

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 06.08.2019

Judgment Delivered on : 21.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH

and

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Writ Petition Nos. 21566 and 20649 of 2018

WP No. 21566 of 2018

Tmt. M. Priya

.. Petitioner

Versus

1. The Registrar General
The High Court of Judicature at Madras
High Court Buildings
Chennai - 600 104

2. The Principal District Judge
Salem

3. The District Munsif
Sankakiri, Salem

.. Respondents

WP No. 20649 of 2018

Tmt. M. Priya

.. Petitioner

Versus

1. The Principal District Judge
Salem

2. The District Munsif
Sankakiri, Salem

3. The Registrar General
The High Court of Judicature at Madras
High Court Buildings
Chennai - 600 104

(R3 impleaded as per order dated 04.09.2018
passed in WMP No. 25159 of 2018)

.. Respondents

WP No. 21566 of 2018:- Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the entire records connected with the impugned memo, passed by the second respondent vide ROC No.2703/A/2018 dated 13.08.2018 and quash the same and consequently direct the second respondent to reinstate the petitioner in service, by declaring her probation, with continuity of service and all consequential benefits.

WP No. 20649 of 2018:- Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the entire records connected with the impugned memo, passed by the first respondent vide D.No.5427 dated 19.07.2018 and quash the same and direct the first respondent to declare the probation of the petitioner as Office Assistant in the second respondent as satisfactory and successful with all consequential benefits.

For Petitioner : Mr. N.G.R. Prasad
for Mr. S.N. Ravichandran
in both the writ petitions

For Respondents : Mr. B. Vijay
in both the writ petitions

COMMON ORDER

R. SUBBIAH, J

The petitioner has filed WP No. 20649 of 2018 challenging the notice dated 19.07.2018 issued by the first respondent - Principal District Judge, Salem, under Section 31 (1) (ii) of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016 expressing his intention to discharge the petitioner from service inasmuch as her performance of duties are not satisfactory. When WP No. 20649 of 2018 was pending before this Court, the petitioner was discharged from service from the cadre of Office Assistant by an order dated 13.08.2018 of the Principal District Judge, Salem. Challenging the order dated 13.08.2018, the petitioner has filed the second Writ Petition being WP No. 21566 of 2018.

2. For the sake of convenience, the parties to these writ petitions can be referred to as per their litigative status in WP No. 21566 of 2018.

3. The facts leading to filing of these two writ petitions are succinctly narrated hereunder.

4. According to the petitioner, she hails from a Most Backward Community and with immense difficulty, she passed S.S.L.C. The petitioner registered her name in the District employment exchange and on the basis of her employment exchange seniority, she was appointed as Office Assistant by proceedings of the second respondent dated 16.04.2014. Subsequently, by another order dated 21.04.2014, she was posted as Office Assistant in the Family Court, Salem. Thereafter, the petitioner was transferred to Sub Court, Salem, III Additional District Court, Salem and finally, she was posted at District Munsif Court, Sankakiri. According to the petitioner, she was discharging her duties sincerely and honestly with utmost dedication and satisfaction of her superiors. It is her case that at the time of joining duty as Office Assistant in the Sub Court, Attur, she had four months child to be looked after. Further, between 20.06.2014 and 22.06.2014 and from 27.06.2014 to 02.07.2014, due to her ill-health, she was compelled to take leave on medical grounds. The petitioner also submitted leave letter indicating her ill-health, however, the Subordinate Judge, Attur refused to receive the same. Therefore, the petitioner was constrained to send the leave letter by Registered Post. It is also the contention of the petitioner that the Subordinate Judge, Attur, for the reasons unknown to her, frequently issued memos to her alleging dereliction in discharge of duties. Further, the III Additional District Judge, Salem, at the behest of the Subordinate Judge, Attur, sent a report dated 05.11.2014 to the second respondent about the leave obtained by the petitioner periodically. Subsequently, the Subordinate Judge, Attur also sent a report dated 09.02.2015 to the second respondent purportedly alleging that the petitioner failed to obey the instructions given to her. It is on the basis of the aforesaid report dated 05.11.2014 of the III Additional District Judge, Salem and the report of the Subordinate Judge, Attur, dated 09.02.2015, the second respondent issued the notice dated 25.02.2015 calling upon the petitioner to submit her explanation. On receipt of the notice dated 25.02.2015, the petitioner submitted her reply dated 03.03.2015 requesting to furnish the reports submitted by the III Additional District Judge, Salem and the Subordinate Judge, Attur against her to enable her to submit an effective explanation. However, by proceedings dated 12.03.2015, the second respondent refused to furnish the reports on the ground that they are confidential reports and it cannot be divulged to

any one, including the petitioner.

5. Aggrieved by the proceedings dated 25.02.2015 and 12.03.2015 of the second respondent, the petitioner filed WP No. 8154 of 2015 before this Court. By order dated 30.03.2015, the Division Bench of this Court observed that the second respondent cannot by-pass the procedures prescribed under the Tamil Nadu Civil Services (Discipline and Appeal) Rules when he seeks to impose major penalty of removal from service or other major penalty on the allegation of grave misconduct. It was further held that in the show cause notice dated 25.02.2015, several allegations have been made without furnishing the details thereof to the petitioner. Therefore, this Court allowed the writ petition on 30.03.2015 and set aside the notices dated 25.02.2015 and 12.03.2015 of the second respondent and directed the second respondent to follow the procedures prescribed by law.

