, similar to the one voiced by the petitioner here, being raised again. The Committee has nowhere held or recorded that the guidelines did in fact apply. It was the recommendation of the Committee for adoption of those guidelines in future was what came to be accepted by the Board also. This would stand duly established upon a reading of the report of the Committee as well as the resolution of the Board.

30. The Court now proceeds to briefly deal with the judgments which have been relied upon from the side of the petitioner. Insofar as the reliance placed by Mr. Mongia on the decision of **Ram Narayan Das** is concerned, that itself flows from a basic fallacy. The Court had deliberately chosen to extract paragraph 10 of the written submissions which had proceeded to describe that extract as being the principles enunciated by the Supreme Court in that decision. This is factually incorrect since what is extracted in the written submissions is the relevant rule in the backdrop of which **Ram Narayan Das** came to be decided. What learned counsel has chosen to

describe as the legal principles which were enunciated, is in fact the statutory rule which fell for consideration before the Supreme Court. This is evident from the following paragraphs of **Ram Narayan Das** which are reproduced hereinbelow:-

> "7. Rule 55-B of the Civil Services (Classification, Control and Appeal) Rules, insofar as it is material provides:
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> "Where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the employment."
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> 13. Where under the rules governing a public servant holding a post on probation, an order terminating the probation is to be preceded by a notice to show cause why his service should not be terminated, and a notice is issued asking the public servant to show cause whether probation should be continued or the officer should be discharged from service the order discharging him cannot be said to amount to dismissal involving punishment. Undoubtedly, the Government may hold a formal enquiry against a probationer on charges of misconduct with a view to dismiss him from service, and if an order terminating his employment is made in such an enquiry, without giving him reasonable opportunity to show cause against the action proposed to be taken against him within the meaning of Article 311(2) of the Constitution, the order would undoubtedly be invalid.
>
> 15. This proposition, in our judgment, does not derogate from the principle of the other cases relating to termination of employment of probationers decided by this court nor is it inconsistent with what we have observed earlier. The enquiry against the respondent was for ascertaining whether he was fit to be confirmed. An order discharging a public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification, may appropriately be regarded as one by way of punishment, but an order discharging a probationer following upon an enquiry to ascertain

> whether he should be confirmed, is not of that nature. In Gopi Kishore Prasad case [AIR (1960) SC 689], the public servant was discharged from service consequent upon an enquiry into alleged misconduct, the Enquiry Officer having found that the public servant was "unsuitable" for the post. The order was not one merely discharging a probationer following upon an enquiry to ascertain whether he should be continued in service, but it was an order as observed by the court "clearly by way of punishment". There is in our judgment no real inconsistency between the observations made in Parshottam Lal Dhingra case [(1958) SCR 828] and Gopi Kishore Prasad case [AIR (1960) SC 689]. The third proposition in the latter case refers to an enquiry into allegations of misconduct or inefficiency with a view, if they were found established, to imposing punishment and not to an enquiry whether a probationer should be confirmed. Therefore, the fact of the holding of an enquiry is not decisive of the question. What is decisive is whether the order is by way of punishment, in the light of the tests laid down in Parshottam Lal Dhingra case [(1958) SCR 828]."

31. Insofar as the decision of the Supreme Court in **V.P. Ahuja** is concerned, regard must be had to the fact that there it was found, as a matter of fact, that the order of termination was clearly stigmatic. It was in the aforesaid backdrop, that the Supreme Court proceeded to observe that even a probationer is liable to be treated fairly and his services cannot in any case be terminated arbitrarily or in a punitive manner. Whether in the facts of the present case, there was a fair assessment and evaluation of the petitioner is an issue which is deferred for deliberation in the subsequent parts of this decision.

32. The judgement of the Supreme Court in **Sumati P. Shere**, firstly is clearly distinguishable since it was dealing with the termination of the services of an ad-hoc employee who had held office for over three years.

Even otherwise all that **Sumati P. Shere** ultimately holds is that even if not formal, an *"informal"* assessment of the work of employees must exist. **Sumati P. Shere** essentially lays down the principle that employees must be made aware of the defects in their work and the deficiencies in their performance. It would be apposite to recollect that the respondents do allude to the fact that the petitioner was informed verbally in this respect on more than one occasion. It has been contended that both the Secretary as well as the Chairman had, on more than one occasion, verbally cautioned the petitioner and advised him to improve. Whether the absence of a written caution would invalidate the order of termination is a question which shall be considered and ruled upon later.

