

REPORTABLEIN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTIONCIVIL APPEAL NOS. 7841-7842 OF 2012

State Bank of India and others

...Appellants

versus

Palak Modi and another

...Respondents

JUDGMENT**G. S. Singhvi, J.**

1. Whether the alleged use of unfair means by Palak Modi and Prabhat Dixit (hereinafter described as ‘the private respondents’) in the test held by appellant No.1 – State Bank of India (for short, ‘the Bank’) constituted the foundation of the decision taken by General Manager (NW-I), State Bank of India, Human Resource Department (respondent No.3) to terminate their services under Rule 16(3) of the State Bank of India (Officers’ Service) Rules, 1992 (for short, ‘the Rules’) is the pivotal question which arises for consideration in these appeals filed against order dated 17.11.2011 passed by the Allahabad High Court in Writ Petition Nos.1298/2011 and 1512/2011.

2. In response to an advertisement issued by appellant No.1, which was published on 1.7.2008, the private respondents applied for appointment as Probationary Officers. They appeared in the two-tier examination held by the Bank, which was followed by group discussion and interview. On being declared successful, the private respondents were appointed as Probationary Officers vide letters dated 5.5.2006, paragraph 5 of which reads as under:

“5. You will be on probation for a period of two years from the date of appointment. Your confirmation in the Bank shall be subject to:

- (a) Satisfactory reports from our own sources as well as from District Authorities regarding your character and antecedents.
- (b) Satisfactory completion of the in-service training during probation.
- (c) Satisfactory performance in the evaluation tests to be conducted by the Bank during the probation period. Your failure in evaluation tests twice will make you unfit for continuing in Bank's service and in that eventuality, your appointment will be cancelled and your services terminated by the Bank.”

3. Vide letter dated 22.12.2010 of Deputy Managing Director and Corporate Development Officer of the Bank, the Probationary Officers of 2009-10 batch were informed that they are due for confirmation on 15.5.2011 and, therefore, they may appear in the test proposed to be conducted on 27.2.2011. Paragraph 2 of that letter which has bearing on the decision of these appeals reads as under:

“2. The relative extract from the extant policy for confirmation of probationary officers is reproduced below:-

- i) The confirmation test shall be held after 21 months from the date of appointment of the probationary officers (during the probation period)
- ii) Candidates scoring a minimum of 75% marks in the written test would qualify for the further process that will include group discussion and interview. Candidates scoring minimum 75% marks in-group discussion/interview also shall be confirmed and placed in the grade of MMGS-II. Those scoring less than 75% marks but minimum 50% (45% for SC/ST/PWD) marks in the written test shall be confirmed in the grade of JMGS-I. Candidates scoring less than 50% (45% for SC/ST/PWD) marks will be given two options as under:

OPTION-I

Candidate will be required to appear in another confirmation test on or before completion of 24th month of his/her probation and in the event of not qualifying in the re-test his/her services will be terminated with immediate effect and he/she will be paid one month's emoluments in lieu of one month's notice in terms of Rule 16(3)(a) of SBI Officer's Service Rule read with the present policy of confirmation of Probationary officers as application hitherto.

OPTION-II

Candidate's probation will be extended by a further period of maximum one year in terms of two periods of six months each (extending the total probation period to a maximum of 36 months) with the provision to appear in 02 more confirmation tests at 06 monthly intervals i.e. 02nd test in 27th month & 03rd test in 33rd month of his/her probation respectively with the following conditions:-

In the event of:

Passing the proposed 02nd test after 27th month of probation candidate will be confirmed as JMGS-I on completion of 30th month of probation including extended period of probation of 06 months. The extended period of probation of six months will, however, not to be counted for service seniority.

Failing in the 02nd test put passing the proposed 03rd test after 33rd month of his/her probation he/she will be confirmed as JMGS-I on completion of 36th month of probation including the extended period of probation of one year. The extended period of probation of one-year will, however, not be

counted for service seniority.

Failing in the proposed 03rd test administered in 33rd month of his/her probation, 04 increments in basic salary given to him/her on appointment, as Probationary Officer will be withdrawn and he/she will be absorbed as Officer JMGS-I on completion of 36th month of probation period including the extended period of probation of one year. The extended period of probation of one year will not be counted for service seniority. In all the above cases, as mentioned in Option II, where probation period is extended, the annual increment date will be shifted by skipping the extended probation period of six or twelve months, as the case may be.

"Further, the service rendered by him/her during extended probation period of six or twelve months will also not be counted as eligible service for seniority as well as for next promotion."

The committee for the Group Discussion /Interview will comprise of a Chief General Manager, a General Manager and a Deputy General Manager besides one

SC/ST representative who should at least be of SMGS IV incumbency.”

4. The private respondents appeared in the test held on 27.2.2011, the result whereof was declared on 10.5.2011. Their names did not figure in the result apparently because Institute of Banking Personnel Selection (for short, ‘IBPS’), an independent expert body engaged in conducting recruitment for various services, which was entrusted with the task of preparing the examination papers and evaluating the answer sheets sent a report to the Bank that some candidates including the private respondents are suspected to have used unfair means. After four days, respondent No.3 issued letters dated 14.5.2011 and extended the probation of the private respondents for three months by invoking Rule 16(2) of the Rules. However, without waiting for expiry of the extended period of probation, respondent No.3 terminated their services vide letters dated 27.6.2011 by indicating that this was being done under Rule 16(3) of the Rules.

5. The private respondents challenged the termination of their services by filing writ petitions mainly on the grounds that the action taken by the concerned authorities of the Bank was arbitrary and violative of the rules of natural justice. They pleaded that during the period of probation, no one had informed them about any shortcoming, deficiency or defect in their work and yet their services were terminated without giving them notice and opportunity of hearing. The private respondents further pleaded that even

though they had requested the concerned officers of the Bank to disclose the reasons for extension of probation and termination of their services but no response was received from them.

6. In the counter affidavits filed on behalf of the appellants, it was pleaded that the decision to extend the probation of the private respondents and to terminate their services was taken after considering the report sent by IBPS about suspected use of unfair means by the candidates. It was further pleaded that on checking the record of seating arrangement, it was revealed that the private respondents and other candidates were seating in close proximity with each other and that was considered as a corroborative evidence of their having used unfair means, namely, copying answers from one another. According to the appellants, action was taken against the private respondents strictly in accordance with the conditions of appointment without holding any formal inquiry into the allegation involving misconduct.

7. The Division Bench of the High Court did not directly deal with the question whether the action taken by the General Manager was arbitrary, unfair and unjustified and whether in the garb of termination simpliciter, the concerned authority had penalized the private respondents on the charge of their having indulged in malpractices in the confirmation test but held that

the action taken by the appellants was contrary to the guidelines framed by the IBPS for detecting cases of use of unfair means. The Division Bench referred to paragraph 4 of the guidelines framed by the IBPS and opined that after considering the report suggesting that the private respondents were suspected to have used unfair means in the examination, the Bank should have scrutinized their cases on the basis of their performance in the descriptive papers and then taken a final decision. The Division Bench took cognizance of the statement of the senior counsel appearing for the Bank that performance of the private respondents in the descriptive papers was not evaluated and held that the Bank could not have discharged them from service by assuming that they had used unfair means in the objective type papers.

