IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. 355/1997

Reserved on:18.7.2008

Decided on:30.9. 2008

Veerta Verma. **…Petitioner.**

Versus

State of Himachal Pradesh and another. **…Respondents**

Coram

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting ?[1]*. yes.*

For the petitioner : **Mr. Ajay Sharma, Advocate.**

For the Respondents : **Mr. Rajinder Dogra, Additional Advocate General for respondent No.1.**

Mr. K.D. Sood, Advocate for respondent No.2.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that in sequel to the recommendations made by the Himachal Public Service Commission, the petitioner was appointed to the Himachal Pradesh Judicial Service purely on temporary basis vide notification dated 26.7.1995. She was posted as Sub Judge-cum-Judicial Magistrate (1), Mandi pursuant to notification dated 28th July, 1995. She was discharged vide notification dated 20th September, 1997 on the ground that she has

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? yes.

not completed her probation period satisfactorily. The petitioner has assailed this order dated 20th September, 1997. The primary ground for assailing the order dated 20th September, 1997 in the writ petition is that though order dated 20th September, 1997 is innocuous but if the veil is lifted it becomes clear that the order casts a stigma and is punitive in nature founded on misconduct. It has also been contended in the petition that she has not been treated in a just and fair manner vis-à-vis one Dr. Baldev Singh. The stand of the employer is that order dated 20th September, 1997, is discharge simpliciter and need not be interfered with by this Court. It is admitted in the reply by respondent No.2 that in the case of Dr. Baldev Singh, the period of probation was extended by another one year with effect from 6.8.1997. It has been averred in the reply that Hon'ble the Chief Justice after considering the explanation of the petitioner dated 14th May, 1997 to the memo dated 6th May, 1997 had administered strict warning to her. There is mentioning of registration of FIR No. 165/95 dated 27.7.1995 under sections 406, 417,465, 467,468, 471, 420 and 120-B of the Indian Penal Code against the petitioner and her prosecution was also sanctioned.

Mr. Ajay Sharma learned counsel appearing on behalf of the petitioner has strenuously argued that order dated 20.9.1997 (Annexure P-3) is violative of Article 14 of the Constitution of India. He also contended that the order dated 20.9.1997 is primarily based on the registration of the FIR against his client bearing FIR No. 165/95 and the sanction accorded to prosecute her. He further contended that his client has been discriminated vis-à-vis Dr. Baldev Singh. His further submission was that there was a serious allegation levelled against Dr. Baldev Singh which has led to a discreet inquiry conducted by a Judicial Officer on the basis of which his explanation was sought for but without taking any final

decision on the report, his probation period was extended on 5th September, 1997. His further contention is that order dated 20th September, 1997 casts stigma if the veil is lifted and the record is perused by this Court.

Mr. K.D. Sood, Advocate appearing on behalf of respondent No.2 has supported the notification dated 20th September, 1997. His contention is that it was for the employer to decide whether the petitioner had completed the probation period satisfactorily or not. He also contended that the notification dated 20th September, 1997 is discharge simpliciter and the petitioner has not substantiated her plea that the same is the outcome of any misconduct. He has strenuously relied upon the warning administered to the petitioner vide Annexure R-2/2 dated 9th June, 1997. He also contended that it was highly improper if a Judicial Officer continued on the post when FIR had already been registered against her and prosecution was sanctioned against her. The respondents have produced the entire record for the perusal of the Court.

I have heard the learned counsel for the parties and perused the entire record carefully.

It will be apt at this stage to have a bird's eye view of the service record of the petitioner while serving as Judicial Officer. She was appointed vide notification dated 26th July, 1995. She was posted as Sub Judge-cum-Judicial Magistrate vide notification dated 28th July, 1995. I have gone through the confidential report of the petitioner for the year 1995-96. The net result of the ACR in the confidential report is 'very good'. In the confidential report for the period with effect from 27.1.1996 to 31.3.1997, the net result is 'good'. In case of Dr. Baldev Singh for the period from 11th August, 1995 to 16th January, 1996, the net result is 'good'. For the period from 16.1.1996 to 31.3.1996, the net result is

'good'. For the period 1.4.1996 to 31.3.1997, net result was 'good'. For the period 1997-98 with effect from 9.6.1997, the net result was 'good. This is how the Annual Confidential Report of the petitioner vis-à-vis Dr. Baldev Singh read. It will be pertinent to take note of Annexure R-2/2 heavily relied upon by Mr. K.D. Sood to substantiate his plea that the petitioner had been administered serious warning and this was one of the factors which has gone against her resulting in her non-confirmation. The text of letter dated June 9th, 1997 reads thus:

> **"Reference your explanation vide registered letter No. SJ/SDJM/Con/Suptd/97-479/97 dated 14/15.5.1997, in reply to Registry Memo No. HHC/CJ/Secy/8-4/84-2582 dated 6.5.1997. On consideration of your explanation, the following lapses are attributed to you:-**
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> **i) Though accepting your plea that the Steno has erroneously typed the date of the zimini order as "2.1.1997" instead of "3.1.1997", you have failed to check the date while signing the said zimini order.**
>
> **ii) Your explanation that you did not know whether the Secretary, Gram Panchayat is a Govt. servant has been found unsatisfactory.**
>
> **iii) You have ordered issue of non-bailable warrant simply on the basis of office report, which resulted in causing harassment, rather insult to a witness. You were supposed to have checked the report especially when non-bailable warrant was likely to be issued.**
>
> **Therefore, the Hon'ble the Chief Justice has been pleased to order issue of "strict warning" to you, which is hereby conveyed."**

It appears from the record that an anonymous complaint was received by Hon'ble the Chief Justice against the petitioner that a criminal case has been registered by the Hamirpur Police. The matter was placed before the Full Court in its meeting held on 5th July, 1996. The decision taken by the Full Court on 5.7.2000 reads thus:

> **"Considered. <u>Resolved that the Superintendent of Police, Hamirpur be asked to expedite the investigation and intimate the High Court the result of investigation. Keeping in view the seriousness of allegations against the judicial Officer (Ms. Veerta Verma), her case for confirmation will not be put up by the Registrar till the investigation is complete and report of the Supdt. Of Police is received</u>."**

Thereafter the matter was again placed before the Full Court. The Full Court accorded the necessary sanction for the prosecution of the petitioner on the basis of the FIR No. 165/95 registered at Police Station, Hamirpur. The petitioner faced the trial and she was acquitted by the learned Chief Judicial Magistrate, Hamirpur on 30th June, 2000. The State preferred an appeal against the judgment dated 30th June, 2000 by way of Criminal Appeal No. 199/2001. The appeal preferred by the State was partly allowed. This Court upheld the acquittal of the petitioner and Sh. Anil Kumar vide judgment dated 14th November, 2007. This fact was brought to the notice of the Court by Mr. Ajay Sharma.

Now, the Court will advert to the conduct of Dr. Baldev Singh. It appears from the record that a complaint dated 5th July, 1997 was received by Hon'ble the Chief Justice against Dr. Baldev Singh. A discreet inquiry was conducted by Sh. Shamsher Singh, Additional District and Sessions Judge against Dr. Baldev Singh. The inquiry was placed before the Full Court. It was decided by the Full Court that the copy of the complaint dated 5th July, 1997 be sent to Dr. Baldev Singh and his explanation be called for with respect to the allegations made against him. Thereafter the learned Registrar Mr. M.R. Verma prepared an agenda for confirmation of Sh. Rakesh Kainthla, petitioner Veerta Verma and Dr. Baldev Singh. The agenda i.e. item No.1 reads thus:

"Item No.1.

Consideration of the matter regarding confirmation/extension of period of probation in respect of the officers of Himachal Pradesh Judicial Service appointed to the Service in August, 1995.

It may be submitted that Ms. Veerta Verma and S/Shri Rakesh Kainthla, Baldev Singh, Yashwant Singh and Rakesh Kumar Chaudhary were appointed to the Himachal Pradesh Judicial Service in August, 1995, on two year's probation.

Rule 2, 3 and 4 of section "C, Part-III of H.P. Judicial Service Rules, 1973 deal with the period of probation, confirmation and departmental examination of the offices of the Himachal Pradesh Judicial Service.

