Reserved:

CENTRAL ADMINISTRATIVE TRIBUNAL

ALLAHABAD BENCH

Original Application No. 1025 of 1992

Smt. Manorama Devi .... Petitioner

Versus

Union of India & Ors .... Respondents

CORAM:

HON'BLE MR. JUSTICE R.K. VARMA, V.C.

HON'BLE MR. V.K. SETH, MEMBER(A)

(By Hon. Mr. Justice R.K. Varma, V.C.)

By this petition filed Under Section 19 of the Administrative Tribunals Act 1985, the petitioner has sought quashing of the order of termination dated 9.1.92 (Annexure A-3 to the petition) passed by the Respondent No.2 and has prayed for consequential reliefs.

R.K.V.

2. The facts giving rise to this petition briefly stated are as follows:

The petitioner was appointed as temporary Civilian Safai Karmachari at Head Quarter's Establishment No.22 in the pay scale of Rs.750-940 by order dated 22.4.91 (Annexure A-1 to the petition). It was stated in the said appointment order that the petitioner will be a probationer for a period of three years from the date of her appointment i.e. 22.4.91. During the period of probation on 9.1.91 the services of the petitioner were terminated by the impugned order of termination.

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3. According to the averment of the petitioner she was performing her duties very well and there was absolutely no complaint of any nature against the applicant but even then while the respondent no.2 Brigadier Commandant was on leave on that day the Incharge of that post namely Shri H.C. Sharma, Col. Officer Commandant issued in Form No.1, notice of termination of the services of the petitioner Under Rule 5(1) of the Central Civil Services (Temporary Services) Rules, 1965 (Annexure A-3 to the petition) terminating the services with effect from the date of expiry of the period of one month from the date on which the notice was served upon her.

4. According to the counter reply, filed by the respo ndents the petitioner after taking the appointment as Safai Karmachari became unwilling to work on the said post and refused to perform the work assigned to her as Safai Karmachari on the pretext that she belongs to the higher caste of Brahmin family. It is further averred by the respondents that a number of verbal warnings were given to the petitioner but that had hardly any effect and there was virtually no improvement in her working attitude or duty. Instead of performing the duties assigned to her, the petitioner was mostly found to be freely loitering around the unit area/lines which not only created potential administrative problems, but also tended to become a security hazard. As such the petitioner who was holding a purely temporary post, was given one months notice of termination of her service as per the provisions of Rule 5(1) of the CCS(Temporary Services) Rules, 1965, vide order dated 9.1.92(Annex A-3)

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4. The petitioner's case is that the impugned order of termination (Annexure A-3) has been passed by way of punishment without holding any enquiry and as such, is illegal and liable to be quashed.

5. At the time of hearing it has been submitted on behalf of the petitioner that even though the order of termination (Annexure A-3) does not mention any reason for termination of the peritioner's services during her probation the respondents have in the counter reply stated the faults of the petitioner to be the reason for her termination and therefore, it becomes clear that the impugned termination order is founded on faults of the petitioner without holding an enquiry and without giving her an opportunity of being heard. As such, it is urged, the order of termination has been passed by way of punishment without giving the petitioner an opportunity of being heard and is therefore liable to be quashed.

6. The learned counsel for the petitioner has cited a few decisions bearing on the question of termination of a probationer, which we proposed to notice hereunder.

K.K.V

In the case of 'Samsher Singh Vs. State of Punjab and another decided by a Bench of Seven Judges of the Supreme Court, (1974) 2 Supreme Court Cases 831) on which the learned counsel for the petitioner has placed reliance, it has been laid down that a probationer has no right to continue to hold the post and therefore the termination of his service does not operate as forfeiture of any right and is to be distinguished from dismissal, removal or reduction in rank. The termination is a punishment only when it is founded on misconduct, negligence or inefficiency. It has further been laid

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down that the services of a probationer can be terminated when the authority is satisfied regarding his inadequacy for the job or unsuitability for temperamental or other reasons & not involving moral turpitude or when his conduct may result in dismissal or removal but without a formal enquiry. The fact of holding an enquiry is not always conclusive. What is decisive is whether the order is really by way of punishment. The substance of the order and not the form would be decisive. It has been submitted on behalf of the petitioner that in the instant case it is alleged that the foundation of the order of termination is the complaint that the petitioner refused to perform the work assigned to her as Safai Karmachari on the pretext that she belongs to the caste of brahmin family, as is disclosed in the Counter affidavit of the respondents. It is urged that the alleged misconduct being in substance the foundation of the order of termination amounts to punishment and petitioner has not been given an opportunity to show cause against the alleged misconduct and no enquiry was held. Thus the discharge of the petitioner during her period of probation in the circumstances cannot be said to be an order of termination simplicitor, but is an order punitive in nature without any proper enquiry and as such, violative of Article 311(2) of the Constitution.