6. After Writ Petition No. 8154 of 2015 was allowed by this Court on 30.03.2015, the Subordinate Judge, Attur issued a memo to the petitioner on 30.04.2015, alleging that the petitioner is neglecting the discharge of her duties and she is often seen conversing with the duty police officials, who attend the court, in the waiting hall, during working hours. This memo dated 30.04.2015 was issued by the Subordinate Judge, Attur, on the basis of an oral complaint received by her. On the very same day, the Subordinate Judge, Attur issued another memo alleging that the petitioner used cell phone in the Court premises during the Court hours. On receipt of the memos, dated 30.04.2015, the petitioner submitted her explanation dated 04.05.2015 reiterating that she discharged her duties with utmost devotion and prayed for dropping all further proceedings in this regard. While so, without considering the explanation offered by the petitioner on 04.05.2015, the second respondent issued a Memo dated 07.11.2016 stating that the petitioner availed 42 days casual leave on Loss of Pay and three days leave on Extraordinary Leave on Loss of Pay. Thus, the petitioner was directed to produce a certificate of good conduct from the Subordinate Judge, Attur within a period of six months, failing which her probation will not be declared and her services will be terminated. On the next day viz., 08.11.2016, the petitioner sent a representation to the Subordinate Judge, Attur, explaining the circumstances under which she was constrained to take leave on Loss of Pay and further requested the Subordinate Judge, Attur to forward a good conduct certificate to the second respondent-Principal District Judge, Salem for declaration of her probation. However, the petitioner was not given such a certificate by the Subordinate Judge, Attur. While so, by Memo,

dated 04.05.2017 of the second respondent, the petitioner was called upon to submit her explanation as to why she be not discharged from service owing to her worst performance of work. Aggrieved by the said Memo, dated 04.05.2017 of the Principal District Judge, Salem, the petitioner filed WP No. 13480 of 2017 before this Court. By order dated 24.05.2017, this Court granted an interim order from discharging the petitioner from service. Ultimately, this Court, by order dated 07.12.2017, set aside the show cause notice dated 04.05.2017 issued by the second respondent with an observation that the order dated 07.12.2017 will not come in the way of the respondents in taking recourse to the appropriate provision of law, if they decide to act against the petitioner.

7. Pursuant to the order dated 07.12.2017 passed by this Court, by proceedings dated 02.02.2018 of the second respondent, the petitioner was transferred from the Sub Court, Attur to the Additional District Court (FTC), Mettur on administrative grounds.

8. When the petitioner was working as Office Assistant at Additional District Court, Mettur, she was placed under suspension by an order dated 07.02.2018 of the Additional District (Fast Track) Judge, Mettur under Rule 17 (e) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules with effect from 07.02.2018, pending contemplation of enquiry into grave charges. When the petitioner was under suspension, the second respondent, in his proceedings dated 16.02.2018, extended the period of probation of the petitioner by six months.

9. By another proceedings dated 19.07.2018 of the second respondent, it was proposed to discharge the petitioner from service on the ground that her performance of duty is not satisfactory. The petitioner was therefore called upon to submit her explanation within a period of ten days. On receipt of the same, the petitioner submitted a representation on 25.07.2018 and on 06.08.2018 seeking to furnish certain documents to enable her to submit her explanation. On the next day, the petitioner has filed the first writ petition, namely WP No. 20649 of 2018 before this Court to quash the memo dated 19.07.2018 of the Principal District Judge, Salem and to consequently direct the first respondent to declare her probation in the cadre of Office Assistant with all consequential benefits. During the pendency of WP No. 20649 of 2018, the second respondent has passed the order dated 13.08.2018 discharging the petitioner from service by concluding that the performance of the petitioner is not satisfactory. Aggrieved by this order dated 13.08.2018, the successive writ

petition being WP No. 21566 of 2018 has been filed by the petitioner.

10. Mr. N.G.R. Prasad, learned counsel appearing for the petitioner submits that though the order of discharge appears to be an order simpliciter, it is an order attached with a stigma. Further, the order of termination has been passed without conducting an enquiry. However, in the counter affidavit filed before this Court, in para No.17, it was stated by the second respondent that in the order of termination dated 19.07.2018, there was no allegation of misconduct made against the petitioner and therefore, there is no stigma. At the same time, it was stated in the counter affidavit that "the misconduct of the petitioner is obvious and prima facie established and therefore, the second respondent decided not to proceed with a detailed enquiry to prove the misconduct of the petitioner." Similarly, in para No.13 of the counter affidavit, reference was made to a complaint filed by wife of an advocate against the petitioner and a representation dated 18.07.2018 made by the Bar Association, Sankari making certain allegation against the petitioner. It is only in the counter affidavit that the second respondent has made certain averments attributing motive against the petitioner but the same were not made in the order of termination. Therefore, the learned counsel for the petitioner would contend that the order of termination cannot be an order simpliciter but the one attached with stigma. In such circumstances, the respondents ought to have conducted an enquiry and afforded an opportunity to the petitioner to put forth her defence. In the absence of an enquiry, the impugned order of termination cannot be sustained.

