IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.2774/2019

PETITIONER : Sushind Kisan Rathod,
Aged about 28 years, Occupation – Peon,
Rajashree Shahu Science College,
R/o Indira Nagar, Chandur Railway,
Tq. Chandur Rly., Distt. Amravati.

...VERSUS...

RESPONDENTS :
1. Rajashree Shahu Science College,
Virul Road, Chandur Railway,
Distt. Amravati through its Principal
Shri S.S. Thakre.

2. Atul Vidya Mandir, Virul Road,
Chandur Railway, Tq. Chandur Rly.,
Distt. Amravati.

3. The Joint Director of Higher
Education, Amravati Division, Amravati.

4. Sant Gadge Baba Amravati
University, Amravati, through its Registrar.

Mr. P.S. Patil, Advocate for petitioner
Mr. H.D. Dangre, Advocate for respondent nos.1 and 2
Mrs. M.A. Barabde, AGP for respondent no.3
Mrs. Gauri Venkatraman, Advocate for respondent no.4

CORAM : AVINASH G. GHAROTE, J.

Date of reserving the judgment : 27/07/2023
Date of pronouncing the judgment : 11/08/2023

1. Heard Mr. P.S. Patil, learned counsel for the petitioner, Mr. H.D. Dangre, learned counsel for the respondent nos.1 and 2, Mrs. M.A. Barabde, learned Assistant Government Pleader for the respondent no.3 and Mrs. Gauri Venkatraman, learned counsel for the respondent no.4. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned counsel for the parties.

2. The petition questions the judgment dated 04/03/2019 passed by the learned Presiding Officer, University and College Tribunal, Nagpur in the appeal filed by the present petitioner under Section 81 of the Maharashtra Public Universities Act, 2016 seeking to quash and set aside the notice of termination dated 12/07/2017 issued by the respondent no.2, thereby terminating the services of the petitioner with effect from 13/08/2017, which judgment dismisses the appeal filed by the present petitioner.

3. Mr. Patil, learned counsel for the petitioner contends that the notice of termination dated 12/07/2017 (pg.57) was stigmatic, as a result of which, the termination could not have been effected without conducting an enquiry, which was never done, on account of which the termination is bad in law. It is contended that the language of the order of termination dated 12/07/2017, though is claimed to be innocuous, however, since the order of termination

refers to the earlier communications dated 07/11/2015; 21/09/2016 and 15/05/2017, all of which reflect upon the management questioning the conduct of the petitioner, the termination was stigmatic. In support of his contention, he places reliance upon ***Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre For Basic Sciences, Calcutta and others, (1999) 3 SCC 60; Chandra Prakash Shahi Vs. State of U.P. and others (2000) 5 SCC 152; V.P. Ahuja Vs. State of Punjab and others (2000) 3 SCC 239*** and ***Anoop Jaiswal Vs. Government of India and another AIR 1984 SC 636***.

4. Mr. Dangre, learned counsel for the respondent nos.1 and 2 supports the impugned order contending that there is no stigma indicated from the language of the notice of termination dated 12/07/2017. The termination, according to him, was pure and simple on account of the performance of the petitioner in discharge of his duties having being found unsatisfactory. In reference to the communications referred to in the notice of termination, he submits that these were merely for the sake of bringing to the notice of the petitioner, the deficiencies observed by the management in the conduct of his work, with an intention to grant an opportunity to the petitioner for improvement. He submits that there is no finding of

guilt or misconduct indicated by the language of the notice of termination dated 12/07/2017 and therefore the termination being simplicitor on account of expiry of the period of probation which had not been completed to the satisfaction of the respondent nos.1 and 2, the petitioner stood terminated on the date of completion of the period of probation and no fault could be found with the same. In support of his contention, he relies upon ***Pavanendra Narayan Verma Vs. Sanjay Gandhi PGI of Medical Sciences and another, (2002) 1 SCC 520, paras 19, 26,31 and 32; Mathew P. Thomas Vs. Kerala State Civil Supply Corpn. Ltd. and others (2003) 3 SCC 263, para 11 and 12; Abhijit Gupta Vs. S.N.B. National Centre, Basic Sciences and others (2006) 4 SCC 469, paras 4, 6 to 8 and 10; Chaitanya Prakash and another Vs. H. Omkarappa (2010) 2 SCC 623***. Reliance is also placed upon ***Usha d/o Ramchandra Mule Vs. Presiding Officer, Additional School Tribunal and others 2003 (1) Mh.L.J. 90*** and ***Mohan Dagadu Nimbalkar Vs. State of Maharashtra and another, 2009 (3), MhLJ 732***. He therefore submits that when the law has progressed to a stage where the Hon'ble Apex Court even in the case of ***Abhijit Gupta*** (supra), wherein though in earlier letters which were referred to in the notice of termination, the

