IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: February 28, 2024

\+ W.P.(C) 12696/2023, CM APPL. 50153/2023

GOVT OF NCT OF DELHI AND ORS

..... Petitioners

Through: Mrs. Avnish Ahlawat, Standing Counsel, GNCTD (Services) with Mrs. Taniya Ahlawat, Mr. Nitesh Kumar Singh, Ms. Laavanya Kaushik, Ms. Aliza Alam and Mr. Mohnish Sehrawat, Advs.

versus

VIRENDER

..... Respondent

Through: Ms. Esha Mazumdar, Ms. Setu Niket and Ms. Isha Roy, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

J U D G M E N T

V. KAMESWAR RAO, J

1. The present writ petition has been filed by the petitioners challenging the order of the Central Administrative Tribunal, Principal Bench, New Delhi ("Tribunal", for short) dated June 02, 2023 in Original Application ("O.A", for short) being O.A. No. 1879/2019, wherein the Tribunal has allowed the O.A and has set aside the order of

termination against the respondent.

2. The facts of the case as noted are that the respondent was appointed as Warder on vide Memorandum June 29, 2016, consequent upon his regular selection through Delhi Subordinate Services Selection Board. He was on probation for a period of two years.

3. On April 11, 2017, at around 20:40 hours, when Tamil Nadu Special Police ('TSP', for short) personnel were changing their duty, they had noticed that a person moving around the outer compound in suspicious manner. A message was delivered to the senior officers and the person was apprehended. Upon personal frisking/ search of the person at C-5 Janakpuri bus stop, some handmade packets (from his laptop bag) were recovered. On enquiry it was revealed that the said person name is Virender / respondent who was deputed as Warden in Central Jail No.02. TSP brought respondent along with his laptop bag to the Deodhy of CJ-04 and handed him over to Superintendent of CJ-04.

4. It is stated that, on the opening of the two handmade packets in presence of Sh. Rishi Kumar, Dy. Superintendent, Sh. P. Toppo- Asst. Superintendent, Sh. Rajgopal- Inspector (TSP), Sh. S. Vinoth Kumar Havildar 1171 (TSP) and Sh. Ramesh, Havildar 1612 (TSP), four bundles contained the prohibited articles, following which, an FIR No. 146/2017 u/s 20/21/67/85 NDPS Act, Hari Nagar Police was registered on April 12, 2017 and respondent was sent to judicial custody. On April 13, 2017, he was released on bail.

5. The petitioners herein, keeping in view that the respondent was under probation and also the overall conduct of the respondent, was

such, through the competent authority i.e. Director General, Prisons vide order dated April 24, 2017 decided to terminate the services of the respondent under Rule 5(1) of the CCS (Temporary Services) Rules, 1965. The termination order reads as under:-

> "*In pursuance of the Proviso to Sub-rule (1) of Rule 5 of the Central Civil Service (Temporary Services) Rules, 1965, I, Sudhir Yadav, Director General, Prisons, hereby terminate forthwith the services of Sh. Virender, Warder- 1685 on having found unsatisfactory and not conducive to the job requirements and direct that he shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of notice at the same rates at which he was drawing them immediately before the termination of his service or, as the case may be, for the period by which such notice falls short of one month.*"

6. Thereafter, the respondent has filed the O.A 1879/2017 before the Tribunal seeking quashing and setting aside of the termination order dated April 24, 2017, with a direction to the petitioners herein to reinstate him in service with all consequential benefits including seniority.

7. The case of the respondent herein, before the Tribunal was that the petitioners herein, have terminated his services vide order dated April 24, 2017 alleging that his services have been found unsatisfactory and not conducive to the job requirements, but the same was without Show Cause Notice and enquiry under the CCS (Temporary Service) Rules, 1965. Hence, being a stigmatic order, the same is illegal.

8. It was also the respondent's case that, he was never warned or counseled. No advisory has been issued to him requiring him to improve his work or conduct. It was stated that the respondent herein

was issued a memorandum dated April 21, 2017 on the ground of absence from duty between April 11, 2017 to April 21, 2017. He was directed to join his duty immediately or submit the medical papers within 48 hours of receipt of the said memorandum, failing which strict departmental action was proposed to be taken against him. The memo further proposed that, in case no reply is received within the stipulated time, further action could be initiated by the authority without any notice to him.