11. The learned counsel for the petitioner also contended that invocation of Section 32 of the Tamil Nadu Government Servants (Conditions of Service) Act 2016 cannot be sustained. Even though the order of suspension was issued to the petitioner under Rule 17 (e) of the Tamil Nadu Government Servants (Discipline and Appeal) Rules, pending contemplation of an enquiry into grave charges, without conducting an enquiry to prove the charges, when the petitioner was under suspension, the second respondent in his proceedings dated 16.12.2018 extended the period of petitioner's probation with effect from 07.12.2017 only to pass an order of termination. The action on the part of the second respondent is punitive in nature camouflaged by an order of termination simpliciter. The fact that the second respondent has not chosen to conduct an enquiry is obvious. The second respondent had chosen to take a short cut method to merely issue a memo by alleging that the services of the petitioner are not satisfactory followed by an order of

termination. The proper course to be adopted by the second respondent is to frame charges and conduct a full-fledged enquiry in compliance with the principles of natural justice, but it was not done in this case. In this context, the learned counsel for the petitioner relied on the decision of the Honourable Supreme Court in the case of Om Prakash Goel vs. Himachal Pradesh Tourism Development Corporation, Shimla and another reported in (1991) 3 Supreme Court Cases 291 wherein, the Honourable Supreme Court, by placing reliance on the earlier decision in Anoop Jaiswal vs. Government of India (1984) 2 Supreme Court Cases 369 held as follows:-

"3. In Anoop Jaiswal vs. Government of India, it is held as under (SCC p.379, para 12)

(W)here the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment, is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employees.

In Nepal Singh vs. State of U.P., (1985) 1 Supreme Court Cases 56, it is held as under (SCC p.61, para 10)

"(W)here allegations of misconduct are levelled against a government servant, and it is a case where the provisions of Article 311 (2) of the Constitution should be applied, it is not open to the competent authority to take the view that holding the enquiry contemplated by that clause would be a bother or a nuisance and that therefore it is entitled to avoid the mandate of that provision and resort to the guise of an ex facie innocuous termination order. The court will view with great disfavour any attempt to circumvent the constitutional provision of Article 311 (2) in a case where that provision comes into play."

In Jarnail Singh vs. State of Punjab, (1986) 3 SCC 277 it is held thus: (SCCp.291, para 32)

(W)here an allegation is made by the employee assailing the order of termination as one based on misconduct, though couched in innocuous terms, it is incumbent on the court to lift the veil and to see the real circumstances as well as the basis and foundation of the order complained of. In other words, the Court, in such a case, will lift the veil and will see whether the order was made on the ground of misconduct, inefficiency, or not.

4. From the above decisions, it can be seen that it is well settled that in a case of an order of termination even that of a temporary employee the Court has to see whether the order was made on the ground of misconduct if such a complaint was made and in that process the court would examine the real circumstances as well as the basis and foundation of the order complained of and if the court is satisfied that the termination of services is not so innocuous as claimed to be and if the circumstances further disclose that it is only a camouflage with a view to avoid an enquiry as warranted by Article 311 (2) of the Constitution, then such a termination is liable to be quashed. In the abovementioned decisions, the impugned termination order was accordingly quashed."

12. By relying on the above decision, the learned counsel for the petitioner would contend that the impugned order of termination is not an order simpliciter and it was passed on the basis of frivolous complaints received against the petitioner. The copy of such complaints have neither been furnished to the petitioner to rebut it nor was an enquiry conducted by the respondents affording an opportunity to the petitioner to put forth her defence. In the absence of the same, the order of termination cannot be said to be an order simpliciter.

13. The learned counsel for the petitioner further contended that as against the order of termination, even though an appeal remedy is provided under Section 36 of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016, when the order of termination passed by the second respondent is questioned on the ground of violation of principles of natural justice and when it offends the constitutional right guaranteed to the petitioner under Article 16 and 21 of The Constitution of India, the writ petition filed by her is maintainable. That apart, the order of termination passed by the second respondent suffers from serious arbitrariness and in violation of the

constitutional guarantee enshrined under Article 14 of The Constitution of India. In such circumstance, without exhausting the appeal remedy, the petitioner is entitled to invoke the jurisdiction conferred upon this Honourable Court under Article 226 of The Constitution of India.

14. Above all, it is contended by the counsel for the petitioner that the petitioner has filed the first writ petition being WP No. 20649 of 2018 in which, on behalf of the respondents, notice was taken on 11.08.2018. However, on the next working day namely 13.08.2018, the order of termination was passed by the second respondent, which is the subject matter of WP No. 21566 of 2008. Thus, during the pendency of WP No. 20649 of 2018, the second respondent has passed the impugned order of termination and it is hit by the principles of sub-judice. The order of termination has been passed hastily only to ensure that the relief sought for in WP No. 20649 of 2018 is not adjudicated by this Court on merits and to render it infructuous.

15. The learned counsel for the petitioner further submitted that even in case an order of termination is passed against a temporary employee, the Court has to see whether the order was made on the ground of misconduct and whether any complaint was made against the employee. In that process, the Court has to examine the real circumstances as well as the basis and foundation of the order complained of. If the Court is satisfied that the termination of services is not so innocuous as claimed to be and if the circumstances further disclose that it is only a camouflage with a view to avoid enquiry as warranted by Article 311 (2) of The Constitution of India, then such a termination is liable to be quashed. Therefore, the learned counsel for the petitioner prayed for allowing WP No. 21566 of 2018.

