CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A. NO.2038/2002
M.A. NO.2854/2002
M.A. NO.1947/2002

New Delhi this the 4th day of September, 2003

HON'BLE SHRI JUSTICE V.S. AGGARWAL, CHAIRMAN

HON'BLE SHRI S.K.NAIK MEMBER (A)

Shri Mahaveer C.Singhvi
S/o Shri Tara Chand Singhvi
R/o A-302, External Affairs Hostel
Kasturba Gandhi Marg
New Delhi-110 001. ..... Applicant

(Shri G.D.Gupta, Sr.Advocate and
Shri Jog Singh and Shri Balvender Singh
and Pankaj Kumar, Advocates)

-versus-

1. The Union of India through
its Foreign Secretary
Ministry of External Affairs
South Block, Government of India,
New Delhi.

2. Mr.P.L. Goyal,
The then Additional Secretary (Admn)
and Presently the Ambassador of India,
Embassy of India, Kirchenfeldtrasse,
28, Postfach, 406
CH-3000, Berne-6, Switzerland ... Respondents

(By Shri N.S.Mehta, Advocate)

O R D E R

Justice V.S.Aggarwal:

The centre stage of the controversy in the present application is the Ministry of External Affairs and one of the probationers of the Indian Foreign Service, 1999 batch (Shri Mahaveer C.Singhvi), the applicant.

2. The main question that comes up for consideration in the present case is as to whether in the facts of the present case the order terminating/discharging the applicant from service was a motive or foundation for doing so.

3. The order of 13.6.2002 which is being challenged reads:

> "The President hereby discharges forthwith from service Shri Mahaveer C. Singhvi, IFS Probationer (1999 Batch), in accordance with the terms of employment issued vide order No.Q/PA.II/578/32/99 dated 21st September, 1999.
>
> By order and in the name of the President.
>
> Sd/-
> (P.L.Goyal)
> Additional Secretary(AD)"

4. Some of the relevant facts are that the applicant was selected for Indian Foreign Service in pursuance of the Civil Services Examination, 1998. He joined at Lal Bahadur Shastri National Academy of Administration on 20.9.1999. Applicant contends that after successful completion of the training, he was deployed to the East Asia Division of Ministry of External Affairs. He contends that he was not allotted any desk, table, chair, office equipments and stationary etc. He had to sit on sofa chairs in a room where three other officers were also sitting. Still he completed the work

assigned to him. Three preferences were asked for allotment of Compulsory Foreign Language. Applicant opted for French, German and Arabic. Vide the letter of 11.1.2001, the criteria till that time adopted was merit-cum-choice, but in contravention of the criteria, the applicant was allotted Spanish language which according to him was an arbitrary order. He submitted a representation. The said representation of the applicant was not liked by the respondents and the then Additional Secretary (Administration) threatened the applicant to throw him out of the service if the did not keep quiet in the matter of allocation of compulsory foreign language.

5. Applicant was posted at Madrid, Spain in confirmation of allocation of Spanish language to him, but the place of his language training was fixed at Valladolid, a place about 200 kms. from Madrid in an arbitrary and vindictive manner. In contravention to the due approval of the Foreign Service Board, the said order had been passed. Applicant requested for arranging the language training at Madrid, the place of his posting because be wanted to take along with him his dependant and ailing parents. However, there was a bias against the applicant. Due to sudden deterioration of the health condition of his parents, he had to seek permission to join the

language course at a later date. The Mission at Madrid permitted the applicant by communication dated 10.9.2001 to join at a later date. Since the date for new course was not intimated and his father's condition did not improve, the applicant sought further extension to join the Mission. The request of the applicant for extension and change of place of language training to Madrid was granted only on 18.2.2002. He planned to join the Mission in July/August,2002, but in the note of 18.2.2002, the request for permission, medical facilities and diplomatic passports to the applicant's dependent parents was not granted. The applicant was being harassed and victimised. Thereafter it is contended that he was served with the order of discharge from the service. Hence the present application.

