

Central Administrative Tribunal  
Principal Bench

O.A.No.2710/2002

Hon'ble Shri Shanker Raju, Member(J)

New Delhi, this the 15th day of July, 2003

Shri Mohit Kumar  
s/o Shri Narendra Kumar Saini  
H.No.77, Bahh Bhativari  
G.T.Road, Chaudharv Crossing  
Ghaziabad. ... Applicant

(By Advocate: Sh. M.K.Bhardwaj)

Vs.

1. Union of India through  
The Director  
Directorate of Preventive Operations  
Customs & Central Excise  
7th Street, Shopping Complex  
Shanti Niketan  
New Delhi - 21.
2. The Jt. Director (Admn.)  
Directorate of Preventive Operations,  
Customs & Central Excise  
7th Street, Shopping Complex  
Shanti Nikethan  
New Delhi - 21.
3. The Commissioner  
Directorate of Preventive Operations,  
Customs & Central Excise  
4th Floor, Lok Navak Bhawan  
New Delhi.
4. The Deputy Director  
Directorate of Preventive Operations,  
Customs & Central Excise  
7th Street, Shopping Complex  
Shanti Niketan,  
New Delhi - 21. ... Respondents

(By Advocate: Sh. R.N.Singh, proxv of Sh. R.V.Sinha)

**O R D E R(Oral)**

**By Shri Shanker Raju, M(J):** -

Applicant impugns respondents' notice dated 5.1.2001 whereby his services have been terminated under Rule 5(i) of the Central Civil Services (Temporary Service) Rules, 1965 (hereinafter called as "Temporary Service Rules") on one month's notice/sum equivalent to pay plus allowances.

2. Appellate order dated 6.12.2001 rejecting the request of applicant for reinstatement is also assailed. Quashment of the above orders have been sought with direction to reinstate the applicant with all consequential benefits.



3 Applicant was offered appointment as Chowkidar in the Directorate of Preventive Operations, Customs & Central Excise vide Memorandum dated 29.10.1998 wherein one of the condition was that his services are terminable at any time by a month's notice. In pursuance of the above, applicant joined on 13.11.1998.

4. Applicant was served with a notice of termination vide notice dated 7.1.2000, and on representation, the same was recalled.

5. Applicant also, by an order dated 5.1.2001, was issued a notice of termination.

6. Applicant preferred a representation against the order of termination and as the same has not been responded to, filed OA 239/2001 wherein by an order dated 31.8.2001 applicant has been directed to make a representation to the respondents and respondents in turn to consider and pass a detailed speaking order.

7. By an order dated 6.12.2001, representation of applicant was rejected, giving rise to the present OA.

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8. Shri M.K.Bhardwai, learned counsel for applicant, relying upon the following decision, contended that termination is founded on an alleged misconduct of the applicant <sup>of</sup> involvement in a criminal case vide FIR No.89/2000 on 30.8.2000 and not as per the conditions of service <sup>is</sup> unsuitable. Accordingly, from the preceding and attendant circumstances and from the order passed by the respondents, the termination is stigmatic and without holding inquiry, the same should not have been resorted to:

(1) Sh. Chandra Prakash Shahi v. State of U.P. & Ors., JT 2000 (5) 181.

(2) Sh. Dipti Prakash Banerjee v. Satendra Nath Bose National Centre for Basic Sciences, Calcutta & Others, JT 1999(11) SC 396.

9. Shri Bhardwai contended that termination has been resorted to without issuing a show-cause notice and is in violation of principles of natural justice.

10. In so far as alleged absence of the applicant, it is contended that the applicant had submitted his medical record as such the same cannot be treated as unauthorised absence. It is further stated that though a preliminary investigation has been done into without holding a departmental inquiry, whereas the service <sup>of</sup> the communication has not been legally affected upon the applicant, dispensing with the inquiry resort <sup>of the</sup> respondents under Rule 5(i) of the Rules <sup>ibid</sup> is a colourable exercise of power which cannot be countenanced under Article 311(2) of the Constitution of India.

11. On the other hand, respondents' counsel Shri R.V.Sinha, through Shri R.N.Singh, contended that applicant, right from his appointment, *had*<sup>ku</sup> not attended his duties regularly and had absented frequently without prior permission. Several verbal warnings as well as two written warnings have been given to him. Apart from it, two notices for termination of services under Rule 5(i) of the Temporary Service Rules *ibid* were issued on 3.12.1999 as well as on 7.1.2000 and taking a compassionate view, applicant was retained in service but by an order dated 6.4.2000, as a last opportunity, to improve his performance, applicant was warned to have satisfactory performance in future, failing which his services would be dispensed with.

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12. It is stated by Shri R.N.Singh that applicant thereafter showed no signs of *improvement*<sup>ku</sup> & remained unauthorizedly absent, as such without holding any disciplinary proceedings as per the terms and conditions of appointment simple order of termination, without casting any stigma, has been issued.