8. Shri U. U. Lalit, learned senior counsel appearing for the appellants argued that the impugned order is liable to be set aside because the view taken by the High Court on the legality and propriety of the decision taken by respondent No.3 in consonance with the terms of appointment of the private respondents and Rule 16(3) of the Rules is ex facie erroneous and is contrary to the terms and conditions of their appointment. Shri Lalit emphasized that officers and employees of unquestionable integrity are required by the Bank because their work involves high degree of responsibility and any compromise in that regard would be detrimental to

larger public interest. Learned senior counsel then argued that the assessment made by the appointing authority on the issue of suitability of the private respondents for confirmation was based on an objective consideration of the report received from IBPS and in the absence of any express stigma in the order of termination/discharge, the respondents were not entitled to complain of violation of the rules of natural justice. Shri Lalit submitted that holding of regular inquiry is not *sine qua non* for discharging a probationer and the High Court committed grave error by nullifying the decision taken by respondent No.3 on the ground of violation of the guidelines/policy framed by IBPS for evaluation of the answer sheets. Shri Lalit produced before the Court xerox copy of the proceedings which culminated in the issue of letters dated 27.6.2011 to show that respondent No.3 approved the note

prepared by Deputy General Manager, Central Recruitment and Promotion Department, who had examined the report sent by IBPS and checked the record relating to seating arrangement which conclusively established that the private respondents had used unfair means in the confirmation test. Shri Lalit finally argued that discharge of a probationer on the ground of unsuitability cannot be termed as punitive and respondent No.3 was not required to give notice and opportunity of hearing to the private respondents. In support of this argument, Shri Lalit relied upon the judgments of this Court in Ajit

Singh v. State of Punjab (1983) 2 SCC 217, Krishnadevaraya Education Trust v. L.A. Balakrishna (2001) 9 SCC 319, Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences (2002) 1 SCC 520, Progressive Education Society v. Rajendra (2008) 3 SCC 310 and Rajesh Kumar Srivastava v. State of Jharkhand (2011) 4 SCC 447.

9. Shri Vikas Singh, learned senior counsel appearing for IBPS submitted that the institute is an expert body which has been conducting examinations for the officers and employees of various organizations and financial institutions.

Shri Singh submitted that IBPS has developed a software of its own for identifying the cases of use of unfair means and the software generates report of all pairs of cases which have identical responses. The report of the software is then reviewed by a group of experts and then and then only a conclusion is reached about suspected use of unfair means. Learned senior counsel then argued that the interpretation placed by the High Court on para 4(B) of the guidelines framed by IBPS is wholly erroneous and the word 'may' used in that paragraph cannot be construed as 'shall' so as to

make evaluation of the descriptive papers as mandatory even in the cases of suspected use of unfair means. He submitted that IBPS had sent report regarding suspected use of unfair means because the candidates had given 11 identical wrong answers and 44 identical correct answers, which was highly improbable and the appellant did not commit any error by relying upon that report. Learned senior counsel referred to the revised guidelines issued by IBPS for detecting the cases of use of unfair means and submitted that the report sent to the Bank was based on evaluation of the

papers of objective test in consonance with the revised guidelines and the concerned officers of the Bank took decision after fully satisfying themselves that the private respondents had used unfair means in the examination. Shri Vikas Singh emphasized that the action taken against the private respondents had salutary and sobering effects on other candidates and not a single case of unfair means was detected by IBPS in the tests held between 17.7.2011 and 24.6.2012 for various batches of new recruits.

10. Shri Pallav Shishodia, Mrs. Shobha Dixit, Senior Advocates and other learned counsel appearing for the respondents argued that even though the

High Court did not specifically dealt with the question whether the action taken by respondent No.3 was vitiated due to violation of the rules of natural justice, the material produced before the High Court and this Court unmistakably shows that the decision contained in letters dated 27.6.2011 was founded on the conclusion reached by the officers of the Bank that the private respondents were guilty of using unfair means in the confirmation test and this could not have been done without giving them action oriented notice and fair opportunity of hearing. Shri Shishodia pointed out that the report prepared by IBPS was based on computer scanning of the answer sheets of the objective papers and the appellants could not have relied upon such report for jeopardizing the career of the private respondents without holding an inquiry and without giving them opportunity to controvert the allegation of use of unfair means. Learned senior counsel submitted that there was no deficiency or defect or shortcoming in the work or performance of the private respondents as Probationary Officers and in the guise of discharging their services under Rule 16(3), the Bank had penalized them on the specific allegation of using unfair means in the confirmation test without complying with the basics of the natural justice.

11. The question whether termination of the service of a temporary employee or a probationer can be treated as punitive even though the order passed by the competent authority does not contain any stigma has been considered in a series of judgments. In *Parshotam Lal Dhingra v. Union of In-*

dia, 1958 SCR 828, which can be considered as an important milestone in the development of one facet of service jurisprudence in the country, the Constitution Bench was called upon to decide whether the order of reversion of an official holding a higher post in an officiating capacity could be treated as punitive. After elaborate consideration of the relevant provisions of the Constitution and judicial decisions on the subject, the Constitution Bench observed:

“...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....”

12. In *State of Punjab and another v. Sukh Raj Bahadur* (1968) 3 SCR 234, Mitter, J. considered several precedents and culled out the following propositions:

“1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service does not attract the operation of Article 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged by Article 311 i.e. an Enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article.”

13. In *State of Bihar v. Shiva Bhikshuk Mishra* (1970) 2 SCC 871, the three Judge Bench considered the question whether the respondent's reversion from the post of Subedar-Major to that of Sergeant in the backdrop of an inquiry made into the allegation of assault on his subordinate was punitive. On behalf of the appellant, reliance was also placed on the judgments in *State of Punjab v. Sukh Raj Bahadur* (supra) and *Union of India v. R. S. Dhaba*, Income-tax Officer, Hoshiarpur, 1969 (3) SCC 603 and it was argued that the order of reversion cannot be treated as punitive because it did not contain any word of stigma and the High Court committed an error by relying upon the inquiry conducted by the Commandant for coming to the

conclusion that the order of reversion was punitive. While rejecting the contention, this Court observed:

“We are unable to accede to the contention of the appellant that the ratio of the above decision is that so long as there are no express words of stigma attributed to the conduct of a Government Officer in the impugned order it cannot be held to have been made by way of punishment. The test as previously laid and which was relied on was whether the misconduct or negligence was a mere motive for the order of reversion or whether it was the very foundation of that order. In Dhaba case, it was not found that the order of reversion was based on misconduct or negligence of the officer. So far as we are aware no such rigid principle has ever been laid down by this court that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government Officer it must be held to have been made in the ordinary course of administrative routine and the court is debarred from looking at all the attendant circumstances to discover whether the order had been made by way of punishment. The form of the order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct. It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order.”

