Central Administrative Tribunal
Principal Bench, New Delhi.

OA-1914/2004

Date of Decision: 21-04-2005.

Shri Satish Kumar .... Applicant

(By Advocate Shri M.K. Bhardwaj)

Versus

Govt. of NCT & ors. ..... Respondents

Coram:

Hon'ble Shri Shanker Raju, Member(J)

1. TO BE REFERRED TO THE REPORTER OR NOT? yes

2. WHETHER IT NEEDS TO BE CIRCULATED TO OTHER BENCHES OF THE TRIBUNAL? yes.

S. Raju
(Shanker Raju)
Member(J)

Central Administrative Tribunal
Principal Bench, New Delhi.

OA-1914/2004

New Delhi this the 21st day of April, 2005.

Hon'ble Shri Shanker Raju, Member(J)

Sh. Satish Kumar,
S/o Sh. Danvir Singh,
R/o Plot No.17/25 Gali No.5,
Shri Enclave Panshali,
Prahlad Pur Bangar,
Delhi-42. ..... Applicant

(through Sh. M.K. Bhardwaj, Advocate)

Versus

Govt. of NCT & Ors. through

1. The Lt. Governor,
   Govt. of NCT of Delhi,
   5, Shyamnath Marg,
   Delhi.

2. Principal Secretary(Home),
   Govt. of NCT of Delhi,
   5th Floor C Wing, Delhi Secretariat,
   I.P. Estate, New Delhi.

3. Director General (Prisons),
   Central Jail Tihar,
   New Delhi.

4. Inspector General (Prisons),
   Central Jail,
   Janakpuri, New Delhi. ..... Respondents

(through Sh. Vijay Pandita, Advocate)

ORDER

Applicant impugns order of termination passed under Sub-rule (1) of Rule 5 of the CCS (Temporary Service) Rules, 1965 and also an order passed on 04.12.2003 rejecting his request for reopening the case of termination and order dated 15.06.2004 whereby, on merit consideration, appeal preferred against termination, was rejected.

2. Brief factual matrix of the case is relevant to be highlighted. Applicant was appointed on recommendation of Staff Selection Board on the temporary post of Warder on probation for a period of 2 years vide Memorandum dated 23.01.1996

and with a stipulation that appointment would be terminated by giving one month's notice without assigning any reasons or in lieu notice pay thereof. Applicant joined the service on 10.07.1996 and also completed training.

3. On 12.10.1996, while performing duties in Jail No.5, applicant was falsely implicated in a criminal case initiated under FIR 826/96 u/s 363/366/376 IPC. The applicant was arrested on 13.10.1996 and had remained in custody. Two other persons were also made accused along with the applicant.

4. An Arrest Report was prepared by the P.S. Hari Nagar, Delhi and was sent to the Jail Superintendent. On receipt of the Arrest Report, Dy. Superintendent, Jail No.5, recorded the statement of the applicant.

5. Without disclosing any reasons, by an order simplicitor, resorting to Rule 5(1) of the Rules ibid was issued on 16.10.1996, whereby applicant's services had been terminated.

6. On a representation filed for revocation of termination, the same was not reopened, which led to filing of an appeal before the Lt. Governor which was dismissed on merit by an order dated 15.06.2004, giving rise to the present OA.

7. Learned counsel of the applicant states that the OA is within limitation as the appeal of the applicant was considered on merit on his honorable acquittal from the criminal charge, which has not been appealed against. It is in this backdrop that on acquittal from the criminal charge, which was basis of his termination, the termination is a nullity, a reliance has been placed on the decision of the Division Bench of this Tribunal in **Shiv Prasad Verma Vs. General Manager, ordnance Factory Khamariya** (1987(2)ATJ CAT 50). Learned counsel states that though the termination order is innocuous yet from the perusal of the appellate order, his termination is resorted to on account of his unsatisfactory work whereas the same is not correct as during the probation the applicant had never been served with any memo and warning etc. to indicate his unsatisfactory performance. In the above backdrop, it is stated that the foundation of the order is registration of criminal case against the applicant; his

involvement in the criminal case; as the applicant had remained in judicial custody from 13.10.1996 to 16.10.2003 and before any final decision of the criminal case, there was no occasion for him to prefer a representation. Denial of a reasonable opportunity to show cause renders the order of termination as punitive and is in violation of Article 311(2) of the Constitution of India. Decision of the Tribunal in **Shakuntala Devi Vs. U.O.i. & Ors.** (2249/2003) passed on 01.04.2004 is relied upon by the applicant's counsel to contend that the order of termination is punitive.

