CASE NO.:
Appeal (civil) 7523 of 2001

PETITIONER:
PAVANENDRA NARAYAN VERMA

Vs.

RESPONDENT:
SANJAY GANDHI P.G.I. OF MEDICAL SCI. & ANR.

DATE OF JUDGMENT: 05/11/2001

BENCH:
G.B. Pattanaik & Ruma Pal

JUDGMENT:

RUMA PAL, J.

Leave granted.

The appellant has challenged the decision of the High Court of Allahabad dismissing his writ petition and upholding an order passed by the respondent No. 1 terminating the appellants services.

The appellant was temporarily appointed on 10th April 1996 to the post of Joint Director (Materials Management) of respondent No. 1. Clauses 3 and 4 of the letter of appointment provided:

3. This appointment is temporary and can be terminated on one months notice from either side or in lieu of this notice on payment of a sum equivalent to one months salary.

4. You will be on probation for a period of one year from the date of appointment and the probation period may at the discretion of the competent authority be curtailed or extended by such period as deemed necessary.

The period of probation was extended on 23rd June 1997 for a period of six months w.e.f. 30th April 1997. This was subsequently further extended for a period of three months w.e.f. 30th October 1997. On 6th February 1998, the impugned order of termination was issued. The language used in the order reads:

.During the period of our work (sic) and conduct was found satisfactory and therefore, your probation was extended for a period months (sic) w.e.f. the forenoon of 30.4.1997 vide office order PG/DIR/DC/479/97 dated 23.6.1997. Again

vide office order No. 811 PG/DIR/DC dated 27th October 1997 your probation period was further extended for three months w.e.f. the forenoon of 30th October 1997. Even during thus (sic) extended period of probation your work and conduct has not been found to be satisfactory.

Therefore, under terms & conditions No. 3 and 4 of the above referred appointment letter, dated services are hereby terminated with immediate effect and for the period a cheque No. VR/00/5856 dated 5.2.1998 for Rs.11.070 (Rupees eleven thousand seventy only) in lieu of on (sic) months notice is enclosed.

According to the appellant, the order was punitive and cast a stigma on the appellant and could not be sustained without a full scale departmental inquiry. It has been argued that the termination order was founded upon allegations of misconduct against the appellant. A summary inquiry had been held by the respondents in which a charge-sheet had been issued to the appellant. The inquiry officer had submitted a report to the respondents, a copy of which was not made available to the appellant, but immediately after the completion of the inquiry the impugned order of termination had been passed. In support of the submission that the order was punitive, our attention was drawn by the appellant to statements made in the counter affidavit filed by the respondent before the High Court where the respondents have alleged that the appellants integrity and honesty were doubtful.

The respondents have submitted that the inquiry was held merely to assess the appellants fitness for being continued on probation. The respondents claimed to have received various complaints regarding the discharge of the appellants duties and in order to give the appellant an opportunity of placing the true facts before the respondent the summary inquiry was held so that the suitability of the appellant for being confirmed in the post of Joint Director (Material Management) could be fairly assessed. It was also submitted that the order was not stigmatic nor punitive and that no statement in the counter affidavit would change that position.

The High Court has accepted the submissions of the respondents and accordingly dismissed the writ petition.

Since the decision in Parshottam Lal Dhingra V. Union of India , Courts have had to perform a balancing act between denying a probationer any right to continue in service while at the same time granting him the right to challenge the termination of his service when the termination is by way of punishment. The law has developed along apparently illogical lines in determining when the termination of a temporary appointee or probationers services amounts to punishment.

In 1974, Krishna Iyer, J. had said, The need, in this branch of jurisprudence, is not so much to reach perfect justice but to lay down a plain test which the administration and civil servant can understand without subtlety and apply without difficulty. Since Dhingra is the Magna Carta of the India civil servant, although it has spawned diverse judicial trends, difficult to be disciplined into one single, simple, practical formula applicable to termination of probation of freshers and of the services of temporary employees , we have thought it best to refer to the facts

of Dhingras case to understand what exactly was meant when the Court said:

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 (N) (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.