9. It was respondent's case before the Tribunal that the contractual employees are entitled to protection under Article 311 of the Constitution of India and their services cannot be terminated on speculative grounds, without holding any enquiry. Therefore, the order of termination is not a simpliciter rather it is smeared with stigma and passed on the alleged misconduct/ FIR. His case was the expression *'unsatisfactory and not conducive to the job requirements'* is stigmatic in nature. Not only this, the petitioners herein loosely used the expression *'unsatisfactory'* in the termination order. It was also stated that the respondent herein was terminated because of the registration of the FIR.

10. The Tribunal while deciding the O.A vide judgment/order dated June 02, 2023, has in paragraphs 10 to 12, held as under :-

> *"10. From the judgment of the Hon'ble High Court of Delhi in Nina Lath Gupta (supra) it is settled that even if the order of termination of the probationer, on the face of it, appears to be innocuous and or order simpliciter, however, if the attending circumstances, more particularly the stand taken in the counter-affidavit, the conclusion was irresistible that the order was penal in nature and since the*

penalty was imposed without affording an opportunity to meet the charge, the order was not sustainable in the eyes of law.

11. In the aforesaid background, even if it is assumed that the impugned order dated 24.04.2017 is presumed to be an order simpliciter, however, in view of the specific stand taken by the respondents in the Memorandum dated 21.04.2017 and in the counter-reply, precisely recorded hereinabove, we are of the considered view that the impugned order of termination is founded on an act of misbehaviour and indiscipline by the applicant and, therefore, the impugned order is found to be punitive and stigmatic. The same being passed without holding an enquiry and without following the principles of natural justice is not sustainable in the eyes of law.

12. Accordingly, the impugned order dated 24.04.2017 is set aside. The respondents are directed to reinstate the applicant in service, as expeditiously as possible, and preferably within six weeks of receipt of a certified copy of this order. The applicant shall be entitled to consequential benefits in accordance with the relevant rules and instructions on the subject. However, the respondents shall be at liberty to initiate disciplinary enquiry and or to take action in accordance with the relevant rules, depending upon the final outcome of the case FIR, referred to hereinabove, if they so decide."

11. Mrs. Avnish Ahlawat, the learned Standing Counsel for petitioners stated that, during the surprise visit of Central Jail No.2 by Jail Superintendent, the respondent was found sleeping in wards during duty hours. He was found absent from duty point on December 16, 2016, for which he was warned and advised to be careful. It was keeping in view the overall conduct of the respondent, the Director General, Prisons, the competent authority, by observing that the respondent's continuance in service is detrimental to the interest of the

Prison Department, decided to terminate the services of the respondent under Rule 5(1) of the CCS (Temporary Services) Rules, 1965.

12. She stated that the Tribunal failed to appreciate that the appointment of the respondent was on probation for two years and the involvement of the respondent in FIR during the probation period is the "motive" of the Competent Authority not to continue him in service by passing the termination order dated April 24, 2017. She also stated that the Competent Authority has rightly decided that, persons who are indulging in such activities bringing prohibited items inside jail premises are not fit for the post of Jail Warden.

13. She stated that, a probationer has no right to hold the post and his service can be terminated at any time during or, at the end of the period of probation on account of general suitability for the post held by him. If the competent authority holds a preliminary inquiry for judging the suitability of the probationer or for his further continuance in service or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. She has also stated that the termination of services of a temporary government servant or probationer under the rules of his employment or in exercise of contractual right is neither *per se* dismissal nor removal and does not attract the provisions of Article 31l of the Constitution of India. An order of termination simpliciter *prima facie* is not a punishment and carries no evil consequences.

14. Mrs. Ahlawat, submitted that the Tribunal failed to appreciate that, in catena of judgments the Supreme Court has held that, only if

there is:- (i) a full scale formal enquiry, (ii) in the allegations involving moral turpitude or misconduct, (iii) which culminated in a finding of guilt; where all these three factors are present, the order of termination would be punitive irrespective of the form. However, if any one of three factors is missing, then it would not be punitive. She also submitted that the termination order is non stigmatic and the Article 311 of the Constitution of India does not come to the rescue of the respondent.

