

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

+ **WRIT PETITION (C) NO. 2773 OF 2000**

Date of Decision : February 13, 2009

Shri Harbhajan Singh Appellant
Through Mr. Vijay Kumar, Advocate

Versus

Airports Authority of India and another Respondents
Through Ms. Anjana Gosain, Advocate

CORAM :

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

SUDERSHAN KUMAR MISRA, J.

1. Shri Harbhajan Singh is an electrical engineer. He belongs to a Scheduled Caste. He was appointed on probation as Assistant Executive Engineer (Electrical), National Airports Division in its Project Division at Goa. He was thereafter transferred to Srinagar Airport. At Srinagar, on 27th June, 1997, his services were terminated. His termination letter reads as follows:

“The Competent Authority has decided that the services of Sh. Harbhajan Singh AEE(E), (on probation) at Srinagar Airport be terminated with immediate effect as per para 4 and 5 of the terms and conditions of the offer of appointment.”

He has invoked this Court's jurisdiction under Article 226 of Constitution of India, inter alia, praying that aforesaid order of

termination dated 27th June, 1997 be quashed and that the respondents be directed to re-instate him with all consequential benefits.

2. He contends that after repeated representations were ignored by the respondents, he moved the Chairman, National Commission for Scheduled Castes and Scheduled Tribes on 2nd July, 1997. After hearing the petitioner as also officers of the respondents, the Commission arrived at the following conclusions:-

“I) The authority to recall the termination order.

II) The authority to reinstate the incumbent and allow him to join his duty with back wages and subsequential benefit.

III) The authority should also cancel his malafide punishment transfer.

The authority concerned to review the matter of the incumbent in light of the above findings and action taken be sent to the commission within three weeks”

In response to these findings, the second respondent wrote to the Commission on 14th August, 1998 and said that the services of the petitioner were terminated as per the terms and conditions of his offer of appointment because his performance, “was not found satisfactory”, during the probation period; and that it may not be feasible to agree with the Commission’s recommendations.

3. He also contends that while he was working at Goa Airport, one Mr. V.K.Gupta, who was working as a contractor there, had turned inimical to him because he had detected several defects in Mr. Gupta’s work. He states that although these defects were brought to Mr.Gupta’s notice, they were not rectified. It is his case that Mr. Gupta

resented the petitioner's scrutiny of his work and filed a false complaint against him on 21st February, 1997. This ultimately led to the impugned order of 27th June, 1997, terminating his services. It is the petitioner's case that the action taken by the respondents to terminate his services is based on certain unilateral findings of misconduct arrived at by the respondents. It is also contended that before reaching this conclusion, the petitioner was not given any opportunity of being heard nor was any departmental enquiry worth the name conducted by the respondents.

4. Although, the termination order reproduced above is fairly innocuous, however, in their written synopsis filed before this Court, the respondents have disclosed specific reasons for terminating the petitioner's services. It is best to reproduce the relevant portion, which is in the following terms:-

“In fact his services along with one Mr.Ashotosh Samarkar have been terminated on the complaint of one Mr.V.K.Gupta, Proprietor of M/s Aircomfort (an air-conditioning contractor of IAAI) whose bills were not cleared and being harassed for not obliging both the employees by giving them bribery. Their services were terminated as a professional misconduct, cheating and demanding illegal gratification while holding a public office for which the punishment of dismissal from services were given for the alleged involvement in the crime as is clear from page 70-75 the paper book”.

5. In addition, even before the National Commission for Scheduled Castes and Scheduled Tribes, the respondents had taken a categorical stand that reason for the termination of petitioner's appointment was misconduct. An examination of the reply dated 6th October, 1997, to the representation of the petitioner before the

Commission, which is also placed on the records of this case, shows clearly that three specific reasons formed the foundation of the decision to terminate the services of the petitioner. The said reply states as follows:

“Shri Harbhajan Singh was appointed on probation as AEE(E) in AAI (NAD) on 5th August, 1996 and was on probation for a period of 2 years as per terms and conditions of his appointment which were duly accepted by him before joining. His services were terminated during the probation period in view of the following misconduct committed by Shri Singh:-

(1) Demanding 5% commission from the Contractor. STD Call by Shri Harbhajan Singh from Goa to Delhi at odd hours i.e, 11.00 PM to Contractor Sh. V.K.Gupta was alleged to have been made in this regard.