33. The principles which must govern the evaluation of a probationer recently fell for consideration before three learned Judges of the Supreme Court in **Rajasthan High Court v. Ved Priya and Another**[8]**.** The relevant paragraphs of that decision are extracted hereunder: -

> "13. At the outset, we may observe that both the appellant as well as the impugned judgment have elucidated the correct statement of law regarding the width and sweep of judicial review by a High Court over the decisions taken by its Full Court on administrative side. Although it would be a futile task to exhaustively delineate the scope of writ jurisdiction in such matters but a High Court under Article 226 has limited scope and it ought to interfere cautiously. The amplitude of such jurisdiction cannot be enlarged to sit as an 'appellate authority', and hence care must be taken to not hold another possible interpretation on the same set of material or substitute the Court's opinion for that of the disciplinary authority. This is especially true given the responsibility and powers bestowed upon the High Court under Article 235 of the

[8] 2020 SCC OnLine SC 337

Constitution. The collective wisdom of the Full Court deserves due respect, weightage and consideration in the process of judicial review.

14. The present case is one where the first respondent was a probationer and not a substantive appointee, hence not strictly covered within the umbrella of Article 311. The purpose of such probation has been noted in Kazia Mohammed Muzzammil v. State of Karnataka

> "25. The purpose of any probation is to ensure that before the employee attains the status of confirmed regular employee, he should satisfactorily perform his duties and functions to enable the authorities to pass appropriate orders. In other words, the scheme of probation is to judge the ability, suitability and performance of an officer under probation. …"

15. Similarly, in Rajesh Kumar Srivastava v. State of Jharkhand it was opined:

> "… A person is placed on probation so as to enable the employer to adjudge his suitability for continuation in the service and also for confirmation in service. There are various criteria for adjudging suitability of a person to hold the post on permanent basis and by way of confirmation. At that stage and during the period of probation the action and activities of the probationer (appellant) are generally under scrutiny and on the basis of his overall performance a decision is generally taken as to whether his services should be continued and that he should be confirmed, or he should be released from service.…"

16. It is thus clear that the entire objective of probation is to provide the employer an opportunity to evaluate the probationer's performance and test his suitability for a particular post. Such an exercise is a necessary part of the process of recruitment, and must not be treated lightly. Written tests and interviews are only attempts to predict a candidate's possibility of success at a particular job. The true test of suitability is actual performance of duties which can only be applied after the candidate joins and starts working.

17. Such an exercise undoubtedly is subjective, therefore, Respondent No. 1's contention that confirmation of probationers must be based only on objective material is far-fetched. Although quantitative parameters are ostensibly fair, but they by themselves are imperfect indicators of future performance. Qualitative assessment and a holistic analysis of non-quantifiable factors are indeed necessary. Merely because Respondent No. 1's ACRs were consistently marked 'Good', it cannot be a ground to bestow him with a right to continue in service.

18. Furthermore, there is a subtle, yet fundamental, difference between termination of a probationer and that of a confirmed employee. Although it is undisputed that the State cannot act arbitrarily in either case, yet there has to be a difference in judicial approach between the two. Whereas in the case of a confirmed employee the scope of judicial interference would be more expansive given the protection under Article 311 of the Constitution or the Service Rules but such may not be true in the case of probationers who are denuded of such protection(s) while working on trial basis.

19. Probationers have no indefeasible right to continue in employment until confirmed, and they can be relieved by the competent authority if found unsuitable. Its only in a very limited category of cases that such probationers can seek protection under the principles of natural justice, say when they are 'removed' in a manner which prejudices their future prospects in alternate fields or casts aspersions on their character or violates their constitutional rights. In such cases of 'stigmatic' removal only that a reasonable opportunity of hearing is sine-qua-non. Way back in Parshotam Lal Dhingra v. Union of India, a Constitution Bench opined that:

> "28…. In short, if the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with."

