

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE VIVEK AGARWAL

ON THE 2nd OF JULY, 2024

WRIT PETITION No. 1977 of 2007

(SANJAY SAHU

Vs

THE STATE OF MADHYA PRADESH AND OTHERS)

Appearance:

(PETITIONER BY SHRI DIVY KRISHNA BILAIYA - ADVOCATE)

(RESPONDENT NO. 1 BY SHRI ABHIJEET AWASTHI - ADVOCATE)

(STATE BY SHRI NITIN GUPTA - DEPUTY GOVERNMENT ADVOCATE)

ORDER

This petition is filed by one Sanjay Sahu S/o Shri Ramesh Sahu who was working as Lower Division Clerk being aggrieved of order dated 3/02/1995 passed by the Secretary, Lokayukta office, Bhopal (M.P.) whereby services of the petitioner were discharged while he was on probation on account of non-requirement of his services.

Petitioner is also aggrieved of the order dated 6th November, 2006 passed by the Director General of Special Police Establishment, in the office of Lokayukta establishment, Bhopal (M.P.) whereby the Director General after taking note of the orders passed by the coordinate Bench of this High Court in W.P.(s) No. 332/2004 on 23/08/2006 observing that the appeal be decided within four months by a reasoned order, decided the appeal holding that there is no provision for filing of appeal against the orders of Secretary, Lokayukta Establishment to the Director General of Special Police Establishment.

Petitioner's contention is that these orders are not sustainable in the eyes of law. It is submitted that petitioner was not allowed to complete even two years term on probation, in as much as, his appointment order is dated

28/10/1993 and he was discharged from service vide order dated 3/02/1995.

Shri Divy Krishna Bilaiya has placed reliance on a Division Bench decision of this court in **Sunil Kumar Verma Vs. The High Court of Judicature at Jabalpur and another** in W.A. No. 413/2006 decided on 2nd May, 2022 and reading from para 6 onwards, it is submitted that the said judgment will have application to the facts and circumstances of the present case and, therefore, the order of discharge be set aside.

When Shri Bilaiya is requested to point out from the pleadings that where is the pleading that order impugned is a stigmatic order and thus, not an order of discharge simpliciter but that of termination for which departmental enquiry was mandatory, Shri Bilaiya reads para 5.9 of the writ petition to point out that the order in question is stigmatic. Para 5.9 of the petition reads as under :-

" That, in given case respondents have not only issued show cause notice twice to the petitioner but they have also subjected him to transfer from Bhopal to Sagar and ultimately they have issued impugned order of termination without allowing him to complete two years probation period. The respondents have filed two returns in the previous round of litigation wherein they have repeatedly averred that they were not happy with the performance of petitioner in service and they have virtually made up their mind to terminate the services of petitioner out of unsatisfactory performance even before he could complete his agreed period of probation. It is therefore humbly submitted that the malafide intention, vindictive approach and arbitrary exercise of powers of respondents are apparent on the face of the record and thus impugned order of termination deserves to be

set aside."

Reading from the judgment of the Division Bench in the case of **Sunil Kumar Verma** (supra), it is pointed out that the Supreme Court in the case of **Jagdish Mitter Vs. The Union of India AIR 1964 SC 449** has considered the scope of applicability of Article 311 (2) of the Constitution of India in a case of dismissal or removal of a temporary employee. In that case, the employee was working as a temporary Second Division Clerk in the General Post Office. His services were terminated on the ground that it was found undesirable to retain him in a Government service and hence, with one month's notice, he was discharged from services. The Hon'ble Supreme Court in that context has held that the protection of Article 311 of the Constitution can be invoked not only by permanent Government servants, but also by public servants who are employed as temporary servants, or probationers, and so, there can be no difficulty in holding that if a temporary public servant or a probationer is served with an order by which his services are terminated, and the order unambiguously indicates that the said termination is the result of punishment sought to be imposed on him, he can legitimately invoke the protection of Article 311 and challenge the validity of the said termination on the ground that the mandatory provisions of Article 311 (2) have not been complied with.

Shri Abhijeet Awasthi, learned counsel appearing for the Lokayukta establishment in his turn places reliance on the judgment of the Supreme Court in the case of **State of Punjab and others Vs. Jaswant Singh 2023 LiveLaw (SC) 761** and reading from para 13, it is submitted that the Hon'ble Supreme Court has placed reliance on the judgment of the Supreme Court in the

case of **State of Punjab and others Vs. Balbir Singh (2004) 11 SCC 743**

and in para 7 of the judgment of **Balbir Singh** (supra), it is held that :-

7. Thus the principle that in order to determine whether the misconduct is motive or foundation of order of termination, the test to be applied is to ask the question as to what was the 'object of the enquiry'. If an enquiry or an assessment is done with the object of finding out any misconduct on the part of the employee and for that reason his services are terminated, then it would be punitive in nature. On the other hand, if such an enquiry or an assessment is aimed at determining the suitability of an employee for a particular job, such termination would be termination simpliciter and not punitive in nature.

