RATNESH KUMAR CHOUDHARY

v.

INDIRA GANDHI INSTITUTE OF MEDICAL SCIENCES, PATNA, BIHAR AND OTHERS

(Civil Appeal No.8662 of 2015)

OCTOBER 15, 2015

[DIPAK MISRA AND PRAFULLA C. PANT, JJ.]

Service Law – Termination of service – During probation – Whether the termination was simpliciter or punitive – Determination of – During probation of the delinquent, complaint challenging his appointment on the ground that he did not possess requisite qualification – Ex parte *vigilance enquiry – Enquiry report alleging his misbehaviour, disobedience, etc. – Held: If misconduct/ misdemeanour constitutes the basis for the final decision taken by competent authority, to dispense with services of the probationer, albeit by a non-stigmatic order, the Court can lift the veil and declare that in the garb of termination simpliciter, the employer has punished the employee for an act of misconduct – In the present case, enquiry was held behind the back of the delinquent and there were stigmatic remarks – There is clear violation of principles of natural justice – Holding of a regular enquiry was imperative – Thus, it was not a termination simplicitor but was punitive – Direction to reinstate the delinquent with 50% salary.*

Allowing the appeal, the Court

HELD: 1. In a given case, the competent authority may, while deciding the issue of suitability of the probationer to be confirmed, ignore the act(s) of misconduct and terminate his service without casting any aspersion or stigma which may adversely affect his

A **future prospects but, if the misconduct/misdemeanour constitutes the basis of the final decision taken by the competent authority to dispense with the service of the probationer albeit by a non-stigmatic order, the Court can lift the veil and declare that in the garb of termination**
B **simpliciter, the employer has punished the employee for an act of misconduct. [Para 27] [740-D-F]**

2. If an *ex parte* enquiry is held behind the back of the delinquent employee and there are stigmatic remarks
C **that would constitute foundation and not the motive. Therefore, when the enquiry commenced and thereafter without framing of charges or without holding an enquiry the delinquent employee was dismissed, definitely, there is clear violation of principles of natural justice. It cannot**
D **be equated with a situation of dropping of the disciplinary proceedings and passing an order of termination simpliciter. In that event it would have been motive and could not have travelled to the realm of the foundation. [Para 28] [741-B-D]**
E

3. In the present case, the Vigilance Department, in fact, had conducted an enquiry behind the back of the appellant. The stigma has been cast in view of the report received by the Central Vigilance Commission which was
F ***ex parte* and when that was put to the delinquent employee, holding of a regular enquiry was imperative. It was not an enquiry only to find out that he did not possess the requisite qualification. Had that been so, the matter would have been altogether different. The**
G **allegations in the report of the Vigilance Department pertain to his misbehaviour, conduct and his dealing with the officers and the same also gets accentuated by the stand taken in the counter affidavit. Thus, by no stretch**
H **of imagination it can be accepted that it is termination**

simpliciter. [Para 28] [741-F-H; 742-A] A

4. It is directed that the appellant be reinstated in service within a period of six weeks and he shall be entitled to 50% towards his salary which shall be paid to him within the said period. [Para 29] [742-D] B

