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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 01st May, 2023*

\+ W.P.(C) 10385/2021

NINA LATH GUPTA ..... Petitioner

Through: Mr. Gurminder Singh, Senior Advocate with Mr. Harshvardhan Jha, Mr. Abhishek Chaudhary, Mr. Aman Pathak and Mr. Gurnoor Sandhu, Advocates

versus

UNION OF INDIA, THROUGH SECRETARY, MINISTRY OF INFORMATION AND BROADCASTING & ANR. ..... Respondents

Through: Ms. Archana Gaur, Advocate for R-1/UOI

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. This writ petition has been filed by the Petitioner seeking the following reliefs:-

> *"(i) Issue a Writ in the nature of Certiorari quashing the Impugned Order dated 24.04.2018 (Annexure P-13) vide which services of the Petitioner have been illegally terminated as being cloaked as an order simplicitor while in fact its foundation is upon allegations of misconduct which is ex facie punitive and stigmatic, that too without affording her an opportunity of hearing or conducting an inquiry into the alleged misconduct which is in total contravention of the Service Rules of National Film Development Corporation (Annexure P-**20**) which are duly applicable to the Petitioner as per Clause 1.15 of her appointment letter 06.07.2007 (Annexure P-1) as also the cardinal principals of Natural Justice.*
>
> *(ii) Issue a Writ in the nature of Mandamus directing the Respondent No. 1 to reinstate the petitioner in service for the remaining period of her tenure which has been illegally denied to her and release all consequential benefits and further if at all the misconduct is to be looked into then conduct an inquiry as per the Service Rules of National Film Development Corporation (Annexure P-**20**) and afford an opportunity of hearing to the Petitioner to*

defend the allegations made against her in the Termination order dated 27.02.2018 which is the foundation of the Impugned Termination dated 24.04.2018 (Annexue P-13)

(iii) Call for the entire record of the case. And

(iv) Pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

2. Necessary and relevant factual matrix as brought forth by the Petitioner is that in the year 2005, the National Film Development Corporation (hereinafter referred to as the 'NFDC') issued an advertisement for appointment to the vacant post of Managing Director (hereinafter referred to as the 'MD') of NFDC. The appointment was for a tenure of 5 years with renewal clause. Petitioner applied and upon selection, was appointed to the post of MD for a tenure of 5 years w.e.f. 17.04.2006. Detailed terms and conditions of employment were communicated to the Petitioner later, *vide* letter dated 06.01.2007. Clause 1.15 of the Offer of Appointment provided that the NFDC Conduct, Discipline and Appeal Rules (hereinafter referred to as the 'NFDC Rules'), framed by Public Enterprises Selection Board, in respect of non-workmen category of staff, would mutatis mutandis apply to the Petitioner, with the modification that the Disciplinary Authority in Petitioner's case would be the Hon'ble President of India.

3. Upon completion of first 5-year tenure, Petitioner was granted two subsequent extensions for 5 years each, the last one being from 17.04.2016 to 16.04.2021. According to the Petitioner, the extensions were granted to her taking into account her unblemished service record and immense contributions to NFDC as its MD and purely on merit.

4. Petitioner avers that during the 12 years tenure as MD, Petitioner contributed by introducing various business verticals to

enhance the revenue of NFDC, the details of which have been furnished in the writ petition. On account of the new business verticals being established, NFDC's turnover saw an exponential increase in the last few years. Revenues grew exponentially from Rs. 17.21 crore in 2008-09 to Rs.251.24 crore in 2012-13. Under Petitioner's leadership, NFDC was presented with Turnaround Award, 2013 by the Board for Reconstruction of Public Sector Enterprise ('BRPSE') for posting profits for three consecutive financial years, post restructuring of NFDC.

5. As the facts unfold, Directorate of Advertising and Visual Publicity made a complaint against the NFDC on 06.01.2012, alleging violations of Electronic Media Advertisement Policy. Respondent No.1/Union of India, *vide* a Presidential Directive dated 07.06.2013, initiated an Inspection (Special Audit) of NFDC and subsequently, on 20.01.2014 issued a Draft Inspection Report and invited comments/ replies from NFDC. The Chairman, NFDC responded to the report and categorically pointed out that the allegations were unfounded and baseless and NFDC had not committed any wrongdoing, as alleged. With a view to examine the issues emanating from the special audit of NFDC, Respondent No. 1 appointed a three-member Committee, headed by former Secretary, Defence Finance and then Advisor to Ministry of Information and Broadcasting and framed the 'Terms of Reference'. The Committee submitted its Report dated 01.10.2014, absolving NFDC of all major allegations and recommending minor corrective measures, which were duly carried out by NFDC.

6. Respondent No. 1 thereafter asked the Comptroller and Auditor General ('CAG') to carry out a Performance Audit of NFDC. CAG *vide* letter dated 08.02.2016 submitted a Draft Performance Report on the functioning of NFDC for the period 2010-11 to 2014-15 and

sought comments from Respondent No. 1 which, in turn, sought comments from NFDC. On 16.03.2016, NFDC furnished its response in which it was categorically stated that the observations in the Report were factually incorrect and elaborate justification was given to demonstrate that NFDC had not violated the Electronic Media Policy and that the minor corrective measures pointed out by the Committee were duly taken by NFDC. As per the averments in the writ petition, thereafter neither NFDC received any response from Respondent No. 1 nor was any Final Performance Audit Report issued by CAG.

