

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 514 of 2005

Thursday..., this the 26th day of July, 2007

C O R A M :

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER**

P.P. Mohammed Kasim,
Palathpura House,
S/o. Sayed Shaikoya,
Andorth, UT of Lakshadweep,
Constable (PIS No. 5199175)
(Under order of termination),
Indian Reserve Batallion,
Lakshadweep, Daman & Diu and
Dadra and Nagar Haveli. ... Applicant.

(By Advocate Mr.P.V. Mohanan)

v e r s u s

1. The Administrator,
Union Territory of Lakshadweep,
Kavaratti.
2. The Inspector General,
Indian Reserve Batallion,
Lakshadweep, Daman & Diu and
Dadra and Nagar Haveli,
Headquarters Kavaratti.
3. The Commandant,
Office of the Commandant,
Indian Reserve Batallion,
Lakshadweep, Daman & Diu and
Dadra and Nagar Haveli, ... Respondents.

(By Advocate Mr. Shafik M.A. (R1&R2))

O R D E R
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

 The applicant challenges the Annexure A-4 order of termination dated 30th

November, 2002 passed by the Third Respondent and also Annexure A-7 order dated 10th December, 2004, whereby the 1st Respondent has dismissed his appeal.

(a) The order of termination reads as under:-

"ORDER"

Whereas Shri Mohd. Kasim PP PIS No. 5199175 Constable (Exe) after completion of the Phase-I training reported for duties at RHQ, Silvassa and is now undergoing collective training.

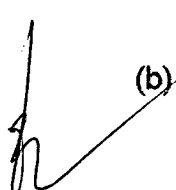
Whereas the said Shri Mohd. Kasim P.P. PIS No. 5199175 Constable (Exe) when Company was on annual change from HQ, Kavaratti to RHQ, Silvassa was found behaving in very indecent manner with the local residents at Taliparamba in Kannur District when the Company stopped to have a break for night halt.

Whereas the said Shri Mohd. Kasim PP, PIS No. 5199175, Constable (Exe) was also found misbehaving and also harassing his superiors as detailed in the Show Cause Notice.

Whereas the said Shri Mohd. Kasim PP PIS No. 5599175 Constable (Exe) was therefore issued with show cause notice vide No. 01/16/MKPP/IRBN/SIL/317/1831 dated 11.10.2002 to explain and furnish reasons for the indiscipline act on his part within 30 days since his behaviour, attitude and act as narrated in the said Show Cause Notice were highly unbecoming of a member of the disciplined force and also were attracting the provisions of the Standing Order No. 02 Chapter II Para-17 Training sub-para (9) under which his services can be terminated without notice during training period.

And whereas the said Shri Mohd. Kasim PP PIS No. 5199175 Constable (exe) has been submitted his reply to said show cause notice vide letter dated 06.11.2002 which is not at all convincing.

Now, therefore, I, the undersigned, is of the opinion that the said Shri Mohd. Kasim PP PIS No. 5199175 Constable (exe) is unsuitable and unfit person to continue as a member of the disciplined person to continue as a member of the disciplined force like Indian Reserve Battalion, Lakshadweep, Daman & Diu and Dadra & Nagar Haveli and, therefore, order that his services stands terminated with immediate effect."

 (b) The order dated 10.12.2004 rejecting the appeal is as under:-

"Your application dated 11.06.2004 regarding reinstatement in service.

Your application has been put to the Hon'ble Administrator, UTs of Daman & Diu and Dadra & Nagar Haveli. The Hon'ble Administrator, UTs of DD & DNH considered your request and rejected it being devoid of merit.

This is for your information."

2. The impugned order itself gives a brief facts relevant to consider the case and hence, narrating the facts as contained in the OA would only be an act of repetition. Admittedly when the applicant was under training, he was, on an alleged act not befitting to a disciplined force, issued with Annexure A-2 Memo dated 31-03-2002 and on a representation made against the Memo, the authorities had issued show cause notice dated 11-10-2002 whereby the authorities had asked the applicant to explain as to why the services of the applicant should not be terminated for the acts committed by him. Again, it was after the applicant had furnished his representation against the Show Cause Notice that the authorities have terminated the services of the applicant invoking the provisions of Order 17(9) of the Standing Orders. No inquiry was however, conducted. The question that arises is whether the applicant's termination is legally valid.