Samsher Singh v. *State of Punjab* **1975 (1) SCR 814 : (1974) 2 SCC 831;** *Radhey Shyam Gupta vs. U.P. State Agro Industries Corporation Ltd. and Another* **1998 (3) Suppl. SCR 558: (1999) 2 SCC 21;** *Parshotam Lal Dhingra vs. Union of India* **AIR 1958 SC 36 : 1958 SCR 828;** *State of Bihar vs. Gopi Kishore Prasad* **AIR 1960 SC 689;** *State of Orissa vs. Ram Narayan Das* **AIR 1961 SC 177 : 1961 SCR 606 ;** *Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tubes Mazdoor Sabha* **1980 (2) SCR 146 : (1980) 2 SCC 593;** *Anoop Jaiswal vs. Govt. of India* **1984 (2) SCR 453 : (1984) 2 SCC 369;** *Nepal Singh vs. State of U.P.* **1980 (3) SCR 613 : (1980) 3 SCC 288;** *Commissioner, Food & Civil Supplies vs. Prakash Chandra Saxena* **(1994) 5 SCC 177;** *Chandra Prakash Shahi vs. State of U.P. and Others* **2000 (3) SCR 529 : (2000) 5 SCC 152;** *Union of India and Others vs. Mahaveer C. Singhvi* **2010 (9) SCR 246 : (2010) 8 SCC 220;** *Dipti Prakash Banerjee vs. Satyendra Nath Bose National Centre for Basic Sciences* **1999 (1) SCR 532 : (1999) 3 SCC 60;** *Pavanendra Narayan Verma vs. Sanjay Gandhi P.G.I. of Medical Sciences and Another* **2001 (5) Suppl. SCR 41 : (2002) 1 SCC 520;** *State Bank of India and Others vs. Palak Modi and Another* **2012 (12) SCR 628 : (2013) 3 SCC 607 – relied on.** C D E F G H

A *State of U.P. vs. Kaushal Kishore Shukla* **1991 (1) SCR 29 : (1991) 1 SCC 691**; *Triveni Shankar Saxena vs. State of U.P.* **1991 (3) Suppl. SCR 534 : (1992) Supp (1) SCC 524**; *State of U.P. vs. Prem Lata Misra* **(1994) 4 SCC 189 – referred to.**

B

Case Law Reference

1975 (1) SCR 814	**relied on.**	**Para 16**
1998 (3) Suppl. SCR 558	**relied on.**	**Para 17**
1991 (1) SCR 29	**referred to.**	**Para 17**
1991 (3) Suppl. SCR 534	**referred to.**	**Para 17**
(1994) 4 SCC 189	**referred to.**	**Para 17**
1958 SCR 828	**relied on.**	**Para 18**
AIR 1960 SC 689	**relied on.**	**Para 18**
1961 SCR 606	**relied on.**	**Para 18**
1980 (2) SCR 146	**relied on.**	**Para 18**
1984 (2) SCR 453	**relied on.**	**Para 20**
1980 (3) SCR 613	**relied on.**	**Para 20**
(1994) 5 SCC 177	**relied on.**	**Para 20**
2000 (3) SCR 529	**relied on.**	**Para 22**
2010 (9) SCR 246	**relied on.**	**Para 23**
1999 (1) SCR 532	**relied on.**	**Para 23**
2001 (5) Suppl. SCR 41	**relied on.**	**Para 24**
2012 (12) SCR 628	**relied on.**	**Para 25**

C D E F G H

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 8662 of 2015. A

From the Judgment and Order dated 01.12.2011 of the High Court of Judicature at Patna in Letters Patent Appeal No. 38 of 2010 in Civil Writ Jurisdiction Case No. 8069 of 2006. B

Kumar Parimal, Aniruddha P. Mayee for the Appellant.

L. R. Singh, C. P. Rajwar, Chandra Prakash, Vivek Singh for Respondents. C

The Judgment of the Court was delivered by

DIPAK MISRA, J. Leave granted.

2. The appellant, in pursuance of the advertisement published in the daily newspaper "Hindustan" dated 13.08.1998, applied for the post of Physiotherapist under Class-II Post in the Indira Gandhi Institute of Medical Sciences (IGIMS). The selection committee of the institute selected him for the appointment in the post as the Chest Therapist. The screening committee observed that the post of Physiotherapist and Chest Therapist are of similar nature and hence, the post of Chest Therapist may be considered from the applications received for the post of Physiotherapist. The selection committee consisted of Director of the IGIMS, Medical Superintendent and a Government representative from the Health Department, in addition to internal and external experts. The appellant along with other candidates were called for interview vide letter dated 02.12.1998 for the post of Physiotherapist/Chest Therapist. D E F G

3. As the facts would exposit, the appellant received the letter of appointment for the post of Chest Therapist on 14.01.1999 which mentioned that he had been selected for H

A appointment to the sanctioned post of Chest Therapist and would be put on probation for a period of two years which could be extended at the discretion of the Director of the Institute. It also contained a condition that the services could be put an end to at any time by giving a month's notice by either side. It
B also stipulated certain aspects which pertained to giving of notice and in lieu of notice, payment or deposit of certain amount as the case may be. The appellant joined the post on 20.08.1999.

