CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

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OA No.1211/91

New Delhi, this the 3rd day of October, 1997

Hon'ble Dr. Jose P. Verghese, Vice-Chairman(J)
Hon'ble Shri K. Muthukumar,Member (A)

Shri Tarsem Lal Verma,
Son of Shri Madan Lal,
LIG Flat No. 116-C.
Motia Khan, Paharganj,
New Delhi-110 055 Petitioner

(By Advocate: In Person)

-Versus-

1. Secretary, Ministry of Defence,
South Block, New Delhi.

2. Secretary, U.P.S.C.,
Shahjahan Road,New Delhi.

3. Shri Suresh Chandra, CAo & JS (Ad.),
C-II, Hutments, Dalhosi Road,
Ministry of Defence, New Delhi.

4. Joint Secretary (T&M),
M/Defence, South Block, New Delhi.

5. Shri P. Anantakrishnan, Dy. CAO(P)
M/Defence, C-II, Hutments,
Dalhousi Road, New Delhi.

6. Shri V.K. Thakur, Dy. CAO(P),
Liaision Officer for SC/ST Cell,
C-II Hutments, M/Defence,
Dalhousi Road, New Delhi.

7. Shri S.K. Sharma, Director, AFFPD,
'H' Block, M/Defence, New Delhi.

8. Shri G.D. Singh, Dy. Director, AFFPD,
'H' Block, M/Defence
New Delhi.

9. Shri Prem Parkash, PA, AFFPD,
'H' Block, M/Defence, New Delhi.

10. Addl. Secretary(A),
Ministry of Defence, South Block,
New Delhi. Respondents

(By Advocate: Shri P.H. Ramchandani)

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ORDER

Hon'ble Dr. Jose P. Verghese, Vice Chairman (J)

The petitioner was appointed on the recommendations of the Union Public Service Commission in the post of Photographic Officer, a Group B Gazette Non-Ministerial in the Armed Forces Headquarters in the pay scale of Rs. 650-1200 by an order dated 11.7.1986 and he joined the post on 16.7.1986. Even though the pay scale applicable to the said post was Rs. 650-1200, keeping in view his vast experience of about 15 years in the field, UPSC recommended 5 increments to the applicant. The post was reserved for a ST candidate.

2. It was stated by the petitioner that the competency of the petitioner was, therefore, recognised even by the UPSC and his work had subsequently earned high appreciation from various quarters. In the year 1989, All India Fine Arts Society had recommended a commendation award in favour of the petitioner. It is to be noted that many of the annual calendars and other Memoranda had utilised the photographs taken by the petitioner for publication at the instance of the Ministry of Defence.

3. The petitioner had approached initially this court alleging malafide and harassment especially on the ground of social origin. The relief then sought by the petitioner was that, even though the petitioner was appointed on 16.7.86, he was not confirmed in spite of the fact that he had been given annual increments ever since. Assuming that the period of probation has been extended even further, the extention of probation for 5 years is contrary

to the rules,and a direction was sought from this court for declaring completion of his probation period in accordance with the rules. In the meantime, some difference arose and accordingly the petitioner was, as stated by him, not permitted to join duty with effect from 5.4.1991 and directions were also sought from this court against the respondents, to restrain them from disallowing the petitioner from entering the office and discharge the duties of his post. Among various other allegations at para 4.31, also referred to in the OA, that he came to know from reliable sources that the respondents are trying to get rid of the petitioner in order to make room for promotion to another favoured officer at their liking. The harassment against the petitioner was, therefore, motivated. In support of the said claim the petitioner had enclosed at Annexure A-20, vide at page 56, of the paper book, a noting of Shri K.D Sinha , Director (MS) Dated 22.2.1989, wherein he has made clear that any attempt to retain Mr. Verma, the petitioner, in service should not be approved. In the said note he has acknowledged that the petitioner was under harassment from AFFPD; for the sake of convenience page 56 note is reproduced herebelow:

> "The preceding note explains the case of Shri T.L. Verme. I agree with the view of the Under Secretary that the proposal of Director, AFFPD to remove Shri Verma from service is not correct. In fact, there have been complaints against Director, AFFPD, that he has been harassing Shri Verma. On enquiry, it was found that Shri Verma was not given the treatment that he should have been given. He was not given any equipment and was not effectively utilised at all. In the ACRs, it has been mentioned that the quality of still photography of Shri Verma is satisfactory and he could have been effectively utilised in still photography but for some reason or the other, Shri Verma was not given any work despite the instructions from the Ministry. Shri Verma has always been complaining that Director, AFFPD, is planning to remove him

from service and has been levelling false allegations of various types. Thus, the apprehension of Shri Verma has been proved correct. Shri Verma has been appointed on the recommendation of the UPSC and he has done some good photography. Therefore, the contention of Director, AFFPD, that Shri Verma does not know good photography is not correct.

2. Therefore, the suggestion of Director, AFFPD, that Shri Verma is not a fit officer to be retained in Govt. service should not be approved.