employee had been called a person of perverted mind and dishonest duffer, having no capacity to learn, despite such intemperate language, it was held that the orders read as a whole indicated no malice. The reason of termination was the absence of improvement, and thus, did not indicate any malice or bias or stigma, and therefore the notice of termination in the instant matter cannot be interfered with.

5. The necessary facts for deciding the present petition, shorn of unnecessary details, indicate that the petitioner was appointed on probation for a period of two years by the order dated 14/08/2015 as a peon in the respondent no.1/College run by the respondent no.2. The period of probation was to expire on 13/08/2017. On 12/07/2017 a notice was issued to the petitioner indicating that in the opinion of the management as his services were not satisfactory and in spite of the communications dated 07/11/2015 (pg.54); 21/09/2016 (pg. 55); 12/05/2017 (pg. 56) asking him to improve, there was no noticeable improvement his services would stand terminated from 13/08/2017.

6. The very purpose of appointing a person on probation is to observe his conduct in the performance of duties entrusted to him; to test his mettle and suitability for the post on which he is

employed and in case such performance, is found to be unsatisfactory, the management would be within its rights to discontinue the services of the employee by not continuing him, beyond the period of probation by it confirming him. No doubt true that such an employee, would be reasonably entitled to an opportunity to correct the deficiency which he is claimed to have, being pointed out the same by the management. However, such an opportunity may not always be reflected from any written communication, for it may be demonstrated to have been given orally too, which in a given case would be sufficient.

7. The seven Judges Bench of the Hon'ble Apex Court in the case of ***Samsher Singh Vs. State of Punjab and another (1974) 2 SCC 831*** has in the matter of termination of a probationer, whether the order is punitive or not, laid down the following propositions :

> *"62. The position of a probationer was considered by this Court in Purshottam Lal Dhingra v. Union of India [AIR 1958 SC 36 : 1958 SCR 828 : 1958 SCJ 217] . Das, C.J. speaking for the Court said that where a person is appointed to a permanent post in Government service on probation the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment because the Government servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to do so. Such a termination does not operate as a forfeiture of any right of a servant to hold the post, for he has no such right. Obviously such a termination cannot be a dismissal, removal or reduction*

in rank by way of punishment. There are, however, two important observations of Das, C.J. in Dhingra case. One is that if a right exists under a contract or Service Rules to terminate the service the motive operating on the mind of the Government is wholly irrelevant. The other is that if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and violates Article 311 of the Constitution. The reasoning why motive is said to be irrelevant is that it inheres in the state of mind which is not discernible. On the other hand, if termination is founded on misconduct it is objective and is manifest.

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

64. Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection. In Gopi Kishore Prasad v. Union of India [AIR 1960 SC 689 : (1960) 2 SCR 982 : (1960) 1 Lab LJ 262] it was said that if the

Government proceeded against the probationer in the direct way without casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way of punishment. Instead of taking the easy course, the Government chose the more difficult one of starting proceedings against him and branding him as a dishonest and incompetent officer.

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]).”*

8. In ***Anoop Jaiswal*** (supra) it was found that foundation for the order of discharge was the alleged act of misconduct, considering which, the termination order was held to be punitive in nature and therefore bad.

