# IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH

Jaipur, this the 5th day of May, 2010

OA No.31/2009

CORAM:

HON'BLE MR. B.L.KHATRI, MEMBER (ADMV.)

Satish Chandra
s/o Shri Ram Lal,
aged 28 years
r/o Plot No.100, Shankar Nagar,
Kagdiwada Vistar Yojana,
Jaipur, last employed as
Peon in the office of Accountant General (A&E),
Rajasthan, Jaipur

.. Applicant

(By Advocate : Shri S.K.Vyas)

Versus

1. Dy. Controller and Auditor General of India, 10 Bahadur Shah Zafar Marg, New Delhi.

2. Accountant General (A&E), Rajasthan, Jaipur

3. Dy. Accountant General (Administration) O/o the Accountant General (A&E), Rajasthan, Jaipur

4. Sr. Accounts Officer (GD) O/o the Accountant General (A&E), Rajasthan, Jaipur

.. Respondent

(By Advocate: Shri Vijay Saini, proxy counsel for Shri S.S.Hasan)

BKL

# ORDER

Per Hon'ble Mr. B.L.Khatri, Member (A)

This OA has been filed against the order dated 1.6.2007 (Ann.A/1) whereby service of the applicant has been terminated under sub-rule (1) of Rule 5 of the Central Civil Service (Temporary Service) Rules, 1965. Through this OA, the applicant has prayed for the following reliefs:-

(a) That the illegal order of termination of services (Annexure A-1) may kindly be quashed.

(b) That the respondent No.4 may be directed to reinstate the applicant in service and to pay him the back wages for the period from 1.7.2007 to the date of reinstatement.

2. Brief facts of the case are that the applicant was appointed as Group-D (Peon) on 30.6.2005 in the office of the Accountant General (A&E), Rajasthan on compassionate grounds. On 9.1.2007 on his way to the office he met with an accident and was assaulted by some youths and sustained head injury resulting in temporary loss of memory. He was hospitalized, cured and became fit to join duty on 13.2.2007. He, however, could not submit any leave application or inform the office about his accident and hospitalization. He submitted leave application with medical certificate of illness and fitness on 13.2.2007 when he resumed his duties. He again suffered due to head injury and remained absent during the period from 19.2.2007 to 22.2.2007 and resumed duty on 23.2.2007 and submitted leave application with medical certificate. Thereafter the applicant was intimated by Sr. Accounts Officer vide

memo No. GD-I/Gr.D employees/07 TR-II dated 6.3.2007 that as he had remained absent without sanction/information or medical certificate of sickness, the leave applied for by him cannot be sanctioned and his case was sent to the legal cell for disciplinary proceedings. A show-cause memo dated 15.2.2007 (Ann.A/5) was also issued to the applicant by the Senior Accounts Officer (Legal Cell) O/o the Accountant General (A&E) Rajasthan, Jaipur as to why the disciplinary proceedings may not be initiated against him for absence without prior permission/information and medical certificate of sickness. The applicant submitted representation dated 28.3.2007 (Ann.A/6) to the Sr. Accountant General (Legal Cell) O/o the Accountant General (A&E) Rajasthan, Jaipur explaining that on account of accident he was unable to move out and could not contact anybody as there was no means available to him and that this omission of not sending information of accident/medical certificate of head injury had taken place on account of circumstances above mentioned and therefore he may not be proceeded against. But vide office order No.62 dated 10.5.2007 (Ann.A/7) passed by the Sr. Accounts Officer (GD), the period of absence from 9.1.2007 to 12.2.2007 and from 19.2.2007 to 22.2.2007 (total 35 days) was declared as 'Dies Non' and vide notice dated 1.6.2007 (Ann.A/1) served under the signature of Senior Accounts Officer (Admn.), O/o the Accountant General (A&E) Rajasthan, Jaipur the services of the applicant were terminated with effect from 1.7.2007 i.e. on the expiry of the period of one month from the date on which above notice was served.