Sd/-
(K.D.Sinha)
Director (MS)
22.2.89 "

4. No specific and serious denial of these allegations of malafide is seen from the reply of the Respondents, either. Notices were issued to the respondents and respondents filed counter affidavit on 12.7.1991 and in reply to para 4.31, the respondent stated the following:

"After dismissal of OA 1621/90 and consequential vacation of stay, the applicant is required to be considered for removal of probation etc. And action in this regard is being taken. It is pre-mature to offer any comments in regard to future course of action. Therefore, the averments in this para are denied."

It was stated on behalf of the petitioner in rejoinder that on the basis of specific allegation of malafide supported by a document and in the absence of specific denial, the averments made by the petitioner should be deemed to have been admitted by the respondents. We find considerable force in the submission of the petitioner.

5. The petition came up for hearing on a number of occasions. By an order dated 3.6.1993, this court had directed that the final hearing of the present OA be

expedited and may be listed for final hearing on 26.7.1993. By one or other reasons, the petition was not finally heard till date and the same is heard by us now.

6. The services of the petitioner were dispensed with by an order of discharge dated 5.5.1993 under Rule 5(1) of C.C.S (TS) Rules, 1965, read with para 2.1 of the Govt. of India Ministry of Defence OM dated 11.7.1986. By this order the services of the petitioner were discharged w.e.f. 5.6.1993. The petitioner did not challenge this order in the original application as the same was filed in 1991.

7. The petitioner has moved an application to amend the OA to incorporate the additional prayer for challenging the discharege order as well as the staying the operation of the said order during pendency of this O.A. By a speaking order, this court did not agree to stay the operation of this order, on the ground that the petitioner could be compensated in terms of money later on, when the OA is finally decided and he can obtain all the back wages from date of the order of discharge. When the said order was passed by this court on 3.6.1993, the Admn. Member sitting along with Vice Chairman (J) in the same Bench disagreed with the said direction and stated that since the final hearing of the OA has been listed on 26.7.1993, there is no harm that the petitioner be allowed to continue and nothing adverse would befall on the respondents if the petitioner is permitted to continue in service especially because prima facie case has been made out by the applicant. After recording the said dissent note on the question of interim relief whether to stay the operation of the discharge order or not, the matter was referred to a third Judicial Member.

The Judicial Member by an elaborate speaking order approved the order of VC(J) namely that the petitioner can both be compensated in terms of money as well as continuance of service and back wages after the final hearing of the case, and he did not stay the operation of the order of discharge and in reality the petitioner remained out of service till today.

8. The only question that remained to be decided is whether the discharge order passed on 5.5.1993 to take affect w.e.f. 5.6.1993, is illegal and contrary to rules or not.

9. It is worth reiterating that the order of appointment had contained the terms and conditions of appointment, according to which the petitioner was to be on probation for a period two years from the date of appointment which may be extended at the discretion of the competent authority and failure to complete the probation period to the satisfaction of the competent authority would render him/her liable to be discharged from service; these terms, applicable to the petitioner, were subject to other rules issued in this behalf. The petitioner was under a liability to serve in any part of India and he was required to take oath and affirmation at the time of joining duty in the prescribed form. It was also one of the conditions of appointment that the appointment may be terminated during the period of probation at any time by a month's notice given by either side, namely, by the appointee or the appointing authority, without assigning any reason.

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10. Thus, from the above terms and conditions, it is clear that even though the services of the petitioner was put on probation, the appointment was undoubtedly a substantive appointment and the order simpliciter passed discharging the petitioner under Rule 5 of the CCS (TS) Rules may not be in accordance with the Rules. This question was previously referred to the Ministry of Law. whether the Rule 5 of C.C.S. (T.S.) Rules will be applicable to cases of persons retained on probation. The Govt. of Inida Ministry of Home Affairs Notification dated 26.8.67 states that in such cases the CCS (TS) will not apply and what is applicable would be the terms of appointment letter. The said OM is reproduced below:

> " A question has arisen whether this rule should be invoked also in the case of persons appointed on probation, where in the appointment letter a specific condition regardging termination of service without any notice during or at the end of the period of probation (including extended period, if any), has been provided. The position is that the CCS (TS) Rules do not specifically exclude probationers or persons on probation as such. However, in view of the specific condition regarding termination of service without any notice during or at the end of the period of probation (including extended period, if any) it has been decided, in consultation with the Ministry of Law, that in cases where such a provision has been specifically made in the letter of appointment, it would be desirable to terminate the services of the probationer/person on probation in terms of the letter of appointment and not under Rule 5(1) of the CCS(TS) Rules, 1965".

11. It is also relevant fact to be borne in mind that the petitioner was served with a show cause notice for the purpose of initiating disciplinary proceedings by a memo dated 28.6.91 and that has been dropped by an order dated 24.1.94, after the order discharging the petitioner from service was issued.

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12. The question therefore that remains to be decided is, whether the order of discharge passed in the case of the petitioner and became effective since 5.6.93 is illegalneeds to be quashed and, if so, what consequential benefits can be given to the petitioner.

