

\$~

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

Reserved on: 28th November, 2019

Decided on: 18th December, 2019

LPA 928/2013

AIRPORTS AUTHORITY OF INDIA Appellant

Through: Mr. K. K. Rai, Senior Advocate with Mr. Ramkrishna Veerendra, Mr. Aman Yadav, Mr. Anshul Rai, Mr. D. P. S. Rajesh and Ms. Sreoshi Chatterjee, Advocates.

Versus

HARBHAJAN SINGH Respondent

Through: Mr. Vijay Kumar and Mr. Jaspal Singh, Advocates.

LPA 183/2014

HARBHAJAN SINGH Appellant

Through: Mr. Vijay Kumar and Mr. Jaspal Singh, Advocates.

Versus

AIRPORTS AUTHORITY OF INDIA Respondent

Through: Mr. K. K. Rai, Senior Advocate with Mr. Ramkrishna Veerendra, Mr. Aman Yadav, Mr. Anshul Rai, Mr. D. P. S. Rajesh and Ms. Sreoshi Chatterjee, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH

J U D G M E N T

%

Dr. S. Muralidhar, J.:

Introduction

1. These two appeals - one by the Airports Authority of India ('AAI') and the other by Mr. Harbhajan Singh (who is, hereafter, for convenience, referred to as 'Respondent') - are directed against the judgment dated 9th September, 2013, passed by the learned Single Judge disposing of W.P.(C) No. 2076/2011 filed by the Respondent. By the said impugned judgment, the learned Single Judge set aside the termination order dated 27th June, 1997, the enquiry report dated 9th August, 2010, and the impugned order dated 27th January, 2011 of the AAI, where the reply of the Respondent to the second show cause notice ('SCN'), in respect of the proposed punishment was rejected. The learned Single Judge directed that the Respondent be reinstated in service and shall be entitled to all consequential benefits, but with 50% back-wages.

2. On 14th March, 2014, an interim order was passed by this Court to the effect that subject to the AAI depositing the entire amount payable to the Respondent in terms of the impugned judgment of the learned Single Judge, there would be a stay on the reinstatement, as well as the recovery of wages, during the pendency of the present appeals. On 29th May, 2014, while noting that the AAI had deposited Rs.43,94,218/-, this Court directed the said amount to be kept by the Registry in a fixed deposit, as already directed on 14th March, 2014. The Court also noted the submissions of Mr. Vijay Kumar, learned counsel for the Respondent, disputing the computation of

the above amount by the AAI, and that the consequential benefits had not been taken into consideration.

3. On 11th July, 2016, a direction was issued to the Respondent to file an affidavit, stating on oath whether after 27th June, 1997, he had taken up employment or was unemployed. Pursuant thereto, the Respondent filed an affidavit on 10th August, 2016, stating *inter alia* that he has remained unemployed since 27th June, 1997, and could not get any job due to stigma of termination of his services. He further pointed out that his family was living on the monthly pension of his father, who was a retired army personnel. The AAI filed a reply to the said affidavit, on 7th January, 2017.

4. The Respondent has filed a separate appeal, being LPA No. 183/2014, against the same impugned judgment of the learned Single Judge, only to the extent that the back-wages had been restricted to 50%. It must be noted, however, at the outset, that Mr. Vijay Kumar, learned counsel for the Respondent stated that if this Court were to reject the AAI's appeal, then the Respondent would not press his appeal.

Background facts

5. The background facts are that the Respondent is an engineering graduate and belongs to the Scheduled Caste ('SC') category. On 13th May 1994, the Respondent was appointed as a Junior Engineer ('JE') in the AAI. He subsequently got promoted as Assistant Engineer ('AE') on 15th December, 1995. When an advertisement was issued for recruitment to the post of Assistant Executive Engineer ['AEE (E)'] in the AAI, the Respondent applied and was selected to that post.

6. According to the Respondent, he was asked to submit a 'technical resignation' in order to enable him to join in the post of AEE (E). He accordingly submitted his technical resignation and joined as AEE (E) at the Goa Airport Project, Goa on 5th August, 1996 under the charge of an Executive Engineer ('EE'). On 30th April, 1997, the Respondent was transferred to the Srinagar Airport. According to the Respondent, he was not informed of the reasons for his sudden transfer. He joined at the Srinagar Airport on 15th May, 1997.

7. At this stage, it requires to be noticed that in the letter dated 16th May, 1996, appointing him as AEE (E), it was stated that there would be a two year period of probation which could be extended at the discretion of the Management of the AAI (NAD), and that during the period of probation, his services were liable to be terminated at any time, without assigning any reasons, by giving one month's notice or payment of salary in lieu thereof, on either side. The offer of appointment was on *ad hoc* basis.

8. While the Respondent worked as AEE (E) at the Goa Airport, a complaint dated 21st February 1997 was received by the AAI from one Mr. V. K. Gupta, acting for M/s. AERCOMFORT, an air-conditioning and refrigeration contractor with its address at Tilak Marg, New Delhi, making allegations against Mr. Ashutosh, the JE and Mr Bhatti, an AE, stating that both the officers were demanding 5% commission as illegal gratification "for legitimate co-operation required for execution of work." The complaint alleged that in the last week of January, 1997 at 11.00 pm, the contractor received an STD call from Mr. Ashutosh, who appeared to be under the

influence of alcohol. It was alleged that Mr. Ashutosh had been behaving in a most undesirable manner with the staff and manhandling the operator in the plant room; in the bills prepared by Mr. Ashutosh and Mr. Bhatti, as received by the said contractor, a lot of measurements had not been taken although the work had been completed several months before; both the officers had threatened the contractor that they would make deductions in spite of the work carried out in order to make him suffer financially, since the contractor had not met their illegal demand. The said contractor was engaged in the work of installing air-conditioning in the New International Block, the Domestic Departure and Arrival Halls, and the associated car parks at the Goa Airport.