(emphasis supplied)

14. In *Samsher Singh v. State of Punjab* (1975) 1 SCR 814, a seven-Judge Bench considered the legality of the discharge of two judicial officers of the Punjab Judicial Service, who were serving as probationers. A. N. Ray, CJ, who wrote opinion for himself and five other Judges made the following observations:

“No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution.

The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may, 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. In such a case, the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The order of termination is illegal and must be set aside”.

Krishna Iyer, J, who agreed with the learned Chief Justice, made the following concluding observations:

“Again, could it be that if you summarily pack off a probationer, the order is judicially unscrutable and immune? If you conscientiously seek to satisfy yourself about allegations by some sort of enquiry you get caught in the coils of law, however harmlessly the order may be phrased? And so, this sphinx-complex has had to give way in later cases. In some cases the rule of guidance has been stated to be ‘the substance of the matter’ and the ‘foundation’ of the order. When does ‘motive’ trespass into ‘foundation’? When do we lift the veil of ‘form’ to touch the ‘substance’? When the Court says so. These ‘Freudian’ frontiers obviously fail in the work-a-day world and Dr Tripathi's observations in this context are not without force.”

15. In Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha

(1980) 2 SCC 593, Krishna Iyer, J. considered as to when the termination simpliciter can be termed as punitive and observed:

“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, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in different proceedings from the formal order, does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live *nexus* between it and the termination of service, the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used.

On the contrary, even 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 simpliciter, if no injurious record of reasons or punitive cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge.”

16. In *Anoop Jaiswal v. Government of India* (1984) 2 SCC 369, this Court considered the question whether termination of the appellant's service, who was appointed to Indian Police Service and was on probation, by invoking Rule 12(b) of the Indian Police Service (Probation) Rules, 1954 was punitive in nature. The facts found by the Court were that while undergoing training at National Police Academy, Hyderabad, the Probationary Officers had delayed attending the ceremonial drill practice. The Director of the Academy called explanation from all the probationers.

The appellant was accused of having instigated others not to join ceremonial drill practice on time. He denied the allegation. Thereafter, his service was terminated by a non-stigmatic order. The appellant challenged the termination of his service on the ground of violation of Articles 14 and 311(2) of the Constitution. The writ petition filed by him was summarily dismissed by the Delhi High Court. This Court referred to the averments contained in the pleadings of the parties, the judgments in *Parshotam Lal Dhingra v. Union of India* (supra), *Samsher Singh v. State of Punjab* (supra), *State of Punjab v. Shri Sukh Raj Bahadur* (supra), *Union of India v. R.S. Dhaba* (supra), *State of Bihar v. Shiva Bhikshuk Mishra* (supra), *R.S. Sial v. State of U.P.* (1974) 3 SCR 754, *State of U.P. v. Ram Chandra Trivedi* (1976) 4 SCC 52 and *I.N. Saksena v. State of M.P.* (1967) 2 SCR 496 and held:

“It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.

In the instant case, the period of probation had not yet been over. The impugned order of discharge was passed in the middle of the probationary period. An explanation was called for from the appellant regarding the alleged act of indiscipline, namely, arriving late at the gymnasium and acting as one of the ringleaders on the occasion and his explanation was obtained. Similar explanations were called for from other probationers

and enquiries were made behind the back of the appellant. Only the case of the appellant was dealt with severely in the end. The cases of other probationers who were also considered to be ringleaders were not seriously taken note of. Even though the order of discharge may be non-committal, it cannot stand alone. Though the noting in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis or foundation for the order should be read along with the order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Article 311(2) of the Constitution.”

(emphasis supplied)

17. In *Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences* (1999) 3 SCC 60, the two Judge Bench considered the appellant's challenge to the termination of his service after adverting to the various communications sent by the Head of the Organization to the appellant and formulated the following points:

- “(1) In what circumstances, the termination of a probationer's services can be said to be founded on misconduct and in what circumstances could it be said that the allegations were only the motive?
- (2) When can an order of termination of a probationer be said to contain an express stigma?
- (3) Can the stigma be gathered by referring back to proceedings referred to in the order of termination?
- (4) To what relief?”

While dealing with the first point, the Court referred to various earlier

judgments and observed:

“As to in what circumstances an order of termination of a probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation. In this area, as pointed out by Shah, J. (as he then was) in *Madan Gopal v. State of Punjab* there is no difference between cases where services of a temporary employee are terminated and where a probationer is discharged. This very question was gone into recently in *Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd.* and reference was made to the development of the law from time to time starting from *Parshotam Lal Dhingra v. Union of India* to the concept of “purpose of enquiry” introduced by Shah, J. (as he then was) in *State of Orissa v. Ram Narayan Das* and to the seven-Judge Bench decision in *Samsher Singh v. State of Punjab* and to post-Samsher Singh case-law. This Court had occasion to make a detailed examination of what is the “motive” and what is the “foundation” on which the innocuous order is based.

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.”

(emphasis supplied)

18. In *Chandra Prakash Shahi v. State of U.P.* (2000) 5 SCC 152, the Court considered the correctness of the order passed by the High Court which had allowed the writ petition filed by the State and set aside the order

passed by U. P. Public Services Tribunal for reinstatement of the appellant.

The competent authority had terminated the appellant's service in terms of Rule 3 of the U. P. Temporary Government Servants (Termination of Service) Rules, 1975. It was argued on behalf of the appellant that the order by which his service was terminated, though innocuous, was, in fact, punitive in nature because it was founded on the allegation that he had fought with other colleagues and used filthy and unparliamentary language. In the counter affidavit filed on behalf of the respondents, it was admitted that there was no adverse material against the appellant except the incident in question. The original record produced before the Tribunal revealed that the appellant's service was terminated on account of his alleged involvement in the quarrel between the constables. After noticing various precedents, this Court observed:

“The whole case-law is thus based on the peculiar facts of each individual case and it is wrong to say that decisions have been swinging like a pendulum; right, the order is valid; left, the order is punitive. It was urged before this Court, more than once including in Ram Chandra Trivedi case that there was a conflict of decisions on the question of an order being a simple termination order or a punitive order, but every time the Court rejected the contention and held that the apparent conflict was on account of different facts of different cases requiring the principles already laid down by this Court in various decisions to be applied to a different situation. But the concept of “motive” and “foundation” was always kept in view.

The important principles which are deducible on the concept of “motive” and “foundation”, concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of

probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

"Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry.

Applying these principles to the facts of the present case, it will be noticed that the appellant, who was recruited as a Constable in the 34th Battalion, Pradeshik Armed Constabulary, U.P., had successfully completed his training and had also completed two years of probationary period without any blemish. Even after the completion of the period of probation under para 541 of the U.P. Police Regulations, he continued in service in that capacity. The incident in question, namely, the quarrel was between two other Constables in which the appellant, to begin with, was not involved. When the quarrel was joined by few more Constables on either side, then an inquiry was held to find out the involvement of the Constables in that quarrel in which filthy language was also used. It was through this inquiry that

the appellant's involvement was found established. The termination was founded on the report of the preliminary inquiry as the employer had not held the preliminary inquiry to find out whether the appellant was suitable for further retention in service or for confirmation as he had already completed the period of probation quite a few years ago but was held to find out his involvement. In this situation, particularly when it is admitted by the respondent that the performance of the appellant throughout was unblemished, the order was definitely punitive in character as it was founded on the allegations of misconduct.”

