

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

% *Judgment Reserved On: 15th September, 2010*
Judgment Delivered On: 20th September, 2010

+ **WP(C) 22658-60/2005**

GOVT. OF NCT OF DELHI & ORS. ...Petitioners
Through : Ms.Avnish Ahlawat, Advocate with
Ms.Latika Chaudhary, Ms.Simran
Singh and Mr.Nitesh Kumar Singh,
Advocates

Versus

NARESH KUMAR ...Respondent
Through: Mr.P.P.Khurana, Sr.Advocate with
Mr.Sunil Magon and Mr.H.K.Bajpai,
Advocates

WP(C) 22669/2005

GOVT. OF NCT OF DELHI & ORS. ...Petitioners
Through : Ms.Avnish Ahlawat, Advocate with
Ms.Latika Chaudhary, Ms.Simran
Singh and Mr.Nitesh Kumar Singh,
Advocates

Versus

SATISH KUMAR ...Respondent
Through: Mr.M.K.Bhardwaj, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MOOL CHAND GARG

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

PRADEEP NANDRAJOG, J.

1. Respondents of the two writ petitions being WP(C) No.22658-60/2005 and WP(C) No.22669-72/2005 i.e. Naresh Kumar and Satish Kumar respectively, were appointed on

probation against the temporary post of Warder Prison in Tihar Jail, Delhi vide memorandum dated 23.1.1996 relevant part whereof reads as under:-

“MEMORANDUM

On the recommendation of Staff Selection Board, the undersigned is hereby please to offer to Sh.Satish Kumar a temporary/post of Warder on a pay of ₹9050/- per month in the scale of ₹950-20-1150-EB-25-1400 in Central Jail, Tihar, New Delhi. The appointee will also be entitled to draw dearness allowance and other allowance at the rates admissible under the Rule and subject to the conditions laid down in the Rules and Orders governing the grant of such allowances in force from time to time. Other Terms and conditions are as follows:-

1. Sh.Satish Kumar will be on a probation for a period of two years from the date of appointment. Failure to complete the period of probation to the satisfaction of the Competent authority will render him liable to discharge from service without any notice.

2. The appointment will be terminated at any time by one month notice given by the either side viz, the appointee or the appointing authority without assigning any reasons. The appointing authority, however reserves the right of terminating the service of the appointee forth with or before expiry of the stipulated period of notice by making payment to him of a sum of equivalent to pay and allowances for the period of notice or unexpired portion thereof. “

2. A bare perusal of the relevant terms of the memorandum aforesaid reveals that Satish and Naresh were to be on probation for a period of 2 years and within the period the probation their services could be terminated without assigning any reasons. Satish Kumar joined duty as Warder Prison in Tihar Jail, Delhi on 10.7.1996 and Naresh Kumar joined duty as Warder Prison in Tihar Jail, Delhi on 23.7.1996.

3. Pursuant to an FIR registered for the offences punishable under Section 363/366/376 IPC Naresh Kumar and

Satish Kumar were arrested on 13.10.96 and were sent to judicial custody along with a third co-accused Jaswant Kumar.

4. Information pertaining to Naresh Kumar and Satish Kumar being accused of having committed the offence of kidnapping and rape and being arrested and denied bail was received by the jail authorities and the competent authority took a decision that services of Naresh Kumar and Satish Kumar should be terminated. On 16.10.1996 services of both the respondents were terminated under rule 5 of the CCS (Temporary Service) Rules 1965.

5. Order terminating services of Naresh Kumar reads as under:-

In pursuance of the proviso to Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service), Rules, 1965, I, R.S.Gupta, I.G.(Prisons) hereby terminate forthwith the services of Sh.Naresh Kumar S/o Sh.Ram Chander, Warder 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 which he was drawing 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.

6. Order terminating service of Satish Kumar reads as under:-

In pursuance of the proviso to Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service), Rules, 1965, I, R.S.Gupta, I.G.(Prisons) hereby terminate forthwith the services of Sh.Satish Kumar S/o Sh.Danbir Singh, Warder 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 which he was drawing 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.

