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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 17.08.2017

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LPA 578/2013

ADITYA BERI

..... Appellant

Through: Mr. Lalit Bhardwaj, Advocate along
with appellant in person

versus

**MINISTRY OF CIVIL AVIATION
THR SECRETARY**

.....Respondent

Through: Mr. Lalit Bhasin, Ms. Ratna Dwivedi,
Ms. Bhavna Dhami and Mr. Ajay
Pratap Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

1. The appellant has preferred the present Letters Patent Appeal to assail the judgment dated 24.05.2013 rendered by the learned Single Judge in W.P.(C.) No. 2511/2012, whereby the appellant's writ petition, inter alia, seeking quashing of the termination letter issued by the Respondent, dated 23.04.2012, has been dismissed.

2. The appellant is a qualified Commercial Pilot having received training and licences in respect of several kinds of Aircraft in the USA.

3. The appellant was granted the rating of second-in-command, by the DGCA, for Boeing 777 on 19.02.2009. The appellant submits that all the trainings were undertaken by him at his own expense. He claims that he is highly qualified to fly various aircrafts.

4. The appellant made his application – against the advertisement issued by the respondent-Air India Charters Limited dated 08.07.2010, for the post of training co-pilot in Boeing-737-800. The appellant submits that after clearing the written and oral examination for the said post, he received an offer letter dated 20.09.2010 offering him the post of Trainee Pilot in Air India Charterers Ltd. The said offer letter was accepted by the appellant, and he commenced his service with the respondent- Air India Charters Limited as a training co-pilot w.e.f. 04.10.2010.

5. The appellant was thereafter sent for training on B-777 in Air India Ltd. and upon the said training being stopped midway the appellant vide letter dated 17.01.2011 requested the then Chairman-cum-Managing Director (CMD), Air India Ltd. – Respondent No.1 herein, to restore his training on B-777 with Air India, wherein he stated that the same had been stopped by Air India Charteres Ltd. abruptly for no disclosed reasons. In his letter he also claimed that Air India Charters Ltd. had already conveyed its ‘no objection’ to the sparing of the appellant vide letter dated 23.12.2010. His request was acceded to by the then CMD of the Respondent-Air India Ltd. Accordingly, the appellant was appointed as a co-pilot (First Officer) in Air India Ltd. with effect from 13.05.2011 vide letter dated 25.05.2011. The appellant was informed that his “*release to operate on your own as a First Officer shall be*” on the terms and conditions communicated in the said

letter. His appointment was on probation for a period of one year from the date of his appointment, i.e. 13.05.2011.

6. On successful completion of his training, the appellant was appointed as a co-pilot (First Officer) with effect from 04.08.2011 vide letter dated 14/20.09.2011 issued on behalf of Air India Ltd. He was released to operate on his own on the right hand side. His appointment was as a probationer for a period of one year in the grade of Co-pilot from the date of his appointment, i.e. 04.08.2011.

7. Thus, both the appointments of the appellant – vide letters dated 13.05.2011 and 04.08.2011 respectively, in Air India Ltd. were on probation for one year from the date of appointment, and his services could be terminated without assigning any reason during the period of probation, with a 30 day notice in writing, or payment in lieu of such notice. Further, his appointments were governed by the applicable rules and regulations of the Respondent management, its establishment orders, and Standing orders, instructions issued and amended from time to time.

8. While the appellant was still on probation, vide letter dated 23.04.2012, issued by the Additional General Manager Operations - Air India Ltd., the services of the appellant stood terminated w.e.f 30.04.2012 as per Clause 17(i)(b) of the Certified Standing Orders. His security deposit of Rs.16 Lakhs – in the form of post-dated cheques was also forfeited.

9. Consequently, the appellant preferred the aforesaid writ petition, wherein he sought a writ in the nature of certiorari to seek setting aside of the termination letter dated 23.04.2012 issued by respondent no.1.