9. On 4th March, 1997, an investigation report was submitted by Mr. A. K. Mishra, the Superintending Engineer (Electrical) ['SE' (E)], *inter alia*, returning the following findings:

- (i) That it was the Respondent who had telephoned at the residence of the contractor at around 11.00 pm, and started abusing the contractor for delay in the air-conditioning work at Goa Airport.
- (ii) That after Mr. Bhatti joined as JE (E), he too started misbehaving with the contractor's local staff.
- (iii) That the Respondent had confirmed calling the contractor at around 10.00 pm, but stated that he spoke only about the progress of the air-conditioning work.
- (iv) That the Respondent was warned by Mr. A. K. Mishra not to make telephone calls to the contractor, particularly at odd hours, and that if

there is any dispute, he should report the matter to the EE (E), who would take suitable action.

- (v) That the EE (E) informed Mr. Mishra that Mr. Bhatti, JE (E) had been cautioned for the incident, and he had responded positively.
- (vi) That, although, the Respondent had been given a warning, it was desirable to shift him to some other airport in the interest of the work.

10. The Central Vigilance Officer ('CVO') in a note dated 4th March 1997, stated that the allegations of the contractor against the two engineers were "proved at the enquiry held", and the misconduct of demanding commission, threatening the contractor on telephone in a drunken state, and delaying the passing of the bills of the contractor was "indeed serious". It was recommended that since the "conduct and performance" of the Respondent and Mr. Ashutosh was not found to be satisfactory, they should be terminated with immediate effect.

11. On receipt of the aforementioned report of Mr. A. K. Mishra, Dr Ramalingam, ACE (E) in his note dated 7th March, 1997 observed that the complaint of the contractor was about the aforesaid officers demanding 5% commission, for which an STD call had been made at 11.00 pm to the contractor's house in Delhi from Goa, and that this complaint was verified with the contractor by SE (E) – II, who visited Goa. The ACE (E) noted that Mr. Bhatti had been recommended for transfer to Srinagar Airport, and had also been warned by the SE (E). It was further noted that the complaint of the contractor was serious in nature. It was noted that the AE (E) i.e. the Respondent herein, did admit to having called the contractor at night, and

that his action in directly dealing with the contractor, and that too at night, called for action. The ACE (E) in his note suggested that they should call for an explanation from the Respondent as to why he should not be removed from service for exceeding his authority under the temporary service conditions, as he was still on probation.

12. Consequent thereto, on 27th June, 1997, the impugned order was passed by the AAI, terminating the Respondent's service with immediate effect, in terms of paragraphs 4 and 5 of the terms and conditions of the offer of appointment. A cheque for a sum of Rs.8131/-, towards payment in lieu of one month's notice, was enclosed with the letter.

First round before the Single Judge and DB

13. In the first round, the Respondent challenged the termination of his services, by filing W.P.(C) 2773/2000 in this Court. It was heard finally by a learned Single Judge of this Court nearly a decade later. By the judgment dated 13th February, 2009, the learned Single Judge set aside the order of termination. In the said judgment, it was noted by the learned Single Judge that although the termination order was "fairly innocuous", in the written synopsis filed before the Court by the AAI, the specific reasons for terminating the Respondent's services were disclosed as under:

"In fact his services along with one Mr. Ashutosh Samarkar have been terminated on the complaint of one Mr. V. K. Gupta, Proprietor of M/s Aircomfort (an air-conditioning contractor of IMI) whose bills were not cleared and being harassed for not obliging both the employees by giving them bribery. Their services were terminated as a professional misconduct, cheating and demanding illegal gratification while holding a public

office for which the punishment of dismissal from services were given for the alleged involvement in the crime as is clear from page 70-75 the paper book.”

14. It was further noted by the learned Single Judge that before the National Commission for the Scheduled Castes and Scheduled Tribes (‘SC/ST Commission’), in response to the complaint filed by the Respondent against his termination, the AAI had taken the stand that the reason for terminating the Respondent was ‘misconduct’. The specific portion of the said reply reads thus:

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

- (1) Demanding 5% commission from the Contractor. STD Call by Shri Harbhajan Singh from Goa to Delhi at odd hours i.e., 11 pm to Contractor Sh. V. K. Gupta was alleged to have been made in this regard.
- (2) Threats given to Contractor over telephone in a drunken state by Shri Singh.
- (3) Delays to pass the bills of the Contractor."

15. It was in the above context that the learned Single Judge examined whether “the impugned order of termination is founded on misconduct or whether misconduct can be said to be merely the motive that prompted the order.” The learned Single Judge noted the judgment of the Supreme Court in ***Dipti Prakash Banerjee v. Satyendra Nath Base, National Centre for***

Basic Sciences, Calcutta (1999) 3 SCC 60, differentiating between ‘foundation’ and ‘motive’ in relation to orders terminating the services of probationers. It was observed that *Dipti Prakash Banerjee (supra)* referred to the Supreme Court’s earlier decision in *Radhey Shyam Gupta v. U. P. State Agro Industries Corporation Limited (1999) 2 SCC 21*, wherein the legal position was summarized as under:

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

16. In the same judgment in *Dipti Prakash Banerjee (supra)*, the Supreme Court examined the issue as to what amounts to ‘stigma’. The learned Single Judge, in this regard, observed:

“It has been held that if the termination of the employee has its motive in some act of misconduct, although the same is not mentioned anywhere in the letter of termination and there is no finding arrived at to that extent even in the records, then, there is no need for any proper enquiry into the matter by giving adequate opportunity to the affected officers. If, however, even if the order itself is innocuous, still, if the records were to demonstrate that misconduct is the foundation of the order, or to put it differently, if the authority concerned comes to a

definite conclusion with regard to the misconduct of the officer before issuing the termination letter, then in that case, misconduct can be said to be the foundation of such an order, and if, the same is issued without proper enquiry, the same is bad.”