16. Repudiating the arguments of the counsel for the petitioner, Mr. B. Vijay, learned counsel appearing for the respondents would contend that order passed by the second respondent discharging the petitioner from service by concluding that she is unsuitable for full membership of service does not cause any stigma and therefore it cannot be said to be arbitrary or unreasonable. It is his contention that the order which is impugned in this writ petition is an order of termination simpliciter and there is no stigma attached to it. It is further stated that the petitioner has filed the first writ petition No. 20649 of 2018 challenging the show cause notice dated 19.07.2018 issued to her and this court did not grant any interim stay. In fact, the writ petitioner, before filing WP

No. 20649 of 2018, submitted a representation seeking time to enable her to file a writ petition before this Court and ultimately, she submitted her explanation on 06.08.2018 to the show cause notice dated 19.07.2018. Taking note of the explanation offered by the petitioner, the appointing authority namely the second respondent concluded that the service rendered by the petitioner in the post to which she was appointed is not satisfactory and she is not eligible for full membership. The second respondent, as an appointing authority, is entitled to form an opinion as regards the performance of discharge of duty by the petitioner. The second respondent, on evaluating the manner in which the petitioner discharged her service has formed a definite opinion that the petitioner is unsuitable to continue in service and such an opinion formed by the second respondent needs no interference by this Court.

17. Elaborating on the procedures contemplated under Section 32 of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016, the learned counsel for the respondents submitted that Section 32 contemplates two kinds of discharge or termination of probation. The first form being termination by simpliciter for unsatisfactory or general inefficiency in discharge of service and the latter being termination of probation by way of penalty for certain misconduct under the Rules. In the present case, the service of the petitioner was found to be unsatisfactory and it falls within the scope of the first kind of termination. In such circumstances, there is no need to conduct any enquiry. Such an enquiry is warranted only in cases where the competent authority proposes to terminate the probation of member for specific charges. In the present case, in the order which is impugned in this writ petition, there is no allegation of misconduct or any specific charges levelled against the petitioner warranting initiation of disciplinary proceedings and conducting an enquiry. As on the date of discharge of the petitioner, there was no disciplinary proceedings initiated against the petitioner. In the order of discharge, it is categorically stated that such an order of discharge is being passed owing to unsatisfactory service rendered by the petitioner during the period of probation. Therefore, the learned counsel for the respondents would contend that the contention of the petitioner that the respondents ought to have initiated disciplinary proceedings and afforded an opportunity to the petitioner to put forth her defence will not arise.

18. The learned counsel for the respondents reiterated his submission that the discharge of the petitioner is an order simpliciter and it is not a stigmatic termination, as alleged.

The earlier writ petition No. 8154 of 2015 was filed by the petitioner challenging the proceedings dated 12.03.2015 of the second respondent refusing to furnish her the report of the III Additional District Judge, Salem. The said writ petition was allowed by this Court on 30.03.2015 on the ground that disciplinary proceedings should be conducted strictly in terms of Rule 17 (b). In the subsequent writ petition filed by the petitioner being WP No. 13840 of 2017, challenging the proceedings dated 04.05.2017 of the second respondent, this Court, by order dated 07.12.2017 categorically held that the competent authority is at liberty to terminate the petitioner on the ground of general unsatisfactory work or incapacity by complying with the principles of natural justice and formalities prescribed under Section 32 of the Act. Pursuant to such an order, the second respondent, upon considering the service record of the petitioner and other relevant materials, has formed an opinion that the services rendered by the petitioner during the period of her probation is unsatisfactory and discharged her from service. Thus, the order discharging the petitioner without declaring her probation does not cause any stigma and it is not in violation of Article 311 of The Constitution of India. The discharge of petitioner due to her unsatisfactory service does not attract Article 311 of The Constitution of India and consequently there is no necessity to conduct any disciplinary proceedings under the service Rules. In order to buttress this submission, the learned counsel for the second respondent relied on the decision of the Honourable Supreme Court in the case of Oil and Natural Gas Commission and others vs. Dr. Mu.S. Iskender Ali reported in (1980) 3 Supreme Court Cases 428 wherein it was held as follows:-

"7.It is obvious that a temporary employee is appointed on probation for a particular period only in order to test whether his conduct is good and satisfactory so that he may be retained. The remarks in the assessment roll, merely indicate the nature of the performance put in by the officer for the limited purpose of determining whether or not his probation should be extended.

15. Reliance was, however, placed by the respondent on a decision of this Court in the case of State of Bihar vs. Gopi Kishore Prasad AIR 1960 SC 689 where it was held that although termination of the service of a person holding the post on probation cannot be said to deprive him of any right to the post and is no punishment but where instead of terminating a person's service the employer chooses to hold an enquiry into his alleged

misconduct and proceeds by way of a punishment, such a course involves a stigma and an order of termination is bad. Such, however, is not the case here. The short history of the service of the respondent clearly shows that his work had never been satisfactory and he was not found suitable for being retained in service and that is why even though some sort of an enquiry was started, it was not proceeded with and no punishment was inflicted on him. In these circumstances, therefore, if the appointing authority considered it expedient to terminate the service of the respondent - a probationer - it cannot be said that the order of termination attracted the provisions of Article 311 of The Constitution. Thus, if the appellant found that the respondent was not suitable for being retained in service that will not vitiate the order impugned as held and observed by this Court in the cases cited above."