Rule 2 supra reads as follows:

2. <u>Period of probation.</u>

(a) Every person appointed to the service shall be on probation for a period of two years.

(b) The High Court may extend the period of probation for a maximum period of two years for reasons to be recorded in writing.

(c) A person on probation shall be liable to be discharged from service without assigning any reason, provided that if he holds a lien or any permanent post under the State Government or any other office office/establishment under any Government/High Court, he shall be liable to be reverted to that post.

(d) A person on probation who holds a lien on any permanent post under the State Government or any other office/establishment under any Government/High Court may if he so desires during the period of probation have the option to revert back to his parent Department/office/establishment, as the case may be after giving such notice as may be prescribed by the Government in consultation with the High Court.

Rule 3 supra reads as under:-

3. Confirmation in service.

"A person who has been declared to have satisfactorily completed his period of probation and who has passed the Departmental Examination as prescribed in sub-Rule 4 below may be confirmed in the service."

Relevant part of Rule 4 supra reads as follows:

4. <u>Departmental Examination</u>.

(i) Every person appointed to the Service after the commencement of these rules shall pass the departmental examination by the prescribed standard within two years from the date of his appointment and if any candidate fails to pass the departmental examination, he may be removed/reverted from the service. The departmental examination shall be conducted by the High Court in accordance with rules and procedure to be framed in this behalf by the High Court.

Provided that the High Court may, for good and sufficient reasons, exempt any candidate/person from passing the whole or any portion of the Departmental Examination or may extend the period within which the period shall so pass the examination.

(ii) .. .. .. "

The exact dates of appointment and expiry of probation period of two years of the aforesaid officers are as follows:

Sr. No.	Name of Officer	Date of appointment to the H.P. Judl. Service.	Date of completion of probation period.
1.	Sh. Rakesh Kainthla	7.8.1995	6.8.1997
2.	Ms. Veerta Verma	9.8.1995	8.8.1997
3.	Dr. Baldev Singh	7.8.1995	6.8.1997
4.	Sh. Yashwant Singh	8.8.1995	7.8.1997
5.	Sh. Rakesh Kumar Chaudhary.	3.8.1995	2.8.1997

It may be submitted that except Sh. R.K.Chaudhary, all the aforesaid officers have passed the departmental examination. Therefore, the case of

Mr. Rakesh Kumar Chaudhary has to be considered in view of the provisions of Rule 4 supra as well amongst other relevant factors.

Ms. Veerta Verma is an accused in case F.I.R. No. 165/65 dated 27.7.1995 under Sections 406, 417, 465, 467, 468, 471, 420, 120-B read with Section 34 of the Indian Penal Code Police Station Hamirpur and the Hon'ble Court has accorded sanction for her prosecution vide order dated July 5, 1997.

There are allegations of gross mis-use of official powers against Dr. Baldev Singh and the inquiry in the matter is pending as per information collected from the Vigilance Cell.

Since the cases of the aforesaid officers, in view of the completion of probation period are to be considered for confirmation or extension of their period of probation etc., therefore the matter was placed before the Hon'ble the Chief Justice and His Lordship was pleased to direct that the matter be placed before the Full Court.

The ACR-dossiers of the concerned officers and other relevant records which may be required for the consideration of the matter by the Hon'ble Full Court will be placed before it at the time of consideration of the matter.

Pursuant to the orders of Hon'ble the Chief Justice, the matter is placed before the Hon'ble Full Court for consideration and orders, please."

It is evident from the agenda that two aspects have been highlighted therein firstly the FIR has been registered against the petitioner and the sanction for her prosecution was accorded on 5.7.1997. As far as Dr. Baldev Singh was concerned, it was stated that the inquiry in the matter was pending against him as per the information received from the Vigilance Cell. The matter thereafter was placed before the Full Court to take a decision whether the probation of the petitioner and Dr. Baldev

Singh was to be extended or not. The matter came up before the Hon'ble Court on 29.8.1997. The following decision was taken by the Full Court, which reads thus:

> **"Item No.1.**
> **Consideration of the matter regarding confirmation/extension of period of probation in respect of the officers of Himachal Pradesh Judicial Service appointed to be Service in August, 1995.**
>
> **Having assessed the performance and conduct of Dr. Baldev Singh, it was resolved to extend the period of his probation for a period of one year on and with effect from 6.8.1997.**
>
> **Having assessed the performance and conduct of Ms. Veerta Verma, it was resolved that she cannot be said to have passed her probationary period satisfactorily and therefore, it is resolved that she be discharged from Service and the Governor be informed to issue notification discharging her from the Service.."**
> **A copy of the complaint dated July 5, 1997 be sent to Dr. Baldev Singh and his explanation be called for with respect to the allegations against him in the aforesaid complaint Annexure-A. The explanation shall reach the Registry of this Court within a period of two weeks from the date of receipt of the communication."**

Thus as far as the petitioner is concerned, the reasons were recorded by the High Court that since the petitioner has not completed the period of probation satisfactorily, she be discharged. However, as far as Dr. Baldev Singh is concerned, his probation period was extended. This decision is dated 29.8.1997. In sequel to the decision of the Full Court vide letter dated 5th September, 1997, the probation period of Dr. Baldev Singh was extended with effect from 6th August 1997. Now, the relevant question is whether the probation period of Dr. Baldev Singh could be extended if the inquiry was pending against him. The notification for

extension of his probation period was issued on 5th September, 1997. However, his explanation was considered by the Full Court in its meeting held on 30th September, 1997, as per item No.1 (supplementary agenda), which reads thus:

> **"Item No.1 (Supplementary agenda)**
> **Consideration of discreet inquiry report submitted by Shri Shamsher Singh, Additional District and Sessions Judge against Dr. Baldev Singh, Sub Judge-cum-JMIC, Shimla (earlier posted as Sub Judge-cum-JMIC, Anni).**
> **Explanation of Mr. Baldev Singh, Sub Judge-cum-Judicial Magistrate (2) Shimla considered. We expect that in future he will conduct himself in a dignified manner in his capacity as a Judicial Officer."**

The learned Registrar has taken a serious note of misconduct of Dr. Baldev Singh. The matter was looked into by the Judicial Officer and the discreet inquiry was furnished to this Court. The comments of Dr. Baldev Singh were called for. He was warned by the Full Court on 30th September, 1997, however, his probation period was extended on 5th September, 1997. There is considerable force in the submission of Mr. Ajay Sharma that his client has not been dealt with in a just and fair manner. I have already taken note of the Annual Confidential Reports of Dr. Baldev Singh and of the petitioner. The petitioner has earned 'very good' entry in the Confidential Report 1995-96, however, in her Confidential Report which she earned only 'good' is for the period 1996-97. As far as Dr. Baldev Singh is concerned, it is evident that he has only earned 'good' in all the Annual Confidential Reports for the relevant period. The only distinguishable features of the case of Dr. Baldev Singh vis-à-vis the petitioner are that as far as the petitioner is concerned she had been warned by Hon'ble the Chief Justice vide communication dated 9th June, 1997 and FIR bearing No. 165/95 was registered against her.

This Court took cognizance of FIR No. 165/95 and the matter was directed to be investigated by the Superintendent of Police, Hamirpur expeditiously. The permission to prosecute her was accorded as discussed hereinabove. She was acquitted by the learned trial court and this decision has been upheld by a Division Bench of this Court. In case of Dr. Baldev Singh, an inquiry was instituted against his misconduct. The Inquiry Officer has submitted the report to this Court. His explanation was called for and he was warned on 30th September, 1997. The Full Court has not taken into consideration that the inquiry was pending against Dr. Baldev Singh when his probation was extended with effect from 6.8.1997 and in the case of the petitioner it was found that she has not completed her probation satisfactorily and the recommendations were made for her discharge from the Himachal Pradesh Judicial Service.

