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

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Date of Decision : February 19, 2015

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W.P.(C) 8114/2013

COOK SURESH KUMAR

..... Petitioner

Represented by: Mr.Anuj Aggarwal, Advocate with
Ms.Niti Jain, Advocate

versus

UNION OF INDIA & ORS

..... Respondents

Represented by: Mr.Rajesh Gogna, Advocate with
Ms.Silky Luthra, Advocate for R-1 to
R-6

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J. (Oral)

1. The petitioner was given employment as a cook by the Central Reserved Police Force and while on probation his services were terminated by an order dated February 14, 2007, which reads as under:-

“NOTICE FOR TERMINATION OF SERVICE

In pursuance of rule Proviso to sub rule (1) of rule 5 of the Central Civil Services (Temporary Service) Rules, 1965, I, Gurdeep Singh Addl. DIGP GC, CRPF, Neemuch hereby terminate forthwith the services of No.055220481 Cook/Hosp Suresh Kumar of GC, CRPF, NMH and direct that he shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of notice at the same rates at which he was drawing them immediately before the termination of his service or, as the case may be, for the period by which such

notice falls short of one month.”

2. Prior thereto a show cause notice bearing no date but issued in the month of December, 2006 was issued to the petitioner by the competent authority which reads as under:-

“OFFICE OF THE ADDL. DY. INSP. GENERAL, GROUP CENTRE, CENTRAL RESERVE POLICE FORCE, NEEMUCH (M.P.)

No. P-VIII-1/2006-EC-2

Dated December, 2006

To,

*Force No. 055220481 Cook (Hospital) Suresh Kumar
Composite Hospital, CRPF,
Neemuch, Madhya Pradesh.*

*Through - The DIGP (Medical), Composite Hospital, CRPF,
Neemuch.*

*Subject:- Representation against suspension – Show
Cause Notice*

Our office is in receipt of your application dated 11/12/06. After carefully examining the contents of your application, you are hereby informed that the CRPF Rules referred to in para 3(a) of your application, are not applicable in case of your suspension. You are further hereby informed that your suspension has already been revoked by the competent authority and an Office Order of even number dated 11/12/06 has already been issued to that effect.

2. In addition to the above, your attention is hereby drawn towards your above referred application and the application dated 5/12/06 addressed to the DIGP, CRPF and it is stated that both of your above referred applications have been presented to the higher authorities without following the proper/prescribed channel, which reflects ignorance of the principles laid down by the Force. Further, you have not

provided due information of your arrest in relation to the criminal proceedings pending pursuant to the theft of computer from the Hospital's store room, to your Appointing/Disciplinary Authority or to your immediate senior, which is violative of the Memorandum No. 30/59/54-EC (a) dated 25/2/1955 issued by the Ministry of Home Affairs, Government of India. In both the aforesaid applications respectfully, you have represented against your suspension and have complained regarding forceful confession obtained from you by the DIGP, Composite Hospital, which cannot be termed as providing due information by you to your Appointing/Disciplinary Authority or to your immediate senior.

3. *Therefore, you are required to show cause as to why:-*

(a) both the applications were addressed to the higher authorities without following the proper channel.

(b) the reasons for not furnishing the due information relating to your arrest in the criminal proceedings to your appointing authority or immediate senior, in capacity of a government servant.

(c) strict disciplinary proceedings be not initiated against you for the reasons as aforesaid.

4. *A written reply to this Office must be ensured within 15 days from the date of receipt of this letter.*

For ADIGP,

GC, CRPF, Neemuch

No.P-VIII-1/2006-EC-2

Dated December, 2006"

3. From the show cause notice it is apparent that pertaining to a theft of a computer from the hospital store room, an FIR was registered. Concededly the petitioner has since been acquitted at the criminal trial.

