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RADHEY SHYAM GUPTA

v

U.P. STATE AGRO INDUSTRIES CORPORATION LTD. AND ANR.

DECEMBER, 15 1998

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[K. VENKATASWAMI AND M. JAGANNADHA RAO, JJ.]

*Service Law:*

*Termination of service—Temporary employee/probationer—Simpliciter*

**C** *or punitive—If the motive behind the preliminary enquiry is not to determine the misconduct but merely to decide the question of retention in service, the termination is not punitive—In such cases the departmental enquiry be dropped at any stage before recording of evidence and an order of termination simpliciter passed—No stigma is attached thereby—Departmental enquiry—Non completion of enquiry before the stage of recording evidence and passing termination order simpliciter—Effect of.*

*Termination of services—Simpliciter or punitive—Test to determine—*

*Temporary employee—Holding of enquiry behind the back of the employee—*

*Test is whether it serves as a motive or foundation of the termination—Court*

**E** *can go behind the order for this purpose—If the purpose of the enquiry is not to find out the truth of the allegations of misconduct but to decide whether to retain the employee against whom a cloud is raised on his conduct. Such enquiry only serves as a motive for the termination—But where the enquiry is held at the back of the employee on the basis of the evidence where a definite finding is reached about the misconduct of an*

**F** *employee and if such finding forms the basis or foundation of the order of termination, such order would be punitive and against the principles of natural justice.*

*Words and phrases—'Motive' and 'foundation', in the context of departmental enquiry under labour law and service jurisprudence.*

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*The appellant was working in the respondent-Corporation as a Branch Manager. He was asked to submit his explanation in respect of allegation of having fraudulently taken Rs. 2000 from the complainant. The respondent neither conducted any disciplinary enquiry nor any oral enquiry in the presence of the appellant. The enquiry officer examined the witnesses and*

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submitted his report without issuing any charge memo or giving a hearing. A In his report, the enquiry officer concluded that the appellant had taken a sum of Rs. 2000 from the complainant and thereafter recommended that the services of the appellant be terminated. The very next day a simple order of termination was passed in terms of the appointment order stating that his services were being terminated with immediate effect on payment of one month's salary in lieu of notice. The Administrative Tribunal allowed the appellant's application challenging the termination order declaring it to be violative of principles of natural justice. The High Court, on appeal by the respondent, held that the enquiry was conducted "to assess the work" of the appellant as it was decided to dispense with his temporary service in terms of Condition No. 3 of the order of appointment, which permitted such termination on payment of one month's salary or after giving one month notice. And that was why a simple order of termination was passed and it did not cause any stigma inasmuch as it did not refer to any disciplinary inquiry. The High Court also held that there was "sufficient material" to indicate the unsatisfactory work and conduct of the appellant. Hence this appeal. D

Allowing the appeal, this Court

HELD: 1.1. The termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive in as much as the above facts are merely the motive and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the officer. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary enquiry is held because the purpose of a preliminary enquiry is to find out if there is *prima facie* evidence or material to initiate a regular departmental enquiry. The purpose of the preliminary enquiry is not to find out misconduct on the part of the officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental enquiry is started, a charge-memo issued, reply obtained and an enquiry officer is appointed, if at that point of time the enquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. The departmental enquiry was stopped because the employer was not sure of establishing the guilt of the employee. The employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which F G H

- A the employer was not interested to ascertain. In fact, the employer by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. [573-H; 574-A-E]
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  - 1.2. In cases where termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee—even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases. [574-F-H]
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  - 1.3. The present is the case where the enquiry officer examined witnesses, recorded their statements and gave a clear finding of the appellant accepting a bribe and even recommended his termination. All these were done behind the back of the appellant. The Managing Director passed the termination order the very next day. It cannot, in the above circumstances, be stated that the report is a preliminary enquiry report. Its findings are definitive. It is not a preliminary report where some facts are gathered and a recommendation is made for a regular departmental enquiry. In view of the principles laid down, this case is an obvious case where the reports and its findings are the foundation of the termination order and not merely the motive. The Tribunal was right in its conclusion. The High Court was in grave error in treating such a report as a preliminary report. [575-D-E]
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*Parshotam Lal Dhingra v. Union of India, AIR (1958) SC 36; State of Bihar v. Gopi Kishore Prasad, AIR (1960) SC 689; State of Orissa v. Ram Narayan Das, [1961] 1 SCR 606; Madan Gopal v. State of Punjab, AIR (1963) SC 531; Ranendra Chandra Banerjee v. Union of India, [1964] 2*

