

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

**Civil Appeal No. 2926 of 2018
(Arising out of S.L.P. (Civil) No.4208 OF 2011)**

**Director Aryabhata Research Institute
Of Observational Sciences (ARIES)**

... Appellants

Versus

Devendra Joshi & Ors.

... Respondents

WITH

**Civil Appeal No. 2927 of 2018
(Arising out of S.L.P. (Civil) No.10679 OF 2011)**

Devender Joshi

.... Appellant

Versus

**Director Aryabhata Research Institute
Of Observational Sciences (ARIES)
& Ors.**

.... Respondents

J U D G M E N T

L. NAGESWARA RAO, J.

**Civil Appeal No. 2926 of 2018 @Special Leave
Petition (Civil) No.4208 of 2011**

Leave granted.

This Appeal is filed against the judgment of the High Court of Uttarakhand at Nainital by which the order dated 31st December, 2008 terminating the services of Respondent No.1 was set aside.

Respondent No.1 was offered appointment to the post of Engineer-B (Civil) on 1st November, 2007 after he was selected pursuant to advertisement dated 10th August, 2007. He had joined on 1st January, 2008. Respondent No.1 was placed on probation for a period of two years from the date of joining. Appellant No.2 was informed by the Competent Authority on 22nd May, 2008 that the period of probation for Group 'A' officers had been reduced from two years to one year. By a letter dated 15th October, 2008, Respondent No.1 was informed that his period of probation had been reduced from two years to one year pursuant to an amendment to the bye-laws.

2. An internal Office Note dated 24th July, 2008 was issued directing Respondent No.1 to submit a detailed report regarding certain irregularities in improvements that were suggested in road infrastructure required for transportation of equipments. By Office Memorandum dated 18th August, 2008, the Registrar communicated certain shortcomings in the discharge of duty by the Respondent No.1. The Respondent No.1 was directed to discharge his duties diligently and complete the allotted tasks within a given time frame. Respondent No.1 was also asked to submit his explanation regarding initiation and completion of the work relating to providing tanks for water supply for a building without prior intimation and without getting formal approval of the proposal/ estimates for the construction of the same.

3. An Office Memorandum dated 23rd December, 2008 was issued calling for an explanation from Respondent No.1 for an alleged misconduct. Reference was made to a preliminary inquiry which revealed that the Respondent No.1 was responsible for removal of a pen-drive and copying the files available in the said pen-drive to his

personal computer without permission. By Office Memorandum dated 31st December, 2008, the Appellant No.2 terminated the services of Respondent No.1. It was mentioned in the said order that the services of Respondent No.1 were discontinued beyond the period of probation of one year. Respondent No.1 submitted a representation to the Appellant for re-instatement which was rejected by an Order dated 2nd April, 2009.

4. Respondent No.1 filed a Writ Petition before the High Court of Uttarakhand at Nainital challenging orders dated 31st December, 2008 and 2nd April, 2009. It was averred in the said Writ Petition that the Respondent No.4, who was selected for appointment to the post of Engineer Group 'B' pursuant to an advertisement issued on 18th April, 2008, was appointed as Engineer-C (Civil). Respondent No.1 was aggrieved by the appointment of Respondent No.4 to Group 'C', which was a post higher than what he was holding for which reason he made a representation on 8th October, 2008. Respondent No.1 sought for the benefits that were given to Respondent No.4 and made a request for appointment as In-Charge/ Project Engineer of the construction projects at Monora

Peak and Devasthal. It was alleged by Respondent No.1 that Respondent No.4 was inimically disposed towards him in view of the representations made against his appointment to Group 'C' post. According to the Respondent No.1, the Office Memorandum dated 23rd December, 2008 was at the behest of Respondent No.4 which formed the foundation of the Order dated 31st December, 2008 by which his services were terminated.

