State of Maharashtra

Vs

Veerappa R. Saboji and Another

Civil Appeal No. 628 of 1976

(N.L. Untwalia, R.S. Pathak JJ)

06.09.1979

JUDGMENT

UNTWALIA, J. –

1. This appeal by special leave has been preferred by the State of Maharashtra from the judgment of the Bombay High Court given in a writ petition filed by respondent 1 for quashing the order of termination of his service. The High Court has allowed the writ petition and quashed the order.

2. Respondent 1 was appointed a Civil Judge (Junior Division) and Judicial Magistrate, First Class, on probation in accordance with the Bombay Judicial Service Recruitment Rules, 1956 - hereinafter referred to as the Rules. In paragraph 3 of the appointment letter dated October 31, 1960, it was clearly stated :

> You will be on probation for a period of two years from the date on which you take charge of your appointment, and during this period your appointment is liable to be terminated without notice. After the period of probation your services are liable to be terminated on one month's notice as long as your appointment is temporary. It should be clearly understood that your appointment at present is purely temporary.

Respondent 1 pursuant to the said letter of appointment joined the Judicial Service, Class II, in the State of Maharashtra on December 7, 1960. The two years' probationary period originally fixed expired on December 6, 1962; even so he was allowed to continue in the post only in an officiating capacity and was not confirmed. His services were terminated by a simple order of termination dated December 15, 1971 which ran as follows :

> The Government is pleased to terminate the services of Shri V. R. Saboji, Officiating Civil Judge, (Junior Division) and Judicial Magistrate, First Class, Kalamnuri, District Parbhani with effect from February 1, 1972.

A copy of the above order was forwarded to the served upon the first respondent along with a covering letter of that date expressly stating therein :

> Yours appointment is still temporary and your services are liable to be terminated on one month's notice. I am to state that Government has decided to terminate your services with effect from February 1, 1972 and that you will, therefore, cease to be in service with effect (from) that date. A formal order is enclosed herewith.

3. The first respondent challenged the order of his termination in the High Court by filing a writ petition impleading the then Law Secretary to the Government of Maharashtra as respondent 1, State of Maharashtra, respondent 2 and S/Shri K. N. Wahi and P. G. Karnik as respondents 3 and 4 respectively. To put it briefly, the case made out by the first respondent in his writ petition was that he had become a confirmed government servant and the order terminating his services simpliciter was by way of punishment. Respondent 3 and 4 were respectively District and Inspecting District Judges in the District where respondent 1 happened to work under them. They bore some ill-feeling and ill-will against him and had made certain enquiries and reported the matter to the High Court as a result of which, according to the belief of the said respondent, some adverse remarks were given to him and his services were terminated at the insinuation of the said two officers. Affidavits were filed on behalf of the State of Maharashtra and respondents 3 and 4 as well. The latter two in their counters denied the allegations of mala fides against them.

4. In the High Court the following five points were urged on behalf of respondent 1 :

> (1) That the order of termination has been passed as by way of punishment which amounts, in fact, to dismissal and since the provisions of Article 311(2) have not been complied with, the order is void;
>
> (2) That the petitioner has been purposefully picked for discharge when many of his juniors were allowed to be retained. Therefore, the order is violative of Article 16 of the Constitution;
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> (3) The order has been passed mala fide with a view to circumvent the provisions of Article 311 of the Constitution;
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> (4) The petitioner had, in fact, at the time of termination of his services become permanent employee in accordance with Rule 4(2)(iv) of the Bombay Judicial Service Recruitment Rules, 1956; and
>
> (5) The order is bad as it is passed in violation of the provisions of Article 235 of the Constitution.

Point No. 5 was decided against respondent 1. Apropos the other four points the High Court has held - (1) that respondent 1 will be deemed to have been confirmed in his post because his work was satisfactory and a vacancy in the permanent cadre was available. The Government had no discretion in the matter and it was bound to confirm the said respondent under Rule 4(2)(iv) of the Rules; (2) that the appointment of respondent 1, therefore, could not be terminated by a simple notice of termination and it was passed by way of punishment in violation of Article 311(2) of the Constitution. The High Court did not hear the counsel on either side on the point of mala fides and they also agreed not to advance any argument on that point, as mentioned in the High Court judgment. Before us also, except in passing, no argument of any substance was advanced to press the point of mala fides. The correctness of the decision of the High Court was assailed before us by Mr. M. N. Phadke, appearing for the appellant, while it was sought to be sustained by Mr. F. S. Nariman appearing for respondent 1. I now proceed to examine the rival contentions of the parties.

