ANOOP JAISWAL

v.

GOVERNMENT OF INDIA & ANR.

January 24, 1984

[E. S. VENKATARAMIAH AND R. B. MISRA, JJ]

Constitution of India—Art. 311 (2)—Applicability of. Protection under Art. 311 (2) available if the order of discharge is found to be by way of punishment. To see whether an order of discharge is by way of punishment, form of the order is not decisive. Court must go behind the form and ascertain the true character of the order.

The appellant who had been selected for appointment in the Indian Police Service was undergoing training as probationer in the National Police Academy. On June 22, 1981 due to rain the appellant as well other probationers reached late by a few minutes at the changed venue for conducting P. T. For this delay explantion was called from all the probationers. In his explanation the appellant sincerely regretted the lapse. The appellant was considered to be one of the ring-leaders who was responsible for the delay. The Director of the Academy without holding an enquiry into the alleged misconduct recommended to the Government that the appellant should be discharged from service. On the basis of that recommendation the Government by its order dated November 9, 1981 discharged the appellant from service. The Government rejected the appellant's representation against the order discharging him. The appellant challenged the validity of the order under Art. 226 of the Constitution. The High Court dismissed the petition at the admission stage. Hence this appeal. The appellant contended that the order discharging him was in reality an order terminating his services on the ground of misconduct and as such could not have been passed without holding an enquiry as contemplated under Art. 311 (2) of the Constitution and the relevant rules governing such an enquiry.

Allowing the appeal,

HELD : The impugned order of discharge is set aside.

Where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee. [563 E-F]

Parshotam Lal Dhingra v. *Union of India*, [1958] S. C. R. 828; *Shamsher Singh & Anr.* v. *State of Punjab*, [1975] 1 S. C. R. 814; *State of Punjab & Anr.*

A v. *Shri Sukh Raj Bahadur*, [1969] 3 S.C.C. 603; *State of Bihar & Ors. v. Shiva Bhikshuk Mishra*, [1971] 2 S. C. R. 191; *R.S. Sial* v. *The State of U. P. & Ors.*, [1974] 3 S. C. R. 754; *State of U.P.* v. *Ram Chandra Trivedi*, [1977] 1 S. C. R. 462; and *I. N. Saksena* v. *State of Madhya Pradesh*, [1967] 2 S. C. R. 496; referred to.

B In the instant case, on going through the record and taking into account all the attendant circumstances the Court is satisfied that the alleged act of misconduct on June 22, 1981 was the real foundation for the action taken against the appellant and that the other instances stated in the course of the counter affidavit are mere allegations which are put forward only for purposes of strengthening the defence which is otherwise very weak. The case is one which attracted Article 311 (2) of the Constitution as the impugned order amounts to a termination of service by way of punishment and an enquiry should have been C held in accordance with the said constitutional provision. That admittedly having not been done, the impugned order is liable to be struck down. [465 B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3040 of 1982.

Appeal by Special leave from the Judgment and Order dated D the 30th August, 1982 of the Delhi High Court in Writ Petition No. 1580 of 1982).

K.N. Bhatt for the Appellant.

M.S. Gujral and *G.S. Narain* for the Respondent.

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The Judgment of the Court was delivered by :

VENKATARAMIAH, J. June 22, 1981 was really a bad day for the appellant Anoop Jaiswal who having been selected by the Union Public Service Commission for appointment in the Indian Police F Service was undergoing training as a probationer at the Sardar Vallabhbhai Patel National Police Academy, Hyderabad alongwith other probationers. On that day all the probationers were expected to be present at 5.50 A.M. at the field where the ceremonial drill practice was to be conducted. Since it was raining at that time it appears that the venue was shifted to the Gymnasium Hall where it was proposed G to conduct P.T./unarmed combat practice and intimation was sent to the trainees at the Mess. When the Assistant Director (Outdoor Training) reached the Gymnasium at 5.50 A.M. none of the probationers had reached there. They all reached the place 22 minutes late i.e. by 6.15 A.M. when the rains had abated and the parade com- H menced at 6.15 A.M. It appears that earlier when a messenger sent by the Assistant Director had gone to call the probationers they had

asked for a vehicle to go to the place as it was raining. This delay was considered as an incident which called for an enquiry. Explanation was called from all the probationers. The appellant was considered to be one of the ring leaders who was responsible for the delay. When the appellant was asked about the incident, he gave his explanation to the Director of the National Police Academy which read thus:

"To

The Director,
National Police Academy,
Hyderabad.

Dear Sir,

In reply to your Memo. dated 22nd June, 1981 I humbly submit that as for my being late in P.T. by 10 mts., I sincerely regret the lapse. But the second charge that I instigated others to do so is totally baseless and without a single iota of truth. I request you Sir to make a thorough enquiry into such an allegation. I never had nor have such plebian mentally.