Rule 2 of the Himachal Pradesh Judicial Service Rules, 1973 deals with the period of probation, which reads thus:

> **"2. <u>Period of probation.</u>**
>
> **(e) Every person appointed to the service shall be on probation for a period of two years.**
>
> **(f) The High Court may extend the period of probation for a maximum period of two years for reasons to be recorded in writing.**
>
> **(g) A person on probation shall be liable to be discharged from service without assigning any reason, provided that if he holds a lien or any permanent post under the State Government or any other office office/establishment under any Government/High Court, he shall be liable to be reverted to that post.**
>
> (h) **A person on probation who holds a lien on any permanent post under the State Government or any other office/establishment under any Government/High Court may if he so desires during the period of probation have the option to**

revert back to his parent Department/office/ establishment, as the case may be after giving such notice as may be prescribed by the Government in consultation with the High Court."

The maximum period for probation is two years, however, the same could be extended for a maximum period of two years for reasons to be recorded in writing. The petitioner was appointed undoubtedly on probation for a period of two years, Dr. Baldev Singh was also appointed on probation for two years. It was necessary as per sub-rule (b) or Rule 2 that the period of probation could be extended for a maximum period of two years for the reasons to be recorded in writing. I have not come across the record whereby reasons were recorded for extending the probation period of Dr. Baldev Singh.

The most important question now is whether the impugned notification dated 20.9.1997 is founded on any alleged misconduct of the petitioner or not. The plain reading of notification dated 20th September, 1997 reflects it to be an order of discharge simpliciter. However, if the veil is lifted as permissible by Hon'ble the Supreme Court, it appears from the record that the foundation for issuance of notification dated 20th September, 1997 is the registration of FIR against the petitioner bearing No. 165/95 and Annexure R-2/2 dated June 9, 1997 whereby, the petitioner has been issued strict warning.

The other vital aspect is whether the petitioner could be discharged on the basis of the registration of FIR against her. The registration of FIR is only for the purpose of setting the criminal machinery in motion. Mere registration of FIR against any person will not constitute any misconduct. It will constitute misconduct if a person is convicted by a criminal court. It appears from the record that the registration of FIR against the petitioner has heavily weighed for not extending her probation period and resulting

in her discharge vide notification dated 20th September, 1997. The employer should have waited for the outcome of the criminal trial on the basis of FIR No. 165/95. She has been acquitted as noticed above by the trial court and this submission has been upheld by a Division Bench of this Court. There was no adverse material against the petitioner except the registration of FIR No. 65/95 and Annexure R-2/2. She has earned 'very good' entry in the Annual Confidential Report 1995-96 and has earned 'good' entry in the subsequent period for 1996-97. She was surely better placed vis-à-vis Dr. Baldev Singh in whose case the period of probation was extended with effect from 6.8.1997.

It can be safely presumed by this Court on the basis of the above discussion that notification dated 20th September, 1997 casts stigma and is punitive in nature and the inquiry was required to be conducted against the petitioner. There is violation of the principles of natural justice. She has not been afforded any opportunity of being heard before the issuance of the impugned order. She has not been treated fairly by the employer. It appears that the employer has adopted different yardstick for dealing with similarly situate persons. So far as the petitioner is concerned, the decision is harsh and oppressive and as far as Dr. Baldev Singh is concerned, he has been dealt with a lenient manner. Comparison of the case of Dr. Baldev Singh has only been made to compare her case to see whether there is violation of Article 14 of the Constitution of India as argued by Mr. Ajay Sharma or not. It is made clear that the observation made hereinabove qua Dr. Baldev Singh will have no bearing on his service record since he has already been confirmed. These observations were necessary to see the veracity of the submissions of Mr. Ajay Sharma on the basis of the specific pleadings made in the petition.

The petitioner's explanation was called for on 14/15th May, 1997. She has furnished reply on 6th May, 1997. The important aspect in her explanation was that the Steno has typed erroneously the date of the zimini order as "2.1.1997" instead of 3.1.1997". True it is that the Judicial Officers have to be careful while signing the zimini orders, however, it cannot be viewed as a serious lapse that the petitioner has not been permitted to complete her probation period. The other issues whether the petitioner was not aware that the Secretary, Gram Panchayat is a Government servant or not was also not such a serious matter which could entail her non-confirmation. The petitioner has issued bailable warrant on the basis of office report. She was supposed to be more careful while issuing non-bailable warrants. However, the fact of the matter is that the petitioner had issued non-bailable warrants as per the office report.

It is evident from the decision of the Full Court dated 5th July, 1997 that a conscious decision had been taken whereby the Registrar was directed not to put up the case of the petitioner for confirmation in view of the seriousness of allegations on the basis of FIR till the investigation of the FIR and the report of the Superintendent of Police was received. It is thus clear that the registration of the FIR against the petitioner was one of the grounds for her non-confirmation. In other words, the Full Court has treated the registration of the FIR against the petitioner as 'misconduct'. Similarly, in letter dated 6th May, 1997, the misconduct/inefficiency of the petitioner has been taken note of. In these circumstances, it can safely be presumed that the order of discharge is a camouflage and there ought to have been regular inquiry instituted against the petitioner or at least she should have been heard before the issuance of impugned order.

Their Lordships of the Hon'ble Supreme Court in the following cases have succinctly explained that the Courts have the jurisdiction to lift the veil to ascertain whether the order is founded on misconduct or not taking into consideration all the preceding attending circumstances:

Their Lordships of the Hon'ble Supreme Court in ***P.L. Dhingra versus Union of India*** AIR 1958 SC 36 have held as under:

> **"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."**

Their Lordships of the Hon'ble Supreme Court in ***The State of Punjab and another versus Sukh Raj Bahadur*** AIR 1968 SC 1089 have culled out the following propositions while dealing with the termination of the services of temporary employees:

> **"On a conspectus of these cases, the following propositions are clear:-**
>
> **1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.**
>
> **2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.**
>
> **3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one**

by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable from preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged by Article 311 i.e. an Enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article."

Their Lordships of the Hon'ble Supreme Court in ***Appar Apar Singh versus State of Punjab and others*** 1970 (3) SCC 338 have held that the circumstances preceding or attendant on the impugned order have also to be examined. Their Lordships have held as under:

"After a review of the case-law on the subject, this Court in State of Punjab and another versus Sh. Sukh Raj Bahadur has enunciated the following propositions which have to be borne in mind in considering the grievance of an officer regarding violation of Article 311 (2). These propositions are as follows:

1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. **An order of termination of service in unexceptionable from preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.**

5. **If there be a full-scale departmental enquiry envisaged by Article 311 i.e. an Enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article.**

In particular it will be noted from the above propositions that the circumstances preceding or attendant on the impugned order have to be examined in each case, the motive behind it being immaterial and if the order visits the public servant with any evil consequence, it must be considered to be one by way of punishment whether he was a mere probationer or a temporary servant. But it is also clear that an order passed after an enquiry is conducted to ascertain whether the public servant should be retained in service or not, does not attract Article 311 (2) of the Constitution.

From a review of the decisions cited above, it is clear that in order to find out whether an impugned order is one passed by way of punishment, the form in which the order is expressed is not decisive and the circumstances preceding or attendant on the order have to be examined in each case. It is also clear that the motive behind the passing of the order is of no consequence. Whether penal consequences flow from the order will have also to be investigated. Having due regard to the propositions enunciated, we will now proceed to consider whether the impugned order can be considered to be one reducing the rank of the appellant as by way of punishment. If the State is able to establish its plea that the enquiry conducted by the two Deputy Directors was only to find out the suitability of the

appellant to be continued as Principal and that as he was found to be unsuitable he was reverted, then the order cannot be considered to be by way of punishment. We however find considerable difficulty in accepting this plea of the State. From the facts given by us in setting out the circumstances leading to the filing of the writ petition, it is clear that the enquiry conducted by the two Deputy Directors was not with a view to find out the suitability or otherwise of the appellant to be continued as Principal. On the other hand, the enquiry was held with a view to investigate into the allegations made by the Principal against some of the members of the staff and the allegations made by Prof. Kapur against the appellant. We have already referred to the questionnaire issued to the appellant and also the points set for determination by the Deputy Directors as also the findings recorded by them. We have already pointed out that one of the allegations which were investigated by the Deputy Directors related to a very serious matter, namely, the charge levelled by Prof. Kapur against the Principal having come to the stage drunk and having done makeup of the girls. We are not concerned with the validity of the enquiry conducted by the Deputy Directors because it is admitted by the State that the said enquiry was conducted ex parte and behind the back of the appellant. It has also been admitted that the statements recorded by the Deputy Directors from various persons were not disclosed to the appellant and the latter had also no opportunity to cross-examine those witnesses. But a finding was recorded by the Deputy Directors that the said allegation made against the Principal has been corroborated by the girls themselves and by the members of the staff who were on the stage. The Deputy Directors after recording this finding against the appellant also recommended that the appellant needs "some exemplary punishment without being called upon to face a regular departmental enquiry". The Government accepted the finding of the