7. A perusal of the two orders afore-noted shows that the orders are non-stigmatic and are orders of discharge simpliciter.

8. After 7 years of being accused of having committed the offences punishable under Section 363/366/376 IPC, Naresh Kumar, Satish Kumar and the third co-accused Jaswant Kumar were acquitted vide judgment and order dated 16.10.2003.

9. On 10.11.2003 they filed separate representations to the Authority appointing them and requested that in view of they being acquitted at the criminal trial the order terminating their services be revoked and they be re-inducted into service. The representations were rejected by the Appointing Authority and were communicated to them in identical words. We note the rejection communicated vide memorandum dated 4.12.2003 to Naresh Kumar. It reads as under:-

Reference his application dated 10.11.2003 regarding the revocation of termination of order dated 16.10.1996. Sh.Naresh Kumar, Ex-Warder is informed that as per rules, the case cannot be reopened after the expiry of 3 month, from the date of termination of service by the Head of Department.

10. Styling it as an Appeal, Naresh Kumar and Satish Kumar submitted representations to the Principal Secretary Home, probably for the reason the order of termination and the order rejecting their representations for re-induction in service was passed by the Inspector General Prisons, and the two thought that the Executive Administrative Head of Prisons being the Principal Secretary Home, Government of NCT Delhi could be the Authority to which they could appeal.

11. Vide order dated 22.6.2004 the Secretary Home rejected the representation styled as an Appeal filed by Naresh Kumar. The order reads as under:-

This concerns an appeal filed by Shri Naresh Kumar, Ex-Warder at Tihar Jail against his termination by an order dated 16.10.1996 of the then I.G. (Prisons), Central Jail Tihar.

2. I had given a personal hearing to the appellant on 21.4.2004 in the course of which he stated that he had been wrongly terminated. He mentioned that his termination was a consequence of a criminal case against him and two others before the court of the Addl. Sessions Judge. The charges against Sh.Naresh Kumar and two others concern the abduction of a lady, with dishonest intentions, and that he had later on raped her. Charges u/s 366/376 IPC have been framed against Sh.Naresh Kumar. He stated that all three had been acquitted by an order dt.16.10.03 of the Addl. Sessions Judge, and in view of this, he may be reinstated in jail service.

3. On going through the order of the termination, it is observed that the then I.G. (Prisons) had terminated the services of Sh.Naresh Kumar on 16.10.1996 in exercise of powers vested under the proviso in Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965. The Prisons Deptt. have stated in their comments regarding the appeal filed by Sh.Naresh Kumar, that this termination order is a termination simplicitor without attaching any stigma. The official was then still in temporary service and his services had been terminated as his work was not satisfactory during the period of probation. This has been done after allowing him one month's pay in lieu of notice of one month. It has further been pointed out by the Prison Deptt. that in the circumstances, termination is possible without assigning any reason.

4. On going through the wording of order of termination dt.16.10.1996 of the then IG (Prisons) it is clear that there is no mention whatsoever of Sh.Naresh Kumar's involvement in another criminal case. In fact, there is no mention whatsoever of any ground or reason which could be construed as causing a stigma on Sh.Naresh Kumar. This is, in fact, the correct procedure for termination under the Temporary Services Rules, where the ground should normally be confined to circumstances concerned with performance during the period of probation. In these

circumstances there is no need for any departmental inquiry. Such procedure would have been essential if there had been any grounds which could cause a stigma on the character or conduct of the charged official, necessitating the conduct of a full-fledged departmental inquiry in which he would be afforded an opportunity to defend himself. This is not the case in the matter regarding termination of Sh.Naresh Kumar.

5. Given the above facts, I see no reason to intervene in the matter and confirm the order already passed and the appeal is dismissed. Sh.Naresh Kumar and the D.G.(Prisons) may be informed accordingly.”