(emphasis supplied)

19. In *Union of India v. Mahaveer C. Singhvi* (2010) 8 SCC 220, the three-Judge Bench considered the question whether termination of the respondent's service who was serving as I.F.S. probationer by way of discharge in accordance with the terms of employment was punitive. The Court noted that the respondent's service was terminated because he had sought extension to join the Mission at Madrid in Spain because of sudden deterioration in the health condition of his parents and also requested for providing medical facilities and diplomatic passports to them. The Court also noted that the Ministry of External Affairs had taken cognizance of the complaint made by one Mrs. Narinder Kaur Chadha that the respondent had been threatening her entire family and in particular her daughter which was followed by some enquiries conducted into his conduct or character by Joint Secretary, Foreign Service Institute and a memorandum was issued to the respondent alleging his unauthorized absence. The Joint Secretary found that the complaint was wholly unfounded. The Court then referred to the

principles laid down in earlier judgments and approved the view taken by the High Court that even though the order of discharge did not contain any stigma, the same was not conclusive and the High Court had rightly termed the same as punitive. Some of the observations made in the judgment are extracted below:

“The materials on record reveal that the complaint made by Mrs Narinder Kaur Chadha to the Minister of External Affairs had been referred to the Joint Secretary and the Director (Vigilance) on 8-2-2002 with a direction that the matter be looked into at the earliest. Although, nothing adverse was found against the respondent, on 19-2-2002, the Joint Secretary (Vigilance) held further discussions with the Joint Secretary (Admn.) in this regard. What is, however, most damning is that a decision was ultimately taken by the Director, Vigilance Division, on 23-4-2002, to terminate the services of the respondent, stating that the proposal had the approval of the Minister of External Affairs. This case, in our view, is not covered by the decision of this Court in Dipti Prakash Banerjee case.”

20. The ratio of the above noted judgments is that a probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post held by him. If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the

competent authority can be nullified on the ground of violation of the rules of natural justice.

21. We shall now consider whether termination of the services of the private respondents is vitiated due to violation of the rules of natural justice. It will be useful to notice Rules 15 and 16 of the Rules which regulate probation and confirmation of the officers of Bank, paragraphs 7(part) and 10 of the advertisement issued by the Bank for recruitment of Probationary Officers, the extracts of note prepared by Deputy General Manager, Central Recruitment and Promotion Department, which was approved by respondent No.3,

letters dated 12.5.2011 and 3.6.2011 of Assistant General Manager (HR), which were duly initialed by the General Manager. The same read as under:

RULES

“15 (1) A person appointed as a Probationary Officer or a Trainee Officer shall be on probation for a period of two years.

15(2) Any other employee promoted as an officer to the Junior Management Grade shall be on probation for a period of one year.

15(3) Any other person appointed to any grade including the Junior Management Grade shall be on probation for such period as may be decided by the competent authority.

Provided that the competent authority may, in the case of any officer, reduce or dispense with the period of probation under this rule.

16(1) An officer referred to in rule 15 shall be confirmed in the service of the Bank, if in the opinion of the competent authority, the officer has satisfactorily completed the training in any institution to which the officer may have been deputed for training, and the in-service training in the Bank.

Provided, that Bank may at its discretion subject to the merit and suitability of a Probationary Officer/Trainee Officer for future leadership role, being determined through a screening process to be prescribed by the Central Human Resources Committee may confirm and give placement (fitment) to such officers in MMGS II.

Provided that an officer directly recruited in any grade may be required also to pass a test in a language other than his mother tongue or a professional course.

16(2) If, in the opinion of the competent authority, an officer has not satisfactorily completed either or both the trainings referred to in sub-rule (1) or if the officer has not passed the test referred to therein or an officer's service is not satisfactory, the officer's probation may be extended by a further period not exceeding one year.

16(3) Where during the period of probation, including the period of extension, if any, the competent authority is of the opinion that the officer is not fit for confirmation:-

- (a) in the case of a direct appointee, his services may be terminated by one month's notice or payment of one month's emoluments in lieu thereof, and
- (b) in the case of a promotee from the Bank's service, he may be reverted to the grade or cadre from which he was promoted."

ADVERTISEMENT

"7. xx JUDGMENT xx

CAREER PATH

The Bank may at its discretion, subject to merit and suitability after probation period of a probationary officer for future leadership role, to be determined through a screening process, confirm and give placement (Fitment) to selected officers in next higher grade i.e. Officers Middle Management Grade Scale II.

The Probationary Officers will be on probation of two years during which they will be given intensive training and towards end of their probation/training period they will be subjected to a screening process. While those probationary officers who

achieve the pre-determined standards may be confirmed and given placement in the next higher grade i.e. Officer Middle Management Grade Scale II. Others who qualify the test but fail to achieve the standards set for placement in Middle Management Grade Scale II, will be confirmed as Officer Junior Management Grade I. The services of those Probationary officers who fail to qualify this process may be terminated.

10. ACTION AGAINST CANDIDATES FOUND GUILTY OF MISCONDUCT:

Candidates are warned that they should not furnish any particulars that are false, tampered/fabricated or should not suppress any material information while filling up the application form.

At the time of written examination/interview, if a candidate is (or has been) found guilty of:

(i) Using unfair means during the examination or (ii) impersonating by any person or (iii) misbehaving in the examination hall or taking away the question booklet (or any part thereof)/ answer sheet from the examination hall or (iv) resorting to any irregular or improper means in connection with his/her candidature for selection or (v) obtaining support for his/her candidature by any unfair means, such a candidate may, in addition to rendering himself/herself liable to criminal prosecution, be liable;

a) To be disqualified from the examination for which he/she is a candidate.

b) To be debarred either permanently or for a specified period, from any examination or recruitment conducted by SBI.

c) For termination of service, if he/she has already joined the Bank.”

NOTE PREPARED BY THE DEPUTY GENERAL MANAGER

STAFF SUPERVISING:

PROBATIONARY OFFICERS 2009-10 BATCH

WRITTEN EXAMINATION FOR CONFIRMATION

HELD ON 27-02-2011.