5. In the High Court judgment there is a reference to an undertaking given by respondent 1 showing his willingness to accept the employment on a temporary basis. But that apart, the letter of appointment itself had indicated that he was being appointed on probation and in a temporary

capacity. It is necessary at this stage to read the relevant provisions of the Rules. Sub-rule (2) of Rule 4 deals with method of recruitment to the Junior Branch, Class II and clause (iv) of sub-rule (2) states :

> Unless otherwise expressly directed, every person appointed under the last foregoing sub-rule shall be on probation for a period of two years and on the expiry of such period he may be confirmed if -
>
> (a) there is a vacancy; and
>
> (b) his work is found satisfactory.

There was sub-clause (c) also which was deleted in 1961 and we are not concerned with that sub-clause.

6. There are two parts of clause (iv) : (1) that it is imperative to put every person appointed under sub-rule (2) on probation for a minimum period of two years "unless otherwise expressly directed", and (2) on the expiry of the said period of two years the person appointed may be confirmed if there is a vacancy and if his work is found to be satisfactory. The plain meaning of the rule is that there is no automatic confirmation on the expiry of the probationary period of two years in the first instance. On the expiry of the said period and on the fulfilment of the requirement of sub-clauses (a) and (b) a government servant becomes eligible for being confirmed and normally he is likely to be confirmed. But it is a matter of common knowledge in many branches of government service including the Judiciary that for administrative reasons or otherwise the confirmation is delayed and is made at a subsequent time. It may also be delayed for watching the work of the government servant for a further period. The expression "unless otherwise expressly directed" governs only the first part of clause (iv) and not the second as was attempted to be argued by Mr. Nariman. In my opinion the rule in questions, therefore, comes under the ordinary and normal rule that without an express order of confirmation the government servant will not be taken to have been confirmed in the post to which he was appointed temporarily and/or on probation. It is not covered by the exceptional rule like the one which was the subject-matter of consideration of this Court in State of Punjab v. Dharam Singh ((1968) 3 SCR 1 : AIR 1968 SC 1210).

7. In Kedar Nath Bahl v. State of Punjab ((1974) 3 SCC 21 : AIR 1972 SC 873) Palekar, J., delivering the judgment on behalf of this court said at page 876, column 2 : (SCC p. 26, para 9)

> The law on the point is now well settled. Where is person is appointed as a probationer in any post and a period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains confirmation automatically even if no order is passed in that behalf. Unless the terms of appointment clearly indicate that confirmation would automatically follow at the end of the specified period, or there is a specific service rule to that effect, the expiration of the probationary period does not necessarily lead to confirmation. At the end of the period of probation an order confirming the officer is required to be passed and if no such order is passed and he is not reverted to his substantive post, the result merely is that he continues in his post as a probationer.

I am aware that a review against this judgment was allowed and the appeal was reheard recently by a Division Bench of this Court ((1978) 4 SCC 336 : 1979 SCC (L & S) 1) to which I was a party.

The appeal was again dismissed and no different view of law was expressed therein than the one extracted above. Bachawat, J. also while delivering the judgment on behalf of Constitution Bench of this Court in Dharam Singh case ((1968) 3 SCR 1 : AIR 1968 SC 1210) has said at page 4 thus :

> This Court was consistently held that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to continue in his post as a probationer only, in the absence of any indication to the contrary in the original order of appointment or promotion or the service rules. In such a case, an express order of confirmation is necessary to give the employee a substantive right to the post, and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation it is not possible to hold that he should be deemed to have been confirmed.