10. The case of the appellant in the writ petition, inter alia, was that his termination was in violation of the principles of natural justice. He raised a grievance that his termination was not preceded by any show cause notice or hearing. The appellant claimed that his termination was resorted to by relying upon Clause 17(i)(b) of the Certified Standing Orders, which do not apply to him, since – according to the appellant, he was not a workman as defined under the Industrial Disputes Act. The appellant also assailed his termination on the ground that the conduct of the respondent in forfeiting the security deposit of Rs.16 lakhs – without giving any reason, shows that the action of the respondent was *void ab initio*. The appellant claimed that his training had been undertaken by him, entirely from his own resources and expenses, and no money was spent by the respondents in the appellant's training. Thus, the security of Rs.16 lakhs could not have been forfeited. He also claimed that his termination was whimsical and unreasonable, since the respondents were short of trained pilots and they were engaging foreign trained pilots on higher wages, when the services of the appellant were terminated. He had never been communicated by the respondents with regard to any breach committed by him of his terms and conditions, or that his services were unsatisfactory. No misconduct was alleged against the appellant. He also alleged that his termination was a colourable exercise of power. He claimed that his termination was stigmatic and would prejudice his future progression.

11. The respondents were noticed in the matter and they filed their counter-affidavit. The respondents justified the termination of the services of the petitioner. The respondents, inter alia, stated in para 7 and 8 of the

preliminary objections as follows:

“7. It is submitted that the services of the petitioner were terminated pursuant to finding of the Vigilance enquiry that his induction as a co-pilot in Air India Ltd was contrary to the procedure of the Respondent Company and was as a result of manipulations done by and at behest of his father. It is submitted that in erstwhile Air India pilots are recruited as trainee pilots. For the same advertisement calling for qualified candidates is placed in established newspapers. Eligible candidates fulfilling the eligibility criteria both technical and academic are subjected to a Written Test. Thereafter the candidates who qualify written test are subjected to interview. Candidates who qualify the interview are put through Simulator Flight Proficiency Test. However, the petitioner did not go through the above detailed induction process which is followed by Air India. Petitioner had earlier twice failed to qualify in the selection procedure when he had applied directly to Air India. Copy of letter dated 26/29.12.2008 indicating the procedure followed by Air India is annexed hereto and marked as Annexure-A.

It is pertinent to point out that Petitioner was appointed by Air India Charters Ltd. through their own selection process.

8. It is submitted that Petitioner was a pilot and thus he held a post of trust where honesty and integrity are inbuilt requirements of functioning and therefore when it was found that his appointment was in violation of Rules and Regulations and Recruitment procedure of the Answering Respondent it Was decided to terminate his services without casting any stigma on him and continuing to employ Petitioner would have been embarrassing and detrimental to the interest of the Respondent Company. Further, in any event Management of the Respondent Company would not have been able to entrust Petitioner with any duties as it lost confidence in the Petitioner in view of the concrete finding of the Vigilance Enquiry that his appointment in Air India Ltd.

was not as per rules and regulations of the Respondent Company.” (emphasis supplied)

12. In para 9 (d) & (e) of the preliminary objections, the respondents stated as follows:

“9. (d) The Vigilance Department of Answering Respondent received a complaint from the Central Vigilance Commission on 17.06.2011 pertaining to the misuse of office by Capt. N.K.Beri the then Officer on Special Duty (OSD) to the CMD Air India Ltd. for altering requirements for recruitment of type-rated pilots in Air India Express to enable his son, Capt. Aditya Beri, petitioner herein to get entry into Air India Charters and thereafter secure a backdoor entry in Air India Ltd. In the Vigilance investigation, it was found that the induction of Capt. Aditya Beri, Petitioner herein was not in accordance with the laid down procedures of the Air India Ltd. It was also found that the advertisement for Type Rated co-pilots for Air India Express was modified and tailor made to favour Petitioner. This was evident from the fact that Air India Express has a fleet of only B-737-800 aircrafts, whereas Respondent No.1 has a type rating of B-777 aircraft. It was also found that Capt N.K. Beri father of Petitioner misused his position to get Petitioner absorbed in the Respondent Company. Further, the training of Petitioner had commenced without any formal agreement between Air India Charters Ltd. and the Air India Ltd. regarding deputing of Petitioner to Air India Ltd. It was also found that Petitioner had not complied with various formalities at the time of his appointment with Air India charters Ltd. such as submission of indemnity bond and 10 post dated cheques of Rs.16 lacs each as security deposit towards cost of training. Accordingly, the Chief Vigilance Officer (CVO) recommended for termination of services of Petitioner who was on probation with the Respondent Company and forfeiting the security deposit which was subsequently deposited by Petitioner”

