CASE NO.:
Appeal (civil) 6342 of 2001

PETITIONER:
State of Punjab & Ors.

RESPONDENT:
Balbir Singh

DATE OF JUDGMENT: 13/09/2004

BENCH:
Y.K. Sabharwal & D.M. Dharmadhikari

JUDGMENT:
J U D G M E N T
Y.K. Sabharwal, J.

The factual background which has given rise to this appeal is that :

The respondent who was appointed a Constable on 16.03.1991, was discharged from service with effect from 17th March, 1993 by an order dated March 19, 1993 passed by the Senior Superintendent of Police under the Punjab Police Rule 12.21. Rule 12.21 of Punjab Police Rules, 1934 provides that "a Constable who is found unlikely to prove an efficient police officer may be discharged by the Senior Superintendent of Police at any time within three years of enrolment. There shall be no appeal against the order of discharge under this Rule". The Order of discharge states that "Balbir Singh has been found unlikely to prove to be efficient police officer. Hence he is hereby discharged from service under PPR 12.21 with immediate effect i.e. 17.03.1993." The appeal and the revision filed by the respondent were dismissed by Deputy Inspector General of Police and Director General of Police respectively.

In a suit filed by the respondent, the civil court held the termination order to be illegal, null and void and set it aside. Respondent was directed to be reinstated in the service with all rights, benefits and privileges. The first appeal filed by the State was dismissed by the Additional District Judge, Patiala and the second appeal by the High Court by the impugned judgment which is under challenge in the present appeal.

The sole question for determination is whether the order of discharge was punitive and, therefore, illegal having been passed without conducting any disciplinary inquiry. The High Court relying upon the decision in Smt. Rajinder Kaur v. State of Punjab & Anr. [(1986) 4 SCC 141] has held the order of discharge to be violative of Article 311 (2) of the Constitution of India. Before examining this decision, it would be useful to notice other decision relevant on the point in issue.

In Parshotam Lal Dhingra v. Union of India [1958 SCR 828], this Court said :

"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. The Union of India (supra). 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 Art. 311(2), as has also been held by this Court in Shyam Lal v. The State of Uttar Pradesh [(1955) 1 S.C.R. 26]. In either of the two abovementioned cases the termination of the service did not carry with it the penal consequences of loss pay, or allowances under r. 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 (supra), 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 Art. 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 Art. 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 Art. 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 inedible 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 not 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 Art. 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."
(Emphasis supplied is ours)

Thus, the order of discharge simplcitor, prima facie, is not punitive, it being in terms of Punjab Police Rule12.21 but the question still is whether the incident which led to the passing of that order was motive or inducing factor or was the foundation of order of discharge.
The test to determine whether the misconduct is 'motive' or the 'foundation' of an order of discharge was laid down after exhaustively dealing with the case law on the topic in the case of Radhey shyam Gupta v. U.P. State Agro Industries Corporation Ltd. & Anr. [(1999) 2 SCC 21] as follows :
"It will be noticed from the above decisions that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as the above facts are merely the motive and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the officer, as stated by Shah, J. (as he then was) in Ram Narayan Das case (AIR 1961 SC 177 : (1961) 1 SCR 606 : (1961) 1 LLJ 552). It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary enquiry is held because the purpose of a preliminary enquiry is to find out if there is prima facie evidence or material to initiate a regular departmental enquiry. It has been so decided in Champaklal case (AIR 1964 SC 1854 : (1964) 1 LLJ 752). The purpose of the preliminary enquiry is not to find out misconduct on the part of the officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental enquiry is started, a charge-memo issued, reply obtained, and an enquiry officer is appointed - if at that point of time, the enquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. That is what is held in Sukh Raj Bahadur case [AIR 1968 SC 1089 : (1968) 3 SCR 234 : (1970) 1 LLJ 373) and in Benjamin case (1967) 1 LLJ 718 (SC)]. In the latter case, the departmental enquiry was stopped because the employer was not sure of establishing the guilt of the employee. In all these cases, the allegations against the employee merely raised a cloud on his conduct and as pointed by Krishna Iyer, J. in Gujarat Steel Tubes case [(1980) 2 SCC 593 : 1980 SCC (L&S) 197] the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on

the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found, and were merely the motive. But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee - even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases."
(Emphasis supplied is ours)

Thus the principle that in order to determine whether the misconduct is motive or foundation of order of termination, the test to be applied is to ask the question as to what was the 'object of the enquiry'. If an enquiry or an assessment is done with the object of finding out any misconduct on the part of the employee and for that reason his services are terminated, then it would be punitive in nature. On the other hand, if such an enquiry or an assessment is aimed at determining the suitability of an employee for a particular job, such termination would be termination simplicitor and not punitive in nature. This principle was laid down by Shah, J (as he then was) as early as 1961 in the case of State of Orissa v. Ram Narayan Das [(1961) (1) SCR 606]. It was held that one should look into 'object or purpose of the enquiry' and not merely hold the termination to be punitive merely because of an antecedent enquiry. Whether it (order of termination) amounts to an order of dismissal depends upon the nature of the enquiry, if any, the proceedings taken therein and the substance of the final order passed on such enquiry. On the facts of that case, the termination of a probationer was upheld inasmuch as the purpose of the enquiry was held to be to find out if the employee could be confirmed. The purpose of the enquiry was not to find out if he was guilty of any misconduct, negligence, inefficiency or other disqualification.