In Rule 6(3) of the Punjab Educational Service (Provincialised Cadre) Class III, Rules, 1961 a certain period had been fixed beyond which the probationary period could not be extended. It was because of that it was held that when the government servant was allowed to continue in the post after completion of the maximum period of probation without an express order of confirmation be could not be deemed to continue in that post as a probationary by implication. In other words because of the express provision in the rule vis-a-vis the maximum period of probation the confirmation was automatic. There is nothing of the kind to be found in the rules in the present case. The view of the High Court to the contrary is erroneous and cannot be sustained.

8. Mr. Nariman submitted that if an interpretation were to be given to Rule 4(2)(iv) that it depended upon the sweet will of the appointing authority to confirm a government servant as and when it liked, then the rule would be violative of Articles 14 and 16 of the Constitution. He placed reliance upon a decision of this Court in S. B. Patwardhan v. State of Maharashtra ((1977) 3 SCR 775 : (1977) 3 SCC 399 : 1977 SCC (L & S) 391) in support of his contention. I find no substance in the argument. The question for consideration in that case related to the competition of seniority between the direct recruits and the promotees in the Engineering cadre. In that connection it was said at page 796 thus : (SCC p. 420, para 39)

> Confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. A glaring instance widely known in a part of our country is of a distinguished member of the judiciary who was confirmed as a District Judge years after he was confirmed as a Judge of the High Court. It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. It shows that confirmation does not have to conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the government.

These observation were made with reference to apparent discriminatory results which followed by applying different standards to the members of the two groups for determining their seniority, one the direct recruits and the other promotees. I am not concerned with such a situation in the present case. It was not suggested on behalf of the Government that the confirmation depended on the sweet will and the pleasure of the Government. What was, however, argued was that on the fulfilment of the two conditions mentioned in sub-clauses (a) and (b) of clause (iv) of sub-rule (2) of Rule 4 of the Rules, the government servant became eligible but there may be several other reasons, administrative or otherwise, which may delay the confirmation. The confirmation can surely be delayed if the suitability of the government servant has got to be watched further to decide whether he should be confirmed in the post or not.

9. Mr. Nariman pointed out that the High Court in support of its view has relied upon a resolution of the Government dated April 19, 1963 and the Gazette notification dated May 11, 1963. It is not necessary to quote both in my judgment. It would suffice to refer to the wordings of the notification only. It reads as follows :

> On satisfactory completion of the probationary period of two years, Shri V. R. Saboji is appointed with effect from December 6, 1962 (afternoon) as officiating Civil Judge (Junior Division) and Judicial Magistrate, First Class.

The submission was that respondent 1 had satisfactorily completed his probationary period of two years and, therefore, he should be deemed to have been confirmed on the strength of this notification. But such an argument is in the teeth of the language of the notification itself as it says that he was appointed from December 6, 1962 as "officiating Civil Judge (Junior Division) and Judicial Magistrate, First Class". In other words even after the completion of the two years' period of continued in officiating capacity and was not confirmed in the post. Two inference are possible to be drawn from this : (1) that the period of probation in case of respondent 1 stood extended beyond two years until and unless he was confirmed, and (2) that in any event he continued in the post in his temporary or officiating capacity. No order was ever made confirming respondent 1 in the post and without such an order it is difficult to sustain the view of the High Court that he was confirmed.

10. The question of violation of Article 311(2) has to be examined in two perspectives. Firstly, if it would be held in agreement with the High Court that he should be deemed to have been confirmed in the post to which he was initially appointed, it is plain that terminating his services by a notice of termination simpliciter like the one given in this case, will be violative of the requirement of Article 311(2). On my finding it is manifest that it is not so. He was continuing in the post in an officiating capacity. His services could be terminated by one month's notice simpliciter according to the terms of the employment. Secondly the question to be examined is whether the termination was by way of punishment. Even in the case of a temporary or officiating government servant his services cannot be terminated by way of punishment casting a stigma on him in violation of the requirement of Article 311(2). This principle is beyond any dispute but the difficulty comes in the application of the said principle from case to case. If a government servant is compulsorily retired or one who is officiating in a higher post is reverted to his parent cadre, or when the services of an officiating or temporary government servant are dispensed with by an order of termination simpliciter, then problems arise in finding out whether it is by way of punishment. In different kinds of situation, different views have been expressed. Yet the underlying principle remains the same. One should not forget a practical and reasonable approach to the problem in such cases. Ordinarily and generally, and there may be a few exceptions, any of the three course indicated above is taken recourse to only if there are some valid reasons for taking the action against the government servant. If a probe in the matter is allowed to be made in all such cases then curious results are likely to follow. In a given case there may be valid reasons, may be of a serious kind, which led the authorities concerned to adopt one course or the other as the facts of a particular case demanded. If one were to say in all such cases that the action has been taken by way of punishment then the natural corollary to this would be that such action could be taken if there was no such reason in the background of the action. Then the argument advanced is that the action was wholly arbitrary, mala fide and capricious

