

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

% *Judgment Reserved on: January 02, 2014*
Judgment Pronounced on: January 13, 2014

+ **WP(C) 4644/2000**

RAMBIR SINGH Petitioner
Represented by: Mr.Prakash Gautam, Advocate with
Mr.Vivek Ojha, Advocate

versus

GOVT.OF INDIA Respondent
Represented by: Ms.Barkha Babbar, Advocate with
Mr.Bhupinder Sharma,
Dy.Commandant, BSF for R-2

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE JAYANT NATH

PRADEEP NANDRAJOG, J.

1. The present writ petition has been filed praying that the order dated January 25, 2000 passed by the Inspector General (Pers.) terminating the service of the petitioner as well as the order dated May 31, 2000 rejecting the appeal preferred by the petitioner be quashed.

2. Admittedly the petitioner was appointed as a Sub-Inspector in BSF on April 17, 1996 and while so working had, in response to an advertisement inviting applications for direct recruitment to the post of Assistant Commandant in BSF applied for being considered for appointment. Having successfully cleared the written examination, physical evaluation and interview, the petitioner was offered appointment as an Assistant

Commandant as per letter dated December 31, 1998. The petitioner submitted his technical resignation from the post of Sub-Inspector. Required to undergo basic training and being on probation till he was confirmed to the post of Assistant Commandant, the petitioner joined the BSF Training Academy at Tekanpur to undergo basic training.

3. After the one year basic training at the Academy was over the petitioner was relieved from the Academy and on January 22, 2000 was posted with the 32nd Bn. Station at Kooch Bihar. On January 25, 2000, invoking Rule 10(2) of the BSF Rules, 1969, which empowers the Competent Authority to terminate the services of an unconfirmed force personnel of BSF, the service of the petitioner was terminated i.e. he was discharged from service. The order reads as under:-

“1. By virtue of the powers vested in the Central Government under Rule 10(2) of the BSF Rules, 1969 and as per the terms and conditions contained in para 4 (a) of HQ DG BSF letter No. 6/1/96 – Para/BSF dated 31 Dec 96, the Central Government after taking into consideration all the facts and circumstances of the case terminated the services of Shri Rambir Singh, a probationer Assistant Commandant (Direct Entry) Roll No. 260198 of Course Sri No. 23 of BSF Academy, Tekanpur.

2. Shri Rambir Singh, Asstt Comdt (Direct Entry) shall stand relieved from his duties with immediate effect.

3. This issue with the approval of Government of India vide MHS No. F. 1281/99/ Para III dated 14.12.99.

*Sd/
(CM BHAT)
Inspector General
25th January 2000”*

4. Appeal preferred by the petitioner against the order dated January 25, 2000 was rejected vide order dated May 31, 2000.
5. The petitioner filed the instant writ petition.
6. It is the case of the petitioner that having successfully cleared the training at the BSF Academy and having been issued a certificate to said effect the question of his performance being sub-standard warranting a discharge from service while on probation did not arise. As per the petitioner the termination was founded on unproved allegations of misconduct and for which no show cause notice was ever issued to him to explain his stand and that no inquiry was conducted with respect to said allegations. Further, the alleged wrongs stated to have been committed by the petitioner were when he was serving as a Sub-Inspector, which as per the petitioner could not be looked into for purposes of determining case of the petitioner to be confirmed or service terminated during probation.
7. During arguments learned counsel for the petitioner heavily relied upon para 3(k) of the counter affidavit filed by the respondents in which it has been pleaded as under:-

“3(k) Contents of para (k) are admitted to the extent that the other trainees were also issued warnings, rest of the contents are wrong and denied. In reply it is submitted that the other officers showed improvement and came up to the standard whereas the petitioner continued to be indisciplined from the time of joining the force.

That it is clear from the perusal of the following:-

- (1) 18.7.96 Severe Reprimand U/Sec. 12(g) of BSF Rules.
- (2) 27-12-96 Severe Reprimand under Section 19(b) and

Section 40 BSF Act and Rules.

- (3) 23-7-98 *Severe Reprimand under Section 19(b) BSF Act & Rules.*
- (4) 8-9-98 *Severe Reprimand under Section 19(b) BSF Act & Rules.*
- (5) 11-9-98 *Severe Reprimand under Section 19(b) BSF Act & Rules.*
- (6) 1-3-99 *Found in out of bound area during parade timings – warning by Group Commandant AC (DE) Course.*

Hence the contention of the petitioner is wrong and denied.”

8. At first blush the second contention would merit exception because of the manner in which the counter affidavit has been drafted. But, with regret we must state that the counsel who drafted the counter affidavit, with reference to the relevant record neither understood the record reflecting the decision making process nor understood the law pertaining to a discharge from service while on probation.

9. A perusal of the order terminating the service of the petitioner, which we have reproduced in paragraph 3 above, would reveal that the same is non-stigmatic on its face.

10. The issue of termination of the services of a probationer has been the subject matter of judicial attention for over five decades now. Various tests have been evolved which were found to be problematic in their applicability. The same have been reformulated from time to time.