(e) The Competent Authority accepted the

recommendations of CVO and approved termination of Capt. Aditya Beri, petitioner as also forfeiture of the security deposit. Accordingly, the services of the petitioner were terminated vide letter dated 23.04.2012 with effect from 30.04.2012 ...”.
(emphasis supplied)

13. The learned Single Judge recorded the arguments of the petitioner/ appellant as follows:

“i. If the termination of services of a probationer is on the foundation of enquiry proceedings, then, in such a case the probationary officer cannot be terminated without following the principles of natural justice. Reliance is placed in support of this argument upon the judgment of the Supreme Court in the case of V.P. Ahuja Vs. State of Punjab and Other (2000) 3 SCC 239. Paras 7 to 9 of the said judgment are relied upon.

ii It is argued that the petitioner’s services have been terminated by a stigmatic order because the counter-affidavit which is filed in this Court on behalf of respondents shows that the order in fact becomes stigmatic because reference is made to enquiry conducted of the alleged irregular appointment of the petitioner.

iii Petitioner as a Pilot is not a workman under the Industrial Disputes Act, 1947 and therefore impugned order is not sustainable because the standing order provision 17(i)(b) of the respondent No.1 which is relied upon in the impugned letter dated 23.4.2012 applies only to a workman.”

14. The learned Single Judge, while dismissing the said writ petition, observed that the impugned termination letter dated 23.04.2012 issued to the appellant was non-stigmatic in nature, and principles of natural justice need not have been followed before removing the services of the appellant. In this regard, reliance was placed on *Muir Mills Unit of NTC (U.P.) Ltd. v. Swayam Prakash Srivastava and Anr.*, (2007) 1 SCC 491. On the second

submission, the learned single judge observed that there were no pending enquiry proceedings against the appellant. Therefore, no ground for application of principles of *audi alteram partem* arose. Finally, on the aspect of non-application of the Certified Standing Order 17(i)(b), the learned single judge held that since the application of this provision to pilots is yet in dispute, reference to a wrong provision for terminating the services could not result in the termination order becoming invalid, since the power to terminate the services of a probationer existed at any time during the probationary period vested in the respondents.

15. The submission of learned counsel for the appellant is that the finding returned by the learned Single Judge in the impugned judgment – that there was no inquiry proceedings concerning the appellant, which could said to be the foundation of the appellant's termination, is erroneous. Learned counsel submits that the counter-affidavit of the respondent-a portion whereof has been extracted herein above, would show that the termination of the appellants services is entirely premised on the allegation that his initial appointment in Air India Limited was manipulated, irregular and engineered by his father Capt. N.K. Behri who was, at the relevant time, the OSD to the CMD of Air India Limited. The respondents have themselves referred to the vigilance inquiry sought to be conducted by the vigilance department of the respondent, pursuant to which the services of the appellant were terminated. Thus, the appellant and his father have been found guilty of misconduct to secure the appellants "irregular appointment" in Air India Ltd. – even without holding a formal inquiry, and the services of the appellant have been terminated on the basis of the so-called vigilance inquiry.

