(2008) 12 AHC CK 0066

Allahabad High Court

Case No: Writ - A No. 12791 of 2008

Tasneem Fatma		APPELLANT
	Vs	
State of U.P.Thru.Secy./Director Secondary Education & Ors		RESPONDENT

Date of Decision: Dec. 1, 2008

Acts Referred:

- Constitution of India, 1950 - Article 311(2)

Hon'ble Judges: Sudhir Agarwal, J

Final Decision: Allowed

Judgement

Sudhir Agarwal, J.

Heard Sri Ashok Khare, Senior Advocate, assisted by Sri H.K Asthana learned Counsel for the petitioner, learned Standing Counsel for the respondents no. 1 to 5, Sri K.A. Ansari for respondent no. 6 and Sri Pankaj Naqvi for respondent no. 9. The respondents no. 7, 8, 10 and 11 were allowed to be deleted from the array of parties vide order dated 26.8.2008 at the request of the learned counsel for the petitioner. Since all the parties are represented and pleadings are complete, as requested and agreed by the learned counsel for the parties, the writ petition was heard finally and is being decided at this stage under the Rules of the Court.

2.The petitioner is aggrieved of the order dated 12.2.2008 of Manager, Committee of Management, Hamidia Girls Inter College, Allahabad (hereinafter referred to as the "College") terminating services of the petitioner, a probationer on the ground of unsuitability and performance. The petitioner has asserted the order on the ground that the impugned order is punitive in nature based on the alleged misconduct. No enquiry has been conducted giving her an opportunity of hearing. The order is in violation of principles of natural justice. It is also argued that the respondents have passed this order maliciously and arbitrarily.

3.The respondents have controverted the submissions and contended that since her performance was not satisfactory, hence she has been terminated by a simple order of termination.

4.Before coming to the rival submissions in detail, it would be useful to have a brief factual matrix giving rise to the present dispute.

5.The facts, as set out in the writ petition, are that the College is an institution, established and maintained as a ''minority institution'' and as such is recognised under the provisions of U.P. Intermediate Education Act, 1921 (hereinafter referred to as the ''1921 Act''). It is imparting education upto intermediate classes. It is recipient of grantinaid from the State Government. For payment of salary to the staff of the College, the provisions of U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 (hereinafter referred to as ''1971 Act'') are applicable. Certain posts of Assistant Teachers in BTC Grade fell vacant in the College. An advertisement was published on 14.10.2006 advertising five posts of Assistant Teachers (BTC Grade). The petitioner applied pursuant to the said advertisement and was interviewed on 22.1.2007. Five candidates, including the petitioner, were selected and the papers sent to the District Inspector of Schools (Second), Allahabad, respondent no. 4 (hereinafter referred to as the ''DIOS'') in compliance of Regulation 17(g) on 24.1.2007. The DIOS forwarded papers of only four candidates for approval to Regional Committee. He withheld papers of one Smt. Sheeba Chauhan for the reasons not known to the petitioner. Regional Committee sent its recommendation on 5.2.2007 with respect to the aforesaid names including the petitioner and, consequently, the DIOS accorded approval vide his letter dated 8.2.2007. Smt. Rashida Khan, respondent no. 9, who was President, however, did not allow the Manager to issue appointment letter having become angry for non communication of approval of Smt. Sheeba Chauhan and said that she will not appoint anyone and blamed Principal and other classIII staff of the College including petitioner''s husband, who was also working as classIII employee in the College. On 17.2.2007, the then Manager Sri Sadiq Husain resigned under the pressure of respondent no. 9 and the respondent no. 9 was elected as Manager also for the remaining period. Under the pressure of Joint Director of Education, respondent no. 9 issued appointment letter dated 17.2.2007 to one Smt. Sangeeta, who was also selected along with the petitioner as Assistant Teacher. Thereafter, the approval for appointment of Smt. Sheeba Chauhan was also granted on 21.2.2007 whereupon the respondent no. 9 issued appointment letters on 22.2.2007 to three more candidates, namely, Smt. Sheeba Chauhan, Smt. Aisha and Smt. Zahida Hasan but withheld appointment letter of the petitioner. In the circumstances, the petitioner made representation on 17.3.2007 complaining about her non appointment, though other candidates selected with the petitioner were already appointed. The Principal of the College vide letter dated 26.3.2007 required the petitioner to appear before her along with her original certificates and testimonials. An appointment letter was issued to the petitioner on 29.3.2007 appointing her as Assistant Teacher (BTC Grade) on probation for one year pursuant whereto the petitioner immediately joined the College.

Thereafter, it is said that the respondent no. 9 continued to harass the petitioner''s husband and called his explanation on 12.5.2007 which he submitted by letter dated 14.5.2007 wherein he said that if necessary, she may enquire against false complaints made against him and the petitioner. The petitioner''s husband on 16.5.2007 received 3 notices simultaneously seeking his explanation which were also replied by him. The respondent no. 9, after some time, went to Pakistan and then resigned from the post of Manager, but continued to overshadow the functioning of the entire institution. Everybody was working under her dictates. On 14.9.2007, the respondent no. 9 sent a letter to the Principal of the College stating that a complaint was received against the petitioner''s qualification and the same is under examination. In the meantime, the petitioner has got prepared a writ petition, which though not filed but sent to respondent no. 9. The respondent no. 9 ordered that petitioner''s promotion and confirmation is stopped for all times tom come. Pursuant to the respondent no. 9''s letter, the Principal also submitted a report making her recommendation that the petitioner is not fit for confirmation. Thereafter, based on the letter dated 14.9.2007 and the Principal''s report, the impugned order of termination has been passed on 12.2.2008, which is clearly punitive since the foundation of termination of the petitioner is the alleged act of preparation of writ petition, which annoyed the respondent no. 9 and that is the only cause and foundation for terminating her services.

6.It is contended that the impugned order of termination is founded on the alleged act of misconduct on the part of the petitioner treated to be a serious misconduct by the respondents. It is also contended that the impugned order is result of mala fide on the part of respondent no. 9 and, therefore, the impugned order is liable to be set aside. Learned counsel Shri Khare further said that in any case the termination is arbitrary and malicious in law. In support of submission, he placed reliance on the Apex Court''s decisions in Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre For Basic Sciences & others 1999 (3) SCC 60, Nar Singh Pal Vs. Union of India & others AIR 2000 SC 1401, Chandra Prakash Shahi Vs. State of U.P. & others 2000 (5) SCC 152, A.P. State Federation of Cooperative Spinning Mills Ltd. & another Vs. P.V. Swaminathan 2001 (3) JT 530 and Nehru Yuva Kendra Sangathan Vs. Mehbub Alam Laskar JT 2008 (2) SC 163.