15. She submitted that, by stating that the performance is not satisfactory will not mean that the termination order is stigmatic one, also the principles of natural justice may not to be followed before termination of services of a probationer. She stated that, if an enquiry is held and the enquiry report forms the '*foundation'* of termination of services of a probationer, only then, principles of natural justice are required to be followed, however, where the enquiry against a probationer is only for determining his suitability for continuing in service or the enquiry report only forms the '*motive'* for removal, as differentiated from a foundation for removal, then a detailed enquiry in terms of the service rules is not necessary. An order of termination simpliciter *prima facie* is not a punishment and carries no evil consequences

16. Mrs. Ahlawat, in support of her submission has relied on the following judgments :-

1. ***Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd., (1999) 2 SCC 21.***
2. ***Director Aryabhatta Research Institute of Observational Sciences and others v. Devendra Joshi and others., 2018***

(15) SCC 73.

3. ***Ratnesh Kumar Chaudhary v. Indira Gandhi Institute of Medical Sciences, Patna, Bihar & Ors., (2015) 15 SCC 151***.

17. She seeks prayers as made in the petition.

18. Ms. Esha Mazumdar, the learned counsel for the respondent stated that the Tribunal vide its order dated June 02, 2023, has rightfully recorded that the order of termination passed by the petitioners is presumed to be an order simpliciter, but memorandum dated April 21, 2017 and counter affidavit implies that the order of termination is founded on an act of misbehavour and indiscipline and hence the order is stigmatic and punitive in nature.

19. According to her, the duty hours of the respondent at the time of the incident in question were 9:00 PM to 5:00 PM at Central Jail No.2. The respondent used to commute from Rohtak to his place of work i.e., Central Jail, Tihar on daily basis. The services of the respondent were terminated vide order dated April 24, 2017, alleging that, his services were found to be unsatisfactory and not conducive to the job requirements. She also stated that the alleged complaints against respondent by the petitioners, i.e., sleeping on job was advised and warned to be careful and that certain inmates had complained orally that the respondent use filthy language, are false.

20. She submitted that the respondent was issued a memorandum dated April 21, 2017 on the ground of absence from duty from April 11, 2017 to April 21, 2017 and was also directed to join duty immediately or submit his medical papers within 48 hours of the receipt of the said memorandum, failing which strict departmental action was proposed to

be taken against him. The said memorandum was received by the respondent on April 24, 2017. Thereafter, on submission of medical papers, he was made to join his duty. His duty time for that day was 13:00 Hrs to 21:00 Hrs in Central Jail No.2, however, to his shock; his services were terminated on the same day at around 6 PM.

21. Ms. Mazumdar also submitted that the termination of respondent's service was based on the filing of the FIR in a false criminal case bearing FIR No. 146/2017 dated April 12, 2017. She has submitted that the termination is stigmatic in nature, as it is based on the filing of the FIR and that, during the cross-examination of the PW-1 in the Trial Court, the PW-1 has stated that the *"……..bag was lying at a distance of 2 metres from where the accused was sitting…",* and that the respondent was having his food which was part of his everyday routine.

22. She stated that the TSP had no jurisdiction to apprehend the respondent from the bus stop and forcefully take him inside the Tihar jail. She has also stated that the respondent was apprehended by the TSP at around 20:50 Hrs and it is intriguing that the PCR call was not made immediately but after a delay of almost four hours at around 00:46 Hrs, that is almost four hours after apprehending the respondent.

23. According to Ms. Mazumdar, no articles pertaining to the respondent were recovered from the bag that has been alleged to belong to the respondent and there were 8-10 other persons present at the bus stand when the respondent was apprehended. She also stated that in the cross-examination of PW-1, he stated that *"the accused almost finished his meal and only a small portion of the meal remained."* This means

that the respondent was taking his meal 10-12 minutes prior to his apprehension and the TSP personnel had seen another person acting suspiciously and intentionally or mistakenly apprehended the respondent. Furthermore, it was dark at that time and the distance between the towers, from where the respondent has been alleged to have been seen, and the bus stand is around 250 meters, as such, it was impossible to see that it was the respondent.