16. Learned counsel submits that the learned Single Judge erred in concluding that the vigilance inquiry was directed against the father of the appellant Capt. N.K. Behri, and not against the appellant. Since the allegation against the father of the appellant Capt. N.K. Behri was that he had manipulated the induction of the appellant as a co-pilot in the respondent Air India Limited, the said allegation was as much against the appellant, as his father, as the appellant was claimed to be the beneficiary of the alleged manipulation by his father Capt. N.K. Behri. Learned counsel submits that the learned Single Judge, therefore, fell in error in not appreciating that the appellants case was squarely covered by the judgment of the Supreme Court in *V.P. Ahuja* (supra) and the reliance placed on *Muir Mills Unit of NTC (U.P.) Ltd.* (supra) was misplaced.

17. Learned counsel for the appellant further submits that, the respondents could not have evaded to hold a proper inquiry since, according to them, the appellant is guilty of a serious misconduct. The resort to termination of the petitioner's services on the ground that he is a probationer, and his services could be terminated without giving any reason by a simplicitor termination letter, is a colourable exercise of the said power vested in the respondents.

18. Learned counsel submits that this Court should lift the veil from the ostensibly non-stigmatic simplicitor termination to appreciate the real nature of termination – which is punitive. Learned counsel further submits that the termination of the appellant is clearly stigmatic, and this is evident from a perusal of the counter-affidavit filed by the respondents alleging manipulation by the appellant and his father Capt. N.K. Behri for the alleged irregular appointment of the appellant.

19. On the other hand, Mr. Bhasin, learned counsel for the respondent supports the impugned judgment. He submits that the respondents, keeping in view the fact that the appellant is a young pilot with a promising career, did not consider it prudent to charge sheet the appellant and to hold an inquiry against him, as the adoption of the said course of action could possibly ruin the appellant's career. He submits that the respondents, therefore, thought it prudent to terminate the services of the appellant-who was a probationer, by a non-stigmatic simplicitor order of termination.

20. Mr. Bhasin has also advanced submissions to show to the court as to how the appellant's appointment in Air India Limited was manipulated and irregular. Mr. Bhasin submits that since the appellant was a probationer, it was not essential to issue any show cause notice to him or grant opportunity of hearing before termination of his services. The principles of natural justice were not attracted in the facts of the present case. He further submits that even if the appellant is reinstated in service, the respondents should be allowed to initiate appropriate action, since the appellants appointment in Air India Limited itself was irregular.

21. In his rejoinder, learned counsel for the appellant, on instructions from the appellant, who is also present in Court, has submitted that the allegations of the appointment of the appellant being irregular or illegal are false and baseless. The appellant submits that there are numerous instances where the respondent has similarly made appointment of pilots, who were earlier appointed in Air India Charters Limited and were subsequently absorbed in Air India Limited. The appellant, who is present in Court, has stated that he is ready & willing to face any inquiry in relation to his appointment, as also

in relation to the alleged misconduct against him in connivance with his father Captain N.K. Beri. The appellant has also stated that he would not press for any back wages for the period that he has remained out of employment on account of his termination. However, the respondents should maintain his continuity of service.

22. Having heard the parties, perused the impugned judgment of the learned Single Judge, the impugned termination order issued by the respondents, and the record – including the counter-affidavit filed by the respondent in the writ proceedings, we are of the view that the impugned judgment cannot be sustained. With due respect to the learned Single Judge, we cannot agree with the reasoning of the learned Single Judge.

23. The jurisprudence on the subject of termination of the services of a probationer, and the circumstances in which the same may be held to be illegal, is well-settled.

24. We may refer to a recent decision of the Supreme Court in ***Ratnesh Kumar Choudhary Vs. Indira Gandhi Institute of Medical Sciences, Patna, Bihar & Others***, (2015) 15 SCC 151, which elaborately considers the earlier decisions of the Supreme Court on the said issue.

