

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
JAIPUR BENCH, JAIPUR

(74)

O.A. No. 416/95
T.A. No.

199

DATE OF DECISION 7.6.1996

Abdul Quaiyoom **Petitioner**

Mr. S.K.Jain **Advocate for the Petitioner (s)**

Versus

Union of India & Ors. **Respondent**

Mr. U.D.Sharma **Advocate for the Respondent (s)**

CORAM :

The Hon'ble Mr. O.P.Sharma, Administrative Member

The Hon'ble Mr. Ratan Prakash, Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of the Judgement ?
4. Whether it needs to be circulated to other Benches of the Tribunal ?


(Ratan Prakash)

Judicial Member


(O.P. Sharma)

Administrative Member

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH, JAIPUR.

O.A.No.416/95

Date of order: 7.6.1996

Abdul Quaiyoom

: Applicant

Vs.

Union of India & Ors.

: Respondents

Mr.S.K.Jain

: Counsel for the applicant

Mr.U.D.Sharma

: Counsel for the respondents

CORAM:

Hon'ble Mr.O.P.Sharma, Administrative Member

Hon'ble Mr.Ratan Prakash, Judicial Member.

PER HON'BLE MR.O.P.SHARMA, ADMINISTRATIVE MEMBER.

In this application under Sec.19 of the Administrative Tribunals Act, 1985, Shri Abdul Quaiyoom has prayed that order dated 7.9.95 (Annex.A1) reverting the applicant from the post of Shop Superintendent scale Rs.2375-3500 to his original post of Junior Shop Superintendent scale Rs.2000-3200 may be quashed and the applicant may be declared to have been continued on the higher post as if he had not been reverted at all, with all consequential benefits. He has further prayed that the applicant may be declared to have been promoted on the post of Shop Superintendent scale Rs.2375-3500 on a regular basis, instead of his promotion being treated as on ad hoc basis.

2. On 9.10.95, the O.A was admitted and for the reasons given in the interim order passed on that date, the Tribunal had directed that order Annexure A-1 dated 7.9.95 reverting the applicant shall not be given effect to till the next date. The operation of the said interim order has continued till date.

3. The facts of the case as stated by the applicant are that when he was working on the post of Junior Shop Superintendent in Ajmer Workshop Loco, he was promoted as Shop Superintendent scale Rs.2375-3500 by respondent No.3 by order dated 15.10.94 (Annex.A2), against a short term vacancy due to one Shri Munishwar Gautam proceeding on leave. Thereafter the

CL

applicant was allowed to continue on the said post vide order dated 29.10.94 (Annex.A3) against the vacancy of one Shri N.K. Khandelwal, proceeding on leave. Thereafter, he was continued on the said post vide order dated 2/3.12.94 (Annex.A4) against the vacancy of one Shri Hakim Singh, retiring from service. The vacancy created by retirement of Shri Hakim Singh was a clear vacancy. Shri Hakim Singh was a general category employee and since the applicant had been appointed against the vacancy created on the retirement of Shri Hakim Singh the applicant was appointed by order Annex.A4 against general and a clear vacancy against which he continued to work without any complaint against him.

4. Further, according to the applicant, on 21.4.95, Shri H.V.Sharma, Assistant Works Manager (AWM) Loco Workshop, Ajmer issued a memo Annex.A5 to the applicant stating that the applicant had shown slack working and exhibited a negative attitude in his work. Apprehending that respondent No.4, against whom the applicant had filed a complaint would cause harassment to the applicant, he gave a reply dated 8.5.95 (Annex.A6) praying that the applicant may be reverted. Thereafter, respondent No.4 made a complaint against the applicant on the basis of which a charge sheet dated 20.5.95 was issued to the applicant alleging that he had misbehaved with respondent No.4 in the presence of 11 other persons and the Works Manager. Enquiry Officer has been appointed to conduct enquiry into the charge sheet without waiting for the reply of the applicant to the charge sheet. Thereafter, letter dated 30.5.95 (Annex.A7) was issued to the applicant by the Works Manager (WM) stating that the said officer had reviewed the applicant's performance and had found his performance as not good. The applicant was advised in this letter to improve his performance. The applicant filed his reply dated 14.6.95

Q

(17)

(Annex.A8) to which no reply was received. Vide letter dated 20.7.95 (Annex.A9) adverse remarks recorded in the ACR of the applicant for the year ending 31.3.95 were communicated wherein the applicant's performance had been described as 'below average'. The applicant filed representation dated 24.8.95 (Annex.A10) against the adverse remarks. The order of reversion has been passed on the basis of the bad performance report, incompetence and general unsuitability alleged on the part of the applicant.

5. The applicant has further stated that he had made a complaint Annex.A12 dated 2.6.95 against respondent No.4 to the Western Railway Mazdoor Sangh (WRMS), (to which reference has been made above) on the basis of which the WRMS had made a complaint to the Chief Works Manager (CWM) by letter dated 10.7.95 (Annex.A11). In the applicant's complaint against respondent No.4, it was stated that respondent No.4 had pressurised the applicant on 22.3.95 to accept certain defective spare parts. When the applicant refused to do so, the respondents started harassing him. Annex.A5 dated 21.4.95 is a communication from respondent No.4 alleging certain technical lapses and deficiencies on the part of the applicant. Another letter Annex.A7 dated 30.5.95 was issued to the applicant by the W.M, alleging certain lapses, etc. on the part of the applicant in which a false allegation was made against the applicant that he had not ensured the presence of a Crane Driver on 28.5.95 which in fact happened to be on Sunday, a rest day, 'for the applicant and the Crane Driver, as stated above. The allegations contained in Annexes.A5 and A7 were not of a serious nature. The issue of charge sheet dated 20.7.95 to the applicant shows the malafides/ulterior motive against the applicant and the order of reversion has been passed to save respondent No.4 and to pressurise the applicant to withdraw the complaint against him.