24. She stated that, the termination order mentions *"not conducive to job requirement"*, which itself has a negative connotation and such conclusion of the petitioners is founded on the false FIR against the respondent. She also stated that the termination of the services of the respondent is completely against the principles of natural justice hence *non est* in the eyes of law, as he was never accorded any opportunity to defend his case. If such action of termination affects livelihood and attaches stigma, then punitive action can only be taken after necessary inquiry.

25. She stated that, it is not necessary that the material which amounts to stigma to be mentioned in the order of termination, it can also be contained in any document referred to in the termination order or in its annexures and can be called for by a future employer. Such an order would not be tenable in law because it was passed without offering an opportunity to the employee to defend the allegations. She has also stated that, in the present case, the petitioners' allegation that the services of the respondent were not satisfactory is clear from the record that the '*foundation'* for termination of his services is because of the false allegations in the FIR against the respondent.

26. She submitted that the Apex Court, in a plethora of judgments has held that the Court can look at the circumstances existing prior to the existence of the issuance of the termination order to ascertain whether the alleged inefficiency was the *'motive'* or the '*foundation*' of the order and if it is ascertained that the so-called inefficiency was the *'foundation'*, then the order is penal and must be interfered with. This means that, merely revoking the punitive or stigmatic part of the order and substituting it with another one would not in any way wipe out the allegations on which the earlier order was founded and will not make the latter order an order of termination simplicitor.

27. She stated that, it is a settled principle of law that, a temporary servant/probationer is entitled to an enquiry in terms of Article 311 of the Constitution of India before his termination. She has also stated that the averments made by the petitioners that the failure to complete the probation period to the satisfaction of the Competent Authority rendered him liable to be discharged from service without any notice is misconceived and inconsistent with the other averments made by the petitioners stating that the respondent has been terminated due to misconduct.

28. In her submission, Ms Mazumdar has submitted that the Supreme Court, in catena of judgments has held that if the form of the termination order is inconclusive, the Court has the power to lift the veil to reveal the true nature of the order and the actual reason for such termination. If the Court is convinced that the order in form is merely a determination of employment but is in reality a cloak for punishment, the Court can give effect to the rights conferred by law upon the

employee.

29. Ms. Mazumdar, in support of her submission has relied upon the following judgments :-

1. ***Samsher Singh v. State of Punjab, (1974) 2 SCC 831***
2. ***Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha, (1980) 2 SCC 593.***
3. ***Anoop Jaiswal v. Govt. of India, (1984) 2 SCC 369.***
4. ***K.C. Joshi v. Union of India, (1985) 3 SCC 153.***
5. ***Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, (1999) 3 SCC 60.***
6. ***A.P. State Federation of Coop. Spg. Mills Ltd. v. P.V. Swaminathan, (2001) 10 SCC 83.***
7. ***Nina Lath Gupta v. Union of India, by High Court of Delhi WP(C) No. 10385 of 2021, decided on May 01, 2023.***
8. ***Chandra Prakash Shahi v. State of U.P and Ors, Civil Appeal No. 2930 of 2000.***
9. ***State Bank of India & Ors. v. Palak Modi &Anr., Civil Appeal No 7841-7842 of 2012 decided on December 03, 2012.***

30. Furthermore, she has also reproduced the charge sheet filed against the respondent and statement of PW-1, HC Vinod. She seeks dismissal of the present petition.

31. Having heard the learned counsel for the parties, the short issue which arises for consideration is, whether the Tribunal was justified in allowing the OA filed by the respondent by quashing the order dated April 24, 2017 directing the reinstatement of the respondent in service and giving liberty to the petitioners herein to initiate disciplinary enquiry in accordance with the relevant rules depending upon the final outcome of the FIR referred to above.