C 4. When the appellant was continuing on the post of Chest Therapist, a complaint was received by the Vigilance Department, Government of Bihar on 3.11.2004 relating to the illegal appointment of the appellant on the post of Chest Therapist. The complaint contained that the advertisement for
D Physiotherapist and Chest Therapist were different because streams are different and the appointment of the appellant was absolutely illegal. In pursuance of the said complaint an enquiry was conducted by the Deputy Superintendent of Police, who submitted a report on 03.11.2004 to the Deputy Inspector
E General of Police, Bihar, Patna. The reports reflected on various aspects and pointed out that the appointment was illegal. On the basis of the said report the Joint Secretary in the Department of Health, vide order dated 09.03.2005
F requested the Director IGIMS to initiate a proceeding for termination of the services of the appellant by giving a show cause notice. On the basis of the said communication the appellant was asked by the Director of IGIMS to show cause within three days as to why on account of illegal appointment
G his services should not be terminated. The petitioner sent his reply on 20.3.2005 and asked for the copy of the complaint as well as the entire report submitted by the Vigilance Department.

5. Despite the request made by the appellant all the
H documents were not supplied to him which the appellant

considered vital. However, he submitted the reply on 08.04.2005 and on 09.04.2005 the Director IGIMS, terminated his services by stating that his appointment on the post of Chest Therapist was illegal in terms of the investigation done by the Cabinet (Vigilance Department, Bihar) and the explanation furnished by him in pursuance of the show cause notice had been found unsatisfactory.

6. Taking exception to the aforesaid order of termination the appellant invoked the writ jurisdiction of the High Court of Judicature at Patna in CWJC No. 8069 of 2006. The learned Single Judge vide order dated 04.11.2009 quashed the order of termination and directed that appellant should be treated in service with all consequential benefits. The learned Single Judge, as is evident, quashed the order on the bedrock that the appellant was all through kept in the dark as to on what grounds his service had been terminated and further he was not furnished with the necessary documents which formed the part of enquiry conducted by the Cabinet, Vigilance Department. The learned Single Judge opined that there had been violation of the principles of natural justice in view of the allegations made against the writ petitioner.

7. Being dissatisfied with the order of the learned Single Judge, the Institute and its Board of Governors preferred LPA No. 38 of 2010. It is appropriate to reproduce certain paragraphs from the judgment of the Division Bench:-

> "5. The ground of illegality in appointment is based upon the advertisement itself which has been enclosed to the memo of appeal as Annexure – 1. Under the advertisement, eligible candidates were required to apply against various posts including post of Physiotherapist at serial 4 and post of Chest Therapist at serial 5. For the post of Physiotherapist, the essential qualification was

A degree/diploma in Physiotherapy from a recognized institute whereas for the Chest Therapist it was degree/ diploma in Chest Therapy from recognized institute. On account of interview and selection, another person was appointed on the post of Physiotherapist and although B the writ petitioner did not have degree/diploma in Chest Therapy he was appointed to the post by relaxing the required essential qualification by the committee. The committee took the view that both the posts involve similar duties and, therefore, degree/diploma in Physiotherapy C could be sufficient for appointment to the post of Chest Therapist.