(h)

6. Further according to the applicant, he has been working directly under the WM from 15.10.94 to 22.3.95, as stated in letter Anxx.A7 dated 30.5.95. There was no complaint against the applicant during this period. It has been stated in the said letter that from 22.3.95 onwards when he was posted in Engine Block Section, his performance was found to be bad. However, in the adverse ACR entries communicated to the applicant vide Anxx.A9, it has been stated that his performance has been 'below average' for the period from 1.4.94 to 31.3.95. The applicant had been promoted as Shop Superintendent in October 1994 and if during part of 1994 his performance was not satisfactory, it was not clear how he was promoted as Shop Superintendent and posted in a responsible section. Thus, the complaints against the applicant and the adverse ACR are the outcome of a conspiracy against the applicant by the respondents "alongwith respondent No.4, Shri H.V.Sharma".

7. The applicant has further stated that promotion to the post of Shop Superintendent scale 2375-3500 is on the basis of seniority alone, the suitability being judged on the basis of the service record. The applicant was promoted as he was the seniormost person. Though the promotion has been made on ad hoc basis, it is really not ad hoc because he is the seniormost person appointed against a clear vacancy after having been found suitable. In the order of promotion, Anxx.A4 it has been stated that the competent authority has approved the applicant's promotion but the order of reversion Anxx.A1 has been by a subordinate authority. Inefficiency (described by the applicant in the O.A as "insufficiency") has been described as the reason for reversion. The allegation regarding inefficiency against him was in fact the outcome of his dispute with respondent No.4. It was not such a deficiency for which the applicant was required to be reverted immediately. He ought to have been given an opportunity to improve his performance.

h

(19)

There was no proper review of his performance on the basis of which letter Annx.A7 dated 30.5.95 was issued which is the basis of reversion of the applicant.

8. The respondents in their reply have stated that the vacancy created by retirement of Shri Hakim Singh against which the applicant was appointed on ad hoc basis was reserved for a candidate belonging to a Scheduled Tribe (ST) although Shri Hakim Singh was a general category employee. Therefore, on his retirement this vacancy was to be filled by an ST candidate on the basis of percentage of reservations for SC and ST candidates and the 40 Point Roster. There were 7 posts of Shop Superintendent out of which one each was required to be filledup by reservation by SC & ST candidate. The post vacated by Shri Hakim Singh fell against the slot of the ST post. Therefore, the applicant's claim that since Shri Hakim Singh belonged to a general category, the post occupied by the applicant on retirement of Shri Hakim Singh should be treated as a general category post has no relevance.

9. The respondents have denied that there were no complaints against the performance of the applicant. Right from the date when he was promoted as Shop Superintendent, there were complaints against him and he was orally advised from time to time to improve his performance. Since there was no improvement in his performance, it was decided to utilise his services on the Shop Floor by transferring him on 22.3.95. Even then he did not improve his performance. A memo dated 21.4.95, Annx.A5 was issued to him. In his letter dated 8.5.95 (Annx.A6) by which the applicant asked for reversion, he tried to hide his shortcomings by making allegations against respondent No.4. Dis-satisfaction of respondent No.4 was not against the applicant personally but on account of his performance. Charge sheet dated 20.5.95 (Annx.P2) was issued to the applicant

QJ

(20)

for his misbehaviour with respondent No.4 on 9.5.95 in the presence of the Senior Officers present in the meeting. However, the issue of the charge sheet has no relevance to the controversy of the present case.

10. The respondents have further stated that letter dated 30.5.95 (Annex.A7) had been issued by WM (Diesel) to the applicant disclosing the assessment of the performance of the applicant made in an objective manner. The reply dated 14.6.95 (Annex.A8) to the said review was taken note of and it was not considered necessary to send any reply to the applicant. The date 28.5.95 mentioned in Annex.A7 when the Crane Driver was not made available by the applicant had been wrongly mentioned due to a typographical error and the correct date was 26.5.95. The applicant has replied to the adverse remarks in the ACR in a vague fashion. The applicant's representation against the ACR entries had been rejected and therefore, these had attained a finality and cannot be questioned by him now. The applicant's performance for the period from 1.4.94 to 31.3.95 had been properly assessed and this included his performance during the period from 15.10.94 to 22.3.95, for the purpose of writing of his ACR. They have denied that there was any conspiracy against the applicant. The allegation of conspiracy has been made against all the respondents which include the Union of India through General Manager, Western Railway, the Chief Works Manager (Diesel) but it has not specified which of these two respondents had hatched the conspiracy. The respondents have further stated that the order of reversion has been passed on the basis of the applicant's unsuitability and poor performance and therefore it is an order of reversion simplicitor and does not cast any stigma on him. The reversion order is, therefore, not penal in nature. His promotion to the post of Shop Superintendent was made primarily on the basis of the fact that

A.J

he was the seniormost person in the cadre of Junior Shop Superintendents at the relevant time. They have denied that the order of reversion was passed with a view to saving respondent No.4 and for pressurising the applicant to withdraw the complaint against respondent No.4. They have denied all the allegations made against respondent No.4. Further according to them, it has been clearly stipulated in the promotion order dated 2/3.12.94 (Annex.A4) that the promotion is ad hoc and temporary and does not confer any right on the applicant to continue on the post or to claim any promotion on a regular and permanent basis. The order of reversion has been passed with the approval of the competent authority and was signed by respondent No.3, Mr.M.A.Bohra, Sr.Personnel Officer, wherein it has also been mentioned that the order has received the approval of the competent authority.

11. Finally, the respondents have taken the stand that under Rule 18 of the Railway Servants (Discipline & Appeal) Rules, the applicant has a statutory remedy available to him of filing an appeal to the appellate authority against the order of reversion but he approached the Tribunal without availing himself of the said remedy. The O.A has been admitted without hearing the respondents on the point regarding availing of an alternative remedy before approaching the Tribunal and therefore, the respondents are, within their right to raise this objection as to the maintainability of the O.A, even now.