20. The order of termination of services of Respondent No. 1 recites that "the Rajasthan High Court, Jodhpur, after examining all the relevant records has been of the opinion that Shri Ved Priya has not made sufficient use of his opportunities and has otherwise also failed to give satisfaction as a probationer in the Rajasthan Judicial Service." It is explicit from these contents that neither any specific misconduct has been attributed to Respondent No. 1 nor any allegation made. The order is based upon overall assessment of the performance of Respondent No. 1 during the period of probation, which was not found satisfactory. Such an inference which can be a valid foundation to dispense with services of a probationer does not warrant holding of an enquiry in terms of Article

> 311 of the Constitution. It is thus not true on the part of Respondent No. 1 to allege that it was a case of an indictment following allegations of corruption against him."

34. The Supreme Court in **Ved Priya** has taken due notice of the fact that the assessment of the work and conduct of a probationer is essentially subjective. It has further pertinently gone onto observe that while quantitative parameters would be ostensibly fair, they alone would not be relevant. In fact, their Lordships have proceeded to observe that *"quantitative parameters"* would, in fact, be imperfect indicators of future performance. It is in the aforesaid backdrop and bearing in mind the nature of the function which the authority performs while assessing the conduct of a probationer that it was held that apart from a qualitative assessment, various non-quantifiable factors are also liable to be taken into consideration before a probationer is confirmed in service. The observations referred to by this Court and as entered by the Supreme Court in **Ved Priya** were significantly made even though in that case the respondent employee had been consistently assessed as being good and so marked and recorded in the ACRs.

35. The Court now proceeds to consider the principal issue which arises in the present case, namely, whether the discontinuance of the petitioner as a probationer can be said to be based on a fair assessment of his performance or was wholly arbitrary and capricious as urged on his behalf. In order to answer the said issue, it would be appropriate to reproduce the relevant parts of the report as drawn by the Secretary as existing on the records of the respondents**:-**

"**Sub: Evaluation of work of Shri J. S. Arora, Director (HRD)**

The performance of Shri J. S. Arora has been reviewed on a number of occasions, since he has taken over his assignment as Director (HRD). There have been number of deficiencies, omissions and commissions and serious mishandling of cases in HDR department which have come to notice. Examination of such cases reveals that –

a) Important cases where Director, HRD is supposed to personally apply his mind have not been carefully attended to.

b) There has not been prioritization of cases for handling urgent cases with priority.

c) There have been instances of Shri Arora attending meetings in Delhi where his participation in the meeting has led to further complication requiring the Secretary to discuss the matter again etc.

Specifically, the following have come to notice over the period of past six months when Shri Arora has been in charge as Director, HRD: -

1) Not attending to Priority Work:-

There were six important items of work entrusted by Chairman as matters requiring priority attention. These were relating to joining of Advisers and shift in charges in Plants, working out relationship between the Advisers, Plant Chiefs and Headquarters, working out the VRS package, performance linked incentive scheme for officers, working out a scheme for phasing out contract workers and lateral recruitment procedure to be taken up for filling up posts of executives. No tangible progress at all could be achieved in any of these matters.

2) Manpower of MTSPS Unit # 4:

Failure to carry out the directive of the Board of the Corporation to firm up the manpower requirement of MTPS Unit – 4 and clear it through circulation before the next Board meeting. This process has taken more than one month and no acceptable out put could be generated by Director, HRD.

3) Failure to represent DVC in SC/ST Commission:

He attended the meeting in the Commission for SC/ST in Delhi regarding the case of Shri Soumitra Haider and could not affectively present the case as a result in which Secretary, DVC had to attend a further meeting in the SC/ST Commission in Delhi and the case has landed into complications and further enquiry. After he attended the meeting, he had not given complete feed back on the meeting in time to Secretary.

4) Official Language matters:

The performance of HRD department in the work relating to implementation of official language implementation policy was noticed adversely in the recent review. There have been inordinate delays in processing recruitment proposals in respect of vacancies relating to posts for the specific purpose of promotion of Hindi.

5) Unauthorised Leave:

Shri Arora has gone on leave recently (7th to 9th January 2004) without permission although he was at Headquarters. When asked for the reason for not submitting leave application in advance and obtaining approval in advance, he asked for leave from 7th to 9th January 2004 in his note dated 16.1.2004.

6) Unauthorised Absence:

Shri Arora joined back from leave (13th to 15th January 2004) on medical ground and joined the office in 16-1-2004. After joining back on 16-1-2004, he chose to be absent without intimation from the selection procedure for the post of Sr. Accounts Officer on 17th Jan 2004, in which he was also a selection committee member. This absence was totally unauthorized and uncalled for and without intimation. He had also not bothered to inform CVO who was to be in the Committee.

