CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK

ORIGINAL APPLICATION No. 49 OF 1987

Date of decision .. August 31, 1987.

Birendra Chandra Behera .. Applicant.

Versus

Union of India & others .. Respondents.

M/s P.V. Ramdas & B.K. Panda, Advocates. .. For Applicant.

Mr. A.B. Misra, Sr. Standing Counsel (Central) .. For Respondents.

C O R A M :

THE HON'BLE MR. B.R. PATEL, VICE CHAIRMAN

A N D

THE HON'BLE MR. K.P. ACHARYA, MEMBER (JUDICIAL)

1. Whether reporters of local papers may be allowed to see the judgment ? Yes .
2. To be referred to the Reporters or not ? Yes.
3. Whether Their Lordships wish to see the fair copy of the judgment ? Yes.

J U D G M E N T

K.P. ACHARYA,MEMBER (J), In this application under section 19 of the Administrative Tribunals Act, 1985 (hereinafter called as the 'Act'), the order of termination passed on 12.3.1984, vide Annexure-1 is under challenge.

2. Shortly stated , the case of the petitioner is that he was an Extra- Departmental Branch Post Master attached to Gaudadiha Post Office within the districtof Mayurbhanj . The petitioner was appointed on 14th November, 1983. After termination of the services of the petitioner, he preferred an appeal on 15.3.1984 which stood dismissed . Thereafter the petitioner filed a suit on 17th December, 1984 in the Court of the Munsff, Baripada which forms the subject-matter of Title Suit No.31 of 1984. The suit was disposed ofon 30th September 1986 and the learned Munsif dismissed the suit . Thereafter , this application under section 19 of the Act has been filed praying to quash the order of termination forming the subject-matter of Annexure-1.

3. In their counter, the respondents- Opp. Parties maintained that the Title Suit No.31 of 1984 having been once dismissed by a competent court, it is no longer open for the applicant to invoke the jurisdiction of this Bench for interference as the decree passed by the learned Munsif operates as resjudicata under section 11 of the Code of Civil Procedure. It is further maintained on behalf of the respondents that the services of the petitioner having been terminated, Rule 6 ofthe E.D.B.P.M. Service Conduct

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Rules wherein it is envisaged that the competent authority has a right to terminate the services of a particular E.D.B.P.M. who has not served for more than three years without assigning any reasons for his unsatisfactory work or on other administrative grounds unconnected with his conduct. Hence the order of termination should not be interferred with. The application being devoid of merit is liable to be dismissed it is no longer open to be challenged.

4. Before dealing with the merits of this case, it is worth-while to dispose of the preliminary objection raised by learned Sr. Standing Counsel who contended that a decree dismissing the suit of the plaintiff (petitioner before this Bench) operates as resjudicata and Section 11 of the Code of Civil Procedure would create a bar for entertaining this application. Before adjudicating the aforesaid contention of the learned Sr. Standing Counsel Mr. Misra, it would be profitable to quote the provisions contained under section 29 of the Administrative Tribunals Act, 1985 which runs thus :

" (i) Every suit or other proceeding pending before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based in such that it would have been if it had arisen after such establishment within the jurisdiction of such Tribunal shall stand transferred on that date to such Tribunal ".

By this provision of law, as soon as the Act came into force, the case/ proceeding shall be deemed to have been transferred because the language of the section indicates ' shall stand transferred on that date to such Tribunal'. ' On that date ' means the date of establishment of the Tribunal under this Act. The Tribunal was admittedly established on 1.11.1985 and thereforeit should be deemed that all cases coming within the purview of the Act on 1.11.85. stood transferred to the Tribunal/ The suit having been admittedly filed on 17.12.1984 and not having been disposed of till 30.9.1986, the case is deemed to have been transferred on 1.11.1985 . Therefore, the moot question that needs determination as to whether the decree passed by the learned Munsif is without jurisdiction and hence a nullity. Though the learned Sr. Standing Counsel did not dispute the fact that on the appointed date the suit shall be deemed to have been transferred yet he submitted that the very fact that the plaintiff in the suit (petitioner in this application) having participated in the hearing of the suit and by his action the petitioner having consented to the disposal of the suit by the learned Munsif, the decree should not be held to be a nullity and on the contrary it should be held that the petitioner is estopped by his conduct to reagitate the matter before the Tribunal. Law is well settled in a plethora of judicial pronouncements that from the consent given by a party cannot confer jurisdiction over a court in matters in which there is a statutory bar created forbidding the courts to take cognizanceof the cause of adtion. Learned Sr. Standing

Counsel could not site a single judgment either of the Hon'ble Supreme Court or of any High Court having taken a view contrary to the above proposition of law. By virtue of the Act providing transfer of the suit / proceeding from the date of establishment of the Tribunal, we have also our grave doubts whether the original court could be competent to even pass an interlocutory order on the application filed by any of the parties before it. In the circumstances stated above, the question of estoppel does not arise and the decree passed by the learned Munsif is undoubtedly a nullity which does not bind down the parties as the judgment in rem and decree passed by the learned Munsif is without jurisdiction. Hence we find no merit in the aforesaid contention of the learned Sr. Standing Counsel and we would further hold that the principles of resjudicata would not apply to this case and this Bench can entertain the application to be disposed of on merits.