Thanking you,

Yours sincerely,
sd/-
Anoop Jaiswal"

It would appear that the Director without holding an enquiry into the alleged misconduct recommended to the Government of India that the appellant should be discharged from the service. On the basis of the above report, the Government of India passed the order of discharge dated November 5, 1981 and communicated it to the appellant. The material part of the order reads thus :

"No. I-22011/9/81 Pers. III
Government of India/Bharat Sarkar
Ministry of Home Affairs/Grih Mantralaya
New Delhi-110001, the 9 Nov. 1981

ORDER

Whereas the Central Government is satisfied that Shri Anoop Jaiswal, appointed to the Indian Police Service on pro-

bation on the result of the Civil Service Examination held in the year 1979, is unsuitable for being a member of the said service, he is hereby discharged under clause (b) of Rule 12 of the Indian Police Service (Probation) Rules, 1954.

The order of discharge will take effect from the date on which it is served on the said Shri Anoop Jaiswal.

In the name of and on behalf of the President of India.

sd/-

(NARENDRA PRASAD
DIRECTOR"

On receipt of the above order of discharge, the appellant made a representation on November 14, 1981 to the Government of India to reconsider the matter. It appears that the Director of the National Police Academy on this occasion recommended that the appellant may be reinstated. That representation was rejected by the Government of India on April 8, 1982. Thereafter, he filed a petition under Article 226 of the Constitution before the High Court of Delhi contending that the order of discharge was violative of Article 311(2) and Article 14 of the Constitution. That petition was dismissed by the High Court at the stage of admission on August 30,1982 after hearing the counsel for the Union of India. Against the judgment of the High Court, the appellant has filed this appeal with special leave under Article 136 of the Constitution.

The main contention of the appellant before us is that the order discharging the petitioner though on the face of it appears to carry no stigma is in reality an order terminating his service on the ground of misconduct alleged to have been committed by him on June 22, 1981 in acting as one of the ring leaders who were responsible for the delay of about twenty-two minutes in the arrival of the probationers at the Gymnasium and that such an order could not have been passed without holding an enquiry as contemplated under Article 311(2) of the Constitution and the relevant rules governing such an enquiry. He has also contended that the order is based on conjunctures and surmises and by way of illustration he has referred us to paragraph 13 of the counter affidavit which reads thus :

"Para 13 :

The petitioner did not conduct himself fully in accordance with the prescribed rules and regulations during his training period. On one occasion when he was sanctioned leave for 16 days in the month of May, 1981, he did not report himself for duty in time. He absented himself wilfully on 1.6.1981 without applying for leave for the day. For this action, he was warned by the Director against recurrence of such conduct. The period of his wilful absence for one day was treated as leave without pay. On two earlier occasions, the petitioner's conduct was found prejudicial to good order and discipline, on the first occasion he was verbally counselled by the Chief Drill Instructor and on the second occasion a Memo mas issued to him.

There was no gradation maintained in the Academy about the attendance, in terms of which the petitioner had the record of being second (or may be third) highest in the Academy. However, thisrecord in this respect was otherwise satisfactory."

The reply of the appellant to the above allegation is found in paragraph 6 of the rejoinder affidavit filed by the appellant which reads :

"Re: Para 13 : The avermentsma de in para 13 of the petition are reiterated and the contentions of the respondent to the contrary are denied as incorrect. It is reiterated that the petitioner conducted himself fully in accordance with rules and regulations. The allegation made by the respondent that I absented myself wilfully on 1.6.1981 without applying for leave for the day is highly misleading. The correct fact is that I was sanctioned my Earned Leave on 15.5.81 for a period of 16 days, and I was to report back for duty on 1.6.81 before 12.00 noon. I made arrangement to reach Hyderabad before 8.00 a.m. on 1.6.1981. However' on account of late running of train in which I was travelling and consequently missing the connecting train, I could reach Hyderabad only around noon and I report at 1.00 p.m. All these facts were duly explained to the Asstt. Director, Outdoor Training; and he permitted to attend the afternoon classes on 1.6.81 which I did. (However, at this suggestion, I applied for leave for the day and the leave was sanctioned without pay). It is

A incorrect to say that I was warned for this. All that the Director said was that on such situations, the proper course was to apply for a day's leave which I did as stated earlier. It is, therefore, very unreasonable to characterise the said incident as wilful absence. The further allegation that on the earlier occasions, the petitioner's conduct was found B prejudicial to good order and discipline, is very vague and without any particulars. Counselling by the Instructor concerned is a routine affair and, in fact, the Instructors are meant to counsel. Even regarding the second occasion, when a memo was said to have issued, it is not stated as to what the offence was. It is significant to note that the C respondent has not denied the allegation made by me that I was not the only one who received such memos and that without exception all the probationary officers had at some time or the other received such memos. I deny the rest of the allegations and reiterate the averments made in para 13 of the petition."