17. The learned Single Judge having examined the records of the case, came to the conclusion that the termination order in the present case was “founded” on the allegations of misconduct and, therefore, the Respondent ought to have been afforded a proper enquiry and opportunity to defend himself before the decision of removing him from service was taken. For the aforementioned reasons, the learned Single Judge set aside the termination order, directing AAI to reinstate the Respondent along with all consequential seniority and benefits within one month, leaving it open to AAI to initiate fresh proceedings against the Respondent, if they were so inclined, in accordance with law within three months.

18. The above order of the learned Single Judge was challenged by the AAI by filing LPA 230/2009, which was disposed of by a Division Bench (‘DB’) of this Court by an order dated 20th July, 2009. The DB upheld the order of the learned Single Judge, with only one modification, i.e. that the Respondent would be entitled to only 50% back-wages.

Appeal in the Supreme Court

19. Thereafter, AAI filed S.L.P.(C) 35309/2009, in which notice was issued by the Supreme Court on 16th December, 2009, granting stay on reinstatement. Liberty was granted to the parties to mention the petition if any settlement was reached.

20. On the next date of hearing i.e. 26th March, 2010, the Supreme Court passed the following order:

“Stand over for three months.

In the meantime, we are granting permission to the Management to hold an enquiry into the alleged misconduct.

We will pass further orders depending upon the result of the enquiry.”

Proceedings before the Enquiry Committee

21. Thereafter, the AAI, issued an SCN dated 11th June, 2010 to the Respondent, the preamble to which set out the sequence of events till then. The operative portion of the SCN reads as under:

“Now therefore, in view of the above Shri Harbhajan Singh is directed to make his submission, if any, to plead his case. His explanation supported by documents, if any, must be submitted within 15 days of the receipt of this show cause notice, failing which it will be presumed that despite affording him an opportunity, he has no submissions to make in his defence. It is also informed that the submission/representations made by him in response to the Show Cause Notice shall be placed before the Inquiry Committee constituted on the directions of the Hon'ble Supreme Court order dated 26.03.2010. The committee after perusing his submission and all other available record, may afford Shri Harbhajan Singh an opportunity to make submissions he may like to and also to be heard in person.

The copies of the following documents are also enclosed herewith.

1. Complaint dated 21.02.97 received from M/s AERCOMFORT
2. Preliminary investigation report dated 04.03.97

3. Directions of Supreme Court dated 26.03.2010.”

22. The Respondent replied to the said SCN on 26th June, 2010. It must be noticed at this stage that by an order dated 11th June, 2010, the AAI constituted the Enquiry Committee (‘EC’), consisting of five of its officers as members. The EC held its proceedings on 29th July, 2010, where it called the Respondent to make his submissions in person in the chamber of the Chairman of the EC. The Respondent appeared at the said time and date. The proceedings of the EC held on that date have been placed on record. The exchange between the EC and the Respondent have been recorded therein as under:

Committee-	Please introduce yourself.
Harbhajan Singh	I, Harbhajan Singh, joined MI on 13.05.1994 as JE at IGIA Terminal-I. Then I was promoted as AE w.e.f. 11.12.1995 at IGIA Terminal - I. On 05.08.1996, I joined in AAI (NAD) as Asstt. EE at Goa Airport against open advertisement for the post of AEE reserved for SC/ST under special recruitment drive in 1995. I was there as AEE at Goa on probation under Executive Engineer, Shri WG Raju. I was looking after the project work including building internal electrical sub-station works, and air conditioning work etc. On 11.04.1997, I was transferred to Srinagar Airport as per the order of Airport Director, Goa and joined Srinagar Airport. On 27.06.1997, my services were terminated vide letter dated SR/AAI/CONF/25/ dated 27.06.1997, while I was on leave.
Committee	Can you please submit any identification proof?
Harbhajan Singh	I am submitting the original letter issued by Airport Authority of India dated 20.07.2010 towards the proof.
Committee	Whether the documents submitted by you, vide letter

	dated 26.06.2010 in response to the Show Cause Notice dated 11.06.2010 are the final documents or would you like to make additional submissions, if any?
Harbhajan Singh	I have given my submission dated 26.06.2010 in response to the AAI Show Cause Notice dated 11.06.2010. Further I would like to submit additional 5 documents (5 sets) as follows, vide my letter dated 29.07.2010. i) Letter of OSD ED (P) dated 06.10.1997 to NCSC/ST ii) ED(P) letter dated 04.12.1997 to NCSC/ST as per directions of former AAFs Chairman Shri S K Narula. iii) Order of Hon'ble National Commission of SC/ST No. H- 4/T & CA-SSW-IV dated 09.06.1998. iv) Order of Hon'ble Single Bench of Delhi High Court dated 13.02.2009; v) Order of Hon'ble Chief Justice (Double Bench) of Delhi High Court dated 20.07.2009. In addition to the above, I further submit two pages of addendum at page 2 & 3 of my letter dated 29.07.2010 submitted today before the Committee.
Committee	Do you have further submission if any, in addition to the submissions made so far.
Harbhajan Singh	No Sir. These are my final written submissions.