7.Counter affidavit has been filed on behalf of respondents no. 6 and 9. The allegations of mala fide are denied. It is said that the performance of the petitioner was assessed by the Principal and in her report dated 30.10.2007, she found that the petitioner''s performance is poor and she is not fit for confirmation. On account of over all assessment of the petitioner''s performance that the Management resolved to terminate her vide resolution dated 12.2.2008 and pursuant thereto, the impugned order of termination was passed. It is said that petitioner was only a probationer and, therefore, she could have been terminated by an order of termination simplicitor. It is denied that the impugned order of termination is punitive in nature or is founded on the alleged misconduct. The learned counsel for the respondents, in support of his submissions, placed reliance on Committee

of Management A.B. Vidyalay Inter College, Kanpur Vs. Raj Kumar Shukla & another 1999 (2) ACJ 1437, Yunus Ali Sha Vs. Mohamed Abdul Kalam & others 1999 (2) ESC 1572, Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences & another JT 2001 (9) SC 420, Miss Manju Shikdar Vs. General Manager (Planning & Development) State Bank of Indore & others 2008 (2) ESC 970 and Registrar, High Court of Gujrat & another Vs. C.G. Sharma 2005 (1) SCC 132.

8.I have heard learned counsels for the parties at great length and perused the record as well as various authorities cited at the bar, and on the subject.

9.The frequently raised issue coming to this Court in the matter of termination simplicitor of a temporary employee or a probationer, is, (a) when an order of termination simplicitor is punitive in nature, founded on any alleged misconduct; and (b) when it can be said to be a case of motive or foundation.

10.Again the same two issues have arisen in this writ petition also and have been argued with vehemence.

11.For the last almost 50 years, the above questions have invoked jurisdiction of this Court as well as the Apex Court very frequently. Despite of a catena of decisions, still the Courts find it, sometimes difficult to decide whether, in the facts and circumstances of a particular case, an order of termination simplicitor is founded on the alleged misconduct or it is only a case of motive. The reason behind it is well understandable. The distinction between the two is very thin and sometimes overlapping. However, this Court, in discharge of its constitutional obligation of dispensation of justice, shall endeavour to find out the distinction between two with the help of various authorities of the Apex Court and High Court on the subject.

12.In Parshotam Lal Dhingra Vs. Union of India AIR 1958 SC 36, a Constitution Bench of the Apex Court considered the question as to when an order of "reversion simplicitor" may be said to be penal attracting Article 311(2) of the Constitution of India necessitating an enquiry preceding such order. An employee working in ClassIII post was given an officiating appointment on ClassII post but on account on certain charges, he was reverted to his substantive post. He Challenged the order being punitive and violative of Article 311(2) of the Constitution. The Court held that in the absence of special contract, a substantive appointment to a permanent post gives the servant, so appointed, a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years" of service or the post is abolished or is dismissed or removed by way of punishment after holding enquiry. An appointment to a temporary post for a certain specified period also gives the servant so appointed a right to hold the post for the entire period of his tenure. His tenure cannot be put to an end during that period unless he is, by way of punishment, dismissed or removed from service. Except in these two cases, the appointment to a post, permanent or temporary, on probation or on an officiating basis or a substantive appointment to a

temporary post gives the servant so appointed, no right to the post and his service may be terminated unless his service had ripened into what is, in the service rules, called a quasipermanent service. It further held that Article 310 does not make any distinction between permanent and temporary post. Hon"ble S.R. Das, C.J., speaking for the Bench, summed up the conclusion as under :

(1)A termination of service brought about by the exercise of a contractual right is not per se dismissal or removal.

(2)The termination of service by compulsory retirement in terms of a specific rule regulating the conditions of service is not a punishment and does not attract Article 311(2).

(3)It is true that the misconduct, negligence, inefficiency or other disqualification may be the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service, the motive operating on the mind of the Government is wholly irrelevant.

(4)If the termination of service is founded on the right flowing from contract or the service rules then prima facie, termination is not a punishment and carries no evil consequences.

(5)Despite of having the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment.

(6)If the servant has got a right to continue in the post, then, unless the contract of employment or the rules provide to the contrary, his services cannot be terminated otherwise than for misconduct, negligence, inefficiency or other good and sufficient cause. Termination of service of such a servant on such grounds would be a punishment as it operates as forefeiture of his right. It is visited with evil consequences of loss of pay and allowances etc., puts an indelible stigma on the officer affecting his future career.

13. Mere form of the order using expressions "terminate", "discharge" etc. is not conclusive and despite of use of such innocuous expressions, the Court can examine the matter to find out the true nature of the order.

14.The next Constitution Bench decision, considering a similar issue is State of Bihar Vs. Gopi Kishore Prasad AIR 1960 SC 689. The incumbent Gopi Kishore Prasad was appointed as a temporary Subdeputy Collector in the year 1944. In 1947, he was appointed to a substantive post in the Bihar Subordinate Civil Service, on probation. While on probation, proceedings were initiated against him. He was called upon to show cause why his services should not be terminated forthwith. The allegations in the show

cause were that during the period of 1948 to May 1949 when he was posted at various places, his reputation continued to be bad and his judicial work after careful scrutiny led to discovery of incredibly perverse decisions given by him. Those proceedings culminated in the order of discharge dated 23.7.1953. Referring to the proceedings, complaining about the corruption and unreliability, as also doubt on his integrity etc., after noticing that the Government found ample material showing that he resorted to corrupt practices justifying his transfer and even thereafter, he was reported to have a doubtful honestly, ultimately the Government, having been satisfied that he working was unsatisfactory, decided to discharge him after consultation with Public Service Commission. The High Court allowed the writ petition holding the said order of "termination simplicitor" violative of Article 311(2) as no enquiry was conducted as per the procedure prescribed thereunder. It held that the order of termination amounts to punishment. Following Dhingra"s judgment, the Apex Court also held the aforesaid order of "termination simplicitor" founded on the alleged misconduct, based on an enquiry held behind him and, therefore, violative of Article 311 (2) of the Constitution. It would be useful to refer the following reason for holding the order of termination punitive as stated in para6 of the judgment :

"It is true that, if the Government came to the conclusion that the respondent was not a fit and proper person to hold a post in the public service of the State, it could discharge him without holding any enquiry into his alleged misconduct. If the Government proceeded against him in that direct way, without casting any aspersions on his honesty or competence, his discharge would not, in law, have the effect of a removal from service by way of punishment and he would, therefore, have no grievance to ventilate in any court. Instead of taking that easy course, the Government chose the more difficult one of starting proceedings against him and of branding him as a dishonest and an incompetent officer. He had the right, in those circumstances, to insist upon the protection of Art. 311 (2) of the Constitution."