8. On the other hand, OA is vehemently opposed by the learned counsel Shri Vijay Pandita, appearing on behalf of the respondents, who also produced the departmental record. Following case laws have been cited:-

(i) **Secretary, Ministry of Works & Housing & Ors. Vs. Mohinder Singh Jagdev & Ors.** (1996(6)SCC 229)

(ii) **State of U.P. & Ors. Vs. Krishna Kumar Sharma** (1997(11)SCC 437)

(iii) **Chandra Prakash Shahi Vs. State of U.P.& Ors.** (2000(5)SCC 152)

(iv) **Dhananjay Vs. Chief Executive Officer, Zilla Paarishad, Jalna** (2003(2)SCC 386)

(v) **U.O.I. Vs. A.B. Bajpai & Ors. Vs. U.O.I. & Ors.** (2003(2)SCC 433)

9. By citing the above case laws, counsel would contend that mere acquittal would not ipso facto entitles the applicant to be reinstated as this would be a charter for him to indulge with impunity in criminal charge.

10. Shri Vijay Pandita, learned counsel contended that the order passed by the respondents and consideration of criminal charges is only a motive, as due to unsatisfactory performance of the applicant, through a simple order of termination without casting a stigma, his services have been dispensed with as per terms and conditions of service and being a Probationer, Article 311(2) would not be attracted.

11. Learned counsel stated that even if in the counter-affidavit same reasons are recorded that would not per se be the reasons of termination. Learned

counsel stated that in view of **Mohinder Singh's** case (supra), the OA is barred by limitation as the termination order was passed in 1996 whereas the present OA has been filed in 2004. It is also stated that no enquiry has been held to enquire into the misconduct of the applicant and as such the criminal charge is only a motive to resort to termination.

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

13. Departmental record shows that on registration of criminal case against the applicant and on his arrest, an arrest report was submitted to the respondents. While a decision was taken to terminate the services of the applicant, the competent authority had observed that as the offence was heinous in nature, departmental action was warranted. From the perusal of the file, I do not find any unsatisfactory performance of the applicant since his appointment in July 1996 till 16.10.1996 when he was terminated from service. No Memos, warnings, advisory notes or any recording by the competent authority as to the unsatisfactory performance has been found in the file.

14. A temporary government servant or a probationer has no right to the post. It is within the discretion of the government to dispense with the services in accordance with terms and conditions or on unsatisfactory performance. However, when such an exercise is actuated with a specific misconduct being foundation of the order which can be arrived at by piercing or lifting the veil and on examination of preceding and attendant circumstances, such an order, though innocuous in term and simplicitor, would be punitive and such an incumbent is entitled for protection of Article 311(2) of the Constitution of India. A right of a probationer was meticulously given by the Apex Court in **Purshotam Lal Dhingra Vs. U.O.I.** (1958 SCR 828). A clear proposition laid down provides that in case of termination, which is founded on misconduct is punitive one and violative of Article 311 of the Constitution of India.

15. Further, a 7 Judges Bench of the Apex Court in **Shamsher Singh Vs. State of Punjab & Anr**. (1974(2)SCC 831) while dealing with the issue held as

follows:-

"63. 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 if 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.

64. Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311 (2) he can claim protection. In Gopi Kishore Prasad v. Union of India (AIR 1960 SC 689) it was said that if the Government proceeded against the probationer in the direct way without casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way of punishment. Instead of taking easy course, the Government chose the more difficult one of starting proceedings against him and branding him as a dishonest and incompetent officer.

65. The fact of holding an enquiry is not always conclusive. What is decisive is whether the order is really by way of punishment (see State of Orissa v. Ram Narayan Das, AIR 1961 SC 177). If there is an enquiry the facts and circumstances of the case will be looked into in order to find out whether the order is one of dismissal in substance (see Madan Gopal V. State of Punjab, AIR 1963 SC 531). In R.C. Lacy v. State of Bihar (Civil Appeal No.590/1962, decided on October 23, 1963) it was held that n order of reversion passing following an enquiry into the conduct of the probationer in the circumstances of that case was in the nature of preliminary inquiry to enable the Government to decide whether disciplinary action should be taken. A probationer whose terms of service provided that it could be terminated without any notice and without any cause being assigned could not claim the protection of Article 311 (2) (see R.C. Banerjee v. Union of India (AIR 1963 SC 1552). A preliminary inquiry to satisfy that there was reason to dispense with the services of a temporary employee has been held not to attract Article 311 (see Champaklal G. Shah v. Union of India, AIR

1964 SC 1854). On the other hand, a statement in the order of termination that the temporary servant is undesirable has been held to import an element of punishment (see Jagdish Mitter v. Union of Inda, AIR 1964 SC 449).

66. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to attract Article 311. The substance of the order and not the form would be decisive (see K.H. Phadnis v. State of Maharashtra, 1971 Supp. SCR 118).

67. An order terminating the services of a temporary servant or probationer under the Rules of Employment and without anything more will not attract Article 311. Where a departmental enquiry is contemplated and if an enquiry is not in fact proceeded with, Article 311 will not be attracted unless it can be shown that the order though unexceptionable in form is made following a report based on misconduct (see State of Bihar v. Shiva Bhikshuk Mishra, 1971 2 SCR 1971)."

16. In the aforesaid judgment, while delivering a concurring order, the then Hon'ble Justice Sh. V.R. Krishna Iyer, observed as under:-

"158. The third contention, argued elaborately by both sides, turns on the scope and sweep of Article 311 in the background of the rules framed under Article 309 and the 'pleasure' doctrine expressed in Article 310. The two probationers, who are appellants, have contended that what purport to be simple terminations of probation on the ground of 'unsuitability' are really and in substance by way of punishment and falling short of the rigorous prescriptions of Article 311 (2), there are bad. Their complaint is that penal consequences have been visited on them by the impugned orders and since even a probationer is protected by Article 311 (2), in such situations the Court must void those orders. Naturally, the launching pad of the argument is Dhingra's case (supra). In a sense, Dhingra is the Magna Carta of the Indian civil servant, although it has spawned diverse judicial trends, difficult to be disciplined into one single, simple, practical formula applicable to termination of probation of freshers and of the services of temporary employees. The judicial search has turned the focus on the discovery of the element of punishment in the order passed by Government. If the proceedings are disciplinary, the rule in Dhingra's case is attracted. But if the termination is innocuous and does not stigmatise the probationer or temporary servant, the constitutional shield of Article 311 is unavailable. In a series of cases, the Court has wrestled with the problem of 'devising a principle or rule to determine this question' – where non-punitive termination of probation for unsuitability ends and punitive action for delinquency begins. In Gopi Kishore (supra) this Court ruled that where the State holds an enquiry on the basis of complaints of misconduct against a probationer or temporary servant, the employer must be presumed to have abandoned his right to terminate simpliciter and to have undertaken disciplinary proceedings bringing in its wake the protective operation of Article 311. At first flush, the distinguishable mark would therefore appear to be the holding of an inquiry into the complaints of misconduct. Sinha, C.J. observed:

It is true that, if the Government came to the conclusion that the respondent was not a fit and proper person to hold a post in the public service of the State, it could discharge him without holding any enquiry into his alleged misconduct... Instead of taking that easy course, the Government chose the more difficult one of starting proceedings against him and of branding him as a dishonest and an incompetent officer. He had the right, in those circumstances, to insist upon the protection of Article 311 (2) of the Constitution.

The learned Chief Justice summarized the legal position thus:

1. Appointment to a post on probation gives the person so appointed no right to the post and his services may be terminated, without taking recourse to the proceedings laid down in the relevant rules for dismissing a public servant, on removing him from service.

2. The termination of employment of a person holding a post on probation without any enquiry whatsoever cannot be said to deprive him of any right to a post and is, therefore, no punishment.

3. But if instead of terminating such a person's service without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct, or inefficiency, or for some similar reason, the termination of service is by way of punishment, because it puts a stigma on his competence ad thus affects his future career. In such a case, he is entitled to the protection of Article 311 (2) of the Constitution.

4. . . . .

5. But, if the employer simply terminates the services of a probationer without holding an enquiry and without giving him a reasonable chance of showing cause against his removal from service, the probationary civil servant can have no cause of action, even though the real motive behind the removal from service was temporarily holding, on account of his misconduct, or inefficiency, or some such case.

159. The fifth proposition states that the real motive behind the removal is irrelevant and the holding of an enquiry leaving an indelible stain as a consequence alone attracts Article 311(2). Ram Narayan Das *supra) dealt with a case where the rules under the proviso to Article 309 provided some sort of an enquiry before termination of probation. In such a case, the enquiry before termination of probation. In such a case, the enquiry test would necessarily break down and so the Court had to devise a different test. Mr. Justice Shah (as he then was) stated the rule thus:

The enquiry against the respondent was for ascertaining whether he was fit to be confirmed.....The third proposition in.....(**Gopi Kishore**) case refers to an enquiry into allegations of misconduct or inefficiency with a view, if they were found established, to imposing punishment and not to an enquiry whether a probationer should be confirmed. Therefore, the fact of holding of an enquiry is not decisive of the question. What is decisive is whether the order is by way of punishment, in the light of the tests laid down in **Purshottam Lal Dhingra's Case**.