23. Thereafter the EC enquired from the Respondent whether he would like to make any oral submissions, he replied in the affirmative and proceeded to

explain in great detail what had happened with him after the termination of his services, which has been recorded as hereunder:

Committee	Would you like to make any oral submissions?
Harbhajan Singh	Yes please. I state that on 27.06.1997, when my services were terminated under the rule of probation, I made representation to AAI management and subsequently, on 02.07.1997, I made my representation to the National Commission for SC / ST. AAI vide their letter dated 06.10.1997, narrated the three reasons of my termination. They are: (a) Demanding commission from contractor over telephone (b) Drunken and threatening over telephone (c) Delay in passing the bill of the contractor In this connection, the former Chairman, Shri SK Narula, had a meeting with the Chairman, National Commission for SC/ST on 02.12.1997 and submitted the documents pertaining to the misconduct signed by Shri SH Khan. ED letter No. C 14011/1/92-EE (Pt. III) dated 04.12.1997. The Commission, after hearing the case, and based on the submission made by the AAI, passed an order dated 09.06.1998 to reinstate me with back wages and subsequential benefits and cancel the mala-fide punishment transfer, (page 8 of the order). In the said order at page-3 & 4, the relevant extract at para7, is reproduced under: “So far as the factual, it is very clear from the record itself that contractor Mr. VK Gupta in his written complaint dated 21.02.1997 regarding demand of 5% commission and abusing in filthy language at

	midnight on STD call from Goa to his Delhi Residence does not mention the name of Sh. Harbhajan Singh. There is no name of Sh. Harbhajan Singh, Asstt. Executive Engineer (E) in the complaint. The name of Shri Harbhajan Singh transpired in the alleged charge in the course of investigation report of Supdtg. Engineer (Elect.) Sh. AK Mishra. This enquiry should have been made on the basis of the original complaint dated 21.02.1997 and as per procedure established by Law, enquiry authority shall had gone by the complaint and even the transfer of Sh Harbhajan Singh based on alleged misconduct is malafide”. “The Chief Engineer, while referring the case to the ED (Vig) had made some remarks "The Asstt. Executive Engineer recruited directly in 1995 from open market are observed to be not only below standard in their competent but also mischievous” “We may therefore keep a close watch on AEE's recruited from open market only in - 1995". The remarks exposed an ulterior motive and highly stigmatic”. I would also like to draw the attention of the Committee to the para 10 & 11 of page 8 of the said order of the Commission. When I was not reinstated by AAI as per the order of the Commission, I approached Hon’ble High Court, Delhi. The Court, vid their order dated 13.02.2009 have ordered to reinstate me with all consequential seniority and benefits. Further, it is mentioned that in para 18 of the said order, the Court observed that “this leaves me in doubt that the entire object if the exercise was to remove the petitioner for something about which the respondent i.e. AAI had convinced themselves but did not think it advisable or necessary to give the petitioner any opportunity to clear his
--	---

	name”. On non-implementation of the Hon’ble High Court, the order passed by the Hon’ble High Bench, Chief Justice of High Court direct AAI to reinstate the petitioner along with all consequential benefits and seniority. The Court further ordered that the order passed by the Single Judge requires no interference as it is in consonance with the settled legal position. In addition to the above, I would also like to draw the attention of the Committee to page 21 of my submission dated 26.06.2010 which highlights the discrepancies and contradictions in the complaint, inquiry proceedings/findings and approval order. Further, I submit that the Committee is therefore requested to take cognizance of my submissions made written as well as oral, especially annexures and letter issued by Department to the contractor. In view of the order / judgments passed by National Commission for SC/ST, Hon’ble Single Bench and Chief Justice of High Court (Bench), which are in my favour for reinstatement and consequential benefits and seniority, hence I may be reinstated with consequential benefits and seniority.
Committee	Would you be willing to appear before the Committee for clarification, if any in future?
Harbhajan Singh	Yes. I will appear before the Committee with prior notice of 2-3 days. I may also be contacted over telephone / mobile Nos. 2***** / 9***** / 9***** (Delhi Nos.)

24. In addition to the above, the Respondent filed an affidavit in S.L.P.(C) 35309/2009, where *inter alia* he submitted as under:

- (i) The EC unilaterally decided the terms of reference and merely sent a

formal SCN. At the hearing which took place on 29th July, 2010, nothing pertaining to the Respondent's misconduct was asked from him.

- (ii) The illegality of the earlier enquiry, could not be overcome by "paying a lip services to the principles of nature justice" by issuing an SCN to the Respondent. In the eyes of law, there was in fact no enquiry at all, and the mandate of the Supreme Court's order dated 26th March, 2010, had been breached.
- (iii) The report of the EC stated that on the issue of the telephone call, there were inconsistencies. It was averred by the Respondent in the affidavit as under:

"It would be germane to mention that the so-called phone call is the bedrock on which all the allegations rest and since there is inconsistency pertaining to the very bedrock, the main allegation unmistakably loses its sting."

- (iv) The other illegality pointed out in the report was reliance on a communication dated 3rd March, 1997. It was stated by the Respondent that "this report was never a part of records in Courts below." Moreover, the Respondent was not confronted with the said communication when he appeared before the EC on 29th July, 2010. He was also not given an opportunity to cross examine the complainant Mr. V. K. Gupta, or even Mr A. K. Mishra, who was present whenever a personal hearing was granted to the Respondent. Even Mr. V. V. G. Raju, who sent the said communication, was not permitted to be cross examined.

Order of the Supreme Court

25. On 29th September, 2010, the EC submitted its findings by a report dated 9th August, 2010, and this was submitted to the Supreme Court, which by an order dated 20th September, 2010, while disposing of the S.L.P., directed as under:

“Leave granted.

Mr. Gopal Subramaniam, learned Solicitor General, states that in pursuance of the order dated March 26, 2010, a Committee was constituted for holding an inquiry into the alleged misconduct of the respondent. He further states that the Committee has concluded the inquiry and submitted its report.

Counsel for the respondent tried to submit that the inquiry said to have been held by the Committee was not proper fair or in accordance with the permission granted by the Court.

At this stage, we are not inclined to go into that question at all.

As stated by the Solicitor General, a report is submitted after holding enquiry into the alleged misconduct by the respondent. The proceeding must, therefore, be allowed to reach its logical conclusion. The appellant may proceed on that basis of the enquiry report, in accordance with law, and pass final orders after giving the respondent the second show cause notice along with a copy of the enquiry report. If the respondent is aggrieved by the final order passed by the Authority, it will be open to him to seek his remedy in accordance with law.