and, therefore, it was violative of Article 16 of the Constitution. Where to draw the line in such cases ? Ordinarily and generally the rule laid down in most of the cases by this Court is that you have to look to the order on the fact of it and find whether it casts any stigma on the government servant. In such a case there is no presumption that the order is arbitrary or mala fide unless a very strong case is made out and proved by government servant who challenges such an order. The Government is on the horns of the dilemma in such a situation. If the reasons are disclosed, then it is said that the order of the Government was passed by way of punishment. If it does not disclose the reasons, then the argument is that it is arbitrary and violative of Article 16. What the government is to do in such a situation ? In my opinion, therefore, the correct and normal principle which can be culled out from the earlier decisions of this Court is the one which I have indicated above.

11. I shall now proceed to refer to only three recent decisions of this Court, two relied upon by the appellant and the one by the respondent. I do not consider it necessary of refer to others.

12. In S. P. Vasudeva v. State of Haryana ((1976) 2 SCR 184 : (1976) 1 SCC 236 : 1976 SCC (L & S) 12), a Bench of this Court to which I was a party, Alagiriswami, J., delivering the judgment of the Court said at page 187 : (SCC p. 240, para 5)

> In cases where enquiries have been held before orders of reversion of a probationer to his former lower post or discharge of a probationer or discharge from service of a temporary servant were passed, certain decisions have taken the view that where the enquiry was held in order to find out the suitability of the official concerned the order would not be vitiated. In certain other cases it has been held that the enquiry was held with a view to punish and as the enquiry did not satisfy the requirements of Article 311 the punishment was bad. It appears to us that this theory as to whether the reversion to a lower post of a probationer in a higher post, or the discharge of a probationer, or the discharge from service of a temporary servant was meant as a punishment leads to a very peculiar situation. After all, if such an order gives no reasons the Court will not normally interfere because ex facie there is nothing to show that the order was intended as a punishment.

Jaswant Singh, J., delivering the judgment of this Court in State of U. P. v. Ram Chandra Trivedi ((1977) 1 SCR 462 : (1976) 4 SCC 52 : 1976 SCC (L & S) 542) on behalf of a Division Bench of this Court, the other two members of which were Khanna and Sarkaria, JJ., reviewed all the earlier cases of this Court they elaborately including the well-known judgment of Das, C.J., in Parshotam Lal Dhingra v. Union of India ((1958) SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544) and the comparatively recent decision of a Bench of 7 Judges in Samsher Singh v. State of Punjab ((1975) 1 SCR 814 : (1974) 2 SCC 831 : 1974 SCC (L & S) 550 : (1974) 2 LLJ 465). Relevant extracts in extenso have been quoted from those two decisions as well as from others. It would be of use of very briefly state the facts of Ram Chandra Trivedi ((1977) 1 SCR 462 : (1976) 4 SCC 52 : 1976 SCC (L & S) 542). The respondent was appointed as a temporary clerk in a Canal Division in the year 1954. Seven years later, he was required to appear in a departmental examination and there it was found that another clerk of another Canal Division was attempting to personate and appear for the respondent. The Executive Engineer detected this and obtained the explanation of both the clerks and reported the matter to the Superintending Engineer. Finding the explanations tendered by the clerks to be unsatisfactory, the Superintending Engineer brought the matter to the notice of the Chief Engineer. The latter asked him to award suitable punishment to the two clerks. The Superintending Engineer thereafter issued the orders terminating the services of both the clerks. Eventually Ram Chandra Trivedi, the respondent, filed a suit challenging the order of termination of his service as having been made by way of punishment in disregard of Article 311(2). The suit was dismissed. The dismissed was maintained by the First Appellate Court. The High Court, however, allowed the second appeal filed by the respondent and decreed his suit. The State came to this court in such a situation. This Court reviewed all the previous decisions and finally said at page 475 : (SCC p. 64, para 23)