12. During the arguments, the learned counsel for the applicant stated that upto 31.3.95, no warning or showcause notices had been issued to the applicant with regard to his performance. Thus, there was no justification for holding that the performance of the applicant for the year ending 31.3.95 was not upto the mark. The applicant's promotion though termed

9.1

(92)

as ad hoc was infact regular in nature for the reasons given in the O.A, and since the post which he occupied on its being vacated by Shri Hakim Singh was not in fact meant for an ST candidate, the applicant could be deemed to have been appointed on it on a regular basis. To the reply to the respondents, Miscellaneous Application, for vacation of the stay granted, the applicant had annexed a copy of the letter dated 28.4.82, which had been referred to by the respondents in Annex.A1, laying down the policy under which the applicant had been reverted. In this letter, it is provided that reversion of an employee should take place only after the incumbent had been warned for unsatisfactory performance and after his subsequent performance has been watched after the warning. In the instant case, although Annex.A7 could be construed as a warning to the applicant, there was no review or watching of the performance of the applicant subsequent to the review of the performance of the applicant referred to in the letter dated 30.5.95 (Annex.A7), as contemplated in letter dated 28.4.82, referred to above, as is apparent from the fact that there was no subsequent communication to the applicant before the order of reversion was passed. Therefore, according to him, Annexure:A1, reverting the applicant has been passed in violation of the instructions contained in the letter dated 28.4.82.

13. The learned counsel for the applicant added that the applicant had not made any allegations of malafides against Shri M.A.Bohra, Sr.Personnel Officer, apart from stating that Shri Bohra had signed the order of reversion of the applicant. However, the applicant had made serious allegations against Shri H.V.Sharma, AWM. The said Shri Sharma had not filed a personal affidavit refuting the allegations made against him. In their judgment in the case of S.Pratap Singh Vs. State of Punjab, AIR 1964 SC 72, the Hon'ble Supreme Court had held that



(23)

if allegations of personal character are made against a person, if these are true and made out by acceptable evidence, these could be countered by documentary evidence, etc, and in the absence of such evidence, these could be disputed by the parties against whom the allegations were made by denying these on oaths. The same view had been taken by the Hon'ble Supreme Court in their judgment in Express Newspapers Pvt.Ltd. & Ors. AIR 1986 SC 872. Since Shri Sharma had himself not filed any affidavit denying the allegations made against him, it should be taken that the allegations made against him are true and therefore, the applicant had been reverted on account of the malafide action of Shri H.V.Sharma.

14. He next referred to the judgment of Calcutta Bench of the Tribunal in the case of Madan Mohan Singh Vs. Union of India & Ors, 1989(6) SLP 322 wherein the Tribunal held that where an order of reversion to a lower post was sought to be justified on the ground of unsuitability of the employee judged from the angle of his refusal to perform a particular piece of work ordered by the superiors, the reversion cannot be taken as having been ordered on the ground of general unsuitability or an administrative ground unconnected with his conduct. The Tribunal had held that the impugned order of reversion cast a stigma on the applicant and therefore, he could not have been reverted without holding an enquiry. Same is the position in this case because it is not merely on ground of general unsuitability that the applicant has been reverted to the lower post. In the case before the Calcutta Bench also, the Tribunal had held that the reversion order did not fall within the purview of the Railway Board's circular dated 28.4.1982. According to the learned counsel for the applicant, the present order of reversion also does not fall within the purview of the said circular.

Q

24

15. The learned counsel for the applicant next cited the judgement of Delhi Bench of the Tribunal in Mrs. Neelima Bhatnagar Vs. Union of India and others, (1989) 9 ATC 601, wherein the Tribunal had held that an order of reversion of the applicant in that case, appointed as an Auditor, to the post of L.D.C., amounted to imposition of a major penalty and, therefore, the order passed, without following the procedure laid down under Rule 14 of the CCS (CCA) Rules, was unsustainable in that case. Even though a show-cause notice was issued before reverting the applicant, this was not considered a justifiable ground for ordering reversion. He, thereafter, referred to the judgement of Calcutta Bench of the Tribunal in Madhab Ch. Das Vs. Union of India and others, 1989 (3) SLR 153, wherein the Tribunal held that reversion of the employee concerned to a lower grade for irresponsible and inefficient performance without following the principles of natural justice was not maintainable, because the order of reversion cast a stigma on that applicant. He also referred to the judgement of the Calcutta Bench of the Tribunal in Smt. K.J. Siddiqui Vs. Union of India and others, 1991 (1) SLR 178, in which the Tribunal held that the order of reversion passed in that case was in order to punish the applicant though it was ostensibly passed for correcting an administrative error and was in colourable exercise of power by the official respondents. Therefore, the order of reversion was quashed. In the instant case also, according to the learned counsel for the applicant, the order of reversion was a colourable exercise of power as seen from the position stated in Annexure-A7 which was even factually not correct. One patent factual error in Annexure-A7 was that while it was alleged that the applicant had failed to arrange for Crane Driver on 28.5.95, this day happened to be a

Q.S

Sunday and therefore, the rest day for the applicant and the Crane Driver. He also referred to the judgement of the Hon'ble Supreme Court in Harpal Singh Vs. State of U.P. and another, ATR 1988 (1) SC 77 in which after adverse entries were recorded for 4 successive years in the ACR of the appellant in that case, his services were terminated. The foundation of the order of termination was the adverse entries in the ACR. The Hon'ble Supreme Court held that the order passed in this case had cast a stigma on the appellant and therefore, he was entitled to defend himself in proceedings provided under the rules applicable to him. The order of termination was, therefore, quashed. Thereafter, he referred to the judgement of the Cuttack Bench of the Tribunal in V.Natesan Vs. Union of India and others, ATR 1987 (2) CAT 324 (short note), wherein the applicant was reverted from the higher post wherein he had worked for more than 33 months, to the post formerly held by him on account of unsatisfactory work, without any disciplinary proceedings being initiated against him. The Tribunal held that the impugned order was not valid and that the applicant could not be reverted without disciplinary proceedings being held against him. He then referred to judgement of the Hon'ble Supreme Court in K.H.Phadnis Vs. State of Maharashtra, 1971 (1) SCC 790. In this case the appellant was repatriated from the temporary post of Controller of Food Grains Department Bombay to his parent Department of Excise and Prohibition. In the facts and circumstances of the case, the Hon'ble Supreme Court held that the applicant's reversion to the parent Department was in the nature of punishment and, therefore, the order was not in compliance with the provisions of Article 311 of the Constitution. He also referred to the judgement of the Hon'ble Supreme Court in State of Uttar Pradesh and others Vs. Sughar