32. Before we come to the merits of the submissions advanced by the learned counsel for the parties, it is necessary to refer to the position

of law in respect of cases of this nature, i.e., where the termination is effected under Rule 5 of the CCS (Temporary Service) Rules, 1965 when a person is on probation. In the judgment in the case of ***Radhey Shyam Gupta (supra)***, the Supreme Court has emphasised the distinction between '*motive'* and *'foundation'*. In a case of *'motive'*, the employer after gathering some *prima facie* facts does not wish to go into the truth of the allegation, but decides merely not to continue the services of the employee. However, if the employer conducts an enquiry only for providing misconduct and the employee is not heard, it would be a case where the enquiry is the *'foundation'* and the *'foundation'* would be bad. Similarly, a further order of termination simpliciter is not a punishment and carries no further consequence.

33. In ***Chandra Prakash Shahi (supra),*** the Supreme Court has culled out the difference between the *'motive'* and *'foundation'* in paragraphs 26 and 27 as under:

> *"26. In Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd [(1999) 2 SCC 21 which related to a probationer, the whole legal position was reviewed by brother M. Jagannadha Rao, J., in an illuminating and research-oriented judgment and after considering various decisions including the decision in Kaushal Kishore Shukla case [(1991) 1 SCC 691and a still later decision in Commr., Food & Civil Supplies, Lucknow, U.P. v. Prakash Chandra Saxena [(1994) 5 SCC 177 so as to trace the development of law relating to this aspect of service jurisprudence, laid down that there has not been any conflict of opinion inter se various judgments including those laying down the "motive" and "foundation" theory. It was held that the question whether the order by which the services were terminated was innocuous or punitive in nature had to be decided on the facts of each case after considering the relevant facts in the light of the surrounding circumstances. The benefit*

and protection of Article 311(2) of the Constitution is available not only to temporary servants but also to a probationer and the court in an appropriate case would be justified in lifting the veil to find out the true nature of the order by which the services were terminated.

27. The whole case-law is thus based on the peculiar facts of each individual case and it is wrong to say that decisions have been swinging like a pendulum; right, the order is valid; left, the order is punitive. It was urged before this Court, more than once including in Ram Chandra Trivedi case [(1976) 4 SCC 52 that there was a conflict of decisions on the question of an order being a simple termination order or a punitive order, but every time the Court rejected the contention and held that the apparent conflict was on account of different facts of different cases requiring the principles already laid down by this Court in various decisions to be applied to a different situation. But the concept of "motive" and "foundation" was always kept in view."

34. Similarly, the Coordinate Bench of this Court in ***Govt. of NCT of Delhi and Ors. v. Naresh Kumar, W.P.(C) 22658-60/2005***, decided on September 20, 2010 has also brought out the difference in the concept of *'motive'* and *'foundation'*. In paragraph 40 to 44 of the said judgment it has been held has under:

"40. We have enough case law, where pertaining to a misconduct detected during the probation of an employee, a show cause notice is issued to respond as to why on account of the stated misconduct the services be not terminated, but ignoring the show cause notice, a simple order of discharge from service is issued. When questioned in a Court on the plea that the veil be lifted to see as to what was the foundation of the order, it was held that motive and foundation are two different concepts. We may quote only from one decision reported as 1980 (2) SCC 593 Gujarat Steel Tube Vs. Gujarat Steel Tubes Majdoor Sangh. As to foundation, it was observed:-

"…….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."

41. As to motive, it was observed:-

"On the contrary, even if there is suspicion of misconduct, the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge."

42. Suffice would it be to state that if an inquiry is conducted into an alleged misconduct behind the back of the employee and a simple order of termination is passed, „founded' on the report of the inquiry indicting the employee, the action would be tainted but where no findings are arrived at any inquiry or no inquiry is held but the employer chooses to discontinue the services of an employee against whom complaints are received it would be a case of the complaints motivating the action and hence order would not be bad as observed in the decision reported as AIR 1999 SC 983 Dipti Prakash Banerjee Vs. Satvendera Nath Bose National Centre Basic Sciences (para 22).

43. To conclude on the issue, we note the decision of the

Supreme Court reported as AIR 2002 SC 23 Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences & Anr., where in para 28 thereof, how the issue has to be dealt with by Courts was stated. It was held: Therefore, whenever a probationer challenges his termination the Courts' 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.