19. The learned counsel for the respondents also placed reliance on the decision of the Honourable Supreme Court in the case of Director, Aryabhatta Research Institute of Observational Sciences (ARIES) and another vs. Devendra Joshi and others reported in (2018) 15 Supreme Court Cases 73, it was held as follows:-

12. A plain reading of the order dated 31-12-2008 would show that it is an innocuous order terminating the services of the respondent 1 at the end of the probation period. As no allegations of misconduct are made in the order, there is no stigma. Even the High Court is of the opinion that there is no stigma. The fact remains that there was a preliminary enquiry conducted by the Management in which there was a prima facie finding recorded against the Respondent 1 of his involvement in an act of misconduct. The appellants decided not to proceed further and hold a detailed inquiry to prove the misconduct of respondent 1. However, the service of Respondent 1 was terminated at the end of the period of probation which cannot be said punitive. Therefore, the order dated 31.12.2018 is an order of termination simpliciter. In view of the above, it cannot be said that misconduct was the foundation for the order of termination."

20. Further reliance was placed on the decision of the Honourable Supreme Court in the case of Kunwar Arun Kumar vs. U.P. Hill Electronics Corporation Limited and others reported in

(1997) 2 Supreme Court Cases 191 wherein it was held as follows:-

5. The petitioner challenged the order of termination in the High Court. The High Court without going into the question whether or not it is a stigma, came to the conclusion that the respondents had totally lost confidence in the appellant and that he was totally unsuitable for the job for which he was employed and, therefore, he was found not entitled to any enquiry. Consequently, it dismissed the writ petition. Shri. Sehgal, learned Senior counsel for the petitioner, contends that the finding recorded amounts to stigma, action taken without conducting enquiry and giving an opportunity to the petitioner, is violative of Article 311 (2) of the Constitution and the rules made thereunder. Therefore, he is entitled to an opportunity of being heard and be dismissed only on the ground of misconduct and not by termination simpliciter. We do not agree with the learned counsel. The reasons mentioned in the order may be a motive and not a foundation as a ground for dismissal. During the period of probation, the authorities are entitled to assess the suitability of the candidates and if it is found that the candidate is not suitable to remain in service, they are entitled to record a finding of unsatisfactory performance of the work and duties during the period of probation. Under these circumstances, necessarily, the appointing authority has to look into the performance of the work and duties during the period of probation and if they record a finding that during that probation period, the work and performance of the duties were unsatisfactory, they are entitled to terminate the service in terms of the letter of appointment without conducting any enquiry. That does not amount to any stigma. If the record does not support a conclusion reached by the authorities, a different complexion would arise. In this case, they have recorded the finding that the petitioner was regularly absent on one ground or the other. Under these circumstances, the respondents terminated his services. We do not find any illegality in the action taken by the respondents."

21. By placing reliance on the above decisions, the learned counsel for the respondents would contend that the respondents need not conduct an elaborate enquiry to prove the misconduct

against the petitioner during her period of probation and therefore, the second respondent is wholly justified in recording unsuitability of the petitioner to continue in the service. Such an evaluation by the second respondent cannot be said to be arbitrary or a stigmatic order calling for interference of this Court. The learned counsel for the respondents therefore prayed for dismissal of the writ petition.

22. We have heard the counsel for both sides and perused the materials placed on record. In the light of the rival submissions made, it has to be examined as to (i) whether the order, which is impugned in Writ Petition No. 21566 of 2018, is liable to be set aside for want of initiation of disciplinary proceedings against the petitioner and (ii) whether the order of discharge is simpliciter or attached with a stigma warranting interference of this Court.

23. Since both the questions required to be examined are inter-twined and inter-related, they are dealt with simultaneously.

24. It is the sum and substance of the counsel for the petitioner that earlier on two occasions, memos were issued to the petitioner and they were challenged before this Court on the ground of arbitrariness without holding an enquiry to enquire into the nature of allegations and manner of misconduct alleged. The circumstances which prompted the petitioner to file writ petitions before this Court and the order passed thereon are delineated hereunder.

25. During the course of the employment of the petitioner, a memo dated 25.02.2015 was issued by the second respondent indicating his proposal to discharge the petitioner from service without conducting any enquiry. In the said memo, the second respondent referred to the leave taken by her from 20.06.2014 to 22.06.2014 and 27.06.2014 to 02.07.2014 without intimation and the report received thereof from the III Additional District Judge, Salem. Reference was also made to the insubordination on the part of the petitioner in not following the instructions given to her by her superiors besides indulging in other works unrelated to her official duties which has caused inconvenience to the Subordinate Judge, Attur where she worked. Therefore, the petitioner was called upon to submit her explanation as to why she should not be discharged from duties. On receipt of the memo dated 25.02.2015, the petitioner sought for the report received from the III Additional District Judge to enable her to submit an effective explanation. However, the second respondent, in his proceedings dated 12.03.2015 has stated that

the report of the III Additional District Judge, Salem cannot be furnished to her and called upon the petitioner to submit her explanation within five days. Challenging the proceedings dated 12.03.2015, the petitioner approached this Court with WP No. 8154 of 2015 in which an order dated 30.03.2015 was passed wherein it was held as follows:-

"5. At the outset, it should be pointed out that no disciplinary proceedings appear to have been initiated against the petitioner in terms of Rule 17 (b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules. The procedure prescribed therein, cannot be by-passed when the first respondent seeks to impose the penalty of removal from service or any other major penalty, on allegations of grave misconduct.