Placed alongside are: -

- ECCB Memorandum dated the 04th December 2003 vide which policy for confirmation of PO/TO as JMGS-I / MMGS-II was formed and was made effective for the batches of the PO/TO who were due for confirmation as from a date after the date of the approval of the policy i.e. 04th December 2003(Flag "A").
 - Letter No. P&HRD: CM: 5:SPL: 815 dated the 29th September 2004 & P&HRD/CM/5/3982 dated the 28th October 2005 regarding pattern for the screening process for considering PO/TO for confirmation as JMGS-I / MMGS-II and also for extension of probation period by 06 months for those who will fail to secure minimum qualifying marks in the written test of functional knowledge (Flag "B").
 - Cadre Management Department Memo No. HR/CM/8/691 dated 17-01-2008 regarding modification in screening process for confirmation of POs in JMGS-I / MMGS-II consequent upon revision in recruitment procedure / criteria approved by the ECCB in its meeting held on 28th December 2007(Flag "C").
 - Cadre Management Department Memo No. HR/CM/6/SPL/517 dated 20-09-2010 forwarding therewith copy of note no. HR/CM/6/111/2010-11 dated the 09th September 2010 with supplementary note dated the 13th September 2010 put up before CHRC in its meeting held on 13th September 2010 advising modification to be effected in the policy for confirmation of Probationary Officers (POs) and Trainee Officers (TOs) (Flag "D").
 - A copy of our approved note No. CRPD/SNP/PO-09-10/269 dated 08-12-2010(Flag "E") finalizing date of confirmation of written test for probationary officers 2009-10 batch.
3. Accordingly, written test was conducted for confirmation of probationary officers 2009-10 batch on 27-02-2011, wherein 2185 candidates appeared in the test against 2204 candidates called for the examination.
4. As per the approved testing pattern, the minimum

qualifying marks in the written test for confirmation in JMGS I is 50% i.e. 100 out of 200 (for SC/ST/PWD 45% i.e. 90 out of 200) and 75% (150 out of 200) for qualifying them for Group Discussion / Interview for their confirmation in MMGS II direct.

5. The policy for confirmation of PO/TO has been modified after announcing the date of the written test but before processing the result thereof. The process of declaring the results as also advising the candidates the effects of their securing less than the minimum passing marks at 50% (45% for SC/ST/PWD candidates) in the written test held on 27-02-2011 have been modified as detailed in the Annexure-II.

6. The evaluation of all the answer papers (Objective type and Descriptive type) in respect of 2185 candidates has since been completed. We are in receipt of the merit list drawn on the basis of aggregate marks secured in Objective & Descriptive Papers from IBPS. The descriptive papers of all candidates who secured marks between 48% and 50% GEN/OBC (43% and 45% in respect of SC/ST/PWD candidates) as also those securing marks between 74% and 75% in the aggregate were subjected to 100% moderation.

7. We have also received report on "Use of Unfair Means" i.e. copying based on analysis done by IBPS, Mumbai. A brief write up in "Detection of use of unfair means in objective tests by the candidates" is enclosed as Annexure-III. They have found 11 such pairs involving 20 candidates (Annexure-IV) as per undernoted table

Copying Cases in Written Test held on 27-02-2011 for Confirmation of Probationary Officers 2009-10 Batch				
Sr. No.	CENTRE	NO. OF PAIRS	NO. OF CANDIDATES	CATEGORY
01	Ahmedabad	02	04	Use of Unfair Means is suspected.
02	Guwahati	01	02	Use of Unfair Means is suspected.
03	Patna	07	12	Use of Unfair Means is suspected.
04	Lucknow	01	02	Use of Unfair Means is suspected.
	TOTAL	11	20	

We have analysed the report given by IBPS, which is based on correct answers, identical wrong answers (IWW) and other mismatches given by pairs, which have indulged in copying. IBPS has made analysis after excluding right answers and most

8. Excluding the pair mentioned above, the statistical and corroborative evidences are against the remaining 18 candidates, we propose to

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45% i.e. 90 out of 200) as such these 59 candidates are not suitable for their confirmation.

10. Accordingly, we recommend:

- i) xx xx xx
- ii) xx xx xx
- iii) Probation period of 59 candidates (60-1 candidate involved in copying), who have failed to secure 50% i.e. 100 out of 200 (for SC/ST/PWD 45% i.e. 90 out of 200), be extended by 6 months. They will be subjected to confirmation re-test within the extended period of probation in terms of the extant policy (Annexure-I).
- iv) 19 candidates (Annexure-I) were absent in the confirmation written test, are not suitable for their confirmation as JMGS-I. Circles have advised the reasons for their absence in the test. Subject to verification by the Circles, the probation period of eligible candidates is to be extended by a further period of 6 months and they will be subjected to confirmation re-test within the extended period of probation.
- v) There are 18 candidates against whom statistical and corroborative evidences (IBPS report, seating plan) are available showing their involvement in use of unfair means i.e. copying in the written test. We propose to cancel their candidature for the confirmation test and Circles will be asked to initiate action as suggested in Para "8".

(emphasis supplied)

LETTER DATED 12.5.2011.

“GENERAL MANAGER NW-I.

CIRCLE DEVELOPMENT OFFICER

STAFF: SUPERVISING PROBATIONARY OFFICERS -2009-10 BATCH RESULT OF WRITTEN EXAMINATION HELD ON 27.02.2011

A written examination for determining the suitability of the Probationary Officers 2009-10 batch for confirmation as officer JMGS-I/ direct placement as officer MMGS-II was conducted on 27.02.2011 in which out of 140 eligible POs, 139 appeared in the above test from our Circle. One PO had tendered resignation from Bank's services just before the above test.

2. In this connection, we have been advised by Corporate Center, vide their letter No. CRPD/SNP/PO2009 10/CONF/74-A dated 10.05.2011 (placed alongside) that out of 139 POs from our Circle, 39 POs, as per Annexure "A", have secured qualifying marks of 150 or more out of 200 (i.e. 75% or more) to become eligible for Group Discussion/ Interview for considering their confirmation as officer MMGS-II in terms of Rule 16 (1) of State Bank of India officers service rules. In case any of these 39 candidates do not secure qualifying marks i.e. 75% or more in GD/Interview, he/she will be considered suitable for confirmation in JMGS-I w.e.f. 15.05.2011 or upon completion of two years probation from the date of their joining the Bank.

3. 96 candidates, as per Annexure "B", have secured minimum qualifying marks of 50% or more but less than 75% (45% or more for SC/ST/PWD) and have thus become eligible for being considered suitable for confirmation as officer JMGS-I w.e.f. 15.05.2011 or upon completion of two years probation from the date of their joining the Bank in terms of Rule 16(1) of State Bank of India Officers Service Rules.

4. 2 candidates, as per Annexure "C", who scored less than 50% (less than 45% for SC/ST/PWD) marks, are not eligible for confirmation at this stage and their probation will be extended for a period of 6 months. They will have to appear for confirmation re-test, which will be scheduled during the extended period of probation. In the event of any candidate failing in the re-test, his/her services will be terminated in terms of offer of appointment letter.