15.Similar issue again cropped up before a Constitution Bench involving discharge of a probationer Subinspector on the ground of unsatisfactory work and conduct in State of Orissa Vs. Ram Narayan Das AIR 1961 SC 177. Sri Ram Narayan Das was appointed as Subinspector on probation in Orissa Public Service and due to certain adverse reports, he was served with a notice as to why he should not be discharged from service for "gross neglect of duties and unsatisfactory work". In the notice, specific instances of neglect of duty were mentioned which included two instances of misconduct, i.e., acceptance of illegal gratification and fabrication of official record. After considering his reply, the D.I.G. passed following order of discharge :

"Probationary S. I. Ramanarayan Das of Cuttack District is discharged from service for unsatisfactory work and conduct with effect from the date the order is served on him""

Aggrieved, Ram Narayandas filed a writ petition in the Orissa High Court which was allowed and that is how the matter came up before the Apex Court. The manner in which

the probationer has to be dealt with was provided under Regulation 668 of Police Manual of Orissa State and Rule 55B of Civil Services (Classification, Control and Appeal) Rules, 1930. The Court observed that being a probationer, he had no right to the post and was liable to be discharged at any time during the period of probation under the terms of his appointment. Meeting the argument that an enquiry preceded the order of discharge rendering it punitive as held by the Apex Court in Gopi Kishore Prasad (supra), the Court explained the test of enquiry and said that one has to look into the object or purpose of the enquiry. Rule 55B itself provided where a probationer is proposed to be terminated for any specific fault or unsuitability, he shall be appraised of such grounds and shall be given an opportunity to show cause whereafter the order of termination shall be passed. The Court held that in case, an enquiry, as contemplated in the Rules, is observed, every termination of probationer shall become punitive, which could not have been the intention of the Court in Gopi Kishore Prasad (supra). It was, thus, held that it is the nature of the enquiry, the proceedings taken therein, and the substance of the final order passed on such enquiry, which would show whether the order is punitive or not. If the enquiry is to find out whether the incumbent is fit to be confirmed or retain in service, or to continue, then such an enquiry would not render the termination, punitive, since this kind of enquiry can not be equated with an enquiry held to find out the correctness of the charges of misconduct, negligence or other disqualification.

16.In Madan Gopal Vs. State of Punjab AIR 1963 SC 531, the Constitution Bench had occasion to consider the same question but in the context of termination of a temporary employee. The order of termination was simplicitor but preceded by a report of the Settlement Officer about the misconduct of the employee and the termination based on the said report. The Court held order to be punitive emphasizing again on the purpose of enquiry. The distinction of the enquiry held in Ram Narayan Das (supra) was highlighted by pointing out that there the enquiry was with a purpose to find out whether the petitioner could be continued or confirmed or not while in Madan Gopal (supra), the enquiry held by the Settlement Officer was to find out whether the employee was guilty of misconduct or not. The Court held that mere form of the order would not be conclusive and the Court can go behind the order looking to the event or the proceedings held in close proximity.

17.In Ranendra Chandra Banerjee Vs. Union of India AIR 1963 SC 1552, which was a case of probationer and an order was passed under Rule 55B of Civil Services (Classification, Control and Appeal) Rules, 1930, the Constitution Bench of the Apex Court held that the order was not punitive since the limited purpose of enquiry was to find out whether the employee should be retained or not following its decision in Gopi Kishore Prasad (supra).

18.The principle of "object or purpose of enquiry" was again emphasized by the Constitution Bench in Jagdish Mitter Vs. Union of India AIR 1964 SC 449. It was a case of a temporary employee, who was discharged from service by an order simplicitor. The termination was challenged by Sri Jagdish Mitter in a suit on the ground that Posts and Telegraphs General Regulations had been contravened and no enquiry was held against

him. The defence on behalf of the Government was that he was a temporary servant and had not become quasi permanent, hence, can be terminated on a month''s notice in terms of his appointment and, therefore, no enquiry is required. The Court held that it is true that a temporary public servant or a probationer is of a precarious character, and can be terminated by a month''s notice, without assigning any reason either in terms of his contract or under the relevant statutes. If any enquiry is conducted before such simple discharge about the suitability of the servant for continuing in service, the incident of such an enquiry would not make the simple order of discharge punitive. There is no element of punitive proceedings in such an enquiry. The idea in holding such an enquiry is not to punish the temporary servant but just to decide whether he deserves to be continued in service or not. However, if the employer decides to hold a formal enquiry to record a finding as to the alleged misconduct of the servant, such an order would amount to dismissal of the temporary servant and in such a case, an enquiry giving an opportunity to the delinquent employee to defend himself is necessary. If some formal departmental enquiry commenced but not pursued to the end and instead a simple order of termination is passed the motive operating in the mind of the authority would be immaterial and such an order would not be punitive. In order to find out whether it is a case of motive or foundation, the form of the order would not be decisive and it is the substance of the matter which would determine the character. The real character of the termination of the services must be determined by reference to the material facts that existed prior to the order. It was also observed where a temporary servant attacks his discharge on the ground of mala fide, while defending the plea of mala fide, if the authorities refer to certain facts justifying the order of discharge relating to the misconduct, negligence or inefficiency of the said servant, that would not make the order founded on any misconduct. The Court held that whenever an enquiry is conducted to find out the suitability of a temporary servant or probationer, it would not make the order punitive. The Court in holding the order of termination to be punitive referred to the order of discharge, which mentioned the words "undesirable to be retained in government service" and held that it expressly casts a stigma on the appellant and in that sense that order must be an order of dismissal and not simple discharge. The Court held the word "undesirable" as casting stigma and differentiated it from the words "it is unnecessary to continue him". The reason for holding the order punitive, evident from the judgment, is :

"As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it would be idle to suggest that the order is a simple order of discharge."

19.Then came the case of Champaklal Chimanlal Shah Vs. Union of India AIR 1964 SC 1854 wherein after holding a preliminary enquiry, the employee was discharged. It was argued that since a fact finding enquiry was conducted with an intention to hold a departmental enquiry if a prima facie case is find out, and, therefore, the termination order passed after completion of preliminary enquiry, would render it punitive. Rejecting this contention, the Court held that once a preliminary enquiry is over, it is open to the employer not to proceed with the regular enquiry to prove guilt of the employee and

instead to pass a simplicitor order of termination. The employer can stop at any stage. The preliminary enquiry, therefore, at the best can be a motive but not a foundation so as to render the order punitive.

20.In A.G. Benjamin Vs. Union of India 1967 (1) LLJ 718 (SC), the charge sheet was issued, explanation was received and enquiry officer was appointed but before completion of enquiry, the proceedings were dropped and the incumbent was terminated. The Court held that the order is not punitive.