7) Selection of Director, SCD:

This meeting was scheduled for 19th January 2004. Shri Arora proceeded on leave before that and no proper intimation was given to all concerned nor any expert thought of for the Committee. The interview had to be postponed.

8) Selection of Director, (Commercial):

Chairman's convenience and orders on composition of Selection Committee were not taken. The interview had to be postponed.

9) Delay in DPC's:

No. of DPC's were not held in time and were held only after prodding.

10) Non-intimation of vacancies:

Manpower position including vacancy monitoring was not done. Post of DHS lies vacant till date.

11) Handling of Disciplinary Cases:

There was no contribution from him in such cases. Basically the vigilance Department had to fill up the gap.

12) Follow-up and Liaison with ASCI:

No liaison has been maintained with ASCI on the manpower study which is for Rs.40 lakhs and is going on in an open ended manner.

13) Other lapses: Examination of issues:

There have been number of other cases which have been put up without any examination of issues/ application of mind. For example the following are readily recalled-

(a) Group Insurance and Personal Accident Insurance Scheme.
(b) Scrapping old panel of GETs.
(c) Case of transfer of Shri A. K. Sengupta, SE (Commn).
(d) Drafting of letter of MP, Shri Basudeb Acharya.
(e) Implementation of Award of labour Court in the case of Shri Jamuna Singh.

All the instances of this nature show that:

There is lack of application of mind and incapacity/ inability to handle the cases by the Director, HRD.

Moreover, it is also seen that specific directives of the Chairman are not being heeded.

It is also seen that he is not able to present a case before a high level forum or authority factually and completely.

Recently, it was noticed that he erroneously quoted the most important figure of employment provided so far in DVC in the materials for presentation before the Parliamentary Consultative Committee.

The incumbent has spent nearly 6 months on probation and this style of functioning is not likely to produce any result and the department can only deteriorate further. In fact, Director (HRD) had a good number of Officers whom he failed to untilise, train and develop. In this process, we have lost valuable six months which is the entire period of probation of Shri Arora and his department is now effectively the most non-functional department in the Corporation. Shri Arora has been given enough time to improve and show results. He has been given advice verbally from time to time by Secretary and Chairman and also cautioned on file to be more careful in dealing with matters. I am also surprised to see that one of the strongest reasons for which Shri Arora had been considered for selection to the post that he was having qualification in Industrial Engineering, has

not been of any use/ application in DVC so far as the man power pattern/ rationalization issues are concerned.

Terms of appointment of Shri Arora include appointment on probation for a period of six months and subsequent continuation is dependent solely upon his successful completion of the probation period as provided in Regulation-12 of DVC Service Regulations.

In view of his performance so far, as mentioned above, there is hardly any option but to consider that Shri Arora's performance during the probation period has been extremely and unacceptably poor. Also, in view of the opportunity given to him and advice given to him from time to time and there being no improvement in performance, there is no case for consideration for extension of the period of probation. He cannot, therefore, be considered to have completed probation period successfully and so he cannot be considered for confirmation.

Action would therefore have to be taken to terminate the services of Shri Arora and immediately and place a senior Engineer of CE level as Director, HRD. A handpicked Director (HRD) out of the presently available Senior Engineers of DVC, would definitely deliver more than what Shri Arora has been able to deliver.

The fair order for termination of Shri Arora may, therefore, be issued."

36. Of equal significance is the report drawn by the Chairman and which ultimately was taken up for consideration by the Board of the respondent – Corporation. The report insofar as it would be relevant to answer the questions posited reads as follows**: -**

"**Sub**: Representation made by Shri J.S.Arora, Ex-Director(HRD),

DVC regarding his termination.

Shri J.S. Arora joined DVC, Kolkata as Director (HRD) on 1.8.2003 in response to the appointment offer bearing No. PL-30/725-3303 dated 8.7.2003 issued by Shri A.K.Basu, the then Secretary, DVC. This appointment offer was issued in favour of Shri Arora after his selection

on the basis of interview held for the post of Director (HRD) against open advertisement.

It is observed that the services of Shri Arora were terminated on 30.1.2004 after assessment of his performance in the post of Director (HRD). The services of Shri Arora were terminated vide order No. PL-30/725/Secy/Misc/pt-476 dated 30.1.2004 under Regulation 12 of DVC Service Regulations.