In that case the employee had been reverted back from an officiating post. The records showed that adverse remarks had been made against the employee in his confidential reports while he was officiating. These remarks were placed before the General Manager who said that he was disappointed to read them and that he should be reverted as a subordinate till he makes good the shortcomings noticed. The order of reversion was passed by the General Manager soon after this. When the issue ultimately came before this Court, this Court upheld the order of reversion, saying:

He had no right to continue in that post and under the general law the implied term of such appointment was that it was terminable at any time on reasonable notice by the Government and, therefore, his reduction did not operate as a forfeiture of any right and could not be described as reduction in rank by way of punishment. Nor did this reduction under Note 1 to R.1702 amount to his dismissal or removal. Further it is quite clear from the orders passed by the General Manager that it did not entail the forfeiture of his chances of future promotion or affect his seniority in his substantive post. In these circumstances, there is no escape from the conclusion that the petitioner was not reduced in rank by way of punishment and, therefore, the provisions of Art. 311(2) do not come into play at all.

(Emphasis supplied)

Therefore, although the General Manager had issued the order of termination on the basis of the adverse reports, the order was not considered as a punishment because it did not jeopardise the appellants career prospects. It is also clear from the paragraph quoted that punishment means the deprivation of a right which the employee otherwise has. Thus, if he is already in service and is reverted from an officiating post, although he does not have a right to continue in the officiating post, he still has a right to be considered for promotion. If he is on probation or on a temporary appointment, he has a right to seek new employment if his appointment or probation is terminated. Anything which jeopardises these rights would be by way of punishment.
Another Constitution Bench of this Court in Benjamin (A.G.) and Union of India explained the decision of Parshotam Lal Dhingra (supra). It followed the two tests mentioned in Dhingras case viz.

(1) Whether the temporary Government servant had a right to the post or the rank, or

(2) Whether he has been visited with evil consequences.

If punishment were restricted to evil consequences, the Courts task in deciding the nature of an order of termination would have been easier. Courts would only have to scan the termination order to see whether it ex-facie contains the stigma or refers to a document which stigmatises the officer, in which case the termination order would have to be set aside on the ground that it is punitive. In these cases the evil consequence must be assessed in relation to the blemish on the employees reputation so as to render him unfit for service elsewhere and not in relation to the post temporarily occupied by him. This perhaps is the underlying rationale of several of the decisions on the issue. In V.P. Ahuja V. State of Punjab and Others cited by the appellant, the Court construed the language of the order and found that it was ex-facie stigmatic.

In Krishnadevaraya Education Trust & Anr. v. L.A. Balakrishna , the first letter of termination mentioned that the Committee appointed to go into the question of general performance of each staff had found that the employee, who had been appointed on probation, was not upto the mark. This was followed by a second order of termination which did not refer to the employees performance at all. The Court held that it was preferable that the order of termination did not mention that the employees performance was not satisfactory as then the employer runs the risk of the allegation being made that the order itself casts a stigma. Nevertheless, the Court held that the reasons stated in the first order did not mean that the termination may be by way of punishment because the probationer is on test and if the services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services.

Finally, this Court in H.F. Sangati V. Register General, High Court of Karnataka and Others dealt with the question whether an order terminating the appointment of a probationer Munsif could be considered to be punitive. In that case during the period of probation, several adverse remarks had been made in the confidential records of the probationer. The Administrative

Committee of the High Court considered these confidential records and came to the conclusion that the appellant was not fit to be confirmed in the post of a judicial officer. They recommended to the High Court accordingly. The High Court accepted the recommendation at a Full Court meeting and referred the matter to the State Government. The State Government accepted the recommendation and discharged the probationer from service. The order of termination mentioned that the employee was unsuitable to hold the post of Munsif. The Court held that the order did not cast any stigma on the employee and was not punitive.

But the law does not rest there. In Shamsher Singh v. State of Punjab, the Courts were asked to look behind the form of the order to find out whether the termination was in substance punitive. So when a full scale inquiry is held against a probationer or a temporary appointee and he is found guilty, an order terminating his services for this reason has been seen as punitive and bad. It is this search for the substance behind the form of the order of punishment which has lead to some apparently conflicting decisions.

Thus some Courts have upheld an order of termination of a probationers services on the ground that the enquiry held prior to the termination was preliminary and yet other courts have struck down as illegal a similarly worded termination order because an inquiry had been held. Courts continue to struggle with semantically indistinguishable concepts like motive and foundation; and terminations founded on a probationers misconduct have been held to be illegal while terminations motivated by the probationers misconduct have been upheld. The decisions are legion and it is an impossible task to find a clear path through the jungle of precedents.

As observed by Alagiriswamy, J. in S.P. Vasudeva V. State of Haryana and Others 1976 (1) SCC 236, at p. 240:

After all no government servant, a probationer or temporary, will be discharged or reverted, arbitrarily, without any rhyme or reason. If the reason is to be fathomed in all cases of discharge or reversion, it will be difficult to distinguish as to which action is discharge or reversion simplicitor and which is by way of punishment. The whole position in law is rather confusing.