6. Needless to state that the application has been contested. The factual assertions of the applicant are being controverted.

7. The Supreme Court in the case of **Parshotam Lal Dhingra** v. **Union of India** [1958] SCR 828 had set the law into motion. It was held that Article 311 of the Constitution does not in terms say that the protection of the same extends only to persons who are permanent members of the service or who hold permanent civil posts. Article 311 which was

stated to be in the nature of proviso to Article 310 makes no distinction between permanent and temporary posts and extends its protection equally to all Government servants holding permanent or temporary posts or even if they were officiating in any one of those posts. Protection of Article 311 can be available where dismissal, removal or reduction in rank is sought to be inflicted by way of punishment and not otherwise. Necessarily, if by way of punishment, the order is so passed, the rigour of the decision in the case of Parshotam Lal Dhingra (supra) would come into play.

8. Subsequently, another Constitution Bench of the Supreme Court in the case of **Union Territory of Tripura and another** v.**Gopal Chandra Dutta Choudhuri**,AIR 1963 SC 601 was considering a similar controversy. Therein, Shri Gopal Chandra Dutta Choudhuri, who was a respondent before the Supreme Court, had been appointed as a Constable in the Police Force. His employment was temporary and was liable to be terminated with one month's notice. The Superintendent of Police informed him that his services would be terminated from a particular date. He had challenged the said order and a similar question had come up for consideration. The Supreme Court in the facts concluded that the order had not been preceded by any enquiry and

further held that it was an order of dismissal to attract Article 311 of the Constitution. In paragraph 5, the findings were:-

> "The order in terms merely terminates the service of the respondent; it was not preceded by any enquiry for ascertaining whether the respondent was guilty of any misdemeanour, misconduct, negligence, inefficiency or a similar cause. In the order on appeal filed to the Chief Commissioner it is recited that the respondent was "an ex-convict for theft and therefore nothing could be done for" him, but the purport thereof is somewhat obscure. The memorandum of appeal filed before the Chief Commissioner was not tendered in evidence, and there is nothing in the order suggesting that the employment of the respondent was terminated because he had, before he was employed on April 18,1954, been convicted by a Criminal Court for theft. It appears from the order of the Chief Commissioner dated May 26, 1958 that the respondent had applied for re-employment in the Police Force and the Chief Commissioner was of the opinion that because the respondent was "an ex-convict in a case of theft" he could not be re-employed. There is no ground for inferring that the Superintendent of Police was seeking to camouflage an order of dismissal by giving it the form of termination of employment in exercise of the authority under Rule 5 of the Central Civil Services (Temporary Service) Rules. It cannot be assumed that an order ex facie one of termination of employment of a temporary employee was intended to be one of dismissal. The onus to prove that such was the intention of the authority terminating the employment must lie upon the employee concerned; but about the intention of the Superintendent of Police there is no evidence except the order of that authority."

9. A few years later, in the case of **Shamsher Singh** v. **State of Punjab and anr.**, 1974(2) S.L.R. 701, an identical question had come up for

consideration. Shamsher and another were appointed as Subordinate Judges. Their services had been terminated. It was held by the Supreme Court that the form of the order is not decisive. Even an innocuously worded order terminating the service may in the facts and circumstances establish that an enquiry into allegations of serious and grave character of misconduct had been made and stigma cast. In Paragraph 71, the Supreme Court held:-

> "The order of termination of the service of Ishwar Chand Agarwal is clearly by way of punishment in the facts and circumstances of the case. The High Court not only denied Ishwar Chand Agarwal the protection under Art.311 but also denied itself the dignified control over the subordinate judiciary. 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 provisions of Article 311. In such a case the simplicity of the form of the order will not be of 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."

Hon'ble Mr.Justice Krishna Iyer in a separate judgement but concurring described the words "form", "substance", "motive" and "foundation" as facets of one aspect. The other controversies that had arisen in the case of Shamsher Singh (supra) are not relevant to be gone into in the facts of

the present case.