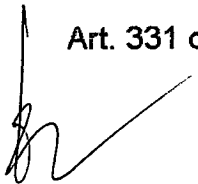
3. Counsel for the applicant argued that the respondents have invoked the provisions of Standing Order No. 02, Chapter II Para 17 Training Sub para (9) thereof. The said order reads as under:-

17. Training
(1).....

.....
(9) A member of the I.R. Battalion undergoing training anywhere or with any organization before confirmation must satisfactorily complete the training. In case anybody deserts/leaves in between the training period or probation without information they stand terminated/dismissed. Termination/dismissal shall follow action as per proposed regulation. Such deserters shall refund all training charges, all pay and allowances drawn etc., A member of the I.R. Battalion found unsuitable can be removed within training period without notice and within probation with prior notice.

4. Counsel for the applicant argues that the reason given for termination as in the impugned Annexure A-4 order does not fit in the above provisions. It is understandable if the applicant was found unsuitable during the course of training but the reason was that the applicant involved in certain alleged act of misconduct and without proper enquiry, the respondents have, invoking the above clause of the Standing Orders has terminated the services of the applicant and the termination order being essentially stigmatic, the same is vitiated.

5. Counsel for the applicant has invited the attention of the Tribunal to the provisions of clause 38 of the Standing Order whereby it has been provided that the procedure for award of Major Punishment shall be the same as is provided for imposing of major penalties on Government Servants under the Central Civil Services (Classification, Control and Appeal) Rules, 1965 as modified from time to time and argued that when the order of termination is not made after holding an inquiry under the provisions as stated above and without giving an opportunity, the termination is vitiated as the same is violative of the provisions of Art. 331 of the Constitution.



6. Counsel for the applicant had relied upon the following decisions of the Apex Court:-

AIR 1986 SC 1790
AIR 2002 SC 27
2004 (11) SCC 743
2005(2) SCC 82

7. Arguments were heard and documents perused. To arrive at a decision whether the impugned order is punitive in nature or an order of termination simplicitor, it is essential to refer to some of the past cases. These are described in the succeeding paragraphs.

(a) In a comparatively old case of *State of Orissa v. Ram Narayan*

Das, (1961) 1 SCR 606, the Apex Court had held as under:-

11. In *Parshottam Lal Dhingra v. Union of India* (1958) SCR 828 this Court by a majority held that if an officer holding an officiating post had no right under the rules governing his service to continue in it, and such appointment under the general law being terminable at any time on reasonable notice, the reversion of the public servant to his substantive post did not operate as a forfeiture of any right: that order visited him with no evil consequences and could not be regarded as a reduction in rank by way of punishment. Bose, J., who disagreed with the majority observed that **the real test was whether evil consequences over and above those that ensued from a contractual termination, were likely to ensue as a consequence of the impugned order: if they were, Article 311 of the Constitution would be attracted even though such evil consequences were not prescribed as penalties under the Rules. In that case, Das, C.J., in delivering the judgment of the majority, entered upon an exhaustive review of the law applicable to the termination of employment of public servants and at pp. 861-863 summarised it as follows:**

Any and every termination of service is not a dismissal, removal or reduction in rank. A termination of service brought about by the exercise of a contractual right is not per se dismissal or removal, as has been held by this court in *Satish Chander Anand v. Union of India* (1953) SCC 655. Likewise the

termination of service by compulsory retirement in terms of a specific rule regulating the conditions of service is not tantamount to the infliction of a punishment and does not attract Article 311(2) as has also been held by this Court in *Shyam Lal v. State of Uttar Pradesh* (1955) 1 SCR 56 In short, if the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or 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 Article 311 must be complied with. As already stated, if the servant has got a right to continue in the post, then, unless the contract of employment or the rules provide to the contrary, his services cannot be terminated otherwise than for misconduct, negligence, inefficiency or other good and sufficient cause. A termination of the service of such a servant on such grounds must be a punishment and, therefore, a dismissal or removal within Article 311, for it operates as a forfeiture of his right and he is visited with the evil consequences of loss of pay and allowances. It puts an indelible stigma on the officer affecting his future career.... But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. **The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences....** The use of the expression, terminate or discharge is not conclusive. In spite of the use of such innocuous expressions, **the court has to apply the two tests mentioned above, namely, (1) Whether the servant had a right to the post or the rank, or (2) Whether he has been visited with evil consequences of the kind hereinbefore referred to?** If the case satisfies either of the two tests then it must be held that the servant has been punished and

the termination of his service must be taken as a dismissal or removal from service...."