**SCR 135; Jagdish Mittar v. Union of India, AIR (1964) SC 449; Champaklal A  
 Chimanlal Shah v. Union of India, AIR (1964) SC 1854; Gujarat Steel Tubes  
 Ltd. v. Gujarat Steel Tubes Mazdoor Sabha, [1980] 2 SCC 593; State of U.P.  
 v. Ram Chandra Trivedi, [1977] 1 SCR 462; State of Maharashtra v. Veerappa  
 R. Saboji [1979] 4 SCC 466; State of Punjab v. Sukh Raj Bahadur, [1968] B  
 3 SCR 234; A.G. Benjamin v. Union of India, (1967) 1 LLJ 718 SC; Nepal  
 Singh v. State of U.P., [1980] 3 SCC 288; Samsher Singh v. State of Punjab,  
 [1974] 2 SCC 831 and Anoop Jaiswal v. Government of India, [1984] 2 SCC  
 369, relied on.**

**State of U.P. v. Kaushal Kishore Shukla, [1991] 1 SCC 691; Triveni C  
 Shankar Saxena v. State of U.P., [1992] Supp.1 SCC 524; State of U.P v. Prem  
 Lata Misra, [1994] 4 SCC 189 and Commissioner of Food & Civil Supplies  
 v. Prakash Chandra Saxena, [1994] 5 SCC 177, distinguished.**

**Beetham v. Trinidad Cement Co., [1960] AC 132; Medical Board of D  
 Queensland v. Byme, [1958] 100 CLR 582; Saskatchewan College of  
 Physicians, ex p Samuels, [1966] 58 DLR 2nd 622; Re : Drummoyn, MC,  
 [1962] SR (NSW) 193; Wisemen v. Borneman, [1971] AC 297 and Re : All  
 General Canada and Canadian Tobacco Manufacturers' Council, [1986] 26  
 DLR 4th 677, referred to.**

**2.1. If there was any difficulty as to what was 'motive' or 'foundation' E  
 the said doubts were removed. No doubt, it is a labour matter but the distinction  
 so far as to what is 'motive' or 'foundation' is common to labour cases and  
 cases of employees in government or public sector. [570-E]**

**2.2. It will be a case of motive if the master, after gathering some *prima facie* F  
 facts, does not really wish to go into their truth but decides merely not  
 to continue a dubious employee. The master does not want to decide or to  
 direct a decision about the truth of the allegations. But if he conducts an  
 enquiry only for purpose of proving the misconduct and the employee is not  
 heard, it is a case where the inquiry is the foundation and the termination  
 will be bad. [571-E]**

**CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6344 of G  
 1998.**

From the Judgment and Order 10.12.97 of the Allahabad High Court in  
 W.P. No. 1501 of 1981.

M.L. Varma, Suresh Singh, Pavan Kumar and Lokesh Kumar for the H

**A** Appellant.

J.M. Khanna and J.P. Goel for the Respondent No. 1.

The Judgment of the Court was delivered by

**B** **M. JAGANNADHA RAO, J.** Leave granted.

This appeal is preferred by the appellant questioning the judgment of the High Court of Allahabad dated 10.12.97 (Lucknow Bench) which reversed the Judgment of the Administrative Tribunal III, Lucknow in claim No. 686 of TIII of 1977 dated 3.12.80.

**C** The appellant was working in the respondent Corporation as Senior Accountant from 27.7.1970. On 17.7.1973, he was appointed as Branch Manager and posted at the Meerut Division of the respondent Corporation and transferred to various places. He was posted at Faizabad as Branch Manager on 3.10.1975 and while he was working there, he received a letter dated

**D** 12.1.1976 from the Managing Director on 15.1.1976 alleging that one person by name Jai Chandra Lal complained that the appellant had fraudulently taken Rs. 2000 Thereafter no disciplinary inquiry was conducted nor any oral inquiry in the presence of the appellant was conducted. It appears that a report dated 22.1.1976 (from him and that the appellant should, therefore, offer his explanation. The appellant denied the allegation and submitted his explanation

**E** on 22.1.1976) was submitted by one Sri Ram Pal Singh, General Manager (Fertiliser) without issuing any Charge Memo or giving hearing. Copy of the report was also not given to the appellant. Thereafter, on 23.1.1976, a simple order of termination was passed stating that the appellant had been appointed as Branch Manager by order dated 17.7.1973, and Condition No.3 of the

**F** appointment order provided that the services of the appellant could be terminated at any time after giving one month's notice or one month's pay in lieu thereof and that his services were being terminated with immediate effect in terms of the aforementioned Condition No. 3 of the appointment order. It was stated that the appellant could obtain one month's pay from the General Manager (Fertiliser), Lucknow.