10. The decision rendered by the Supreme Court in the case of **Anoop Jaiswal** v. **Government of India and another**, 1984(1) SLR 426 is illuminatory. Anoop Jaiswal had made his grade by selection by the Union Public Service Commission in Indian Police Service. He was undergoing training as a probationer at the Sardar Vallabhbhai Patel National Police Academy, Hyderabad. All the probationers were expected to be present at 5.50 A.M. at the field where the ceremonial drill practice was to be conducted. It was raining at that time and the venue was shifted to Gymnasium Hall. When the Assistant Director reached the Gymnasium, none of the probationers had reached there. They came 22 minutes late. When a messenger was sent to call the probationers, they had asked for a vehicle to go to the place as it was raining. Anoop Jaiswal was taken to be one of the ring leaders. An order was issued that Anoop Jaiswal was unsuitable for being a member of the said Service and he was discharged under Rule 12 of the Indian Police Service (Probation) Rules, 1954. One of the contentions raised before the Supreme Court was that though the order on the face of it appeared to carry no stigma, in reality it was an order terminating his services on the ground of misconduct and, therefore, without holding an

inquiry as contemplated under Article 311 of the Constitution, action could not be taken against Anoop Jaiswal. The Supreme Court held that the alleged act of misconduct in not joining the drill and other actions of Anoop Jaiswal were foundation for the action taken against him. The Supreme Court further held that it attracted Article 311(2) of the Constitution and the impugned order could not be sustained. In paragraph 15, the Supreme Court thereupon while allowing the appeal of Anoop Jaiswal held:-

> "15. A narration of the facts of the case leaves no doubt that the alleged act of misconduct on June 22, 1981 was the real foundation for the action taken against the appellant and that the other instances stated in the course of the counter affidavit are mere allegations which are put forward only for purposes of strengthening the defence which is otherwise very weak. The case is one which attracted Article 311(2) of the Constitution as the impugned order amounts to a termination of service by way of punishment and an enquiry should have been held in accordance with the said constitutional provision. That admittedly having not been done, impugned order is liable to be struck down. We accordingly set aside the judgement of the High Court and the impugned order dated November 9, 1981 discharging the appellant from service. The appellant should now be reinstated in service with the same rank and seniority he was entitled to before the impugned order was passed as if it had not been passed at all. He is also entitled to all consequential benefits including the appropriate year of allotment and the arrears of salary and allowances upto the date of his reinstatement. The appeal is accordingly allowed."

Similar question again came up before the Supreme

Court in the case of **Smt.Rajinder Kaur v. Punjab State and another**, AIR 1986 SC 1790. Smt.Rajinder Kaur, referred to was a Constable. The Superintendent of Police had discharged her from service. Though it was stated in the order that it was on the ground of inefficiency but it was on the basis of an enquiry into the misconduct of staying in nights with male constable. No enquiry had been held. The Supreme Court referred to the decision of Anoop Jaiswal (supra) that form of the order could be camouflage and that if the order in reality is 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 upon the employee. The appeal of Rajinder Kaur was allowed and in the facts, it was held that it was by way of punishment. The operative part of the judgement of the Supreme Court reads:-

> "13. On a conspectus of all these decisions mentioned hereinbefore, the irresistible conclusion follows that the impugned order of discharge though couched in innocuous terms, is merely a camouflage for an order of dismissal from service on the ground of misconduct.This order has been made without serving the appellant any charge-sheet, without asking for any explanation from her and without giving any opportunity to show cause against the purported order of dismissal from service and without giving any opportunity to cross-examine the witnesses examined, that is, in other words the order has been made in total contravention of the provisions of Art.311(2) of the Constitution. The impugned order is, therefore, liable to be quashed and set aside. A writ of certiorari

be issued on the respondents to quash and set aside the impugned order dated 9.9.1980 of her dismissal from service. A writ in the nature of mandamus and appropriate directions be issued to allow the appellant to be reinstated in the post from which she has been discharged. The appeal is thus allowed with costs. The authorities concerned will pay all her emoluments to which she is entitled to in accordance with the extant rules as early as possible in any case not later than eight weeks from the date of this judgment."