11. 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 service 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.

12. 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.

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

14. 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.”

15. 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, service jurisprudence has recognized that where the termination of service of a probationer visits him with a stigma or is penal or mala-fide, the probationer would have a right to question the cause which has resulted in he being removed from service.

16. What is a stigma?

17. 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 Thesaurus by Burton gives the meaning of the word ‘to be blemish, defect, disgrace, disrepute, imputation, mark of disgrace or shame’.

18. 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.

19. 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.

20. The reason is obvious. Notwithstanding subjecting a new recruit to the rigours 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.

21. After considering the aforementioned decisions; 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.”*

22. We then note the decision of the Constitution Bench reported as AIR 1974 SC 2192 Shamsher Singh v. State of Punjab, wherein it was held that where the order terminating the 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.

23. 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.”

24. 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 simplicitor, 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.”

25. Suffice it 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 the order would not be punitive as was observed in the decision reported as AIR 1999 SC 983

Dipti Prakash Banerjee Vs. Satvendera Nath Bose National Centre for Basic Sciences (para 22).

26. 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., wherein 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*’.

27. Guided by the aforementioned judicial pronouncements, we now proceed to examine the circumstances attendant on the order of termination dated the order dated January 25, 2000 issued by the Inspector General (Pers.).

28. We have perused the relevant record. On July 14, 1999 the Director BSF Academy Tekanpur wrote a letter to the DG HQ BSF informing as under:-

“No.5307/STS/AC(DE)/99/3331

14 July 1999

To

HQ DG BSF
(Pers Dte)
10, CGO Complex
Lodhi Road
New Delhi – 110 007

**Sub: Weeding out on grounds of Unsuitability-AC(DE)
Trainees-Rule-26**

1. The AC (DE) Course Srl-23 commenced on 19/01/99 in BSF Academy Tekanpur, Sh.Rambir Singh one of the AC(DE) Trainee joined this course on 11/01/99. The afore mentioned

trainee attended the course regularly wef 18/01/99 till 14/02/99.

2. He complained of low back pain on 15/02/99 and was given 04 days sick rest. The trainee again reported sick on 20/02/99 and was referred by BSF Hospital Tekanpur to JA Hospital Gwalior. He was given 12 days rest by the civil Hospital. The trainee reported for training on 03/03/99 and did not carry out any physical exercised like stretching, vaulting, climbing and diving etc. He has also not carried out drill activity during the drill periods. An advisory note was issued to the trainee by the Sr.Instr. AC (DE) on 3rd May' 99 which is placed at Flag 'A'.

3. The afore mentioned trainee is also an indiscipline type of trainee. He did not obey the orders of the drill Instructor during the drill classes on 21/04/99. An application submitted by the Drill Inst is enclosed at Flag-'B'. The trainee continued his indiscipline activities despite counselling and warning given by the Group Comdr on 22/02/99 and 01/03/99 (placed at Flag – 'C' and 'D').

4. Sh.Rambir Singh AC (DE) trainee did not mend his ways despite issue of verbal and written warning and kept on repeating his indiscipline activities. On 21 May' 99, during an outdoor exercise, he misguided few trainees of his syndicate and asked them to travel in a tractor in Map Reading exercise (point to point). He was warned by the Sr Insr on 21.05.99 (copy placed at Flag 'E'). On 1st June' 99, this trainee assaulted one of the fellow trainee during the training hours in front of the squad Instr and SO Instr while moving from one place to another.

5. Sh.Rambir Singh AC (DE) trainee has undergone training in BSF Academy as SI (DE) during 1996-97. On perusal of his SR, it reveals that he has earned two entries during the training period and three red entries in his previous

Unit i.e. 138 Bn. BSF. Details of punishment earned by the afore mentioned trainee is as under:-

<i>(a) Severe Reprimand</i>	<i>U/s 19(a) on 17/06/96</i>
<i>(b) -do-</i>	<i>U/s 19(b) on 27/12/96</i>
<i>(c) -do-</i>	<i>U/s 19(b) on 23/07/98</i>
<i>(d) -do-</i>	<i>U/s 19(b) on 08/09/98</i>
<i>(e) -do-</i>	<i>U/s 19(b) on 11/09/98</i>

(Photo copies of extract of Service Record are placed at Flag – ‘F’ to ‘K’ for ready reference).

6. Keeping in view, his attitude of malingering, indiscipline and previous history of punishment, it is, recommended that Shri Rambir Singh AC(DE) Trainee be weeded out on the grounds of unsuitability.

*Sd/
(Dr.G.P.Bhatnagar)
Director, BSF Academy Tekanpur.”*

29. In the office of the DG HQ, processing the letter the Joint Assistant Director (Confidential) authored a note dated July 30, 1999, recording therein that as per the letter received by the Director BSF Academy Tekanpur, besides acts of indiscipline for which verbal and written warnings were issued, and in spite thereof the indiscipline continued, the appraisee i.e. the petitioner had a fairly bad service profile when he was working as a Sub-Inspector. The severe reprimands issued to the petitioner between June 17, 1996 till September 11, 1998 were referred to in the note. A query was put in the note to the effect whether past service record as a Sub-Inspector could be considered. The matter was thereafter processed at various levels till when on September 08, 1999 the Deputy Director (Pers.) put up a note, inter-alia recording as under:-

(a) On 15.02.99 he complained (of) low back pain and was given 4 days sick rest from 15th to 18th Feb' 1999.