(A)

(26)

Singh (1974) 1 SCC 218. In this case the Hon'ble Supreme Court held that even where an official has no right to hold a post, he can not be reverted in a manner which will show conclusively that the intention was to punish him. He also relied upon the judgement of Allahabad Bench of the Tribunal in Suresh Kumar Vs. Union of India and others, 1987 (3) SLF 186, in which the applicant was reverted to his substantive post of Assistant Station Master from that of Traffic Apprentice due to his suspension for misbehaviour. During the suspension, disciplinary proceedings were initiated but not completed. The Tribunal held that reversion in such circumstances had visited the applicant with evil consequences. He also relied upon the judgement of the Calcutta Bench of the Tribunal in Samir Chandra Banerjee Vs Union of India and others, (1989) 11 ATC 752, in which it was held that where adhoc appointment had continued for 18 months, reversion from such appointment without considering fitness for empanelment in terms of Railway Board's directions in circular No. 207 of 1988 was not permissible. He also relied upon the judgement of the Hon'ble Supreme Court by a Five-Judge Bench in Jagdish Mitter Vs. Union of India, AIR 1964 SC 449, in which an order of discharge of a temporary government servant stating that he was found to be undesirable to be retained in government service was held to be an order of dismissal and therefore, provisions of Article 311 (2) had to be complied with before such an order could be passed.

16. He added that since a stigma has been cast on the applicant while reverting him from the higher post, which he had a right to hold in view of factual position stated above, the reversion was penal in nature. Since this reversion has been ordered without holding any disciplinary proceedings

hj

(29)

against him, therefore, in view of the provisions of Article 311 of the Constitution, the order was liable to be quashed and the applicant was entitled to continue on the post of Shop Superintendent.

17. The learned counsel for the respondents stated during his arguments that order Annexure-A² promoting the applicant to the post of Shop Superintendent was passed purely on the basis of seniority, in leave vacancy, and his suitability for promotion had not been assessed before passing the order. The same was the position when orders at Annexures-A3 and A4 were passed continuing him on the higher post, although in terms of Annexure-A4 he was continued on the higher post on account of retirement of one Shri Hakim Singh who was occupying a vacancy which was infact reserved for an ST candidate. Since the roster points reserved for ST candidates had not been filled up, the ratio of the Hon'ble Supreme Court's judgement in the case of R.K.Sabharwal and others Vs. State of Punjab and others, 1995 (1) SLR 791 did not bar this post being treated as reserved for an ST candidate, although earlier it was filled up by appointing a general category candidate. Thus the applicant's promotion to the post of Shop Superintendent was purely adhoc and he had not acquired any right to hold the post. He referred to the meaning of "incompetence" (अक्षमता) used in order Annexure-A1 reverting the applicant and stated that in the Chambers 20th Century Dictionary, the meaning of this expression has been given as "grossly deficient in ability in one's work". The order of reversion could be passed where it was found that a government servant was not competent to perform his duties and such an order cannot be assailed as penal in nature, in a situation where the government servant concerned has acquired no right to hold the post. The applicant's reply at Annexure-A6

W

26

to the first letter of caution and warning at Annexure-A5 does not in fact controvert what has been stated in the communication Annexure-A5. Annexure-A7 is a review of the applicant's performance and it was only thereafter that he was reverted to the lower post. He admitted that the mention in Annexure-A7 that on 28-5-95, the applicant had not arranged the Crane Driver was factually incorrect, inasmuch as the correct date on which this failure was caused by the applicant was 26-5-95. However, and even if it is accepted that on 28-5-95 there was ^{no} ~~h~~ such failure as alleged on the part of the applicant, this did not invalidate the other points mentioned in Annexure-A7 while assessing performance of the applicant. He added that it was not necessary that in terms of letter dated 28-4-82 (annexed to the applicant's reply to the Misc. Application seeking vacation of interim directions) there had to be a second review before reverting the applicant on account of poor performance. According to him, the contents of letter dated 28-4-82 could not be construed that rigidly.

18. He further stated that no clear malafides has been alleged against any of the officers and the allegations about malafides were vague. Relying on the Hon'ble Supreme Court's judgement in State of Punjab and others Vs Chaman Lal Goyal, 1995 (1) SLR 700, he urged ^{that} ~~h~~ in such circumstances no notice should be taken of the allegations of malafides against any officer. As regards the chargesheet issued to the applicant for misbehaviour (Annexure-R2) that was quite a separate matter for which disciplinary proceedings in accordance with the rules has been initiated against the applicant and that matter could not be dragged into the present controversy because that is not the basis of reversion of the applicant.

QJ

(29)

19. He relied upon a number of judgements to urge that the order of reversion in the present case could not be considered to be penal in nature. In *Union of India and others Vs. P.S.Bhatt*, 1981 (1) SLJ 212, the Hon'ble Supreme Court held that the reversion of the respondent in the case before it was without attaching any kind of stigma. In this case, the respondent an employee of All India Radio had been indulging in loose talk and filthy and abusive language against the Station Director and other officers and this may lead to the formation of a reasonable belief in the minds of the authorities that the person behaving in such a fashion is not a suitable person to be employed on the higher post of Producer. The undesirable conduct on the part of the respondent might have been the motive for terminating the employment of the respondent on the higher post, held by him on probation, and for reverting him to his old post. Even if misconduct, negligence, inefficiency may be the motive or the inducing factor which influences the authority to terminate services of an employee on probation, such termination according to the Hon'ble Supreme Court cannot be termed to be a penalty or punishment. Thereafter, he relied upon the judgement of Hon'ble Supreme Court in *R.S.Sial Vs. The State of U.P. and others*, 1974 SLJ 396, wherein it was held by the Hon'ble Supreme Court that even though misconduct, negligence, inefficiency or other disqualifications may be the motive or inducing factor which influence the Government to take action under the express or implied terms of contract of employment or under statutory rules, nevertheless if a right exists under the contract or under the rules to terminate the services, the motive operating in the mind of the Government is wholly immaterial. The same rule would hold good according to the learned counsel for the respondents, if the order passed is