5. Now coming to the merits of the case, it may be noticed that the termination order was passed on 12.3.1984, vide Annexure-1. The order of termination runs thus :

> " The services of Sri Birendra Chandra Behera EDBPM Goudadiha BO under Takatpur SO are hereby ordered to be terminated under Rule 6 of the ED Agents (Conduct and Service) Rules, 1964 with immediate effect on administrative grounds unconnected with his conduct ".

Rule 6 of the EDA Conduct and Service Rules, 1964 provides as follows :

> " The services of an employee who has not already rendered more than three year's continuous service from the date of his appointment shall be liable to termination

by the appointing authority at any time without notice for generally unsatisfactory work, or on any administrative ground unconnected with his conduct ".

Placing reliance on the above quoted provision it was contended by the learned Sr. Standing Counsel that admittedly the petitioner has not rendered more than three years continuous service from the date of appointment and the order of termination indicates that such termination has been effected on administrative grounds unconnected with the conduct of the petitioner. Such being the position, there is no scope for the Bench to unsettle the order of termination. At the first flush the argument advanced by the learned Sr. Standing Counsel appears to be convincing but if one probes a little deeper, we think the contention of the learned Sr. Standing Counsel is devoid of any merit. We have no dispute regarding the proposition laid down that the competent authority under Rule 6 can terminate the services of a particular employee who has not rendered more than three years continuous service either generally for unsatisfactory work or on administrative ground unconnected with his conduct. If the order of termination had been passed unconnected with the conduct of the petitioner, we are in complete agreement with the learned Sr. Standing Counsel that the impugned order should not be unsettled but if the services had been terminated due to certain mis-conduct committed by the petitioner, it now requires to be considered as to whether Article 311 (2) of the Constitution

is attracted . On this subject there has been a beadroll of judgments of the Hon'ble Supreme Court and at the outset we would like to refer the judgment of the Hon'ble Supreme Court, reported in A.T.R. 1986 CAT 193 (Jarnail Singh & others v. State of Punjab and others). Their Lordships were pleased to obserbe as follows :-

> " The crucial question required to be decided in the instant appeals is whether the impugned order of termination of services of the petitioners can be deemed to be an innocuous order of termination simplicitor according to the terms and conditions of the services without attaching any stigma to any of the petitioners or it is one in substance and in fact an order of termination by way of punishment based on misconduct and made in violation of the procedure prescribed by Article 311 (2) of the Constitution of India. In other words when the order of termination is challenged as casting stigma on the service career , the Court can lift the veil in order to find out the real basis of the impugned order even though on the face of it the order in question appears to be innocuous ".

A case of similar nature had come up before Their Lordships of the Supreme Court which is reported in 1968(3) Supreme Court Reporter 828 (State of Punjab and another vrs. Shri Sukh Raj Bahadur). The following propositions were laid down by the Hon'ble Supreme Court while considering the question whether in case of termination of service of a temporary servant or a probationer, Article 311 (2) of the Constitution would be attracted . The following propositions were laid down :

> " 1. The services of a temporary servant

or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination have to be examined in each case the motive behind it being immaterial.

3. If theorder visits the public servant with any evil consequences or casts an aspersion against his character or integrity , it must be con-sidered to be one way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry launchedby the superior authorities only to ascertain whether the public servant should be retained in service does not attract the operation of Article 311 of the Constitution

5. If there be a full-scale departmental enquiry envisaged by Article 311 i.e, an Enquiry Officer is appointed, a charge sheet submitted, explanation called for and considered, any order of termination of service made there-after will attract the operation of the said article ".

In the case of State of Bihar & others v. ShivaBhikshuk Misra, reported in 1971 (2) Supreme Court Reporter 191, Their Lordships were pleased to observe as follows :-

" So far as we are aware no such rigid principle has ever been laid down by this Court that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government Officer it must be held to have been made in the ordinary course of administrative routine and the Court is debarred from looking at all the attendant circumstances to discover whether the orderhad been made by way of punishment. The form

of the order is not condlusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct. It may be that an order which is innocuous on the face and does not 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 circumstanees 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 ".