25. In ***Ratnesh Kumar*** (supra), the appellant had been appointed as a Chest Therapist even though he had applied for the post of Physiotherapist at the respondent institute. He was placed on probation for a period of two years. During the probationary period, his services could be put to an end at any time by giving one month's notice on either side. While the appellant was still a probationer, a complaint was received by the Vigilance

Department of the Government of Bihar alleging that his appointment as Chest Therapist was illegal. In pursuance of the said complaint, the Deputy Superintendent of Police made an inquiry and submitted his report finding, the appointment of the appellant therein to be illegal. On the basis of the said report, the Joint Secretary in the Department of Health requested the Director of the respondent institute to initiate proceedings for termination of the services of the appellant by giving him a show-cause notice. The appellant was given a show-cause notice and granted three days time to reply. The appellant sent a reply requesting for documents which were however not supplied to him. He then submitted his reply on 08.04.2005 and, on the following day, his services were terminated by stating that his appointment to the post of Chest Therapist was illegal in terms of the investigation conducted by the Cabinet (Vigilance Department, Bihar), and the explanation furnished by the appellant in pursuance of the show-cause notice was not found satisfactory.

26. The appellant therein then preferred a writ petition, which was allowed by the learned Single Judge on the grounds of violation of principles of natural justice, since the appellant had not been granted an adequate opportunity to meet the charge against him.

27. On appeal, the Division Bench, however, reversed the said decision on the premise that the appellant's appointment as Chest Therapist itself was irregular-since the advertised post was that of Physiotherapist, and the essential qualifications could not have been relaxed only qua the appellant without giving others the chance to compete for the post.

28. The Supreme Court reversed the said decision of the Division Bench on the premise that the termination was not based only on the finding that the appointment of the appellant was irregular and illegal, but also on misconduct attributed to the appellant. The appellant was alleged to have misbehaved with the patients admitted in the hospital, and he was even punished for his indiscipline in service. These findings were contained in the vigilance report obtained by the respondent institute.

29. The show-cause notice issued to the appellant therein, however, did not make any allegation of any misconduct. It referred to the vigilance report of the Cabinet Vigilance Department, Information Bureau, Bihar, Patna and alleged that the appointment of the appellant was found to be illegal/ wrong. The termination order, by itself, did not refer to any misconduct on the part of the appellant. It merely stated that the appellant's appointment to the post of Chest Therapist was illegal in terms of the investigation done by the Cabinet Vigilance Department, Bihar and the explanation furnished by the appellant in pursuance of the show-cause notice had been found to be unsatisfactory.

30. The Supreme Court in the aforesaid decision also took note of the averments in the counter-affidavit filed by the respondents and found that the respondent in the counter-affidavit had alleged misbehavior and disobedience with the seniors against the appellant. It was also alleged therein that he quarreled with his colleagues for which many complaints had been received against him. The counter-affidavit also referred to the report made by the Cabinet Vigilance Department.

31. The submission of the appellant before the Supreme Court was that on the basis of the vigilance report along with the allegations made in the counter-affidavit, it was graphically clear that the termination of the appellant was not a termination simplicitor. The vigilance report and the counter-affidavit alleged misbehavior and disobedience on the part of the appellant with his seniors. Thus, the submission of the appellant was that the alleged misconduct formed the foundation of the termination, and was not merely the motive for termination.

32. The Supreme Court took stock of the earlier decisions rendered by it on the subject. We deem it appropriate to refer to the decisions considered by the Supreme Court, and the relevant extracts from those decisions, as set out in *Ratnesh Kumar* (supra) are following:

(A) *Shamsher Singh Vs. State of Punjab, 1974 (2) SCC 831:*

“No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution.”

“The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been

made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The order of termination is illegal and must be set aside.” (emphasis supplied)

- (B) ***Radhey Shyam Gupta Vs. UP State Agro Industries Corporation Limited & Another***, (1999) 2 SCC 21.