5. In terms of the Corporate Centre letter under reference, mentors (SMGS-IV/V) have to be identified for the 2 candidates (Annexure "C"), who could not qualify the confirmation test, for proper guidance and counselling to upgrade their knowledge / skills in the Bank. In order to enable them to imbibe more learning during their extended probation period, we also propose to change their branches. The mentors and branches identified for them are as under:

Sl.	Name	Present Branch	Proposed Branch/Office	Mentors identified
1.	Ms. Smriti	Indira Na-	RASMECCC,	Mrs. Shubha

	Anand	gar, Bareilly	Bareilly	Doorwar, AGM (Trg.), SBLC, Bareilly
2.	Shri Abhishek Debnath	Kamachha, Varanasi	RASMECCC, Varanasi	Shri S.K.Srivastava, CM (Trg.), SBLC, Varanasi

6. Further, 2 candidates, as per Annexure "D", have been found suspected to have indulged in copying and as such their probation will be extended by 3 months in terms of Corporate Centre letter No. CRPD/SNP/PO2009-10/CONF/75 dated 10.05.2011.

7. Accordingly, in respect of 2 candidates of the above batch of Probationary Officers (2009-10 batch), who could not qualify in the confirmation test conducted on 27-02-2011, and 2 candidates who have been found suspected to have indulged in copying will have to be served letters on the lines of draft letters (Annexure-E & F) and their acknowledgement will have to be obtained. We, therefore, propose to deliver letters (placed below for your signature) to these 4 candidates. Further, we also propose to confirm 96 candidates (Annexure "B") as officer JMGS-I w.e.f. 15.05.2011 or upon completion of two years probation from the date of their joining the Bank in terms of Rule 16(1) of State Bank of India Officers Service Rules.

Submitted for approval, please.

ASSISTANT GENERAL MANAGER (HR)”

Annexure-“D”

“Central Recruitment Promotion Department, Corporate Centre, Mumbai Confirmation of Probationary Officers (2009-10) Batch Written Examination Held On Sunday, 27-02-2011. COPYING CASES

CSRNO	CIR	ROLLNO	TITLE	NAME	DOB	PFINDEX
1	LUC	2263701061	MS	PALAK MODI	19-06-85	5910633
2	LUC	2263701067	SHRI	PRABHAT DIXIT	22-11-83	5908930

LETTER DATD 3.6.2011.

“General Manager NW-I (Appointing Authority)

Circle Development Officer

Staff : Supervising

Probationary officers : 2009 Batch

Result of Confirmation Test Held on 27.02.2011

Copying Case : Extension of Probation Period by Three Months

139 Probationary Officers of 2009 batch appeared in the screening test for confirmation in JMGS-I and MMGS-II on 27.02.2011 from our Circle. Corporate Centre vide their e-mail letter no. CRPD/SNP/PO-2009-10/CONF/75 dated 10.05.2011 (Flag-‘A’) has forwarded a list of 02 candidates viz Ms. Palak Modi, PF index no. 5910633 and Shri Prabhat Dixit, PF index no. 5908930 where the use of unfair means (copying) is suspected as per report furnished by IBPS which is further supported by the corroborative evidence of sitting next to one-another | in different rows in the same room, as indicated by the sitting plan in the above mentioned test.

2. Corporate Centre also advised that as approved by the Appropriate Authority, the probation period of these candidates is to be extended by 03 months in terms of Rule 16(2) of SBIOSR and appropriate process to be completed within extended probation period. Further, as the statistical and additional corroborative evidences are against these candidates, as an examination conducting body, Corporate Centre has cancelled their candidature for the confirmation test.

3. A note was placed to the appointing authority i.e. General Manager (NW-I) and upon his approval (Flag-‘B’) the probation period of these 02 candidates has been extended by 03 months. We propose to initiate appropriate action against the above mentioned 02 Probationary Officers in the matter at the earliest within the extended probation period.

4. Corporate Centre has advised that keeping in view the unsatisfactory conduct of these 02 officers during the written examination held on 27.02.2011, these candidates cannot be deemed to be fit for confirmation and are, therefore, liable for action in terms of Rule 16(3) of SBIOSR by the Appropriate Authority. In this connection, we have also discussed the matter with AGM (Law) at Corporate Centre.

5. We, therefore, propose subject to your approval, to initiate necessary action against these 02 Probationary Officers for termination of their services at the earliest. Upon approval we will draft a letter for termination of their services and forward the same to Corporate Centre for vetting. Upon receipt of advices from Corporate Centre, we will put up the termination letter, to be served to these 02 POs, for your signature. The appropriate authority in the

matter is Appointing Authority, i.e., senior most General Manager of the Circle.

Submitted for approval.

Asstt. General Manager (HR)”

22. A combined reading of Rules 15(1) and 16 and paragraph 5 of the conditions of appointment makes it clear that a person appointed as a Probationary Officer remains on probation for a minimum period of two years at the end of which he is entitled to be confirmed if the competent authority is of the opinion that he has satisfactorily completed the training in any institution to which he may have been deputed and the in-service training in the Bank. The Probationary Officer can also be subjected to screening for judging his merit and suitability. If the Probationary Officer fails to satisfactorily complete the training(s) or fails to pass the screening test or his service is not satisfactory, then the Bank can extend the period of probation by a further period of which the outer limit is one year. In a given case, the competent authority can, if it is of the opinion that the Probationary Officer is not fit for confirmation, terminate his service by one month's notice or payment of one month's emoluments.

23. It is thus evident that satisfactory performance during the period of probation, successful completion of training(s) and passing of the test conducted by the Bank for judging his suitability for the post constitute the touchstone for his confirmation.

24. The policy of confirmation, which was circulated vide letter dated 20.9.2010 envisaged placement of the Probationary Officers scoring 75% or more marks in the written test, group discussion and interview in MMGS-II. Those scoring less than 75% but minimum 50% (general category) and 45% (SC/ST/PWD) could be confirmed in JMGS-I. Those scoring less than 50% or 45%, as the case may be, are eligible to again appear in the confirmation test and qualify the same before completion of two years' probation. If he fails to qualify the test second time, his service is liable to be terminated in terms of Rule 16(3) of the Rules. An alternative available to the Bank is to extend the period of probation of the candidate for maximum one year with two opportunities to appear in the confirmation tests at six-monthly interval.

25. The primary object of the confirmation test held on 27.2.2011, which could also be termed as evaluation test within the meaning of paragraph 5(c) of the appointment letter was to decide whether the officer has made use of the opportunities made available to him by the Bank to prove his worth for the job for which he was recruited and whether he has acquired sufficient knowledge about the functional requirements of the Bank. The test also gave an opportunity to the Probationary Officer to demonstrate that he was meritorious enough to be placed in the higher grade.

26. There is a marked distinction between the concepts of satisfactory completion of probation and successful passing of the training/test held during or at the end of the period of probation, which are *sine qua non* for

confirmation of a probationer and the Bank's right to punish a probationer for any defined misconduct, misbehaviour or misdemeanor. In a given case, the competent authority may, while deciding the issue of suitability of probationer to be confirmed, ignore the act(s) of misconduct and terminate his service without casting any aspersion or stigma which may adversely affect his future prospects but, if the misconduct/misdemeanor constitutes the basis of the final decision taken by the competent authority to dispense with the service of the probationer albeit by a non stigmatic order, the Court can lift the veil and declare that in the garb of termination simpliciter, the employer has punished the employee for an act of misconduct.