12. Vide order of even date the Secretary Home, Government of NCT Delhi rejected the representation, styled as an Appeal, filed by Satish Kumar. The order reads as under:-

This concerns an appeal filed by Sh.Satish Kumar, Ex-Warder, Central Jail Tihar requesting that he may be reinstated to his post at Tihar Jail. By way of a background it may be mentioned that by an order dated 16.10.1996 passed by the then Inspector General (Prisons), Shri R.S.Gupta, in pursuance of the proviso to Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965, the services of Sh.Satish Kumar, present petitioner had been terminated. It may be mentioned here that Sh.Satish Kumar had been tried by the court of the Addl.Sessions Judge in Sessions Case No.26/1997 based on a FIR No.26/1996, having been charged u/s 363/366/376 IPC. The complaint against the petitioner and some others was to the effect that they had abducted the complainant, Ms.Savita and outraged her modesty in a conference hall on 12.10.1996 and raped her on the same date at the house of one Jaswant Sharma at Vijay Enclave. After weighing the evidence, the Addl. Sessions Judge had disbelieved the story of Ms.Savita and had acquitted the present petitioner, Sh.Satish Kumar and two others. During the period of trial the three persons were in judicial custody, and they were ordered to be released. This order of the Addl.Sessions Judge was passed on 16.10.03. It is the contention of the petitioner in his appeal received in this office on 2.1.04 that following

his acquittal, he may be restored to his position as a warder in Tihar Jail.

2. In this connection he has mentioned that he had earlier requested the Director General (Prisons) for revocation of the termination order dt.16.10.03 by his application dated 10.11.03, to which he had received a reply on 4.12.03 from the Officer Incharge (Vigilance) in the Directorate General of Prisons, rejecting his request for revocation of the termination order dated 16.10.2003 by his application dated 10.11.2003, to which he had received a reply on 4.12.2003 from the Officer Incharge (Vigilance) in the Directorate General of Prisons, rejecting his request for revocation of the termination order pointing out that the case cannot be re-opened after expiry of three months from the date of termination by the Head of Department. I had given the petitioner an opportunity for personal hearing on 9.6.2004 and he had availed of the same. During the hearing he had mentioned that his family circumstances were very difficult owing to his financial position and requested for revocation of the termination order. He had also contested the reasons given by the Director General (Prisons) for rejecting his request.

3. I have carefully gone through the impugned order dated 16.10.1996 passed by the then Inspector General (Prisons) under Central Civil Services (Temporary Service) Rules, 1965. This order is strictly in pursuance of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965 and it does not make any mention whatsoever of the criminal case which was then pending against the petitioner. In short, the inference one can draw is that his involvement in the criminal case was not the ground for his termination. In view of this it cannot be said that any stigma had been cast on the petitioner in the process of terminating his service under Central Civil Services (Temporary Service) Rules. Also within the framework of the Central Civil Services (Temporary Service) Rules, 1965 there is a prescription under Rule 5 (2) for a Head of Deptt. or Competent Authority to reopen the case 'suo moto' and re-instate the government servant in service or such other order as may be considered proper. There is a specific stipulation that no case shall be reopened under the Sub rule after the expiry of three months except in special

circumstances. No such special circumstances exist in this case.

4. I have also considered the comments of the Director General (Prisons) received in this office on 16.2.04 on the appeal filed by the petitioner. The Prisons Deptt. have pointed out that the termination order passed by the Inspector General (Prisons) is termination simplicitor without attaching any stigma. It has been stated that his termination from service took place because his work was not satisfactory during the probation period.

5. Taking the above circumstances into consideration, there is no substance in the petitioner's appeal and the same is accordingly dismissed. The petitioner and the Director General (Prisons) may be informed accordingly."

13. It may be noted by us that the IG Prisons rejected the representations filed by Naresh Kumar and Satish Kumar holding that the order terminating their services was dated 16.10.1996 and as per rules the case could not be reopened after the expiry of three months. Same is the reasoning adopted by the Principal Secretary Home who additionally held that the orders terminating their services were non-stigmatic and there was no necessity of conducting a full-fledged inquiry before terminating their services.