This order passed by us shall substitute the operative order of the High Court.

The appeal stands disposed of with the above observations and directions.”

Termination order

26. Pursuant to the said order, a second SCN was issued to the Respondent by the AAI on 26th October, 2010, enclosing a copy of the report dated 9th August, 2010 of the EC, and asking him to make his submissions/representation. Pursuant thereto, the Respondent submitted his reply on 8th November, 2010,

27. After taking into consideration the reply of the Respondent, the Competent Authority ('CA') of the AAI held that there were no reasons which could persuade it to take a view different from the one taken by the EC, and confirmed the termination of the Respondent's services by the order dated 27th January, 2011.

Second round

28. The Respondent, for a second time, assailed the said order by filing W.P. (C) 2076/2011 before the learned Single Judge. By the impugned judgment dated 9th September, 2013, the learned Single Judge allowed the said petition and quashed the order terminating the Respondent's services, directing him to be reinstated with 50% back-wages. *Inter alia*, the learned Single Judge held as under:

- (i) Once the Supreme Court directed the AAI to hold an enquiry into the Respondent's misconduct, and take it to the logical conclusion, it was incumbent on the AAI to conduct a fresh enquiry, consistent with the principles of fairness and natural justice, regardless of the fact that the Respondent was a probationer.

- (ii) It was a settled legal position that a probationer's services cannot be terminated on the ground of misconduct without holding a proper departmental enquiry.
- (iii) Of the three allegations of misconduct, two were based on the telephone calls. The admitted position of the AAI was that there were inconsistencies as far as the facts relating to the telephone calls were concerned. As regards the third allegation, regarding not favouring the contractor in approving his bad work, no allegation regarding the misconduct and bad conduct of the Respondent arose. Therefore, the report dated 4th March, 1997 of Mr. Mishra and the contractor's complaint dated 21st February, 1997, lost steam. The previous report dated 4th March, 1997, ought to have been ignored.
- (iv) Mr Mishra's report dated 4th March, 1997 had been rejected both by the learned Single Judge as well as the DB of this Court. Placing reliance on the said report, together with a further enquiry report dated 9th August, 2010, was improper. The letter dated 3rd March, 1997 had not been part of the judicial record till 9th August, 2010. This document was not even supplied to the Respondent along with the SCN issued prior to the report of the alleged fresh enquiry.
- (v) The assessment of the performance of the Respondent was not the basis of termination. In terms of the order of the Supreme Court, a full-fledged enquiry regarding the misconduct of the Respondent, fully compliant with the principles of natural justice, was imperative.

In the present case, neither was any witness examined, nor any statement by any witness tendered in evidence. Needless to say, the Respondent then had no opportunity to cross-examine them. The conclusion of the EC was therefore not based on evidence.

29. Elaborate written submissions have been filed by both the sides on more than one occasion, and these have been taken into account by this Court.

Submissions on behalf of AAI

30. Mr. K. K. Rai, learned Senior Counsel appearing for the AAI submitted that the following issues would arise for consideration by the Court:

- (i) If the department makes a subsequent assessment of the probationer based on his performance and not as a disciplinary action as in the present case, is he entitled to a regular departmental enquiry required for punishment?
- (ii) Whether the Hon'ble Supreme Court contemplated a regular departmental enquiry particularly when it was informed that an enquiry has been conducted by a Committee?
- (iii) Whether the Respondent, having submitted to the proposed enquiry without any demur or protest, can now turn around and question its composition when the report is not palatable to him?
- (iv) Whether it is possible for an employer to subsequently pass an order segregating the punitive portion of the order?
- (v) Whether, in the facts and circumstances of the case, the Respondent, being a probationer, was entitled to merely a

limited enquiry to judge his suitability or a full-fledged departmental enquiry?

- (vi) Whether the quashing of an order on lack of enquiry shall call for further enquiry and not reinstatement as mandated by the Hon'ble Supreme Court in ***Chairman, Life Insurance Corporation of India v. A. Masilamani (2013) 6 SCC 530*** (para 16)?
- (vii) Whether a probationer who has worked for only a year should be reinstated in service at this stage on technical grounds where there is a total loss of confidence?

31. Mr. Rai submitted that the EC held the termination of the Respondent to be in order, only because his performance was not satisfactory, and not on the ground of misconduct. Mr. Rai submitted that the enquiry conducted in accordance with the order dated 26th March, 2010 of the Supreme Court was a general enquiry merely to assess the Respondent's performance. It was not intended as a disciplinary action. Hence, the misconduct could not be said to be the 'foundation' of the order of termination. This was a case of termination *simpliciter* and not a case of punishment. Therefore, according to Mr. Rai, the Respondent's termination cannot be held to be bad in law for the reason that he had not been accorded a regular departmental enquiry.

Submissions on behalf of the Respondent

32. Mr. Vijay Kumar, learned counsel appearing for the Respondent, on the other hand, referred to the order of the Supreme Court which had directed a proper enquiry to be held. He also referred to the judgment of the learned Single Judge dated 13th February, 2009 in W.P.(C) 2773/2000, which was reiterated by a DB of this Court, which drew the distinction between

‘motive’ and ‘foundation’.

33. Mr. Vijay Kumar pointed out that if the Supreme Court had meant for only a general enquiry to be held, there would have been no further directions to the AAI, after the report of the EC had been submitted, to carry the issue to its logical conclusion. In fact, pursuant thereto, a second SCN was issued to the Respondent, enclosing a copy of the report of the EC. Therefore, by no stretch of imagination, could this be said to be a mere general enquiry.