7. While the Petitioner was in her third five-year tenure, a termination order dated 27.02.2018 was served upon her on 03.03.2018, without affording any opportunity of hearing/inquiry/ issuance of a show cause notice. Relevant part of the termination order dated 27.02.2018 is as follows:-

> *"In exercise of powers conferred under Article 78(4) of Memorandum of Association of National Film Development Corporation (NFDC) Ltd., the President of India has decided to terminate the services of Ms. Nina Lath Gupta, Managing Director, NFDC, with immediate effect giving 3 months salary in lieu of 3 months notice period.*
>
> *2.* ***Ministry of Information and Broadcasting has arrived to this decision due to the fact that NFDC has not been able to adhere the prescribed procedures in certain cases like (i) release of Advertisement spots to selected private channels in excess of 5% limited prescribed in the Electronic Media Policy, (ii) Non-refund of 15% commission to the client Ministry, (iii) Rs. 4.29 crores were charged in excess of actual expenditure from Ministries, (iv) non-adherence to the Standard Operating Procedure (SOP) as co-producer for coproduction of films under the scheme "Film Production in various Regional Languages" and (v) non – adherence to the due process for utilization of funds for restoration of films****."*

8. News of Petitioner's termination was broadcasted all over by the Media, causing prejudice to her reputation and future career prospects as also causing huge mental trauma. The order was challenged by the Petitioner by filing W.P.(C) 2163/2018 in this

Court. While issuing notice on 08.03.2018, Court stayed the operation of the termination order. When writ petition came up for hearing on 23.04.2018, Respondent No. 1/Union of India stated before the Court that in order to put an end to the controversy, paragraph 2 of the impugned order, which Petitioner claimed to be stigmatic, would be treated as withdrawn, though according to Respondent No. 1, the same was non-stigmatic. In view of this stand of Respondent No. 1, writ petition was disposed of, permitting Respondent No. 1 to replace the impugned order by a *simplicitor* order dispensing with the service of the Petitioner, within three days and directing that the order passed shall be communicated to the Petitioner, enabling her to avail remedies against the said order. Relevant part of the order dated 23.04.2018 is as under:-

> *"1. Impugned order of 27th February, 2018 (Annexure P-1) terminates petitioner's service while granting three months' salary in lieu of notice period. Learned senior counsel for petitioner assails impugned termination on the ground that in paragraph No.2 thereof, there are serious allegations against petitioner which are unfounded and these allegations render the impugned order stigmatic and liable to be quashed as the impugned termination is not preceded by any disciplinary action under the Conduct, Discipline and Appeal Rules.*
>
> *2. Learned senior counsel for first respondent, on instructions, submits that in order to put to an end to the controversy, paragraph No.2 of impugned order be treated as withdrawn, although it does not stigmatize petitioner.*
>
> *3. Learned senior counsel for petitioner submits that the allegations made in paragraph No.2 of impugned order are required to be withdrawn.*
>
> *4. Once paragraph No.2 is withdrawn from impugned order, then no orders in this regard are required to be passed.*
>
> *5. In view of aforesaid stand taken on behalf of first respondent, impugned order of 27th February, 2018 be replaced by first respondent by a simplicitor order dispensing with the service of petitioner. Let it be so done within three days from today and it be communicated to petitioner, so that petitioner may avail of the remedies against the order so passed in lieu of order of 27th February, 2018. It is made clear that upon substitution of impugned order, Annexure P-13 (colly.), etc., will not be of any consequence.*

> *6. With aforesaid directions, this petition and the pending application are disposed of."*

9. On 24.04.2018, Respondent No. 1 passed a fresh termination order, omitting paragraph 2 of the earlier order. Order dated 24.04.2018 is as follows:-

> *"In exercise of the powers conferred under Article 78(A) of the Memorandum and Articles of Association of National Film Development Corporation (NFDC) and as per clause 11 of the terms and conditions of appointment of Ms. Nina Lath Gupta, which were issued vide order dated 202/20/Z005-F(C) dated 06.01.2007 (copy enclosed), the President of India has decided to terminate the services of Ms. Nina Lath Gupta, Managing Director, NFDC with immediate effect giving 3 months salary in lieu of three months notice period.*
>
> *2. Upon termination all benefits associated with this position will cease to be valid. Ms. Nina Lath Gupta is ordered to return all property of NFDC, like Company car, computers hardware keys etc. to Human Resources Department of NFDC.*
>
> *3. Ms. Nina Lath Gupta is bound by the relevant confidentiality policy. Any information that was received during the course of her work, regarding customers, company, partners etc. must not be disclosed to any party. Such information must also be deleted from all personal devices of Ms. Nina Lath Gupta.*
>
> *4.* ***The present order is issued in furtherance of directions issued by the Hon'ble Delhi High Court vide its final judgment and order dated 23.4.2018 in W.P.(C) No. 2163 of 2018 and CM No. 11675 of 2018.***
>
> *5. This is issued without prejudice to the rights and remedies available under law."*

10. Petitioner challenged the order dated 23.04.2018 disposing of the writ petition, before the Division Bench in LPA 265/2018, whereby Court had allowed Respondent No. 1 to replace the stigmatic and punitive part of the order. Simultaneously, Petitioner also made a representation to Respondent No. 1 to withdraw the termination order, defending the allegations levelled against her.