**G** It was the appellant's case before the Administrative Tribunal, Lucknow, that though the termination order appeared to be innocuous, it was still punitive in nature inasmuch as it was based on an *ex parte* report of inquiry by the said Ram Pal Singh and that the allegation of accepting a bribe in a sum of Rs. 2000 was not merely the motive but the very foundation of the

**H** order of termination. The appellant also raised a plea of *malafides* against the

said Shri Ram Pal Singh who allegedly bore a grudge against the appellant A as the appellant while working at Meerut in 1973-74 had made certain serious complaints against one Balbir Singh Chauhan, Assistant Sales Officer-I - who was a close friend of the said Shri Ram Pal Singh. In fact, soon after the appellant complained against Balbir Singh, a letter of transfer is said to have been engineered and the appellant was transferred to Varanasi on 9.5.74. Various details have been given to prove *malafides*. B

The Administrative Tribunal, Lucknow in its order dated 31.12.80 accepted the appellant's contention and allowed the appellant's application and quashed the termination order declaring it to be violative of principles of natural Justice and hence void. It also held that the inquiry report of Shri Ram Pal Singh was a *mala fide* one. It was, however, stated that the respondents would be at liberty to initiate regular inquiry if they so desired and deal with the appellant's case in accordance with law. C

Aggrieved by the said judgment, the respondent Corporation filed Writ Petition No. 1591 of 1981 and the same was allowed by the High Court on 10.12.97 holding that though an inquiry was conducted by Shri Ram Pal Singh and a report was given against the appellant, the same was conducted "to assess the work" of the appellant as it was decided to dispense with his temporary service in terms of Condition No.3 of the order of appointment, which permitted such termination on payment of one month's salary or after giving one month's notice. That was why a simple order of termination was passed and it did not cause any stigma inasmuch as it did not refer to any disciplinary inquiry. There was "sufficient material" to indicate the unsatisfactory work and conduct of the appellant. The High Court referred to various decisions relied upon by the appellant and said that they did not apply. It, however, held that the ruling of this Court in *State of U.P. v. Kaushal Kishore Shukla*, [1991] 1 SCC 691 was in point, that whenever, the competent authority was satisfied that the work and conduct of a temporary employee was not satisfactory, it could pass a simple order of termination and such an order could not be treated as one of punishment. The High Court also referred to *Triveni Shanker Saxena v. State of U.P.*, [1992] Suppl. 1 SCC 524 and *State of U.P. v. Km. Premlata Misra*, [1994] 4 SCC 189. The High Court held as follows: E

"In view of the law laid down by the Hon'ble Supreme Court, we are of the opinion that the temporary services of the respondent No.1 have not been terminated by way of punishment founded on any misconduct but on the other hand, the competent authority has found H

A that the respondent No.1 was not fit to be continued in services on account of unsatisfactory work and conduct. There is no material to establish that the respondent No.1 had outstanding or meritorious service record."

It further observed:

B "Further in view of the law laid down by Hon'ble Supreme Court, *even if some exparte preliminary inquiry has been conducted or disciplinary inquiry was initiated* to inquire into some misconduct, it is the option of the competent authority to withdraw the disciplinary proceedings and take the action of termination of service under the terms of appointment and the same would not be by way of punishment."

On this reasoning, the Writ Petition of the Corporation was allowed, the order of the Tribunal was set aside and the termination order was upheld.

D Aggrieved by the Judgment of the High Court, the appellant has preferred this appeal. It is contended by the learned senior counsel for the appellant Sri M.L. Verma that the High Court had assumed that the inquiry was a preliminary inquiry and that the appellant's conduct was not satisfactory. On the other hand, the report was not preliminary inquiry report but it was in fact a final one which gave findings as to the guilt of the appellant in regard to the allegation of receiving a bribe of Rs. 2000 and the said finding was arrived at by examining witnesses behind the back of the appellant and, therefore, there was a clear violation of principles of natural justice. In other words, the findings in the inquiry report were the 'foundation' for the termination. This was not a case where some allegations against the appellant were the 'motive'.  
E It was permissible for the Court to go behind the order and find out if it was punitive in nature. It was also argued that the High Court was in error in not going into the question of *malafides* even though the Tribunal had held that the inquiry report was vitiated by *malafides*.