Thus a shift was made from the factum of enquiry to the object of the enquiry. Madan Gopa (supra) found the Court applying the

career. In such a case, he is entitled to the protection of Article 311 (2) of the Constitution.

4. . . . .

5. But, if the employer simply terminates the services of a probationer without holding an enquiry and without giving him a reasonable chance of showing cause against his removal from service, the probationary civil servant can have no cause of action, even though the real motive behind the removal from service was temporarily holding, on account of his misconduct, or inefficiency, or some such case.

159. The fifth proposition states that the real motive behind the removal is irrelevant and the holding of an enquiry leaving an indelible stain as a consequence alone attracts Article 311(2). Ram Narayan Das *supra) dealt with a case where the rules under the proviso to Article 309 provided some sort of an enquiry before termination of probation. In such a case, the enquiry before termination of probation. In such a case, the enquiry test would necessarily break down and so the Court had to devise a different test. Mr. Justice Shah (as he then was) stated the rule thus:

The enquiry against the respondent was for ascertaining whether he was fit to be confirmed.....The third proposition in.....(**Gopi Kishore**) case refers to an enquiry into allegations of misconduct or inefficiency with a view, if they were found established, to imposing punishment and not to an enquiry whether a probationer should be confirmed. Therefore, the fact of holding of an enquiry is not decisive of the question. What is decisive is whether the order is by way of punishment, in the light of the tests laid down in **Purshottam Lal Dhingra's Case**.

Thus a shift was made from the factum of enquiry to the object of the enquiry. Madan Gopa (supra) found the Court applying the object of enquiry doctrine to a simple order of termination which had been preceded by a show cause notice and enquiry. It was held that if the enquiry was intended to take traumatic action, the innocent phraseology of the order made no difference. Then came Jagdish Mitter v. Union of India (supra) where Mr. Justice Gajendragadkar (as he then was) held:

No doubt the order purports to be one of discharge and, as such, can be referred to the power of the authority to terminate the temporary appointment with one month's notice. But it seems to us that when the order refers to the fact that the appellant was found undesirable to be retained in Government service, it expressly casts a stigma on the appellant and in that sense, must be held to be an order of dismissal and not a mere order of discharge.

160. Thus we see how membranous distinctions have been evolved between an enquiry merely to ascertain unsuitability and one held to punish the delinquent – too impractical and uncertain, particularly when we remember that the machinery to apply this delicate test is the administrator, untrained in legal nuances. The impact on the 'fired' individual, be it termination of probation or

removal from service, is often the same. Referring to the anomaly of the object of inquiry test, Dr. Tripathi has pointed out:

The 'object of inquiry' rule discourages this fair procedure and the impulse of justice behind it by insisting that the order setting up the inquiry will be judicially scrutinized for the purpose of ascertaining the object of the inquiry.

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. He says:

As already explained, in a situation where the order of termination purports to be a mere order of discharge without stating the stigmatizing results of the departmental enquiry a search for the 'substance of the matter' will be indistinguishable from a search for the motive (real, unrevealed object) of the order.

Failure to appreciate this relationship between motive (the real, but unrevealed object) and form (the apparent, or officially revealed object) in the present context has led to an unreal interplay of words and phrases wherein symbols like 'motive' 'substance', 'form' or 'direct' parade in different combinations without communicating precise situations or entitles in the world of facts.

161. The need, in this branch of jurisprudence, is not so much to reach perfect justice but to lay down a plain test which the administrator and civil servant can understand without subtlety and apply without difficulty. After all, between 'unsuitability' and 'misconduct', 'thin partitions do their bounds divide'. And, over the years, in the rulings of this Court, the accent has shifted, the canons have varied and predictability has proved difficult because the play of legal light and shade has been baffling. The learned Chief Justice has, in his judgment, tackled this problem and explained the rule which must govern the determination of the question as to when termination of service of a probationer can be said to amount to discharge simpliciter and when it can be said to amount to punishment so as to attract the inhibition of Article 311. We are in agreement with what the learned Chief Justice has said in this connection. So far as the present case is concerned, it is clear on the facts set out in the judgment of the learned Chief Justice that there is breach of the requirements of Rule 7 and the orders of termination passed against the appellants are, on that account, liable to be quashed and set aside."