7. The later decision of the Supreme Court case relied upon by the learned counsel for the petitioner is in the case of 'Anoop Jaiswal Versus Government of India & another (1984) 2 Supreme Court Cases 369, wherein the appellant having been selected for appointment in IPS was undergoing training as probationer and before completion of his probation period he was discharged by a simple order on the ground of unsuitability. It is held that where the form of the order is merely camouflage for an order of dismissal for misconduct, it is always open to the court before

which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment, is in reality a cloak for an order of punishment the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by the law upon the employee.

In the instant case it is urged by the learned counsel for the petitioner that the order of termination of the petitioner during the period of probation is in reality a cloak for an order of punishment and that the petitioner having not been afforded a reasonable opportunity to defend herself against the alleged misconduct as provided in Article 311(2) of the Constitution, the order of discharge is liable to be quashed.

8. The learned counsel for the petitioner has cited another decision of Supreme Court in the case of Dr. Mrs. Sumati P. Shere Vs. Union of India and Ors (1989) 2 UPLBEC 125 and has placed reliance on the following observations.

> " We must emphasize that in the relationship of master and servant there is a normal obligation to act fairly. An informal, if not formal, give and take on the assessment of work of the employee should be there. The employee should be made aware of the defect in his work and deficiency in his performance. Defects or deficiencies; indiference or indiscretion may be with the employee by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases

> may put the employee on the right track. without any such communication, in our opinion, it would be arbitrary to give a movement order to the employee on the ground of unsuitability."

9. It has been submitted on behalf of the petitioner that the petitioner was performing her duty and there was absolutely no complaint of any nature against the petitioner and that the respondents did not at any time before her termination apprise her by any communication in respect of defects or deficiency, indifference or indiscretion, if at all noticed by the respondents in her work.

10. The respondents have stated that a number of verbal warnings were given to the applicant but there was no improvement in her working attitude or performance of duty. There is, however, no evidence of any written communication in this behalf which would have been a conclusive proof in the matter. The respondents also have not stated that any written communication informing the petitioner of the defects or deficiency or indifference in her work have been noticed by them or that she was required to improve her attitude and performance in her working.

R.K.

11. When a probationer is sought to be terminated on the ground of inadequacy or any defect in the employee even without the completion of the period of probation, it will be only just and fair that the employee should give written warning, so that substance and content of the warning may be ascertained and the employee is afforded an opportunity to improve accordingly. A

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written warning also puts the matter beyond the pale of controversy and its substance and content become ascertainable in the event of denial by the employee. Moreover, if an opportunity to improve is to be given to the employee before taking final step of putting an end to the service of the probationer even without completion of the period of probation which seriously effects him, the employee is entitled to know precisely the shortcoming and inadequacy in respect of which he is expected to improve and this can properly be done by giving the employee a writi warning instead of a verbal warning.

12. Having heard learned counsel for the parties and having considered the material on record and the relevant decisions cited before is, we are of the opinion that this petition must be allowed.

13. The Counter reply filed by the respondents makes it clear that the impugned termination order is founded on faults of the petitioner and as such, the termination order is not an order of termination simplicitor but is by way of punishment. The petitioner was therefore entitled for an enquiry and an opportunity of being heard before the termination. The respondents in our opinion, have also not acted fairly in terminating the services of the petitioner during her probationery period even without giving her a written communication of her defects or inadequacy so as to afford her a chance to improve her working. The impugned order of termination is thus not sustainable in law, being punitive in nature and having been passed in violation of the principles of natural justice.

14. Accordingly, we hereby quash the order of termination dated 9.1.92 (Annexure A-3 to the petition and direct the respondents to take the petitioner back

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in service, treating her as continuing in service as if no order of termination had been passed, for the purposes of continuity of service, pay and allowance.

15. There shall, however, be no order as to costs.

Member (A) Vice Chairman

Dated: August 30th, 1993

(Uv)