On the other hand, learned counsel for the respondent, Sri J.M. Khanna made a vehement submission that the termination was the result of a preliminary inquiry and it was always permissible to rely on such an inquiry and pass a simple order of termination by giving a one month's notice or giving one month's pay in lieu thereof. He contended that it was not permissible for the Court to look into the report given by Sri Ram Pal Singh to the General Manager as the same was confidential in nature. The Court could not go behind the order.

On the basis of the above contention, the following point arises for A consideration:

Whether the report of Sri Ram Pal Singh was a preliminary report and whether it was the *motive* or the *foundation* for the termination order and whether it was permissible to go behind the order? B

On this point, the question is whether the contents of the report dated 22.1.76 of Sri Ram Pal Singh against the appellant were the *motive* or *foundation* for the termination order dated 23.1.76 issued by the General Manager? C

Now, there are *two lines* of cases decided by this Court which deal with the question in issue. In certain cases of temporary servants and probationers, this Court has taken the view that if the *ex parte* inquiry or report are the *motive* for the termination order, then the termination is not to be called punitive merely because principles of natural justice have not been followed. On the other hand, there is *another* line of cases where this Court has held that the facts revealed in the inquiry are not the motive but the *foundation* for the termination of the services of the temporary servant or probationer, and hence punitive as principles of natural justice have not been followed, and such orders are to be declared void. This Court has held that for finding out whether a given case falls within either of these two categories, it is permissible for the High Court or Administrative Tribunal to go behind the order and look into the record of the proceedings, the antecedent and attendant circumstances culminating in the order of termination. D E

In what situations the allegations of misconduct will be the motive and in what cases they will be the foundation, it is argued, is not clear enough.

In fact, Krishna Iyer, J. in his characteristic style described the words 'form', 'substance', 'motive' and 'foundation' as the facts of an inscrutable sphinx, baffling lawyers and judges alike. [See *Samsher Singh v. State of Punjab*, [1974] 2 SCC 831 at 889]. According to him, the need in this branch of law is to lay down a simple test which can be grasped by the administrator or civil servant without much subtlety. F

De Smith says, as to procedural fairness where preliminary inquiries are conducted (See 5th Ed., 1995 (page 491, para 10.027) that the question of "proximity between investigation and act or decision" depends on the *degree of proximity* so far as the person affected claiming a right of hearing is concerned. He says: G

"Thus, a person empowered or required to conduct a preliminary H

- A investigation with a view to recommending or deciding whether a formal inquiry or hearing (which may lead to a binding and adverse decision) should take place, is not normally under any obligation to comply with rules of fairness (*Beetham v. Trinidet Cement Co.*, (1960) A.C., 132; *Medical Board of Queens Land v. Byme*, (1958) 100 C.L.R. 582; *Saskatchewan College of Physicians, ex P Samuels*, (1996) 58 D.L.R.(2ND) 622; *Re: Drummoynes M.C.* (1962). S.R. (N.S.W.) 193. But he may be placed under such an obligation if his *investigation is an integral part of a process which may terminate in action adverse to the interest of a person claiming to be heard before him*. (*Wiseman v. Borneman* (1971) AC 297). *Re: All General Canada and Canadian Tabacco Manufacturers' Council* (1986) 26.D.L.R (4th) 677.”
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The above principles stated in De Smith are, as we shall presently see, very close to what is laid down in *Samsher Singh's* case and other cases decided by this Court.

- D It is, therefore, necessary to refer to the development of the law in this branch between 1958 to 1974 in the first phase - a development which was noticed by Krishna Iyer, J. in the above case and also by E.S. Venkataramiah, J. (as the then was) in *Anoop Jaiswal v. Government of India*, [1984] 2 SCC 369.
- E There are atleast seven Constitution Bench Judgments and a Judgment of seven Judges of this Court on this issue. It will be seen that from stage to stage the law has been developed.