17. On a cumulative reading of the two views expressed by the then Chief Justice and Justice Sh. Krishna Iyer would discern though a very thin membrane covers the issue of motive of unsuitability and misconduct. Summarily packing of probation, the order is immune from judicial review but what is required to be ascertained is the substance of the matter. If an order is founded on misconduct, to ascertain it an enquiry is not always necessary. Punitiveness is implied and for want of reasonable opportunity, protection of Article 311(2) is the right of the probationer and a corresponding duty of the State is to provide the same as the order visits a probationer with civil consequences.

18. Apex Court in **State of Maharashtra Vs. Veerappa R. Saboji and Anr.** (1979(4)SCC 466) laid down the principle of lifting the veil with the following observations:-

> "The question of violation of Article 311(2) has to be examined in two perspectives. Firstly, if it could be held in agreement with the High Court that he should be deemed to have been confirmed in the post to which he was initially appointed, it is plain that terminating his services by a notice of termination simpliciter like the one given in this case, will be violative of the requirement of Article 311(2). On my finding it is manifest that it is not so. He was continuing in the post in an officiating capacity. His services could be terminated by one month's notice simpliciter according to the terms of the employment. Secondly the question to be examined is whether the termination was by way of punishment. Even in the case of a temporary or officiating government servant his services cannot be terminated by way of punishment casting a stigma on him in violation of the requirement of Article 311(2). This principle is beyond any dispute but the difficulty comes in the application of the said principle from case to case. If a government servant is compulsorily retired or one who is officiating in a higher post is reverted to his parent cadre, or when the services of an officiating or temporary government servant are dispensed with by an order termination simpliciter, then problems arise in finding out whether it is by way of punishment. In different kinds of situation, different views have been expressed. Yet the underlying principle remains the same. One should not forget a practical and reasonable approach to the problem in such cases. Ordinarily and generally, and there may be a few exceptions, any of the three courses indicated above is taken recourse to only if there are some valid reasons for taking the action against the government servant. If a probe in the matter is allowed to be made in all such cases then curious results are likely to follow. In a given case there may be valid reasons, may be of a serious kind, which led the authorities concerned to adopt one course or the other as the facts of a

particular case demanded. If one were to say in all such cases that the action has been taken by way of punishment then the natural corollary to this would be that such action could be taken if there was no such reasons in the background of the action. Then the argument advanced is that the action was wholly arbitrary, mala fide and capricious and, therefore, it was violative of Article 16 of the Constitution. Where to draw the line in such cases? Ordinarily and generally the rule laid down in most of the cases by this Court is that you have to look to the order on the face of it and there is no presumption that the order is arbitrary or mala fide unless a very strong case is made out and proved by the government servant who challenges such an order. The Government is on the horns of the dilemma in such a situation. If the reasons are disclosed, then it is said that the order of the Government was passed by way of punishment. If it does not disclose the reasons, then the argument is that it is arbitrary and violative of Article 16. What the Government is to do in such a situation? In my opinion, therefore, the correct and normal principle which can be culled out from the earlier decisions of this Court is the one which I have indicated above."

19. In a Constitution Bench decision by 7 Judges of the Apex Court in **Delhi Transport Corporation Vs. DTC Mazdoor Congress and Ors**.(1991 SC (L&S) 1213), the following observations have been made:-

"230. There is need to minimize the scope of the arbitrary use of power in all walks of life. It is inadvisable to depend on the good sense of the individuals, however high-placed they may. It is all the more improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power and good sense, circumspection and fairness does not go with the posts, however, high they may be. There is only a complacent presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. In particular, in a society pledged to uphold the rule of law, it would be both unwise and impolitic to leave any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law.

231. The employment under the public undertakings is a public employment and a public property. It is not only the undertakings but also the society which has a stake in their proper and efficient working. Both discipline and devotion are necessary for efficiency. To ensure both, the service conditions of those who work for them must be encouraging, certain and secured, and not vague and whimsical. With capricious service conditions, both discipline and devotion are endangered, and efficiency is impaired.

232. The right to life includes right to livelihood. The right to livelihood therefore cannot hang on the fancies of individuals in authority. The employment is not a bounty from them or can its

survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be cosigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them."