6. In our considered view, the authorities of the Vigilance Department as well as the Institute have subsequently D come to a correct finding that such a course of action was not open for the selection committee. If the essential qualification for the post of Chest Therapist was to be lowered down or changed, due advertisement of such change in policy was required to be made so that for the E post of Chest Therapist those who had degree/diploma in Physiotherapy could have filed their applications. This was not done by the concerned authorities at the relevant time. The relaxation in the essential qualification thus benefited only the writ petitioner and none else. In such F circumstances, it is not possible to hold that the selection and appointment of the writ petitioner was not illegal. The constitutional mandate of giving similar treatment and opportunity to others was clearly violated.

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8. We are also of the considered view that in a case of illegal appointment there is no scope to condone such appointment on the plea that no fraud has been alleged

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against the beneficiary of such appointment." A

Being of this view the Division Bench allowed the appeal and unsettled the decision rendered by the learned Single Judge.

8. We have heard Mr. Kumar Parimal learned counsel for the appellant and Mr. L.R. Singh learned counsel for the State. B

9. Though various contentions were raised by the learned counsel for both the parties, yet ultimately the controversy centred around the issues whether the order of termination passed by the authority is stigmatic or not; and whether there had been violation of principles of natural justice, for no regular enquiry was conducted. Learned counsel for the appellant has drawn our attention to the Vigilance Report dated 03.11.2004 and the show cause notice dated 18.03.2005. In the course of hearing, we had perused the documents in original that are in Hindi, and asked the learned counsel for the parties to file the English translation thereof which has been complied with. The relevant part of the vigilance report dated 03.11.2004 is reproduced below:- C D E

> "Shri Ratnesh Kumar Chawdhary appointed illegally on the post of Chest Therapist began to work in Chest Therapist Department. But he was having no experience of working on the post of Chest Therapist, therefore his behaviour with the patients admitted in the hospital was not congenial and correct and he had no knowledge of working, therefore, his Officer In-charge issued warning from time to time and wrote to the Director to take action against him. His work being unsatisfactory, many warnings were issued to him, explanation was called and punishment was given. During investigation his work was found to be totally unsatisfactory and his conduct was not proper. During the inquiry conducted against charged F G H

officer, Medical Superintendent (Medicines) wrote in his inquiry report that the written warning has been given to the Chest Therapist by the President and Director of Administrative Officers Union that if he does not make necessary improvement, then his services may be terminated from this Establishment. "As well as the order of punishment of withholding his two annual increments with cumulative effect was passed by I.G.I.M.S. for his indiscipline in the service and warning was issued, if in future any complaint is received then his services may be terminated". Despite that, there was no improvement in this official. As a result of which, President Administrative body was authorized to constitute an inquiry committee according to Resolution No.71/1047 made in 71st Meeting dated 02.12.2003 of Administrative Body of I.G.I.M.S. Patna. For constituting Special Committee, the proposal was sent to then President, Health Department. 71st Meeting of Administrative Body was organized under the Chairmanship of Hon'ble Dr. Shakil Ahmad, Health Minister in which seven other doctor members in addition to the Director participated.

The file of all papers relating to the charged officer was sent in 2003 to then Health Minister, the President of I.G.I.M.S. Patna. In this connection, no information as to what action was taken on those papers is not available in I.G.I.M.S. Patna. Director of aforesaid establishment Dr. Deleep Kumar Yadav stated in his statement that the charged officer Shri Ratnesh Kumar Chowdhury was appointed on the post of Chest Therapist by the Selection Committee. Complaints were received against him. Dr. Deleep Kumar Yadav, Director of above establishment, according to his competence, took disciplinary action at this stage against the charged officer. But in connection with illegal appointment, it was not possible to take any

action at this stage as his appointment is within the jurisdiction of permanent Selection Committee. He also made it clear that the conduct of charged officer was not correct. As a result of which there was always dispute with his In-charge Dr. Sudhir Kumar. Due to his unlawful conduct, Dr. Sudhir Kumar, Neurologist, I.G.I.M.S. Patna left from there in 2003." A B