27. The use of unfair means in the evaluation test/confirmation test held by the Bank certainly constitutes a misconduct. The Bank itself had treated such an act to be a misconduct (paragraph 10 of advertisement dated 1.7.2008). It is not in dispute that the services of the private respondents were not terminated on the ground that there was any deficiency or shortcoming in their work or performance during probation or that they had failed to satisfactorily complete the training or had failed to secure the qualifying marks in the test held on 27.2.2011. As a matter of fact, the note prepared by the Deputy General Manager, which was approved by the General Manager makes it crystal clear that the decision to dispense with the services of the private respondents was taken solely on the ground that they were guilty of using unfair means in the test held on 27.2.2011. To put it

differently, the foundation of the action taken by the General Manager was the accusation that while appearing in the objective test, the private respondents had resorted to copying. IBPS had relied upon the analysis made by the computer and sent report to the Bank that 18 candidates were suspected to have used unfair means. The concerned authority then sent for the chart of seating arrangement and treated the same as a piece of evidence for coming to the conclusion that the private respondents had indeed used unfair means in the examination. This exercise was not preceded by an inquiry involving the private respondents and no opportunity was given to them to defend themselves against the charge of use of unfair means. In other words, they were condemned unheard which, in our considered view, was legally impermissible.

28. Before concluding, we may notice the judgments relied upon by the learned senior counsel for the appellants. In **Ajit Singh v. State of Punjab** (supra), this Court considered the question whether the decision of the State Government to terminate the services of the appellants, who were appointed as Executive Officers on

probation of one year, could be nullified on the ground of violation of Articles 14 and 16 of the Constitution. The facts of the case show that the Punjab Town Improvement Act, 1922 was enacted to make provision for the improvement and expansion of towns in Punjab. The Act envisages the creation and constitution of Trusts and the Trust so created will have a corporate personality with perpetual succession and a common seal. The duties and functions of the Trust inter alia include preparing of schemes under the Act for various purposes. Section 17 conferred power on the State Government to constitute certain services in the manner therein prescribed. One such service contemplated by the section was Punjab Service of Trust Executive Officers. Sub-section (2) of Section 17 conferred power on the State Government to make rules for regulating the recruitment and the conditions of service of members of the Trust services constituted by the State Government. Armed with this power, the State Government constituted Punjab Service of Trust Executive Officers. In exercise of the power conferred by Section 73 read with Section 17(2) of the Act, the State Government framed rules styled as Punjab Trust Services (Recruitment and Conditions of Service) Rules, 1978 ("1978 Rules" for short). Rule 5(2)(i) inter alia provided that 50 per cent of the vacancies in

the cadre of Executive Officers shall be filled by direct recruitment and for this purpose Rule 5(4) envisaged the setting up of a Selection Committee called Punjab Trust Services Selection Committee. In 1978, Directorate of Local Government, Punjab issued Advertisement No. 1078 inviting applications for the posts in Class I, II and III of Trust Executive Officers. Pursuant to this advertisement, large number of persons applied for various posts. The Punjab Trust Services Selection Committee interviewed various candidates and ultimately recommended 11 persons for the post of Trust Executive Officers. Ajit Singh and Rajinder Singh were recommended for Class I post; S. Sarup Singh and R.L. Bhagat were recommended for Class II post of Trust Executive Officers and the remaining seven petitioners in this group of petitions were recommended for Class III post of Trust Executive Officers. These recommendations were accepted and appointment orders were issued by Punjab Government on May 28, 1979. After each appointee completed one year of service, an increment was released in his favour. After one year, the State Government terminated their services vide orders dated 25.9.1980. One of the several grounds on which the appellants challenged the termination of their services was that the action of the employer was wholly arbitrary, discriminatory and violative of equality clause contained in the Constitution. While quashing orders dated 25.9.1980, this Court observed:

“When the master-servant relation was governed by the archaic

law of hire and fire, the concept of probation in service jurisprudence was practically absent. With the advent of security in public service when termination or removal became more and more difficult and order of termination or removal from service became a subject-matter of judicial review, the concept of probation came to acquire a certain connotation. If a servant could not be removed by way of punishment from service unless he is given an opportunity to meet the allegations if any against him which necessitates his removal from service, rules of natural justice postulate an enquiry into the allegations and proof thereof. This developing master-servant relationship put the master on guard. In order that an incompetent or inefficient servant is not foisted upon him because the charge of incompetence or inefficiency is easy to make but difficult to prove, concept of probation was devised. To guard against errors of human judgment in selecting suitable personnel for service, the new recruit was put on test for a period before he is absorbed in service or gets a right to the post. Period of probation gave a sort of *locus penitentiae* to the employer to observe the work, ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserved a right to dispense with his service without anything more during or at the end of the prescribed period which is styled as period of probation. Viewed from this aspect, the courts held that termination of service of a probationer during or at the end of a period of probation will not ordinarily and by itself be a punishment because the servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to (see *Parshotam Lal Dhingra v. Union of India*). The period of probation therefore furnishes a valuable opportunity to the master to closely observe the work of the probationer and by the time the period of probation expires to make up his mind whether to retain the servant by absorbing him in regular service or dispense with his service. Period of probation may vary from post to post or master to master. And it is not obligatory on the master to prescribe a period of probation. It is always open to the employer to employ a person without putting him on probation. Power to put the employee on probation for watching his performance and the period during which the performance is to be observed is the prerogative of the employer.”

The Court then took cognizance of the fact that on completion of one year's probation an increment was released in favour of the appellants and proceeded to observe:

“It is implicit in release of increment that the petitioners had satisfactorily discharged their duty during the probation period, and at any rate the work and conduct was not shown to be unsatisfactory, which permitted an increment to be earned. Assuming, as contended for on behalf of the respondents that period of probation was two years, the fact that on the expiry of one year of service an increment was released, would imply that during the period of one year the work and conduct has not been unsatisfactory. If it was otherwise the release of increment could have been interdicted on the ground that neither the work nor the conduct was satisfactory. The fact that the increment was released would at least permit an inference that there was satisfactory completion of the probation period and that during the probationary period, the work and conduct of each of the petitioners was satisfactory. If up to the end of June, 1980 the work and conduct of each of the petitioners was satisfactory and if the service of each of them was, simultaneously on the same day September 25, 1980 dispensed with on the ground mentioned in Rule 9(2)(a) in that in the opinion of the appointing authority, the work and conduct of each of the petitioners was not satisfactory, then between June 1980 and September 1980 something was simultaneously done by each of the petitioners to permit the appointing authority - the State - to reach an affirmative conclusion that the work and conduct, became wholly unsatisfactory and the degree of dissatisfaction with the service was so high that the service of all the 11 petitioners recruited on the same day was required to be dispensed with on identical ground. This is too fortuitous to carry conviction.”