11. However, in the case of **Bishan Lal Gupta v. The State of Haryana and ors.**, AIR 1978 SC 363, the Supreme Court had held that a less formal inquiry should be sufficient to determine whether a probationer who has no fixed or fully formed right should be allowed to continue or not. The difference was noted as between the permanent and temporary employees. The Supreme Court in this regard on the facts of the case held:-

"He had ample opportunity to answer in writing whatever was alleged against him. No rule was shown to us to support the view that anything more was needed if the intention was not to hold a full departmental trial to punish but a summary inquiry to determine only suitability to continue in service. The High Court was not satisfied with his explanations. It is difficult to see how a fuller enquiry, as contemplated by Art.311 of the Constitution, which also only requires a "reasonable opportunity of being heard" in respect of the charges made, could improve his position. It may be that, if the petitioner had acquired a right to the post and was not a mere probationer whose services were being terminated, he could have technically speaking claimed a formally fuller process of hearing before he could be punished for a fault. But, in the case before us, the petitioner had no right to continue in service despite adequate reasons for terminating his services. He could, therefore, only claim a hearing which was

> reasonably sufficient and appropriate for determining whether there were adequate reasons to continue him in service, even if he could not be removed by way of punishment without a fuller inquiry."

12. The entire law on the subject had again been reviewed by the Apex Court in the case of **Radhey Shyam Gupta v. U.P.State Agro Industries Corporation Ltd. and another**, (1999) 2 SCC 21. The Supreme Court while referring to the words, "form", "substance", "motive" and "foundation" used in the earlier decisions recorded that difficulties, if any, had been removed after the decision in the case of Shamsher Singh (supra) and it was observed:-

> "26. If there was any difficulty as to what was "motive" or "foundation" even after Shamsher Singh case the said doubts, in our opinion, were removed in Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdooor Sabha, 1980 SCC (L&S) 197 again by Krishna Iyer, J. No doubt, it is a labour matter but the distinction so far as what is "motive" or "foundation" is common to labour cases and cases of employees in the government or the public sector. The learned Judge again referred to the criticism by Shri Tripathi in this branch of law as to what was "motive" or what was "foundation", a criticism to which reference was made in Shamsher Singh case.

It was further held:-

> "27. In other words, it will be a case of motive if the master, after gathering some prima facie facts, does not really wish to go into their truth but decides merely not to continue a dubious employee. The master does not want to decide or direct a decision about the truth of the allegations. But if he conducts an enquiry only for the

purpose of proving the misconduct and the employee is not heard, it is a case where the enquiry is the foundation and the termination will be bad."

Thereupon the Supreme Court went on to conclude that these are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer which are all arrived at behind the back of the employee. That is why the misconduct is the foundation and not merely the motive in such cases. Where the statements of the witnesses were recorded at the back of the delinquent and a termination was recommended followed by the order of termination, the Supreme Court held that the findings are definitive. It was a foundation for termination and not merely the motive and the Supreme Court held:-

"36. In our view, it is an absolutely clear case where the enquiry officer examined witnesses, recorded their statements and gave a clear finding of the appellant accepting a bribe and even recommended his termination. All these were done behind the back of the appellant. The Managing Director passed the termination order the very next day. It cannot, in the above circumstances, be stated by any stretch of imagination that the report is a preliminary enquiry report. Its findings are definitive. It is not a preliminary report where some facts are gathered and a recommendation is made for a regular departmental enquiry. In view of the principles laid down in the cases referred to above, this case is an obvious case where the report and its findings are the

foundation of the termination order and not merely the motive. The Tribunal was right in its conclusion. The High Court was in grave error in treating such a report as a preliminary report."