> **Deputy Directors as well as their recommendation to impose punishment against the appellant and it is on the basis of such acceptance that the order of reversion was passed. No doubt, the order by itself and on the face of it is innocuous but, in our view, the finding recorded by the Deputy Directors against the appellant and their recommendation to impose punishment upon the appellant are the very foundation for the Government for passing the order reverting the appellant from P.E.S.' Class 1 to P.E.S. Class II."**

The Hon'ble Supreme Court in ***Shamsher Singh versus State of Punjab*** AIR 1974 SC 2192 has held that if the probationer is discharged on the ground of mis-conduct or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311 (2) of the Constitution. Their Lordships have held as under:

> **"No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311 (2) of the Constitution."**

Their Lordships of the Hon'ble Supreme Court have held in ***Gujarat Steel Tubes Ltd and others versus Gujarat Steel Tubes Mazdoor Sabha and others*** (1980) 2 SCC 593 that the court will find out from other proceedings or documents connected with the formal order of termination

what the true ground for the termination is and if the order has a punitive flavour in cause or consequence it is dismissal. Their Lordships have held as under:

> **"Before we leave this part of the case, a reference to some industrial law aspects and cases may be apposite though a little repetitive. Standing orders certified for an industrial undertaking or the model Standing Orders framed under the Industrial Employment Standing Orders Act provide for discharge simpliciter, a term understood in contradistinction to punitive discharge or discharge by way of penalty. It is not unknown that an employer resorts to camouflage by garbing or cloaking a punitive discharge in the innocuous words of discharge simpliciter. Courts have to interpose in order to ascertain whether the discharge is one simpliciter or a punitive discharge, and in doing so, the veil of language is lifted and the realities perceived. In the initial stages the controversy raised was whether the court/tribunal had any jurisdiction to lift such a veil. Probe and penetrate so as to reveal the reality, but this controversy has been set at rest by the decision in Western India Automobile Association v. Industrial Tribunal, Bombay13. The wide scope of the jurisdiction of industrial tribunal/ court in this behalf is now well established. If standing orders or the terms of contract permit the employer to terminate the services of his employee by discharge simpliciter without assigning reasons, it would be open to him to take recourse to the said term or condition and terminate the services of his employee but when the validity of such termination is challenged in industrial adjudication it would be competent to the industrial tribunal to enquire whether the impugned discharge has been effected in the bona fide exercise of the power conferred by the terms of employment. If the discharge has been ordered by the employer in bona fide exercise of his power, then the industrial tribunal may not interfere with it; but the**

words used in the order of discharge and the form which it may have taken are not conclusive in the matter and the industrial tribunal would be entitled to go behind the words and form and decide whether the discharge is a discharge simpliciter or not. If it appears that the purported exercise of power to terminate the services of the employee was in fact the result of the misconduct alleged against him, then the tribunal would be justified in dealing with the dispute on the basis that, despite its appearance to the contrary, the order of discharge is in effect an /order of dismissal. In the exercise of this power, the court/tribunal would be entitled to interfere with the order in question (see Assam Oil Co. v. Its Workmen). In the matter of an order of discharge of an employee as understood within the meaning of the Industrial Disputes Act the form of the order and the language in which it is couched are not decisive. If the industrial court is satisfied that the order of discharge is punitive or that it amounts to victimization or unfair labour practice it is competent to the court/ tribunal to set aside the order in a proper case and direct reinstatement of the employee (see Tata on Mills Co. Ltd. v. Workmen). The form used for terminating the service is not conclusive and the tribunal has jurisdiction to enquire into the reasons which led to such termination. In the facts of the case it was found that Standing Orders provided that an employee could ask for reasons for discharge in the case of discharge simpliciter. Those reasons were given before the tribunal by the appellant, viz., that the respondent's services were terminated because he deliberately resorted to go-slow and was negligent in the discharge of his duty. It was accordingly held that the services of the employee were terminated for dereliction of duty and go-slow in his work which clearly amounted to punishment for misconduct and, therefore, to pass an order under Clause 17(a) of the Standing Orders permitting discharge simpliciter in such circumstances

was clearly a colourable exercise of power to terminate services of a workman under the provisions of the Standing Orders. In these circumstances, the tribunal would be justified in going behind the order and deciding for itself whether the termination of the respondent's services could be sustained (vide Management of Murugan Mills Ltd. v. Industrial Tribunal, Madras). This view was affirmed in Tata Engineering & Locomotive Co. Ltd. v. S. C. Prasad). After approving the ratio in Murugan Mills cases, this Court in L. Michael v. M/s. Johnson Pumps India Ltd, observed that the manner of dressing up ~order did not matter. The slightly different observation in Workmen of Sudder Office, Cinnamare v. Management was explained by the Court and was further affirmed that since the decision of this Court in Chartered Bank v. Chartered Bank Employees' Union it has taken the consistent view that if the termination of service is a colourable exercise of power vested in the management or is a result of victimization or unfair labour practice, the court tribunal would have jurisdiction to intervene and set aside such termination. It was urged that a different view was taken by this Court in Municipal Corporation of Greater Bombay v. P. S. Malvenkar. The employee in that case was discharged from service by paying One month's wages in lieu of notice. This action was challenged by the employee before the Labour Court and it was contended that it was a punitive discharge. The Corporation contended that under Standing Order 26 the Corporation had the power *to* djs-scharge but there was an obligation to give reasons if so demanded by the employee. The Corporation had also the power to discharge by way of punishment. The Court in this connection observed as under:

> **Now one thing must be borne in mind that these are two distinct and independent powers and as far as possible neither should be construed so as to emasculate the other or to**

render it ineffective. One is the power to punish an employee for misconduct while the other is the power to terminate simpliciter the service of an employee without any other adverse consequence. Now, proviso (i) to clause (1) of Standing Order 26 requires that the reason for termination of the employment should be given in writing to the employee when exercising the power of termination of service of the employee under Standing Order26. Therefore, when the service of an employee is terminated simpliciter under Standing Order 26, the reason for such termination has to be given to the employee and this provision has been made in the Standing Order with a view to ensuring that the management does not act in an arbitrary manner. The management is required to articulate the reason which operated on its mind in terminating the service, of the employee. But merely because the reason for terminating the service of the employee is required to be given - and the reason must obviously not be arbitrary, capricious or irrelevant - it would not necessarily in every case make the order of termination punitive in character so as to require compliance with the requirement of clause (2) of Standing Order 21 read with Standing Order 23. Otherwise, the power of termination of service of an employee under Standing Order 26 would be rendered meaningless and futile, for in no case it would be possible to exercise it. Of course, if misconduct of the employee constitutes the foundation for terminating his service, then even if the order of termination is purported to be made under Standing Order 26, it may be liable to be regard as punitive in character attracting the procedure of clause (2) of Standing Order 21 read with Standing Order 23, though even in such a case it

may be argued that the management has not punished the employee but has merely terminated his service under Standing Order 26.

It does not purport to run counter to the established ratio that the form of the order is not decisive and the Court can lift the veil. However, it may be noted that there was an alternative contention before the Court that even if the order of discharge was considered punitive in character, the employer corporation had led evidence before the labour court to substantiate the charge of misconduct and that finding was also affirmed."