29. In **Krishnadevaraya Education Trust v. L.A. Balakrishna** (supra), the Court noted

that the services of the respondent, who was appointed as Assistant Professor on probation were terminated on the ground of unsuitability and observed:

“There can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the recruit/appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job, then the employer has a right to terminate the services as a reason thereof. If the termination during probationary period is without any reason, perhaps such an order would be sought to be challenged on the ground of being arbitrary. Therefore, naturally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged, without assigning any reason. If the order on the face of it states that his services are being terminated because his performance is not satisfactory, the employer runs the risk of the allegation being made that the order itself casts a stigma. We do not say that such a contention will succeed. Normally, therefore, it is preferred that the order itself does not mention the reason why the services are being terminated.

If such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer were terminated. Mere fact that in response to the challenge the employer states that the services were not satisfactory would not ipso facto mean that the services of the probationer were being terminated by way of punishment. 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.

In the instant case, the second order which was passed terminating the services of the respondent was innocuously

worded. Even if we take into consideration the first order which was passed which mentioned that a Committee which had been constituted came to the conclusion that the job proficiency of the respondent was not up to the mark, that would be a valid reason for terminating the services of the respondent. That reason cannot be cited and relied upon by contending that the termination was by way of punishment.”

30. In **Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences** (supra), this Court again considered the question whether termination of the service of probationer can be termed as punitive merely because it is preceded by an inquiry for the purpose of judging his suitability and answered the same in negative. The two-Judge Bench referred to a large number of precedents and observed:

“29. ... Generally speaking when a probationer's 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 probationer's 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.”

31. In *Progressive Education Society v. Rajendra* (supra), this Court examined correctness of the order passed by the School Tribunal constituted under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, which was approved by the High Court, quashing the termination of the service of respondent No.1 on the ground of unsatisfactory performance during the period of probation. This Court

referred to the relevant provisions of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 and observed:

“The law with regard to termination of the services of a probationer is well established and it has been repeatedly held that such a power lies with the appointing authority which is at liberty to terminate the services of a probationer if it finds the performance of the probationer to be unsatisfactory during the period of probation. The assessment has to be made by the appointing authority itself and the satisfaction is that of the appointing authority as well. Unless a stigma is attached to the termination or the probationer is called upon to show cause for any shortcoming which may subsequently be the cause for termination of the probationer's service, the management or the appointing authority is not required to give any explanation or reason for terminating the services except informing him that his services have been found to be unsatisfactory.

The facts of this case are a little different from the normal cases relating to probation and the termination of the services of a probationer in that the satisfaction required to be arrived at under sub-section (3) of Section 5 of the MEPS Act has to be read along with Rule 15 of the MEPS Rules, 1981 with particular reference to sub-rule (6) which provides that the performance of an employee appointed on probation is to be objectively assessed by the Head during the period of his probation and a record of such assessment is to be maintained. If the two provisions are read together, it would mean that before taking recourse to the powers vested under sub-section (3) of Section 5 of the MEPS Act, the performance of an employee appointed on probation would have to be taken into consideration by the school management before terminating his services.

Accordingly, while Rules 14 and 15 of the MEPS Rules, 1981 cannot override the provisions of sub-section (3) of Section 5 of the MEPS Act, it has to be said that the requirements of sub-rule (6) of Rule 15 would be a factor which the school management has to take into consideration while exercising the powers which it undoubtedly has and is recognised under sub-section (3) of Section 5 of the Act.

This brings us to the next question regarding the sufficiency of the materials before the school management while purporting to pass the order of termination on 1-8-1994. As has been discussed, both by the School Tribunal and the High Court, the confidential report which has been produced on behalf of the school management does not inspire confidence on account of the different dates which appear both in Part I and Part II of the said report. Part I of the self-assessment form gives the particulars of the teacher concerned and the remarks of the reporting authority, namely, the Head Mistress of the school. The date in the said part is shown as 4-7-1994, whereas the date at the end of Part II, which is the form of the confidential report giving details of the teacher's performance is dated 24-6-1994, which appears to be in line with the date given of the forwarding letter written by the Head Mistress to the Secretary of the Society. To add to the confusion created by the different dates on the form, there is a third date which appears on Part I of the self-assessment form which shows that the documents were presumably forwarded to the management of the school on 6-8-1994, which is a date which is prior to the date of termination of the services of Respondent 1, namely, 1-8-1994.

This merely goes to show that the said documents are not above suspicion and that the requirements of Rule 15(6) and Rule 14 had not been complied with prior to invocation by the school management of the powers under sub-section (3) of Section 5 of the MEPS Act.”

32. In *Rajesh Kumar Srivastava v. State of Jharkhand* (supra), the two-Judge Bench examined challenge to the termination of the appellant's service, who was a Probationer Munsif. After examining the record placed

before it, the Bench held that the competent authority had terminated the service of the appellant because his work was not satisfactory and such decision cannot be termed as stigmatic or punitive.

33. The proposition laid down in none of the five judgments relied upon by the learned counsel for the appellants is of any assistance to their cause, which were decided on their own facts. We may also add that the abstract proposition laid down in paragraph 29 of the judgment in Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences (supra) is not only contrary to the Constitution Bench judgment in Samsher Singh v. State of Punjab (supra), but large number of other judgments – State of Bihar v. Shiva Bhikshuk Mishra (supra), Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha (supra) and Anoop Jaiswal v. Government of India (supra) to which reference has been made by us and to which attention of the two-Judge Bench does not appear to have been drawn. Therefore, the said proposition must be read as confined to the facts of that case and cannot be relied upon for taking the view that a simple order of termination of service can never be declared as punitive even though it may be founded on serious allegation of misconduct or misdemeanor on the part of the employee.

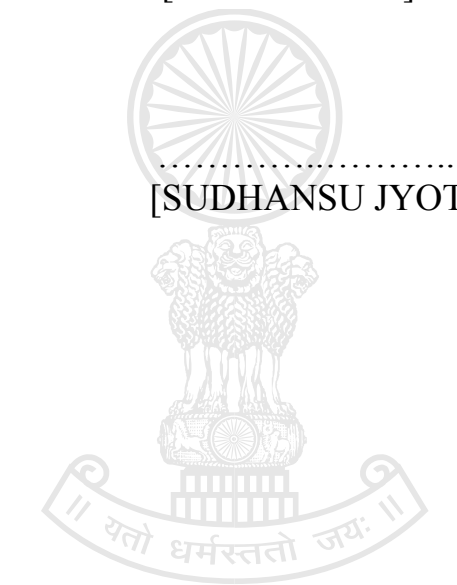
34. In the result, the appeals are dismissed. The appellants shall reinstate the private respondents within 15 days of the production of copy of this judgment before respondent No.3 and give them all consequential benefits like pay, allowances, etc. within next one month. However, it is made clear

that this judgment shall not preclude the competent authority from taking fresh decision in the matter of confirmation of the private respondents after giving them effective opportunity of hearing against the allegation of use of unfair means in the test held on 27.2.2011.

.....J.
[G.S. SINGHVI]

.....J.
[SUDHANSU JYOTI MUKHOPADHAYA]

New Delhi,
December 03, 2012.



JUDGMENT