11. During the pendency of the appeal, Respondent No. 1 obtained legal opinion from the Solicitor General of India regarding the correct course to be adopted while dealing with the case of Petitioner's

termination. The opinion rendered by the Solicitor General on 28.02.2019 was brought on record before the Division Bench by the Petitioner by filing C.M. APPL. 4744/2020, which was allowed *vide* order dated 05.02.2020. In the meantime, a Notification was issued by Respondent No. 1 to fill up the post of MD, NFDC, against which C.M. APPL. 14982/2020 was filed by the Petitioner and *vide* order dated 14.07.2020, the Division Bench stayed the operation of the Notification. Eventually, however, the appeal was dismissed as withdrawn granting liberty to the Petitioner to challenge the fresh termination order dated 24.04.2018 and relevant part of the order dated 12.02.2021 is as follows:-

> *"1. The present Appeal impugns the order dated 23rd April, 2018 in W.P.(C) 2136/2018, of dismissal of the writ petition.*
>
> *2. After some arguments, the senior counsel for the appellant seeks to withdraw the appeal with liberty to take proceedings with respect to termination letter dated 24th April, 2018.*
>
> *3. The counsel for the respondent-Union of India opposes.*
>
> *4. However, since the letter dated 24th April, 2018 is of after the impugned order, we are of the view that the objections to the challenge if any thereto be taken in the said challenge and are not required to be considered by us.*
>
> *5. The appeal is thus dismissed as withdrawn with liberty to the appellant to take appropriate proceedings in accordance with law with respect to the termination letter dated 24th April, 2018 and with liberty to the respondents to oppose the said challenge if any made, on all grounds available in law."*

12. Pursuant to the liberty granted by the Division Bench, present writ petition has been filed by the Petitioner assailing the termination order. Arguing on behalf of the Petitioner, learned Senior Counsel raised the following contentions:-

(a) The first order of termination passed on 27.02.2018, clearly refers to allegations against NFDC in paragraph 2 thereof, on the basis of which Respondent No. 1 decided to terminate the services of the Petitioner, prior to completion of

her third five-year tenure. Therefore, the motive and foundation of Respondent No. 1 in terminating the Petitioner is loud and clear and only to wriggle out of the legal implications of the punitive and stigmatic order, Respondent No. 1 found a convenient way of dispensing with the services of the Petitioner by seeking to substitute the said order with another order which action is *ex facie* illegal and arbitrary. It is settled law that Courts are empowered to look at the attendant circumstances in order to ascertain the actual motive and foundation behind the termination order and present is a case where the Court need not delve deep into the circumstances, as the foundation for termination is apparent on the face of the order. In ***A.P. State Federation of Coop. Spinning Mills Ltd. and Another v. P.V. Swaminathan, (2001) 10 SCC 83***, the Supreme Court has held that the Court is not debarred from looking at the attendant circumstances existing prior to issuance of the termination order to ascertain whether the alleged inefficiency was the motive or formed the foundation of the order and if the Court comes to a conclusion that the so-called inefficiency was the real foundation, then the order is penal and must be interfered with, if proper procedure is not followed, prior to passing the order.

(b) There is no gainsaying that mere revocation of the punitive and stigmatic part of the order and substituting it with another one would not wipe out the allegations on which the earlier order was founded and will not make the latter order an order of termination *simplicitor*. In any event, the second order impugned herein is equally stigmatic, as it contains a reference to the Court order and the trail would take any reader to the allegations levelled in the first order. In ***Dipti Prakash Banerjee***

v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Others, (1999) 3 SCC 60, the Supreme Court held that the material, which amounts to stigma, need not be contained in the order of termination and may be contained in any document referred to in the termination order or in its annexures and obviously, the document will be called for by a future employer. Such an order would stand vitiated if passed without an inquiry or granted an opportunity to the employee to defend the allegations levelled.

(c) It is settled law that even a contractual appointment cannot be terminated without affording an opportunity of hearing, if founded on allegation and/or misconduct, which casts a stigma on the employee. The Supreme Court in ***K.C. Joshi v. Union of India and Others, (1985) 3 SCC 153***, held that contract of service has to be in tune with Articles 14 and 16 of the Constitution of India and if it is to be suggested that one can dismiss anyone without a semblance of inquiry or whisper of principles of natural justice, such an approach overlooks the well-settled principle that if State action affects livelihood or attaches stigma, punitive action can be taken only after an inquiry, in keeping with the principles of natural justice.