Their Lordships of the Hon'ble Supreme Court have also held in ***Meet Singh versus State of Punjab*** 1980 (3) SCC 288 that the function of the court is to discover the nature of the order by attempting to ascertain what was the motivating consideration in the mind of the authority which prompted the order and the intention behind the order can be discovered and proved like any other fact from the evidence on the record. Their Lordships have further held that in each case it is necessary to examine the entire range of facts carefully and consider whether in the light of those facts the superior authority intended to punish the government servant or having regard to his character, conduct and suitability in relation to the post held by him it was intended simply to terminate his services. Their Lordships have held as under:

"In the appeal before us, it is urged for the appellant that the High Court was wrong in holding that the order terminating the appellant's services was not an order imposing a punishment. We are referred to the disciplinary proceedings instituted against the appellant in 1969 and it is submitted that although the order of termination does not refer to those proceedings and the charge on which they were commenced, the appellant's services were terminated with a view to punish him for

contracting a second marriage without prior permission of the government. We are satisfied that the contention is without substance. It is now well settled law that an order terminating the services of a temporary government servant and ex facie innocuous in that it does not cast any stigma on the government servant or visits him with penal consequences must be regarded as effecting a termination simpliciter, but if it is discovered on the basis of material adduced that although innocent in its terms the order was passed in fact with a view to punishing the government servant, it is a punitive order which can be passed only after complying with Article 311 (2) of the Constitution. The scope of the enquiry called for in such a case has been outlined by one of us in State of Maharashtra versus Veerappa R. Sobji. But the question which calls for determination in all such cases is whether the facts satisfy the criterion repeatedly laid down by this Court that an order is not passed by way of punishment, and is merely an order of termination simpliciter, if the material against the government servant on which the superior authority has acted constitutes the motive and not the foundation for the order. The application of the test is not always easy. In each case it is necessary to examine the entire range of facts carefully and consider whether in the light of those facts the superior authority intended to punish the government servant or, having regard to his character, conduct and suitability in services. The function of the court is to discover the nature of the order by attempting to ascertain what was the motivating consideration in the mind of the authority which prompted the order.

In the present appeal, the appellant was a temporary government servant. The question whether he should be retained in service was a matter which arose directly during the drive instituted by the Inspector General of Police in March, 1970 for weeding out police officers who were unsuitable or unfit to be

> **continued in service. The Superintendent of Police prepared a list of Sub-Inspectors functioning within his jurisdiction, and included the name of the appellant in that list. The material which he considered was sufficient to led to the conclusion that the appellant, who was a temporary government servant, was not suitable for being retained in service. His general character and conduct led to that impression. There is nothing to show that the impugned order was made by way of punishment. The circumstances that a disciplinary proceeding had been instituted against him earlier does not in itself lead to the inference that the impugned order was by way of punishment. As we have observed, that is a conclusion which must follow from the nature of the intent behind the order. That intention can be discovered and proved, like any other fact, from the evidence on the record. In this case, it is not proved that the impugned order was intended by way of punishment."**

Similarly, their Lordships of the Hon'ble Supreme Court in ***Anoop Jaiswal versus Government of India and another*** (1984) 2 SCC 369 have held that the court can go behind the form of the order of dismissal to find out the real cause of action. Their Lordships have held as under:

> **"On behalf of the Union of India reliance has been placed on State of Punjab versus Shri Sukh Raj Bhadur; Union of India versus R.S. Dhaba; State of Bihar versus Shiva Bhilkshuk Mishra; R.S. Sial versus State of U.P; State of U.P. Versus Ram Chandra Trivedi and I.N. Saksena versus State of M.P. We have gone through these decisions. Except the case of Ram Chandra Trivedi all other cases referred to above were decided prior to the decision in Shamsher Singh case which is a judgment delivered by a Bench of seven Judges. As pointed out by us in all these cases including the case of Ram Chandra Trivedi the principal applied is the one enunciated by Parshotam Lal Dhingra case which we**

have referred to earlier. It is urged relying upon the observation in Shri Sukh Raj Bahadur case that it is only when there is a full scale departmental enquiry envisaged by Article 311 (2) of the Constitution i.e. an enquiry officer is appointed, charge-sheet submitted, explanation called for and considered, any termination made thereafter will attract the operation of Article 311 (2). It is significant that in the very same decision it is stated that the circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial. As observed by Ray, C.J. in Samsher Singh case the form of the order is not decisive as to whether the order is by way of punishment and that even an innocuously worded order terminating the service may in the fact and circumstances of the case establish that an enquiry into allegations of serious and grave character of mis-conduct involving stigma has been made in infraction of the provision of Article 311 (2).

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 mere 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. In the instant case, the period of probation had not yet been over. The impugned order of discharge was passed in the middle of the probationary period. An explanation was called for from the appellant regard the alleged act of indiscipline, namely, arriving late at the gymnasium and acting as one of the ringleaders on the occasion and his explanation was btained. Similarly explanations were called for from other probationers and enquiries were made behind the back of the appellant. Only the

> **case of the appellant was dealt with severely in the end. The cases of other probationers who were also considered to be ringleaders were not seriously taken note of. Even though the order of discharge may be noncommittal, it cannot stand alone. Though the noting in the file of the Government may be irrelevant, the cause of the order cannot be ignored. The recommendations of the Director which is the basis of foundation for the order should be read along with the order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Article 311 (2) of the Constitution."**

The Apex Court in ***Jarnail Singh and others versus State of Punjab and others*** (1986) 3 SCC 277 have held that to ascertain whether the termination is punitive or not, the Court can go behind an ex facie innocuous order of termination to find real basis of termination. Their Lordships have held as under:

> **"In the instant case as we have stated already hereinbefore that though the impugned order was made under the camouflage or cloak of an order of termination simpliciter according to the terms of the employment, yet at page-SC1635 considering the attendant circumstances which are the basis of the said order of termination, there is no iota of doubt in inferring that the order of termination had been made by way of punishment on the ground of misconduct and adverse entry in service record without affording any reasonable opportunity of hearing to the petitioners whose services are terminated and without complying with the**

mandatory procedure laid down in Art. 311(2) of the Constitution of India.

The position is now well-settled on a conspectus of the decisions referred to hereinbefore that the mere form of the order is not sufficient to hold that the order of termination was innocuous and the order of termination of the services of a probationer or of an ad hoc appointee is a termination simpliciter in accordance with the terms of the appointment without attaching any stigma to the employee concerned. It is the substance of the order i.e. the attending circumstances as well as the basis of the order that have to be taken into consideration. In other words, when an allegation is made by the employee assailing the order of termination as one based on misconduct, though couched in innocuous terms, it is incumbent on the Court to lift the veil and to see the real circumstances as well as the basis and foundation of the order complained of. In other words, the Court, in such case, will lift the veil and will see whether the order was made on the ground of misconduct, inefficiency or not. In the instant case we have already referred to as well as quoted the relevant portions of the averments made on behalf of the State respondent in their several affidavits alleging serious misconduct against the petitioners and also the adverse entries in the service records of these petitioners, which were taken into consideration by the Departmental Selection Committee without giving them any opportunity of hearing and without following the procedure provided in Art. 311(2) of the Constitution of India, while considering the fitness and suitability of the appellants for the purpose of regularising their services in accordance with the Government Circular made in October, 1980. Thus the impugned orders terminating the services of the appellants on the ground that "the posts are no longer required" are made by way of punishment."

The Apex Court again in ***Babu Lal versus State of Haryana and others*** (1991) 2 SCC 335 has held that the real nature of the order can be examined by the Court and if the simple order of termination is found to be a camouflage for a punitive action, the order is liable to be set aside. Their Lordships have held as under:

> **"Moreover, from the sequences of facts of this case the inference is irresistible that the impugned order of termination of the service of the appellant is of penal nature having civil consequences. It is well settled by several decisions of this Court that though the order is innocuous on the face of it still then the Court if necessary, for the ends of fair play and justice can lift the veil and find out the real nature of the order and if it is found that the impugned order is penal in nature even though it is couched with the order of,' termination in accordance with the terms and conditions of the order of appointment, the order will be set aside. Reference may be made in this connection to the decision of this Court in Smt. Rajinder Kaur v. State of Punjab (1986) 4 SCC 141 : (AIR 1986 SC 1790) in which one of us is a party. It has been held that (at p. 1792 of AIR):-**
>
> **"The impugned order of discharge though stated to be made in accordance with the @page-SC1314 provisions of Rule 12.21 of the Punjab Police Rules, 1934, was really made on the basis of the misconduct as found on enquiry into the allegation behind her back. Though couched in innocuous terms, the order was merely a camouflage for an order of dismissal from service on the ground of misconduct. This order had been made without serving the ,appellant any charge-sheet, without asking for any explanation from her and without giving any opportunity to show cause against the purported order of dismissal from service and without giving any opportunity to cross examine the witnesses examined. The order was thus, made in total**

contravention of the provisions of Art. 311(2) and was therefore, liable to be quashed and set aside."

