

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.12288 of 2013

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Manmohan Singh Son Of Swarika Singh Resident Of Village - Kichani, Post -
Office - Harnaut, Police Station - Harnaut, Nalanda

... .. Petitioner/s

Versus

1. The State Of Bihar through the Chief Secretary, Bihar, Patna.
2. The Chairman, Bihar Industrial Area Development Authority Cum Industrial
Development Commissioner, Department of Industries, Bihar, Vikas
Bhawan, Bailey Road, Patna 800001
3. The Managing Director, Bihar Industrial Area Development Authority, Ist
Floor, Udyoug Bhawan, East Gandhi Maidan, Patna 800004
4. The Executive Engineer, Bihar Industrial Area Development Authority, Ist
Floor, Udyoug Bhawan, East Gandhi Maidan, Patna 800004
5. The Consultant Technical, Bihar Industrial Area Development Authority, Ist
Floor, Udyoug Bhawan, East Gandhi Maidan, Patna 800004

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Navendu Kumar, Advocate
For the State	:	Mr. Manish Kumar, AC to AAG-6
For the BIADA	:	Mr. Ayush Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH

ORAL JUDGMENT

Date : 30-08-2024

Heard Mr. Navendu Kumar, learned counsel
appearing on behalf of the petitioner; Mr. Manish Kumar,
learned AC to AAG-6 for the State and Mr. Ayush Kumar,
learned counsel for the respondent nos. 2 to 5.

2. The petitioner has sought for the following



reliefs as prayed for in the present writ petition, which are, *inter alia*, reproduced hereinafter:

“(i) For quashing / setting aside the order dated 08.04.2013 passed by the Chairman, Bihar Industrial Area Development Authority (for brevity hereinafter referred as BIADA) cum Industrial Development Commissioner, Department of Industries, Bihar in Appeal No. 04/2012 preferred by the petitioner against the order of termination of his service from BIADA passed under the order of the Managing Director, BIADA, which was issued under the signature of the Secretary, BIADA contained in memo no. 6760/Stha. Dated 31.10.2012.

(ii) For quashing / setting aside the order of termination of petitioner's service from BIADA passed under the order of the Managing Director, BIADA which was issued under the signature of the Secretary, BIADA vide memo no. 6760/Stha. Dated 31.10.2012.

(iii) For issuance of a direction to the concerned respondents to restore and continue the petitioner's service till the remaining period under contract.

(iv) For any such other order / orders for which the petitioner is entitled.”

BRIEF FACTS

3. The petitioner was appointed as a Junior Engineer in Bihar Industrial Area Development Authority (for brevity hereinafter referred as BIADA) on contract basis. At the time when he was posted at Patna, he was directed to get the boundary wall constructed at Industrial Mega Park, Bihta, Patna. On the allegation that he had allowed construction by deviating from the drawing of boundary approved by the National Institute of Technology (N.I.T.), Patna, a show cause dated 14.09.2012 was issued to him to which he had submitted his reply vide letter dated 17.09.2012 pleading his innocence that the Executive Engineer during his inspection had verbally



directed certain deviation in accordance with the provision of B.O.Q. An enquiry committee had submitted report on 07.11.2012 against the petitioner and the petitioner was terminated vide memo no. 6760/stha. dated 31.10.2012. The petitioner had preferred an appeal bearing Appeal No. 04 of 2012 before the Chairman, BIADA cum Industrial Development Commissioner, Department of Industries, Bihar against the said order which was dismissed vide order dated 08.04.2013. Hence the present writ petition.

SUBMISSION ON BEHALF OF THE PETITIONER

4. Learned counsel submitted that the petitioner vide letter no. 637 dated 24.02.2009 was appointed on contract for a term of one year and the same was extended from time to time as per the terms and conditions of the appointment. The petitioner was served with show cause notice dated 14.09.2012 for explaining why he had allowed deviation in the structure at the construction site from the sanctioned map approved by the N.I.T. without obtaining any approval.

