CASE NO.:
Appeal (civil) 1123 of 2006

PETITIONER:
Nehru Yuva Kendra Sangathan

RESPONDENT:
Mehbub Alam Laskar

DATE OF JUDGMENT: 22/01/2008

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T
WITH

CIVIL APPEAL NO. 1125 OF 2006

S.B. SINHA, J :

1. These two appeals involving common questions of fact and law were taken up for hearing together and are being disposed of by this common judgment.

Appellant is an autonomous body operating under the Department of Youth Affairs and Sports, Ministry of Human Resource Development, Government of India. It is a \023State\024 within the meaning of Article 12 of the Constitution of India.

Respondent herein was appointed as a Youth Co-ordinator in terms of an offer of appointment dated 28.9.1994; paragraph 5 whereof reads as under:-

\0235. You will be on probation for a period of one year from date of joining. Your probation period may be extended if considered necessary by the Sangathan. During the probation period, you will have the option of resigning, if you so desire, without any notice. Likewise, the Sangathan will be at liberty to terminate your services without any notice and without assigning any reasons whatsoever, during the probation period. Upon successful completion of this period you will be advised in writing of the fresh terms and conditions of your employment.\024

2. He allegedly withdrew some amount from the Government Fund (to which he was entitled to) and deposited it in his personal bank account. An enquiry in that behalf was conducted behind his back and on the basis of the result thereof, his probation was terminated, stating:

\023Services of Sh. Mehboob Alam Laskar S/o Late Latif Ahmed Laskar working as Youth Coordinator in NYK-North Tripura, are terminated forthwith.

He shall handover the charge to Sh. Topan Nag, Youth Coordinator, NYK-Karimganj immediately after receipt of this order. Sh. Nag will hold the additional charge of the Kendra till further orders.

Sd/- S.Y. Quraiahi
Director General\024

3. He filed a representation before the appropriate authority for

reconsideration of his case. He also filed another representation/appeal seeking review of the order of termination dated 24.5.1995 on or about 20.2.1999.

As the said representation was not being responded to within a reasonable time by the respondents, he filed a writ petition before the High Court which was marked as Writ Petition (C) No. 3136 of 1999. The said Writ Petition was disposed of by the High Court directing the appellant to consider his representation keeping in mind the decision of the High Court in the case of Ajay Gupta being Civil Rule No. 5582 of 1995 wherein an order of reinstatement had been passed.

4. The said representation of the appellant was rejected by an Order dated 13.10.1999 stating that the case of Ajay Gupta which was the subject matter of above-mentioned Civil Rule, was not similar, stating;

\0237. In view of the above explained facts, it is submitted that your case cannot be treated as similar with that of Shri Ajay Kumar Gupta, his services were terminated during the probation period after conducting preliminary inquiry. Later, he refuted the allegations against him and appealed to the disciplinary authority. Though his termination was well within the rules of the Sangathan and also as per the conditions mentioned in the appointment letter, it was decided to give him a chance as per principles of natural justice. However, on further inquiry, he was found to be guilty of misappropriation and the termination of his services was found justified.

On the other hand, your services were terminated during the probation period on the basis of certain prima facie allegations of financial irregularities. The same charges were also admitted by you in your letter dated 14th June, 1995. Therefore, no other inquiry was considered necessary by the competent authority since the charges were already proved/admitted by you.\024

5. The legality/validity of the said Order was questioned by the respondent by filing another writ petition before the High Court which was registered as Writ Petition (Civil) No. 480 of 2001. By reason of a judgment and order dated 9.4.2003, the said order was set aside and the writ petition was allowed, holding :

\023The law is well settled that if a probationer does not satisfy the requirements of the employer, his services can be dispensed with by an order of discharge; but if in the order of discharge there is any imputation of misconduct, which may have a bearing on the future employment of the probationer an enquiry in the matter should be conducted and the probationer ought to be given an opportunity to defend himself. Though in the initial order of termination, there is no imputation or any misconduct against the petitioner, in the subsequent order, it has been elaborately recited that the foundation of the order of discharge is on account of financial irregularities committed by the petitioner. The subsequent order which is now challenged, has the effect of casting a stigma on the petitioner and, therefore, not much persuasion is required for this Court to hold that the authority should not have passed the order

without affording a reasonable opportunity to the writ petitioner to defend himself of the charges leveled. Admittedly no enquiry was held. That being the position, this Court has no Option but allow the writ petitioner and to interfere with the order dated 18-10-99. The writ petitioner shall now be reinstated in service and the Authority will be at liberty to initiate a fresh proceeding against him in accordance with law, if is so advised. The question of the entitlement of the writ petitioner to any back wages will be considered by the authority in accordance such norms as may be in force.\024