4. The petitioner submitted a response to the show cause notice issued to him in December 2006 and pleaded innocence. The department issued the termination order dated February 14, 2007.
5. The petitioner submitted a representation against the order dated February 14, 2007 which was rejected on July 26, 2007. He submitted a memorial to the DG, CRPF which was rejected on January 07, 2009. On being acquitted at the criminal trial, petitioner submitted another representation which was rejected on May 28, 2013 resulting in instant writ petition being filed praying that the impugned orders dated February 14, 2007 and the order dated May 28, 2013 be set aside.
6. In the counter affidavit filed the stand taken by the respondents is: -

“VI. That on the intervening night of 10.11.2006 or 11.11.2006 a computer system being CPU No.5043A-1073499 alongwith the monitor, keyboard and mouse was found missing from the main store of Station Hospital GC, Neemuch. Accordingly, a Court of Inquiry was ordered to find out the circumstances under which computer system was lost from the Hospital Store and to fix the responsibility of error doing persons was ordered vide office order No.IX-9/06-EC-2 dated 11.11.2006. Besides, a report regarding theft was lodged with Police Station Neemuch (by DIG Medical) Cantt Composite Hospital Neemuch on 11.11.2006. On 13.11.2006 during formal investigation made by the DIG (Medical), Composite Hospital, Neemuch alongwith the Hospital Staff. Petitioner informed the DIG (Medical) that the lost computer is lying in the bushes behind the Hospital building. Accordingly, Police Station Neemuch Cantt was informed and the lost computer was recovered by the Police from the bushes behind the Hospital building and was taken in their custody, which later on was released from the Court on 17.11.2006.

VII. That theft being a suspected case, both of them were arrested on 22.11.2006 at about 2210 hrs in connection with FIR No.486/06 dated 11.11.2006 under section 379 of

IPC. Subsequently, RT/Cook Pawan Kumar was released from judicial custody on bail on 24.11.2006 and Petitioner was released on 29.11.2006 (AN). During the Police investigation, both the above Cooks admitted their offence before the Police. As such, Police Station Neemuch submitted a Criminal Challan No.415/2006 dated 11.12.2006 under Section 457 and 380 of IPC to the Court of CJM Neemuch. Apart from above, both the Petitioner and Pawan Kumar were held responsible for theft by the Court of Inquiry and it was opined that they are not 'fit' persons to retain further in the Force."

7. The issue of termination of probationers has cropped up time and again. It has received judicial attention over four decades. Tests have been evolved, found to be difficult to apply; they have been reformulated from time to time.

8. Till date no test has been devised where a person's capacity, integrity, suitability, utility and capacity to work in harmony with the others can be tested at one go. Therefore, law vests a right in the employer, to keep under the watch the services of the person he has employed, but for a specified duration of time. This is to guard against errors of human judgment in selecting a suitable candidate. The employee remains on test for a specified duration i.e. the period of probation before he gets a right to be permanently absorbed. This period of probation affords to the employer locus to watch the efficiency, ability, integrity, sincerity, suitability and the competence of the probationer employee. This is the period of reassurance for the employer to reassure that his initial judgment was right. Therefore, an employer has a legal right to dispense with the services of the employee without anything more, during or at the end of the prescribed period, which is styled as the period of probation.

9. In the light of the aforesaid concept of probation as understood under Service Jurisprudence, termination of the services of the probationer, during or at the end of the period of probation does not affect any right of his, as indeed he has no right to continue to hold the post, save and except after confirmation.

10. However, where a probationer is stigmatized, evil consequences flow. He has to live with the stigma all his life. This stigma would affect his future prospects of finding suitable employment elsewhere. Therefore, harmonizing the right of the employer and the right of the employee the service jurisprudence has recognized that where the termination of services of a probationer visits him with a stigma or is penal or mala fide, the probationer would have a right to justify that the cause which has resulted in his being removed is other than relating to his personal capacity, suitability, utility or capacity to work.

11. When is the order of termination of services of probationer discharge simplicitor and when is it punitive?

12. To find an answer to the above question we look at the judicial precedents on the point.

13. The first decision on the point is the decision of the Constitutional Bench of the Supreme Court reported as AIR 1958 SC 826 Purshottam Lal Dhingra v Union of India wherein it was held that where under the contract or Rules the government has a right to terminate the services of a probationer at any time, the termination of services of the probationer, in the manner provided in the contract or Rules, would not attract the provisions of Article 311(2) of the Constitution of India. In such cases, the motive operating on the mind of the government while terminating the services of the probationer is wholly irrelevant was the law declared.

However, where the government had terminated the services of the probationer to penalize him for misconduct, negligence or any like reason, the requirements of the provisions of Article 311(2) must be complied with. It was further held that it is not the form of the termination order but the substance thereof which would determine whether it is penal and that, in an appropriate case, the Court can tear the veil behind a termination order which is innocuous on its face and is a discharge simplicitor.