20. As regards whether an act of misconduct is foundation or merely a motive for terminating the services, the following observations are relevant to be reproduced from the decision of the Apex Court in **Dipti Prakash Banerjee Vs. Satvendra Nath Bose National Centre for Basic Sciences, Calcutta & Ors**. (JT 1999(1)SC 396):-

"19. 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 (AIR 1963 S.C. 531) 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 R.S. Gupta v. U.P. State Agro Industries Corporation Ltd. & Anr. (J.T. 1998(8) S.C. 585) and reference was made to the development of the law from time to time starting from Purshottam lal Dhingra v. Union of India (1958 SCR 828), to the concept of 'purpose of inquiry' introduced by Shah, J. (as he then was) in State of Orissa v. Ram Narayan Das 91961 (1) SCR 606) and to the seven Bench decision in Samsher Singh v. State of Punjab (1974(2)SCC 831) 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 innocuous order is based.

20. This Court in that connection referred to the principles laid down by Krishna Iyer, J. in Gujarat Steel Tube v. Gujarat Steep Tubes Mazdoor Sangh (1980(2) SCC 593). As to 'foundation', it was said by Krishna Iyer, J. as follows:

".....a termination effected because the master is satisfied of the misconduct and of the desirability of terminating the service of the delinquent servant, it 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 inquiry 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."

and as to motive:

"On the contrary, even if there is suspicious of misconduct, the master may say that he does not wish to bother about it and may not go into his built 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 simipliciter, if no injurious record of reasons or pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge."

As to motive one other example is the case of State of Punjab v. Sulkh Raj Bahadur (1968(3)SCR 234) where a charge memo for a regular inquiry was served, reply given and at that stage itself the proceedings were dropped and a simple termination order was issued. It was held, the order of simple termination was not founded on any findings as to misconduct. In that case, this Court referred to A.S. Benjamin v. Union of India (Civil Appeal No. 1341 of 1966 dt. 13.12.1966) (SC) where a charge memo was issued, explanation was received, an inquiry officer was also appointed but before the inquiry could be completed, the proceedings were dropped and a simple order of termination was passed, the reason for dropping the proceedings was that "departmental proceedings will take a much longer time and we are not sure whether after going through all the foundation, we will be able to deal with the accused in the way he deserves'. The termination was upheld.

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 **Chandra Prakash Shahi Vs. State of U.P. & Ors**. (2000(5)SCC 152) in so far as motive and foundation and the difference thereof has been observed with the following observations:-

"27. 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.

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 this 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".

29."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, 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."

22. A recent decision of the Apex Court in **Mahtew P. Thomas Vs. Kerala State Civil Supply Corpn. Ltd**. (2003 SCC (L&S) 262), the following observations have been made:-

"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 vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta* and Pavanendra Narayan Verma vs. Sanjay 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 allegations 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, this: (SCC pp.71-72)

"21. 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".

From a long line of decisions it appears to us that whether an order for 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 categorize 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 façade 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 weigh 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 a person to continue in service or he is in reality removed from service on the foundation of his misconduct.

12. 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."

23. If one has regard to the above, foundation and motive are overlapping. What is relevant is not the form of the order but is the substance of it. In case the background and attending circumstances indicate design of the representation to terminate the services on the basis of misconduct, the order becomes punitive. It is also to be ascertained whether any efforts have been made to adjudge the suitability of person to continue in service or else, he is removed in reality on foundation of the misconduct. It is also equally settled that merely because a preliminary enquiry has been held to go into verification of misconduct has not been held or preceded the order of termination, the same would not become a punitive one. What has been held in **Shamsher Singh's** case (supra) is that when a simple order of termination is founded on misconduct, the same requires the protection of Article 311(2) of the Constitution of India.

24. Respondents have cited for purposes of limitation, the decision in the case of **Mohinder Singh Jagdev's** (supra). The same deals the Limitation Act and the facts and the ratio by a Constitution Bench in **State of M.P. Vs. Syed Qamarali** (1967 SLR 228 SC) was distinguished on the ground that in that case suit was filed after the appeal against dismissal was set aside wherein in **Jagdev Singh's** case the factual situation was different. Keeping in light the above, applicant, who was terminated on 16.10.1996, made application for reopening the case on his acquittal from the criminal case, the same was turned down which gives a lease of limitation as per Section 21 of the Administrative Tribunals Act, 1985 according to which an order when assailed in departmental appeal, the final order thereof was passed. The limitation would run therefrom for a period of one year and as this OA was filed within the aforesaid period, the decision in **Jagdev's** case being distinguishable, and in the wake of specific provision under Administrative Tribunals Act, 1985, would not apply to the facts

and circumstances of the present case and I hold that this OA is within limitation.