5. The petitioner in his reply dated 17.09.2012, had made categorical denial that the boundary was being constructed as per the drawing, but that was stopped by the Executive Engineer during his inspection and he had verbally



directed him to provide middle band also in addition to the band at top. Secondly, in defense, he has stated that the middle band was by mistake not mentioned in the approved drawing sheet. The Executive Engineer admitting his action in this regard mentioned that the provision of B.O.Q. provides for required alteration additional band in the middle was constructed. The Executive Engineer had visited the site and after completion of both bands along with wall, the measurement was entered in the Measurement Book-5. Learned counsel submitted that it is the Executive Engineer, who after visiting the site had directed the petitioner who was posted on the post of Junior Engineer on contract basis to add middle band in the structure. Learned counsel further submitted that deviation which has been made the contractor who was in-charge of executing work was paid on the basis of measurement book after the Executive Engineer was satisfied after he had inspected the site of Industrial Mega Park, Bihta, on 02.07.2012. Learned counsel submitted that the petitioner had to abide the order of the higher officer, however, the petitioner had made complaint before the Technical Advisor, as well as, Managing Director, BIADA.

6. Learned counsel has further submitted that the Executive Engineer was the main witness who was required to



be examined by the Management and no opportunity was given to the petitioner to cross-examine the Executive Engineer in respect of the allegation made against the petitioner. Learned counsel further submitted that penalty order being stigmatic and before he was terminated from service even being contractual in nature, the requirement of Article 311 of the Constitution of India, was required to be followed. Learned counsel submitted that no procedure for holding inquiry was held in accordance with paragraph no. 1.5 of Part-II and Clause (iv) of the Bihar Industrial Area Development Authority (Financial, Service and Technical) Regulations, 2007 (hereinafter referred to as the 'Regulations, 2007' for short) and there has been complete go by to prescribed procedure contained in Part-II Para-2.7(XII) which required misconduct against an employee to be established. Learned counsel in support of his stand has relied on a Division Bench judgment passed in the case of ***The Director, Bihar Education Project Council & Anr. Vs. Satya Narayan Baitha & Ors. (L.P.A. No. 1451 of 2009)***. The Division Bench vide order dated 22.04.2010 on relying several decisions of the Apex Court in connection with termination simpliciter in respect of contractual employee has held to be against the mandate of Article 311 and has quashed the order of termination. Learned



counsel has specifically relied on Paragraph Nos. 14, 17, 19 and 22 of the said judgment, which are, *inter alia*, reproduced hereinafter:

“14. The reliance placed on one of the clause of the order of appointment of the writ petitioner envisaging termination of service by giving one month notice on salary in lieu thereof can also not be made applicable in this case, inasmuch as the petitioner was sought to be removed on specific ground of misconduct for which the regulations provide a procedure to be followed. Thus, when the impugned order was passed indicating that the services of the petitioner were dispensed with after giving one month notice it was actually by way of stigma on charges of misconduct and the same cannot be held to be termination simplicitor. The Apex Court in the case of State of Maharashtra vs. Veerappa R. Saboji & anor., reported in AIR 1980 S.C. 42, has clarified this aspect wherein it has been held as follows:

“18. The law, it seems to me, is that where the services of a temporary government servant or a probationer government servant are terminated by an order which does not ex facie disclose any stigma or penal consequences against the government servant and is merely a termination order simplicitor, there is no case ordinarily for assuming that it is anything but what it purports to be. Where, however, the order discloses on the face of it that a stigma is cast on the government servant or that it visits him with penal consequences, then plainly the case is one of punishment. There may still be another kind of case where although the termination of services is intended by way of punishment, the order is framed as a termination simplicitor. In such a case, if the government servant is able to establish by material on the record that the order is in fact passed by way of punishment, the innocence of the language in which the order is framed will not protect it if the procedural safeguards contemplated by Article 311(2) of the Constitution have not been satisfied. In a given case, the government servant may succeed in making out a prima facie case, that the order was by way of punishment but an attempt to rebut the case by the authorities may necessitate sending for the official records for the purpose of determining the truth.”.

17. It is well settled that any order which is capable of being assailed and reviewed by a court either in an administrative or a quasi judicial proceeding must contain the reasons. It is not sufficient compliance of the principles of natural justice that a show cause notice would be slammed to an employee and thereafter an order of punishment would be passed even without discussing the defence/ explanation of such employee. This aspect of the matter in fact stands well settled in a series of



judgment and one may readily refer to the judgment of the Constitution Bench of the Apex Court in the case of S.N.Mukherjee vs. Union of India, reported in AIR 1990 S.C. 1984.