9. In ***Dr. Mrs. Sumati P. Shere Vs. Union of India and others (1989) 3 SCC 311*** while considering the termination for unsatisfactory performance, of an ad-hoc appointee in a substantive vacancy, the need to communicate the assessment of work so as to afford an opportunity to improve, was asserted in the following words :

> *“**5.** We must emphasise that in the relationship of master and servant there is a moral obligation to act fairly. An informal, if not formal, give-and-take, on the assessment of work of the employee should be there. The employee should be made aware of the defect in his work and deficiency in his performance. Defects or deficiencies; indifference or indiscretion may be with the employee by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, in our opinion, it would be arbitrary to give a movement order to the employee on the ground of unsuitability.”*

10. What constitutes 'stigma', has been stated in ***Allahabad Bank Officers' Association and another Vs. Allahabad Bank and others, (1996) 4 SCC 504*** in the following words :

> ***"17.*** *The above discussion of case-law makes it clear that if the order of compulsory retirement casts a stigma on the government servant in the sense that it contains a statement casting aspersion on his conduct or character, then the court will treat that order as an order of punishment, attracting provisions of Article 311(2) of the Constitution. The reason is that as a charge or imputation is made the condition for passing the order, the court would infer therefrom that the real intention of the Government was to punish the government servant on the basis of that charge or imputation and not to exercise the power of compulsory retirement. But mere reference to the rule, even if it mentions grounds for compulsory retirement, cannot be regarded as sufficient for treating the order of compulsory retirement as an order of punishment. In such a case, the order can be said to have been passed in terms of the rule and, therefore, a different intention cannot be inferred. So also, if the statement in the order refers only to the assessment of his work and does not at the same time cast an aspersion on the conduct or character of the government servant, then it will not be proper to hold that the order of compulsory retirement is in reality an order of punishment. Whether the statement in the order is stigmatic or not will have to be judged by adopting the test of how a reasonable person would read or understand it."*

11. ***Radhey Shyam Gupta Vs. U.P. State Agro Industries Corporation Ltd. and another (1999) 2 SCC 21***, after considering the law as extant on the question, and elucidating the distinction between motive and foundation, 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 [AIR 1961 SC 177 : (1961) 1 SCR 606 : (1961) 1 LLJ 552] . 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 find out if there is prima facie evidence or material to initiate a regular departmental enquiry. It has been so decided in Champaklal case [AIR 1964 SC 1854 : (1964) 1 LLJ 752] . 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 [AIR 1968 SC 1089 : (1968) 3 SCR 234 : (1970) 1 LLJ 373] and in Benjamin case [(1967) 1 LLJ 718 (SC)] . 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 [(1980) 2 SCC 593 : 1980 SCC (L&S) 197] 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."*

Thus, the motive for termination has been distinguished from the foundation for termination inasmuch as in the former, the termination would not be punitive in nature while in the latter it would be so.

12. ***Dipti Prakash Banerjee*** (supra) relied upon by Mr. P.S. Patil, learned counsel for the petitioner was a case where the appellant's performance during probation was not satisfactory. The organization so informed the appellant during the first one-year period on 11/12/1995 and 15/04/1996 and he was asked to improve. Thereafter, on 30/04/1996, his probation was extended

giving him an opportunity to improve. During this six-month period, again the Director wrote on 17/10/1996 pointing out his deficiencies and asking him to improve by giving a further extension of probation on 31/10/1996 by another six months. A note was sent on 29/03/1997 to him regarding his deficiencies and finally, the termination order was passed on 30/04/1997. For considering motive and foundation, the following points were framed :

Sr. No.	Points	answer
1	In what circumstances, the termination of a probationer's services can be said to be founded on misconduct and in what circumstances could it be said that the allegations were only the motive?	Principles as enunciated in ***Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd***. (supra) were relied upon.
2	When can an order of termination of a probationer be said to contain an express stigma?	It depends on the facts and circumstances of each case and the language or words employed in the order of termination of the probationer to judge whether the words employed amount to a stigma or not.

3	Can the stigma be gathered by referring back to proceedings referred to in the order of termination?	The material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its annexures. Obviously, such a document could be asked for or called for by any future employer of the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular enquiry was conducted.

What is also material to note is that in ***Dipti Prakash Banerjee*** (supra) an Enquiry Committee is said to have been appointed regarding the conduct of the appellant and it gave a report in which it found the appellant's “behaviour reprehensible” and it confirmed that the appellant was “involved in a scuffle and did misdeeds like obtaining false signatures”, and said that the appellant was “guilty of inefficient performance or duty, irregular attendance without permission, rude and disorderly behaviour and wilful insubordination”. Further, the Enquiry Committee said that he must be “punished”. It did not say that proceedings for disciplinary action were to be initiated. It was in the context of this position it was held that the order impugned therein was stigmatic.