In the case of Anoop Jaiswal v. Government of India and another, reported in AIR 1984 Supreme Court 636 Hon'ble Mr. Justice Venkataramiah speaking for the Court was pleased to observe as follows :-

" The form of the order is not decisive as to whether the order is by way of punishment and that even an innocuously worded order terminating the service may in the fact and circumstances of the case establish that an enquiry into allegations of serious and gnave character of misconduct involving stigma has been made in infradtion of the provision of Article 311 (2). Where the form of the order is merely a camoulflage 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 law upon the employee "

" Even though the order of discharge may be non-committal, it cannot stand alone . Though the noting in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation which is

> the basis or foundation for the order should ~~should~~ be read alongwith the order for the purpose of determining its character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for the incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground if the servant has not been afforded a reasonable opportunity to defend himself as provided in Article 311 (2) of the Constitution."

Similar view has been taken by Their Lordships of the Supreme Court in the cases of Shamsher Singh and another v. State of Punjab (1975(1) S.C.R. 814, Nepal Singh v. State of Uttar Pradesh and others (A.I.R. 1985 S.C. 84 .

6. Keeping in view, the aforesaid dictum laid down by Their Lordships, Mr. P.V.Ramdas, learned counsel for the petitioner invited our attention to the averments finding place in paragraphs 5,6 and 9 of the written statement filed on behalf of the respondents- Opposite Parties before the learned Munsif, Baripada who was in seisin of Title Suit No. 31 of 1984 and contended that the impugned order cannot be construed as a termination simplicitor because if the veil is lifted and the averments in the aforesaid paragraph of the written statement are taken into consideration, it would indicate that the foundation for terminating the services of the petitioner was due to the misconduct on his part and therefore Rule 6 would not be attracted. Rule 6 would have no application to the facts of the case. Paragraph 5 of the written statement runs thus :

> " That the averment in para 2 is not correct and hence denied. The Plaintiff

was irresponsible in his duties and allowed his brother Narendra Behera, an Ex-BPM, whose service was terminated after detection of irregularities, to handle postal records without permission from authorities ".

Para 6 of the written statement runs thus :-

" That the avernment in para '3' is admitted so far as the removal part is concerned. He was removed from service without notice , after detection of serious irregularities committed by him. "

The relevant portion of para 9 is quoted as hereunder :

" xx xx
After detection of irregularities, committed by him and after it was detected that he destroyed some documents, the appointing authority terminated his service under Rule 6 of Rules relating to conduct and service of Extra Departmental Agents".

While trying to repel the contention of Mr. Ramdas it was submitted by the learned Sr. Standing Counsel that this Bench should not take notice of the averments made in the written statement because the written statement has not been filed before thisBench and it has been filed before the Munsif. We find no substance in the aforesaid argument of the learned Sr. Standing Counsel because the Court can take judicial notice of the nature of case put forward before the competent court at a previous stage so as to determine the issue at hand. It was submitted before us by the learned Senior Standing Counsel that previous to the appointment of the petitioner, a particular employee was put off from duty and in his place the petitioner had been temporarily

appointed and therefore, the impugned order should be construed as an order of termination simplicitor. We find no merit in this contention because at one stage the case of the Opposite Parties (defendants before the learned Munsif) was that the termination order has been passed because the petitioner had committed certain serious irregularities being irresponsible in his duties andhe had destroyed some documents of the Government. The cumulative effect of these allegations contained in the written statement cannot but amount to misconduct. Hence inno circumstances, we could pursuade ourselves to hold that the order of termination has no connection with the conduct of the petitioner. Such being the position, we are of opinion that Rule 6 would have no application to the facts of the present case . We would further hold that the alleged act of misconduct was the cause of the order and that detection of these irregularities and misconduct on the part of the petitioner has led the authorities to pass the order of discharge andhence Article 311 (2) of the Constitution would certainly be attracted.

7 . Lastly it was contended by the learned Sr. Standing Counsel that the petitioner being a tempora Government servant, Article 311 (2) of the Constitution cannot be made applicable . This contention of the learn Sr. Standing Counsel is also devoid of any merit becaus in the case of Parshotam Lal Dhingra v. Union of India, reported in 1958 SCR 828, Hon'ble the Chief Justice Sri A.N.Ray speaking for the Court was pleased to observe

follows :-

> " 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 it 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 ".

In view of the observations made by Their Lordships in the aforesaid judgment, provisions of Article 311 (2) of the Constitution will also apply to probationers.

8. In view of the discussions made above, we are of opinion that the order of termination is not sustainable. Hence theorder of termination is hereby set aside and it is directed that the petitioner be reinstated into service forth-with.

9. Thus, the application stands allowed leaving the parties to bear their own costs.

31.8.87.

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Member (Judicial)

B.R. PATEL, VICE CHAIRMAN, I agree

31.8.87

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Vice Chairman.

Central Administrative Tribunal,
Cuttack Bench, Cuttack.
August 31, 1987/Roy.