> Keeping in view the principles extracted above, the respondent's suit could not be decreed in his favour. He was a temporary hand and had no right to the post. It is also not denied that both under the contract of service and the service rules governing the respondent, the State had a right to terminate his service by giving him one month's notice. The order to which exception is taken is ex facie an order of termination of service simpliciter. It does not cast any stigma on the respondent nor does it visit him with evil consequences, nor is it founded on misconduct. In the circumstances, the respondent could not invite the Court to go into the motive behind the order and claim the protection of Article 311(2) of the Constitution.

13. The case relied upon for the respondent is an unreported decision of this Court in Manager, Government Branch Press v. D. B. Belliappa. Speaking for the court, Sarkaria, J., found that the order of termination was wholly arbitrary and had been passed because of some hostile motive which the authority terminating the services had against the government servant concerned. On the facts of this case it was found that the decision of the High Court allowing the writ petition of the government servant was correct and was covered by some earlier decisions of this Court. I may briefly refer to the facts of this case also from the judgment. The appellant in the appeal was the Manager of a Government Press who had terminated the services of Belliappa by the impugned order without assigning any reason, albeit in accordance with the conditions of his service, while three employees, similarly situated, junior to Belliappa in the same cadre had been retained. A charge of hostile discrimination was levelled with sufficient particularity against the appellant. Hostile animus was also attributed by Belliappa in his writ petition to his superior officers. He asserted that his service record was good. This fact was not controverted by the appellant by filing any counter-affidavit. The impugned order was preceded by a show-cause notice of proposed disciplinary action against Belliappa. In such a situation it was observed in the judgment : (SCC p. 482, para 16).

> Of course, there is always some reason or cause for terminating the services of a temporary employee. It is not necessary for state that reason in the order of termination communicated to the employee concerned. But where there is a specific charge of arbitrary discrimination or some hostile motive is imputed to the authority terminating the service, it is incumbent on the authority making the impugned order to explain the same by disclosing the reason for the impugned action.

It would also be seen from the judgment that sufficient time was given to learned Counsel for the appellant to show to the Court as to whether the services of the respondent had been terminated on the ground of unsuitability. Yet learned Counsel failed to produce any such material in the Court. In that view of the matter the order of the High Court was upheld.

14. Now coming to the facts of the instant case, I find the allegations of mala fides were made in the writ petition only against respondents 2 and 3 who were the immediate superior officers of respondent 1 at the relevant time. No specific allegation was made against them that they made reports against him to the High Court due to any ulterior motive or to feed any grudge against

respondent 1. Merely to say, as was said by him in his writ petition, that their action was not justified and it was out of bias that they took the action, was not, in the least, any allegation of mala fide. If it were to be permitted in such cases to examine all these reports in detail to find out whether the reports were justified or not and thank to draw an inference of mala fide, on that basis, where will it lead to ? Then in every case the reasons for termination of service will have to be scrutinised thread-bare to arrive at a conclusion that the order passed was not mala fide. On his own showing respondent 1 had earned adverse remarks before his service was terminated which clearly showed that his record was not satisfactory. The High Court, therefore, recommended to the Government that the services of respondent 1 be terminated. The Government accepted the recommendation of the High Court and terminated his services. No allegation whatsoever of any hostile discrimination was made in the writ petition against the High Court or the Government, not even against the Chief Justice or any Judge of the High Court who might have dealt with this matter. Nor was any such allegation made against the Law Secretary or the Chief Secretary or any Minister of the Government. After all when the orders were passed against respondent 1 the High Court must have examined the matter carefully and found that it was not desirable to allow respondent 1 to continue in the service and must have found further that the facts did not warrant or make it expedient to hold any regular enquiry against respondent 1 and to remove him from service by way of punishment. I may add that the High court file containing the recommendation in case of respondent 1 was ready in the High Court to be shown to the Division Bench which heard the writ petition. But the learned Judges refused to see it because the State counsel was not prepared to show it to respondent 1. Obviously it could not be shown to him. Otherwise he would have come out with a plea, right or wrong, that the order was made against him by way of punishment. This is the delicate area where the Government and the State counsel find themselves in a peculiar and delicate position. Mr. Phadke also informed us that the High Court file was ready with him and if we liked we may see it. On the facts and in the circumstances of this case we did not think it necessary to see and, therefore, we did not see.