(2) Threats given to Contractor over telephone in a drunken state by Shri Singh.

(3) Delays to pass the bills of the Contractor.”

6. The issue before this Court is whether the impugned order of termination is founded on misconduct or whether misconduct can be said to be merely the motive that prompted the order. In the former case, the impugned order of termination could not have been passed without holding a proper enquiry and affording an opportunity to the petitioner.

7. In a number of cases, including the case of **Dipti Prakash Banerjee** vs. **Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and others** (1999) 3 SCC 60, the Supreme Court has laid down the criteria for differentiating between, “foundation”, and, “motive”, in relation to orders terminating services of probationers. In that case, after referring to a number of decisions,

the Supreme Court traced the history and background of the development of the law and in particular the reasoning of that Court in the case of **Radhey Shyam Gupta v. U.P.State Agro Industries Corpn. Ltd.** (1999) 2 SCC 21 wherein the Supreme Court has set down the circumstances under which an apparently innocuous order can be said to have misconduct as its foundation, as well those where misconduct can be said to form the motive thereof. In that context, the Supreme Court concluded as follows:-

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

In the same judgment, the Supreme Court also went into the question as to what amounts to ‘stigma’. In that context, whilst holding in paragraph 28 thereof that, “use of the word unsatisfactory work and conduct in the termination order will not amount to a stigma” and that,

“31. 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 amount to a stigma or not.....”

In that case, one aspect which was considered is “whether the impugned order is founded on any conclusions arrived at by the employer as to his misconduct or whether the termination was biased because the employer did not want to continue an employee against whom there were some complaints.”

The terms ‘motive’ and ‘foundation’ have been referred to repeatedly in a number of judgments. It has been held that if the termination of the employee has its motive in some act of misconduct, although the same is not mentioned anywhere in the letter of termination and there is no specific finding arrived at to that extent even in the records, then, there is no need for any proper enquiry into the matter by giving adequate opportunity to the affected officers. If, however, even if the order itself is innocuous, still, if the records were to demonstrate that misconduct is the foundation of the order, or to put it differently, if the authority concerned comes to a definite conclusion with regard to the misconduct of the officer before issuing the termination letter, then in that case, misconduct can be said to be the foundation of such an order, and if, the same is issued without proper enquiry, the same is bad. In this view of the matter, it is obvious that the question whether the misconduct forms the motive or the foundation of the impugned order must be answered after examining the records. In the latter case, regardless of whether an employee is a permanent employee or a temporary employee, he is entitled to the protection of the principles of natural justice and to have a proper enquiry conducted in this behalf. If such a case concerns a temporary employee then, although he may not be entitled to the fullest compliance of the rules and regulations pertaining to a

domestic enquiry applicable in the case of a regular employee, nevertheless, there must be a fair and impartial enquiry which follows a procedure which is just, fair and reasonable.

8. In this context, and with regard to whether the Court can go behind an innocuous letter of termination to determine whether misconduct is the foundation of the said order, the observations of the Supreme Court in the case of **Delhi Transport Corpn. vs. D.T.C. Mazdoor Congress and Ors.**, (1991) Supp (1) SCC 600 are apposite.

It held;

“335....it is open to the authorities to terminate the services of a temporary employee without holding an enquiry. But in view of the march of law made, viz., that it is not the form of the action but the substance of the order is to be looked into, it is open to the court to lift the veil and pierce the impugned action to find whether the impugned action is the foundation to impose punishment or is only a motive....”

9. In this case, most interestingly, the respondents in their replies before the National Commission for Scheduled Castes/ Scheduled Tribes have themselves taken a very categorical stand that the reason for the termination of petitioner's appointment was certain charges of misconduct, which, according to the respondents, were proved.

10. A perusal of the record shows that a complaint was made against the petitioner, while he was working at Goa Airport. This was investigated by Sh. A.K. Mishra, Superintending Engineer, who suggested in his investigation report that, “it is desirable to shift AEE (E) to some other Airport, in the interest of work.” An enquiry report was also prepared wherein it was concluded that the complaint against

the petitioner was of serious nature and therefore it was recommended that the petitioner's performance be watched or otherwise punitive action may be taken.