Shri Arora was subsequently offered appointment to the post of Head of Personnel & Administration in BPSCL (a joint venture of DVC & SAIL) vide appointment offer No. BPSCL/CEO/15/2407 dated 3.6.2004 in consideration of his representation. Shri Arora, however, did not accept the above appointment.

DVC has been receiving representations from Shri Arora regarding his termination. Desk Officer (DVC), MOP, GOI vide his letter dated 7.6.2005 has also forwarded an earlier representation of Shri Arora dated 12.6.2004 for reinstatement in DVC.

In order to examine the factual details pertaining to the appointment and subsequent termination of Shri J.S.Arora, Ex Director (HRD), DVC, Kolkata and recommend /suggest further course of action to be adopted by DVC, a committee was constituted by the Corporation vide Office order No. PL-30/725-278 dated 10.8.2005.

The committee after making an in-depth examination of available records has submitted its report dated 5.9.2005. Committee has recommended for consideration of the representation of Shri Arora for placement in DVC, as deemed fit.

The above report along with all representations made by Shri Arora and case file has been perused and considered by me.

It is evident from the report that the performance of Shri Arora was reviewed by the then Secretary, DVC. During such review numberof deficiencies was observed in his performance as Director (HRD). It is also observed after perusal of records that Shri Arora could not apply his mind to the various issues and as a result on various occasions embarrassing situations occurred for the Corporation. It is also seen that the then Secretary and Chairman also, on some occasions, advised Shri Arora to improve his performance. As no improvement was noticed in the matter of performance during the period of six months, the services of Shri Arora under Regulation 12 of DVC Service Regulations which provides that the services of a probationer can be terminated without notice during the period of his probation. It is therefore, clear that the termination order of Shri Arora as Director (HRD) during his period of

probation was in consonance with Regulation 12 of DVC Service Regulations.

It is also crystal clear that despite several representations received from Shri J.S.Arora, Ex-Director(HRD) pursuant to his termination from the services of DVC, none of the preceding two Chairmen gave any instruction for his reinstatement as Director (HRD), DVC presumably due to his past bad performance as Director(HRD) and lack of suitability for the said post.

In these circumstances, I am considering it appropriate to record my following observations with regard to the representations received from Shri Arora and the reports submitted by the committee.

It is evident from the legal opinion dated 20th July 2005 that Hon'ble Supreme Court in the matter of Mathew P. Thomas vs. Kerala State Civil Supply Corporation [JT 2002 (2) SC 162] has held that termination for unsatisfactory service is not stigmatic. Hon'ble Supreme Court in its another judgement also held that the termination during the period of probation is legal.

It is revealed from the report that the performance of Shri Arora was reviewed by the then Secretary, DVC which is recorded in his note dated 30.1.2004. Thereafter, the services of Shri Arora were terminated by the Secretary & Appointing Authority after discussion with Chairman vide order dated 30.1.2004 which was issued under Regulation 12 of DVC Service Regulations. The probation period was also not considered for extension beyond six months as there is no such provision under DVC SR. Moreover, the post of Director (HRD) occupied by Shri Arora was very sensitive and important and therefore it was appropriate not to allow extension of probationary period to prove his suitability for the post. This would have been detrimental to the interest of the Corporation and would have resulted in adversely affecting the smooth functioning of the Corporation.

In view of the facts and circumstances explained above it is very much clear that the order dated 30.1.2004 regarding termination of the services in respect of Shri J.S.Arora was passed in conformity with the Regulation 12 of DVC SR and did not suffer from any legal infirmities.

Corporation however, had offered appointment to Shri J.S.Arora as Chief of Personnel in BPSCL (a joint venture of the Corporation) vide letter dated 3.6.2004 in response to his representation dated 17.2.2004 purely on sympathetic and humanitarian consideration. However, Shri Arora did not accept the offer of appointment. Hence, there was not any other option but to cancel his appointment at BPSCL.

In the circumstances it would not be in the interest of the Corporation to accede to the request of Shri Arora for his reinstatement in DVC.

Director (HRD) may prepare a comprehensive proposal for developing a proper mechanism which would ensure implementation of the Committee's recommendations made under SI. No.4 of its term of reference."

In the above backdrop, Secretary may please arrange to place my observations as recorded above before DVC Board for information and further decision, if any, in this regard."