“Authority exercising quasi-judicial function must record reasons for its decision irrespective of whether the decision is subject to appeal, revision or judicial review. Reasons should be clear and explicit though may not be elaborate. This is one of the embodied rules of natural justice- Requirement is greater at original stage ”

19. There would be no need to dilate on this issue that when an employee is removed from service by whatever method without complying the principles of natural justice such order is patently unsustainable. The Apex Court in the case of Managing Director, U.P.Warehousing Corporation & anor. vs. Vijay Narayan Vajpayee, reported in AIR 1980 SC 840 had in fact gone into this aspect wherein it has been held as follows:

“14. The appellant is a Corporation constituted under the Agricultural Produce (Development and Warehousing) Corporation Act, 1956 (Central Act 28 of 1956) which was subsequently replaced by Warehousing Corporation Act, 1962 (Central Act 58 of 1962). It is a statutory body wholly controlled and managed by the government. Its status is analogous to that of the Corporation which were under consideration in Sukhdev Singh case. The ratio of Sukhdev Singh case, therefore, squarely applies to the present case. Even if at the time of the dismissal, the statutory regulations had not been framed or had not come into force, then also, the employment of the respondent was public employment and the statutory body, the employer, could not terminate the services of its employee without due enquiry in accordance with the statutory regulations, if any in force, or in the absence of such regulations, in accordance with the rules of natural justice. Such an enquiry into the conduct of a public employee is of a quasi-judicial character. The respondent was employed by the appellant- Corporation in exercise of the powers conferred on it by the statute which created it. The appellant's power to dismiss the respondent from service was also derived from the statute. The court would, therefore, presume the existence of a duty on the part of the dismissing authority to observe the rules of natural justice, and to act in accordance with the spirit of Regulation 16, which was then on the anvil and came into force shortly after the impugned dismissal. The rules of natural justice in the circumstances of the case, required that the respondent should be given a reasonable opportunity to deny his guilt, to defend himself and to establish his innocence which means and includes an opportunity to cross-examine the witnesses relied upon by the appellant- Corporation and an opportunity to lead evidence in defence of the charge as also a show cause notice for the proposed punishment. Such an opportunity was denied to the respondent in the instant case. Admittedly, the respondent was not allowed



to lead evidence in defence. Further, he was not allowed to cross-examine certain persons whose statements were not recorded by the Enquiry Officer (opposite party 1) in the presence of the respondent. There was controversy on the point. But it was clear to the High Court from the report of enquiry by the opposite party 1 that he relied upon the reports of some persons and the statements of some other persons who were not examined by him. A regular departmental enquiry takes place only after the charge sheet is drawn up and served upon the delinquent and the latter's explanation is obtained. In the present case, no such enquiry was held and the order of dismissal was passed summarily after perusing the respondents' explanation. The rules of natural justice in this case, were honoured in total breach. The impugned order of dismissal was thus bad in law and had been rightly set aside by the High Court."

22. Thus, in the facts of this case in order to do complete justice between the parties we would hold that the order of the learned Single Judge of reinstatement with back wages of respondent no.1- writ petitioner be substituted by paying him compensation of a sum of Rs. 1 lac within a period of three months from the date of receipt/ production of a copy of this order. We would also make it clear that the termination order of the petitioner dated 23.7.2009, quashed by the learned Single Judge, is not being interfered with and the said order will not stand in the way of the writ petitioner in his future career in getting employment in any service."

SUBMISSION ON BEHALF OF THE RESPONDENT

7. *Per contra*, learned counsel appearing on behalf of the respondent submitted that the petitioner was appointed on 24.02.2009 on contract basis and, thereafter, he admits that his contract was renewed from time to time and order of termination was in currency of renewed contract contained in Memo No. 5558 dated 27.08.2012. Learned counsel clarifies that the petitioner was served with show cause notice contained in Letter No. 5965 dated 14.09.2012 (Annexure-1 to the writ petition) and the petitioner filed his reply on 17.09.2012. The