Analysis and reasons

34. Having considered the above submissions, the Court is of the view that the stand of the AAI that the enquiry conducted by constituting the EC pursuant to the order dated 26th March, 2010 of the Supreme Court was a ‘general enquiry’, and not a formal enquiry into the misconduct of the Respondent, is unacceptable. The order of the Supreme Court has to be seen in tandem with the order of the learned Single Judge and the DB of this Court in the first round. Both those judgments, on the basis of the stand taken by the AAI in the pleadings and its written submissions, formed the concurrent view that although the Respondent was a probationer at the relevant time, since the termination of his services was founded on his alleged misconduct, a formal enquiry was mandated to carry on such termination.

35. A collective reading of the orders passed by the Supreme Court in the SLP filed by the AAI makes it clear that the Supreme Court impliedly

accepted this determination. It was for this reason that the AAI was directed to hold an enquiry in the order dated 26th March, 2010. The EC constituted by the AAI for that purpose was expected to hold not a mere ‘general enquiry’, but a proper enquiry into the alleged misconduct.

36.1 The submission of Mr. Rai that it was possible to segregate the punitive portion of the order from the non-stigmatic portion, relying on the decision in *State of Uttar Pradesh v. Akbar Ali Khan AIR 1966 SC 1842*, is misconceived. In the said case, the Respondent therein, who was an employee on probation in the United Provinces Civil Service as a Tahsildar, was alleged to have drawn excess travelling allowance in respect of certain journeys undertaken by him. An enquiry was conducted, whereby the Respondent was given an opportunity to show cause why his probation should not be terminated.

36.2 By order dated 13th August 1957, the Respondent was informed by the Governor of Uttar Pradesh that his probation was terminated and that he was to be reverted to his previous post of Naib Tahsildar, and further that he would not be considered for promotion for a period of seven years from the date of reversion. By order dated 1st December 1958, the Governor cancelled that part of the order by which it was directed that the Respondent therein not be considered for promotion but confirmed the termination of probation of the Respondent therein, because in view of the Governor, the Respondent had “during the probation not made sufficient use of his opportunities and had failed to give satisfaction.”

36.3 The High Court of Judicature at Allahabad held that the order dated 13th August, 1957 reverting the Respondent therein to the position of Naib Tahsildar to be in the nature of a penalty without conforming to the requirements of Article 311 of the Constitution of India, and was therefore liable to be quashed. The DB in appeal also observed that the order dated 13th August, 1957 was a punitive order. By order dated 1st December 1958, the Governor had sought to convert the order dated 13th August, 1957 into an order under Rule 14 of the Subordinate Revenue Executive Service (Tahsildar) Rules, 1944 (hereinafter, 'Rules') which the Governor had no power to do. Under Rule 14 of the Rules, the Governor was authorized to revert a person appointed on probation if it appeared at any time that the person had not made sufficient use of his opportunities or had failed to pass departmental examination or had otherwise failed to give satisfaction.

36.4 The State of Uttar Pradesh challenged the order of the DB by way of an appeal by special leave. Allowing the appeal, the Supreme Court observed under paragraph 10:

“The proceeding against the respondent, it is true, commenced on a report which charged him with having submitted travelling allowance bills in respect of journeys not performed by him. But it is clear from the letter dated September 27, 1956, that the inquiry made against the respondent was only for the purpose of affording him an opportunity to show cause why his "probation should not be terminated forthwith." The Governor of U.P. after considering the explanation submitted by the respondent, by order dated August 13, 1957, terminated the probation of the respondent, and further directed that he should not be considered for promotion for a period of seven years from the date of reversion. The second part of the order, it appears, was not given effect to, for even before December 1,

1958 the respondent was posted as an officiating Tahsildar. By the second order dated December 1, 1958, the Governor of U.P. cancelled the stoppage or promotion and only confirmed the order in so far as it related to termination or probation. We are unable to agree with the High Court that the first limb of the order dated August 13, 1957, was punitive in character. The inquiry against the respondent was held for the purpose of determining his probation. Under r. 14 of the Subordinate Revenue Executive Service (Tahsildar) Rules, 1944, the Governor is authorised to revert a person appointed on probation, if it appears at any time that the person not made sufficient use of his opportunities or has failed to pass the departmental examination completely or has otherwise failed to give satisfaction. An officer who has submitted travelling allowance bills in respect of journeys not undertaken by him may not unreasonably be regarded as one who "has failed to give satisfaction." It cannot be assumed merely because an inquiry is directed to ascertain whether a person appointed on probation has failed to give satisfaction, that it is intended to hold an inquiry with a view to impose punishment against that person. Inquiry against the respondent which was commenced for ascertaining whether he should be continued on probation or whether his probation should be terminated, did not change its character merely because the Governor made an order which he could not make in that inquiry. There is nothing to show that the scope of the inquiry was at any time extended. The order withholding promotion was one which the Governor was in the inquiry incompetent to pass, and apparently the order was not given effect to, and when presumably his attention was drawn to the irregularity that part of the order was cancelled."

36.5 The Supreme Court accordingly held:

"14. We are therefore of the view that the High Court was in error in holding that the order made by the Governor determining the probation of the respondent infringed the protection of Art. 311. The Governor initially passed an order determining the probation and also passed an order stopping promotion. The latter part of the order which the Governor was

incompetent to pass under r. 14 did give rise to a justifiable grievance which the respondent could set up, but after that order was cancelled the respondent had no cause for grievance. It cannot be said that by terminating the probation any penalty was imposed: and if that be the correct view the opinion expressed by the High Court that by passing the order dated December 1, 1958 the Governor was seeking to convert the earlier order of punishment into an order under r. 14 of the Subordinate Revenue Executive Service (Tahsildars) Rules, 1944 retrospectively, cannot be accepted. The order terminating probation was made under r. 14 and continued to retain that character. The vice in the second part of the order did not either before or after it was cancelled affect the validity of the order terminating the respondent's probation.”