- F The first decision of the Constitution Bench was in *Parshottam Lal Dhingra v. Union of India*, AIR (1958) SC 826. There a twin test was laid down - whether the order in terms of the appointment gave a right to terminate and whether the order was punitive in nature. If misconduct was *motive*, the order was not punitive but if it was the *foundation* it was punitive. In that case, the employee was working in a higher post in an officiating capacity and that appointment was terminated and he was reduced in rank. S.R. Das, C.J. stated (para 28) (p49) that misconduct, negligence, inefficiency or other disqualification might be the *motive* or the *inducing factor* which influenced the Government to take action *under the terms* of the contract of employment or the specific service rule, and the *motive* was irrelevant. But if the termination was '*founded*' on misconduct, negligence, inefficiency or other disqualification, it would have to be treated as a punishment. It was also held that the use of the word 'termination' or 'discharge' was not conclusive. In spite of the
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use of such innocuous expressions, the Court could still hold it to be punitive. On the facts of the case the termination of the officiating appointment was based upon certain adverse remarks and it was held that it was not by way of punishment.

Next came the decision of the Constitution Bench in *State of Bihar v. Gopi Kishore Prasad*, AIR (1960) SC 689. Here a test of 'inquiry' was laid down. That was a case of probationer. The Government had come to the conclusion, *on inquiry*, that the respondent was unsuitable for the post held on probation. Because of the inquiry, Sinha, C.J. held this to be "clearly by way of punishment." Termination (without notice) but after holding an inquiry into the alleged misconduct or inefficiency or some similar reason would be punitive. Government could not, "brand him dishonest and incompetent without inquiry." If it did so, it would be by way of punishment, but not if the position "was that he was found unsuitable", without holding an inquiry. Both *Dhingra and Gopi Kishore Prasad* were decided when the law in this branch was just developing.

However, Shah, J. (as he then was) in *State of Orissa v. Ram Narayan Das*, [1961] 1 SCR 606 gave a new dimension to the legal principles. That case also related to a probationer but was governed by Rule 55-B of the Civil Services (Classification, Control and Appeal) Rules which was a special provision and which stated that "where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity for show cause against it, before orders are passed by the authority competent to terminate the employment." If the test of 'inquiry' laid down by Sinha, CJ was to be applied, every termination of a probationer made by following the rule and conducting an inquiry would become punitive. The 'inquiry test' (as pointed out by Krishna Iyer, J. in *Samsher Singh's case*) broken down. A new test had to be invented. Therefore Shah, J. (as he then was) laid down a new test which required that one should look into "object or purpose of the inquiry" and not merely hold the termination to be punitive merely because of an antecedent inquiry. J.C. Shah, J (as he then was) said:

"Whether it amounts for an order of dismissal depends upon the nature of the inquiry, if any, the proceedings taken therein and the substance of the final orders passed on such inquiry."

The learned Judge pointed out that the employee being a probationer, H

- A "the inquiry against the respondent was for ascertaining *whether he was fit to be confirmed.*" His Lordship pointed out that this inquiry was not of the same nature as an inquiry into charges of misconduct, negligence, inefficiency or other disqualification. On the facts of the case, the termination of a probationer was upheld inasmuch as the purpose of the inquiry was to find out if the employee could be confirmed. The purpose of the inquiry was not to find out if he was guilty of any misconduct, negligence, inefficiency or other disqualification.
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We then come to the third case decided by the Constitution Bench in *Madan Gopal v State of Punjab*, AIR (1963) SC 5312. Here Shah, J. (as he

- C then was), applied the same principle laid down earlier by him but in this case he held the order was punitive. That was a case of a temporary employee. There was a report of the Settlement Officer about the 'misconduct' of the employee and the termination was based on the said report. It was, therefore, held that though the order of termination was an order *simpliciter* still the Court could go behind the same and further if the foundation was the finding as to misconduct, then the order was punitive. The termination order was quashed, even though the employee participated therein because the statutory procedure for a regular departmental inquiry was not followed. Emphasis was again made on the "purpose of the inquiry". The distinction between the earlier case and this case was that while in *Ram Narayan Das*' Case, the inquiry was made to find out if the probationer could be continued and confirmed and was, therefore, not punitive, the position in the *Madan Gopal*'s case was that the inquiry by the Settlement Officer was to find out if the employee was guilty of misconduct. In fact the termination order was based on the inquiry held behind his back and was held to be punitive. In *Ravindra Chandra v. Union of India*, AIR (1963) SC 1552, being a case of a probationer
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- F to whom Rule 55-B of the Central Rules applied, Wanchoo J. (as he then was) upheld the order on the ground that the limited purpose of the inquiry was to find out whether he could be 'retained or not' in the service. In other words, the inquiry was not with a view to see if the employee had misconducted in his duties. This case was similar to *Ram Narayan Das* case.