(b) In a very recent case of ***Kendriya Vidyalaya Sangathan v. Arunkumar Madhavrao Sinddhaye***, (2007) 1 SCC 283, the Apex Court has held as under:-

"In *State of U.P. v. Kaushal Kishore Shukla* {(1991) (1) SCC 691}, the employee was appointed on ad hoc basis on 18-2-1977 as an Assistant Auditor and his employment was extended on several occasions and the last extension was granted on 21-1-1980, which was to expire on 28-2-1981. His services were terminated on 23-9-1980. The termination order was challenged on the ground that certain allegations of misconduct had been made against him regarding which an ex parte inquiry was held wherein he was not given any opportunity of hearing. The High Court accepted the plea of the employee that the order of termination of services was founded on the allegations of misconduct and the ex parte enquiry report and accordingly quashed the termination order. This Court set aside the judgment of the High Court with the following observations: (SCC pp. 699 & 705, paras 8&13)

The respondent being a temporary government servant had no right to hold the post, and the competent authority terminated his services by an innocuous order of termination without casting any stigma on him. The termination order does not indict the respondent for any misconduct. The inquiry which was held against the respondent was preliminary in nature to ascertain the respondent's suitability and continuance in service. There was no element of punitive proceedings as no charges had been framed, no inquiry officer was appointed, no findings were recorded, instead a preliminary inquiry was held and on the report of the preliminary inquiry the competent authority terminated the respondent's services by an innocuous order in accordance with the terms and conditions of his service. Mere fact that prior to the issue of order of termination, an inquiry against the respondent in regard to the allegations of unauthorised audit of Boys' Fund was held, does not change the nature of the order of termination into that of punishment as after the preliminary inquiry the competent authority took no steps to punish the respondent, instead it exercised its power to terminate the respondent's services in accordance with the contract of service and the Rules.

* * *



13. In **S.P. Vasudeva v. State of Haryana** {1976} 1 SCC 236, it was held that where an order of reversion of a person who had no right to the post, does not show ex facie that he was being reverted as a measure of punishment or does not cast any stigma on him, the courts will not normally go behind that order to see if there were any motivating factors behind that order. Both these decisions have been rendered by Benches of three learned Judges. "

(c) In yet another recent case of **Jai Singh v. Union of India**, (2006) 9

SCC 717, the Apex Court has held as under:-

"9. The question whether the termination of service is simpliciter or punitive has been examined in several cases e.g. **Dhananjay v. Chief Executive Officer, Zilla Parishad** (2003) 2 SCC 386 and **Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd.** (2003) 3 SCC 263. An order of termination simpliciter passed during the period of probation has been generating undying debate. The recent two decisions of this Court in **Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences** (1999) 3 SCC 60 and **Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences** (2002) 1 SCC 520 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 **Dipti Prakash Banerjee** after referring to various decisions it was 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 thus: (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 of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case.**

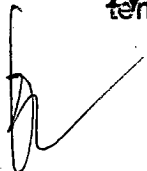


Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorise or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service. State of Haryana v. Satyender Singh Rathore, (2005) 7 SCC 518 (emphasis in original)

11. These aspects were highlighted recently in *State of Haryana v. Satyender Singh Rathore* (2005) 7 SCC 518

8. The common thread going through in all the above decisions from 1961 till date is that right to challenge an order of termination during probation is not unbridled, for a probationer does not have any right to continue as such. If the intention of the authorities is to punish an individual by way of dismissal or removal then, the same cannot be saved by holding full fledged inquiry, giving opportunity to the individual concerned to defend his/her case. If after having a preliminary inquiry (either with or without participation of the individual concerned) it had been decided to terminate the services as the individual was not found suitable then the drill of non holding of full fledged inquiry under the relevant rules with opportunity to the individual need not be followed and in such cases, order of termination would be covered under termination during probation. Again, such an order carrying the term "unsatisfactory service" does not in any way carry stigma with the order of termination. The above decisions are more proximate than the ones relied upon by the counsel for the applicant.

9. In the instant case, the order of termination, though uses the terms such as indecent manner, misbehaving and harassing the superiors, as the details have not been reflected, the order of termination is only in the nature of termination without any sting of stigma.

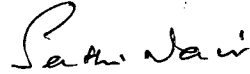


10. The O.A., therefore, being devoid of merit is dismissed. No costs.

(Dated, this 26th July, 2007)



Dr. K B S RAJAN
JUDICIAL MEMBER



SATHI NAIR
VICE CHAIRMAN

CVT.