10. After so narrating, the report proceeded to state thus:-

"In this way, during inquiry it becomes clear that necessary qualifications and standards were prescribed for the post of Physiotherapist and for the post of Chest Therapist in the advertisement published in this connection. It is nowhere marked in the advertisement that if the application of separate eligibility holders against both aforesaid posts are not available, then any one from the said candidates in the Panel List shall be taken into consideration for the appointment. Despite that, the appointment of the applicant for the post at Serial No.04 in the advertisement, was made on the post given at serial No.05, whereas the applicant neither applied for the post, nor he had eligibility for that post. Without making any comment by the Selection Committee, Shri Ratnesh Kumar Chowdhary was appointed on the post of Chest Therapist and to prove this illegal appointment as genuine appointment, the Establishment issued the appointment letter in which it is mentioned that the appointment of the applicant is being made on the post, applied for, by the applicant, on the post of Chest Therapist, which was absolutely wrong. Therefore, this illegal appointment may be cancelled. The information of which may be given to the Administrative Department of the charged employee." C D E F G

11. On the basis of the aforesaid report, a show cause H

notice was issued. The said show cause notice issued to the appellant on 18th March, 2005, reads as follows:-

> "Your appointment was made on the post of Chest Therapist in this establishment. Shri Tarkeshwar Singh, Member Bihar Legislative Assembly made some allegations in his complaint letter. Those allegations were examined by Cabinet Vigilance Department. According to the report filed under Letter No. 724/G.O. dated 24.12.2004 of Cabinet Vigilance Department, Investigation Bureau, Bihar, Patna, your appointment was found illegal/wrong. Report of Cabinet Vigilance Department was considered by the Health Department and decision was taken to terminate your service. The department issued direction to take action to terminate your service vide Letter No.1/9/2005/78(1)Swa. Dated 08.03.2005. Therefore submit your explanation within three days to the undersigned as to why your appointment which is illegal/wrong be not terminated from the Institute."

12. As has been stated earlier a reply was filed by the appellant which was not accepted and, eventually, he was served with the order of dismissal. At this juncture, it is necessary to refer to the counter affidavit filed in the present case. In paragraph 3 of the counter affidavit, the respondents have stated certain facts. The relevant part of the said assertion is reproduced below:-

> "That even after being appointment, while serving during the period of probation, Petitioner had misbehaved with his seniors and he did not obey the seniors. He also quarrelled with his colleagues for which many complaints were received against him. However during probation period, petitioner was given warning and on 29.1.2001 his yearly increments was withheld. Petitioner continued to work on probation till the date of his dismissal and he

was never made permanent." A

13. In the counter affidavit a reference has been made to the report submitted against the appellant by the Cabinet (Vigilance) Department, the relevant part of which we have quoted hereinbefore. B

14. It is submitted by the learned counsel for the appellant that on a perusal of the report along with allegations made in the counter affidavit, it is graphically clear that the termination of the appellant is not a termination simpliciter. The report C comments on his behaviour, knowledge of working, his conduct, his mis-behaviour, imposition of earlier punishment and disobedience shown by him to his seniors. It is urged by the learned counsel that though the appellant was a probationer and his appointment has been styled as illegal on the ground D that he did not possess the requisite qualification for the post of Chest Therapist, yet under the guise of passing an order of termination simpliciter, the authorities have, in many a way, attached stigma which makes the order absolutely stigmatic. It is canvassed by him that even if the order demonstrably E appears to be an innocuous order, the court in the in the obtaining factual score should lift the veil or peep through the veil to perceive its true character.

15. The aforesaid submissions have been controverted F by the learned counsel for the respondents.

16. To appreciate the controversy, we may refer to certain authorities which are pertinent to appreciate the controversy. In ***Samsher Singh* v. *State of Punjab***[1], a seven-Judge Bench G was considering the legal propriety of the discharge of two judicial officers of the Punjab Judicial Service who were serving as probationers. The majority laying down the law stated that:-

[1] (1974) 2 SCC 831 H

A "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
B 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
C of Article 311(2) of the Constitution."