(d) Clause 1.15 of the terms and conditions of Petitioner's offer of appointment provided that the NFDC Rules in respect of non-workmen category of staff would mutatis mutandis apply to the Petitioner and hence, her service could not have been terminated without holding proper inquiry, in accordance with the Rules, especially when motive and foundation behind the termination is clearly punitive and stigmatic. Respondent No. 1 has even overlooked the legal opinion rendered by the

Solicitor General of India, who had suggested a different course of action to deal with Petitioner's case.

13. None appeared on behalf of Respondent No. 2 on the date of the final arguments.

14. Ms. Archana Gaur, learned counsel appearing on behalf of Respondent No. 1 contended as follows:-

(a) Petitioner joined the post of MD, NFDC purely on contractual basis on a five-year tenure, which was subsequently extended twice and therefore, the relationship between the Petitioner and Respondent No. 1 being contractual in nature can only be governed by terms and conditions of the Appointment Letter read with Articles of Association of NFDC. It is settled law that contract of service giving rise to relationship of a master and servant cannot be enforced in a writ petition or even otherwise and the only remedy available is to file a suit for other consequential reliefs. A contract of service is incapable of specific performance being inherently terminable in nature and on this short ground, writ petition deserves to be dismissed.

(b) As per the terms and conditions incorporated in the letter dated 06.01.2007, services of the Petitioner could be dispensed with by giving three months' notice or on payment of three months' salary in lieu thereof, with the approval of Department of Public Enterprises. In this context, reliance was placed on Clause 1.1 of the terms and conditions, which is as follows:-

> *"1.1* ***Period:*** *The period of her appointment will be 5 years w.e.f. 17.04.2006 (A/N) in the first instance or till the age of superannuation or until further orders whichever event occurs earlier and in accordance with the provisions of the Companies Act. The appointment may, however, be terminated even during this period by either side on 3 months notice or on payment of three months salary in lieu thereof."*

(c) Though the tenure of the Petitioner was further extended twice consecutively for five years each, but the terms and conditions remained unchanged. Additionally, Article 78(4) of the Memorandum of Association of NFDC expressly stipulates that the President shall have the power to remove any Director including Chairman and Managing Director from office at any time, in his absolute discretion and thus, the Petitioner cannot argue that an inquiry was mandated, before issuing termination order, there being no challenge either to the terms and conditions of appointment or the Articles of the Memorandum of Association. Article 78(4) reads as follows:-

> *"ARTICLE 78:*
>
> *(4) The President shall have the power to remove to any Director including the Chairman and Managing Director from Office at any time in his absolute discretion."*

(d) Though the stand of Respondent No. 1 has consistently been that the termination order dated 27.02.2018 was not stigmatic or punitive as alleged by the Petitioner, however, Respondent No. 1 decided to omit paragraph 2 of the said order only with a view to put a quietus to the whole controversy and litigation. The order was withdrawn with the leave of the Court and after deleting the allegedly stigmatic contents, fresh order was passed, which is an order *simplicitor,* containing not an iota of allegation against the Petitioner. Moreover, Petitioner's argument also overlooks Explanations 6(ii) and (iii) to Rule 21 of NFDC Rules, wherein there is an express and empathic declaration that termination of service of a person appointed under a contract/agreement will not amount to penalty, either major or minor. Since termination under a contract does not amount to a penalty, question of holding a full-fledged inquiry

as per Rule 23 (major-penalty) or summary inquiry as per Rule 25 (minor- penalty) does not arise. Explanations 6(ii) and (iii) to Rule 21 of NFDC Rules, are as follows:-

> *"21. PENALTIES*
> *……..*
> *EXPLANATION*
> *…….*
> *6. Termination of services*
> *(i) ……*
> *(ii) of an employee appointed in a temporary capacity otherwise under a contract or an agreement or the expiration of the period for which he/she was appointed or earlier in accordance with the terms of his/her appointment,*
> *(iii) of an employee appointed under a contract or agreement in accordance with the terms of such contract or agreement, and*
> *(iv) ....."*

(e) Petitioner has placed heavy reliance on the opinion of the Solicitor General of India, overlooking that even therein, it is opined that termination of the Petitioner does not amount to penalty, major or minor, within the meaning of Rule 21 of the NFDC Rules and would not attract Rules 22 and 25 thereof. In any case, once the appointment of the Petitioner is contractual/ tenure based, none of the rigours of holding a regular inquiry would be attracted in the present case and hence, no infirmity can be found in the impugned termination order.