44. We may only add by stating that nobody acts for no reasons and indeed if somebody were to act on account of no reasons, that itself would vitiate an action as not only being unintelligible but as being perverse. Obviously, something has to impel or propel an employer to terminate the services of his employee. It is only when the termination is by way of penalty would the principles of natural justice and opportunity to participate at an inquiry where guilt to be determined is the object of the inquiry would come into play. Obviously, where on the finding of guilt an order terminating the services of an employee is passed it can safely be said that the employee has been penalized for a wrong. But where the misdemeanour is not treated as proved and no inquiry is held, and where an inquiry is held, the report is not made the foundation of the order, but what is opined by the employer is that the employee has lost the confidence of the employer, an order of termination cannot be said to be founded on the misdemeanour and the misdemeanour would remain as the motive for the action. This situation would not attract the principle that the termination is penal."

35. In ***Director Aryabhatta Research Institute of Observational Sciences (supra)*** the Supreme Court has reiterated the observations made in paragraphs 33 and 34 of ***Radhey Shyam Gupta (supra)*** bringing out the analysis of cases where misconduct was treated as the *foundation* or *motive* for termination of service. Though, we may state that, in ***Director Aryabhatta Research Institute of Observational Sciences (supra)*** it was concluded that the termination of the

respondent No.1 at the end of probation period could not be termed as punitive.

36. The Supreme Court in the case of ***State of Punjab and Ors. v. Constable Avtar Singh***, ***(2008) 7 SCC 405*** has in paragraph 11 held as under:

> *"11. We have heard learned counsel for the parties. We are in total agreement with the submission of the learned counsel for the State of Punjab that the controversy involved in this case is no longer res integra. Learned counsel appearing for the respondent had drawn our attention to a two-Judge Bench decision of this Court in Prithipal Singh v. State of Punjab [(2002) 10 SCC 133 : 2003 SCC (L&S) 103] . The Court held that once there is stigma, the principle is well settled, an opportunity has to be given before passing any order. Even where an order of discharge looks innocuous, but on a close scrutiny, by looking behind the curtain if any material exists of misconduct and which is the foundation of passing of the order of discharge, or such could be reasonably inferred, then it leaves no room for doubt that any consequential order, even of discharge, would be construed as stigmatic. The decision in Sukhwinder Singh [(2005) 5 SCC 569 : 2005 SCC (L&S) 705] was given by a three-Judge Bench and in view of that decision in 2005, there is no scope for this Court to take a different view. We are squarely bound by the said decision."*
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> *(emphasis supplied)*

37. In the case of ***State of Punjab and Ors. v. Sukhwinder Singh, (2005) 5 SCC 569***, the Supreme Court has in paragraph 20, has held as under:

> *"20. In the present case neither any formal departmental inquiry nor any preliminary fact-finding inquiry had been held and a simple order of discharge had been passed. The High Court has built an edifice on the basis of a statement made in the written statement that the respondent was a habitual absentee during his short period of service and has concluded*

therefrom that it was his absence from duty that weighed in the mind of the Senior Superintendent of Police as absence from duty is a misconduct. The High Court has further gone on to hold that there is direct nexus between the order of discharge of the respondent from service and his absence from duty and, therefore, the order discharging him from service will be viewed as punitive in nature calling for a regular inquiry under Rule 16.24 of the Rules. We are of the opinion that the High Court has gone completely wrong in drawing the inference that the order of discharge dated 16-3-1990 was, in fact, based upon misconduct and was, therefore, punitive in nature, which should have been preceded by a regular departmental inquiry. There cannot be any doubt that the respondent was on probation having been appointed about eight months back. As observed in Ajit Singh v. State of Punjab [(1983) 2 SCC 217 : 1983 SCC (L&S) 303 : AIR 1983 SC 494] the period of probation gives time and opportunity to the employer to watch the work, ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserves a right to dispense with his service without anything more during or at the end of the prescribed period, which is styled as period of probation. The mere holding of preliminary inquiry where explanation is called from an employee would not make an otherwise innocuous order of discharge or termination of service punitive in nature. Therefore, the High Court was clearly in error in holding that the respondent's absence from duty was the foundation of the order, which necessitated an inquiry as envisaged under Rule 16.24(ix) of the Rules."