Their Lordships of the Hon'ble Supreme Court have held in ***Om Prakash Goel versus Himachal Pradesh Tourism Development Corporation Ltd, Shimla and another*** (1991) 3 SCC 291 that if charge sheet is served and inquiry is conducted, but before conclusion of the inquiry order of simple termination is passed against a temporary employee, the order is to be treated as a camouflage to avoid the inquiry under Article 311 (2) of the Constitution of India. Their Lordships have held as under:

"From the above decisions it can be seen that it is well settled that in a case of an order of termination even that of a temporary employee the Court has to see whether the order was made on the ground of misconduct if such a complaint was made and in that process the Court would examine the real circumstances as well as the basis and foundation of the order complained of and if the Court is satisfied that the termination of services is not so innocuous as claimed to be and if the circumstances further disclose that it is only a camouflage with a view to avoid an enquiry as warranted by Art. 311(2) of the Constitution, then such a termination is liable to be quashed. In the abovementioned decisions, the impugned termination order was accordingly quashed.

It is not in dispute that a regular charge-sheet was served on the petitioner, as mentioned above, on 21st August, 1981 and to the said charge-sheet a list of documents also was appended on the basis of which the articles of charges were framed. The petitioner replied to these charges on 7th September, 1981. Without reference to any of the charges or the reply the order of termination was passed on 8th January, 1982 as already mentioned. In the counter-affidavit at more than

> **one place it is admitted about the framing of the charges etc. regarding the new,; item which refers to the information given out by the petitioner. It is stated in the counter-affidavit that services of the petitioner were terminated as a probationer and not on the basis of the enquiry report which came after the services of the petitioner had been terminated. It can therefore be seen that an enquiry, in fact, was contemplated and was held but the report came into light after termination of the services of the petitioner. It is also submitted on behalf of the petitioner that the audit report would show many irregularities as pointed out by the petitioner and that the petitioner acted honestly in pointing out the irregularities. It is not necessary for us to go into this question. Having gone through the various records and also the, admissions made in the counter-affidavit, we are satisfied that the termination order, though appears to be innocuous, was only intended to punish the petitioner for the misconduct, in respect of the allegations which are mentioned in the charges that were served on him. After serving the charge-sheet, as a matter of fact, the enquiry was conducted. But before the conclusion of the enquiry the termination order was passed. Therefore it is not difficult to see that the form of the termination order is only a cloak for an order of punishment."**

Their Lordships of the Hon'ble Supreme Court in ***Dipti Prakash Banerjee versus Satyendra Nath Bose National Centre for Basic Sciences*** (1999) 3 SCC 60 have formulated the following points for consideration:

> **"(l) In what circumstances, the termination of a probationer's services can be said to be founded on misconduct and in what circumstances could it be said that the allegations were only the motive?**
> **(2) When can an order of termination of a probationer be said to contain an express stigma?**

(3) Can the stigma be gathered by referring back to proceedings referred to in the order of termination?
(4)To what relief?

Their Lordships have dealt with these points as under:

"As to in what circumstances an order of termination of a probationer can be said to be punitive or not depends upon whether certain allegations which are the cause of the termination are the motive or foundation. In this area, as pointed out by Shah, J. (as he then was) in *Madan Gopal* v. *State of Punjab* there is no difference between cases where services of a temporary employee are terminated and where a probationer is discharged. This very question was gone into recently in *Radhey Shyam Gupta* v. *U.P. State Agro Industries Corpn. Ltd.* and reference was made to the development of the law from time to time starting from *Parshotam Lal Dhingra* v. *Union of India* to the concept of "purpose of enquiry" introduced by Shah, J. (as he then was) in *State of Orissa v.Ram Narayan Dass* and to the seven-Judge Bench decision in *Samsher Singh* v. *State of Punjab* and to *post-Samsher Singh* case-law. This Court had occasion to make a detailed examination of what is the "motive" and what is the "foundation" on which the innocuous order is based.

This Court in that connection referred to the principles laid down by Krishnalyer, J. in *Gujarat Steel Tubes Ltd.* v. *Gujarat Steel Tubes Mazdoor Sabha6.*As to "foundation", it was said by Krishna lyer, J. as follows: (SCC p.617,para 53)

"[A] termination effected because the master is *satisfied* of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, 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 enquiry 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 noninjurious terminology is used." (emphasis supplied)

and as to motive: (SCC pp. 617-18, para 54) "54. 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 punitive cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge." (emphasis supplied)

As to motive, one other example is the case of *State of Punjab* v. *Sukh Raj Bahadur* where a chargememo for a regular enquiry was served, reply given and at that stage itself, the proceedings were dropped and a simple termination order was issued. It was held, the order of simple termination was not founded on any findings as to misconduct. In that case, this Court referred to *AG. Benjamin* v. *Union of India8* where a charge-memo was issued, explanation was received, an enquiry officer was also appointed but before the enquiry could be completed, the proceedings were dropped and a simple order of termination was passed. The reason for dropping the proceedings was that "departmental proceedings will take a much longer time and *we are not sure* whether after going through all the foundation, we will be able to deal with the accused in the way he deserves". The termination was upheld.

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.

In the light of the above principles laid down in *R.S. Gupta case* we do not think anything more is to be added. Point 1 is decided accordingly.

***Point* 2**

In the present case before us, the order of termination dated 30-4-1997 is not a simple order of termination but is a lengthy order which we have extracted above. It not only says that performance during probation is not satisfactory but also refers to a letter dated 30-4-1996 by which the period of probation was extended by six months from 2-5-1996, and to letters dated 17-10-1996 and 31-10-1996. It concludes by saying that the appellant's "conduct, performance, ability and capacity during the *whole period* of probation" was not satisfactory and that he was considered "unsuitable" for the post for which he was appointed.

The contention for the appellant is that if the appellant is to seek employment elsewhere, any new employer will ask the appellant to provide the copies of the letters dated 30-4-1996, 17-10-1996 and 31-10-1996 referred to in the impugned order and that if the said letters contain findings which were arrived at without a full-fledged departmental enquiry, those findings will amount to stigma and will come in the way of his career.

In the matter of "stigma", this Court has held that the effect which an order of termination may have on a person's future prospects of employment is a matter of relevant consideration. In the seven-Judge Bench decision in *Samsher Singh* v. *State of Punjab* Ray, C.J. observed that if a simple order of termination was passed, that would enable the officer to "make good in other walks of life without a stigma". It was also stated in *Bishan Lal Gupta* v. *State of Haryana* that if the order contained a stigma, the termination would be bad for "the individual concerned must suffer a substantial loss of reputation which may affect his future prospects".

There is, however, considerable difficulty in finding out whether in a given case where the order of termination is not a simple order of termination, the words used in the order can be said to contain a "stigma". The other issue in the case before us is whether even if the words used in the order of termination are innocuous, the court can go into the words used or language employed in other orders or proceedings referred to by the employer in the order of termination.

As to what amounts to stigma has been considered in *Kamal Kishore Lakshman* v. *Pan American World Airways Inc.* This Court explained the meaning of "stigma" as follows: (SCC p. 150, para 8)

"8. According to Webster's *New World Dictionary,* it (stigma) is something that detracts from the character or reputation of a person, a mark, sign etc. indicating that something is not considered normal or standard. The *Legal Thesaurus* by Burton gives the meaning of the word to be blemish, defect, disgrace, disrepute, imputation, mark of disgrace or shame. The Webster's *Third New International Dictionary* gives the meaning as a mark or label indicating a deviation from a norm. According to yet another dictionary 'stigma' is a matter for moral reproach."