15. I have heard the learned counsels for the parties and examined their rival contentions.

16. Petitioner is primarily aggrieved by the impugned action of Respondent No. 1, whereby her services were terminated by a punitive and stigmatic order, without affording her any opportunity of hearing or conducting an enquiry as per the Service Rules of NFDC. The moot question that arises for consideration before this Court is whether the impugned order terminating the services of the Petitioner and

truncating the five-year tenure is punitive and/or stigmatic and if so, what relief is she entitled to, considering that her appointment was on tenure basis. Before proceeding to answer this question, it is important to note few facts at the cost of repetition. Petitioner was initially appointed as MD, NFDC for 5 years w.e.f. 17.04.2006. Upon completion of five-year tenure and taking into account her unblemished and dedicated service as well as her contributions to NFDC as its MD, Petitioner was granted two successive extensions for five-years each. The first five-year extension was given vide order dated 18.04.2011 and the second vide order dated 11.04.2016. The third tenure was to end on 16.04.2021. Petitioner has, with precision, detailed the contributions she made, during her long tenure in NFDC, including introducing various business verticals to enhance the revenue, some of which are as under:-

> *"I. 360-degree communications supplier to Government of India including production and dissemination of advertisement and government messaging, social media, event management, design, etc.*
>
> *II. Monetization of digital rights of films.*
>
> *III. Training and skill development.*
>
> *IV. Feature film promotion & production.*
>
> *V. Facilitator of film business through a film market set up."*

17. It is averred that NFDC's turnover on account of these business verticals showed an exponential increase from Rs.17.21 crores in 2008-09 to Rs.251.24 crore in the year 2012-13. Under Petitioner's leadership, NFDC was awarded the 'Turnaround Award, 2013' by the BRPSE. None of these facts are disputed or controverted by the Respondents. Rough patch commenced in Petitioner's life when Directorate of Advertising on Visual Publicity, made a complaint against NFDC on 06.01.2012, alleging violations of the Electronic Media Advertisement Policy, based on which an Inspection (Special

Audit) of NFDC was initiated vide a Presidential Directive dated 07.06.2013. Draft Inspection Report was issued by Respondent No. 1 regarding the functioning of NFDC and comments were invited from NFDC. The then Chairman, NFDC responded to the Report categorically stating that the allegations were unfounded and baseless. Respondent No. 1 appointed a three-member Committee headed by the former Secretary, Defence Finance and then Advisor to Ministry of Information and Broadcasting, to look into the matter. The Committee rendered its Report on 01.10.2014, absolving NFDC of all major allegations and only recommending certain corrective measures, which, according to the Petitioner, were duly carried out. This was followed by a CAG Audit, after which again comments were sought from NFDC and given and finally, the matter rested there and no further action was taken. However, based on these allegations, only the Petitioner was singled out and her services were terminated, without any show cause notice or inquiry, enabling her to defend the allegations/accusations.

18. This news, according to the Petitioner, was very damaging to her reputation and cast a stigma on her entire service as it was also widely publicised in the media, both print and electronic. A reading of order dated 27.02.2018, which has been extracted in the earlier part of the judgment, leaves no doubt that paragraph 2 thereof clearly adverted to certain allegations against NFDC, which led to Petitioner's termination and thus constituted the 'foundation', making the order stigmatic and punitive. Petitioner challenged this order in W.P. (C) No. 2163/2018 and realising that the order was illegal and may not sustain in Court of law, with its attending legal implications, Respondents sought leave to withdraw the order with liberty to pass a fresh order *simplicitor* and the Court permitted this course of action.

Respondent No.1 issued an order dated 24.04.2018, by merely omitting paragraph 2 of the order dated 27.02.2018 and it is this order which needs to be tested to see whether it is stigmatic and punitive or a termination order *simplicitor*. Before doing that, it would be pertinent to examine the law on the subject.

19. The vexed question of stigmatic/punitive order has been arising before the Courts for decades, *albeit* mostly in the case of a probationer. There is no statutory definition of the word 'stigma'. According to Webster's *New World Dictionary*, stigma is something that detracts from the character or reputation of a person indicating that something is not normal or standard. *Legal Thesaurus* by Burton defines the word to mean blemish, defect, disgrace, disrepute and Webster's *Third New International Dictionary* defines the word as indicating a deviation from a norm. As commonly understood, stigma is a matter for moral reproach. While the employee takes a position that the order may not contain express words of stigma yet it may be stigmatic, founded on allegations, while the employer pleads that under a contract of employment, the employer has an inherent right to terminate the services of an employee since he has no vested right to hold the post and that too, without assigning any reason, as is the situation in the present case where Petitioner was appointed on 'tenure' basis. One of the earliest and most celebrated judgments on the issue of right of an employer to terminate the services of an employee, without assigning any reason, is of the Constitution Bench of the Supreme Court in ***Parshotam Lal Dhingra v. Union of India, AIR 1958 SC 36,*** where the Supreme Court held as follows:-

> *"26. ..... Shortly put, the principle is that when a servant has right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant or his reduction to a lower post is by itself and prima facie a*

punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. But 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. One test for determining whether the termination of the service of a government servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post. If he had a right to the post as in the three cases hereinbefore mentioned, the termination of his service will by itself be a punishment and he will be entitled to the protection of Article 311. In other words and broadly speaking, Article 311(2), will apply to those cases where the government servant, had he been employed by a private employer, will be entitled to maintain an action for wrongful dismissal, removal or reduction in rank. To put it in another way, 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.

xxx xxx xxx

28. ……..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) SCR 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 26] . In either of the two abovementioned cases the termination of the service did not carry with it the penal consequences of loss of pay, or allowances under Rule 52 of the Fundamental Rules. It is true that the misconduct, negligence, inefficiency or other disqualification may be the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service the motive operating on the mind of the Government is, as Chagla, C.J., has said in Shrinivas Ganesh v. Union of India [LR 58 Bom 673 : AIR (1956) Bom 455] wholly irrelevant. 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 forefeiture 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. A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. If the government servant has a right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. 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. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty. 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……."