One of the judicially evolved 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 (c) 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 been upheld. The three factors are distinguishable in the following passage in Shamsher Singh v. State of Punjab (supra) where it was said:

Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion

that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. 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.

(Emphasis supplied)

Thus in Benjamins case (supra), complaints had been received against a temporary employee. A notice had been sent to the employee to show cause why disciplinary action should not be taken against him. The inquiry officer was appointed but before the inquiry was completed, the services of the employee were terminated with one months salary in lieu of notice. The Constitution Bench upheld the order of termination and drew a distinction between a preliminary inquiry and a departmental inquiry. It was held that a preliminary inquiry held to satisfy the Government whether there was no reason to dispense with the services of the temporary employee should not be mistaken for a departmental inquiry held to decide whether punitive action should be taken.

In State of Uttar Pradesh and Another V. Kaushal Kishore Shukla , the employee had been appointed on a temporary basis for a fixed tenure. During the period of his service, adverse entries were made in his character roll. Complaints were also received by the auditors of the employer. A summary inquiry was held. It was found that the auditors complaint was correct. The employee was transferred to another post. He did not join and the employer terminated his services. This Court, while upholding the order of termination, said that the mere fact that prior to the issue of the termination an inquiry was held against the employee did not make the order of termination into one of punishment.

In Radhey Shyam Gupta v. U.P. State Agro Industries Corporation Ltd. and Another a full scale inquiry was held into the allegations of bribery against a temporary employee. The Court set aside the termination because it found that the report submitted was not a preliminary inquiry report but it was in fact a final one which gave findings as to the guilt of the employee. In Dipti Prakash Banerjee V. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Others the termination order itself referred to three other letters. One of the letters explicitly referred to misconduct on the part of the employee and also referred to an Inquiry Committees report, which report in its turn had found that the employee was guilty of misconduct. The termination was held to be stigmatic and set aside.

The case of Chandra Prakash Shahi v. State of U.P. and Others related to a constable who was on probation after successfully completing his training. The constable completed his period of probation without blemish. One year later, his services were terminated by issuance of a notice in terms of Rule 3 of the U.P. Temporary Government Servants (Termination of Service) Rules, 1975. An inquiry was held into the allegations of misconduct. The Court found as a fact that the inquiry was not held to judge the suitability of the constable but with a view to punish him. The order was held to be punitive and set aside. Therefore, whenever a probationer challenges his termination the courts first task will be to apply the test of stigma or the form test. If the order survives this examination the substance of the termination will have to be found out.

Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationers appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationers appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job. As was noted in Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences (supra)

At the outset, we may state that in several cases and in particular in State of Orissa v. Ram Narayan Das, it has been held that use of the word unsatisfactory work and conduct in the termination order will not amount to a stigma.

Returning now to the facts of the case before us. The language used in the order of termination is that the appellants work and conduct has not been found to be satisfactory. These

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12 AIR 1961 SC 177

words are almost exactly those which have been quoted in Dipti Prakash Banerjees case as clearly falling within the class of non-stigmatic orders of termination. It is, therefore safe to conclude that the impugned Order is not ex facie stigmatic. We are also not prepared to hold that the enquiry held prior to order of termination turned this otherwise innocuous order into one of punishment. An employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. A charge sheet merely details the allegations so that the employee may deal with them effectively. The enquiry report in this case found nothing more against the appellant than an inability to meet the requirements for the post. None of the three factors catalogued above for holding that the termination was in substance punitive exist here.

It was finally argued by the appellant that the intention of the respondents to punish him was clear from the following statement in the affidavit filed on their behalf. It is important to mention herein that even

honesty and integrity of the petitioner was also under cloud as he took undue favours by misusing his position from the suppliers and maligned the reputation of the institute.

That an affidavit cannot be relied on to improve or supplement an order has been held by a Constitution Bench in Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi

.when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise

Equally an order which is otherwise valid cannot be invalidated by reason of any statement in any affidavit seeking to justify the order. This is also what was held in State of Uttar Pradesh v. Kaushal Kumar Shukla (supra):

The allegations made against the respondent contained in the counter-affidavit by way of a defence filed on behalf of the appellants also do not change the nature and character of the order of termination.

Having held against the appellant on all counts, we dismiss the appeal but without any order as to costs.

.J.
(G.B.Pattanaik)

.J.
(Ruma Pal)

November 5, 2001.