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The learned counsel for the parties have cited a number of decisions before us in support of their respective cases. On going through them we are of the view that there is not much divergence in them as to the true legal principles to be followed in matters of this nature but the real problem appears to be one of application E of those principles in a given case in determining whether the particular action taken amounts to a punishment attracting Article 311(2) of the Constitution or a mere discharge simpliciter not requiring the holding of an enquiry as contemplated under Article 311(2). We shall now deal with two leading cases having a bearing on the question before us. In *Parshotam Lal Dhingra* v. *Union of India*[1] this Court F after an elaborate consideration of the relevant provisions of the Constitution and judicial decisions cited before them observed:

"The net result is that it is only in those cases where the Government intends to inflict those three forms of punishments that the Government servant must be given a reasonG able opportunity of showing cause against the action proposed to be taken in regard to them. It follows, therefore, that if the termination of service is sought to be brought about otherwise than by way of punishment then the Government servant whose service is so terminated cannot claim the

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(1) [1958] S.C.R. 828.

protection of Art. 311(2) and the decisions cited before us and referred to above, in so far as they lay down that principle, must be held to be rightly decided.

The foregoing conclusion, however, does not solve the entire problem, for it has yet to be ascertained as to when an order for the termination of service is inflicted as and by way of punishment and when it is not.....

Where a person is appointed to a permanent post in a Government service on probation, the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment, for the Government servant, so appointed, has no right to continue to hold such a post any more than the servant employed on probation by a private employer is entitled to do. Such a termination does not operate as a forfeiture of any right of the servant to hold the post, for he has no such right and obviously cannot be a dismissal, removal or reduction in rank by way of punishment.....

It does not, however, follow that, except in the three cases mentioned above, in all other cases, termination of service of a Government servant who has no right to his post, e.g., where he was appointed to a post, temporary or permanent, either on probation or on an officiating basis and had not acquired a quasi-permanent status, the termination cannot, in any circumstances, be a dismissal or removal from service by way of punishment.....

In short, if the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carries with it no evil consequences and so Art. 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Art. 311 must be complied with."

The case of *Shamsher Singh & Anr.* v. *State of Punjab*[1] decided by a Bench of seven Judges of this Court directly deals with the case of a probationer who is discharged from service without complying with Article 311(2) of the Constitution. In that case two Judicial Officers of the Punjab Judicial Service were involved. For purposes of the present appeal it is sufficient if we refer to the case pertaining to Ishwar Chand Agarwal who was at the material time serving as a probationer in the Punjab Civil Service (Judicial Branch). By an order dated December 15, 1969 his services were terminated. The said order did not contain any statetement which would attach any stigma to the career of the officer concerned. It read as follows :

> "On the recommendation of the High Court of Punjab and Haryana, the Governor of Punjab is pleased to dispense with the services of Shri Ishwar Chand Agarwal, P.C.S. (Judicial Branch), with immediate effect, under Rule 7(3) in Part 'D' of the Punjab Civil Services (Judicial Branch) Rules, 1951, as amended from time to time"."

Rule 7(3) of the Punjab Civil Service (Judicial Branch) Rules, 1951 relied on in the above order provided that on the completion of the period of probation of any member of the service, the Governor might on the recommendation of the High Court confirm him in his appointment if he was working against a permanent vacancy, or if his work or conduct was reported by the High Court to be unsatisfactory, dispense with his services or revert him to his former substantive post, if any, or extend his period of probation and thereafter pass such orders as he could have passed on the expiry of the first period of probation. In this case Ray, C.J. observed in the course of his judgment thus :

> "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 propoer 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.

(1) [1975] 1 S.C.R. 814.

Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any Rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any termperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct of inefficiency or corruption, and if his services are terminated without following the provisions of Artiele 311(2) he can claim protection."

Having said so, the learned Chief Justice proceeded to examine the facts of the case and found that an enquiry officer nominated by the Director of Vigilance had recorded statements of some witnesses behind the back of the officer concerned in respect of certain allegations of misconduct and had on that basis made a report to the High Court and that the High Court had after accepting the said report, made a recommendation to the Governor to the effect that the officer was not a suitable person to be retained in service. The order of termination was because of the recommendations in the report. The the learned Chief Justice observed :

"The order of termination of the services of Ishwar Chand Agarwal is clearly by way of punishment in the facts and circumstances of the case. The High Court not only denied Ishwar Chand Agarwal the protection under Article 311 but also denied itself the dignified control over the subordinate judiciary. The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the fact and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision 311. In such a case the simplicity of the form of

A the order will not give any sancity. That is exactly what has happened in the case of Ishwar Chand Agarwal. The Order of termination is illegal and must be set aside."