6. The Order dated 24.5.1995 was, indisputably based on the findings that an enquiry had been made behind the back of the respondent. Had the result of the preliminary enquiry been taken into consideration only for the purpose of judging the suitability of the respondent to continue in service, the same could not have been said to be a foundation for terminating the probation.

There exists a distinction between motive and foundation. If misconduct is the foundation of such an order, the same would be bad in law even if it appears to an innocuous one.

7. As the said Order was not complied with, a contempt petition was also filed wherein by an Order dated 11.5.2004, the Contemnor was directed to comply with the Orders of the Court without delay. A Writ Appeal was also preferred against the Order dated 9.4.2003 which by reason of the impugned judgment dated 11.05.2004 has been dismissed.

These appeals are directed against the aforementioned Orders dated 25.3.2004 and 11.5.2004.

8. Mr. Rana Ranjit Singh, learned counsel appearing on behalf of the petitioner submitted that a subsequent order which was passed on the representation of the respondent himself could not have been taken into consideration by the High Court for the purpose of arriving at a finding that the initial order of termination of his probation was not valid. It was furthermore urged that, in any event, the representation having been filed by the respondent in the year 1999, the writ petition ought not to have been entertained.

9. Mr. P.K. Goswami, learned senior counsel appearing on behalf of the respondent, on the other hand, submitted that the learned Single Judge, as also the Division Bench of the High Court rightly opined that the foundation of the order being a misconduct, the Order dated 24.5.1995 was wholly unsustainable. It was pointed out that this Court by an order dated 14.6.2004 stayed the operation of the order subject to the condition that until further orders, the appellant would pay to the respondent, every month the last drawn salary but the said order was vacated by an order dated 13.2.2006 and pursuant thereto the respondent had been taken in service and in that view of the matter, this Court, may not exercise its discretionary jurisdiction under Article 136 of the Constitution of India.

10. The Office Order dated 24.5.1995 was not a speaking one. Respondent was given a notice. He accepted that he had put the money withdrawn from the banks in his own accounts. He justified his action in his letter dated 14.6.1995. It, however, does not transpire that any further enquiry was made. Respondent was found to be guilty of misappropriation of the Appellant\022s fund. Evidently, the said explanation was not considered. Had an enquiry been held, the said explanation of the respondent might have been found to be acceptable by the appellant.

11. Respondent was appointed on a temporary basis. He was put on probation. Indisputably, the period of probation was required to be completed upon rendition of satisfactory service. Only in the event of

unsatisfactory performance by the employee, the termination of probation would have been held to be justified. It is, however, well-known that when the foundation for such an order is not the unsatisfactory performance on the part of the employee but overt acts amounting to misconduct, an opportunity of hearing to the concerned employee is imperative. In other words, if the employee is found to have committed a misconduct, although an order terminating probation would appear to be innocuous on its face, the same would be vitiated, if in effect and substance it is found to be stigmatic in nature.

12. Mere holding of a preliminary enquiry where explanation is called for from the employee, if followed by an innocuous order of discharge, may not be held to be punitive in nature but not when it is founded on a finding of misconduct.

13. In Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Others [(1999) 3 SCC 60], this Court held that the material which amounts to stigma need not be contained only in the termination order, but may also be contained in an Order or proceeding referred to in the order of termination or annexure thereto.

When the report submitted by a competent authority in a disciplinary proceeding forms the foundation therefor, it would be stigmatic in nature as such an order will have civil consequences.

14. It is not necessary for us to consider a large number of decisions operating in the field as this Court recently in Jaswantsingh Pratapsingh Jadeja Vs. Rajkot Municipal Corporation & Anr. [(2007) 12 SCALE 115] has considered the question at some length.