20. In ***Samsher Singh v. State of Punjab and Another, (1974) 2 SCC 831,*** the Supreme Court held that form of an order is not

conclusive and the Court can lift the veil in a given case to find out the actual reason and true character of the order terminating the service of an employee. Relevant part of the judgment is as follows:-

> *"80……..The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311……."*

21. To the same effect is the decision of the Supreme Court in ***Anoop Jaiswal v. Government of India and Another, (1984) 2 SCC 369,*** where the Supreme Court held as under:-

> *"12. It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."*

22. It would be relevant to refer to another decision of the Supreme Court in this context in ***State of Uttar Pradesh and Another v. Kaushal Kishore Shukla, (1991) 1 SCC 691***, where the Supreme Court held as under:-

> *"7. ……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 inquiry 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 v. Union of India [1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544] , a Constitution Bench of this Court held that the mere use of expressions like 'terminate' or 'discharge' is not conclusive and in spite 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 way of punishment….."*

23. In ***Dipti Prakash Banerjee (supra),*** the Supreme Court drew a distinction between 'motive' and 'foundation' and held as follows:-

> *"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."*

24. The Supreme Court also held that the material which amounts to stigma may not be contained in the termination order of a probationer but may be contained in documents referred to in the termination order or its annexures and such documents can be asked for by any future employer of the probationer in which case employees' interest would be harmed and such a termination order will be vitiated on the ground that it was passed without conducting an inquiry. In ***Chandra Prakash Shahi v. State of U.P. and Others, (2000) 5 SCC 152***, the Supreme Court reiterated the concept of motive and foundation as follows:

> *"28. The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a*

probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

29. "Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry."

25. Another important judgment in this context is ***Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and Another, (2002) 1 SCC 520***, where the Supreme Court held as follows:-

"21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.

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28. Therefore, whenever a probationer challenges his termination the court's first task will be to apply the test of stigma or the "form" test. If the order survives this examination the "substance" of the termination will have to be found out.

> *29. Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job."*

26. Applying the aforesaid principles and examining the impugned order in the backdrop of the principles propounded therein, the Division Bench of this Court in ***Baijnath Mandal v. UOI & Ors., 2014 SCC OnLine Del 7204***, after examining the judgments on stigmatic/punitive order held that there can be no doubt that when an employee has been granted a temporary status and the order of termination is stigmatic and punitive and not a discharge *simplicitor,* then a departmental inquiry has to precede the termination and an order without an inquiry, would be violative of principles of natural justice. This has severe consequences for the employee since it gets printed and submitted with the stigmatic declaration made against him, marring his future prospects of employment. Court held that Respondent should have conducted a departmental enquiry before terminating the services to provide a chance to the Petitioner to meet the accusations of his misbehaviour, since termination was founded on his alleged misbehaviour. Division Bench quashed the termination order and directed the reinstatement of the Petitioner with consequential benefits. In ***Mangal Singh v. Chairman, National Research Development Corporation & Ors., 2009 SCC OnLine Del 2345***, Petitioner was an appointee on contractual basis and his services

were terminated by what he alleged was a punitive and stigmatic order, without a departmental enquiry. The Court came to the conclusion that the termination order was not a discharge *simplicitor* but stigmatic and punitive in character and misconduct was the foundation of the order of termination and not merely a motive. The Court further observed as follows:-

> *"19. No doubt, it has been urged by the Respondent-Corporation that the order of termination was owing to the coming to an end of the Petitioner's fixed period of service under the contract, but it seems to me that when the Petitioner was terminated, the impugned order dated 4th June, 2004 clearly finds him guilty of misconduct, thereby casting a stigma on the Petitioner, and in that sense must be held to be an order of dismissal and not a mere order of discharge. It further seems that anyone who reads the order in a reasonable way, would naturally conclude that the Petitioner was found guilty of misconduct, and that must necessarily import an element of punishment which is the basis of the order and is its integral part.*
>
> *20. It is trite to say, that when an authority wants to terminate the services of a temporary employee, it can pass a simple order of discharge without casting any aspersion against the temporary servant or attaching any stigma to his character. As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it becomes idle to suggest that the order is a simple order of discharge. The test in such cases must be: does the order cast aspersion or attach stigma to the officer when it purports to discharge him? If the answer to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance, to amount to dismissal.*
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> *xxx xxx xxx*
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> *23. In India Literacy Board (supra) the Supreme Court was hearing an appeal against an interim order passed by the Allahabad High Court and issued an order to the Single Judge before whom the writ petition was posted to take up the matter on a priority basis and dispose of the same in accordance with law. It was not a matter that related to termination of services of a tamporary employee, but rather to the issue whether in the case of contractual employment for a fixed term, mandamus can be issued continuing the employees is service. Surendra Prasad Tewari's case (supra) was again a case relating to regularization of services in public employment and the Supreme Court followed the ratio of the earlier Constitution Bench decision in Secretary of State, Karnataka (supra) and held that it would be improper for the Courts to give directions for regularization of services of persons working as daily-wager, ad hoc employee, probationers, temporary or contract employee,*

appointed without following the procedure laid down under Articles 14, 16 and 309 of the Constitution.