6. A look at the first show cause notice dated 25.02.2015 would show that several allegations, without details, have been made against the petitioner at the behest of the learned Sub-Judge, Attur. Therefore, the first respondent is not entitled to keep everything secret and merely issue a show cause notice for removing the petitioner from service.

7. In view of the above, the writ petition is allowed and the impugned proceedings are set aside. It will be open to the first respondent to follow the procedure prescribed by law. No costs. The connected miscellaneous petition is closed."

26. Pursuant thereto, a notice dated 30.04.2015 was issued to the petitioner by the Subordinate Judge, Attur in which reference was made to the act of the petitioner in conversing with the duty policemen who attend duties to the Court, during working hours by neglecting the discharge of her duties. By the notice dated 30.04.2015, the petitioner was called upon to submit her explanation within three days. On the same day namely 30.04.2015, yet another notice was issued by the Subordinate Judge, Attur in which it was stated that the petitioner is seen conversing in her mobile phone continuously during office hours and that she failed to keep the court hall clean. It was further stated that inspite of repeated instructions given to her, she failed to follow the same and continued to neglect the discharge of her duty. The petitioner submitted her explanation to both the notices dated 30.04.2015, on 04.05.2015, praying to drop all further proceedings in this regard.

27. Following the memo dated 30.04.2015, on 07.11.2016, the second respondent caused a notice to the petitioner in which

reference was made to the unauthorised leave taken by her for a period of 42 days, which were treated as leave on loss of pay. By referring to the dates on which the petitioner had taken leave, the petitioner was called upon to obtain a certificate of good conduct from the Subordinate Judge, Attur in which court she is working. The petitioner therefore submitted a letter dated 08.11.2016 requesting the Subordinate Judge to issue a certificate of good conduct to her.

28. In the above circumstances, on 04.05.2017, the second respondent, by declaring the discharge of duties of the petitioner as "very worst and work performance not satisfactory" called upon her to submit her explanation within 15 days to show cause as to why she should not be discharged from service. This proceeding dated 04.05.2017 of the second respondent was subjected to challenge by the petitioner in WP No. 13480 of 2017. By order dated 07.12.2017 this Court passed the following order:-

"8.1This statement shows predisposition to 'discharge' petitioner from the service on the ground of being unfit for service.

8.2 Quite clearly, giving opportunity to the petitioner to respond to the show cause notice in these circumstances will be a pyrrhic exercise and an empty formality.

8.3 Accordingly, the impugned show cause notice is set aside.

9. Needless to say this would not come in the way of the respondents in taking recourse to the appropriate provision of law, if they decide to act against the petitioner.

10. The writ petition is disposed of in the aforesaid terms. Consequently, the connected miscellaneous petitions are closed. Parties are left to bear their own costs."

29. On 07.02.2018, the petitioner was suspended from service pending contemplation of enquiry into grave charges against her. The suspension was made purportedly for the dereliction of duty committed by her. However, on 06.03.2018, the suspension of the petitioner was revoked and she was transferred to the Court of District Munsif, Sankari on administrative grounds.

30. In the meantime, by proceedings dated 16.02.2018 of the second respondent, the probation of the petitioner was extended for a period of six months from 07.12.2017, the date on which this Court passed the order in the writ petition No. 13480 of

2017 filed by the petitioner.

31. While so, by the proceedings dated 19.07.2018 of the second respondent, which is impugned in WP No. 20649 of 2018, the second respondent, invoking Section 31 (1) (ii) of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016 issued a notice calling upon the petitioner to submit her explanation within ten days as to why she should not be terminated from service inasmuch as her performance of discharge of duties is not satisfactory. When WP No. 20649 of 2018 was pending, the second respondent passed the order dated 13.08.2018 discharging the petitioner from service during the period of her probation. This order of discharge dated 13.08.2018 is challenged in WP No. 21566 of 2018.

32. With this factual background, it has to be examined as to whether the order of termination is simpliciter or attached with stigma. For this purpose, the order dated 13.08.2018 has to be looked into. In the order dated 13.08.2018, the second respondent, being the appointing authority has pointed out that the period of probation of the petitioner was extended and during such extended period also, the discharge of duty by the petitioner is not satisfactory. Reference was also made to the show cause notice dated 19.07.2018 issued to her seeking her explanation. Further, it was stated that on examination of the records relating to her service, it was found to be not satisfactory and that the petitioner is not suitable for continuing in the employment. Thus, in the order dated 13.08.2018, there was no adverse remarks made against the petitioner with respect to the manner in which she discharged her duties. Nor there were any allegations of misconduct levelled against the petitioner. It was merely stated that the service of the petitioner hitherto is not satisfactory and that her probation cannot be declared entitling her to become a permanent member of the government service. When such an opinion was formed by the second respondent, being the appointing authority, whether this Court can substitute it's view and direct the second respondent to declare the probation of the petitioner has to be examined.