Similar observations were made in *Allahabad Bank Officers' Assn.* v. *Allahabad Bank.* At the outset, we may state that in several cases and in particular in *State of Orissa* v. *Ram Narayan Das,* it has been held that use of the word "unsatisfactory work and conduct" in the termination order will not amount to a stigma.

We may advert to a few cases on the question of stigma. We shall refer initially to cases where a special rule relating to termination of a probationer required a particular condition to be satisfied and where the said condition was referred to in the order of termination. In *Hari Singh Mann* v. *State of Punjab* the probationer was governed by Rule *8(b)* of the Punjab Service Rules, 1959 and the fact that the word "unfit" as required by the Rules was used, was held not to be a ground for quashing the order on the ground of "stigma", for to hold that it amounted to a "stigma" would amount to robbing the authority of the right under the Rule. Similarly, where a rule required a show-cause notice to be issued and an enquiry to be conducted before terminating probation, such as Rule 55-B of the Central Civil Services (CCA) Rules, there would be no question of characterizing the simple order of termination as one founded on the allegations which were the subject of the enquiry. That was because, in such a case, the purpose of the enquiry was to find out if the officer was to be continued in service and not to find out if he was guilty *(State of Orissa* v. *Ram Narayan Das, Ranendra Chandra Banerjee* v. *Union of India).* In *State of Gujarat* v. *Akhilesh* C. *Bhargav* the termination order merely referred to Rule *12(bb)* of the Indian Police Service (Probationer) Rules, 1959. It was contended that the reference to the said Rule *12(bb)* itself amounted to a stigma but this was rejected following *Ram Narayan Das case.*

We shall next advert to some more cases and to particular words employed while passing orders of termination of probationers. In *State of Bihar* v. *Gopi*

Kishore PrasadIS **a show-cause notice was given seeking a reply to the allegation regarding the officer's bad reputation and in regard to certain perverse decisions given by him in his judicial functions during the period of probation. The termination order stated that certain facts were brought to the notice of the Government about his unsatisfactory work and conduct and that grave doubts had arisen about his integrity which indicated that he was a corrupt and an unreliable officer. It was also said that, confidential enquiries revealed that he was a corrupt officer and that annual confidential reports of his superior officer referred to his bad reputation and *therefore* his work during the period of probation was not satisfactory. The Constitution Bench of this Court held that it was a clear case of stigma and the matter indeed required a fullfledged departmental enquiry under Rule 55 of the CCS (CCA) Rules. In *Jagdish Mitter* v. *Union of India* the use of the words "undesirable to be continued" in service was held by the Constitution Bench to amount to a stigma. This case was followed in *State of U.P.* v. *Madan Mohan Nagar* where the order said that the officer had "outlived his utility" and such an order was held to amount to a stigma. *Jagdish Mitter* was approved by the seven-Judge Bench in *Samsher Singh cases* on this point. But in *Kunwar Arun Kumar* v. *U.P. Hill Electronics Corpn. Ltd.*the termination order used the word "unsatisfactory" and the same was upheld as it did not amount to a stigma. In two cases arising under industrial law, one in *Chandu Lal* v. *Pan American World Airways* and *Kamal Kishore Lakshman* v. *Pan American World Airways Inc.* 10 where the termination order used the word "loss of confidence", the said orders were held to contain a stigma and therefore punitive. In *Jagdish Parsad* v. *Sachiv, Zila Ganna Committee* the termination order stated that the officer had concealed certain facts relating to his removal from an earlier service on the charge of corruption and therefore not suitable for**

appointment. This was held to amount to a stigma. But in *Union of India* v. *R.S. Dhaba* where the order merely said "found unsuitable", it was held not to amount to a stigma. In *Allahabad Bank Officers' Assn.* v. *Allahabad Bank* the order was one of compulsory retirement and said that a Special Committee had unanimously recommended for the officer's compulsory retirement, that the Chairman and Managing Director agreed with the Committee's views regarding "want of application to the Bank's work and lack of potential" and that the officer was also found to be *not "dependable".* This Court after referring to a number of cases explained that the words "not dependable" were used in the context of the facts of the case and not as an aspersion on his reputation but in relation to his work and were to be understood in that sense in the setting of the words "want of application" and/ or "lack of potential". It was observed: (SCC p. 513 ,para 19)

"Any person reading the letter or the order of compulsory retirement would not be led to believe that there was something wrong with Appellant 2 as regards his conduct or character. They would only indicate that he had ceased to be useful to the Bank in his capacity as a Manager."

Again in *High Court of Judicature at Patna* v. *Pandey Madan Mohan Prasad Sinha* it was held that termination of a probationer on the basis of uncommunicated adverse remarks was valid.

Thus, it depends on the facts and circumstances of each case and the language or wards employed in the order of termination of the probationer to judge whether the wards employed amount to a stigma or not. Point 2 is decided accordingly.

***Point* 3**

The next question is whether the reference in the impugned order to the three earlier letters amounts to a stigma if those three letters contained anything in the

nature of a stigma even though the order of termination itself did not contain anything offensive.

Learned counsel far the appellant relies upon *Indra Pal Gupta* v. *Managing Committee, Model Inter College* decided by a three-Judge Bench of this Court. In that case, the order of termination of probation, which is extracted in the judgment, reads as follows: (SCC p. 386, para 1).

"With reference to the above (viz. termination of service as Principal), I have to mention that in view of Resolution No. of the Managing Committee dated April 27, 1969 (copy enclosed) and subsequent approval by the D.I.O.S., Bulandshahr, you are hereby informed that *your* service as Principal of this Institution is terminated".

Now the copy of the resolution of the Managing Committee appended to the order of termination stated that the report of the Manager was read at the meeting and that the facts contained in the report of the Manager being serious and not in the interests of the institution that therefore the Committee unanimously resolved to terminate his probation. The report of the Manager was not extracted in the enclosure to the termination order but was extracted in the counter filed in the case and read as follows: (SCC p. 388,para 3)

"It will be evident from the above that the Principal's stay will not be in the interest of the Institution. It is also evident that the seriousness of the lapses is enough to justify dismissal but no educational institution should take all this botheration. As such my suggestion is that our purpose will be served by termination of his services. Why, then, we should enter into any botheration. For this, i.e., for termination of his period of probation, too, the approval of the D.I.O.S. will be necessary. Accordingly, any delay in this matter may also be harmful to our interests.

Accordingly, I suggest that instead of taking any serious action, the period of probation of Shri Inder Pal

Gupta be terminated without waiting for the period of end."

It was held by Venkataramiah, J. (as he then was) (p.392) that the letter of termination referred to the resolution of the Managing Committee, that the said resolution was made part of the order as an enclosure and that the resolution in its turn referred to the report of the Manager. A copy of the Manager's report had been filed along with the counter and the said report was the "foundation". Venkataramiah, J. (as he then was) held that the Manager's report contained words amounting to a stigma. The learned Judge said: "This is a clear case where the order of termination issued is merely a camouflage for an order imposing a penalty of termination of service on the ground of misconduct….", that these findings in the Manager's report amounted to a "mark of disgrace or infamy" and that the appellant there was visited with evil consequences. The officer was reinstated with all the benefits of back wages and continuity of service.

It will be seen from the above case that the resolution of the Committee was part of the termination order being an enclosure to it. But the offensive part was not really contained in the order of termination nor in the resolution which was an enclosure to the order of termination but in the Manager's report which was referred to in the enclosure. The said report of the Manager was placed before the Court along with the counter. The allegations in the Manager's report were the basis for the termination and the said report contained words amounting to a stigma. The termination order was, as stated above, set aside.

The above decision is, in our view, a clear authority for the proposition that the material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its annexures. Obviously, such a document could be

asked for or called for by any future employer of the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular enquiry was conducted. We shall presently consider whether, on the facts of the case before us, the documents referred to in the impugned order contain any stigma.