Krishna Iyer, J. who agreed with the learned Chief Justice had at the end of this judgment this to say :

B "Again, could it be that if you summarily pack off a probationer, the order is judicially unscrutable and immune ? If you conscientously seek to satisfy yourself about allegations by some sort of enquiry you get caught in the coils of law, however harmlessly the order may be phrased ? And, so this sphinx-complex has had to give way in later cases. In some cases the rule of guidance has been stated to be 'the substance of the matter'; and the 'foundation' of the order. When does 'motive' trespass into 'foundation' ? When do we lift the veil of form to touch the 'substance' ? When the Court says so. These 'Freudian' frontiers obviously fail in the work-a-day world and Dr. Tripathi's observations in this context are not without force. He says:

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

G On behalf of the Union of India reliance has been placed on *State of Punjab & Anr.*v.*Shri SukhRaj Bahadur*,[1] *Union of India & Ors.* v. *R.S. Dhaba*,[2] *State of Bihar & Ors.*v.*Shiva Bhikshuk Mishra*,[3] *R.S.*

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(1) [1968] 3 S.C.R. 234.
(2) [1969] 3 S.C.C. 603.
(3) [1971] 2 S.C.R. 191.

Sial v. *The State of U.P.&Ors.*[1], *State of U.P.* v. *RamChandraTrivedi*[2] and *I.N. Saksena* v. *State of Madhya Pradesh.*[3] We have gone through these decisions. Except the case of *Ram Chandra Trivedi* (supra) all other cases referred to above were decided prior to the decisions in *Shamsher Singh's* case (supra' 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* (supra) the principle applied is the one enunciated by *Parshotam Lal Dhingra's* case (supra) which we have referred to earlier. It is urged relying upon the observation in *Shri Sukh Raj Bahadur's* case (supra) 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, a 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 *Shamsher Singh's* case (supra) 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 misconduct involving stigma has been made in infraction of the provision of Article 311(2).

A B C D E

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

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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 regarding the alleged act of indiscipline, namely, arriving

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(1) [1974] 3 S.C.R. 754.
(2) [1977] 1 S.C.R. 462.
(3) [1967] 2 S.C.R. 496.

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late at the Gymnasium and acting as one of the ring leaders on the occasion and his explanation was obtained. Similar 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 ring leaders were not seriously taken note of. Even though the order of discharge may be non-committal, it cannot stand alone. Though the noting in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis or foundation for the order should be read alongwith 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 Union of India has placed before us all the relevant material including the recommendation of the Director of the National Police Academy that the appellant may be reinstated. In this case, as stated above, explanation was called for form the appellant and other probationers. Explanations were received and all the probationers including the appellant were individually interviewed in order to ascertain facts. Explanation submitted by him and the answers given by others had weighed with the Director before making the recommendation to the Government of India on the basis of which action was taken. The only ground which ultimately prevailed upon the Director was that the appellant had not shown any sign of repentance without informing him that his case would be dealt with leniently if he showed any sign of repentance. In fact in the very first reply he gave to the Director on being asked about the incident which took place on June 22, 1981, the appellant stated 'I sincerely regret the lapse.' Neither in the letter which the Director first wrote to the Central Government nor in the counter affidavit filed in this Court, due importance has been given to the said expression of regret and it is further seen that no additional lapse on the part of the appellant between June 22, 1981 and the date on which the Director wrote the letter to the Central Government, which would show that the appellant had not shown any sign of repentance is pointed out, although there is a reference to his reporting to duty late on an earlier date on June 1, 1981. On going through the above record before the Court and taking into

account all the attendant circumstances we are satisfied that the Director wished to make the case of the appellant an example for others including those other probationers who were similarly situated so that they may learn a lesson therefrom. A

A narration of the facts of the case leaves no doubt that the alleged act of misconduct on June 22, 1981 was the real foundation for the action taken against the appellant and that the other instances stated in the course of the counter affidavit are mere allegations which are put forward only for purposes of strengthening the defence which is otherwise very weak. The case is one which attracted Article 311(2) of the Constitution as the impugned order amounts to a termination of service by way of punishment and an enquiry should have been held in accordance with the said constitutional provision. That admittedly having not been done, the impugned order is liable to be struck down. We accordingly set aside the judgment of the High Court and the impugned order dated November 5, 1981 discharging the appellant from service. The appellant should now be re-instated in service with the same rank and seniority he was entitled to before the impugned order was passed as if it had not been passed at all. He is also entitled to all consequential benefits including the appropriate year of allotment and the arrears of salary and allowances upto the date of his reinstatement. The appeal is accordingly allowed. B C D

The appellant had to face this case just at the commencement of his career. We have allowed his claim in the name of the Constitution. This should help him to regain his spirit and also encourage him to turn out to be a public servant in the true sense of that expression. E

Having regard to the facts and circumstances of the case, we feel that the parties should be directed to bear their own costs. F

H.S.K. *Appeal allowed.*