21.In State of Punjab Vs. Sukh Raj Bahadur AIR 1968 SC 1089, a three Judge Bench of the Apex Court decided the question, a simple order of reversion, whether punitive or not. The servant was officiating in Punjab Civil Service, Executive Branch. A charge sheet was issued to which he submitted reply. The disciplinary enquiry, thereafter, did not proceed and the Government passed an order of reversion after dropping further proceedings. The Court held that the order does not amount to punishment. After referring various earlier authorities from Dhingra (supra) and onwards the Court culled out the following propositions :

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

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

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

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

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

22.These principles were followed by the Apex Court in subsequent decisions in Union of India Vs. R.S. Dhaba 1969 (3) SCC 603, State of Bihar Vs. Shiva Bhikshuk Mishra 1970 (2) SCC 871, R. S. Sial Vs. State of U.P. AIR 1974 SC 1317 and State of U.P. Vs. Sughar Singh AIR 1974 SC 423.

23.Thereafter, the issue again drew attention of the Apex Court in Shamsher Singh Vs. State of Punjab 1974 (2) SCC 831. The matter was considered by a Larger Bench of

seven Judges of the Apex Court. Hon''ble A.N. Ray, C.J. in his majority judgment, which he delivered for himself and five other Hon''ble Judges, held that 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 enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provisions of Article 311. In such a case, the simplicity of the form of the order will not give any sanctity. The theory of motive and foundation was reiterated.

24.In The State of Punjab Vs. P. S. Cheema AIR 1975 SC 1096, the employee was a temporary Tax Subinspector in Excise and Taxation Department. The Vigilence Department framed the charge against him of dereliction of duty and gross negligence. Charge sheet was served upon him. He submitted his reply to the charge sheet and, thereafter, he was terminated by giving a month''s notice. The employee made a representation to the Chief Minister of the State of Punjab, who called for a report and directed that in the meantime, the employee should continue in service. On 16.6.1964, the Chief Minister passed an order that considering good record, the employee did not deserve "punishment of termination of service only on account of a few bad reports" and that he should continue in service and his case should be reviewed after he has earned another report from the present Excise and Taxation Commissioner for the year 196465. Thereafter, on 27.10.1964, the Excise and Taxation Commissioner without waiting for further report, as directed above, terminated the employee stating that in terms of conditions of his service, he is given a month''s notice, whereafter he shall stand terminated. In the suit filed by the him, the Court held that the order of termination is bad being punitive. That judgment was confirmed in first appeal as well as in second appeal. Following Shamsher Singh (supra), the Apex Court held that in view of the concurrent findings, the appeal filed by the State deserves to be dismissed.

25.In State of U.P. Vs. Ram Chandra Trivedi 1976 (4) SCC 52, these question came to be considered before a threeJudge Bench of the Apex Court. Sri Trivedi was appointed as temporary Clerk in Canal Division. He was required to appear in a departmental examination. It is alleged that one Gopal Deo Santiya detected to have personated and appeared for the respondent in the said test. The Executive Engineer called explanation of both the Clerks and reported the matter to the Superintending Engineer. The Superintending Engineer brought the matter to the notice of Chief Engineer who passed an order directing Superintending Engineer to award suitable punishment to both the Clerks. The Superintending Engineer terminated both the Clerks by a simple order of termination. It was held by the Court, after reviewing the earlier case law including Shamsher Singh (supra) that consistent law is that the motive in passing an order of termination or reversion operating in the mind of the Government is not a relevant factor for determining whether the order was passed by way of punishment or not, The Court did not find the order of termination punitive and in the absence of any pleading with respect to background facts, held that the order was not punitive and declined to call for

the record.

26.In R. S. Sial (supra) and Regional Manager Vs. Pawan Kumar Dubey 1976 (3) SCC 334 also same view was taken.

27.In Gujrat Steel Tubes Ltd. Vs. Gujarat Steel Tubes Mazdoor Sabha 1980 (2) SCC 593 the Supreme Court considered the distinction in "foundation" and "motive". Though it was a labour matter, but the question of "motive" and "foundation" was common to labour cases as well as the cases involving a Government servant and Public Sectors. In para 53 and 54 of the judgment, the Hon"ble Court sought to clarify the aforesaid distinction as under :

"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 coverups 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 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 noninjurious 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 cutback 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."

28.In Nepal Singh Vs. State of U.P. 1980 (3) SCC 288, the employee was temporarily appointed and in a drive launched by the Inspector General of Police for weeding out unsuitable and unfit police officers, he was terminated by a simple order of termination. The Court held that mere fact that the drive was launched by DIG would not make the order punitive.

29.In Oil & Natural Gas Commission Vs. Dr. Md. S. Iskander Ali 1980 (3) SCC 428, a threeJudge Bench of the Apex Court considered the validity of termination of a probationer. Dr. Ali was appointed purely on temporary basis as Medical Officer and under the terms of his appointment, he was to remain on probation for a period of one year extendable at the discretion of the appointing authority. It also provided that his appointment may be terminated any any time without assigning any reason. On the basis of certain reports, it appears that some departmental enquiry was initiated but could not proceed further. After completion of one year''s probation, the same was extended for another six months and, thereafter, he was terminated by simple order of termination. The High Court allowed the writ petition and in appeal, the Apex Court reversing the judgment and upholding the order of termination held that prima facie the order is simple termination without involving any stigma. It does not involve any evil consequences and the respondent employee has no right to service. It also recorded a finding that the employee could not make out a strong case necessitating to delve into the documents and material in order to determine a case of victimisation or punishment.

30.In State of Maharashtra Vs. Veerappa R. Saboji AIR1980 SC42, the Court held that ordinarily and generally the rule laid down in most of the cases by the Apex is that one has to look into the order on the face of it to find out whether it casts any stigma on the employee. There is no presumption that the order is arbitrary or mala fide unless a very strong case is made out and proved by the Government servant who challenges such an order.

31.Then came Anoop Jaiswal Vs. Government of India 1984 (2) SCC 369, where a probationer was terminated by innocuous order. Considering the fact finding enquiry and the various instances in close proximity when the order was passed, the Court held that the termination simplicitor was a camouflage though founded on the alleged misconduct. It was held that the Court can go behind the order to find out the real nature of the order and if some report or recommendation is the foundation or the basis of the order, the same has to be read along with the order for the purpose of determining the true character of the innocuous order of termination.

32.In Shesh Narain Awasthy Vs. State of U.P. 1988 (2) LLJ 99 (SC), a temporary constable was terminated by innocuous order. However, on scrutiny, it was found that he was terminated on account of his alleged participation in activities of an unrecognised Police Karamchari Parishad. The order of termination was held punitive.

33.In Ravindra Kumar Misra Vs. U.P. State Handloom Corporatin Ltd. AIR 1987 SC 2408, the employee was working in a public sector undertaking on temporary basis. Though while continued to be temporary, he was given two promotions. On 22.11.1982, he was placed under suspension on the allegation of misconduct, dereliction of duty, mismanagement and showing fictitious production of terrycot cloth based on a preliminary enquiry made against him. The order of suspension was revoked shortly and he was terminated. He challenged the order alleging it to be punitive but failed in the High Court.