It was in this context argued for the respondent that the employer in the present case had given ample opportunity to the employee by giving him warnings, asking him to improve and even extended his probation twice and this was not a case of unfairness and this Court should not interfere. It is true that where the employee had been given suitable warnings, requested to improve, or where he was given a long rope by way of extension of probation, this Court has said that the termination orders cannot be held to be punitive. [See in this connection *Hindustan Paper Corpn.* v. *Purnendu Chakrobarty,Oil & Natural Gas Commission* v. *Dr Md.* S. *Iskender Ali, Unit Trust of India* v. *T. Bijaya Kumar, Principal, Institute of Postgraduate Medical Education & Research, Pondicherry* v. S. *Andel* and a labour case *Oswal Pressure Die Casting Industry* v. *Presiding Officer.* But in all these cases, the orders were simple orders of termination which did not contain any words amounting to stigma. In case we come to the conclusion that there is stigma in the impugned order, we cannot ignore the effect it will have on the probationer's future whatever be the earlier opportunities granted by the respondent-Organization to the appellant to improve.

On this point, therefore, we hold that the words amounting to "stigma" need not be contained in the order of termination but may also be contained in an order or proceeding referred to in the order of termination or in an annexure thereto and would vitiate the order of termination. Point 3 is decided accordingly.

Their Lordships of the Hon'ble Supreme Court in ***Chandra Prakash Shahi versus State of U.P. and others*** (2000) 5 SCC 152 have again explained the expression "motive" and "foundation" and have laid down the following basis to determine the same. Their Lordships have held as under:

> **"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".**
>
> **"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."**

Their Lordships of the Hon'ble Supreme Court in ***A.P. State Federation of Cooperative Spinning Mills Limited and another versus P.V. Swaminathan*** (2001) 10 SCC 83 have held that 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. Their Lordships have held as under:

> **"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 persons 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.

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."

Their Lordships of the Hon'ble Supreme Court have in ***Mathew P. Thomas versus Kerala State Civil Supply Corporation Limited and others*** (2003) 3 SCC 263 have again laid down the criteria for differentiating between 'foundation' and 'motive' while considering termination of the services of a probationer. Their Lordships have held as under:

"An order of termination simplicitor passed during the period of probation has been generating undying debate. The recent two decisions of this Court in Deepti Prakash Banerjee vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and others [(1999) 3 SCC 60] and Pavanendra Narayan Verma vs. Sanjay Gandhi PGI of Medical Sciences and another [(2002) 1 SCC 520], after survey of most of the earlier decisions

touching the question observed as to when an order of termination can be treated as simplicitor and when it can be treated as punitive and when a stigma is said to be attached to an employee discharged during period of probation. The learned counsel on either side referred to and relied on these decisions either in support of their respective contentions or to distinguish them for the purpose of application of the principles stated therein to the facts of the present case. In the case of Deepti Prakash Banerjee (supra), after referring to various decisions indicated as to when a simple order of termination is to be treated as "founded" on the allegations of misconduct and when complaints could be only as motive for passing such a simple order of termination. In para 21 of the said judgment a distinction is explained, thus: -

"21. If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

From long line of decisions it appears to us whether an order of termination is simplicitor or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or

> **overlapping. It may be difficult either to categorize or classify strictly orders of termination simplicitor falling in one or the other category, based on misconduct as foundation for passing the order of termination simplicitor or on motive on the ground of unsuitability to continue in service. If the form and language of the order of termination simplicitor of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simplicitor or punitive. In cases where the services of a probationer are terminated by an order of termination simplicitor and the language and form of it do not show that either it is punitive or stigmatic on the face of it but there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other words, the façade of the termination order may be simplicitor but the real face behind it is to get rid of services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simplicitor to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service or he is in reality removed from service on the foundation of his misconduct."**

The terms "motive" and "foundation" again fell for consideration before the Hon'ble Supreme Court in ***Nehru Yuva Kendra Sangathan versus Mehbub Alam Laskar, 2008 (1) Scale 590***. Their Lordships have held as under:

> **"Respondent was appointed on a temporary basis. He was put on probation. Indisputably, the period of probation was required to be completed upon rendition**

of satisfactory service. Only in the event of unsatisfactory performance by the employee, the termination of probation would have been held to be justified. It is, however, well-known that when the foundation for such an order is not the unsatisfactory performance on the part of the employee but overt acts amounting to misconduct, an opportunity of hearing to the concerned employee is imperative. In other words, if the employee is found to have committed a misconduct, although an order terminating probation would appear to be innocuous on its face, the same would be vitiated, if in effect and substance it is found to be stigmatic in nature.

Mere holding of a preliminary enquiry where explanation is called for from the employee, if followed by an innocuous order of discharge, may not be held to be punitive in nature but not when it is founded on a finding of misconduct.

In Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Others [(1999) 3 SCC 60], this Court held that the material which amounts to stigma need not be contained only in the termination order, but may also be contained in an Order or proceeding referred to in the order of termination or annexure thereto. When the report submitted by a competent authority in a disciplinary proceeding forms the foundation therefor, it would be stigmatic in nature as such an order will have civil consequences.

It is not necessary for us to consider a large number of decisions operating in the field as this Court recently in Jaswantsingh Pratapsingh Jadeja Vs. Rajkot Municipal Corporation & Anr. [(2007) 12 SCALE 115] has considered the question at some length. Reliance, however, is placed by Mr. Rana Ranjit Singh on Abhijit Gupta Vs. S.N.B. National Centre, Basic Sciences and Others [(2006) 4 SCC 469]. The said decision has been taken into consideration in Jadeja (supra), stating :

"If the satisfaction of the employer rested on the unsatisfactory performance on the part of the appellant, the matter might have been different, but in that case, from the impugned order it is evident that it was not the unsatisfactory nature and character of his performance only which was taken into consideration but series of his acts as well, misconduct on his part had also been taken into consideration therefor. It is one thing to say that he was found unsuitable for a job but it is another thing to say that he was said to have committed some misconduct."

As in the instant case, it now stands admitted that the services of the respondent had been terminated on a finding of misconduct, the said decision of this Court in Abhijit Gupta (supra) has no application. Reliance has also been placed on Jai Singh Vs. Union of India and Others [(2006) 9 SCC 717]. In that case, the appellant's conduct was shown in the records as Unsatisfactory.Therein, this Court noticed that the order of termination was the only motive and not the foundation therefor stating :

"9. The question whether the termination of service is simpliciter or punitive has been examined in several cases e.g. Dhananjay v. Chief Executive Officer, Zilla Parishad and Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd. An order of termination simpliciter passed during the period of probation has been generating undying debate. The recent two decisions of this Court in Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences and Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences after survey of most of the earlier decisions touching the question observed as to when an order of termination can be treated as simpliciter and when it can be treated as punitive and when a stigma is said to be attached to an employee discharged during the period of probation. The learned counsel on either side referred to and relied on these decisions either in

support of their respective contentions or to distinguish them for the purpose of application of the principles stated therein to the facts of the present case. In Dipti Prakash Banerjee after referring to various decisions it was indicated as to when a simple order of termination is to be treated as "founded" on the allegations of misconduct and when complaints could be only as a motive for passing such a simple order of termination. In para 21 of the said judgment a distinction is explained thus: (SCC pp. 71-72)

21 . If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

From a long line of decisions it appears to us that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorise or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service."

Accordingly, in view of the aforesaid reasoning and the definitive law laid down by their Lordships of the Hon'ble Supreme Court, the decision of the employer not to confirm or extend the period of probation only on the basis of the registration of FIR bearing No. 165/95 dated 27.7.1995 and letter dated 9.6.1997 Annexure R-2/2 is declared arbitrary and unreasonable, thus, violative of Article 14 of the Constitution of India. The petitioner has been discriminated vis-à-vis Dr. Baldev Singh. The attending circumstances preceding the discharge lead only to one conclusion that the impugned order is punitive in nature. The employer ought to have instituted a regular inquiry against the petitioner or she should have been given a reasonable opportunity to clear her position. The impugned order thus is declared null and void.

In view of the aforesaid discussion, the writ petition is allowed. Annexure P-3 dated 20.9.1997 is quashed and set aside. The petitioner shall be deemed to be in service with all consequential benefits. There shall be no order as to costs.

30.9.2008 **(Rajiv Sharma), J.**
awasthi