In the case of Mathew B. Thomas v. Kerala State Civil Supply Corporation Ltd. & Ors. [(2003) 3 SCC 263], it was observed that the fagade of the termination order may be simplicitor, but the real face behind it is to get rid of the services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simplicitor to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process, it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from the service on the foundation of his misconduct. In this case the respondent Corporation, in terms of clause 2 of the appointment order terminated the services of the appellant, who was a probationer, on charges of grave misconduct and repeated dereliction of duty tantamounting to unsatisfactory performance. It was his duty to inspect all the commodities received by the Corporation at the depots and to verify the quality of goods in conformity with the specifications given by the Head Office. It was alleged that he had betrayed the confidence reposed in him as a responsible officer of the Corporation by accepting sub-standard quality goods in collusion with suppliers for undue pecuniary benefits. The termination Orders were upheld by this court.

In the case of Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences & Anr. [2002 (1) SCC 520], this Court laid down the test to determine the nature of the termination order, i.e. whether the termination is punitive or simplicitor. The court observed that One of the judicially involved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely, if any one of the three factors is missing, the termination has to be upheld.

Krishna Iyer, J in the case of Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha [(1980) 2 SCC 593] observed that a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, is a dismissal. If there is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simplicitor, if no injurious record of reasons or punitive pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge. In other words, it will be a case of motive if the master, after gathering some prima facie facts, does not really wish to go into their truth but decides merely not to continue a dubious employee. The master does not want to decide or direct a decision about the truth of the allegations. But if he conducts an enquiry only for the purpose of proving the misconduct and the employee is not heard, it is a case where the enquiry is the foundation and the termination will be bad.

In the light of the above legal position, we will now determine whether, in substance, the order of discharge in the present case is punitive in nature. For this purpose it would be necessary to ascertain, firstly, the 'nature of enquiry' i.e. whether the termination is preceded by full scale formal enquiry into allegations involving misconduct on the part of the respondent, which culminated in the finding of guilt, and secondly the 'purpose of the enquiry', i.e. whether the purpose of the enquiry is to find out any misconduct on part of the employee or it is aimed at finding out as to the respondent being unlikely to prove as an efficient police officer.

According to the facts on record, no enquiry of the nature specified above, was held in the present case. It is a case of discharge simplicitor. Nothing much turns upon the observations made by the Deputy Inspector General of Police in his order dated October 8, 1993 while deciding the appeal of the respondent. Respondent consumed liquor and misbehaved with a lady constable. He was medically examined. On this basis, coming to the conclusion that he was unlikely to prove himself an efficient Police Officer, an order of discharge under Punjab Police Rule, 12.21 was passed. There was no enquiry. There was no stigma of punishment. It seems that while deciding the appeal of the respondent, the Deputy Inspector General of Police has referred to prima facie finding out of approved facts as a departmental enquiry and the observations of Deputy Inspector General of Police have been misconstrued by courts below.

The nature of enquiry was preliminary and not a full scale formal enquiry so as to lead to the inference that the object of the enquiry is to determine the guilt of the respondent. The basis of the discharge in the present case was not the misconduct on the part of the respondent, his services were terminated under Rule 12.21 of the Punjab Police Rules, 1934 considering the standards of discipline expected from police personnel.

In State of Punjab & Ors. v. Bhagwan Singh [(2002) 9 SCC 636], an order of discharge passed under the Punjab Police Rule 12.21 read as under :

"It has been reported to me by In-charge of PTC, Ladha Kofthi, Sangrur, Inspector Joginder Singh, RI Police Lines, Faridkot and Inspector Sadhu Ram, PS City Kot Kapura that the act and conduct of Const. Bhagwan Singh, No. 1819/Fdkt. on the whole is not satisfactory and he is unlikely to become a good police officer. I am also satisfied with their reports. I, Jasminder Singh, IPS, SSP/Faridkot being competent authority do hereby discharge Const. Bhagwan Singh, No. 1819/Fdk. from service w.e.f. today i.e. 4-9-1992

A.N. under PPR 12.21 as he is found to be unlikely to prove a good police officer."

The aforesaid order of discharge had been held to be illegal by the District Judge and the judgment of the District Judge was affirmed by the High Court. Allowing the appeal of the State, this Court held that the order of discharge to the extent it stated that the officer was unlikely to prove a good police officer, was in terms of the relevant Rule 12.21. Even in respect of the sentence in the impugned order that the performance of the officer on the whole was 'not satisfactory', this Court held that that also does not amount to any stigma. The contention urged on behalf of the employee that the reference in the impugned order to the reports of the Inspectors on the basis of which the assessment was made would itself amount to stigma was rejected.

The lower court and the High Court, placing reliance on the case of Rajinder Kaur (supra) held the termination invalid. The reliance on the said decision is totally misplaced. In that case, on an allegation made by the department against the appellant that she spent two nights with a constable, an investigation was caused to be made into the said allegation against her conduct and on the basis of that investigation the impugned order of discharge was made by the Superintendent of Police after an enquiry through a Deputy Superintendent of Police regarding the conduct of the appellant. On the facts of the case, order of discharge, though in accordance with the provisions of Rule 12.21 of the Punjab Police Rules, 1934 was really founded on the misconduct as revealed in enquiry into the allegation behind her back by the Deputy Superintendent of Police. The misconduct was the foundation of that order of discharge and, therefore, it was quashed.

In the present case, order of termination cannot be held to be punitive in nature. The misconduct on behalf of the respondent was not the inducing factor for the termination of the respondent. The preliminary enquiry was not done with the object of finding out any misconduct on the part of the respondent, it was done only with a view to determine the suitability of the respondent within the meaning of Punjab Police Rule 12.21. The termination was not founded on the misconduct but the misbehaviour with a lady Constable and consumption of liquor in office were considered to determine the suitability of the respondent for the job, in the light of the standards of discipline expected from police personnel.

For the reasons aforesaid, we are unable to sustain the impugned judgment.

In this view, the appeal is allowed and the judgment and order of the High Court is set aside. The parties shall bear their own costs.