13. The order of discharge on the face of it does not indicate the reasons why this order has been passed. After receipt of the said order the petitioner had given a representation against the said order, and the said representation has also not been disposed of till date. In the circumstances it is stated that the order on the face of it discloses no reason. On the other hand in the counter affidavit filed by the respondent it was only stated that the said order was passed in accordance with the rules. The contention on behalf of the petitioner is that a substantive appointment made w.e.f. 16.7.86 cannot be subjected to an order of discharge simpliciter, after about six years and it was further stated that by no stretch of imagination and under no circumstances probation of the petitioner could have been extended beyond 2 years, much less beyond 5 years. The MHA notification dated 14.4.59 had stipulated that it would be desirable to have uniformity with regards to probation in defence services and the period of probation normally be two years; where there are any speical reasons, a longer or short period may be fixed in consultation with the Deptt. of Personnel & A.R. and in this case even though it was provided for two years, it happened to be extended to six years which according to the petitioner is illegal and contrary to rules pertaining to probation. By another OM of the same date MHA had stipulated that while

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the normal probation may be extended in suitable cases, it is not desirable that an employee should be kept for more than the double the normal period under any circumstances. It was also stated that the decision where an employee should be confirmed or his probation extended should be taken, soon after the expiry of initial probationary period i.e. ordinarily within 6-8 weeks and communicat the same to the employee together with reasons in case of extension. In the absence of any such communication of any specific order of extension, the continuance of the probation for almost six years cannot be said to be in accordance with any known principles of rules. In the circumstances, the said order of discharge passed due to non-completion of probation period is liable to be quashed.

14. The contention of the petitioner is that the order of discharge even though on the face of it is non-speaking, namely, an order made simpliciter in the circumstances of the case, the court may lift the veil and see the real motive of issuing the discharge order. As stated in the earlier part of this order (vide para 3 and 4 above), the allegation of malafide inter alia, has not been specifically denied by the respondents. In the absence of any specific denial, this court will have to hold that the order of discharge is issued with malafide intentions and the same needs to be quashed, on that ground as well.

15. The Hon'ble Supreme Court in a number of decisions had come to the conclusion that the purport and intent of probation is not to puish the incumbent, rather it is only a testing period in the hands of the employer so that before the petitioner is confirmed and made permanent,

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he should be given an option to observe the performance of the incumbent and therafter the option is given to the employer to deal with the incumbent before making his services permanent.

> " When the master servant relation was governed by the archaic law of hire and fire, the concept of probation in service jurisprudence was practially absent. With the advent of security in public service when termination or removal become more and more difficult and order of termination or removal from service because 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 judgement 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 short of locus parentiae 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 more than a servant employed on probation by a private employer is entitled to (See Purshottam Lal Dhingra v. Union of India) (1) 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 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

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> to employ a person without putting him oin probation. Power to put the employee on probation for wathching his performance and the period during which the performance is to be observed is the prerogative of the employer".(1983(2)SLR 1 at 6).

These conclusions have been arrived at by the Hon'ble Supreme Court in Ajit Singh vs. State of Punjab (1983(2) SLR 1) which in turn was relying on some of the previous decisions of the same court in the case of Purshottam Lal Dhingra v. Union of India, (1958 S.C.R. 828,State of U.P. & Ors. v. Babu Ram Upadhaya, 1961(2) S.C.R. 679 at 710 and State of U.P. v. Manbodhan Lal Srivastava, 1958(2) S.C.R. 533.

16. The Hon'ble Supreme Court in the said case also came to the conclusion that once the incumbent has been granted increments year after year, that itself could indicate that the performance of the petitioner was satisfactory. It is because ordinarily, increment is released in favour of the holder of the post, only when his performance is found satisfactory. It is implicit in release of increment that the petitioner had satisfactorily discharged his duty, during the probation period and at any rate the work and conduct was not shown to be unsatisfactory which permitted increment to be withheld. To quote:

> " An increment may be withheld from a Government employee by a competent authority if his conduct has not been good or his work has not been satisfactory. Now almost all the petitioners completed their one year service by June, 1980. An increment was released in favour of each of them. 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 the 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 atleast 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 petitioner was satisfactory".(id supra at page 9)

17. In the circumstances, we are of the view that the order of discharge, even though on the face of it, is an order simpliciter, is one issued contrary to rules and contrary to terms and conditions stipulated in the order of appointment, and also is one passed on the basis of malafide intentions at the instance of respondents. In result, the order of discharge is quashed and the petitioner is declared to be entitled to all consequential benefits. The following directions are issued:

1. The petitioner shall be reinstated in service forthwith.

2. The petitioner is entitled to full back wages as per the terms of order passed on 3.6.93 by Division Bench of this Court and thereafter referred to the Third Judicial Member of this Court, in the circumstances given in para 7 above.

3. The full compliance of consequential relief would be done within 8 weeks from the receipt of copy of the order and reinstatement shall be done forthwith on receipt of a copy of this order.

4. The petitioner is also entitled to exemplary cost of Rs.5,000/-.

Ordered accordingly. The OA is allowed to the extent mentioned above.

(K.Muthukumar)
Member(A)

(Dr. Jose P.Verghese)
Vice Chairman (J)

Mittal