In this case, the termination of the probationer was challenged as being punitive in nature, since it was based on an ex-parte report of inquiry which indicated that the appellant had accepted a bribe. The Tribunal had allowed the application of the appellant and quashed the termination. The High Court had reversed the said decision. The Supreme Court restored the order of the Tribunal. The question posed by the Supreme Court in *Radhey Shyam Gupta* (supra) was as follows:

“Whether the report of Shri Ram Pal Singh was a preliminary report and whether it was the motive or the foundation for the termination order and whether it was permissible to go behind the order?”

The Supreme Court in ***Ratnesh Kumar*** (supra) observed in respect of ***Radhey Shyam Gupta*** (supra) as follows:

“17. This Court noticed that there are two lines of authorities. In certain cases of temporary servants and probationers, it had taken the view that if the ex-parte enquiry or report is the motive for the termination order, then the termination is not to be called punitive merely because the principles of natural justice have not been followed; and in the other line of decisions, this Court has ruled that if the facts revealed in the enquiry are not the motive but the foundation for the termination of the services of the temporary servant or probationer, it would be punitive and principles of natural justice are bound to be followed and

failure to do so would make the order legally unsound. The Court referred to the judgments rendered in Samsher Singh (supra), Parshotam Lal Dhingra vs. Union of India, State of Bihar vs. Gopi Kishore Prasad and State of Orissa vs. Ram Narayan Das and, eventually, opined that if there was any difficulty as to what was “motive” or “foundation” even after the Samsher Singh’s case the said doubts were removed in Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tubes Mazdoor Sabha . The clarification given by the Constitution Bench in the said case, being instructive, the two-Judge Bench reproduced the same, which we think we should do:-

“53. 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 processes 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 the termination is. If, thus scrutinised, the order has a punitive flavour 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 service of the delinquent servant, 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 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.

54. 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 not then the moving factor in the discharge. We need not chase other hypothetical situations here.”

18. On that basis, the Court proceeded to opine thus:-

*“In other words, it will be a case of motive if the master, after gathering some prima facie facts, does not really wish to go into their truth but decides merely not to continue a dubious employee. The master does not want to decide or direct a decision about the truth of the allegations. **But if he conducts an enquiry only for the purpose of proving the misconduct and the employee is not heard, it is a case where the enquiry is the foundation and the termination will be bad.**”*

19. After stating the said principle, the Court traced the history and referred to Anoop Jaiswal vs. Union of India, Nepal Singh vs. State of U.P. and Commissioner, Food & Civil Supplies vs. Prakash Chandra Saxena and opined as follows:-

“33. It will be noticed from the above decisions that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as the above facts are merely the motive and not the foundation. The reason why they are

the motive is that the assessment is not done with the object of finding out any misconduct on the part of the officer, as stated by Shah, J. (as he then was) in Ram Narayan Das case. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary enquiry is held because the purpose of a preliminary enquiry is to find out if there is prima facie evidence or material to initiate a regular departmental enquiry. It has been so decided in Champaklal case. The purpose of the preliminary enquiry is not to find out misconduct on the part of the officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental enquiry is started, a charge-memo issued, reply obtained, and an enquiry officer is appointed — if at that point of time, the enquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. That is what is held in Sukh Raj Bahadur case and in Benjamin case. In the latter case, the departmental enquiry was stopped because the employer was not sure of establishing the guilt of the employee. In all these cases, the allegations against the employee merely raised a cloud on his conduct and as pointed by Krishna Iyer, J. in Gujarat Steel Tubes case the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer

from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found, and were merely the motive.