13. Shri R.N.Singh<sup>ku</sup> contends that applicant was arrested in a criminal case of theft, which is an additional factor showing his unsuitability *for*<sup>ku</sup> retention of service but was not foundation of the order of termination which is passed on account of unsatisfactory performance of the applicant during his *probation*<sup>ku</sup> period.

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14. It is further stated that the applicant had avoided receipt of the notice which had been sent to his available address. On deputing the Gazetted Officer to verify whether the applicant has been residing, it was found that the applicant still resides on the available address but *had* wilfully avoided the communication.

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15. Relving upon Sh. Chandra Prakash Shahi's case supra, it is contended that the temporary Government servant has no right to hold on the post on account of unsuitability. termination resorted to would be a simple order of termination.

16. In so far as the stigma is concerned, Shri R.N.Singh contends that notice of termination is simple and the appellate order passed is on the directions of the Tribunal to pass a reasoned order, it also does not caste any stigma upon the applicant.

17. Shri R.N.Singh, along with his DA, several documents have been annexed to show that from time to time, applicant was issued warnings and memos to improve his performance. Having failed to improve his performance, a *simple* termination has been resorted to.

18. No rejoinder has been filed by the applicant to controvert the contentions putforth by the respondents.

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19. I have carefully considered the rival contentions of the parties and perused the material on record.

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20. In so far as the claim of applicant that the termination is founded on specific act of misconduct of the applicant, that is, remaining absent from duty and involvement in the criminal case, which is foundation is concerned, Apex Court in Dipti Prakash Benerjee's case supra held as follows:

"21. If findings were arrived at in inquiry 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 inquiry was not held, no finding were arrived at and the employer was not inclined to conduct an inquiry 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 inquire 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."

21. In Shri Chandra Prakash Shahi's case supra, the following observations have been made by the Apex Court.

"28. 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 enquiry is held and it is, on the basis of that enquiry 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 enquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that enquiry, the order would be punitive in nature as the enquiry 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".

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22. If one has regard to the above, no preliminary inquiry was held in the present case, to go into the alleged misconduct of the applicant. Earlier, applicant was issued twice the notice for termination taking compassionate view and to give an opportunity to improve his performance, applicant was reinstated back. Applicant despite clear warnings written as well as oral, has not improved. *By* a memorandum dated 29.8.2000, he was asked to explain as to why the disciplinary proceedings should not be initiated against him. As the performance of the applicant remained unsatisfactory, taking resort to the same, as a temporary employee has no right to the post till he is confirmed, on his unsuitability, dispensed with the services of applicant.

23. In so far as his involvement in the criminal case is concerned, apart from the unsatisfactory performance, on account of frequent absent from duty, and his wilful attitude not to improve his performance, the fact of his involvement in the criminal case was considered only as an additional factor showing his unsuitability. The same was not made a foundation, order is independent of involvement in the criminal case, otherwise performance

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of the applicant had remained unsatisfactory from the record. As such applying the test in Dipti Prakash Benerjee's case as well as Chandra Prakash Shahi's case supra, I find that the same was merely a motive and was not a foundation.

24. Accordingly, termination resorted to by way of a simple order in accordance with terms and conditions and being a temporary servant as the performance of applicant was not satisfactory, there is no element of punitiveness in the order passed by respondents.

25. In so far as the stigma is concerned, in Dipti Prakash Benerjee's case supra, the Apex Court has held as follows:

"35. The above decision is, in our view, clear authority for the proposition that the material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its Annexures. Obviously such a document could be asked for or called for by any future employer of the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular inquiry was conducted. We shall presently consider whether, on the facts of the case before us, the documents referred to in the impugned order contain any stigma.

36. It was in this context argued for the Respondent that the employer in the present case had given ample opportunity to the employee by giving him warnings, asking him to improve and even extended his probation twice and this was not a case of unfairness and this Court should not interfere. It is true that where the employee had been given suitable warnings, requested to improve, or where he was given a long rope by way of extension of probation, this Court has said that the termination orders cannot be held to be punitive. Hindustan Paper

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Corporation v. Purendu Chakraborty [JT 1996(10) SC 1]. See in this connection, Oil & Natural Gas Commission v. Md. S. Iskendu [1980(3) SCC 428], Unit Trust of India v. T. Bijiava Kumar [1992(5) Serv. L.R. 855 (SC)], Principal, Institute of P.G. Medical Education & Research, Pondichery v. S. Anand & Others [JT 1992 (6) SC 82] and a labour case Dewal Pressure Die Casting Industry v. Presiding Officer [JT 1998 (2) SC 256]. But in all these cases, the orders were simple orders of termination which did not contain any words amounting to stigma. In case we come to the conclusion that there is stigma in the impugned order, we cannot ignore the effect it will have on the probationer's future whatever be earlier opportunities granted by the respondent organisation to the appellant to improve."