AJ

not for termination of services but for reversion of a government servant from a higher to a lower post which he does not hold in a substantive capacity. He also relied upon the judgement of Hon'ble Supreme Court in S.P. Vasudeva Vs. State of Haryana, 1976 SLJ 271, wherein it was held on the facts of that case that reversion from the adhoc post of Legal Assistant in the office of Deputy Commissioner, Karnal to his parent office, that of Chief Engineer, P.W.D. did not violate provisions of Article 311 of the Constitution, as the applicant had no right to hold the post and the order of reversion did not cast any stigma on him. In State of U.P. Vs. Ram Chandra Trivedi, 1976 SLJ 583, it was held by the Hon'ble Supreme Court that where an order of termination is that of termination simpliciter, the court could not be invited to go into the motive behind the order. In Commodore, Commanding Southern Naval Area, Cochin Vs. V.N. Rajan 1981 (2) SLJ 48, the Hon'ble Supreme Court held that the termination of services of temporary employee on ground of unsuitability for the post which he held, without casting any stigma on him, was not by way of punishment. He then referred to the judgement of the Rajasthan High Court in Narpat Singh Phati Vs. State of Rajasthan and others, wherein it was held, relying upon the judgement of the Constitution Bench of the Hon'ble Supreme Court in the State of Orissa and another Vs. Ram Narayan Das, 1961 SC 177, that where the services of an employee were terminated on ground of his work not being found satisfactory, an observation of this nature in the order of termination cannot be said to be an expression of stigma and the provision of Article 311 would not be attracted. In the judgement in Ram Narayan Das case, the Hon'ble Supreme Court had held that in the order of discharge in the case of probationer, observation like "unsatisfactory work and conduct" did not amount to a stigma.

h.s

20. The learned counsel for the respondents next relied upon the judgments of the Hon'ble Supreme Court in State of U.P & Anr. Vs. Kaushal Kishore Shukla, 1991(2) SLJ 96, Triveni Shankar Saxena Vs. State of U.P & Ors, 1992(3) SLP 128, State of U.P & Anr. Vs. Kumari Premlata Mishra 1994(2) SLP 708, Commissioner, Food & Civil Supplies, Lucknow & Anr. Vs. Prakash Chandra Saxena & Anr. 1994(4) SLP 447 and Ram Chandra Tripathi Vs. U.P Public Service Tribunal IV & Ors, 1994 (2) SLR 27, in support of the view that where reversion of a temporary employee, not entitled to hold the post had been effected by an order of termination simpliciter without casting a stigma on him, such order of reversion could not be questioned as being violative of provisions of Article 311(2) of the Constitution. In the case of Kaushal Kishore Shukla and the three cases referred to above thereafter, the termination of the services of the persons concerned had been effected by passing an order of termination simpliciter and these orders have been upheld by the Hon'ble Supreme Court. The same principle, according to him, would be applicable where reversion of an employee not entitled to hold the higher post had been effected to the lower post on the ground of his unsuitability, etc, to hold the higher post.

21. We have heard the learned counsel for the parties and have gone through the material on record including the rejoinder filed by the applicant to the reply of the respondents and the reply filed by the applicant to the Miscellaneous Application filed by the respondents praying for vacating the interim direction issued by the Tribunal.

22. The issues to be considered in this case can broadly be described as under:

(i) Whether malafides can be said to have been established against those respondents against whom these have been alleged in the O.A and who have been impleaded either by name or

4

(3D)

otherwise in the O.A.

(ii) Whether the respondents had material before them to justify the reversion of the applicant and whether proper procedure had been followed in reverting the applicant.

(iii) Whether the applicant's appointment to the post of Shop Superintendent was by way of promotion on ad hoc/temporary basis or whether it could be described to be regular in nature, and therefore, whether the applicant could be said to have acquired a right to hold the post of Shop Superintendent.

(iv) Whether on account of the wording of the order of reversion, a stigma had been cast on the applicant, thereby making the order penal in nature and therefore whether the procedure of regular disciplinary proceedings should have been followed before reverting the applicant, in view of the provisions of Article 311(2) of the Constitution.

(v) Whether the reversion order has been passed by the authority not competent to pass it.

23. As regards the issue of malafides, the applicant has impleaded Shri M.A.Bohra, Sr. Personnel Officer, as respondent No.3 and Shri H.V.Sharma, AWM(Diesel), as respondent No.4, both by name. Shri Bohra had signed the order of reversion of the applicant. During the arguments, the learned counsel for the applicant conceded that the applicant had nothing personal against Shri Bohra and therefore, the allegations of malafides against him, if any made, need not be pursued. The allegations of malafides against Shri H.V.Sharma, respondent No.4, are to the effect that he was prejudiced against the applicant due to a complaint made against him by the applicant. Shri Sharma has not denied the allegations on oath. It was, therefore, the case of the learned counsel for the applicant that in view of the judgments of the Hon'ble Supreme Court in the cases of S.Pratap Singh and Express Newspapers, relied upon by him, the allegations against Shri Sharma should be taken to be true and