14. Aggrieved by the said order rejecting their representations styled as an Appeal, Satish Kumar and Naresh Kumar filed Original Application No.1914/2004 and Original Application No.1800/2004 respectively before the Central Administrative Tribunal praying that the order dated 16.10.1996 terminating their services and the order dated 22.6.2004 passed by the Appellate Authority be quashed, it was also prayed that they be re-inducted in service with all consequential benefits.

15. Briefly noted, it was pleaded by both that the order terminating their services in the year 1996 was by way of

penalty imposed upon them as they were an accused on the allegation of having committed offences punishable under Section 363/366/376 IPC and that being penal in nature the department was obliged to hold an inquiry. Both of them pleaded that having joined service on 10.7.1996 and 23.7.1996 nothing adverse pertaining to their working was intimated to them till their services were terminated on 16.10.1996. Additional plea taken by Satish Kumar was that the order terminating his services was stigmatic.

16. The response of the department was that the services of Satish Kumar and Naresh Kumar were rightly terminated as within two months of the two joining service they were arrested by the police for having committed an offence punishable under Section 363/366/376 IPC. It was stated that the two were still under probation and the letter of appointment permitted the department to terminate their services without assigning any reasons. It was stated that the order terminating their services were non-stigmatic. It was pleaded that the Tribunal could not pry into the reasons which weighed with the Authority to terminate their services. Unfortunately, pertaining to Naresh Kumar it was pleaded that his work was not satisfactory. In the case of Satish Kumar, it was pleaded that the order dated 16.10.1996 could not be challenged by way of Original Application filed in the year 2004.

17. The Tribunal has allowed the petitions filed by the respondents. The Original Application filed by Satish Kumar was allowed vide order dated 21.4.2005. After copiously noting various judgments pertaining to when could the Court lift the veil and look for reasons behind an innocuous order of discharge, but without digesting them, the Tribunal held that the foundation of the order discharging the services of Satish

Kumar was his being accused of having committed an offence punishable under Section 363/366/376 IPC and thus his services were terminated by way of penalty and the same not being preceded by an inquiry rendered the order liable to be set aside. On the bar of limitation, the Tribunal held that since the appeal filed by Satish Kumar was entertained by the Appellate Authority and rejected vide order dated 22.6.2004, the Original Application filed before the Tribunal within one year thereof was within limitation.

18. Pertaining to the Original Application filed by Naresh Kumar, the Tribunal chartered a different route. In view of the justification given by the department in its pleading by way of reply to the Original Application that Naresh Kumar's unsatisfactory service was the cause to terminate his service, after calling upon the department to produce the record and justify the said plea, and finding none, the Tribunal held that it is apparent that the order of termination was motivated on the basis of some serious misconduct for which no inquiry was held and hence the order terminating the services of Naresh Kumar was illegal.

19. The Government of NCT Delhi has challenged the order dated 21.4.2005 allowing OA No.1914/2004 filed by Satish Kumar by and under WP(C) 22669-72/2005. The order dated 25.8.2005 allowing OA No.1800/2004 filed by Naresh Kumar has been challenged by and under WP(C) No.22658-60/2005.

20. Three issues were debated at the Bar between learned counsel for the parties. The first was whether the original applications were within limitation and the rival viewpoints projected at the debate were that: as per the petitioners the memorandum styled as an appeal was a non-statutory representation since no statutory provision