And again:-

"The form of the order is not decisive as to whether the
D order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction
E of the provision 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 Agarwal. The order of termination is illegal and must be set aside."

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17. In ***Radhey Shyam Gupta vs. U.P. State Agro Industries Corporation Ltd. and Another***[2], the services of the appellant were terminated as he was a probationer. He challenged the order of termination before the Administrative
G Tribunal, Lucknow, U.P., alleging that though the termination order appeared to be innocuous, it was really punitive in nature, inasmuch as it was based on an *ex-parte* report of enquiry which indicated that he had accepted the bribe and, therefore, it was not merely the motive, but the very foundation of the

H [2] (1999) 2 SCC 21

order of termination. The tribunal allowed the application of the appellant and quashed the order of termination. The High Court in the writ petition, placing reliance on the decisions rendered in ***State of U.P. vs. Kaushal Kishore Shukla***[3], ***Triveni Shankar Saxena vs. State of U.P.***[4] ***and State of U.P. vs. Prem Lata Misra***[5], came to hold that the order of termination had not been founded on any misconduct, but on the other hand, the competent authority had found that the employee was not fit to be continued in service on account of unsatisfactory work and conduct. The High Court also observed that even if some *ex-parte* preliminary enquiry had been conducted or a disciplinary enquiry was initiated to inquire into some misconduct, it was 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. This Court after taking note of the submissions of the learned counsel for the parties posed the following question:-

> "Whether the report of Shri 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?"

18. This Court noticed that there are two lines of authorities. In certain cases of temporary servants and probationers, it had taken the view that if the *ex-parte* enquiry or report is the motive for the termination order, then the termination is not to be called punitive merely because the principles of natural justice have not been followed; and in the other line of decisions, this Court has ruled that if the facts

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[3] (1991) 1 SCC 691

[4] (1992) Supp (1) SCC 524

[5] (1994) 4 SCC 189

A revealed in the enquiry are not the motive but the foundation for the termination of the services of the temporary servant or probationer, it would be punitive and principles of natural justice are bound to be followed and failure to do so would make the order legally unsound. The Court referred to the judgments B rendered in ***Samsher Singh (supra), Parshotam Lal Dhingra vs. Union of India***[6]***, State of Bihar vs. Gopi Kishore Prasad***[7] ***and State of Orissa vs. Ram Narayan Das***[8] and, eventually, opined that if there was any difficulty as to what was "motive" or "foundation" even after the ***Samsher*** C ***Singh's*** *case* the said doubts were removed in ***Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tubes Mazdoor Sabha***[9]. The clarification given by the Constitution Bench in the said case, being instructive, the two-Judge Bench reproduced the same, D which we think we should do:-

> "*53.* 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 E 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 F 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 G of the misconduct and of the consequent desirability of

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[6] AIR 1958 SC 36

[7] AIR 1960 SC 689

[8] AIR 1961 SC 177

H [9] (1980) 2 SCC 593

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 a different proceeding 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.

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 pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge. We need not chase other hypothetical situations here."

19. On that basis, the Court proceeded to opine thus:-

"In other words, it will be a case of motive if the master, after gathering some prima facie 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 direct a decision about the truth of the allegations. But if he conducts an enquiry only for the purpose of proving the misconduct and the employee is not heard, it is a case where the enquiry is the foundation and the termination will be bad."