25. As regards applicability of the decision of the Apex Court in **Babu lal Vs. State of Haryana (1991 SCC (L&S) 488)** when on termination of an ad hoc employee on his acquittal from criminal charge, reinstatement was ordered holding that the termination resorted to was founded on the misconduct, as such, the same without an opportunity is an infraction of Article 311(2) of the Constitution of India. In **Jagdev Singh's** case, respondents resorted to termination on availability of acquittal of the respondent therein in criminal case whereas in the instant case the applicant was terminated on the ground of alleged involvement, which was weighed as a misconduct against him and was the basis of foundation.

26. The Apex Court in **Rajinder Kaur Vs. State of Punjab & Anr.** (AIR 1986(73) SC 1790) held as follows:-

> "8. This Court has stated in no uncertain terms in the case of P.L. Dhingra v. Union of India, 1958 SCR 828 at p. 862: (AIR 1958 SC 36 at p. 49) as follows:-
>
> "But even if the Government has, by contract under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Art. 311 must be complied with."
>
> 9.This decision has been relied upon by this Court in the case of K.H. Phadnis v. State of Maharashtra, 1971(Supp)SCR 118: (AIR 1971 SC 998) where it has been held that even in the case of reversion of an employee who has been repatriated from the temporary post of Controller of Food Grains Department to his parent department of Excise and Prohibition, to which he had a lien might be sent back to the substantive post in ordinary routine administration or because of exigencies of service. Such a person may have been drawing a salary more than that of his substantive post but when he is reverted to the parent department the loss of salary cannot be said to have any penal consequences. The matter has to be viewed as one of substance and all relevant factors have to be considered in ascertaining whether the order is a genuine one of accidence of service in which a person sent from the substantive post to a temporary post has to go back to the parent post without any aspersion against

his character or integrity, or whether the order amounts to a reduction in rank by way of punishment.

10. It has been further observed by this court in the case of State of Bihar v. Shiva Bhikshuk Mishra, (1971)2SCR 191 at p, 196: (AIR 1971 SC 1011 at p. 1014):

"The form of the order is not conclusive of its true nature and it might merely be a cloak and 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."

27. The decision in **Krishna Kumar Sharma's** case would be distinguishable on the ground that therein the services of the respondents were dispensed with due to his unsatisfactory service record wherein he has been found absenting and was warned etc. This may be a case of termination simpliciter on unsatisfactory performance and there would be no punitiveness in the order. However, in the present case when during the probation there is no material to indicate any unsatisfactory performance of the applicant, the only ground to dispense with his services is his alleged involvement in the criminal case being the foundation of the order. The said decision would not be applicable in the present case and the same is distinguishable.

28. **Chandra Prakash Shahi's** case has only laid down the test for the misconduct as a motive or foundation. Therein a preliminary enquiry was held to adjudge unsatisfactory performance of the applicant but in the present case for want of unsatisfactory performance, the sole incident of alleged involvement of the applicant in criminal case is the only material for judging his suitability and without making any effort to judge the suitability of the applicant, the order is founded on his involvement in the criminal case. Accordingly, this decision would not be applicable to the facts of the present case.

29. The decision in **A.B. Bajpai's** case cited by the respondents is to the effect that though reasons in counter-affidavit would not cast stigma and would also not apply because in the present case in the Appellate order itself the ground for termination is unsatisfactory performance which is reiterated in the counter reply. Moreover, from the perusal of the records, the facts are found contrary to what has been pleaded.

30. Lastly, the decision **Dhananjay's** case (supra) where the following observations have been made:-

> "5. Para 2 of the impugned order of termination of services makes a mention of the fact that the appellant was suspended. The learned counsel for the appellant, pointing out this paragraph, submitted that it would cast stigma on the appellant and it would adversely affect his prospects. The High Court, in dismissing the writ petition, relied on the decision of this Court in the case of Bihari Lal aforementioned. Para 5 of the said judgment reads thus: (SCC pp.387-88, para 5)
>
> "5. It is true that the respondent was acquitted by the criminal court but acquittal does not automatically give him the right to be reinstated into the service. It would still be open to the competent authority to take decision whether the delinquent government servant can be taken into service or disciplinary action should be taken under the Central Civil Services (Classification, Control and Appeal) Rules or under the Temporary Service Rules. Admittedly, the respondent had been working as a temporary government servant before he was kept under suspension. The termination order indicated the factum that he, by the, was under suspension. It is only a way of describing him as being under suspension when the order came to be passed but that does not constitute any stigma. Mere acquittal of government employee does not automatically entitle the government servant to reinstatement. As stated earlier, it would be open to the appropriate competent authority to take a decision whether the enquiry into the conduct is required to be done before directing otherwise, available. Since the respondent is only a temporary government servant, the power being available under Rule 5(1) of the Rules, it is always open to the competent authority to invoke the said power and terminate the services of the employee instead of conducting the enquiry or to continue in service a government servant accused of defalcation of public money. Reinstatement would be charter for him to indulge with impunity in misappropriation of public money."
>
> 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 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, is also not a factor to indicate that the respondent wanted to take action against the appellant on his misconduct to remove from service.