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26. Apex Court in **Union of India & Others v.**

**A.P.Baipal & Ors.**, 2003(1) SCSLJ 202 held as follows:

"7. The grounds stated in the counter affidavit filed by the appellants in answer to the challenge made by the respondent no.1 in the O.A. before the Tribunal were only the basis to assess the unsuitability of the respondent no.1 to continue in the sensitive post for which he was appointed. It may be added that Annexure C-3 on which the Tribunal heavily relied to say that the impugned order was stigmatic was an annexure to the counter filed by the appellants. It was a confidential letter written by the Assistant Director of the Department. In our view, the Tribunal committed a serious error in law and on facts of the present case in concluding that the order of termination of services of the respondent no.1 involved stigma attached to respondent. The grounds stated in the counter affidavit in answer to the challenge made by the respondent no.1 were the factors to assess the suitability or otherwise of respondent no.1 to continue in service. Having regard to all relevant aspects, the authorities reached a conclusion that respondent no.1 was not suitable to continue in service. The order of termination of his services was simpliciter without attaching any stigma to the conduct of respondent no.1. In this view, the impugned order cannot be sustained. Accordingly, it is set aside and the appeals allowed. No costs."

27. Apex Court in **Dhananjay v. Chief Executive Officer, Zila Parishad, Jalna**, 2003(1) SC 272

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held as follows:

"6. If we look to the paragraph extracted above, it becomes clear that the facts of that case are almost similar to the facts of the present case. Although a distinction was sought to be made to contend that judgment has no application to the facts of the present case, we are unable to agree with the submission. Merely because the appellant was kept under suspension, that, by itself, is not indicative that the respondent had intended from the beginning to get rid of the services of the appellant by holding an enquiry. It is not the case of the appellant that in spite of the fact that his services were needed, the order of termination of services was passed. Even though the appellant was acquitted in the criminal case launched against him on the basis of the complaint made by the respondent, it is also not a factor to indicate that the respondent wanted to take action against the appellant on his misconduct to remove him from service."

28. Apex Court in **Mathew P. Thomas v Kerala State Civil Supply Corporation Ltd. and Others**, 2003 SCC (L&C) 262 held as follows:

"11. An order of termination simpliciter passed during the period of probation has been generating undying debate. The recent two decisions of this Court in **Dipti Prakash Banerjee v. Salvendra Nath Bose National Centre for Basic Sciences, Calcutta** and **Pavanendra Maravan Verma v. Santay Gandhi PGI of Medical Sciences** after survey of most of the earlier decisions touching the question observed as to when an order of termination can be treated as simpliciter and when it can be treated as punitive and when a stigma is said to be attached to an employee discharged during the period of probation. The learned counsel on either side referred to and relied on these decisions either in support of their respective contentions or to distinguish them for the purpose of application of the principles stated therein to the facts of the present case. In the case of **Dipti Prakash Banerjee** after referring to various decisions indicated as to when a simple order of termination is to be

treated as "founded" on the allegation of misconduct and when complaints could be only as a motive for passing such a simple order of termination. In para 21 of the said judgment a distinction is explained. thus (SCC pp.71-72)

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"21. If findings were arrived at in inquiry 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 inquiry was not held, no finding were arrived at and the employer was not inclined to conduct an inquiry 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 inquire 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."

From a long line of decisions, it appears to us that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorise or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service. If the form and language of the so-called order of termination simpliciter of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simpliciter or punitive. In cases where the services of a

probationer are terminated by an order of termination simpliciter and the language and form of it do not show that either it is punitive or stigmatic on the face of it but in some cases there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other words, the facade of the termination order may be simpliciter, but the real face behind it is to get rid of the services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simpliciter to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from service on the foundation of his misconduct.

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11. In the present case, even on earlier occasions when the appellant failed to perform his duties properly during probation period he was warned to improve and continued in the service. If he was to be removed from service on the allegations of misconduct, at that time itself the respondents could have removed him from service. This is also a circumstance to indicate that his order of termination was simpliciter. Therefore, having regard to the particular facts and circumstances and in view of what is stated above, we have no good reason to disagree with the impugned order."

12. If one has regard to the aforesaid, no stigma has been casted upon applicant in the order of termination. As no annexure has been referred to in the order of termination, perusal of which could indicate any stigma attached to the applicant. However, in the order passed on representation, which is an outcome of the directions of this Court, I do not find any stigma attached to applicant. What has been reflected is the unsatisfactory service record of applicant and the incidents<sup>h</sup> to substantiate it.<sup>h</sup>

30. Applicant, whose performance, remained unsatisfactory, on account of his unsuitability for retention of service, <sup>his</sup> services have been dispensed with under Rule 5(i) of the Temporary Services Rules <sup>ibid.</sup> in my considered view, the same cannot be held to a stigmatic order. 22

31. Having regard to the aforesaid and in the light of the settled position of law, as the termination resorted to is on account of unsatisfactory performance of applicant, I do not find any violation<sup>v</sup> of either principles of natural justice or Article 311(2) of the Constitution of India.

32. Moreover, not being founded on misconduct and a non-stigmatic order, holding of departmental inquiry, is not a condition precedent in a simple order of termination as per the terms and conditions of the appointment, in case of temporary Government servant, who is yet to attain a confirmed status.

33. In the result, for the foregoing reasons, OA is dismissed. No costs.

S. Raju  
(Shanker Raju)  
Member(J)