allegation against the petitioner being serious to have recommended for payment to the contractor despite the fact that the contractor had not placed under ream in about 124 piles. The said important figure was not mentioned in the Measurement Book prepared by the petitioner and in spite of the said fact, the petitioner had recommended for payment in order to confer benefit upon the contractor. Learned counsel submitted that the petitioner was found to have committed misconduct in terms of the Regulations, 2007 and, accordingly, in terms of Part-II Para-2.7(XII) and to that extent, a statement has been made in paragraph no. 32 of the counter affidavit. Learned counsel further submitted that the required procedure for termination is contained in paragraph no. 1.5 of Part-II and Clause (iv) of the said paragraph provides in case of serious charges of misconduct against an employee are must be established. Learned counsel submitted that show cause of the petitioner was found not satisfactory and, accordingly, by a reasoned order dated 31.10.2012 contained in Memo No. 6760, the petitioner was terminated. Learned counsel, in these backgrounds, submitted that the order of termination has been passed following the procedure prescribed under Regulation, 2007 and there has been no violation of principle of natural justice in the



case of the petitioner. Learned counsel further proceeded to clarify that the strict adherence of the procedure prescribed under Article 311 is not required so far as the Employee of the BIADA is concerned. In this regard, learned counsel has referred to Chapter-I, Sub-Clause 1.2 of the Regulations, 2007 that the Regulations shall apply to all the employee of BIADA as also the employees on deputation (except otherwise provided) to BIADA to the extent that they are not in contravention of the terms and conditions of their deputation/contract to BIADA provided, however hat the Authority may, by resolution duly passed for reasons of exigencies and in the interest of BIADA, exclude any class of employee or post from application of these Regulations. Learned counsel, in these backgrounds, submitted that the petitioner being a contractual employee, even though the order of termination is simpliciter, the impugned order don't require any interference by this Court.

CONSIDERATION, ANALYSIS AND CONCLUSION

8. The petitioner was appointed on contract basis vide Letter No. 637 dated 24.02.2009, thereafter, the contract was renewed year after year and was renewed vide Memo No. 5558 dated 27.08.2012. The petitioner was served with a show cause notice dated 14.09.2012 contained in Letter No. 5965. The



petitioner had filed his reply on 17.09.2012 and the same was considered in accordance with Part-2, para 1.5, which provides for termination. It is gainful to reproduce para 1.5 of Part 2 of Regulations, 2007, which *inter alia* as follows:

" 1.5 Termination of Service

(a) *The services of an employee may be terminated by the MD without assigning any reason by a notice of one months in writing to the employee or on payment of one months pay and allowances in lieu of such notice.*

(b) *The service of an employee shall stand terminated:-*

(i) *If his appointment is made for a specified period on the expiry of such period unless the appointment is extended for a further period.*

(ii) *If his appointment is made against a temporary post, on the abolition of the post or on the expiry of the period for which the post is created.*

(iii) *If (s)he fails to resume duty on the expiry of the maximum period of extraordinary leave granted to him and after his explanation, if any, in reply to a show cause notice, which should be given in all such cases, has been taken into account.*

(iv) *If serious charges of misconduct against an employee are established.*"

9. On perusal of Clause (iv), it appears that in case of serious charges of misconduct against employee, the employee can be terminated from service only if the same is established. I find that the provision prescribes for the proposed misconduct which can only mean to follow procedure prescribed under Article 311 of the Constitution of India to be followed in case of serious charges of misconduct to be established.

10. The word misconduct has been defined in Stroud's Judicial Dictionary, which runs as under:



"Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct".

11. Before I proceed to analyse, as to whether, complete departmental enquiry was required to be followed in accordance with the mandate of Article 311 of the Constitution of India for inflicting punishment of termination against the petitioner and same having not followed with any interference with the penalty order is called for. It is relevant to examine whether the petitioner can be held to be a workman within the meaning of Section 2 of the Industrial Dispute Act, 1947 and remedy against the order of termination lies before the Industrial Tribunal or in view of the Misconduct and provisions of Clause (iv) of Paragraph 1.5 of Part 2, which provides for established misconduct, in respect of contractual employee of BIADA, which falls within the meaning of Article 12 of the Constitution, the employee can invoke writ jurisdiction of this Court for judicial review against the penalty order dated 31.10.2012 contained in Memo No. 6760.