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26. In the light of the discussion above, in my opinion, the Petitioner was dismissed without affording him the opportunity of presenting his case before the disciplinary authority, thereby violating the protection guaranteed to temporary servants under Article 311(2) of the Constitution of India. Further, the order of termination was not a discharge simplicitor but a dismissal, and was stigmatic and punitive in character. Also, the misconduct of the Petitioner was the foundation of the order of termination and not merely the motive. Resultantly, the impugned order of termination is held to be stigmatic and punitive and not sustainable. I, therefore, allow this petition and set aside the impugned orders dated 4th of June, 2004 and the consequent order in appeal dated the 1st of December, 2006 passed by the Respondent-Corporation. The Respondents are directed to reinstate the Petitioner, with all consequential benefits. This, however, will not prevent the Respondents from taking action in accordance with law."

27. Therefore, what emerges from the conspectus of the aforesaid judgments is that if an order is founded on allegations, the order is stigmatic and punitive and services of an employee cannot be dispensed with without affording him an opportunity of defending the accusations/allegations made against him in a full-fledged inquiry. Since this case relates to a tenure appointment, it will be pertinent to look at the law with respect to stigmatic orders in the context of tenure appointments. In ***Dr. L.P. Agarwal v. Union of India and Others, (1992) 3 SCC 526,*** Petitioner was Director, AIIMS, who had been appointed for a period of 5 years or till he attained the age of 62 years, whichever was earlier, the Supreme Court examined the meaning and connotation of the term 'tenure' and observed that tenure is a term during which an office is held. It is a condition of holding office and once a person is appointed to a tenure post, his appointment begins when he joins and comes to an end on completion of the tenure, unless curtailed on 'justifiable' grounds. Such a person does not superannuate, he only goes out of office on completion of his tenure

and thus, the question of prematurely retiring him does not arise. In ***A.P. State Federation of Coop. Spinning Mills Ltd (supra),*** Respondent was appointed as General Manager (Finance) for a period of 3 years and prior to the said period coming to an end, his services were terminated. Respondent approached the High Court in a writ petition seeking quashing of the order and the learned Single Judge dismissed the writ petition after coming to a conclusion that the termination order was innocuous and not penal in nature and termination being in accordance with the contract of service, after giving three months' salary in lieu of the notice, required no interference. The Division Bench, allowing the appeal held that though the order on the face of it appeared to be innocuous, however, if the attendant circumstances were examined, more particularly, the stand in the counter affidavit, the conclusion was irresistible that the order was penal in nature and since penalty was imposed without affording opportunity to meet the charge, the order was unsustainable. This order of the Division Bench was challenged before the Supreme Court and the contention of the Appellant was that the reasons indicated in the order were the motive for termination and not the foundation, requiring an inquiry, prior to termination. The Supreme Court upheld the order of the Division Bench, to the extent that the order of termination was vitiated and ruled as follows:-

> *"3. The legal position is fairly well settled that an order of termination of a temporary employee or a probationer or even a tenure employee, simpliciter without casting any stigma may not be interfered with by the court. But the court is not debarred from looking at the attendant circumstances, namely, the circumstances prior to the issuance of order of termination to find out whether the alleged inefficiency really was the motive for the order of termination or formed the foundation for the same order. If the court comes to a conclusion that the order was, in fact, the motive, then obviously the order would not be interfered with, but if the court comes to a conclusion that the so-called inefficiency was the real foundation for passing of order of termination, then obviously such*

an order would be held to be penal in nature and must be interfered with since the appropriate procedure has not been followed. The decisions of this Court relied upon by Mr K. Ram Kumar also stipulate that if an allegation of arbitrariness is made in assailing an order of termination, it will be open for the employer to indicate how and what was the motive for passing the order of termination, and it is in that sense in the counter-affidavit it can be indicated that the unsuitability of the person was the reason for which the employer acted in accordance with the terms of employment and it never wanted to punish the employee. But on examining the assertions made in paras 13 and 14 of the counter-affidavit, in the present case it would be difficult for us to hold that in the case in hand, the appellant-employer really terminated the services in accordance with the terms of the employment and not by way of imposing the penalty in question.

4. In fact, the letter of the Commissioner for Handlooms and Director of Handlooms and Textiles dated 19-5-1993 was the foundation for the employer to terminate the services and as such the Division Bench of the Andhra Pradesh High Court was justified in holding that the order of termination is based upon a misconduct, though on the face of it, it is innocuous in nature. We therefore do not find any infirmity with the said conclusion of the Division Bench of the Andhra Pradesh High Court requiring our interference."