A 20. After stating the said principle, the Court traced the history and referred to ***Anoop Jaiswal vs. Govt. of India***[10], ***Nepal Singh vs. State of U.P.***[11] ***and Commissioner, Food & Civil Supplies vs. Prakash Chandra Saxena***[12] and opined as follows:-

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"33. It will be noticed from the above decisions that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory
C will not be punitive inasmuch as the above facts are merely the *motive* and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the officer, as stated by Shah, J. (as he then was)
D in *Ram Narayan Das 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 enquiry is held because the purpose of a preliminary enquiry is to find out if there is prima facie evidence or
E material to initiate a regular departmental enquiry. It has been so decided in *Champaklal case*. The purpose of the preliminary enquiry is not to find out misconduct on the part of the officer and if a termination follows without
F 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,
G the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. That is what is held in *Sukh Raj Bahadur case*

[10] (1984) 2 SCC 369
[11] (1980) 3 SCC 288
H [12] (1994) 5 SCC 177

and in *Benjamin case.* In the latter case, the departmental enquiry was stopped because the employer was not sure of establishing the guilt of the employee. In all these cases, the allegations against the employee merely raised a *cloud* on his conduct and as pointed by Krishna Iyer, J. in *Gujarat Steel Tubes case* the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found, and were merely the *motive*.

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

A 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."

21. Appreciating the facts of the said case, the Court set B aside the judgment of the High Court and restored that of the tribunal by holding that the order was punitive in nature.

22. In ***Chandra Prakash Shahi vs. State of U.P. and Others***[13] after addressing the history pertaining to "motive" C and "foundation" and referring to series of decisions, a two-Judge Bench had held that:-

"28. The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to D 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 E 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 F 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 G 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".

H [13] (2000) 5 SCC 152

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

23. A three-Judge Bench in ***Union of India and Others vs. Mahaveer C. Singhvi***[14], dwelled upon the issue whether the order of discharge of a probationer was simpliciter or punitive, referred to the authority in ***Dipti Prakash Banerjee vs. Satyendra Nath Bose National Centre for Basic Sciences***[15] and came to hold thus:-

"It was held by this Court in *Dipti Prakash Banerjee case* that whether an order of termination of a probationer can be said to be punitive or not depends on whether the allegations which are the cause of the termination are the motive or foundation. It was observed that if findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, a simple order of termination is to be treated as founded on the allegations and would be bad, but if the enquiry was

[14] (2010) 8 SCC 220

[15] (1999) 3 SCC 60

A not held, and 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's services, it would only be a case of motive and the order of termination of the employee would B not be bad."

24. At this juncture, we must refer to the decision rendered in ***Pavanendra Narayan Verma vs. Sanjay Gandhi P.G.I. of Medical Sciences and Another***[16], wherein a two-Judge C Bench struck a discordant note by stating that:-

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

G 25. The said decision has been discussed at length in ***State Bank of India and Others vs. Palak Modi and Another***[17] and, eventually, commenting on the same, the Court

[16] (2002) 1 SCC 520

H [17] (2013) 3 SCC 607

ruled thus:-

> "The proposition laid down in none of the five judgments relied upon by the learned counsel for the appellants is of any assistance to their cause, which were decided on their own facts. We may also add that the abstract proposition laid down in para 29 in *Pavanendra Narayan Verma* v. *Sanjay Gandhi PGI of Medical Sciences* is not only contrary to the Constitution Bench judgment in *Samsher Singh* v. *State of Punjab*, but a large number of other judgments—*State of Bihar* v. *Shiva Bhikshuk Mishra*, *Gujarat Steel Tubes Ltd.* v. *Mazdoor Sabha* and *Anoop Jaiswal* v. *Govt. of India* to which reference has been made by us and to which attention of the two-Judge Bench does not appear to have been drawn. Therefore, the said proposition must be read as confined to the facts of that case and cannot be relied upon for taking the view that a simple order of termination of service can never be declared as punitive even though it may be founded on serious allegation of misconduct or misdemeanour on the part of the employee."

We respectfully agree with the view expressed hereinabove.