37. It would also be relevant to extract the Minutes of the meeting of the Board of the Corporation held on 21 March 2006 and where the issue relating to the termination of the petitioner came up for consideration. The Minutes are extracted hereunder**:-**

"Extract from the Minutes of the 568'" Meeting of the Corporation held on 21.3.2006.

File No. LD/Suit/455

RESOLUTION NO.7453(ITEM NO.28)

Appointment & subsequent termination of Shri J.S. Arora, Ex-Director/(HRD), DVC representation of Shri Arora in this regard.

The Corporation noted the following decisions given by Shri R.K. Singh the then Chairman, DVC on the report of the Committee and the appeal/representation of Shri Arora when it was placed for his review and reconsideration,

"It is evident from the report that the performance of Shri Arora was reviewed by the then Secretary, DVC. During such review, number of deficiencies was observed in his performance as Director (IIRD). It is also observed after perusal of reeds that Shri Arora could not apply his mind to the various issues and as a result on various occasions embarrassing situations occurred for the Corporation. It is also seen that the then Secretary and Chairman also, on some occasions, advised Shri Arora to improve his performance. As no improvement was noticed in the matter of performance during the period of six months, the services of Shri Arora under Regulation 12 of DVC Service Regulations which provides that the services of a probationer can be terminated without notice during the period of his probation. It is therefore, clear that

the termination order of Shri Arora as Director (HRD) during his period of probation was in consonance with Regulation 12 of DVC Service Regulations.

It is also crystal clear that despite several representations received from Shri J.S.Arora, Ex-Director (HRD) pursuant to his termination from the services of DVC, none of the preceding two Chairmen gave any instruction for his reinstatement as Director (HRD), DVC presumably due to his past bad performance as Director(HRD) and lack of suitability for the said post.

In these circumstances, I am considering it appropriate to record my following observations with regard to the representations received from Shri Arora and the reports submitted by the Committee.

It is evident from the Legal Opinion dated 20th July, 2005 that Hon'ble Supreme Court in the matter of Mathew P. Thomas-vs-Kerala State Civil Supply Corporation [JT 2002 (2) SC 162] has held that termination for unsatisfactory service is not stigmatic. Hon'ble Supreme Court in its another judgement also held that the termination during the period of probation is legal.

It is revealed from the report that the performance of Shri Arora was reviewed by the then Secretary, DVC which is recorded in his note dated 30.01.2004. Thereafter, the services of Shri Arora were terminated by the Secretary & Appointing Authority after discussion with Chairman vide order dated 30.01.2004 which was issued under Regulation 12 of DVC Service Regulations. The probation period was also not considered for extension beyond six months as there is no such provision under DVC SR. Moreover, the post of Director (HRD) occupied by Shri Arora was very sensitive and important and therefore, it was appropriate not to allow extension of probationary period to prove his suitability for the post. This would have been detrimental to the interest of the Corporation and would have resulted in adversely affecting the smooth functioning of the Corporation.

In view of the facts and circumstances explained above, it is very much clear that the order dated 30.01.2004 regarding termination of the services in respect of Shri J.S.Arora was passed in conformity with the Regulation 12 of DVC SR and did not suffer from any legal infirmities.

Corporation, however, had offered appointment to Shri J.S. Arora as Chief of Personnel in BPSCL (a Joint Venture of the Corporation) vide letter dated 03.06.2004 in response to his representation dated 17.02.2004 purely on sympathetic and humanitarian consideration. However, Shri Arora did not accept the offer of appointment. Hence, there was not any other option but to cancel his appointment at BPSCL.

In the circumstances it would not be in the interest of the Corporation to accede to the request of Shri Arora for his reinstatement in DVC."

Corporation endorsed the above decision given by the then Chairman, DVC.

Corporation also directed to implement the recommendations made by the Committee regarding general appointment procedure to be adopted for similar appointments in future under terms of reference 4 of the Committee.

Note: The Implementation Report on the above Resolution or the progress made, if any, towards its implementation may kindly be communicated to the undersigned within 7(seven) days from the date of issue of the Resolution. Subsequent progress in the matter may be communicated on fortnightly basis.