33. A person who is appointed to a government service will be on probation for a period of two years. The entitlement of such person appointed to get all the benefits attached to the post such as annual increment, promotion etc., depends first on getting his probation declared. In other words, such appointment will be construed as temporary in nature and only if probation is declared, the appointee will get entitled to all the service benefits attached to the post. The regularisation

of the temporary service is technically termed as declaration of probation. During the period of probation, the appointing authority is bound to assess, evaluate and adjudge the potentiality of such employee to continue in service, his basic understanding to the work assigned to him, the efficiency with which he could complete the tasks assigned, the manner in which he co-ordinates with other employees to get the work done, the behaviour towards the superiors, punctuality in attending the office etc. The two years probation period from the date of initial appointment will be a testing time for the government servant, within which time, he has to prove his potentiality and capability to discharge his work efficiently and honestly and thereby inspire the confidence of the employer. In the absence of possession of the above qualities during the period of probation, the appointing authority cannot be expected to mechanically declare the probation of a government servant on completion of two years. Therefore, before declaring the probation, the appointing authority will normally get the feed back relating to the employee from his immediate superiors, the conduct of the employee during the discharge of the work and thereafter form an opinion as regards the suitability of the employee to continue in service. The potentiality or suitability of the employee appointed to a government service is an important factor for declaration of probation. For assessing the same, the appointing authority is given a discretionary power. It is sufficient for the appointing authority to merely say that the performance of an employee during the course of his probation is satisfactory or not satisfactory and the appointing authority need not elaborate reasons for coming to such conclusion. On the contrary, if any allegation of misconduct is made, during the period of probation, then the appointing authority, even before declaring the probation, is bound to conduct a disciplinary proceeding to prove the charges levelled against the employee.

34. In the present case, the appointing authority has come to a conclusion that the petitioner is unsuitable for continuance in the government post, to which she was appointed. In the order of discharge, there was no allegation of misconduct levelled against the petitioner. The appointing authority has simply formed an opinion based on the reports given by the III Additional District Judge, Salem and Subordinate Judge, Attur and independently examined the past performance of the petitioner to conclude that the discharge of duty by the petitioner is not satisfactory and refused to declare the petitioner's probation and discharged her from service. In such circumstances, the order of discharge, which is impugned in WP No. 21566 of 2018, is only an order simpliciter and it is not

attached with a stigma, as has been contended by the counsel for the petitioner.

35. The learned counsel for the petitioner strenuously contended that even though the order of discharge did not indicate about the misconduct on the part of the petitioner, in the counter affidavit, certain allegations have been made and it exposes the mind of the appointing authority to prematurely discharge the petitioner from service without conducting any enquiry. We are unable to accept the submission of the counsel for the petitioner. It is true that certain remarks were made in the counter affidavit against the petitioner. Such averments have been made, in our opinion, only for the consideration of this Court to show that the second respondent, in a situation of this nature, is wholly justified in discharging the petitioner from service. Even otherwise, such passive remarks made in the counter affidavit filed on behalf of the second respondent cannot be taken into account by this Court to hold that the order of discharge is a stigmatic order warranting our interference.

36. On perusal of the records, we have noticed that there were allegations against the petitioner that from the date of joining service, she did not seriously pursue the tasks assigned to her. There were also allegations against the petitioner that she failed to discharge her duties properly, she was found conversing in her mobile phone during office hours, engaged in a conversation with policemen who attended Court duty, availed leave without prior permission from the employer, confrontational attitude towards the higher officials, lack of devotion to her duty etc., As mentioned above, the petitioner was periodically issued notice reminding her that she is on probation and that she must improve her performance. At every stage, the petitioner was informed of the derelictions committed by her and therefore, the petitioner ought to have devoted her time and attention to efficient discharge of her work. We have also gone through the various explanations offered by the petitioner as and when she was called upon to do so. In one of the explanations dated 04.05.2015, we have noticed that the petitioner had adopted a confrontational attitude towards the Subordinate Judge, Attur. The explanation dated 04.05.2015 was also sent by the petitioner to the Honourable Chief Justice of this Court for intervention, which, in our opinion, is not warranted. Such an attitude on the part of the petitioner shows desperation and lack of devotion to duty. Similarly, in one of the proceedings dated 20.07.2018 of the District Munsif, Sankiri, reference was made to the petitioner leaving the office on 20.07.2018 without prior intimation to the appropriate

authority to whom such intimation ought to have been given. It is no doubt true that these averments have not been mentioned by the second respondent while passing the order of discharge, but we can infer that these conduct of the petitioner would have definitely weighed the second respondent not to declare the probation of the petitioner. In other words, the past conduct of the petitioner in discharge of duty is the foundation for passing the order of discharge against her. In fact, the learned counsel for the respondent has drawn the attention of this Court to Section 32 (3) of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016 which empowers the appointing authority to declare the probation of a government servant on assessing his suitability to continue in government service. Section 32 of Tamil Nadu Government Servants (Conditions of Service), Act, 2016 reads as follows:-

"32. Probationer's Suitability for Full Membership:- (1) At the end of the prescribed or extended period of probation, as the case may be, the appointing authority shall consider the probationer's suitability for full membership of the service, class or category for which he was selected.