14. Next came the decision of the Constitutional Bench reported as AIR 1960 SC 689 State of Bihar v Gopi Kishore Prasad wherein following 5 propositions were laid down regarding termination of the services of a probationer:-

“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 311(2) of the

Constitution and will, therefore, be liable to be struck down.

5. *But, if the employer simply terminates the services of the 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.”*

15. Thereafter in the decision reported as 1961 (1) SCR 606 State of Bihar v Ram Narayan Das the ‘inquiry test’ laid down in Gopi’s case (supra) was given a new dimension. It was laid down that one should look into ‘*object or purpose of the inquiry*’ and not hold the termination to be punitive merely because an inquiry was conducted before the issuance of termination order. Where the inquiry was conducted to ascertain whether the probationer is fit to be confirmed the termination order would not be punitive.

16. Then came the decision of the Supreme Court reported as (1964) 5 SCR 190 Champaklal Chimanlal Shah v. Union of India wherein it was held that a preliminary enquiry conducted by the employer to satisfy that there was reason to dispense with the services of the probationer would not attract the provisions of Article 311(2) of the Constitution of India.

17. After considering the decisions in Purshottam Lal’s case (supra), Gopi Kishore’s case (supra) and Ram Narayan’s case (supra), in the decision reported as AIR 1968 SC 1089 State of Punjab v. Sukh Raj Bahadur a three-Judge Bench of the Supreme Court culled out following propositions with regard to termination of services of a probationer:-

“On a conspectus of these cases, following propositions are clear:

1. *The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Art. 311 of the Constitution.*

2. *The circumstances preceding or attendant on the order of termination have to be examined in each case, the motive behind it immaterial.*

3. *If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.*

4. *An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Art. 311 of the Constitution.*

5. *If there be a full-scale departmental enquiry envisaged under Art. 311 i.e. an Enquiry Officer is appointed, a charge sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article.” (Emphasis Supplied)*

18. We then note the decision of the Constitutional Bench reported as AIR 1974 SC 2192 *Shamsher Singh v. State of Punjab* wherein it was held that where the order of termination of services of a probationer is ‘*motivated*’ by a misconduct, negligence, inefficiency or any other like disqualification, the same is not punitive. However, where the order terminating the services of a probationer is ‘*founded*’ on misconduct, negligence, inefficiency or any other like disqualification, the same is punitive. It was further held that the motive behind the termination order is irrelevant for the reason motive inheres in the state of mind which is not

discernible. On the other hand, if the order of termination is founded on misconduct it is objective and manifest.

19. In the decision reported as AIR 1980 SC 1896 Gujarat Steel Tubes Ltd v Gujarat Steel Tubes Mazdoor Sabha a three-Judge Bench of the Supreme Court dwelt upon the concepts of ‘motive’ and ‘foundation’ referred to in the earlier decisions of the Supreme Court in Purshottam Lal Dhingra and Shamsher Singh’s cases (supra) in the following terms:-

“The anatomy of a dismissal order is not a mystery, once we agree that that substance, not semblance, governs the decision. Legal criteria is not so slippery that verbal manipulations may outwit the court. Broadly stated, the face is the index to the mind and an order fair on its face may be taken at its face value. But there is more to it than that, because sometimes words are designed to conceal deeds by linguistic engineering. So it is beyond dispute that the form of the order or the language in which it is couched is not conclusive. The court will lift the veil to see the true nature of the order. Many situations arise where courts have been puzzled because the manifest language of the termination order is unequivocal or misleading and dismissals have been dressed up as simple termination. And so, judges have dyed into distinctions between the motive and foundation of the order and a variety of other variations to discover the true effect of an order of termination. Rulings are a maze on this question but, in sum, the conclusion is clear. If two factors coexist, an inference of punishment is reasonable though not inevitable. What are they? If the severance of service is effected, the first condition is fulfilled and if the foundation or causa causans is the servant’s misconduct the second is fulfilled. If the basis or foundation of the order of termination is clearly not turpitudinous or stigmatic or rooted in misconduct or visited with evil pecuniary effects, then the inference of dismissal stands negated and vice versa. These canons run right through the disciplinary branch of master and servant jurisprudence, both under Article 311 and in other cases including workmen under managements....