38. In ***Ratnesh Kumar Chaudhary (supra)***, the Supreme Court has in paragraph 33 and 34, held as under:

"33. It will be noticed from the above decisions that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as the above facts are merely the motive and not the foundation. The reason why they are the motive is that the

assessment is not done with the object of finding out any misconduct on the part of the officer, as stated by Shah, J. (as he then was) in Ram Narayan Das case [State of Orissa v. Ram Narayan Das, AIR 1961 SC 177] . It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary enquiry is held because the purpose of a preliminary enquiry is to find out if there is prima facie evidence or material to initiate a regular departmental enquiry. It has been so decided in Champaklal case [Champaklal Chimanlal Shah v. Union of India, AIR 1964 SC1854]. The purpose of the preliminary enquiry is not to find out misconduct on the part of the officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental enquiry is started, a charge-memo issued, reply obtained, and an enquiry officer is appointed — if at that point of time, the enquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. That is what is held in Sukh Raj Bahadur case [State of Punjab v. Sukh Raj Bahadur, AIR 1968 SC 1089] and in Benjamin case [A.G. Benjamin v. Union of India, (1967) 15 FLR 347 (SC)] . In the latter case, the departmental enquiry was stopped because the employer was not sure of establishing the guilt of the employee. In all these cases, the allegations against the employee merely raised a cloud on his conduct and as pointed by Krishna Iyer, J. in Gujarat Steel Tubes case [Gujarat Steel Tubes Ltd. v. Mazdoor Sabha, (1980) 2 SCC 593 : 1980 SCC (L&S) 197] the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found,

and were merely the motive.

34. But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee — even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases."

(emphasis supplied)

39. Ms. Mazumdar has also relied upon the judgment in the case of ***Chandra Prakash Shahi (supra)*** wherein the order of termination of the appellant/Constable, who was on probation was set aside by the Tribunal. The Supreme Court upheld the same, noticing that the appellant had completed his training and probationary period of two years without any blemish and had been terminated on account of quarrel between two constables in which to begin with he was not involved. The termination was observed to be founded on the report of the preliminary enquiry conducted to find out the involvement of the appellant, but did not find out whether the appellant was further suitable for retention in service or confirmation as he has already completed the period of probation few years ago.

40. She has also referred to the judgment in the case of ***Palak Modi (supra)*** wherein the Supreme Court in paragraph 14 (2) held that the foundation of the action taken by the General Manager terminating the services of the respondent No.1 on the accusation that while appearing in the objective test, the private respondents had resorted to copying and the respondents were condemned unheard which was legally impermissible. It was further held if the misconduct misdemeanor constitutes the basis of the final decision taken by the competent authority to dispense with the service of the probationer by a non-stigmatic order, the Court can lift the veil and declare that in the garb of termination simpliciter the employer punished the employee for an act of misconduct.

41. The Supreme Court, in its latest opinion in the case of ***State of Punjab and Ors. v. Jaswant Singh***, ***2023 (9) SCC 150***, has in paragraph 18, held as under:

> *"18. In view of the principles as reiterated in various judgments by this Court, if we examine the facts of the case in hand leading to the order of discharge, then it is crystal clear that respondent-plaintiff was appointed as a constable and joined the duties on 12.11.1989 on probation. During probation, while he was on training, he along with other trainee constables was deputed for law and order duty in Amritsar District on 24.11.1990. Respondent-plaintiff and other recruits were relieved from the said duty and reported back at the Training Centre, except respondent-plaintiff, who remained on prolonged absence without any intimation to the Training Centre. The S.P., Training Centre, vide memorandum dated 21.02.1991, made a recommendation to S.S.P. that the respondent-plaintiff had not shown any interest in the training and lacks sense of responsibility, further recommending that he is unlikely to prove himself as a good and efficient police*

officer, hence, he may be discharged under Rule 12.21 of PPR. From perusal of the said Rule, it is apparent that in case a probationary constable is found unlikely to prove an efficient police officer, he may be discharged by the Senior Superintendent of Police at any time within three years from the date of enrolment. The S.S.P. relying upon the recommendation of the supervising officer (S.P., Training Centre) formed an opinion that the probationary constable is found unlikely to prove an efficient police officer owing to his demeanour as reported and discussed herein above.