(2) If the appointing authority decides that a probationer is suitable for such full membership, it shall, as soon as possible, issue an order declaring the probationer to have satisfactorily completed his probation. If no such order is issued within six months from the date on which he is eligible for such declaration, the probationer shall be deemed to have satisfactorily completed his probation on the date of expiry of the prescribed or extended period of probation. A formal order declaring the completion of probation shall, however, be issued by the competent authority. In all cases in which serious charges are pending and therefore probation cannot be declared, an order to that effect that the question of declaration of probation cannot be considered till the charges are disposed of shall be issued by the competent authority within six months from the due date for completion of probation and the final order on probation shall be passed as early as possible and in any case within one month after the disposal of the charges or six months after the due date for completion of probation, whichever is later.

Explanation:- For the purpose of calculating

the period of probation of a probationer, complete calendar months, irrespective of the number of days in each month, shall first be calculated and then the odd number of days calculated subsequently. Periods of leave, if any, taken during the period of probation shall be excluded while calculating the period of probation.

(3) If the appointing authority decides that the probationer is not suitable for such membership, it shall, unless the period of probation is extended under Section 33, by order, discharge him from the service after giving him a reasonable opportunity of showing cause against the action proposed to be taken in regard to him;

Provided that where a Probationer has been given a reasonable opportunity of showing cause against the imposition on him of any of the penalties specified in clauses (iv), (vi), (vii) and (viii) of Rule 8 of Tamil Nadu Civil Services (Discipline and Appeal) Rules and the conclusion of the disciplinary proceedings, a tentative conclusion is arrived as to discharge him from the service, a further opportunity of showing cause specifically against such charge need not be given to him.

Explanation I:- The decision of the appointing authority that the probationer is not suitable for full membership may be based also on his work and conduct till the date of the decision, inclusive of the period subsequent to the prescribed or extended period of probation

Explanation II: Where the competent authority proposes to terminate the probation of a member of a service for general unsatisfactory work or incapacity without the need for enquiry into specific charges, he shall do so under Section 31 or under this section as the case may be. In cases where he proposes to terminate the probationer of such a member for specific charges in addition to, or distinct from general inefficiency or incapacity, he shall frame specific charges and follow the detailed procedure laid down in Rule 17 (b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules, as such termination of probation by way of penalty will attract the provisions of Article 311 (2) of the Constitution.

37. In the present case, by adhering to Section 32, the second respondent, by an order dated 16.02.2018 extended the probation of the petitioner for a period of six months with a view to give an opportunity to the petitioner to improve her performance. As there was no sign of any improvement in the performance of the petitioner, the second respondent, invoking the powers conferred under Explanation II to Section 32 (3) refused to extend the period of probation of the petitioner any further and discharged her from service. The second respondent, being the appointing authority, is not satisfied with the performance of the petitioner and therefore, he had chosen to refuse to declare the probation and discharge him from service. Therefore, we hold that the order of discharge passed by the second respondent is a discharge simpliciter and it is not attached with any stigma. There is no necessity for the second respondent to frame specific charges against the petitioner and to conduct an elaborate enquiry to prove those charges. Therefore, the order of discharge cannot be construed as the one passed by the second respondent as a measure of punishment.

38. The learned counsel for the petitioner would vehemently contend that even assuming that the order of discharge is without attached with any stigma and it is a termination simpliciter, yet, the Court has to see the surrounding circumstances under which it was passed as well as the basis and foundation of the order complained of. In this context, the learned counsel relied on the earlier writ petitions filed by the petitioner and the orders passed thereof to contend that the petitioner was whimsically targeted by the respondents with an intention to terminate her from service, at every stage. We are unable to accede to such submissions made on behalf of the petitioner. Even in the earlier orders passed by this Court, the merits or otherwise of the contentions raised by the petitioner has not been gone into, but this Court only directed the respondents to follow the procedures prescribed. In fact, in the order dated 30.03.2015 passed in WP No. 8154 of 2015, the Division Bench of this Court granted liberty to the respondents to follow the procedures prescribed by law and to proceed further. Accordingly, by following the procedures prescribed under Section 31 and 32 of Tamil Nadu Government Servants (Conditions of Service) Act, 2016, the second respondent extended the probation of the petitioner for a period of six months and thereafter passed the order of termination simpliciter without referring to any misconduct on the part of the petitioner. If any misconduct is alleged against the probationer, then it is obligatory on the part of the appointing authority to frame charges and to conduct an enquiry. Such a situation does not arise in this case.

38. In so far as the prayer sought for in WP No. 20649 of 2018, it no longer survives for consideration and therefore, the relief sought for in WP No. 20649 of 2018 has become infructuous. Therefore, we dismiss WP No. 20649 of 2018 as having become infructuous.

39. In view of the conclusion we have reached hereinabove, we dismiss WP No. 21566 of 2018 by confirming the order passed by the second respondent vide ROC No.2703/A/2018 dated 13.08.2018. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge
Salem

2. The District Munsif
Sankari, Salem

3. The Registrar General
The High Court of Judicature at Madras
High Court Buildings
Chennai - 600 104.

+lcc to Mr. S.N. Ravichandran, Advocate sr.87806

WP.NO.21566 & 20649/2018

rsk(co)
nr 30/10/2019