13. Once again in the case of **Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Others,** (1999) 3 SCC 60, a similar question had come up for consideration. The Supreme Court considered four questions, namely;-

(1) In what circumstances, termination of a probationer's services can be said to be founded on misconduct and in what circumstances could it be said that allegations were only a motive;

(2) When can an order of termination of a probationer be said to contain an express stigma;

(3) Can stigma be gathered by referring back to proceedings referred to in termination order; and

(4) Whether the appellant was entitled to any relief. On point (3), the Court further considered whether stigma could be inferred from three letters referred

to in the impugned termination order though this order itself did not contain anything offensive."

The answers given by the Supreme Court are:-

"Point I: If findings are arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, simple order of termination is to be treated as 'founded' on the allegations and will be bad. If, however 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 employer did not want to enquire into truth of allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be motive and not foundation and simple order of termination would be valid.

Point 2: There is considerable difficulty in finding out whether in a given case where the order of termination is not a simple order of termination, the words used in the order can be said to contain a 'stigma'. It depends on facts and circumstances of each case and language or words used to ascertain whether termination order contains stigma.

Point 3: Material which amounts to stigma need not be contained in termination order of a probationer but might be contained in documents referred to in the termination order or in its annexures. Such documents can be asked for, or called for, by any future employer of the probationer. In such a case, employee's interests would be harmed and therefore termination order would stand vitiated on the ground that no regular enquiry was conducted.

Point 4.: Language of letter dated 11.12.1995 clearly points out that the instances referred to therein were not mere

> allegations against the appellant. Had these been mere allegations, it would have been a case of motive but this letter points out definitive conclusions of misconduct which give rise to an inescapable conclusion that these findings were part of foundation of impugned termination order. It is not a case of mere motive. Contents of three letters referred to in the impugned termination order are clearly in the nature of stigma."

The applicant further submitted a large number of precedents from different High Courts rendered before the decision of the apex court in the case of **Dipti Prakash Banerjee** (supra). Keeping in view the authoritative decisions of the Apex Court, it becomes unnecessary to refer to those precedents.

14. On the strength of these decisions in law, the learned counsel for the applicant urged that the order though on the face of it looked innocuous is in fact punitive. The applicant was being harassed. Therefore, it was the foundation for discharging the applicant from service rather than the motive.

15. The position in law is well-settled that the court can always lift the veil and see whether the order is punitive in nature or not. The doctrine of lifting the veil is well-settled. If there is camouflage or smoke-screen, it would be permissible for the court to tear off the mask and see the real face of the transaction. It varies in the facts and circumstances of each case as to

whether an order is punitive in nature or whether the facts provide the motive or the foundation.

16. In the present case in hand, the facts from the record made available to us indicate that the applicant wanted to join German language course, but was given Spanish language. He protested and even now claim that the order was arbitrary. He is alleged to have used political pressure. To get things right, he entered into direct correspondence with the Mission which was not permissible and was on unauthorised absence besides there was a complaint by a member of the public against the applicant.

17. The learned counsel for the respondents then made available to us, the relevant departmental file in original wherein the matter pertaining to the applicant had been examined. We have gone through the same. In our opinion, it clearly indicates that though the abovesaid facts were available before the authorities, still no enquiry had been held. No findings were arrived at. The employer was not inclined to conduct the enquiry but did not want the applicant to continue. When such is the situation, it would only be a motive rather than the foundation for discharging the services of the applicant. The case of the applicant, therefore, would fall within the answer

given to Question No.(1) in the case of Dipti Prakash Banerjee (supra). The facts, therefore, would show that it cannot be termed in the facts of the present case that the order casts any stigma or that the facts available show the foundation for termination/discharge of service of the applicant. It would only be a motive. Resultantly on that ground, the applicant cannot succeed.