3. The respondents have filed reply. In the reply they have stated that the averments made in Para 4(2) is an admission on the part of the applicant to the fact that he did not comply with the extant Leave Rules. Even he did not submit a copy of the FIR by 1.6.2007 i.e. the date of order of termination of his service. The applicant also did not submit medical certificate of his illness timely as envisaged in the rules, which is quiet evident as per Annexure A-4 itself. It is further stated that as a matter of fact, the applicant was habitual in absconding from his duty place on earlier occasions also. His period from 18.9.2006 to 20.9.2006 was declared dies-non for his unauthorized absence. Further, the applicant remained absence from his duties willfully and unauthorizedly and such period of absence was declare as dies non, as per the details given below:-

(i) 18.9.2006 to 20.9.2006 (03 days)
(ii) 9.1.2007 to 12.2.2007 (35 days)
(iii) 19.2.2007 to 22.2.2007 (04 days)
(iv) 1.5.2007 (01 day)

The respondents have further stated that the provisions of CCS (CCA) Rules, 1965 were not at all applicable to the applicant and the appointing authority has rightly invoked the provisions of CCS (Temporary Service) Rules, 1965 and in view of the misconduct of the applicant found to have been proved, his services were terminated in terms of Rule 5(1) of the said Rules.

4. The applicant has filed rejoinder thereby reiterating the submissions made in the OA.

5. The learned counsel for the applicant has vehemently contended that the absence of the applicant was treated as misconduct under CCS (Conduct) Rules, 1964 which is violative of Rule 3(i)(ii) and 3(i) (iii) thereof and therefore disciplinary proceeding under CCS (CCA) Rules, 1965 was contemplated and termination of service of the applicant under Rule 5(i) of CCS (Temporary Service) Rules, 1965 was illegal. The learned counsel for the applicant has relied upon the following case laws:-

i) Dipti Prakash Banerjee vs. Stavendra Nath Bose National Centre for Basic Sciences, Calcutt and Ors., AIR (SC) 1999) 983

ii) Ishwar Chand Agarwal vs. State of Punjab, AIR (SC) (1974) 2192

As regard the case law at Sl.No.i), the learned counsel for the applicant relied upon para 18 of this order, which reads as under:-

> "18. This Court in that connection referred to the principles laid down by Krishna Iyer, J. In Gujarat Steel Tube v. Gurajat Steel Tubes Mazdoor Sangh6. As to 'foundation', it was said by Krishna 'Iyer, J. as follows:-
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> ".....a termination effected because the master is satisfied of the misconduct and of the desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in different proceedings from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service, the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used."

In the case at Sl.No.ii), the learned counsel for the applicant relied upon by para 157 to 161, which read as under:-

> "157. The third contention , argued elaborately by both sides, turn on the scope and sweep of Article 311 in the background of the rules framed under Article 309 and the pleasure doctrine expressed in Article 310. the two probationers, who are appellants, have contended that what purport to be simple terminations of probation on the ground of unsuitability are really and in substance by way of punishment and falling short of the rigorous prescriptions of Art. 311 (2), they are bad. Their complaint is that penal consequences have been visited on them by the impugned orders and since even a probationers is protected by Article 311(2), in such situations the Court must void those orders. Naturally, the launching pad of the argument is Dhingras case AIR 1958 SC 36. In a sence, Dhingra is the Magna Carta of the Indian civil servant, although it has spawned diverse judicial trends, difficult to be disciplined applicable to termination of probation of into one single, simple, practical formula freshers and of the services of temporary employees. The judicial search has turned the focus on the discovery of the element of punishment in the order passed by Government. If the proceedings are disciplinary, the rule in Dhingra case is attracted. But if the termination is innocuous and does not stigmatise the probationer or temporary servant, the constitutional shield of Article 311 is unavailable. In a series of cases, the Court has wrestled with the problem of devising a principle or rule to determine this question-where non-punitive termination of probation for unsuitability ends and punitive action for delinquency being. In Gopi Kishore, AIR 1960 SC 689 this Court rules that where the State holds enquiry on the basis of complaints of misconduct against a probationer or temporary servant, the employer must be presumed to have abandoned his right to terminate simplicitor and to have undertaken disciplinary proceedings bringing in its wake the protective operation of Article 311. At first flush, the distinguishing mark would therefore appear to be the holding of an inquiry of an inquiry into the complaints of misconduct, Sinha, C.J., observed:
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> "It is true that, if the Government came to the conclusion that the respondent was not a fit and proper person to hold a post in the public service of the State, it could discharge him without holding enquiry into his alleged misconduct... Instead of taking that easy course, the Government chose the more difficult one of starting proceedings against him and of branding him as a dishonest and an incompetent officer. He had the right, in those circumstances, to insist upon the protection of Article 311(2) of the Constitution.