Q1

(33)

it should be assumed that Shri Sharma has acted malafide in the matter of taking action of reversion against the applicant. What we find however is that the order of reversion Annex.A1 has been signed by Shri M.A.Bohra, on behalf of the Chief Works Manager. Shri H.V.Sharma was an Asstt. Works Manager, a supervisory authority under whom the applicant worked for some time presumably from 22.3.95 onwards. Shri H.V.Sharma had issued Annex.A5 dated 21.4.95, adversely commenting upon the performance of the applicant and asking him to improve his performance. However, Annex.A7 dated 30.5.95, reviewing the performance of the applicant had been issued by the Works Manager who was the Controlling Authority for the applicant, although it appears that Shri H.V.Sharma, respondent No.4 was an intermediate supervisory authority. We had called for the original ACR of the applicant for the year 1994-95 in which the applicant's performance had been adversely commented upon (as per communication Annex.A9) and we find that the Reporting Authority for the applicant was the Works Manager, Shri Laxmi Narayan, who had recorded his remarks as Reporting Officer on 22.5.95. It is on this basis that we hold that the WM was the Controlling Officer for the applicant for the year 1994-95. If it was on the basis of the performance of the applicant as assessed by the Works Manager in the ACR of the applicant that he was reverted, malafides should have been alleged against the Works Manager, but he has not been impleaded in the O.A either by name or even by designation. Review of performance as per Annex.A7 has also been done by the Works Manager which could be the basis of the reversion of the applicant. Annex.A5, was issued well before Annex.A7 was issued. Shri H.V.Sharma, respondent No.4 was neither the Reporting Authority for the applicant nor had he passed the order of reversion of the applicant. The applicant has also not presented any material to show how respondent No.4 was responsible for passing the order.

(1)

of reversion of the applicant, or how he hatched a conspiracy to harm the applicant although some vague allegations to this effect have been made in the O.A. We are not, therefore, persuaded that it was on account of any malafide action on the part of respondent No.4 that the applicant was reverted. Allegations of malafides have not been pressed against Shri M.A. Bohra. Therefore, we cannot hold that it was on account of the malafide action of any of the respondents that the applicant came to be reverted. Although Shri H.V.Sharma has not denied the allegation of malafides against him on oath, yet since he had no role to play in the matter of applicant's reversion, it cannot be held that it was on account of malafide action of Shri H.V.Sharma, that the applicant was reverted. Hence, the judgments in S.Pratap Singh case ^{and} Express Newspapers case would be of no relevance as far as facts of this case are concerned. On the other hand, in view of the Hon'ble Supreme Court's judgment in Chaman Lal Goyal case, it has to be held that since the allegations of malafides against the respondents are not clear and specific, but are rather vague, the action of the respondents in reverting the applicant cannot be termed as due to malafides on the part of respondents. (Incidentally, we also perused the file relating to the allegations made against respondent No.4 by the applicant through the Union and found that a preliminary investigation had already been conducted which showed that the allegations against respondent No.4, had no substance).

24. Regarding the procedure followed in reverting the applicant and the material on the basis of which reversion had been ordered, it is seen that the applicant's performance was reviewed by Annexes A5 & A7 dated 21.4.95 and 30.5.95, respectively. In the ACE for the year ending 31.3.95, several adverse remarks had been recorded by the Works Manager and the applicant's overall performance had been rated therein as

9

'below average'. Thus, the respondents had material before them to come to the conclusion that the applicant was not fit to be continued on the post to which he had been promoted vide order dated 15.10.94 (Annex.A2). It is, no doubt true that there is a wrong mention of a date in Annex.A7 on which the applicant failed to perform certain duty but that does not invalidate the contents of rest of Annex.A7. We cannot read the contents of the instructions dated 28.4.82, which are annexed to the applicant's reply to the Miscellaneous Application filed by the respondents for vacating the interim stay order, too rigidly to conclude that after the review by Annex.A7, another formal review should have been carried out before reverting the applicant. What we have to see is whether there was material before the respondents on the basis of which they took the decision to revert the applicant. We cannot go into the question of adequacy of the material, as if we are acting as an Appellate Authority. Even before recording the adverse remarks in the ACR the applicant had been warned/ advised orally from time to time by the respondents to improve his performance. In these circumstances, we cannot question the procedure adopted by the respondents ~~or~~ on the basis for reverting the applicant, i.e. the availability of the material on the basis of which such decision was taken.

25. Now, we may consider the nature of the appointment of the applicant on the post of Shop Superintendent to which he was promoted by Annex.A2 dated 15.10.94 and from which he has been reverted. Annexes.A2, A3 and A4 are successive orders by which the applicant was continued on the post of Shop Superintendent after his promotion thereto by order Annex.A2. Order Annex.A2 describes the applicant's promotion to the aforesaid post as temporary and on ad hoc basis, on the basis of seniority. It has, further been clarified in the said order that the promotion is temporary and the official will have no

Q.W

(36)

right to claim to continue on the post either on a regular or permanent basis. In orders Annexs.A2 and A3, it was stated that the applicant was to hold the post of Shop Superintendent on account of the incumbents proceeding on leave. In Annex.A4, it was stated that he had been continued on the post on account of its being vacated by Shri Hakim Singh, on retirement. We are of the view, that we do not have to go to the question whether vacancy arising on account of the retirement of Shri Hakim Singh, should go to an ST candidate. Regardless of the category of the candidate to whom that particular vacancy should go, the fact remains, as revealed by the orders Annexs.A2, A3 and A4, that the applicant's own appointment on promotion to the post of Shop Superintendent was ad hoc, temporary, granted only on the basis of seniority and that he had no right to claim to continue on that post. Therefore, we hold that the applicant had acquired no right to hold the post.

26. Next question is whether by the language used in Annex.A1 a stigma has been cast on the applicant thereby making the order penal in nature. The order is in Hindi. A free translation of the operative part of the order Annex.A1 dated 7.9.95 by which the applicant was reverted is as under: "Subject: Reversion on account of general unsuitability. Shri Abdul Quaiyoom was appointed to the post of Shop Superintendent scale Rs.2375-3500 on ad hoc temporary basis against a leave vacancy. However, on account of his continuous bad performance report, incompetence and general unsuitability, his reversion has ordered with immediate effect to his original lower post of Junior Shop Superintendent scale Rs.2000-3200 after following the policy laid down in letter dated 28.4.82, issued by the Railway Board. This order has been issued with the approval of the competent authority."

This order is signed by Shri M.A.Bohra, on behalf of the Chief Works Manager, Workshop Ajmer.

(32)

27. So what has been stated in this order is that his reversion has been ordered on account of the applicant's bad performance report, incompetence and general unsuitability. According to the learned counsel for the applicant, the cumulative effect of the various expressions used while reverting the applicant was that the order was penal in nature. He has particularly taken objection to the use of the expression 'incompetence' because if the applicant was initially promoted on this post even on ad hoc basis, the authorities must have considered him competent enough to hold this post.