Reliance, however, is placed by Mr. Rana Ranjit Singh on Abhijit Gupta Vs. S.N.B. National Centre, Basic Sciences and Others [(2006) 4 SCC 469]. The said decision has been taken into consideration in Jadeja (supra), stating :

\023If the satisfaction of the employer rested on the unsatisfactory performance on the part of the appellant, the matter might have been different, but in that case, from the impugned order it is evident that it was not the unsatisfactory nature and character of his performance only which was taken into consideration but series of his acts as well, misconduct on his part had also been taken into consideration therefor. It is one thing to say that he was found unsuitable for a job but it is another thing to say that he was said to have committed some misconduct.\024

As in the instant case, it now stands admitted that the services of the respondent had been terminated on a finding of misconduct, the said decision of this Court in Abhijit Gupta (supra) has no application.

15. Reliance has also been placed on Jai Singh Vs. Union of India and Others [(2006) 9 SCC 717]. In that case, the appellant\022s conduct was shown in the records as \023Unsatisfactory\024.

Therein, this Court noticed that the order of termination was the only motive and not the foundation therefor stating :

\0239 . The question whether the termination of service is simpliciter or punitive has been examined in several cases e.g. Dhananjay v. Chief Executive Officer, Zilla Parishad and Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd. An order of termination simpliciter passed during the period of probation has been generating undying debate. The recent two decisions of this Court in Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences and Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences after survey of most of the earlier decisions touching the question observed

as to when an order of termination can be treated as simpliciter and when it can be treated as punitive and when a stigma is said to be attached to an employee discharged during the period of probation. The learned counsel on either side referred to and relied on these decisions either in support of their respective contentions or to distinguish them for the purpose of application of the principles stated therein to the facts of the present case. In Dipti Prakash Banerjee after referring to various decisions it was indicated as to when a simple order of termination is to be treated as \021founded\022 on the allegations of misconduct and when complaints could be only as a motive for passing such a simple order of termination. In para 21 of the said judgment a distinction is explained thus: (SCC pp. 71-72)

\021 21 . 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 \021 founded \022 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.\022

From a long line of decisions it appears to us that whether an order of termination is simpliciter 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 categorise or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or on motive on the ground of unsuitability to continue in service.\024

(emphasis in original)

16. The respondent evidently, was not aware that his services had been terminated on a finding of misconduct or the fact that an enquiry had been conducted by the appellant behind his back. He pleaded bona fide in his action. It was not an admission on his part in regard to the imputation of misconduct.

He filed representations after representations. He also moved the High Court. If the appellant had come to know at a later stage, the real object and purport for which the order dated 24.5.1995 was issued, he could challenge the same thereafter. The foundation of the order having been disclosed by the appellant, at a later stage, the original order must be held to be vitiated in law.

In the earlier round of the writ petition, the High Court did not go into the question as to whether the order dated 24.5.1995 was legal or not. The High Court merely asked the officers of the appellant to consider his representation. His representation was also to be considered keeping in view the case of Ajay Kumar Gupta. Ajay Kumar Gupta\022s case was distinguished by the appellant on the premise that whereas the services of Ajay Kumar Gupta were terminated upon holding a disciplinary proceeding

the services of the respondent had been terminated on the basis of an enquiry.

A \021State\022 within the meaning of Article 12 of the Constitution of India should have placed full facts before the High Court. Only in its anxiety to show that the case of Ajay Kumar Gupta was different from that of the respondent, it came out with the truth that the respondent was guilty of a serious misconduct. We, therefore, do not find any legal infirmity in the judgment of the High Court.

In any event, the respondent is in service now. Appellant even in terms of the direction of the learned Single Judge is entitled to initiate a departmental proceeding against the respondent. If such a proceeding is initiated, explanation offered by the respondent may be accepted or may not be accepted, but in the facts and circumstances of this case, we are of the opinion that services of the respondent could not have been terminated.

17. We, however, are of the opinion that the respondent should not be granted the entire backwages. He will be entitled to back wages only from the date of the order of the learned Single Judge of the High Court, namely 9.4.2003. In view of the aforementioned directions, we are of the opinion that no further order is necessary to be passed in the contempt matter.

18. Civil Appeal No. 1125 of 2006 is, therefore, allowed and Civil Appeal No. 1123 of 2006 is dismissed. No order as to costs.