7. In our view, having regard to the facts and circumstances of the case, it is not possible to hold that the order of termination of services was not simpliciter or the misconduct was the foundation for passing such order. Even if an enquiry was ordered to find out or verify the truth or otherwise, the allegation by itself does not establish that the respondent had any such design to somehow remove the appellant from service. In our view, the High Court was right in dismissing the Writ Petition in the light of the facts of the present case and the judgment of this Court, referred to above".

31. If one has regard to the above, in the present case the applicant was placed under suspension and a criminal complaint was filed. On the basis of the decisions of the Apex Court that the suspension would not cast any stigma and acquittal would not entitle for reinstatement has not gone into the fact and the decision of the Constitution Bench in **Shamsher Singh's** case where on lifting the veil and on ascertainment of real substance of the order if unearthed to be founded on a particular misconduct, the order would be punitive attracting Article 311(2) of the Constitution of India. Accordingly, the aforesaid dicta was in the peculiar facts and circumstances of the case but as in the present case the very basis of termination of the applicant is on his involvement in the criminal case without any other material to show unsatisfactory conduct or purpose and there is no efforts made to found the suitability of the applicant to continue in service, the aforesaid termination as reflected from the notings on file is removal of the applicant from service wherever a severe departmental action is recommended.

32. It is trite law that a Constitution Bench of the Apex Court cannot be over-ridden by the decision of the Bench of lesser Coram. It is equally settled that when two decisions of the same Coram of the Apex Court are pitted for consideration, the latest one is to be followed. In **Mathew's** case, which is subsequent to **Dhanjay's** case (supra) what has been made permissible is to travel beyond the order, which is simpliciter and to weigh its reality to find out the real cause and basis of the order. Necessarily, an enquiry was not per se into misconduct lays a foundation of solitary action of recommendation of termination on receipt of an arrest report when performance during probation

does not indicate otherwise and to render utility of a probationer for his further retention. The criminal charge, which constitutes misconduct, is certainly not only a motivating factor but also real basis and foundation of the order. Otherwise also, if the sole consideration is the criminal charge and involvement of the applicant in criminal case without any motivating factor of assessment of work to judge efficiency for retention of a probationer, the aforesaid criminal misconduct does not become a motive but is the real intent to do away with the services of the applicant.

33. It is also not the case that despite criminal misconduct, respondents have other material to justify this conclusion as to non-satisfactory service by the applicant. Mere involvement in the criminal case outside the ambit of performance of duties would not be a misconduct when the applicant has not done an act unbecoming of a government servant. Power to terminate has been exercised more on a penal side to remove the applicant with a view to find whether investigation or enquiry which par takes the character of a punitive order and as a result thereof civil consequences are ensued for which denial of an opportunity to show cause is violative of Article 311(2) of the Constitution of India. As such the order cannot be sustained in law.

34. In criminal jurisprudence, more particularly, Criminal Procedure Code, there is no concept of Honorable acquittal from the criminal charge. Once the prosecution has been burdened to establish the charge, if none of the ingredients are established and prosecution has failed to prove the charges, the acquittal has to be treated as acquittal on merit. In the instant case, not only the allegations of prosecution being a minor was belied by an ossification test but also the intent of rape was not established. As such, this acquittal is a clean acquittal flor all purposes.

35. Be that as it may, once the very basis of termination i.e. unsatisfactory performance of the applicant has not been established, certainly the exercise undertaken by the respondents is misuse of their power and as the reasonable

opportunity has been denied to the applicant, termination cannot be sustained in law.

36. In the result, for the foregoing reasons, O.A. is allowed, impugned orders are set aside. Respondents are directed to reinstate the applicant in service forthwith. The interregnum period shall count for all consequential benefits and for back wages, the respondents shall take decision as per FR 54(b) within two months from the date of receipt of a copy of this order. However, respondents, if so advised, are at liberty to take due process of law. No costs.

S. Raju

(Shanker Raju)
Member(J)

/vv/