prescribes any appeal against an order terminating the services of a probationer and the rejection of a non-statutory representation could not extend the limitation. The response of the respondents was that the order dated 22.6.2004 passed by the Principal Secretary Home refers to his deciding the appeals filed by Naresh Kumar and Satish Kumar and thus the bar of limitation did not come in the way of the respondents. The second debate was whether Naresh Kumar and Satish Kumar being accused for having kidnapped and abducted a girl was the motive or the foundation for the action taken. Whereas the petitioners urged that the two being accused of serious offences and arrested was the motive and not the foundation of the order terminating their services, the respondents urged to the contrary by pleading that the order terminating their services was founded on the misdemeanour. The third issue of debate pertained to Naresh Kumar and the debate was whether Naresh Kumar's services were terminated on account of deficiency in work for which there was no proof and which was the justification pleaded before the Tribunal, to which the response of learned counsel for the petitioners was that an ignorant lawyer pleaded an ignorant defence and that the same had to be ignored and reality had to be seen.

21. On the bar of limitation, it is settled law that non-statutory representation can never extend the limitation. The order terminating the services of the respondents is dated 16.10.1996. Learned counsel for the respondents could show to us no statutory provisions providing the remedy of appeal against said order. In fact, the memorandums filed by Naresh Kumar and Satish Kumar under the label of an appeal is against the order/memorandum dated 4.12.2003 rejecting their representations for revocation of the order dated 16.10.1996. No statutory provision has been shown to us

which provides for the remedy of an appeal against an order rejecting a representation to recall or revoke an order of termination. That apart, order dated 4.12.2003 passed by the appointing authority rejecting the representations dated 10.11.2003 and 14.11.2003 filed by Naresh Kumar and Satish Kumar against the order dated 16.10.1996 terminating their services, clearly states that the representations were rejected as the case could not be reopened after the expiry of three months of the date when order terminating their services was passed. It is apparent that the representations made to the Appointing Authority were highly belated and were rejected as barred by limitation. Merely by labeling a representation as an Appeal and the said work being reflected in the order communicating rejection of the representation would not make the representation an appeal. It is settled law that it is the substance which matters and not the label.

22. Thus, we hold that not only was the representation dated 10.11.2003 and the representation dated 14.11.2003 filed by the respondents questioning the order terminating their services highly belated, the remedy before the Tribunal was barred by limitation.

23. We deal with the two further issues debated at the Bar.

24. The issue of termination of a probationer 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.

25. What is the final position of the law?

26. A person undergoes selection along with others and on being found more meritorious finds employment. This person cannot contend that since the employer has tested his

suitability he is entitled to serve till he attains the age of superannuation.

27. 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 watch the services of the person he has employed, but for a 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 the locus to watch the efficiency, ability, integrity, sincerity, suitability and the competent 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.

28. 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 has no right to continue to hold the post, save and except after confirmation.

29. The period of probation affords an opportunity to an employer to observe the work, conduct, efficiency, utility, integrity and suitability of the probationer to make up his mind whether to permanently absorb the probationer or dispense with his services.

30. In the decision reported as AIR 1962 SC 1711, S.Sukhwant Singh Vs. State of Punjab, the Supreme Court observed:-

“12. But the very fact that a person is a probationer implies that he has to prove his worth, his suitability for the higher post in which he is officiating if his work is not found to be satisfactory, he will be liable to be reverted to his original post even without assigning any reason, it would, therefore, not be correct to say that a probationer has any right to the higher post in which he is officiating or a right to be confirmed. A probationer being merely made eligible for being absorbed in a permanent post is in no better position.”

31. 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.

32. In the decision reported as AIR 1958 SC 36 Purshottam Lal Dhingra vs. UOI, the Supreme Court 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.

33. What is a stigma?

34. In the decision reported as 1987 (1) SCC 146 Kamal Kishore Lakshman Vs. Pan Amercian World Airways it was observed: *According to Webster's New World Dictionary, it (stigma) is something that detracts from the character or reputation of a person..... The Legal Thesuras by Burton gives the meaning of the word 'to be blemish, defect, disgrace, disrepute, imputation, mark of disgrace or shame'.*

35. In the decision reported as AIR 1961 SC 177 State of Orissa Vs. Ram Narayan Dass it was held that the words 'unsatisfactory work and conduct' in the termination order will not amount to a stigma.