12. Similar question arose before the Apex Court in case of ***St. Mary's Education Society & Anr. vs. Rajendra Prasad Bhargava & Ors. in Civil Appeal No. 5789 OF 2022 (Arising out of S.L.P. (Civil) No. 1118 of 2022)***, wherein, the



Hon'ble Supreme Court has held that contract of personal service cannot be enforced subject to following conditions, namely,

"(i) when the employee is a public servant working under the Union of India or State;

(ii) when such an employee is employed by an authority/ body which is a State within the meaning of Article 12 of the Constitution of India; and

(iii) when such an employee is 'workmen' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and raises a dispute regarding his termination by invoking the machinery under the said Act. "

13. Considering the exception laid down by the Apex Court in ***St. Mary's (supra) relying on the case of Sarvepalli Ramaiah v. District Collector, Chittoor, reported in (2019) 4SCC 500 in*** which it has been, *inter alia*, held as follows:-

"40. Administrative decisions are subject to judicial review under Article 226 of the Constitution, only on grounds of perversity, patent illegality, irrationality, want of power to take the decision and procedural irregularity. Except on these grounds administrative decisions are not interfered with, in exercise of the extraordinary power of judicial review. Judicial review under Article 226 is directed, not against the decision, but the decision-making process. Of course, a patent illegality and/or error apparent on the face of the decision, which goes to the root of the decision, may vitiate the decision-making process..."

14. The BIADA is a statutory body constituted under the Bihar Industrial Area Development Act, 1974. Its vision is to develop world-class industrial areas in Bihar and attract investments from both domestic and global investors. BIADA was established with the objective of planned



development of industrial areas in the state of Bihar. The authority undertakes various activities for the development of industries in the state. These include providing infrastructure facilities, such as water, power, roads, sewage, and drainage; developing new industrial areas; and relocating existing industries from congested areas to developed areas. BIADA also provides incentives to industries located in its industrial areas.

15. The main objective of setting up this authority is to promote and develop industrial areas in the state of Bihar. The Authority is responsible for the planning, development, and management of all government-owned industrial estates/areas in Bihar. I find that the BIADA is covered by the definition 'State' as contained in Article-12 of the Constitution of India and being controlled directly by the State Government.

16. I find that the action of BIADA is amenable to writ jurisdiction and this Court in exercise of power conferred under Article 226 can interfere with the termination order and the order of termination calls for judicial review in view of Regulations, 2007 and the procedure contained in paragraph no. 1.5 of Part-II, was required to be followed for imposing punishment, which refers charges are established. In case of serious charge for establishing the same procedure prescribed



under Article 311 are required to be followed calling for interference with the punishment order dated 31.10.2012 contained in Memo No. 6760/Stha.

17. The question arises in the above mentioned facts of the case, as to whether, the order dated 30.10.12 contained in Memo No. 6760 is stigmatic and not simpliciter ending with the culmination of the contract in case of the petitioner, who was appointed on contract basis had a right to the post and termination during the continuation of contract whether has resulted in any evil consequences and whether an order attracts the protection of Article-311 of the Constitution of India depends on the nature of enquiry by the Disciplinary Authority.

18. The theory of the "nature of inquiry" evolved into a new "motive and foundation" test, which performs a similar role of discovering the nature of termination. In ***Ravindra Kumar Misra vs. U.P. State Handloom Corporation Ltd.*** reported in ***AIR 1987 SC 2408***, the Hon'ble Supreme Court has held that if the delinquency of a probationer is only taken as the operating motive then the order is not punitive, but when such delinquency forms the foundation of the termination order then it is punitive. Thus, it needs to be proved that the



delinquency is not a mere 'motive' but has transformed to become 'foundation' for the termination to avail the protection of Article-311 of the Constitution of India.

19. In this regard, I find it profitable to refer to the law laid down by the Apex Court in ***Purushottam Lal Dhingra vs. Union of India*** reported in ***1957 SCC Online SC 5***. It would be apt to reproduce paragraph no. 28 of the said judgment:

"28. The position may, therefore, be summed up as follows : Any and every termination of service is not a dismissal, removal or reduction in rank. A termination of service brought about by the exercise of a contractual right is not per se dismissal or removal, as has been held by this Court in Satish Chander Anand v. Union of India [(1953) 1 SCC 420 : (1953) SCR 655] . Likewise the termination of service by compulsory retirement in terms of a specific rule regulating the conditions of service is not tantamount to the infliction of a punishment and does not attract Article 311(2), as has also been held by this Court in Shyam Lal v. State of Uttar Pradesh [(1955) 1 SCR 26] . In either of the two abovementioned cases the termination of the service did not carry with it the penal consequences of loss of pay, or allowances under Rule 52 of the Fundamental Rules. It is true that the misconduct, negligence, inefficiency or other disqualification may be the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service the motive operating on the mind of the Government is, as Chagla, C.J., has said in Shrinivas Ganesh v. Union of India [LR 58 Bom 673 : AIR (1956) Bom 455] wholly irrelevant. In short, if the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with. As already stated if the servant has got a right to continue in the post, then, unless the contract of employment or the rules provide to the contrary, his services cannot be terminated otherwise than for misconduct, negligence,



inefficiency or other good and sufficient cause. A termination of the service of such a servant on such grounds must be a punishment and, therefore, a dismissal or removal within Article 311, for it operates as a forfeiture of his right and he is visited with the evil consequences of loss of pay and allowances. It puts an indelible stigma on the officer affecting his future career. A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. If the government servant has a right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty. The use of the expression "terminate" or "discharge" is not conclusive. In spite of the use of such innocuous expressions, the court has to apply the two tests mentioned above, namely, (1) whether the servant had a right to the post or the rank, or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Article 311, which give protection to government servant have not been complied with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant."

20. The Apex Court in case of ***State of U.P. & Ors.***

Vs. Ram Bachan Tripathi reported in (2005) 6 SCC 496 and in case of ***Rajesh Kumar Srivastava vs. the State of Jharkhand & Ors.*** reported in (2011) 4 SCC 447, had gone into to determine, as to whether, the service of a person claiming continuation was



satisfactory then it cannot be held to be as a result of any evil consequences.

21. The Apex Court in case of ***Samsher Singh v State of Punjab*** reported in ***(1974) 2 SCC 831*** and ***Anoop Jaiswal v Government of India*** reported in ***(1984) 2 SCC 369*** held that the form of an order is not its final determinant and the Court can find out the real reason and true character behind terminating/removing an employee.

22. The Apex Court has reiterated the principle of termination of service without enquiry does not deprive any right to the post and hence is not punishment but, if instead of terminating the services without enquiry, the employer chooses to hold enquiry into alleged misconduct on inefficiency or termination of the service is punitive because it puts stigma on the competence and, therefore, the employee is entitled to protection of Article 311 (2) of the Constitution of India in case of ***Abhay Jain vs. High Court of Judicature For Rajasthan & Anr.*** reported in ***(2022) 13 SCC 1***. I find it apt to reproduce paragraphs no. 40.1, 59, 51, 64.1 and 78 of the said judgment, which *inter alia* are as follows:

"40.1. Article 311(2) of the Constitution of



India:

“311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.—(1)

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply

—
(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.”

50. *This Court also further observed that : (Gopi Kishore Prasad case [State of Bihar v. Gopi Kishore Prasad, 1959 SCC OnLine SC 40 : AIR 1960 SC 689] , AIR pp. 691-92, para 5)*

“5. ... In our opinion, the controversy raised in this case is completely covered by the decision of the Constitution Bench of this Court in Dhingra case [Parshotam Lal Dhingra v. Union of India, 1957 SCC OnLine SC 5 : AIR 1958 SC 36] . The main question for decision in that case was whether the appellant Dhingra had been reduced in rank by way of punishment as a result of the order of the General Manager of the Railway. Though, in that case, this Court decided that the order impugned had not that effect, this Court went elaborately into all the implications of the service conditions, with particular reference to the Railway Service Rules and the constitutional provisions contained in Section 240 of the Government of India Act, 1935 and Article 311 of the Constitution. The elaborate discussion in that judgment has reference to all stages of employment in the public services including temporary posts, probationers, as also confirmed officers. Insofar as those observations have a bearing on the termination of service or discharge of a probationary



public servant, they may be summarised as follows:

1. Appointment to a post on probation gives to the person so appointed no right to the post and his service may be terminated, without taking recourse to the proceedings laid down in the relevant rules for dismissing a public servant, or removing him from service.

2. The termination of employment of a person holding a post on probation without any enquiry whatsoever cannot be said to deprive him of any right to a post and is, therefore, no punishment.

3. But, if instead of terminating such a person's service without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct, or inefficiency, or for some similar reason, the termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career. In such a case, he is entitled to the protection of Article 311(2) of the Constitution.