11. In support of his contentions, counsel for the petitioner has drawn my attention to a letter of the Chief Vigilance Officer issued on June 19, 1997 communicating the Chairman's approval to the termination of the petitioner's service. This letter states as follows:

"The Chairman, AAI (NAD) has approved termination of the probation of Shri Harbhajan Singh Bhatti, AEE (E) and Shri Ashutosh Sawarkar, JE(E) of CA, Goa with immediate effect for the misconducts mentioned in the report of Sh. A.K. Mishra SE (E)".

In other words, the authority concerned, including the Chairman, AAI (NAD), was satisfied about the existence of the misconduct and that the misconduct was fully established and was the clear and specific reason for the termination.

This position has been further confirmed by internal communications between the various officers of the respondent authority. In particular a communication dated 4th June, 1997, of Mr.D.K. Mahopatra, the CVO/ED(V), where it is stated as follows:-

"It is noticed that the allegations of the contractors against the aforesaid engineers are proved at the enquiry held"

In this context, counsel for the petitioner has also drawn my attention to communication dated 11th August, 1997, sent by the petitioner to the second respondent, wherein he stated that he has not

been given any opportunity of being heard and that this fact has not been rebutted anywhere.

12. These records, coupled with the averments made by the respondent at the bar, show that before issuing the order of termination, the respondent authority had fully satisfied itself about the guilt of the petitioner. It is not as if the misconduct attributed to the petitioner was merely in the realm of allegations, and in respect of which no further enquiry was made or conclusions drawn, before the decision to dispense with the petitioner's services was taken. I can understand that when certain allegations are received against a Probationary Officer, the concerned authority may look at the nature of those allegations and thereafter, without arriving at any definite conclusions about the correctness or otherwise of those allegations, a decision is taken to put an end to the service within the probation period. In that case, the misconduct alleged is merely the motive for terminating the service and it cannot be said to form the foundation for the termination order.

13. The counsel for the respondent has stated that it is in fact correct that the communications from 4th March, 1997 to 4th June, 1997 between various officers of the department inter-se show clearly that although on 7th March, 1997, the Chief Engineer had suggested that his explanation should be called as to why he should not be removed from service, it was ultimately decided that no such explanation is necessary because the misconduct has been proved by the enquiry held, and being a Probationary Officer, there is no need for any further action. In this context, it is noteworthy that it is the respondents own stand in their written synopsis filed in Court which are reproduced in

paragraph 4 above, that the petitioner's service was terminated, "as a professional misconduct, cheating and demanding illegal gratification for which the punishment of dismissal from service were given for involvement in the crime"

14. Thus admittedly, an enquiry into the alleged misconduct was conducted against the petitioner behind his back and no opportunity was given to him to present his case. His services were terminated because of the said enquiry with a view to punish him. The Supreme Court in **Chandra Prakash Shahi v. State of U.P. and others**, (2000) 5 SCC 152 held that;

"29. "Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry."

Looking to the observations of the Supreme Court in the above case and the circumstances of this matter, I have no doubt that the order in the instant case can also be said to be founded on the allegations of misconduct. It follows therefore that the authority ought to have afforded a proper enquiry and opportunity to the petitioner before taking a decision and removing him from service.

15. Counsel for the respondents also seems to think that the facts constituting either foundation or motive for termination must be found in the order of termination itself. According to her, misconduct as the reason for termination can be said to constitute the foundation of the termination order only if this is spelt out in the termination order itself and not otherwise. This submission appears to be wholly unfounded and is not supported by any authority. On the contrary, I find that the decision of the Supreme Court in **Mathew P. Thomas vs. Kerala State Civil Supply Corpn. Ltd. and others** (2003) 3 SCC 263 supports the view that the issue whether the alleged misconduct forms the foundation of the termination order or not must be decided by going into the facts of the case and even if there is a completely innocuous order not giving any reasons, if reasons for giving that order exist on the record, the same can be said to be foundation for that order. The Court, inter alia, held thus,

“.....From a long line of decisions, it appears to us that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service. If the form and language of the so-called order of termination simpliciter of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simpliciter or punitive. In cases where the services of a probationer are terminated by an order of termination simpliciter and the language and form of it do not show that either

it is punitive or stigmatic on the face of it but in some cases there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other words, the façade of the termination order may be simpliciter, but the real face behind it is to get rid of the services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simpliciter to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from service on the foundation of his misconduct.”