37. However, in the instant case, the facts are different. In the first round, it was held by the learned Single Judge and the DB of this Court that the impugned order, terminating the Respondent's services, was stigmatic and the foundation of such termination was the alleged misconduct of the Respondent. It was not the stand of the AAI that the termination of the Respondent's services was only on the ground of his “unsatisfactory performance”; that came up much later, in the report dated 9th August, 2010 i.e. when the EC met to enquire into the misconduct pursuant to the order dated 26th March, 2010.

38. Therefore, the Court is unable to accept the plea of the AAI that the impugned order be ‘segregated’, by treating the punitive portion separate from the portion whereby the Respondent's services have been terminated on account of “unsatisfactory performance.” This can at best be viewed as an attempt, although belated, by the AAI to avoid the legal consequences of not complying with the requirements of principles of natural justice while

holding a regular enquiry into the alleged misconduct of the Respondent.

39. In this connection, it requires to be noted that as far as the first report dated 4th March, 1997 of Mr A. K. Mishra is concerned, there was no participation of the Respondent in that exercise. The said report was in fact rejected by the learned Single Judge and the DB of this Court. Further, as far as the complaint dated 21st March, 1997 is concerned, the complainant was not examined. Consequently, that complaint too could not be taken into account.

40. As far as the report of the EC is concerned, it is seen that it does not advert to any alleged misconduct by the Respondent. Its proceedings dated 29th July 2010, the relevant portions of which have been extracted hereinbefore, make it clear that nothing pertaining to the alleged misconduct of the Respondent was confronted to him. No document was shown to the Respondent which could impute any misconduct to him. Consequently, there was no occasion for the Respondent to request for the examination of any witness in order to establish his innocence.

41. The onus was on the AAI to prove the Respondent's misconduct, which it miserably failed to do before the EC. The report of the EC placed reliance on the letter dated 3rd March 1997, issued by the EE, Mr. V. V. G. Raju. This document was not served to the Respondent along with the SCN dated 11th June, 2010. When the Respondent noted that this letter had been relied upon in the enquiry report dated 9th August 2010, he raised the issue, of the denial of the right to cross examine Mr. Raju, in his response dated 14th September,

2010. The Supreme Court had no occasion to examine the correctness of the report and left it to the AAI to take it to its logical conclusion.

42. The EC failed to provide the Respondent an effective opportunity of defending himself in the enquiry. It failed to provide him all the evidence that was going to be used against him in the enquiry. Accordingly, the Court is of the view that the enquiry conducted by the EC did not satisfy the requirement of principles of natural justice.

43. The EC appears to have exceeded its brief by not confining itself to finding out the truth of the allegations against the Respondent regarding his alleged misconduct. It proceeded to recommend termination of his services on the basis of his alleged “unsatisfactory performance.”

44. In *State of Uttaranchal v. Kharak Singh (2008) 8 SCC 236*, the Supreme Court decried this approach by observing as under:

“13. Another infirmity in the report of the enquiry officer is that he concluded the enquiry holding that all the charges have been proved and he recommended for dismissal of the delinquent from service. The last paragraph of his report dated 16.11.1985 reads as under:

“During the course of above inquiry, such facts have come into light from which it is proved that the employee who has doubtful character and does not obey the order, does not have the right to continue in the government service and it is recommended to dismiss him from the service with immediate effect.”

Though there is no specific bar in offering views by the enquiry officer, in the case on hand, the enquiry officer exceeded his limit by saying that the officer has no right to continue in the government service and he has to be dismissed from service with immediate effect. As pointed out above, awarding appropriate punishment is the exclusive jurisdiction of the punishing /disciplinary authority and it depends upon the nature and gravity of the proved charge/charges and other attended circumstances. It is clear from the materials, the officer, who inspected and noted the shortfall of trees, himself conducted the enquiry, arrived at a conclusion holding the charges proved and also strongly recommended severe punishment of dismissal from service. The entire action and the course adopted by the enquiry officer cannot be accepted and is contrary to the well-known principles enunciated by this Court.

14. A reading of the enquiry report also shows that the respondent herein was not furnished with the required documents. The department's witnesses were not examined in his presence. Though the respondent who was the writ petitioner specifically stated so in the affidavit before the High Court in the writ proceedings, those averments were specifically controverted in the reply affidavit filed by the department. Mere denial for the sake of denial is not an answer to the specific allegations made in the affidavit. Likewise, there is no evidence to show that after submission of the report by the enquiry officer to the disciplinary authority, the respondent herein was furnished with the copy of the said report along with all the relied upon documents. When all these infirmities were specifically pleaded and brought to the notice of the appellate authority (i.e. Forest Conservator), he rejected the same but has not pointed the relevant materials from the records of the enquiry officer and disciplinary authority to support his decision. Hence, the appellate authority has also committed an error in dismissing the appeal of the respondent.”

45. There is merit in the contention of learned counsel for the Respondent that the enquiry report of the EC dated 9th August, 2010, was based on “no

evidence.” This is consistent with the law explained by the Supreme Court in *Meenglas Tea Estate v. Its Workmen AIR 1963 SC 1719*, wherein, in paragraph 4, it was held as under:

“4. The Tribunal held that the enquiry was vitiated because it was not held in accordance with the principles of natural justice. It is contended that this conclusion was erroneous. But we have no doubt about its correctness. The enquiry consisted of putting questions to each workman in turn. No witness was examined in support of the charge before the workman was, questioned. It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirements must be substantially fulfilled before the result of the enquiry can be accepted. A departure from this requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him. In the present case neither was any witness examined nor was any statement made by any witness tendered in evidence. The enquiry, such as it was, was made by Mr. Marshall or Mr. Nichols who were not only in the position of judges but also of prosecutors and witnesses. There was no opportunity to the persons charged to cross-examine them and indeed they drew upon their own knowledge of the incident and instead cross-examined the persons charged. This was such a travesty of the principles of natural justice that the Tribunal was justified in rejecting the findings and asking the Company to prove the allegation against each workman de novo before it.”