The learned Chief Justice summarized the legal position thus:

> "1. Appointment to a post on probation gives the person so appointed no right to the post and his services may be terminated, without taking recourse to the proceedings laid down in the relevant rules for dismissing a public servant, or removing him from service.
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> 2. The termination of employment of a person holding a post on probation without any enquiry whatsoever cannot be said to deprive him of any right to a post and is, therefore, no punishment.
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> 3. But if instead of terminating such a persons service without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct or inefficiency, or for some similar reason, the termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career, in such a case, he is entitled to the protection of Article 311(2) of the Constitution.
>
> 4. ....
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> 5. But, if the employer simply terminates the services of a probationer without holding an enquiry and without giving him a chance to showing cause against his removal from service, the probationary civil servant have no cause of action, even though the real motive behind the removal from service may have been that his employer thought him to be unsuitable for the post he was temporarily holding, on account of his misconduct, or inefficiency, or some such causes.

158. The 5th proposition states that the real motive behind the removal is irrelevant and the holding of an enquiry leaving an indelible stain as a consequence alone attracts Article 311(2). Ram Narayan Das AIR 1961 SC 177 dealt with a case where the rules under the proviso to Article 309 provided some sort of an enquiry before termination of probation. In such a case, the enquiry test would necessarily break down and so the Court had to devise a different test Mr. Justice Shah (as he then was) stated the rule thus:

> "The enquiry against the respondent was for ascertaining whether he was fit to be confirmed ... the third proposition in ... (the Gopi Kishore) case AIR 1960 SC 689 refers to an enquiry into allegations of misconduct or inefficiency with a view, if they were

found established to imposing punishment and not to an enquiry whether a probationer should be confimed. Therefore, the fact of holding of an enquiry is not decisive of the question. What is decisive is whether the order is by way of punishment, in the light of the tests laid down in Purshottam Lal Dhingra case AIR 1958 SC 36.

Thus a shift was made from the factum of enquiry to the object of the enquiry. Madan Gopal AIR 1963 SC 531 found the Court applying the object of enquiry doctrine to simple order of termination which has been preceded by a show cause notice and enquiry. It was held that if the enquiry was intended to take traumatic action, the innocent phraseology of the order made no difference. Then came AIR 1964 SC 449 where Mr. Justice Gajendragadkar (as he then was) held:

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

159. Thus, we see membranous distinction have been evolved between an enquiry merely to ascertain unsuitable and one held to punish the delinquent – too impractical and uncertain, particularly when we remember that the machinery to apply this delicate test is the administrator, untrained in legal nuances. The impact on the fired; individual be it termination of probation or removal from service, is often the same. Referring to the anomaly of the object of inquiry test. Dr. Tripathi ahs pointed out*:

> * Spotlights an Constitutional Interpretation-1972 – N.M.Tripathi Pvt.Ltd., Bombay.
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> "The object of inquiry rule discourages this fair procedure and the impulse of justice behind it by insisting that the order setting up the inquiry will be judicially scrutinized for the purpose of ascertaining the object of the inquiry.