The Apex Court held that being an employee of public sector corporation, a temporary employee can be terminated by a simple order of termination and Article 311 has no application in such a case. The Court also found that the service rules authorizes the employee to terminate temporary employee by simple order of termination. In the circumstances, the Apex Court held that the employee being a temporary servant has no right to post and under the contract of service and also the service rules governing him, the employer has right to terminate him by giving one month''s notice. The order of termination is innocuous and does not cast stigma nor visit evil consequence, hence, it cannot be said to be founded on misconduct and, accordingly, upheld the order of termination.

34.In State of U.P. Vs. Kaushal Kishore Shukla 1991 (1) SCC 691, Triveni Shanker Saxena Vs. State of U.P. 1992 Supp. (1) SCC 524 and State of U.P. Vs. Prem Lata Misra 1994 (4) SCC 189, the order of termination simplicitor was passed in respect to temporary employees in exercise of statutory powers under U.P. Temporary Government Servants (Termination of service) Rules, 1975 after being satisfied that the work and conduct of the temporary employee was not satisfactory. The Court emphasized that the termination is in accordance with the terms and conditions of service regulated by relevant service rules. Further in Kaushal Kishore Shukla (supra), the Court held that the decision in Nepal Singh AIR 1985 SC 84 was rendered per incuriam having not considered Champaklal (supra).

35.In Commissioner of Food and Civil Supplies Vs. P. C. Saxena 1994 (5) SCC 177, the departmental proceedings were started and dropped. The Court held that the order is not punitive.

36.In Radhey Shyam Gupta Vs. State Agro Industries Corporation Ltd. another 1992 (2) SCC 21, a Division Bench of the Apex Court had an occasion to have a retrospect of the earlier law on the subject of "termination simplicitor" when punitive. The employee was working as Senior Accountant in a public sector corporation of State of U.P. He was served with a letter by the Managing Director alleging that one person has complained that the employee had fraudulently taken Rs. 2,00/ and was required to submit his explanation. The employee denied the allegation. No enquiry was conducted thereafter, but it appears that the report was submitted by the General Manager, Fertilizer. Thereafter, a simple order of termination was passed referring to condition no. 3 of the appointment order enabling the employer to terminate temporary employee by giving one month''s notice or pay in lieu thereof. It was contended that the order, though innocuous but is punitive since it is based on the ex parte report of enquiry and the allegation of bribe. It is not mere motive but the very foundation of the termination. The Tribunal accepted the contention and set aside the order of termination whereagaisnt the writ petition was allowed by the High Court. The High Court, in reversing the order of Tribunal, held that the enquiry was in the nature of a preliminary enquiry and, there was enough material to indicate that the work and conduct of the employee was unsatisfactory. The Apex Court formulated the following questions :

(1)Whether the report was a preliminary report?

(2)Whether it was the motive or the foundation for the termination order?

(3)Whether it was permissible to go behind the order?

37.After referring the entire earlier case law, the Court held that there is no conflict in the opinion that in the matter of termination simplicitor, the theory of motive and foundation has to be applied to find out whether the order is punitive or not. The matter has to be tested on the facts of each case considering relevant facts in the light of the surrounding circumstances. In the matter of Government servant, Article 311''s protection is available not only to temporary servants but also to a probationer. Going through the report, the Court held that enquiry officer examined witnesses, recorded their statements and gave a clear finding of acceptance of bribe by the employee concerned and recommended his termination. The entire enquiry was ex parte. The termination order was passed on the very next date. Therefore, in the facts of this case, the report cannot be said to be a preliminary enquiry report. Its findings are definite and not a preliminary report where some facts are gathered and a recommendation is made for a regular departmental enquiry. The termination, therefore, was held to be punitive.

38.Validity of termination of a probationer by a simplicitor order, again raised before the Apex Court in Dipti Prakash Banerjee (supra). Considering earlier judgments, the Apex Court held :

(1)If findings were arrived at in an enquiry as to misconduct behind the back of the officer or without a regular departmental enquiry, the simple order of termination has to be treated as founded on the allegations and will be bad, but if the enquiry was not held, no finding was arrived at and employer was not inclined to conduct an enquiry, but at the same time, if he did not intended to continue the employee against whom there were allegations, it will only be a case of motive and the order will not be bad.

(2)If the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence, in such case also the allegations would be a motive and not the foundation and the order of termination simplicitor would be valid. The mere fact that the order mentions certain words like "unsuitable", "unsatisfactory work and conduct", "not dependable", "lack of potential" etc. by itself may not amount to a stigma but whether from the language or the words implied in the order of termination it cast a stigma or not will depend upon the facts and circumstances of each case.

(3)If the order of termination does not contain any word amount to stigma, but refer to some other document, which contains the words amounting to stigma, that would vitiate the order of termination simplicitor.

39.The distinction between "foundation" and "motive" was explained in para 21 of the judgement as under :

"If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid. From a long line of decisions it appears to us that whether an order of termination is simplicitor or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simplicitor or on motive on the ground of unsuitability to continue in service."(para 9)

(emphasis added)

40.In Nar Singh Pal (supra), the employee, who was working as a casual labour in the Government department for more than ten years, was terminated after a preliminary enquiry of an incident of assault by the employee upon some other worker. After having the record of the preliminary enquiry, the Court found that the evidence was recorded proving quilt of the employee concerned and, therefore, was a case where he was terminated on the alleged misconduct without holding any regular enquiry. The order of termination, therefore, was set aside.

41.In Chandra Prakash Shahi (supra), which was a case of termination simplicitor of a probationer, the employee was a constable on probation in Provincial Armed Constabulary and was terminated by a simple order of termination in exercise of power under U.P. Temporary Government Servants (Termination of service) Rules, 1975. A preliminary enquiry was held against Chandra Prakash Shahi and it was observed therein that he had indulged in a misconduct of hurling blows and using filthy language to the superior officers of the department, whereafter the order of termination was passed. The Court held that in such matter of termination simplicitor, the concept of "motive" and "foundation" has always been considered. "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. However, when a motive would become a foundation is an issue which has to be decided by the Court with reference to the facts of the given case. Motive and foundation are certainly two points of one line ordinarily apart but when they they come together, motive get transformed and merged into foundation. With

reference to a probationer, the Court held that a probationer has no right to hold the post and can be terminated at any time during the period of probation on account of general unsuitability to the post in question. If for determination of suitability of probationer for the post in question or for his further retention in service or for confirmation, an enquiry is held and based thereon a decision is taken to terminate his service, the order will not be punitive as the enquiry and finding therein would only be a motive. But if there are allegations of misconduct and an enquiry is held to find out the truth of that misconduct and an order of termination is passed based on such enquiry, it would be punitive in nature as the enquiry was held not for assessing the general suitability of the employee for the post in question but to find out the truth of allegations of misconduct against that employee. In that case, the order would be founded on misconduct. It will not be a case of mere motive.