Masters and servants cannot be permitted to play hide and seek

with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic process but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The court will find out from other proceedings or documents connected with the formal order of termination what the true ground for termination is. If, thus scrutinize, the order has a punitive flavor in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the services of a delinquent servant, it is a dismissal, even if he had right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal even if full benefits as on simple termination, are given and non-injurious terminology is used. On the contrary, even if there is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or punitive pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is then not the moving factor in the discharge. We need not chase other hypothetical situations here. What is decisive is the plain reason for the discharge, not the strategy of a non-enquiry or clever avoidance of stigmatizing epithets. If the basis is not misconduct, the order is saved. (Emphasis Supplied)

20. In the decision reported as (1999) 3 SCC 60 Dipti Prakash Banerjee v. Satvendra Nath Bose National Centre for Basic SC, following 3 questions had arisen for consideration before the Supreme Court:-

“(i) In what circumstances, the termination of a probationer’s

services can be said to be founded on misconduct and in what circumstances could it be said that the allegations were only the motive?

(ii) When can an order of termination of a probationer be said to contain an express stigma?

(iii) Can the stigma be gathered by referring back to proceedings referred to in the order of termination?"

21. With respect to the question No.(i), the Court observed as under:-

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

22. With respect to the question No.(ii), the Court observed as under:-

"Thus, it depends on the facts and circumstances of each case and the language or words employed in the order of termination of the probationer to judge whether the words employed amounts to stigma or not."

23. With respect to the question No.(iii), the Court observed as under:-

"On this point, therefore, we hold that the words amounting to "stigma" need not be contained in the order of termination but may also be contained in an order or proceeding referred to in the order of termination or in an annexure thereto and would vitiate the order of termination."

24. We then note the decision of the Supreme Court reported as (2002) 1 SCC 520 Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences wherein the Supreme Court summarized the law relating to the termination of services of a probationer as follows:-

“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 (c) which 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 termination. Conversely if any of the three factors is missing, the termination has been upheld.

.....

...Therefore, whenever a probationer challenges his termination the courts 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.

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.” (Emphasis Supplied)

25. Lastly, we note the decision of a three-Judge Bench of the Supreme Court reported as (2005) 5 SCC 569 State of Punjab v Sukhwinder Singh wherein the ratio of law laid down by the Supreme Court in Ram Narayan's

case (supra) that where the inquiry was conducted by the employer to ascertain whether the probationer is fit to be confirmed the termination order would not be punitive was reiterated.

26. From the aforesaid decisions, we can safely conclude that the legal position which emerges is that where an inquiry is conducted into an alleged misconduct committed by the probationer behind his back and a simple order of termination is passed '*founded*' on the report of the inquiry indicting the probationer, the action of termination of services of probationer would be tainted. But where no findings are arrived at any inquiry or no inquiry is held but the employer chooses to discontinue the services of an employee against whom complaints are received it would be a case of the complaints '*motivating*' the action of termination of services of probationer and hence would not be tainted.

27. To illustrate, let us take a hypothetical situation. A and B are working as Head Cashier and Junior Cashier respectively in a bank. Whereas A is the permanent employee of the bank, B is a probationer. The chest of the bank has 2 locks numbered X and Y. Whereas A is entrusted with the key of lock X and B is entrusted with the key of lock Y. The purpose is that the chest could be opened after both locks X and Y are unlocked and since cash is kept in the chest, A and B would have to jointly open the chest and each would be a guard against the other. On a given day some money is found missing from the chest. An inquiry conducted reveals that A and B used to entrust their respective key to each other when one would leave the precincts of the bank for some personal work. Nobody's guilt is determined, and as a matter of fact the fact finding inquiry is not intended to determine anybody's guilt. Services of B are terminated by the bank. It would be a case where the termination based on the inquiry would be '*motivated*' on the inquiry

report and not '*founded*' thereon. There is no aspersion cast upon B and the termination would be immune from challenge. But if the inquiry held is to find out who misappropriated the money and a definite finding is arrived at that B misappropriated the money and holding him to be a corrupt man, services of B are terminated, it would be a case where termination is '*founded*' on the inquiry and would be vitiated in law.

28. In the instant case the counter affidavit filed would show that the respondents held a Court of Inquiry at which a definite verdict of guilt was returned against the writ petitioner. The writ petitioner was therefore entitled to a full fledged inquiry to prove his innocence and we find that on lifting the veil the non-stigmatic order terminating petitioner's service is penal in nature.

29. We thus allow the writ petition and quash the order terminating the service of the petitioner and order his reinstatement but without any back wages. Petitioner would be entitled to notional pay increments on being reinstated. The department would be free to take action as per law.

30. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

FEBRUARY 19, 2015

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