Again, could it be that if you summarily pack off a probationer, the order is judicially unscrutable and immune? If you conscientiously seek to satisfy yourself about allegations by some sort of enquiry you get caught in the coils of law, however, harmlessly the order may be phrased ? And so, this sphinx-complex has had to give way in later

cases. In some cases the rule of guidance has been stated to be the substance of the matter and the foundation of the order. When does motive trespass into foundation ? When do we lift the veil of from to touch the substance ? When the Court say so. These Freudian frontiers obviously fail in the work-a-day and Dr. Tripathis observations in this context are not without force. He says.

> "As already explained, in a situation where the order of termination purports to be a mere order of discharge without stating the stigmatizing results of the departmental enquiry a search for the substance of the matter will be indistinguishable from a search for the motice (real, unrevealed object) of the order.
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> Failure to appreciate this relationship between motive (the real, but unrevealed object) and from (the apparent, or officially revealed object) in the present context has led to an unreal interplay of words and phrases wherein symbols like motive substance, form of direct parade in different combinations without communicating precise situation or entities in the world of facts.

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

161. In the result, we agree with the conclusion reached by the learned Chief Justice and concur in the order proposed by him."

6. The learned counsel for the respondents has relied upon the submissions so made in the reply and its annexures.

7, I have heard the rival submissions made by the parties and also perused the documents and the case laws. The plea of the learned counsel for the applicant is that it is not a case of termination of service simplicitor under Rule 5(1) of CCS (Temporary Service) Rules, 1965. He pleaded that absence of the applicant without sanction/information was treated as misconduct under CCS (Conduct) Rules, 1964 and violative of Rule 3(i)(ii) and 3(i)(iii) thereof and disciplinary proceedings under CCS (CCA) Rules, 1965 were comtemplated, as such, termination of service of the applicant under Rule 5(i) of CCS (Temporary Service) Rules, 1965 was illegal. From the material placed on record it is evident that the respondents, on the basis of the facts as mentioned in the order, have treated the absence of the applicant as dies-non without considering application of the applicant and also without taking into account the medical certificate submitted subsequently. The applicant vide para 4.5 have submitted that a show-cause memo dated 15.2.2007 was issued to the applicant by the Senior Accounts Officer (Legal Cell) O/o the Accountant General (A&E) Rajasthan, Jaipur as to why disciplinary proceedings may not be initiated against him for absence without prior sanction/information and medical certificate of sickness. Copy of the memo is annexed as Ann.A/5. The respondents have not denied the fact as mentioned in

para 4.5. However, they have stated that disciplinary proceedings have not been initiated, only show-cause notice was issued.

8. Law on this point is well settled. In the case of Parshotam Lal Dhingra vs. Union of India, AIR 1958 SC 36 it was held that if the servant has no right to the post, as where he is appointed to a post, permanent or temporary either on probation or on an officiating basis and whose temporary service has not ripened into a quasi-permanent service as defined in the Temporary Service Rules, the termination of his employment does not deprive him of any right and cannot, therefore, by itself be a punishment. It was also held in this judgment that if the Government has, by contract, express or implied, or, under the rules, the right to terminate the employment at any time, then such termination in the manner provided by the contract or the rules, is prima-facie and per se, not a punishment and does not attract the provisions of Article 311 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 requirement of Article 311 must be complied with.

9. Further, in the case of State of U.P. vs. Ram Chandra Trivedi, 1976 (2) SLR 859 it was held that both under the contract of service and the service rules governing the respondent, the State had a right to terminate his services by giving him one month's notice. The order in the instant case is ex-facie an order of termination of service simplicitor. It does not cast any stigma on the respondent nor does it visit him with evil consequences, nor is it founded on

misconduct. In the circumstances, the respondent could not invite the Court to go into the motive behind the order and claim the protection of Article 311 (2) of the Constitution.

10. In view of the above discussions, I am of the view that the OA is bereft of merit, therefore, In the result, it is dismissed with no order as to costs.

(B.L.KHATRI)
Admv. Member

R/