42.In A.P. State Federation of Cooperative Spinning Mills Ltd. (supra), the employee was appointed as General Manager (Finance) for a period of three years but he was terminated before expiry of the said period. It was contended that though the order is innocuous, but the attending circumstances show that it is penal. The Court held that in a case of termination simplicitor, the Court is not debarred from looking into attending circumstances to find out whether the termination is the result of a motive or foundation. Having gone through the attending circumstances, the Court upheld the judgment of the High Court holding that the termination was founded on alleged misconduct and was penal in nature.

43.In Mathew P. Thomas Vs. Kerala State Civil Supply Corporation Ltd. and others, (2003) 3 SCC 263 after following Dipti Prakash Banerjee (Supra) and Pavanendra Narayan Verma (Supra), the Hon''ble Apex Court has observed as under:

"From a long line of decisions it appears to us that whether on order of termination is simplicitor or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simplicitor falling in one or the other category, based on misconduct as foundation for passing the order of termination simplicitor or on motive on the ground of unsuitability to continue in service. If the form and language of the so called order of termination simplicitor of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simplicitor or punitive. In cases where the services of a probationer are terminated by an order of termination simplicitor and the language and form of it do not show that either it is punitive or stigmatic on the face of it but in some cases there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other words, the faï¿½ade of the termination order may be simplicitor, but the real face behind it is to get rid of the services of a probationer on the basis of misconduct. In such cases it becomes necessary

to travel beyond the order of termination simplicitor to find out what in reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service as he is in reality removed from service on the foundation of his misconduct."(Para 11)

44.In Abhijit Gupta Vs. S.N.B. National Centre, Basic Sciences & others 2006 (4) SCC 469, the employee was a probationer. On 20.11.1995, he received a letter wherein it was said that his performance during probation was far from satisfactory, he lack drive, imagination and initiative in performance of his duties and despite of frequent advices has failed to improve his performance. He was, then advised to improve so as to enable the authorities to consider him for confirmation. The probation was extended from time to time. Thereafter, he was discontinued by observing that his performance, ability and capability was examined and found unsatisfactory, hence, his is considered unsuitable for the post and not suitable for confirmation. The order was assailed being punitive in nature. The writ petition was allowed by the Hon''ble Single Judge of the High Court but judgment was reversed in appeal. The Apex Court referring to Dipti Prakash Banerjee (supra) noticed that the Courts continue to struggle with semantically indistinguishable concepts like "motive" and "foundation". Terminations founded on misconduct are illegal while terminations motivated by misconduct are not bad. The decision are legion and it is impossible task to find a clear path through the jungle of the precedents. After considering certain tests formulated by the Apex Court in para 21 of the judgment in Dipti Prakash Banerjee (supra), the Court noticed that one of the judicial test to determine whether order of termination is punitive or not would be (a) a fullscale formal enquiry; (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present, the order of termination would be punitive irrespective of the form and if any one of three factors is missing, the termination would be unassailable. The Apex Court observed that generally speaking when a probationer''s appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or inaptitude, whatever the language used in the termination order may be. It also said that although strictly speaking the stigma is 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. In order to constitute stigma, the order must be in a language which imputes something over and above mere unsuitability for the job. The Apex Court, therefore, held that the order in that case was not punitive.

45.In Jai Singh Vs. Union of India & others 2006 (9) SCC 717, the employee was engaged as daily wage constable in auxiliary battalion and was terminated on the ground of disbandment of battalion and also indicating his conduct to be unsatisfactory. The Court did not find the order of termination to be punitive since neither it was founded on any misconduct or otherwise was stigmatic.

46.This has been reiterated in State of Punjab & others Vs. Sukhwinder Singh JT 2005 (6) SC 170, Kendriya Vidyalaya Sangathan Vs. Arunkumar Madhavrao Sinddhaya & another JT 2006 (9) SC 549, Jaswantsingh Pratapsingh Jadeja Vs. Rajkot Municipal Corporation & another JT 2007 (12) SC 240 and Nehru Yuva Kendra Sangathan (supra).

47.This is another but important aspect of this matter. When the form of the order would determine whether it casts stigma or not by using certain words reflecting upon assessment of work and conduct of the employee concerned has also been subject matter of consideration. Some of such cases we have already dealt with and some we propose to refer as under.

48.In Allahabad Bank Officers Association and another Vs. Allahabad Bank and others AIR 1996 SC 2030 the Apex Court while considering as to whether an order of compulsory retirement can be treated to be stigmatic and in what circumstances, held that if it contains a statement casting aspersion on the conduct of the employee, it would be stigmatic but if it merely highlights the unsuitability of the employee, it is an order simplicitor. The Court held that expression like "want of application", "lack of potential" and "found not dependable" when made in relation to the work of the employee would not be sufficient to attract the charge that they are stigmatic.

49.In Dhananjay Vs. Chief Executive Officer, Zila Parishad, Jaina, 2003 (96) FLR 1002 (S.C.) mention of the word "suspension" in the order of termination was not held to be stigmatic or punitive.

50.In State of U.P. and others Vs. Ram Bachan Tripathi, 2005 (106) FLR 1214 the Hon"ble Apex Court considering as to when an order of termination simplicitor can be said to be stigmatic held as under:

"We shall first examine the plea relating to the stigma. Usually a stigma is understood to be something that is detraction from the character or reputation of a person. It is blemish, imputation, a mark or label indicating a deviation from a norm."(Para 6)

"Mere description of a background fact cannot be called as stigma. In the termination order it was merely stated that the show cause notices were issued and there was no response. This can by no stretch of imagination be treated as a stigma as observed by the Tribunal and the High Court."(Para 7)

51.In Rajasthan State Road Transport Corporation & others Vs. Zakir Hussain JT 2005 (7) SC 512 the Hon"ble Apex Court following its earlier judgment in the case of Kaushal Kishore Shukla (supra) held:

"In State of Uttar Pradesh & another vs. Kaushal Kishroe Shukla this Court has observed in Para 6 as under:

"The High Court held that the termination of respondent"s services on the basis of adverse entry in the character roll was not in good faith and the punishment imposed on him was disproportionate. It is unfortunate that the High Court has not recorded any reasons for this conclusion. The respondent had earned an adverse entry and complaints were made against him with regard to the unauthorized audit of the boys fund in an educational institution, in respect of which a preliminary inquiry was held and thereupon, the competent authority was satisfied that the respondent was not suitable for the service. The adverse entry as well as the preliminary inquiry report with regard to the complaint of unauthorized audit constituted adequate material to enable the competent authority to form the requisite opinion regarding the respondent"s suitability for service. Under the service jurisprudence a temporary employee has no right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service. If on the perusal of the character roll entries or on the basis of preliminary inquiry on the allegations made against on employee, the competent authority is satisfied that the employee is not suitable for the whereupon the services of the temporary employee are terminated, no exception can be taken to such an order of termination." (Para 20)