15. It was also argued on behalf of respondent 1 that 162 officers had been appointed when respondent 1 was appointed to the Judicial Service of Maharashtra along with them. The service of none else was terminated and, perhaps, others junior to him were confirmed. Mr. Phadke informed that till 1971 none of the 162 officers had been confirmed. Some of them might have been or must have been confirmed later. No occasion arose for terminating the services of any other out of those 162 officers except respondent 1 by the year 1971. It is not quite correct to say that his service record was all through satisfactory, and this fact was not controverted in the counter filed on behalf of the State. Having examined all the relevant paragraphs I find that apart from the denial being there in the counter, respondent 1 himself, as I have stated above, disclosed in his writ petition acts of commissions and omissions on his part which led respondents 3 and 4 to submit adverse reports against him to the High Court. That being so, in my opinion, the order of termination against respondent 1 was not passed by way of punishment contravening the requirement of Article 311(2), nor was it arbitrary or mala fide.

16. For the reasons stated above, I allow this appeal, set aside the judgment and order of the High Court and dismiss the writ petition filed by respondent 1. In regard to costs, already an order was passed that costs will be paid by the appellant in any event. Accordingly, the costs or any balance thereof, will be paid by the appellant.

Pathak, J. (concurring) -

I agree with the judgment and order proposed by my learned brother. There are certain observations, however, in his judgment on the point whether a government servant petitioner is entitled to information from the relevant official records forming the basis of the order terminating his services. Unfortunately, I find myself unable to subscribe to those observations.

18. The law, it seems to me, is that where the services of a temporary government servant or a probationer government servant are terminated by an order which does not ex facie disclose any stigma or penal consequences against the government servant and is merely a termination order simpliciter, there is no case ordinarily for assuming that it is anything but what it purports to be. Where, however, the order discloses on the face of it that a stigma is cast on the government servant or that it visits him with penal consequences, then plainly the case is one of punishment. There may still be another kind of case where although the termination of services is intended by way of punishment, the order is framed as a termination simpliciter. In such a case, if the government servant is able to establish by material on the record that the order is in fact passed by way of punishment, the innocence of the language in which the order is framed will not protect it if the procedural safeguards contemplated by Article 311(2) of the Constitution have not been satisfied. In a given case, the government servant may succeed in making out a prima facie case that the order was by way of punishment but an attempted to rebut the case by the authorities may necessitate sending for the official records for the purpose of determining the truth. It is in such a case generally that the official records may be called for by the Court. It is not open to the Court to send for the official records on a mere allegation by the government servant that the order is by way of punishment. For unless there is material on the record before the Court in support of that allegation, an attempted by the Court to find out from the record whether the termination of service is based on the unsuitability of the government servant in relation to the post held by him or is in reality an order by way of punishment will in effect be an unwarranted attempt to delve into the official records for the purpose of determining the nature of the order on the basis of a mere allegation of the government servant. On a sufficient case being made out on the merits before the Court by the government servant it is open to the Court to resort to scrutiny of the official records for the purpose of verifying the truth. I am unable to see why the Court should decline to peruse the official records in an appropriate case and why, where consideration of privilege and confidentiality do not suffer, the information set forth in the records should not be made available to the government servant. The mere possibility that the official records could confirm what the government servant had set out to prove and prima facie had, indeed, proved should not suit out disclosure of the information.