The above contention of counsel for the respondents cannot be accepted for another reason, which is that it is not the form of the order but the substance which has to be looked into to decide whether the reasons that prompted the order form the foundation or motive for that order. As held by the Supreme Court in **Delhi Transport Corporation's case** (supra), it is not the form of the action but the substance of the order which has to be looked into and for this purpose, it is open to the Court to lift the veil and pierce the impugned action to find whether the impugned action is the “foundation” to impose punishment or only a “motive”.

16. The counsel for the respondents has also relied on a decision of a Division Bench of this court in **Pinaki Ghosh vs. International Airport Authority of India** in LPA 2058/06 decided on 21st September, 2007. In that case, since performance is one of the criteria by which the suitability of an officer is judged during probation, all that was said that the officer's performance was found

unsatisfactory and the period of probation was not extended. It was not as if the probation was brought to an end as a punishment for misconduct, which is a completely different matter altogether. *Pinaki Ghosh's case (supra)* examined the question whether the order which stated that the officer's probation was not being extended because his performance was found to be unsatisfactory could be said to be stigmatic or not. In this connection, I have put it to learned counsel for the respondent that supposing, in a hypothetical case, if an officer's service was terminated during his period of probation and the letter of termination said, for example, "that it has been established that you are a thief, smuggler and cheat and therefore have no right to work in the organization, you deserve to be sent to jail", or words to that effect, whether such a letter terminating a probationer's service can be said to be stigmatic? Counsel for the respondent stated that even if such an order is given, it cannot amount to a stigma on the officer concerned. I am afraid such a statement by the counsel merely illustrates the lack of clarity on her part with regard to the law on the subject including the concept of termination simpliciter and one that is stigmatic, which have to be tested on the anvil of the terms, "foundation" and "motive", regardless of whether the officer is a confirmed officer or someone who is still on probation.

17. In the case at hand, probation has been admittedly brought to an end on the basis of a specific finding of, "professional misconduct, cheating and, demanding illegal gratification for which the punishment of dismissal from services was given.....". In other words, he has been punished for his involvement in a criminal act. This is the respondents own stand. Further more, I notice that although the

aforesaid letter written by the respondents to the SC/ST Commission on 14th August, 1998 states that the petitioner's services were terminated because his performance "was not found satisfactory"; unfortunately, the admitted facts demonstrate that it was not merely a case of evaluating the petitioner's performance during the probation period in the sense of Samsher Singh's case (**Samsher Singh Vs. State of Punjab** (1974) 2 SCC 831). The record shows that instead of being restricted to considering whether the work of the petitioner is satisfactory or whether he is not suitable for the post on account of inadequacy for the job or for any other temperamental or other reason not involving moral turpitude and hence must be discharged; the respondents went much further and reached conclusions to the effect that the petitioner was guilty of serious misconduct of a criminal nature. It is their own case that the impugned termination was a punishment inflicted on him for his misconduct. Clearly, therefore, the limits laid down by the Supreme Court in **Dipti Prakash Banerjee's case** (supra) have been transgressed. To the layman's understanding, the scope of the assessment to determine whether an officer's performance is satisfactory or not should naturally include everything that might be relevant for this purpose, including allegations of serious misconduct involving bribery and corruption. However, the law as it stands today, lays down different procedure to be adopted depending upon whether the decision to dispense with an officer's service is based merely on inadequacy for the job which has nothing to do with moral turpitude or whether it is based on a finding that the officer is guilty of serious misconduct. In the latter case, it is recognized that the officer's termination order casts a stigma on him and therefore it must not be passed without holding a proper enquiry.

18. Here, it is respondents own case that the services of the petitioner were terminated with a view to punish him for professional misconduct, threats and demanding illegal gratification while holding a public office. Furthermore, admittedly, no opportunity was given to the petitioner to present his case and the enquiry, such as it was, was conducted behind his back. There appears to be no defence to this petition in the light of the settled law. This leaves me in no doubt that the entire object of the exercise was to remove the petitioner for something about which the respondents had convinced themselves, but did not think it advisable or necessary to give the petitioner any opportunity to clear his name. I have no doubt that serious misconduct formed the foundation of the petitioners' dismissal order.

19. Under the circumstances, the impugned order dated 27th June, 1997 discharging the petitioner is quashed and set aside. The respondents are directed to reinstate the petitioner along with all consequential seniority and benefits within one month from today. It is open to the respondents to initiate any fresh proceedings against the petitioner if they are so inclined in accordance with law within three months from today.

Sudershan Kumar Misra, J.

February 13, 2009
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