18. In that event, it had been contended that the applicant had continued as a probationer beyond the period of two years and, therefore, he would be deemed to have been confirmed.

19. Initial letter of appointment issued in this regard reads:

> "PROBATION:- You will be on probation for a period of not less than two years from the date of appointment and will be required to undertake such training and pass such examinations as the Government may prescribe. Failure to pass the prescribed examinations or to complete the probation to the satisfaction of the Government will render you unfit for confirmation in the service. The Central Government may discharge from the Service forthwith any probationer, who may be found unsatisfactory during the period of probation or who fails to complete satisfactorily the prescribed course of training or to pass the prescribed examinations."

20. Rule 16 of the Indian Foreign Service (Recruitment, Cadre, Promotion, Seniority)

Rules,1961 reads:

> "16. Probation and training of direct Recruits-
>
> (1) An Officer appointed under the provisions of rule 14 to the junior scale of the Service shall be on probation for a period of two years, during which he shall be required to undergo such training and pass such examinations as may be prescribed by the Central Government from time to time.
>
> (2) The Central Government may discharge from the service forthwith any probationer who may be found unsatisfactory during the period of probation or who fails to complete satisfactorily the prescribed course of training or to pass the prescribed examinations.
>
> (3) The Central Government may at its discretion, extend the period of probation for such period as it may deem fit.
>
> (4) On satisfactory completion of his probation, an officer may be confirmed in the Service."

21. Learned counsel for the applicant had relied upon a decision of the Supreme Court in the case of **State of Gujarat vs. Akhilesh C.Bhargav and ors.**, AIR 1987 SC 2135. In the said case, the Probation Rules prescribed an initial period of two years of probation. It did not provide any optimum period of probation, but there were administrative instructions issued by the Ministry of Home Affairs indicating the guide-lines to be followed. In the said instructions, it had been mentioned that a member of the service should be kept on probation, but it is not desirable that he should be kept on

probation for years except in exceptional circumstances. It is these instructions which were taken note of and the Supreme Court held that it would be tantamounting to deemed confirmation. In the present case, the position is not so. Therefore, it must be stated that the decision of the Supreme Court in the case of Akhilesh C.Bhargav (supra) is distinguishable.

22. Even in the case of **State of Punjab** vs. **Dharam Singh,** [1968] 3 S.C.R. 1, the facts were that on completion of the specified period of probation, an employee had continued. There was no order of confirmation. It was held that in the absence of anything to the contrary in the original order of appointment or promotion or the service rules, the initial period of probation is deemed to be extended by necessary implication. But in that case, the service rules fixed a specific period beyond which it cannot be extended. The Supreme Court held that it may amount to deemed confirmation. In the present case as referred to above, the rules themselves provide the extension period and, therefore, the case of Dharam Singh (supra) will not come to the rescue of the applicant.

23. So far as the case of **Bhaskar Gajanan Kajrekar** vs. **Administrator, Dadra and Nagar Haveli**

and ors., (1993) 3 SCC 237 is concerned, the appellant had joined as Chief of Police in Dadra and Nagar Haveli. He was repatriated and was transferred to Delhi Armed Police. It was on the record that the post of Chief of Police in Dadra and Nagar Haveli was declared permanent but the appellant before the Supreme Court was not considered for promotion on the ground that the recruitment rules for the post were not yet finalised. When they were finalised, the appellant had been considered for confirmation. The Supreme Court held that it was incumbent upon the respondents to consider the appellant for confirmation. Once again the facts were totally different and would not help the applicant.

24. In the present case before us, the facts indicate that not only in the order of appointment of the applicant but even in the rules referred to above, the period of probation could be extended. In the absence of specific order having been passed therein, it cannot be termed that the applicant would have been deemed to be confirmed. The said contention must also fail.

25. No other argument has been raised.

26. For these reasons, the application being without merit must fail and is dismissed.

(S.K. Naik)
Member (A)

(V.S. Aggarwal)
Chairman

/sns/