34. But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee — even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases.” (emphasis supplied)

- (C) In ***Ratnesh Kumar*** (supra), the Supreme Court then considered its decision in ***Chander Prakash Shahi Vs. State of UP & Others***, (2000) 5 SCC 152 and quoted the following extract from the said decision:

“28. The important principles which are deducible on the concept of “motive” and “foundation”, concerning a probationer, are that a probationer has no right to hold the

post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

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.*** (emphasis supplied)

- (D) It also referred to a 3-Judge Bench decision in ***Union of India and Another Vs. Mahaveer C. Singhvi***, (2010) 8 SCC 220, wherein it was held as follows:

"It was held by this Court in Dipti Prakash Banerjee case that whether an order of termination of a

probationer can be said to be punitive or not de-pends on whether the allegations which are the cause of the termination are the motive or foundation. It was observed that if findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, a simple order of termination is to be treated as founded on the allegations and would be bad, but if the enquiry was not held, and 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's services, it would only be a case of motive and the order of termination of the employee would not be bad." (emphasis supplied)

- (E) The Supreme Court then proceeded to take note of ***Pavanendra Narayan Vs. Sanjay Gandhi PGI of Medical Sciences & Anr.***, (2002) 1 SCC 520, which a later Bench of the same Court found to be not in consonance with the earlier view of the Supreme Court in ***State Bank of India & Another Vs. Palak Modi***, (2013) 3 SCC 607. In ***Palak Modi***, (supra), the ratio laid down by the Court - taken note of in ***Ratnesh Kumar*** (supra), was as follows:

"The ratio of the abovenoted judgments is that a probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post held by him. If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the

ground of violation of the rules of natural justice.
(emphasis supplied)

- (F) The Supreme Court then applied the aforesaid principles to the facts of ***Ratnesh Kumar*** (supra). The Supreme Court while allowing the appeal held as follows:

“28. *In the case at hand, it is clear as crystal that on the basis of a complaint made by a member of the Legislative Assembly, an enquiry was directed to be held. It has been innocuously stated that the complaint was relating to illegal selection on the ground that the appellant did not possess the requisite qualification and was appointed to the post of Chest Therapist. The report that was submitted by the Cabinet (Vigilance) Department eloquently states about the conduct and character of the appellant. The stand taken in the counter affidavit indicates about the behaviour of the appellant. It is also noticeable that the authorities after issuing the notice to show cause and obtaining a reply from the delinquent employee did not supply the documents. Be that as it may, no regular enquiry was held and he was visited with the punishment of dismissal. It is well settled in law, if an ex parte enquiry is held behind the back of the delinquent employee and there are stigmatic remarks that would constitute foundation and not the motive. Therefore, when the enquiry commenced and thereafter without framing of charges or without holding an enquiry the delinquent employee was dismissed, definitely, there is clear violation of principles of natural justice. It cannot be equated with a situation of dropping of the disciplinary proceedings and passing an order of termination simpliciter. In that event it would have been motive and could not have travelled to the realm of the foundation. We may hasten to add that had the appellant would have been visited with minor punishment, the matter possibly would have been totally different. That is not the case. It is also not the case that he was terminated solely on the ground of earlier punishment. In fact, he continued in service thereafter. As the report would reflect that there are many an allegation subsequent to the imposition of punishment*

*relating to his conduct, misbehaviour and disobedience. The Vigilance Department, in fact, had conducted an enquiry behind the back of the appellant. The stigma has been cast in view of the report received by the Central Vigilance Commission which was ex parte and when that was put to the delinquent employee, holding of a regular enquiry was imperative. It was not an enquiry only to find out that he did not possess the requisite qualification. Had that been so, the matter would have been altogether different. **The allegations in the report of the Vigilance Department pertain to his misbehaviour, conduct and his dealing with the officers and the same also gets accentuated by the stand taken in the counter affidavit. Thus, by no stretch of imagination it can be accepted that it is termination simpliciter.** The Division Bench has expressed the view that no departmental enquiry was required to be held as it was only an enquiry to find out the necessary qualification for the post of Chest Therapist. Had the factual score been so, the said analysis would have been treated as correct, but unfortunately the exposition of factual matrix is absolutely different. Under such circumstances, it is extremely difficult to concur with the view expressed by the Division Bench". (emphasis supplied)*

33. Thus, merely because the order of termination, on the face of it, appears to be non-stigmatic, the termination of a probationer would not-only on that account, be held to be legal. If the terminated employee raises the plea, and it appears from the record, that the termination was founded upon an alleged misconduct, the termination of the services of the probationer would be liable to be held colourable exercise of power and illegal.