19. What I say here in no way detracts from what this Court has laid down in State of U. P. v. Ram Chandra Trivedi ((1977) 1 SCR 462 : (1976) 4 SCC 52 : 1976 SCC (L & S) 542). The Court did deprecate there the act of the High Court in probing into the departmental correspondence that passed between the superiors of the government servant for the purpose of determining whether the impugned order was passed by way of punishment. But it does not appear from the facts recited in that case that the government servant had made out any case that the impugned order had been made by way of punishment and that on the claim being disputed by the State it was necessary to ascertain whether the case sought to be proved by the government servant stood rebutted or confirmed by the departmental correspondence. I am unable to spell out from the judgment any absolute rule enunciated by this Court that where the order terminating the services of a temporary or a probationer government servant is ex facie an order of termination simpliciter, the government servant is barred from establishing that it is in fact an order by way of punishment, and that on the government servant succeeding in establishing it to be so the court is prohibited from examining the official records for the purpose of verifying the true position.

20. The question of scrutinising the official records arises where a government servant is entitled to

show that although the order impugned by him purports to be an order of termination simpliciter it is in fact an order made by way of punishment. In regard to that right this Court specifically referred in Ram Chandra Trivedi ((1977) 1 SCR 462 : (1976) 4 SCC 52 : 1976 SCC (L &S) 542) to the decisions in Union of India v. R. S. Dhaba ((1969) 3 SCC 603) and R. S. Sial v. State of U. P. ((1974) 3 SCR 754 : (1975) 3 SCC 111 : 1974 SCC (L & S) 501) with approval and observed : (SCC p. 61, para 16)

> The form of the order, however, is not conclusive to its true nature. The entirely of circumstances preceding or attendant on the impugned order must be examined by the court and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order.

And it proceeded to quote from Samsher Singh v. State of Punjab ((1975) 1 SCR 814 : (1974) 2 SCC 831 : 1974 SCC (L & S) 550 : (1974) 2 LLJ 465), decided by a Bench of seven Judges of this Court that : (SCC p. 62, para 19)

> No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution. (SCC p. 851, para 63)

In the same case, it was observed further : (SCC p. 62, para 19)

> Where a departmental enquiry is contemplated and if an enquiry is not in fact proceeded with, Article 311 will not be attracted unless it can be shown that the order though unexceptionable in form is made following a report based on misconduct. (SCC p. 852, para 67)

It seems clear that if a government servant is able to establish that, although the impugned order is innocent ex facie, it was made on the ground that he was guilty of misconduct and, therefore, the order was intended by way of punishment. The law still is that an order, although framed in terms which do not cast an aspersion against the character and integrity of the government servant or visit him with evil consequences, may still be proved to be in fact one by way of punishment. It is true that in S. P. Vasudeva v. State of Haryana ((1976) 2 SCR 184 : (1976) 1 SCC 236 : 1976 SCC (L & S) 12), this Court laid down that ordinarily the courts should not go behind an order of reversion of a person who had no right to the post if ex facie it did not disclose that he was being reverted as a measure of punishment and did not cast any stigma on him. But the words advisedly used were :

> The courts will not normally go behind that order to see, if there were any motivating factors behind that order.

No definite principle as a rule of law appears to have been laid down in that case on the point and the Court has merely suggested that the question whether it should be open to the courts in such cases to go behind the order should be examined de novo, and it recommended that an order reverting a probationer from a higher to a lower post, or discharging a probationer, or discharging a temporary servant from service should not be questioned except on the basis of mala fides in making the order. From the further comments of the Court, it appears that the observation was made with a view to lightening the burden of the Court having regard to the heavy load of work presently occupying it. Until the day that the recommendation is accepted, I believe it to be true that the jurisdiction of the courts extends to examining and scrutinising the official records in the circumstances to which I have specifically adverted.

21. In the present case, if the High Court refused to examine the official records, I presume that the reason was that the respondent government servant had failed to make out any case whatever that the order was by way of punishment, and there being no doubt in the mind of the High Court on the point it was justified in declining to look into the official records. That the respondent government servant has been unable to make out any case at all that impugned order is by way of punishment is clearly evident from the material before us. No occasion arises in such a case for scrutinising the official records.

22. The appeal is allowed, the judgment and order of the High Court are set aside and the writ petition filed by the first respondent is dismissed. In view of the order already made by this Court that the respondent will be entitled to his costs from the appellant in any event, the respondent will be paid his costs accordingly.

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