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The theory of '*object of the inquiry*' was further emphasised by the Constitution Bench in *Jagdish Mitter v. Union of India*. AIR (1964) SC 449. That was a case of a temporary employee. The discharge from service was by way of an order '*simpliciter*'. But there, an inquiry was held and the termination order was based on it as it stated on its face that it was '*found undesirable*' to retain the employee and hence his services were being

terminated. The order was held to be punitive on its face and was quashed. A Gajendragadkar, J. (as he then was) discussed the earlier cases and held that in every case the purpose of the inquiry was crucial. If the inquiry was held 'only for the purpose of deciding whether the temporary servant should be continued or not, it could not be treated as punitive and that the motive operating in the mind of the authority was not relevant. But "the form in which the order terminating the service is expressed will not be decisive." It was held that "what the Court will have to examine in each case would be, having regard to the material facts existing upto the time of discharge, is the order of discharge in substance one of dismissal". Therefore, the 'form' was not of importance but the 'substance' was. B

Finally, we come to the seventh case, *Champaklal Chimanlal Shah v. Union of India*, AIR (1964) SC 1854, a case strongly relied upon by the learned counsel for the respondent, Shri J.M. Khanna. Here, it was the case of a preliminary inquiry which was intended to find out if a *prima facia* case was made out to start a regular departmental inquiry. The question was whether a termination order passed soon after the completion of the preliminary inquiry could be treated as punitive. Wanchoo, J. (as he then was) held that it could not be as held. Once the preliminary inquiry was over, it was open to the employer not to make a regular inquiry for proving the guilt of the employee. The employer could stop at that stage and pass a simple order of termination. The facts as gathered or revealed in the preliminary inquiry would be the motive and not the 'foundation' since there was no inquiry as to their correctness made. The order could not be quashed as being punitive. C D E

We finally come to the seven Judge Judgment rendered in *Samsher Singh v. State of Punjab*, [1974] 2 SCC 831, to which we made a brief reference at the beginning of this Judgment. The case concerned two Judicial Officers. So far as the termination order passed against Sri Ishwar Chand Aggarwal was concerned, it was quashed holding it to be punitive as it was based on the report of an Inquiry Officer appointed by the Director of Vigilance. The Inquiry Officer recorded statements of witnesses behind the back of the officer and definitive findings therein were the basis for the termination. It was not a preliminary inquiry. A.N. Ray, C.J. held that the object of the said inquiry was (see p 855) (para 79 and 80) G

"to ascertain the *truth* of the allegation of misconduct. Neither the report nor the statements recorded by the Enquiry Officer reached the appellant. The Inquiry Officer gave his *findings* of misconduct. ... The order of termination was because of the recommendation in the report. H

A The order of termination of the services of Ishwar Chand Aggarwal is clearly by way of *punishment* in the facts and circumstances of the case.... The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may, in the facts and circumstances of the case establish that an inquiry into allegation of serious and grave character of misconduct involving stigma has been made in infraction of Article 311. In such a case, the simplicity of the form of the order will not give any sanctity. That is exactly what has happened in the case of Ishwar Chand Aggarwal. The order of termination is illegal and must be set aside."

C A.N. Ray, C.J., wrote the opinion for himself and five other learned Judges. Krishna Iyer, J. wrote a separate but concurring Judgment where he referred to the new dimension to the law given by Shah, J. (as he then was) in the sixties. The learned Judge said that the words 'form', 'substance', 'motive' and 'foundation' were baffling and the need of the hour was a simple test.

E If there was any difficulty as to what was 'motive' or 'foundation' even after *Shamsher Singh's* case, the said doubts, in our opinion, were removed in *Gujarat Steel Tubes v. Gujarat Steel Tubes Mazdoor Sangh*, [1980] 2 SCC 593, again by Krishna Iyer, J. No doubt, it is a labour matter but the distinction so far as what is 'motive' or 'foundation' is common to labour cases and cases of employees in government or public sector. The learned Judge again referred to the criticism by Shri Tripathi in this branch of law as to what was 'motive' or what was 'foundation', a criticism to which reference was made in *Samsher Singh's* case. The clarification given by the learned Judge is, in our opinion, very instructive. It reads as follows (at pages 616-617):

G "Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. 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. If thus scrutinised, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is *satisfied of the misconduct* and of the consequent

desirability of terminating the service of the delinquent servant, it is A  
 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 a 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 non-  
 injurious terminology is used.