After hearing learned counsel for the parties and going through the record, Annexure P-3 which is the impugned order does not talk of the conduct of the petitioner. It is only mentioned that since his services are not required, they are dispensed with. He has been given one month's pay in lieu of notice in terms of the order of appointment.

As far as the appellate order Annexure P-2 is concerned, that is admitted by Shri Bilaiya who was given time yesterday to study and bring to the notice of the court that there is no provision for appeal against the order passed by the Secretary of the Lokayukta organization to the Director General of Special Police Establishment.

Thus, it is evident that when there is no provision of appeal, then filing of an appeal was a fruitless exercise which has been dealt with by the authorities by passing the impugned order Annexure P-2. As far as reliance of Shri Bilaiya

on the judgment of Division Bench of this court in **Sunil Kumar Verma** (supra) is concerned, that reliance appears to be misplaced. Firstly, there is no stigmatic order as is evident from Annexure P-3. The law laid down in the case of **Jagdish Mitter** (supra) will have no application because in the case of **Jagdish Mitter** (supra), the Constitution Bench of Hon'ble Supreme Court has held that order of discharge of temporary servant stating that he was found undesirable to be retained is an order of dismissal for which there is a need to fulfil the requirements of Article 311.

In the present case, there is no such stipulation in the impugned order Annexure P-3. Petitioner has not been termed to be undesirable. It is only mentioned that his services are not required. Therefore, that being the fine distinction between found to be undesirable and services being not required, the judgment in the case of **Jagdish Mitter** (supra) will have no application to support the case of the petitioner.

Similarly, the Division Bench of this court in the case of **Sunil Kumar Verma** (supra) has placed reliance on the judgment of the Supreme Court in the case of **State of Uttar Pradesh Vs. Madan Mohan Nagar AIR 1967 SC 1260**. In that case also, again the Constitution Bench has dealt with the aspect of stigma. As held earlier, there is no stigma attached in the present case.

The seven Judges Bench of the Supreme court in **Samsher Singh Vs. State of Punjab and another (1974) 2 SCC 831** in para 65 to 67 has held as under :-

65. The fact of holding an enquiry is not always conclusive.

What is decisive is whether the order is really by way of punishment (see *State of Orissa v. Ram Narayan Das* [AIR 1961 SC 177 : (1961)])

1 SCR 606 : (1961) 1 SCJ 209]). If there is an enquiry the facts and circumstances of the case will be looked into in order to find out whether the order is one of dismissal in substance (see Madan Gopal v. State of Punjab [AIR 1963 SC 531 : (1963) 3 SCR 716 : (1963) 2 SCJ 185]). In R.C. Lacy v. State of Bihar [Civil Appeal No. 590 of 1962, decided on October 23, 1963] it was held that an order of reversion passed following an enquiry into the conduct of the probationer in the circumstances of that case was in the nature of preliminary inquiry to enable the Government to decide whether disciplinary action should be taken. A probationer whose terms of service provided that it could be terminated without any notice and without any cause being assigned could not claim the protection of Article 311(2) (see R.C. Banerjee v. Union of India [AIR 1963 SC 1552 : (1964) 2 SCR 135 : (1964) 1 SCJ 578]). A preliminary inquiry to satisfy that there was reason to dispense with the services of a temporary employee has been held not to attract Article 311 (see Champaklal G. Shah v. Union of India [AIR 1964 SC 1854 : (1964) 5 SCR 190 : (1964) 1 Lab LJ 752]). On the other hand, a statement in the order of termination that the temporary servant is undesirable has been held to import an element of punishment (see Jagdish Mitter v. Union of India [AIR 1964 SC 449 : (1964) 1 Lab LJ 418]).

66. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to attract Article 311. The substance of the order and not the form would be decisive (see K.H. Phadnis v. State of Maharashtra [(1971) 1 SCC 790 : 1971 Supp

SCR 118]).

67. An order terminating the services of a temporary servant or probationer under the Rules of Employment and without anything more will not attract Article 311. 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 (see *State of Bihar v. Shiva Bhikshuk Mishra* [(1970) 2 SCC 871 : (1971) 2 SCR 191]).

Thus, it is evident that the order of not continuing the petitioner in service during probation being not a stigmatic order will not attract the provisions of Article 311 (2) of the Constitution of India.

Therefore, when the judgment of the Supreme Court in **Jaswant Singh** (supra) which have heavily placed reliance on its earlier decision in **Balbir Singh** (supra) is taken into consideration, then an inquiry for an assessment aimed at determining the suitability of an employee for a particular job would not be a termination but would be discharge simpliciter which is not punitive in nature.

In view of such facts, the impugned orders when tested cannot be faulted with.

Accordingly, the petition deserves to be dismissed and is hereby dismissed.

(VIVEK AGARWAL)
JUDGE