28. This issue has been considered in some of the judgments cited by the learned counsel for the parties. However all the judgments cited are not quite relevant to the issue. The issue has to be considered from the standpoint whether the applicant had a right to hold the post and whether by the order of reversion, he had been penalised. Several of the judgments are on the question whether in these circumstances, the services of the official could be terminated, but even where a person is reverted to a lower post, the same considerations will have to be borne in mind. Judgment of the Tribunal in Madan Mohan Singh case will have no applicability here, because the facts of that case show that the reversion of the applicant was sought to be justified only on the ground of his unsuitability judged from the angle of his refusal to perform a particular piece of work ordered by his superiors. That is not the position in this case because the reversion here is mainly on ground of general unsuitability and incompetence. In Neelima Bhatnagar case the decision by the Tribunal that the procedure followed by the respondents attracted the principle of natural justice was given on its own facts. Moreover, in this judgment of the Tribunal none of the judgments of the Hon'ble Supreme Court as to whether the applicant had a right to hold the post

36

and whether the order of reversion was in fact penal in nature have been considered. In Madhab Chandra Das case also none of the judgments of the Hon'ble Supreme Court on the issue were either considered or discussed. In Smt. K.J. Siddiquis case, the Tribunal had found on the facts of that case that the order of reversion was passed to punish the applicant in colourable exercise of power. In this judgment also, however, the judgments of the Hon'ble Supreme Court regarding the right to hold a post and whether an order of termination/reversion is in fact penal in nature were not considered. The short notes in the case of V. Natesan, do not give us any clue as to the facts of that case and therefore, we cannot say whether this judgment has any relevance here. In Suresh Kumar case, also decided by the Tribunal, the applicant was initially suspended for misbehaviour and disciplinary proceedings were initiated against him but these were not concluded and the applicant was reverted. This case will also have no applicability in the facts of the present case, because no disciplinary proceedings were initiated against the applicant. The disciplinary proceedings initiated against the applicant vide Anxx.P2 are a separate matter and it is not on account of these pending disciplinary proceedings that the applicant had been reverted. In Samir Chandra Banarjee case, the reversion was quashed as being violative of the administrative instructions of the Railway Board in a case in which, an ad hoc appointment had continued for 18 months and reversion had been ordered from such appointment without considering fitness for empanelment in terms of the Railway Board's instruction. Here again what we find that the facts of the case on the basis of which this ~~decision~~ was given are totally different from those in the present case.

A/

29. The judgment of the Hon'ble Supreme Court in cases of Jagdish Mitter, Harpal Singh, Sughar Singh and K.H.Phadnis are relevant and will be considered later. The learned counsel for the respondents has also cited a number of judgments mostly of the Hon'ble Supreme Court which will also be considered alongwith those cited by the learned counsel for the applicant which are considered relevant.

30. The first judgment that we may consider now in the case of Kaushal Kishore Shukla. In this case, a preliminary enquiry was held against the respondent which revealed that the allegations against him were correct. Ultimately his services were terminated. The respondent was an ad hoc and temporary employee and was governed by the U.P Govt. Servants (Temporary Service) Rules. The order of termination was upheld by the Hon'ble Supreme Court. The following were some of the observations of the Hon'ble Supreme Court while upholding the order of termination:

"Para 6: ... Under the service jurisprudence a temporary employee has no right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service. If on the perusal of the character roll entries or on the basis of preliminary enquiry on the allegations made against an employee, the competent authority is satisfied that the employee is not suitable for the service whereupon the services of the temporary employee are terminated, no exception can be taken to such an order of termination."

"Para:7 A temporary government servant has no right to hold the post, his services are liable to be terminated by giving him one month's notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary government servants. A

Q

10

temporary government servant can, however, be dismissed from service by way of punishment. Whenever the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service ~~or~~ the relevant rules or it may decide to take punitive action against the temporary government servant. If it decides to take punitive action it may hold a formal enquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article 311 of the Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant, very often the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. It is now well settled that the form of the order is not conclusive and it is open to the Court to determine the true nature of the order. In *Parshotam Lal Dhingra Vs. Union of India*, 1958 SCR 828, a Constitution Bench of this Court held that the mere use of expressions like 'terminate' or 'discharge' is not conclusive and inspite of the use of such expressions the Court may determine the true nature of the order to ascertain whether the action taken against the government servant is punitive in nature. The Court further held that in determining the true nature of the order the Court should apply two tests, namely, (1) whether the temporary government servant had a right to the post or the rank or (2) whether he has been visited with evil consequences; and if either of the tests is satisfied, it must be held that the order of termination of a temporary government servant is by

Q

21

way of punishment. It must be borne in mind that a temporary government servant has no right to hold the post and termination of such a government servant does not visit him with any evil consequences. The evil consequences as held in Purushotam Lal Dhingra case do not include the termination of services of a temporary government servant in accordance with the terms and conditions of service. The view taken by the Constitution Bench in Dhingra case has been reiterated and affirmed by the Constitution Bench decisions of this Court in the State of Orissa Vs. Ram Narayan Das (1961) 1 SCR 606, R.C.Lacy Vs. State of Bihar, AIR 1964 SC 1054, Champaklal Chimanlal Shah Vs. Union of India (1964) 5 SCR 190, Jagdish Mitter Vs. Union of India, AIR 1964 SC 449, A.G.Benjamin Vs. Union of India 1967 SLR 185, Shamsher Singh Vs. State of Punjab supra. These decisions have been discussed and followed by a three Judge Bench in State of Punjab Vs. Sukh Raj Bahadur, (1968) 3 SCR 234."