On the contrary, even if there is *suspicion* of misconduct the *master* C  
*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 pecuniary cut-back on his  
 full terminal benefits is found. For, in fact, misconduct is not then the D  
 moving factor in the discharge. We need not chase other hypothetical  
 situations here.”

In other words, it will be a case of motive if the master, after gathering E  
 some *prima facie* facts, does not really wish to go into their truth but besides  
 merely not to continue a dubious employee. The master does not want to  
 decide or to direct a decision about the truth of the allegations. But if he  
 conducts an inquiry only for purpose of proving the misconduct and the  
 employee is not heard, it is a case where the inquiry is the foundation and  
 the termination will be bad.

Subsequent to the above cases, there have been a number of other F  
 cases where the above principles have been applied. We shall refer to a few  
 of them where some more principles have been discussed. In *State of U.P. v.*  
*Ram Chandra Trivedi*, [1997] 1 SCR 462, the employee's service were terminated  
 as he allowed some other employees to impersonate him in an examination.  
 The order was innocuous but the case was preceded by an inquiry and it was  
 held that the petitioner in his pleadings had not made out a case for calling  
 for departmental records to examine if it was a case of punishment. That was  
 how this case was explained by Pathak, J. (as he then was) in *State of*  
*Maharashtra v. S.R. Saboji*, [1971] 4 SCC 466. In *Anoop Jaiswal v. Government*  
*of India* [1984] 2 SCC 369, it was held while quashing the order of termination,  
 that it was open to the Court to go behind the order and find out if the report/ G  
 H

- A recommendation of the superior authority was a camouflage and if that was the basis or foundation for the order the report/recommendation, then it should be read along with the order for the purpose of determining the true character of termination. If on a reading of the two together, the Court reached the conclusion that the alleged finding of misconduct was the cause or basis of the order, and that but for the report containing such a finding, the order would not and could not have been passed, the termination order would have to fall to the ground as having been passed without the officer being afforded a reasonable opportunity. It was also held that it was wrong to presume that an order would be punitive only if a regular inquiry was conducted *ex parte* or behind the back of the officer. Even if it was not a regular inquiry, any other inquiry where evidence was taken and findings were arrived behind the back of the officer, would make the subsequent termination bad. Vankataramiah, J. (as he then was) pointed out in the above case the *shift* in the law as brought about by *Samsher Singh's* case.
- So far as *Triveni Shankar Saxena v. State of U.P.*, [1992] Suppl. 1 SCC 524 and *State of U.P. v. Prem Lata Motors*, [1994] 4 SCC 189, relied upon by the High Court are concerned, in the former case, the termination order was a simple order which did not cast any stigma and there were several adverse entries in his confidential reports. The termination was as per rules. In the latter case the employee's superiors complained that the employee was not regular in her work, and was in the habit of leaving office during office hours. A simple order of termination was passed in terms of the order of her temporary appointment. There was no prior inquiry. In both these cases, the termination orders were upheld.
- We shall now refer to a different type of cases where a departmental inquiry was started, then dropped and a simple order of termination was passed. In *State of Punjab v. Sukh Raj Bahadur*, [1968] 3 SCR 234, the charge memo was served, reply given and at that stage itself, the proceedings were dropped and a termination order was passed. The High Court felt that the 'object of departmental inquiry', being to punish the employee, the order of termination must be treated as punitive. This was not accepted by a three Judge Bench consisting of Justice Shah (as he then was) who had laid down in *Madan Gopal's* case AIR (1963) SC 531, the principle of 'object of the inquiry'. This Court reversed the High Court Judgment and held that neither *Madan Gopal's* case nor *Jagdish Mitter's* case AIR (1964) SC 449, applied. This was because in the case before them the inquiry did not go beyond the stage of the explanation. No findings were given and no inquiry report was

submitted as in the above two cases. In that case (i.e. *Sukh Raj Bahadur*) this Court felt that the decision in *A.G. Benjamin v. Union of India*, (Civil Appeal No. 1341 of 1966 dated 13.12.1966) (SC) was more direct. In *Benjamin's* case, a charge memo was issued, explanation was received and an Enquiry Officer was also appointed but before the inquiry could be completed, the proceedings were dropped stating that: "departmental proceedings will take a much longer time and we are not sure whether after going through all the formalities, we will be able to deal with the accused in the way he deserves." There also, the order was held not to be punitive. Following the above case, this Court in *Sukh Raj Bahadur's* case stated that the position before them was similar to what happened in *Benjamin's* case and concluded as follows:

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"the departmental inquiry did not proceed beyond the stage of submission of a chargesheet followed by the respondent's explanation thereto. The inquiry was not preceded with, *there were no sittings of any inquiry officer, no evidence recorded and no conclusion arrived at in the inquiry.*"

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The underlined words are very important and demarcate the line of distinction. If the inquiry officer held no sittings, did not take evidence nor record any conclusions and if at that stage the inquiry was dropped and a simple order of termination was passed, the same would not be punitive.