4. In the last mentioned case, if the probationer is discharged on any one of those grounds without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge, it will amount to a removal from service within the meaning of Article 311(2) of the Constitution and will, therefore, be liable to be struck down.

5. But, if the employer simply terminates the services of a probationer without holding an enquiry and without giving him a reasonable chance of showing cause against his removal from service, the probationary civil servant can have no cause of action, even though the real motive behind the removal from service may have been that his employer thought him to be unsuitable for the post he was temporarily holding, on account of his misconduct, or inefficiency, or some such cause.”

(emphasis supplied)

51. *A seven-Judge Bench of this Court in Samsher Singh v. State of Punjab [Samsher Singh v. State of Punjab, (1974) 2 SCC 831 : 1974 SCC (L&S) 550] has held that : (SCC pp. 851-52 & 856-57, paras 64-66 & 86)*

“64. ... The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection. ...

65. The fact of holding an enquiry is not always



conclusive. What is decisive is whether the order is really by way of punishment (see State of Orissa v. Ram Narayan Das [State of Orissa v. Ram Narayan Das, 1960 SCC OnLine SC 36 : AIR 1961 SC 177 : (1961) 1 SCR 606]). If there is an enquiry the facts and circumstances of the case will be looked into in order to find out whether the order is one of dismissal in substance (see Madan Gopal v. State of Punjab [Madan Gopal v. State of Punjab, 1962 SCC OnLine SC 43 : AIR 1963 SC 531 : (1963) 3 SCR 716]). In R.C. Lacy v. State of Bihar [R.C. Lacy v. State of Bihar, 1963 SCC OnLine SC 1] it was held that an order of reversion passed following an enquiry into the conduct of the probationer in the circumstances of that case was in the nature of preliminary inquiry to enable the Government to decide whether disciplinary action should be taken. A probationer whose terms of service provided that it could be terminated without any notice and without any cause being assigned could not claim the protection of Article 311(2)....

66. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to attract Article 311. The substance of the order and not the form would be decisive (see K.H. Phadnis v. State of Maharashtra [K.H. Phadnis v. State of Maharashtra, (1971) 1 SCC 790]).

86. ... In the facts and circumstances of this case it is clear that the order of termination of the appellant Shamsheer Singh was one of punishment. The authorities were to find out the suitability of the appellant. They however concerned themselves with matters which were really trifling. The appellant rightly corrected the records in the case of Prem Sagar. The appellant did so with his own hand. The order of termination is in infraction of Rule 9. The order of termination is therefore set aside.” (emphasis supplied)

64.1. *In fact, this Court in the aforesaid itself has held that : (Ved Priya case [Rajasthan High Court v. Ved Priya, (2021) 13 SCC 151] , SCC pp. 158-59, paras 21 & 24)*

“21. True it is that the form of an order is not crucial to determine whether it is simpliciter or punitive in nature. An order of termination of service though innocuously worded may, in the facts and circumstances of a peculiar case, also be aimed at punishing the official on probation and in that case it would undoubtedly be an infraction of Article 311 of the Constitution. The Court in the process of judicial review of such order can always lift the veil to find out as to whether or not the order was meant to visit the probationer with penal consequences. ...

24. ... If the genesis of the order of termination of service lies in a specific act of misconduct, regardless of over all satisfactory performance of duties during the probation period, the Court will be well within its reach to unmask the hidden cause and hold that the simpliciter order of termination, in fact, intends to punish the probationer without establishing the



charge(s) by way of an enquiry. However, when the employer does not pick-up a specific instance and forms his opinion on the basis of overall performance during the period of probation, the theory of action being punitive in nature, will not be attracted.” (emphasis supplied)

78. Accordingly, the appeal is allowed and the impugned order of the High Court dated 21-10-2019 [Abhay Jain v. High Court of Rajasthan, 2019 SCC OnLine Raj 7837] is set aside and the discharge order dated 27-1-2016 is quashed. Keeping in view that the appellant has not worked as judicial officer after he was discharged, we direct that while the appellant be reinstated with all consequential benefits including continuity of service and seniority, but will be entitled to be paid only 50% back wages, which may be paid within a period of four months from today.”