28. In the aforesaid case, the letter of the Commissioner for Handlooms and Director of Handlooms and Textiles was the foundation for the termination order and hence found to be stigmatic. It is thus trite that in a tenure employment, if the termination order of the employee is an order *simplicitor* and casts no stigma, it warrants no interference by the Court, however, if the attendant circumstances lead to a conclusion that termination is founded on allegations, then being penal in nature, the order would be untenable in law, if issued without affording an opportunity to the employee to defend the accusations.

29. Another judgment, which needs a mention and is close on facts, is in the case of ***Dr. Vijayakumaran C.P.V. v. Central University of Kerala and Others, (2020) 12 SCC 426***, wherein the Supreme Court observed that the termination order was issued in the backdrop of Internal Complaints Committee Report and going by the terms and

tenor of the order, it was incomprehensible to construe such an order to be an order *simplicitor* when the report of the Inquiry Committee was the foundation. The Supreme Court also reiterated the position of law that the material which amounts to stigma need not be contained in the termination order and may be in any document referred to therein, which reference will inevitably effect the future prospects of the incumbent and if so, the order must be construed as an *ex facie* stigmatic order of termination.

30. In the background of the principles of law elucidated in the aforementioned judgments, if one examines the nuances of the present case, it is luminously clear that several allegations permeated the first order viz: NFDC had not adhered to the prescribed procedures relating to release of advertisement spots to selected private channels; non-refund of 15% commission to the client Ministry; Rs. 4.29 crores charged in excess of actual expenditure from the Ministries; non-adherence to the standing operating procedures for co-production of films; and non-adherence to due process for utilization of funds for restoration of films. There can be no doubt that the order was 'founded' on allegations and was not an innocuous or a *simplicitor* order of termination. In order to wriggle out of the legal implications that would have been a fall out of the stigmatic order, the order was withdrawn, however, as rightly pointed out by the Petitioner, the allegations were not wiped out and despite omission of paragraph 2 thereof, the impugned order is a camouflage and founded on the same allegations, as admittedly, there was no fresh or any other reason/ trigger for truncating the five-year tenure. Minus the allegations, there is no cause for termination as it is nobody's case that Petitioner was otherwise unsuitable for the job.

31. Be it ingeminated and underscored that applying the law laid down in ***Dipti Prakash Banerjee (supra)*** and ***Dr. Vijayakumaran C.P.V. (supra)***, that the stigmatic part may not necessarily be contained in the order itself but if it is referable or traceable to another document which casts a stigma, it is enough to categorize the order as stigmatic, the impugned order cannot sustain. Clearly, the impugned order makes a reference to order dated 23.04.2018, passed by the Court in W.P.(C) No. 2163/2018 and this reference is enough to connect the dots to the previous order, allegations contained therein and the earlier litigation, which shall inevitably affect the future prospects of the Petitioner.

32. Another material fact that needs to be noted is that in furtherance of the constitution of the Committee to look into the complaint filed against NFDC by DAVP, CAG was asked to carry out performance audit of NFDC. Though NFDC had through Chief Financial Officer submitted its comments before the CAG but no final report has been tabled till date. It was pointed out that no other officer or office bearer of NFDC at any level whatsoever was issued a show cause notice or charge sheeted or even blamed for any lapse or irregularity, alleged in the complaint and only the Petitioner has been singled out and visited with the harsh consequence of termination, without even a hearing. The mere fact that despite the allegations levelled against NFDC as an organisation, not a single person, other than the Petitioner, has even been blamed and even CAG found merit in the comments sent by NFDC, which is why the final report was never tabled, speaks volumes of the illegality in the action of the Respondents in terminating the Petitioner. Therefore, for all the aforesaid reasons, the impugned order dated 24.04.2018 cannot be sustained and is hereby quashed and set aside.

33. Ordinarily, this Court would have given liberty to the Respondents to initiate inquiry proceedings against the Petitioner, giving her the opportunity to defend herself, however, on account of the untraversed facts that no action worth the name has been even initiated against any other employee of NFDC and even the final CAG report was not tabled, it would be unfair, unjust, iniquitous and harsh to permit the Respondents to initiate any coercive proceedings against the Petitioner at this stage.

34. The next question that begs an answer is what relief can be granted to the Petitioner. On the date of passing the impugned order, Petitioner had a balance tenure of nearly 3 years, since the five-year tenure was scheduled to expire on 16.04.2021. With the chequered history of litigation and passage of time, the balance period of about 2 years and 11 months has ended and Petitioner cannot be reinstated. Therefore, Petitioner can only be compensated in terms of monetary benefits such as pay and allowances, reimbursement of amounts recovered towards HRA, Income Tax, SBF and GSLI etc.

35. Accordingly, it is directed that the Respondents shall pay all outstanding dues of the Petitioner on account of salary and other allowances for the balance tenure of about 2 years 11 months. Petitioner is also held entitled to refund of all amounts recovered from her towards HRA etc., during this period. Payments shall be released within a period of eight weeks from today.

36. Writ petition stands allowed, in the aforesaid terms.

JYOTI SINGH, J

MAY 01 , 2023/shivam