13. ***Chandra Prakash Shahi*** (supra) reiterates the position about motive and foundation in the following words :

> *"28. The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry 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 this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".*
>
> *29. "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. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry."*

14. ***V.P. Ahuja*** (supra) does not detail much of the factual position, however relying upon ***Dipti Prakash Banerjee*** (supra) holds

that the language of the termination order itself indicated that the termination was stigmatic and therefore in absence of an enquiry could not be sustained.

15. In ***Pavanendra Narayan Verma*** (supra) the following parameters for determining whether an order was punitive or not, were laid down :

> *"21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale 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 termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld."*

After considering the earlier judgments, as enumerated above, it has been held that :

> *"28.Therefore, 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."*

As to what needs to be considered in order to determine whether the impugned order is stigmatic, the following has been said :

> *"29. 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 ineptitude, 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 mere unsuitability for the job."*

Though an enquiry was held in this matter prior to the termination, it was held that this by itself would not turn an otherwise innocuous order into one of punishment, as an employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. A charge-sheet merely details the allegations so that the employee may deal with them effectively. The enquiry report in this case found nothing more against the appellant than an inability to meet the requirements for the post. It was thus found that none of the three factors catalogued in the judgment for holding that the termination was in substance punitive existed and therefore the impugned order was not stigmatic.

16. ***Usha Ramchandra Mule*** (supra) holds that to decide whether the termination order was stigmatic, it was necessary to look at the termination order itself.

17. ***Mathew P. Thomas*** (supra) after considering ***Dipti Prakash Banerjee*** and ***Pavanendra Narayan Verma*** (supra) holds that :

> *"11.------- 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 categorize 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. If the form and language of the so-called order of termination simpliciter 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 simpliciter or punitive. In cases where the services of a probationer are terminated by an order of termination simpliciter 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 facade of the termination order may be simpliciter, 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 simpliciter 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 or he is in reality removed from service on the foundation of his misconduct."

18. ***Mohan Dagadu Nimbalkar*** (supra) goes a step ahead and holds as under :

> *"12. At the end of probation period the probationer-Judge could be confirmed subject to his fitness for confirmation. The question of fitness can be considered only at the end of the period of probation, and on such consideration if the probationer is found suitable by the appointing authority then the appointing authority may issue an order of confirmation. It is well settled that an order of confirmation is a positive act on the part of the employer which the employer is required to pass in accordance with the rules governing the question of confirmation subject to a finding that the probationer is in fact fit for confirmation. In such a case there is no bar against termination at any point of time after expiry of the period of probation, more particularly when there is a provision in the rules for initial probation and extension thereof. It is also well settled that even if the maximum period of probation has expired and neither any order of confirmation has been passed, he cannot be deemed to have been confirmed merely because the said period has expired. Thus, if the probationer while continuing on probation has been considered and found not suitable for confirmation by the appointing authority, it is open to the appointing authority to terminate his services without affording him an opportunity of being heard.*
>
> *Merely because some enquiry of the alleged misconduct was pending during the probation period, it cannot be treated as stigma more particularly when an order of termination, in such a case, was issued on the ground that the probationer failed to complete his probation period satisfactorily and if his termination was not based upon such enquiry or its outcome against the probationer. Similarly, if there is no material on record to connect the enquiry with the order of termination or if the termination is not based on such enquiry, such termination cannot be treated as stigmatic and in that case an opportunity of being heard need not be provided before issuance of the order of termination. In other*

> *words, if termination is based upon an assessment of the probationer's work and conduct during the entire period of probation and if he fails to complete the probation period satisfactorily, it is not necessary to give any opportunity of being heard to the probationer Judge.*"

19. ***Abhijit Gupta*** (supra) was a case in which the communications prior to the termination letter, used very harsh language regarding the performance of the employee, in as much in some of the letters addressed to him, the employee had been called a person of "perverted mind" and "dishonest, duffer having no capacity to learn". Some communications informed the employee that his performance during the probationary period was "far from satisfactory" and that it had been observed that he lacked drive, imagination and initiative in the performance of his duties. He was advised to improve "in order to enable us to consider your case for confirmation favourably". Several extensions were granted to the employee. On the basis of this language it was contended that the termination letter on account of the probation period not having been extended, though innocuous, in reference to what had been stated in the earlier letter was in fact stigmatic, which contention was upheld by the High Court. In the Hon'ble Apex Court it was held that 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? Applying which it was held that though some of the earlier communications used intemperate language, however, the termination was on account of unsatisfactory completion of service and thus not stigmatic.