(emphasis added)

52.Similar situation arises in the case of State of Punjab Vs. Balbir Singh 2002(1) SCC 743. The order of discharge mention the words "unlikely to prove an efficient police officer." Further before passing the aforesaid order of discharge it appears that Shri Balbir Singh, who was found to have consumed liquor and misbehaved with a lady constable was medically examined and thereafter discharge order was passed. The appeal, which was filed before the Deputy Inspector General of Police, was rejected and while rejecting the appeal, he referred to the aforesaid facts and stated that the discharge order was correct. Shri Balbir Singh challenged the order of discharge on the basis of the averments contained therein as well as in the order of the Deputy Inspector General of Police. The Hon"ble Apex Court upholding the aforesaid order of discharge held as under;

"In the present case, order of termination cannot be held to be punitive in nature. The misconduct on behalf of the respondent was not the inducing factor for the termination of the respondent. The preliminary enquiry was not done with the object of finding out any misconduct on the part of the respondent, it was done only with a view to determine the suitability of the respondent within the meaning of Punjab Police Rule 12.21. The termination was not founded on the misconduct but the misbehaviour with a lady constable and consumption of liquor in office were considered to determine the suitability of the respondent for the job, in the loight of the standards of discipline expected from police personnel."(para 17)

53.In Registrar, High Court of Gujarat and another Vs. C.G. Sharma (supra), the Hon"ble Apex Court has held as under:

"We are also satisfied, after perusing the Confidential Reports and other relevant vigilance filed etc. that the respondent is not entitled to continue as a judicial Officer. The order of termination is termination simplicitor and not punitive in nature and, therefore, no opportunity needs to be given to the respondent herein. Since the overall performance of there was found to be unsatisfactory by the High Court during the period of probation. It was decided by the High Court that the services of the respondent during the period of probation of the respondent be terminated because of his unsuitability for the post. In this view of the matter, order of termination simplicitor cannot be said to be violative of Articles 14, 16 and 311 of the Constitution of India. The law on the point is crystallized that the petitioner remains probationer unless he has been confirmed on the basis of the work evaluation. Under the relevant Rules under which the respondent was appointed as a Civil Judge, there is no provision for automatic or deemed confirmation and/or deemed appointment on the regular establishment or post, and in that view of the matter, the contentions of the respondent that the respondent services were deemed to have been continued on the expiry of the probation period, are misconceived."

54.Thus mere description of background fact cannot be treated to constitute stigma. The term ''stigma'' has to be understood in its plain meaning as something that is detraction from the character or reputation of a person. It is blemish, imputation, a mark or label indicating a deviation from a norm The assessment of work and performance and recording of satisfaction of the authority concerned that he is not satisfied with the work and performance regarding fitness of the employee concerned would not make the order stigmatic since it is not a blemish on the character and reputation of the person concerned but it reflects on the capacity and efficiency of the incumbent with respect to the work for which he/she was employed.

55.The aforesaid observation has been referred to and relied upon recently in Abhijit Gupta Vs. S. N. B. National Centre, Basic Sciences and others AIR 2006 SC 3471 observing:

"The real test to be applied in a situation where an employee is removed by an innocuous order of termination is: Is he discharged as unsuitable or is he punished for his misconduct ?....." (para14)

56.Another argument was raised in Abhijit Gupta (Supra) that when the words referring to unsuitability etc. are mentioned in the order, if they are read by the future employer it may prejudice the future employment of the employee and in that view of the matter it should be treated to be stigmatic. However, the Apex Court rejected the above contention by relying on its earlier decision in Ravindra Kumar Misra (supra) and in paras 12 and 13 held :

"12. It referred to Dipti Prakash Banerjee (supra) and pointed out that in Dipti Prakash Banerjee (supra) the termination letter expressly made reference to an earlier letter which had explicitly referred to all the misconducts of the employee and a report of an inquiry

committee which had found that the employee was guilty of misconduct and so the termination was held to be stigmatic and set aside. Finally, this Court said that whenever a probationer challenges his termination the court''s first task will be to apply the test of stigma or the ''form'' test. If the order survives this examination the ''substance'' of the termination will have to be found out. What this Court further observed in para 29 is crucial and of great relevance :

''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 speaking when a probationer''s appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or inaptitude, whatever the language used in the termination order may be. Although strictly speaking the stigma is 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 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 meter unsuitability for the job.''

13. In the case of the appellant before us, the record in uncertain terms makes it clear that every time the appellants attention was drawn to his deficiencies and he was repeatedly advised to improve his behaviour, conduct and discharge of work. True, that in some of the letters there was intemperate language used (the appellant was also equally guilty of doing that). Notwithstanding the intemperate language, we are unable to accept the contention of the appellant''s counsel that the letter dated 741998 indicates that the appellant was being charged with the misconduct and, therefore, being removed from service. Read as a whole, the letter gives the impression that the removal of the appellant from service was only because the respondents, after giving a long rope to the appellant, had come to the conclusion that the appellant''s service was unsatisfactory and there was no hope of his improvement.''

57.From the above discussions, the principles discernible to find out whether a simple order of termination/discharge of a temporary employee or probationer is punitive or not, broadly, may be stated as under :

(a)The termination of services of a temporary servant or probationer under the rules of his employment or in exercise of contractual right is neither per se dismissal nor removal and does not attract the provisions of Article 311 of the Constitution.

(b)An order of termination simplicitor prima facie is not a punishment and carries no evil consequences.

(c)Where termination simplicitor is challenged on the ground of casting stigma or penal in nature, the Court initially would glance the order itself to find out whether it cast any

stigma and can be said to be penal or not. If it does not, no further enquiry shall be held unless there is some material to show certain circumstances, preceding or attending, shadowing the simplicitorness of the said order.

(d)The Court is not precluded from going beyond the order to find out as to whether circumstances, preceding or attending, makes it punitive or not. If the circumstances, preceding or attending, show only the motive of the employer to terminate, it being immaterial would not vitiate the order unless it is found that order is founded on such act or omission constituting misconduct.

(e)If the order visits the public servant with evil consequences or casts aspersions against his character or integrity, it would be an order by way of punishment irrespective of whether the employee was a mere probationer or temporary.

(f)"Motive" and "foundation" are distinct, though the distinction is either very thin or overlapping. "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. "Foundation", however, is the basis, i.e., the conduct of the employee, When his acts and omissions treated to be misconduct, proved or founded, it becomes a case of foundation.

(g)If an order has a punitive flavour in cause or consequence, it is dismissal, but if it falls short of it, it would not.