(M. J. Jaffrey)
Joint Secretary

To
The Director (HRD),
DVC, Kolkata"

38. The report as drawn up by the Secretary establishes that the petitioner by virtue of being the Director (HRD) had frequent interactions with the said authority as well as the Chairman. The Secretary after alluding to various specific instances, which in his opinion indicated the unsuitability of the petitioner to man the responsible post of Director (HRD), had come to opine that the petitioner was inept and that the HRD department under his control and supervision had become the most "non-functional"

department of the Corporation. The Secretary apart from referring to the lack of leadership qualities displayed by the petitioner had taken into consideration aspects such as a failure to attend to priority works, to heed the advice and directives of the Chairman, providing of inaccurate information to a Parliamentary Standing Committee to ultimately describe the performance of the petitioner during the probationary period as being "extremely and unacceptably poor". The Chairman, after taking note of the report of the Committee and the legal opinion which existed on file, found no reason to differ from the opinion as formed by the Secretary. Both these reports were duly considered by the Board of the Corporation and the views expressed and recorded duly accepted. The aforesaid recital of facts establishes that the circumstances leading up to the termination of the petitioner was considered at different hierarchical levels of the Corporation, duly deliberated upon and all authorities ultimately came to the firm conclusion that the termination did not merit review. The resolution of the Board of the Corporation must be accorded additional significance since it represents a collective review of the impugned action having been undertaken at the highest level and no justification being found to exist which warranted the petitioner being reinstated.

39. As is well settled, the assessment of the work and performance of a probationer, is a function which must be primarily discharged by the employer with the Court invoking its powers of judicial review only where such action can be said to be tainted by manifest arbitrariness and lack of probity. While the action to terminate the services of a probationer would

not sustain if established to be blatantly capricious, Courts would be equally wary of taking on the mantle of assessing the performance and suitability of a probationer and substitute or impose its own opinion on the aforesaid question. All that judicial review would mandate would be to pose the question whether the performance and suitability of a probationer was fairly evaluated and assessed by the employer bearing in mind factors which would be relevant and germane keeping in mind the interests and efficiencies of administration.

40. Tested on the anvil of the aforesaid precepts, this Court comes to conclude that the opinion as formed by the Secretary and the Chairman, which came to be collectively approved by the Board, unequivocally evidences the respondents having duly undertaken an exercise to fairly assess the suitability of the petitioner. The reports of both the Secretary as well as the Chairman have referred to specific aspects of the work and responsibilities assigned to the petitioner and his failure to meet the standards expected of an incumbent manning a senior and responsible position in the organisation. The petitioner was appointed as a Director in the HRD department of the Corporation. The Department of Human Resources in any functional organisation employing a large work force plays a pivotal and significant role. It oversees and performs various essential functions commencing from recruitment and appointment of qualified and able staff, their placement for efficient working of the organisation, myriad functions relating to industrial relations, attending to the demands raised by officers and employees to ensure a healthy working

environment. As the Director of this key department, the respondents have ultimately and upon a fair appraisal of his performance come to conclude that the petitioner is unsuited to discharge the duties and functions attached to that post and that in any case he had failed to improve the working of the concerned Department. They ultimately came to conclude that his continuance would not be in the interest of the organisation. Regard must be had to the fact that the decision to discontinue the engagement of the petitioner was not based on some unsubstantiated or unproven misconduct nor has the impugned action been established to be founded on malice or motivated by extraneous considerations. In any case the formation of opinion cannot be viewed as being capricious, biased or unfair.

41. Insofar as the offer of appointment in the subsidiary of the Corporation is concerned, the final offer admittedly was in respect of a post which was clearly inferior in status to the position that was originally held by the petitioner. While initially, the petitioner asserts he was offered an equivalent position, the reasons which ultimately weighed with the respondent to offer a downgraded post are not clearly borne out from the record. This aspect would, in any case, be of little significance since the petitioner cannot be recognised as invested with an indefeasible right to be offered an equivalent post by the respondents after the termination of his engagement as a probationer. Significantly the offer of appointment as made by the subsidiary also placed the petitioner on probation. It was not that the petitioner was offered a permanent placement in the subsidiary. That offer was also subject to the work and performance of the petitioner

being assessed over a period of six months. This clearly demolishes the contention of Mr. Mongia that the second offer of appointment is liable to be viewed as a recognition of the merit of the petitioner and the termination of his engagement being self-contradictory. The Court also bears in mind the contention of the respondents that the second offer of appointment was based solely on sympathetic considerations and offered as a matter of grace.