36. The reason is obvious. Notwithstanding subjecting a new recruit to the rigors of a selection process, the employer has a right to see whether the recruit is able to perform the duties assigned to him. Being on probation, the recruit is kept under a watch to ascertain his performance. Not only is the recruit under the scrutiny but even the initial judgment of the employer is under a scrutiny for the reason even the employer has to consider and decide whether his initial judgment was correct. Logic demands that where the new recruit is able to discharge the duties assigned to him he should be permanently absorbed. It would be most illogical to say to the recruit that I find nothing wrong with your work but still I do not permanently absorb you. That is why some decisions have taken the view that it would be unfair not to point out the shortcomings in the work of a probationer thereby depriving him an opportunity to improve himself and all of a sudden discharge him from service stating that his work is not up to the mark.

37. In the instant case the order terminating the services of Naresh Kumar and Satish Kumar, contents whereof have been noted by us in paras 5 and 6 above do not refer to

any fact which casts a stigma on the two and thus we need not debate on the language of the orders with respect to the controversy that ex facie the orders are stigmatic in nature.

38. With respect to the plea that they being an accused for having committed offences punishable under Section 363/366/376 IPC and this was the foundation for the action, we note that the said controversy has to be resolved by noting the fact that in the orders terminating their services no reference has been made to said fact and on the language of the orders it cannot be said that the orders are founded on the ground that they have committed the offence of which they were charged of.

39. We have only to look to the fact whether by lifting the veil we can determine that the order terminating their services is founded on the fact that they have committed the offences which they were charged of. This process of inquiry would of necessity require us to determine whether the circumstance of they being accused of having committed serious penal offences was the motive propelling the formation of the opinion that it was no longer desirable to retain the two in service.

40. We have enough case law, where pertaining to a misconduct detected during the probation of an employee, a show cause notice is issued to respond as to why on account of the stated misconduct the services be not terminated, but ignoring the show cause notice, a simple order of discharge from service is issued. When questioned in a Court on the plea that the veil be lifted to see as to what was the foundation of the order, it was held that motive and foundation are two different concepts. We may quote only from one decision reported as 1980 (2) SCC 593 Gujarat Steel

Tube Vs. Gujarat Steel Tubes Majdoor Sangh. As to foundation, it was observed:-

“.....a termination effected because the master is satisfied of the misconduct and of the desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the 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 different proceedings from the formal order, does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry 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.”

41. As to motive, it was observed:-

“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 pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge.”

42. Suffice would it be to state that if an inquiry is conducted into an alleged misconduct behind the back of the employee and a simple order of termination is passed, ‘founded’ on the report of the inquiry indicting the employee, the action 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 and hence order would not be bad as observed in the decision reported as AIR 1999 SC 983 Dipti Prakash Banerjee Vs. Satvendera Nath Bose National Centre

for Basic Sciences (para 22).

43. To conclude on the issue, we note the decision of the Supreme Court reported as AIR 2002 SC 23 Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences & Anr., where in para 28 thereof, how the issue has to be dealt with by Courts was stated. It was held: *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.*

44. We may only add by stating that nobody acts for no reasons and indeed if somebody were to act on account of no reasons, that itself would vitiate an action as not only being unintelligible but as being perverse. Obviously, something has to impel or propel an employer to terminate the services of his employee. It is only when the termination is by way of penalty would the principles of natural justice and opportunity to participate at an inquiry where guilt to be determined is the object of the inquiry would come into play. Obviously, where on the finding of guilt an order terminating the services of an employee is passed it can safely be said that the employee has been penalized for a wrong. But where the misdemeanour is not treated as proved and no inquiry is held, and where an inquiry is held, the report is not made the foundation of the order, but what is opined by the employer is that the employee has lost the confidence of the employer, an order of termination cannot be said to be founded on the misdemeanour and the misdemeanour would remain as the motive for the action. This situation would not attract the principle that the termination is penal.