5. The Appellant filed a reply in which the Order dated 31st December, 2008 was justified on the ground that the termination of the services of Respondent No.1 at the end of the period of probation was due to unsatisfactory work and not for any misconduct. The Appellant contended that there was no stigma attached to the Order of termination as the discontinuance of the services of Respondent No.1 was not due to misconduct. The Appellant further alleged that it was decided not to proceed against Respondent No.1 to prove misconduct though a *prima facie* finding of misconduct was recorded in the preliminary inquiry. Finally, it was submitted that the Order dated 31st December, 2008 was an order of

termination simpliciter, not warranting any opportunity to be given to the delinquent employee.

- 6.** The High Court held that the Order dated 31st December, 2008 being an innocuous order of termination did not cast any stigma against Respondent No.1. The High Court further held that the Order dated 31st December, 2008 was challenged on the ground that it was vitiated by *mala fide*. The High Court found that Respondent No.4 could not have been appointed to Group 'C' post when he was selected for appointment to Group 'B' Engineer post. The fact that there was no advertisement to Group 'C' post was also highlighted. It was also held that the services of the Respondent No.1 were terminated because of his objection to the appointment of Respondent No.4 to a Group 'C' post. The Memorandum dated 23rd December, 2008 was issued at the behest of Respondent No.4 who was holding a higher post than Respondent No.1. On the said finding, the High Court set aside the Order dated 31st December, 2008 and extended the probationary period of Respondent No.1 by one more year. There was a further direction to the Appellant to consider the representation

dated 8th October, 2008 of Respondent No.1 either by giving the post of Engineer-B (Civil) to Respondent No.1 or by reverting Respondent No.4 to the post of Engineer -C (Civil).

7. We have heard Mr. Ajit Kumar Sinha, learned Senior Counsel appearing for the Appellants and Mr. Jayant Bhushan, learned Senior Counsel and Mr. S.N. Bhat, Advocate appearing for Respondent No.1. Mr. Sinha submitted that the High Court committed an error in setting aside the Order of termination dated 31st December, 2008 on the ground that it was *mala fide*. He referred to letters written to Respondent No.1 regarding his unsatisfactory performance even prior to the appointment of Respondent No.4 to contend that the finding of the High Court that the termination of services of Respondent No.1 was at the instance of Respondent No.4 is not correct. Though, there was a preliminary inquiry that was conducted into the alleged misconduct, the Appellant decided not to proceed further and hold a departmental inquiry to prove any misconduct of Respondent No.1. However it was decided to terminate the services on completion of the probation period due to

unsatisfactory work. He also made an attempt to justify the appointment of Respondent No.4 to the post of Engineer-B (civil). He further submitted that the appointment of Respondent No.4 was not challenged by Respondent No.1 in the Writ Petition.

8. Mr. Jayant Bhushan, learned Senior Counsel submitted that the point that arises for consideration is whether the Order dated 31st December, 2008 is sustainable as the foundation of the Order is misconduct as mentioned in the Memorandum dated 23rd December, 2008. He submitted that the Order of termination ought to have been preceded by a detailed inquiry after providing sufficient opportunity to Respondent No.1.

9. The High Court held that the reason for the Order dated 31st December, 2008 was not to end the probation of the Appellant but to punish him for objecting to the appointment of Respondent No.4 to Engineer-B (Civil) post. The High Court referred to a representation made by Respondent No.1 on 8th October, 2008 pointing out that Respondent No.4 could not have been appointed to Engineer-B (Civil) post. Without taking any action on the said representation, the Appellants initiated a

preliminary inquiry for misconduct and issued a Memorandum dated 23rd December, 2008 seeking an explanation from Respondent No.1. Thereafter, an innocuous Order of termination of probation was passed on 31st December, 2008.