42. The Court then proceeds to deal with the submission of Mr. Mongia flowing from a failure on the part of the respondents to have produced records which may have borne the written cautions allegedly recorded and conveyed to the petitioner. Undisputedly, despite repeated opportunities having been granted to the respondents at different stages of these proceedings, no records which may have lent credence to the recitals to the aforesaid effect as appearing in the report of the Secretary, were produced. Even the Committee that was constituted by the respondent itself noted that no such records were either produced or were traceable. The respondents expressed their inability to produce records when the matter was taken up for final hearing with learned senior counsel stating that since the matter was extremely old, it would be impossible to ferret or trace out the relevant record at this stage. The Court thus proceeds on the premise that the contention of the petitioner that no written warning was ever issued has gone unrebutted and, in any case, has not been disproved. The issue that would still survive for consideration would be, whether the absence of a formal or written notice would by itself invalidate the impugned action.

This, in the considered opinion of the Court, must be answered against the petitioner for reasons which follow.

43. Firstly, the Court fails to find any mandatory legal requirement which obligated the respondents to apprise the petitioner of the shortcomings necessarily in writing. A probationer may be advised to shore up his work and performance even verbally. In fact, **Sumati P. Shere** lends support to the conclusion of this Court in this respect when the Supreme Court succinctly observed that *"an informal, if not formal give and take on the assessment of work of an employee should be there."* What **Sumati P. Shere** emphasises is the imperative need to inform and communicate the employee of shortcomings in performance enabling him to improve his output and performance. The observations as entered in **Ram Narayan Das** were based on the language of Rule 55-B of the CCS Rules which expressly contemplated the employee being informed of the proposal to terminate his employment and being granted an opportunity to show cause against the proposed action. The observations appearing in **V.P. Ahuja** are to be understood in light of the Court finding the terms of the order of termination to be ex facie stigmatic. In any case and was noted hereinbefore, the proposition that even a probationer is entitled to be treated fairly cannot possibly be disputed. In summation it may only be noted that none of the decisions noticed above, lay down, as a principle of law, that a probationer must be warned or cautioned in writing before his services are dispensed with.

44. Additionally, the Court takes into consideration the consistent stand of the respondents that the petitioner was verbally cautioned by both the Secretary as well as the Chairman on multiple occasions to improve his functioning. The Court finds no justification to either ignore or disbelieve those assertions of the respondents. Regard must also be had to the fact that both the abovementioned authorities had the opportunity to closely monitor the work of the petitioner directly and evaluate his abilities to discharge the responsibilities attached to the post held by him. This was, therefore, not a case where the decision to terminate the services of the petitioner was based upon hearsay. The Court also weighs in consideration the undisputed fact that the Board of the Corporation had the occasion to review the decision making process and ultimately resolved to affirm the decisions taken by the Secretary and the Chairman.

45. The Court also finds merit in the submission of Mr. Das, learned senior counsel, that the report of the Committee and the legal opinion were not binding on the Chairman. They were merely tools and aids to enable the Chairman to arrive at a just and fair conclusion. Bearing in mind the subjective character of the exercise which was liable to be undertaken to evaluate and assess the ability of the petitioner, the Court finds no justification to interfere with the impugned orders on this score. The conclusion of the Committee that the procedures contemplated under the O.M. to evaluate and assess the performance of probationers in future can at best be viewed as being recommendatory in character. The Board also accepted the recommendation made in this respect. However, merely

because the respondents did resolve to adopt another methodology to be implemented in the future, that would not warrant invalidating the termination of the probationary engagement of the petitioner.

46. The Union respondent has, in the considered view of this Court, rightly come to the conclusion that in matters relating to officers and employees of autonomous bodies it principally has no authority to either interfere or intervene. This since it is those organisations who stand statutorily vested with the power to exercise administrative and supervisory control over their officers and employees. It would be wholly inappropriate, if not impermissible, for the Union to intercede except where it is conferred an appellate, revisionary or supervisory power in that regard by law. Under the statutory regimen which applied in the present case, the Union was, undisputedly, assigned no role to discharge and thus rightly desisted from interfering with the decision ultimately taken by the Corporation.

47. Accordingly, and for the aforenoted reasons, the writ petition fails and shall stand dismissed.

YASHWANT VARMA, J.

JANUARY 18, 2022
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