26. In ***Palak Modi's case***, the ratio that has been laid down by the two-Judge Bench is to the following effect:-

> "The ratio of the abovenoted judgments is that a probationer has no right to hold the post and his service can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post held by him. If the competent authority holds an inquiry for judging the suitability of the probationer or for his further continuance in service

A or for confirmation and such inquiry is the basis for taking decision to terminate his service, then the action of the competent authority cannot be castigated as punitive. However, if the allegation of misconduct constitutes the foundation of the action taken, the B ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice.

27. In the facts of the case, the Court proceeded to state C that there is a marked distinction between the concepts of satisfactory completion of probation and successful passing of the training/test held during or at the end of the period of probation, which are sine qua non for confirmation of a probationer and the Bank's right to punish a probationer for D any defined misconduct, misbehaviour or misdemeanour. In a given case, the competent authority may, while deciding the issue of suitability of the probationer to be confirmed, ignore the act(s) of misconduct and terminate his service without casting any aspersion or stigma which may adversely affect E his future prospects but, if the misconduct/misdemeanour constitutes the basis of the final decision taken by the competent authority to dispense with the service of the probationer albeit by a non-stigmatic order, the Court can lift the veil and declare that in the garb of termination simpliciter, F the employer has punished the employee for an act of misconduct.

28. In the case at hand, it is clear as crystal that on the basis of a complaint made by a member of the Legislative G Assembly, an enquiry was directed to be held. It has been innocuously stated that the complaint was relating to illegal selection on the ground that the appellant did not possess the requisite qualification and was appointed to the post of Chest Therapist. The report that was submitted by the Cabinet H (Vigilance) Department eloquently states about the conduct

and character of the appellant. The stand taken in the counter affidavit indicates about the behaviour of the appellant. It is also noticeable that the authorities after issuing the notice to show cause and obtaining a reply from the delinquent employee did not supply the documents. Be that as it may, no regular enquiry was held and he was visited with the punishment of dismissal. It is well settled in law, if an ex parte enquiry is held behind the back of the delinquent employee and there are stigmatic remarks that would constitute foundation and not the motive. Therefore, when the enquiry commenced and thereafter without framing of charges or without holding an enquiry the delinquent employee was dismissed, definitely, there is clear violation of principles of natural justice. It cannot be equated with a situation of dropping of the disciplinary proceedings and passing an order of termination simpliciter. In that event it would have been motive and could not have travelled to the realm of the foundation. We may hasten to add that had the appellant would have been visited with minor punishment, the matter possibly would have been totally different. That is not the case. It is also not the case that he was terminated solely on the ground of earlier punishment. In fact, he continued in service thereafter. As the report would reflect that there are many an allegation subsequent to the imposition of punishment relating to his conduct, misbehaviour and disobedience. The Vigilance Department, in fact, had conducted an enquiry behind the back of the appellant. The stigma has been cast in view of the report received by the Central Vigilance Commission which was ex parte and when that was put to the delinquent employee, holding of a regular enquiry was imperative. It was not an enquiry only to find out that he did not possess the requisite qualification. Had that been so, the matter would have been altogether different. The allegations in the report of the Vigilance Department pertain to his misbehaviour, conduct and his dealing with the officers and the same also gets accentuated by the stand taken in the

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A counter affidavit. Thus, by no stretch of imagination it can be accepted that it is termination simpliciter. The Division Bench has expressed the view that no departmental enquiry was required to be held as it was only an enquiry to find out the necessary qualification for the post of Chest Therapist. Had
B the factual score been so, the said analysis would have been treated as correct, but unfortunately the exposition of factual matrix is absolutely different. Under such circumstances, it is extremely difficult to concur with the view expressed by the Division Bench.
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29. Consequently, the appeal is allowed and the judgment and order passed by the Division Bench of the High Court is set aside and that of the learned Single Judge is upheld, though on different grounds. Accordingly, it is directed that the
D appellant be reinstated in service within a period of six weeks and he shall be entitled to 50% towards his salary which shall be paid to him within the said period. In the facts and circumstances, there shall be no order as to costs.

E Kalpana K. Tripathy Appeal allowed.