In this judgment, the earlier judgments of the Constitution Bench of the Hon'ble Supreme Court in Purushotam Lal Dhingra case, Jagdish Mitter case and Shamsher Singh case have also been considered. Since the judgment in Jagdish Mitter case has been considered and explained by the Hon'ble Supreme Court in Kaushal Kishore Shukla case while laying ~~out~~ ^{down} the principles incorporated in paras 6 and 7 of the judgment, as referred to above, we need not separately consider the judgment of Jagdish Mitter case now. In Harpal Singh case, decided by a two Judge Bench of the Hon'ble Supreme Court, the Hon'ble Supreme Court's judgments in Shamsher Singh Vs. State of Punjab (1975) 1 SCR 814 and in Jagdish Mitter case were considered. In Shamsher Singh case, the Hon'ble Supreme Court had held that if a probationer is discharged on ground of misconduct or inefficiency or for similar reason without a proper enquiry and

92

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. However, in Commissioner Food & Civil Supplies case, also referred to above, the Hon'ble Supreme Court had held that Shamsher Singh case related to a judicial officer who had the protection of Article 355 of the Constitution and that any enquiry conducted by the executive into an alleged misconduct of such judicial officer would be per se illegal and without jurisdiction. In that situation, the Hon'ble Supreme Court had held that an enquiry having been initiated against the delinquent ought to be perused to its logical conclusion, either by holding him not guilty or by imposing penalty on him. This is how the ratio in Shamsher Singh case has been distinguished in Commissioner, Food & Civil Supplies case. Therefore, according to us, in view of the later judgments of the Hon'ble Supreme Court in Naushal Kumar Shukla case and Commissioner, Food & Civil Supplies case, the applicant cannot claim benefit of the judgment in Harpal Singh case. In K.H.Phadnis case, the Hon'ble Supreme Court had held, on the facts of that case, that where the appellant had been reverted from a temporary post in another department to which he was appointed on deputation, to his lower substantive post in his original department, the order was penal in nature. As is apparent from para 18 of the judgment, the case has been decided on its own facts which are different from those in the present case. In Sughar Singh case, the Hon'ble Supreme Court held that where an order of reversion shows that the intention was to punish the official, he could not be reverted except by following the provisions of Article 311 of the Constitution. In that case, an adverse entry was recorded in the ACF of the official to the effect that he was suspected to have got

QJ

entries of date of birth and educational qualifications altered on the authority of a fictitious certificate, which had to be corrected later on and that he had been severely warned on this count. Thereafter, the applicant was reverted from the higher officiating post to his lower substantive post. The Hon'ble Supreme Court held that the adverse entry was the foundation of the order of reversion. The Hon'ble Supreme Court, therefore, held that the order of reversion was really an order of punishment in disguise which therefore must be struck down for noncompliance with the requirements of Article 311 of the Constitution. This judgment was delivered by a two Judges Bench of the Hon'ble Supreme Court in 1973 and it appears to be in conflict with the three Judge Bench judgment by the Hon'ble Supreme Court in Kaushal Kishore Shukla case delivered in January 1990. Therefore, in the circumstances, we are of the view that the judgment in Kaushal Kishore Shukla case has to be followed, in preference to judgment in Sughar Singh case.

31. We do not have to discuss in detail the remaining judgments cited by the learned counsel for the respondents except stating that the judgment in Ram Chandra Tripathi case is not directly applicable to the facts of the present case. Suffice it to say that the judgment in Kaushal Kishore Shukla case was followed in Kumari Prem Lata Mishra case by the Hon'ble Supreme Court in which it was held that where termination is on account of unsuitability or unfitness it cannot be considered to be by way of punishment. However, we may also make a reference to Rajasthan High Court Judgment in Narpat Singh Bhati case in which a reference to a Constitution Bench decision of the Hon'ble Supreme Court in State of Orissa Vs. Ram Narayan Das AIR 1961 SC 177 has been made. In Ram Narayan Das case, the Hon'ble Supreme Court had considered the order of discharge of a Police Officer on probation and had

Q1



held that observations like unsatisfactory work and conduct in the order of termination would not amount to a stigma.

32. The position that emerges from the above discussion is that where an official has no right to hold the post, his termination or reversion to the lower post would not amount to imposition of a penalty on him. Further, if the order passed terminating his services or reverting him is on the ground of his general unsuitability and bad performance report, the order cannot be construed as penal in nature. In the instant case, since the applicant's appointment was on ad hoc, temporary basis, merely based on his seniority and in leave vacancies or other vacancies arising in similar situations, he had not acquired any right to hold the post of Shop Superintendent scale 2375-3500. Also there is material on record to suggest that his performance was consistently bad in the post of Shop Superintendent. The reversion has been ordered on an assessment of his general performance which has been found to be unsatisfactory and it is not founded on any specific act of misconduct. In our view, incompetence, inefficiency and general unsuitability are more or less interchangeable expressions or are different aspects of the same positions namely unfitness to hold the post. No specific act of misconduct has been alleged against the applicant while reverting him, which would justify initiation of disciplinary proceedings against him before passing the order of reversion. We have carefully considered all the judgments cited and the arguments advanced by the learned counsel for the applicant, but we find that the applicant's case is not advanced by these. In the circumstances, we are of the view that the order of reversion does not suffer from any vice of illegality.

33. Finally, the order of reversion cannot be justifiably assailed on the ground that it was passed by an authority



(43)

subordinate to the authority which had appointed the applicant. The order of promotion of the applicant had been signed by Shri M.A Bohra, Sr. Personnel Officer on behalf of the Dy. Chief Works Manager. The order of reversion has been signed by Shri M.A Bohra, on behalf of the Chief Works Manager. The order of reversion has, therefore, certainly not been passed by an authority subordinate to the one which had initially granted promotion to the applicant or had approved the order of promotion. Therefore, the order of reversion cannot be faulted on this ground either.

34. In the result, we find no merit in this O.A. It is, therefore, dismissed with no order as to costs. Since we have disposed of the O.A on merits, it is not necessary for us to give any findings or the preliminary objections raised by the respondents, as referred in para 11 (supra).

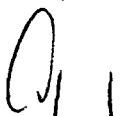
35. The interim direction issued on 9.10.95 stands vacated.



(Ratan Prakash)

2
L

Member (Judl.)



(O.P. Sharma)

Member (Adm.).