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In *Nepali Singh v. State of U.P.*, [1988] 3 SCC 370, a three Judge Bench held the order to be punitive as it was passed after issuing a charge memo, a reply received, even though no evidence was adduced and no findings were given. But in a latter three Judge Bench case in *State of U.P. v. Kaushal Kishore Shukla*, [1991] 1 SCC 691, *Nepali Singh's* case was not followed as being a judgment rendered *per incuriam* as it did not consider *Champak Lal's* case AIR (1964) SC 1854. Of course, the above case, i.e. *Kaushal Kishore Shukla's* case was one where there was an adverse entry and only a preliminary report and then a simple order of termination was issued. That order was upheld. Similarly, in *Commissioner of Food & Civil Supply v. P.C. Saxena*, [1994] 5 SCC 177, the facts were that the departmental inquiry was started and dropped and this Court held the order not to be punitive.

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

- A is not done with the object of finding out any misconduct on the part of the Officer, as stated by Shah, J. (as he then was) in *Ram Narayan Das's* case. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary inquiry is held because the purpose of a preliminary inquiry is to find out if there is *prima facie* evidence or material to initiate a regular departmental inquiry. It has been so decided in *Champaklal's* case. The purpose of the preliminary inquiry is not to find out misconduct on the part of the Officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental inquiry is started, a charge memo issued, reply obtained, and an Enquiry Officer is appointed - if at that point of time, the inquiry is
- B dropped and a simple notice of termination is passed, the same will not be punitive because the Enquiry Officer has not recorded evidence nor given any findings on the charges. That is what is held in *Sukh Raj Bahadur's* case and in *Benjamin's* case. In the latter case, the departmental inquiry was stopped because the employer was not sure of establishing the guilt of the employee. In all these cases the allegations against the employee merely raised a *cloud* on his conduct and as pointed by Krishna Iyer, J. in *Gujrat Steel Tubes* case, the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer, by opting to pass a simple order of termination as permitted by the terms of appointment
- C or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found, and were merely the *motive*.
- F But in cases where the termination is preceded by an inquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the Officer and where on the basis of such a report, the termination order is issued, such an order will be violative of principles of natural justice inasmuch as the purpose of the inquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental inquiry. In such cases, the termination is to be treated as *based* or *founded* upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employees' conduct but are cases where the employer has virtually accepted the definitive and clear findings of the Inquiry
- G Officer, which are all arrived at behind the back of the employee - even though

such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive, in such cases. A

Coming now to the facts of the case before us, the inquiry officer, Sri R.P. Singh examined witnesses and in his report dated 22.1.76 has said: "I conclude that Sri R.P. Gupta took a sum of Rs.2000 from Sri Jai Chandra Lal", thereafter referring to certain facts said they 'go to prove the correctness of the complaint". Not only that, he concluded "I, therefore, suggest that service of Shri R.S. Gupta may be *terminated* and one month salary may be given to him in lieu of the notice". The very next day, the impugned simple order of termination followed. B

In our view, it is an absolutely clear case where the inquiry officer examined witnesses, recorded their statements and gave a clear finding of the appellant accepting a bribe and even recommended his termination. All these were done behind the back of the appellant. The Managing Director passed the termination order the very next day. It cannot in the above circumstances be stated, by any stretch of inspection that the report is a preliminary inquiry report. Its findings are definitive. It is not a preliminary report where some facts are gathered and a recommendation is made for a regular departmental inquiry. In view of the principles laid down in the cases referred to above, this case is an obvious case where the report and its findings are the *foundation* of the termination order and not merely the motive. The Tribunal was right in its conclusion. The High Court was in grave error in treating such a report as a preliminary report. C

For all the above reasons, we set aside the High Court's Judgment and F  
restore the Tribunal's order. There will be no order as to costs.

R.K.S.

Appeal allowed.