23. In case of State of ***Haryana & Anr. vs. Satyender Singh Rathore*** reported in ***(2005) 7 SCC 518***, where also, the Apex Court has faced to deciding an order of termination in case of contractual employee could be alleged to have committed misconduct and penal in nature relying on several decisions of the Apex Court including ***A.P. State Federation of Coop. Spg. Mills Ltd. v. P.V. Swaminathan*** reported in ***(2001) 10 SCC 83***, wherein, the Apex Court had held that without complying the principle of natural justice and the order being stigmatic had allowed the claim of the appellant of the said case directing the State Government to give all the consequential benefits along with reinstatement.

24. The Apex Court in recent judgment in case of ***Swati Priyadarshini vs. the State of Madhya Pradesh & Ors.*** ***(Civil Appeal No.9758 Of 2024 Arising Out Of Special Leave***



Petition (C) No.11685 Of 2021) has held that the termination orders being stigmatic in nature, relating to alleged misconduct involving moral turpitude, the same could not have been passed without holding a regular enquiry and the termination order could not have been passed without giving an opportunity of being heard and in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. I find it gainful to *inter alia* reproduce paragraphs no. 35 to 37 of the aforesaid judgment:

"35. We would only be adding to verbosity by multiplying authorities. In view of the above dictum, it is clear that the Respondents did not comply with Clause 4 – either the first part or the second part thereof. The order dated 30.03.2013 does visit the appellant with evil consequences and would create hurdles for her re further employment.

36. In view of the discussions made hereinabove, the Impugned Judgment is quashed and set aside. The judgment of the learned Single Judge dated 20.06.2017 stands revived, however with a modification to the extent that the appellant shall be entitled to all consequential benefits including notional continuation in service at par with other similarly- situated employees, but with the back wages restricted to 50%. Further, in view of the long passage of time, we deny liberty to the respondents to proceed afresh against the appellant as was granted by the learned Single Judge. However, this will not preclude the respondents from taking action against the appellant in accordance with law in futuro apropos her official duties on the post in question, if the situation so arises. The exercise be completed within three months from the date of receipt of this judgment.

37. The appeal is allowed and disposed of on the above terms while leaving the parties to bear their own expenses.
"



25. Considering the allegation contained in Office Order No. 614 dated 01.02.2012 that the petitioner was found to be negligent in the matter of construction of boundary wall in the industrial area that the petitioner having not obtained permission before deviation from the revised vetted map dated 27.04.2012 and the show cause of the petitioner was not found satisfactory without giving proper reasons for rejection of his show cause in spite of the fact that termination of petitioner can only be held to be stigmatic and not simpliciter affecting future career of the petitioner, who has been terminated from service for the said reason without any established charge in accordance with Regulation, 2007 governing the provision contained in Clause 1.5 (iv) required an enquiry to be held and on the basis of the proved charges, the decision was required to be taken by the Disciplinary Authority.

26. Misconduct is defined as a transgression of a known rule or standard of behaviour, or an intentional act that is wrongful or improper. It can also refer to a violation of a law or standard especially by a government official. Misconduct literally means wrong conduct or improper conduct. In usual parlance, misconduct means a transgression of some established



and definite rule of action.

27. It is clear that the respondents did not comply with Clause (iv) of paragraph 1.5 of Part 2 of the Regulation, 2007, and holding of an enquiry as prescribed under Article 311 of the Constitution of India to establish proved misconduct was required and in absence of same, the order dated 31.10.2012 contained in Memo No. 6760/Stha. is vitiated in the eye of law, being stigmatic in nature and would create hurdles for petitioner's further employment. In absence of proved misconduct, same is set aside and quashed in view of the discussions made hereinabove,

28. In view of long passage of time, I don't find it proper to direct the respondents to proceed afresh against the petitioner, however, since, I have already quashed the order of termination dated 31.10.2012 contained in Memo No. 6760, the respondents, for the purposes of initiating a fresh proceeding in accordance with law shall reinstate the petitioner on the post then may proceed to take disciplinary action against the petitioner, if the situation, so arises.

29. The present writ petition is allowed in view of the discussions made hereinabove and the law laid down by the



Apex Court. There shall be no order as to costs.

30. Interlocutory application(s), if any, shall also stand disposed of.

(Purnendu Singh, J)

Niraj/-

AFR/NAFR	A.F.R.
CAV DATE	N/A
Uploading Date	18.09.2024
Transmission Date	N/A