45. We need to reemphasize the fact that Naresh Kumar and Satish Kumar joined service on 23.7.1996 and

10.7.1996 respectively and their services were terminated on 16.10.1996. Naresh Kumar worked for 2 months and 24 days and Satish Kumar worked for 3 months and 6 days. Within this short period they became an accused for having committed serious penal offences punishable under Section 363/366/376 IPC and were arrested and denied bail. They were taken on probation to the post of Warder Prison, which required them in discharge of their duties to keep an eye on prisoners and ensure that neither does a prisoner escape nor does a prisoner indulge in activities which are prohibited as per the jail manual. If a warder is accused of kidnapping/abducting a girl, certainly he would lose the confidence of the employer qua his suitability to work as a warder and the decision taken by the employer as to the lack of the suitability of the warder cannot be labeled as the ipse dixit of the employer.

46. As regards the issue that the petitioners sought to justify terminating services of Naresh Kumar on the plea that his working was found to be deficient, in respect of which plea no material could be shown to the Tribunal, suffice would it be to state that the plea appears to be the result of an over enthusiastic lawyer who did not understand the law on the subject on the issue of a misdemeanour being the motive or the foundation of an order of discharge simpliciter and though that it would be better to plead deficient and unsatisfactory service, being blissfully ignorant of the fact that there was no material in support of the said plea. The fact of the matter remains, on which neither party was at variance that it was the involvement of Naresh Kumar and Satish Kumar in the alleged crime committed pertaining to a girl being kidnapped and raped. Though not very relevant but it would be of some importance to note vis-à-vis Satish that at the criminal trial he examined as DW-1, the Assistant Superintendent Jail

Sh.Subhash Batra to prove that in the intervening night of 12th and 13th October 1996, from 12:00 midnight till 6:00 AM he was posted on duty and the witness stated that though posted on duty, Satish was found absent during the night. It be noted that the victim, as per the FIR in question, did not return home when night fell on 12th October 1996 and reached home the next day. As per the victim Naresh Kumar had kidnapped her and had raped her in the house of co-accused Jaswant Sharma in the night and thereafter the other two accused which included Satish Kumar had also raped her. The accused were acquitted on account of contradictions made by the prosecutrix at the trial. There was a serious dispute as to the age of the prosecutrix and the learned Trial Judge held her to be a major by reading the opinion of the medical expert pertaining to her age by adding years on the plus side for the reason Medical Jurisprudence tells us that the exact age of a person cannot be determined on medical examination and there is always an error of plus or minus one year on either side of the age opined by the medical expert.

47. Be that as it may we have noted the aforesaid facts to bring home the point that Satish Kumar was absent from duty on the night when the victim was away from her house and if not more, it establishes the propensity of Satish Kumar to abandon duties.

48. Before concluding we may observe that the respondents were acquitted at the criminal trial is irrelevant when the issue of their termination is being considered for the reason we have held that the order terminating the services of the respondents was not founded on proof of the misdemeanour of having committed the offences charged of. The same was a motive for the action. The involvement of the two in a criminal offence, keeping in view the nature of the

offence, has been held by us as a justifiable ground for the employer to opine that the two had lost the confidence of the employer.

49. We thus hold that the Original Applications filed by the respondents questioning the orders terminating their services were highly belated and were barred by limitation. We further hold that the orders terminating the services of the respondents were not founded on any misdemeanour and thus there was no requirement to hold an inquiry. The orders are innocuous and non-stigmatic and even lifting the veil we find no stigma. Thus, we allow the writ petitions and quash the impugned order dated 25.8.2005 and dismiss OA No.1800/2004 filed by Naresh Kumar as also the impugned order dated 21.4.2005 and dismiss OA No.1914/2004 filed by Satish Kumar.

50. However, we refrain from imposing any costs keeping in view the financial status of the respondents.

(PRADEEP NANDRAJOG)
JUDGE

(MOOL CHAND GARG)
JUDGE

SEPTEMBER 20, 2010
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