(emphasis supplied)

42. We may also refer to the latest opinion of this Court in ***Government of NCT of Delhi and Anr. v. Dalbir Singh, W.P.(C) 6596/2023***, wherein this Court by referring to various judgments and on the basis of the termination order issued in the following manner has held that the order being non-stigmatic, the Tribunal could not have set aside the order of termination. The said termination order is reproduced as under:

> *"In pursuance of the Proviso to Sub-rule (1) of Rule 5 of the Central Civil Service (Temporary Services) Rules, 1965, I, Ajay Kashyap, Director General, Prisons, hereby terminate forthwith the services of Sh. Dalbir Singh, Warder - 1663 and direct that he shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of notice at the same rates at which he was drawing them immediately before the termination of his service or, as the case may be, for the period by which such notice falls short of one month."*

43. Having noted the judgments of the Supreme Court and this Court on the issue, it is clear that, if the order of termination is simpliciter as permitted by the terms of appointment or as permitted by rules so that the employee would not suffer any stigma attached to rest

of his career then such an order is permissible as the employer was not interested in finding the truth of the allegations against the government servant. But in cases as held by the Supreme Court in ***Ratnesh Kumar Chaudhary (supra)***, where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definite nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order was issued, such an order would be violative of principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegation with a view to punish him and not merely gather evidence for a future regular departmental enquiry.

44. In the case in hand, we have already reproduced the order of termination in paragraph 5 above. The said order of termination unlike an order of termination in the case of ***Dalbir Singh (supra)*** concludes that, having found the ***"unsatisfactory and not conducive"*** nature of the respondent's working; his services are required to be terminated. The termination on the ground of ***"unsatisfactory and not conducive"*** working is not contemplated in the terms of appointment or for that matter under Rule 5 of the CCS (Temporary Service) Rules, 1965 which reads as under:

> *"5. Termination of temporary service.*
> *(1) (a) The services of a temporary Government servant shall be liable to termination at any time by a notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant;*
> *(b) the period of such notice shall be one month.*
> *Provided that the services of any such Government servant may be terminated forthwith and on such termination, the*

Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before the termination of his services, or as the case may be, for the period by which such notice falls short of one month."

45. The stand of the petitioners before the Tribunal and before us is by relying upon the fact that the petitioner was absent between the period April 11, 2017 to April 21, 2017 for which a memorandum was issued to the respondent. A reference is also made to the FIR registered against respondent under the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act', for short). So it follows that the absence / the FIR were the *'foundation'* for terminating the services of the respondent and as such the same could not have been done without following the principles of natural justice. The said oder of termination is stigmatic and punitive in nature. We may also state that, had the rules permitted, a government servant who is *'found unlikely to prove himself an efficient police officer'* may be discharged by the employer within three years of enrollment, as was the rule in the case of ***Jaswant Singh (supra)*** would justify the termination, but no such rule has been shown to us. In any case, the termination being under Rule 5, the same has to be an order simpliciter.

46. In the present case, we have already held that the impugned order is stigmatic and that the Tribunal was justified to the extent of holding that the termination order of the respondent was bad. But, what we do not agree is the conclusion arrived by the Tribunal, that is, the Tribunal while setting aside the order of termination had granted liberty

to the petitioners to initiate disciplinary enquiry and /or take action in accordance with the relevant rules depending upon the final outcome of the FIR, which according to us shall mean that the employer needs to wait for the final decision on the FIR, which will take its own time.

47. We would state here that, mere pendency of an FIR shall not restrain/preclude the employer to initiate disciplinary proceedings under the relevant rules, as it is a settled law that, a Criminal Case & Departmental Enquiry are two different proceedings and for holding the charge against a government servant in a departmental enquiry, the same needs to be proved on the principles of preponderance of probability.

48. We dispose of the petition by directing the petitioners to reinstate the respondent in service within six weeks of the receipt of the copy of this order with all consequential benefits in accordance with the relevant rules and instructions but with liberty to the petitioners to initiate action against the respondent in accordance with the conduct rules and proceed accordingly. No costs.

CM APPL. 50153/2023 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

ANOOP KUMAR MENDIRATTA, J

FEBRUARY 28, 2024*/jg*