(b) On 20.02.99 he again reported sick and referred by BSF Hospital Tekanpur to JA Hospital Gwalior and remained on 12 days rest from 20.02.99 to 03.03.99.

(c) He did not obey the orders of drill instructor during the drill classes on 21.04.99.

(d) He is an indisciplined type of officer and did not carry out various physical exercise during training hours and FPET events on 2nd Apr', 7th Apr' and 1st May 99. He has also not carried out drill activities during the drill periods on 4th March 99, 9th Apr' and 21st Apr' 99.

(e) He was warned by the Senior Instructor of AC(DE) course in writing on 22 Feb' 99 for absenting himself from the classes for 6 days while visiting the Hospital. He was again warned in writing on 1st Mar' 99 for visiting out of bound area during parade timing on 21.02.99 at 11.45 hours.

(f) On 21st May 99, during map reading out door exercise, he misguided his syndicate trainee officer and at his instance they travelled in civilian tractor along with him in exercise area, which is a gross misconduct on his part being an officer trainee and also having served as Sub Inspector in filed area.

(g) Shri Rambir Singh Asstt. Commandant(DE) trainee did not mend his ways despite issue of verbal and written warning and kept on repeating his indisciplined activities. On 1st June' 99, the trainee officer assaulted one of the fellow trainee during the training hours in front of the instructors, while moving from one place to another.(sic)''

Thereafter it stands recorded that even while working as a Sub-Inspector, the petitioner was inflicted the punishment of severe reprimand on 5 occasions.

It was opined that the service record as a Sub-Inspector could not be considered while deciding whether services of petitioner should be dispensed with as a probationer. But, it was made explicit to the Competent Authority that it would be advisable that clarification from DoPT as well as the Ministry of Home Affairs be obtained.

30. Thereafter commenced the usual story which would be told by every file of the Government. It moved from desk to desk.

31. The final view taken was, and rightly so, that past service record as a Sub-Inspector had to be ignored. The final view was that the record of the petitioner as a trainee at the BSF Academy at Tekanpur alone had to be considered. Pithily stated, the record would be that having joined the basic training course at Tekanpur on February 15, 1999, on February 22, 1999, followed by on March 01, 1999, May 21, 1999, August 10, 1999, August 19, 1999, November 24, 1999, December 02, 1999 and December 03, 1999 warnings were issued to the petitioner for a range of ill founded activities and conduct such as absenteeism, shirking drill or being a laggard during drills, being out of bounds during training and misguiding other officers.

32. It is thus apparent, a fact to which we have made a brief reference to in paragraph 8 above, that an ill drafted counter affidavit has unnecessarily given birth to a controversy compelling us to look into the record.

33. Pithily stated, the record would evidence that having joined the basic training at Tekanpur Academy on February 15, 1999 till July 14, 1999 when the Director of the Academy wrote the letter of even date, contents whereof have been extracted by us in paragraph 28 above, the petitioner had evinced a conduct of a disobedient, obstinate and mischievous person who not only would indulge in individual acts of indiscipline but even encouraged others

to do so. He was found to be a shirker at the training. In spite of being warned and cautioned he repeated the wrongs. The severe reprimands, being 5 in number have no effect.

34. We see no scope for an argument that the order terminating the service, which on its face is non-stigmatic, is founded on an unproved wrong and therefore is penal. The order is motivated on the general conduct of the petitioner honestly recorded by his superior officers. Indeed, in spite of being warned and cautioned, verbally and in writing, the petitioner persisted in his objectionable activities and continued the same in spite of being severely reprimanded on as many as 5 occasions.

35. The argument that the petitioner successfully completed the training evidenced by the fact that he was posted to the 32nd Bn. on January 22, 2000 would mean that there was nothing against the petitioner and that surprisingly 3 days thereafter on January 25, 2000 the impugned order was passed and hence there is something more than what meets the eye i.e. there is a taint in the order dated January 25, 2000, overlooks the fact that on July 14, 1999 the Director of the BSF Academy at Tekanpur initiated the proposal requiring the Competent Authority to consider whether the petitioner was fit to be made permanent or discharged from service while still on probation. Thereafter the file meandered from table to table as is usual in every government department. As time ticked passed and the file moved from desk to desk, the one year period of training was over and the Director of the Academy at Tekanpur had no option but to record completion of training resulting in the administrative department issuing a posting order on January 22, 2000 attaching petitioner to the 32nd Bn. station at Kooch Bihar.

36. Finding no merit in the writ petition we dismiss the same but without any orders as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(JAYANT NATH)
JUDGE

JANUARY 13, 2014
mamta