34. Viewed in the aforesaid light, it is evident from the counter-affidavit of the respondents filed in the writ proceeding that the termination of the services of the appellant was founded upon the serious allegation made

against the appellant's father and the appellant, that his father had contrived to get the appellant appointed in the respondent-Air India Limited through the back door and in an irregular manner. This is evident from the aforesaid extract from the counter-affidavit of the respondents filed in the writ proceedings and in particular paragraph 9(d).

35. In the counter-affidavit, the respondents have candidly admitted that pursuant to the findings of the vigilance inquiry, which showed that the induction of the appellant was contrary to the procedure of the respondent company "*and was the result of manipulations done by and at the behest of his father*", the services of the appellant were terminated.

36. The counter-affidavit further shows that the respondents have cast a doubt on the honesty and integrity of the appellant, and on that basis, his services have been terminated. In paragraph 8 from the counter-affidavit, as extracted hereinabove, the respondents have stated that "*further, in any event, management of the respondent company would not have been obliged to entrust the petitioner with any duties as it lost confidence in the petitioner in view of the Court finding of the vigilance inquiry that his appointment in Air India Limited was not as per rules & regulations of the respondent company*".

37. It is also evident from the counter-affidavit that it was on the recommendations of the Chief Vigilance Officer that the services of the appellant were terminated. In effect, what the respondents have done, is to condemn the appellant – on the basis of the allegation of his acting in conspiracy with his father, in securing a back door entry into Air India

Limited, without giving any opportunity to the appellant to deal with the said allegation. The respondents have also attacked the integrity and honesty of the appellant and concluded that he is not worthy of trust and confidence. This conclusion, too, has been drawn without any opportunity to the appellant to defend himself. If it were a mere case of an irregular appointment, without anything more, the respondents would have been justified in terminating the petitioner while he was a probationer by issuing an innocuous order of termination simplicitor. However, the respondents have founded the termination on-what would constitute, serious misconduct if proved against the appellant.

38. The termination of the appellant is in violation of the principles of natural justice. The investigation into the alleged illegal hiring of the appellant at the behest of his father, with his connivance, was conducted ex-parte by the vigilance department of the respondent, and no opportunity was given to the appellant. The respondents have not produced any material on record to show that the appellant was not performing his duties satisfactorily. Termination of the appellant, based on the fact that disciplinary enquiry was pending against the father of the appellant, is illegal and arbitrary in nature since the appellant has been adjudged as manipulative in his conduct, leading to loss of faith and confidence in him.

39. In the aforesaid facts & circumstances, in our view, the learned Single Judge was not justified in placing reliance on *Moire Mills* (supra). In *Moire Mills* (supra), since the termination of the probationer was entirely founded upon the performance being found to be “not satisfactory”, the Supreme Court held that there was no right in the respondent to be heard before the

simplicitor termination of his services by an innocuous order of termination. On facts, the decision in *Moire Mills* (supra) was not attracted in the present case.

40. For the aforesaid reasons, we set aside the impugned judgment of the learned Single Judge and allow the present appeal. We direct that the appellant be reinstated in services of the respondent Air India Limited as a probationer from the date of his removal. However, he shall not be entitled to any back wages since the appellant has himself voluntarily stated that he does not press for the said relief. Even otherwise, since the appellant has not rendered any service after his termination, and keeping in view the background in which the termination has taken place, as also the fact that the respondent has expressed its intention to inquire into the conduct of the appellant, we are not inclined to grant any back wages to the appellant. The period for which the appellant has remained out of service would, however, to be counted as period spent on duty for all purposes. We leave it open to the respondents to proceed against the appellant in accordance with law. In the circumstances of the case, the parties are left to bear their respective costs.

VIPIN SANGHI, J.

REKHA PALLI, J.

AUGUST 17, 2017