10. We do not agree with the findings of the High Court that the Order dated 31st December, 2008 was passed only to punish Respondent No.1 for his objection to the appointment of Respondent No.4 to the post of Engineer-C (Civil). As the appointment of Respondent No.4 was not assailed by Respondent No.1 in the Writ Petition, the High Court ought not to have adjudicated the issue of validity of the appointment of Respondent No.4. The High Court committed an error in ignoring the letters dated 24th July, 2008 and 18th August, 2008 written by the Management to Respondent No.1 pertaining to his unsatisfactory work. The said letters were issued prior to the representations made by Respondent No.1 against the appointment of Respondent No.4. A perusal of the Memorandum dated 23rd December, 2008 would show that there is a *prima facie* finding recorded in the preliminary inquiry against Respondent No.1 which

cannot be attributed to the representation made by Respondent No.1 against the appointment of Respondent No.4. We are constrained to hold that there is no basis for the finding of the High Court that the real reason for the Order dated 31st December, 2008 was to ensure that the manner in which Respondent No.4 was appointed to the post of Engineer-C (Civil) remained concealed. We are satisfied that the Order dated 31st December, 2008 does not suffer from any infirmity and it is an Order of termination simpliciter. There is sufficient material on record to indicate that Respondent No.1 was informed about his unsatisfactory performance during the period of his probation.

11. A plain reading of the Order dated 31st December, 2008 would show that it is an innocuous order terminating the services of Respondent No.1 at the end of the probation period. As no allegations of misconduct are made in the Order, there is no stigma. Even the High Court is of the opinion that there is no stigma. The fact remains that there was a preliminary inquiry conducted by the Management in which there was a *prima facie* finding recorded against the Respondent No.1 of his

involvement in an act of misconduct. The Appellants decided not to proceed further and hold a detailed inquiry to prove the misconduct of Respondent No.1. However, the service of Respondent No.1 was terminated at the end of the period of probation which cannot be said punitive. Therefore, the Order dated 31st December, 2008 is an order of termination simpliciter. In view of the above it cannot be said that misconduct was the foundation for the order of termination.

12. It will be useful to refer to the relevant portion of a judgment of this Court in ***Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd.***¹, wherein it was held as follows:

“33. It will be noticed from the above decisions that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as the above facts are merely the motive and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the officer, as stated by Shah, J. (as he then was) in Ram Narayan Das case. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary enquiry is held because the purpose of a preliminary enquiry is to

¹ (1999) 2 SCC 21 para 33 & 34- Followed in *Ratnesh Kumar Choudhary v. Indira Gandhi Institute of Medical Science, Patna, Bihar* (2015) 15 SCC 151

find out if there is prima facie evidence or material to initiate a regular departmental enquiry. It has been so decided in Champaklal case. The purpose of the preliminary enquiry is not to find out misconduct on the part of the officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental enquiry is started, a charge-memo issued, reply obtained, and an enquiry officer is appointed — if at that point of time, the enquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. That is what is held in Sukh Raj Bahadur case and in Benjamin case. In the latter case, the departmental enquiry was stopped because the employer was not sure of establishing the guilt of the employee. In all these cases, the allegations against the employee merely raised a cloud on his conduct and as pointed by Krishna Iyer, J. in Gujarat Steel Tubes case the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found, and were merely the motive.

34. *But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice*

inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee — even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases.”

For the aforementioned reasons, the judgment of the High Court is set aside and the Appeal is allowed accordingly.

Civil Appeal No. _____ of 2018 @ Special Leave Petition (Civil) No.10679 of 2011

Leave granted.

13. This Appeal has been filed by Respondent No.1 being aggrieved by the judgment of the High Court of Uttarakhand at Nainital by which the High Court has rejected the prayer of Respondent No.1 to direct his confirmation as Engineer -B (Civil).

14. For the reasons mentioned in Civil Appeal _____ of 2018 @ S.L.P. (Civil) No. 4208 of 2011, the Appeal is dismissed.

.....J.
[S.A. BOBDE]

.....J.
[L. NAGESWARA RAO]

**New Delhi,
March 19, 2018.**