(h)Where the employer is satisfied of the misconduct and the consequent desirability of termination, it is dismissal even though the order is worded innocuously. However, where there is mere suspicion of misconduct and the employer does not wish to bother about it, and, instead of going into the correctness of guilt, feel like not to keep the employee and thus terminate him, it is simpliciter termination and not punitive.

(i)Where the termination simplicitor is preceded by an enquiry, preliminary or regular, the Court would see the purpose, object of such enquiry as also the stage at which, the order of termination has been passed.

(j)Every enquiry preceding the order of termination/discharge, would not make it punitive. Where an enquiry contemplated in the rules before terminating an probationer or temporary employee is held, it would not make the order punitive.

(k)If the enquiry is to find out whether the employee is fit to be confirmed or retained in service or to continue, such an enquiry would not render termination punitive.

(l)Where the employer hold a formal enquiry to find out the correctness of the alleged misconduct of the employee and proceed on the finding thereof, such an order would be punitive, and, cannot be passed without giving an opportunity to the concerned employee.

(m)If some formal departmental enquiry commenced but not pursued to the end. Instead a simple order of termination is passed, the motive operating in the mind of the authority would be immaterial and such an order would be non punitive

(n)When an order of termination is assailed on the ground of mala fide or arbitrariness, while defending the plea of mala fide, if the authority has referred certain facts justifying the order of discharge relating to misconduct, negligence or inefficiency of the employee in the appeal or in the affidavit filed before the Court, that would not make the order founded on any misconduct.

(o)Sometimes when some reason is mentioned in the order, that by itself would not make the order punitive or stigmatic. The following words mentioned in the order have not been held to be punitive.

i."want of application",

ii."lack of potential",

iii."found not dependable",

iv."under suspension",

v."work is unsatisfactory",

vi."unlikely to prove an efficient officer".

(p)Description of background facts also have not been held to be stigmatic.

(q)However, the words "undesirable to be retained in Government service", have been held stigmatic.

(r)If there is (i) a full scale formal enquiry, (ii) in the allegations involving moral turpitude or misconduct, (iii) which culminated in a finding of guilt; where all these three factors are present, the order of termination would be punitive irrespective of the form. However, if any one of three factors is missing, then it would not be punitive.

58.The aforesaid are not exhaustive, but lay down some of the principles to find out whether termination of an employee is simplicitor or punitive. Each and every case has to be considered in the light of the facts and circumstances of the case, but broadly the aforesaid are the factors to find out whether termination of an employee is punitive or not.

59.Considering the present case in the light of the aforesaid legal principles, this Court find that the respondent no. 9 treated the attempt of the petitioner of preparation of a writ petition to be filed in this Court, such a serious action that it could not restrain itself from writing a letter dated 14.9.2007 informing the Principal of the College that promotion and confirmation of the petitioner is to be stopped for all times. It would be useful to quote the

language of the said letter in its entirety to find out the intent of respondent no. 9 for acting against the petitioner and its extent, which reads as under :

"Hamidia Girls Intermediate College

A L L A H A B A D 211003

No. : Dated : 14.9.2007

Principal

Hamidia Girls Inter College

Allahabad

.....

Mrs. Tasneem Fatma was elected as a teacher on 22nd January, 2007. A complaint was received against her qualification. The same was examined and finally a letter of appointment was issued to her.

In the mean time she got prepared a writ petition which was though not filed but has been sent to us with an ulterior motive. Promotion and confirmation is to be stopped for all time.

Please call her explanation.

Sd/

(Mrs. Rashida Khan)

Manager"

60.The aforesaid letter appears to be received by the Principal on 30.10.2007. A copy of the aforesaid letter is on record as Annexure3 to the writ petition and it shows that on 30.10.2007, the following endorsement was made on the aforesaid letter :

"This should be fixed."

61.Though the petitioner was appointed on 29.3.2007 and was on probation for a period of one year, there appears to be no reason as to why her character roll ought to have been assessed almost after six months only, i.e., on 30.10.2007 itself, when the Principal submitted following report on the work and conduct of the petitioner :

"Mrs. Tasneem Fatma B.A. B.Ed. joined the staff of Hamidia Girls Inter College Alld as an assistant teacher (BTC) on 24.03.2007. She is an average teacher and knows her subject. She seems weak to control her classes. Discipline in the classes is poor. She was found to be irregular in checking the written work. Under the above circumstances

not fit for confirmation."

62. Manager also countersigned the aforesaid remarks of the Principal on 30.10.2007 itself.

63.It is not in dispute that after 30.10.2007, the petitioner continued to work and discharge her duties as Assistant Teacher in the College, but no subsequent assessment of her performance was made by any authority. On the basis of the assessment made by the Principal, which was countersigned by the Manager on 30.10.2007, the management observed that the work and conduct of the petitioner was not satisfactory and on that basis itself, the impugned order of termination dated 12.2.2008 was passed. It is not the case of the respondents that the work and conduct of the petitioner for one year itself was assessed. On the contrary, for the purpose of assessment of her work and performance, the only material placed on record is the aforesaid assessment report countersigned by the Manager on 30.10.2007 preceded by the then Manager"s letter dated 14.9.2007 wherein she clearly said that the petitioner is not to be confirmed for all times as she has got a writ petition prepared with an ulterior motive and for that purpose explanation be called from her. In the circumstances and in the absence of any material on record justifying that the employer, in this case, assessed the work and performance of the petitioner and did not act upon the alleged act of misconduct, i.e., preparation of a writ petition, this Court is of the opinion that the order impugned though is worded innocuously, but is founded on the alleged act treated to be a misconduct. This Court, therefore, has no hesitation in holding the same to be illegal since no enquiry was conducted against the petitioner neither any opportunity was given and she has visited penal consequences for such punitive termination.

64.In view of the discussion made hereinabove, I am of the view that the order impugned in this writ petition is not sustainable. The petitioner is entitled for reinstatement with all consequential benefits for the reason that she has been made to suffer on account of wholly illegal act of the respondents. Here is not a case where the petitioner should be denied benefit of back wages. The circumstances which would justify denial of back wages and where the employee must be allowed full back wages or partly, are discussed in detail by this Court in Brijendra Prakash Kulshrestha Vs. Director of Education, U.P. and others 2007(3) ADJ 1, where it was held that in the kind of a case as in hand, where the termination of the employee was wholly attributable to the arbitrary and illegal case of the employer, the employee cannot be made to suffer. If the petitioner here is not allowed arrears of salary, it would cause prejudice to her without any fault on her part.

65.In the result, the writ petition is allowed. The order dated 12.2.2008 passed by respondent no. 6 (Annexure1 to the writ petition) is quashed. The petitioner shall be entitled for reinstatement with all consequential benefits.

66.The petitioner is also entitled to cost which is quantified to Rs. 5,000/.