46. Further, in *Kuldeep Singh v. Commissioner of Police (1999) 2 SCC 10*, the Court emphasized that the holding of a regular enquiry was not a mere

formality. It observed as under in paragraph 32:

“32. Apart from the above, Rule 16(3) has to be considered in the light of the provisions contained in Article 311(2) of the Constitution to find out whether it purports to provide reasonable opportunity of hearing to the delinquent. Reasonable opportunity contemplated by Article 311(2) means "Hearing" in accordance with the principles of natural justice under which one of the basic requirements is that all the witnesses in the departmental enquiry shall be examined in the presence of the delinquent who shall be given an opportunity to cross-examine them. Where a statement previously made by a witness, either during the course of preliminary enquiry or investigation, is proposed to be brought on record in the departmental proceedings, the law as laid down by this Court is that a copy of that statement should first be supplied to the delinquent, who should thereafter be given an opportunity to cross-examine that witness.”

47. Consequently, as regards the first four issues raised by the AAI, this Court is of the view that the Supreme Court did contemplate a regular departmental enquiry and that the mandate of the EC was not to make a mere assessment as to the performance of the Respondent but to enquire into his alleged misconduct. There was no occasion for the ‘segregation’ of the punitive part of the order from its non-punitive, non-stigmatic part. It was not open to the AAI to take this approach after a first round of litigation, culminating in the order of the Supreme Court which mandated that it should take the report of the EC to its logical conclusion.

48. Mr. Rai then contended that once the Respondent participated in the enquiry of the EC, he could not subsequently turn around and say that it had been improperly constituted only because its report was not acceptable to

him. According to Mr. Rai, neither in his reply dated 26th June, 2010 to the SCN dated 11th June, 2010, nor when appearing before the EC on 29th July, 2010 did the Respondent object to the procedure being followed by the EC. Further, the Supreme Court had also been kept informed while the enquiry was underway. Even before the Supreme Court, no objection was raised by the Respondent. Therefore, according to Mr. Rai, the Respondent has waived his right to the principles of natural justice and was estopped from objecting to the procedure adopted by the EC. He placed reliance on the decisions in *State of U. P. v. Sheo Shanker Lal Srivastava* (2006) 3 SCC 276, *National High School, Madras v. Education Tribunal* (1992) Supp. 3 SCC 106, *Manak Lal v. Prem Chand Singhvi* AIR 1957 SC 425 and *U. D. Lama v. State of Sikkim* (1997) 1 SCC 111.

49. As already noticed, the Respondent was not provided with the material which was going to be relied upon by the EC in returning findings against him in its report. At the first available occasion, in response to the second SCN, the Respondent did question the validity of the procedure adopted by the EC. Moreover, it was incumbent upon the EC to follow the procedure while holding a regular departmental enquiry in accordance with the prescribed rules. There is no question of waiver of this procedure by the Respondent. The burden was on the AAI to establish the alleged misconduct of the Respondent, and not the other way round. This burden was not discharged by the AAI.

50. In fact, the EC did not put any question to the Respondent regarding his alleged misconduct. Although in *State of U. P. v. Sheo Shanker Lal*

Srivastava (supra), there was an observation that principles of natural justice could be excluded by the statute and also be waived, in the present case, it is plain that after the judgment of the learned Single Judge and the DB of this Court, as impliedly affirmed by the Supreme Court, it was incumbent upon the AAI to hold a regular departmental enquiry into the alleged misconduct of the Respondent.

51. The said decision, and the other decisions cited in this regard by Mr. Rai, do not come to the aid of the AAI at all, as they are distinguishable on facts. Issue (v) is accordingly answered against the AAI.

52. Turning now to Issue (vi), about whether there should be a further enquiry and not reinstatement, the reliance placed on the decision in ***Chairman, Life Corporation of India v. A. Masilamani (2013) 6 SCC 530*** is misplaced. There has already been a whole round of litigation, where the Respondent was found to be wrongly terminated without holding a full enquiry. The Supreme Court gave the AAI an opportunity to rectify this mistake, and yet the AAI did not avail itself of this opportunity. There is no question of starting a third round of litigation by directing another enquiry to be held. This submission is accordingly rejected.

53. On the issue of reinstatement, Mr. Rai referred to the additional affidavit filed by the Respondent, where he categorically states that he has remained unemployed throughout. AAI's affidavit, without bringing on record any tangible material, simply seeks to poke holes in the above assertion of the Respondent about his remaining unemployed. This Court finds no basis put

forth by the AAI to contradict what the Respondent has stated on affidavit. In other words, there is nothing placed before the Court by the AAI to persuade it to disbelieve the Respondent when he states that after the termination of his services way back in June, 1997, he has continued to remain unemployed.

Conclusion and directions

54. For all of the aforementioned reasons, the Court is unable to find any error having been committed by the learned Single Judge in the directions issued by him requiring reinstatement of the Respondent with all consequential benefits and 50% back-wages. The said order will now get implemented forthwith by issuing the necessary orders not later than four weeks from today.

55. The appeal being LPA 928/2013 of the AAI is accordingly dismissed with costs of Rs. 20,000/- which shall be paid by the AAI to the Respondent within four weeks from today.

56. In view of the above decision, this Court finds no reason to interfere with the impugned order, insofar as it restricts the back-wages to 50%. The appeal filed by the Respondent, being LPA 183/2014 is therefore, also dismissed. There shall be no orders as to costs.

57. The amount deposited in this Court by the AAI be released forthwith to the Respondent, Mr. Harbhajan Singh, together with the interest accrued thereon. If there is any discrepancy in the amount calculated by the AAI, it

will be open to the Respondent to seek appropriate remedy in accordance with law.

58. Both the appeals are disposed of in above terms.

S. MURALIDHAR, J.

TALWANT SINGH, J.

DECEMBER 18, 2019

rd