20. ***Chaitanya Prakash*** (supra) was a case in which the employee a probationer, in spite of being afforded several opportunities to improve his performance, the same was felt to be unsatisfactory by the employer which resulted in his termination, challenge to which succeeded before the High Court, by allowing the petition, holding that the order of termination was stigmatic. The Hon'ble Apex Court, held that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. It further held that the respondent/employee was time and again informed during the probation period about his deficiencies and was given ample opportunities to improve them, therefore, enough precautions were taken by the appellants/employer to see that the respondent/employee improved his performance and such an opportunity was provided to him, but such advices and opportunity were totally misplaced as the respondent/employee considered the same as unnecessary

encroachment and interference in his work and wrote back rudely in an intemperate language. It also held that the action on part of the employer in informing its opinion for the termination of the employee to another prospective employer, where the employee had applied for employment, as a result of which the candidature of the employee was turned down, also could not be held to stigmatic as the employer was duty bound to correctly provide information to the prospective employer when asked for.

21. The following principles therefore emerge from the above judicial pronouncements :

21.1. A probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. An employer therefore has a right to terminate the services of a probationer, if the performance of the probationer is not up to his satisfaction, as it is the satisfaction of the employer, which is of paramount importance, who would otherwise be saddled with the employee, who according to the employer has not performed satisfactorily in the discharge of his duties, even during the period of probation.

21.2. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, that the probation has not been completed satisfactorily, is not stigmatic.

21.3. It is the language of the termination letter, which has a material bearing in holding whether the termination is stigmatic or not.

21.4. When the language of the termination letter does not cast any aspersions or doubt on the conduct and character of the probationer, the same cannot be considered to be stigmatic.

21.5. Communications/letters referred to in the order of termination can be looked into to determine whether the termination is simplicitor for unsatisfactory performance or stigmatic.

21.6. Before termination of a probationer, the assessment of his performance should be made and any deficiencies noticed should be brought to his notice, so as to afford him an opportunity to improve.

21.7. The unsatisfactory performance of a probationer should be the motive and not the foundation for his termination.

21.8. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job.

21.9. The test would be is the employee discharged as unsuitable or is he punished for his misconduct.

21.10. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an enquiry is held and it is on the basis of that enquiry that a decision is taken to terminate his service, the order will not be punitive in nature.

21.11. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an enquiry. But in those cases the authority may not hold an enquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation, in which circumstances, the order of termination cannot be held to be punitive.

21.12. Even in cases where a preliminary enquiry is held, it is open for the employer not to proceed ahead with a full-fledged

enquiry and simplicitor terminate the services of a probationer on the ground of unsatisfactory performance.

21.13. The tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct to find out the truth of that misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination should be held to be punitive irrespective of the form of the termination order, as the enquiry would be 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 this situation, the order would be founded on “misconduct” and it will not be a mere matter of “motive”.

21.14. Even if an enquiry may have been conducted, that by itself, cannot make the termination order stigmatic, unless, there is material on record and so also background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer, for determining which in

the given circumstances the facade of the order of termination may be lifted to ascertain the real reason for termination.

21.15. Even if an enquiry of the alleged misconduct was pending during the probation period, it cannot be treated as stigma more particularly when an order of termination, in such a case, was issued on the ground that the probationer failed to complete his probation period satisfactorily and if his termination was not based upon such enquiry or its outcome against the probationer.

21.16. If there is no material on record to connect the enquiry with the order of termination or if the termination is not based on such enquiry then also the termination cannot be held to be stigmatic.

22. It is in light of the above principles that the communications mentioned in the notice of termination will have to be considered.

23. The communication dated 07/11/2015 (pg.54) issued to the petitioner, indicated that his behavior with the senior employees in the college was not proper and the same should be improved. The communication dated 21/09/2016 (pg.55) indicated that the work entrusted to him was not being satisfactorily

completed which was being brought to his notice and would not be tolerated henceforth. The communication dated 15/05/2017 (pg. 56), reiterating the contents of the earlier communications also indicated that the services of the petitioner, since his employment as a peon, were highly unsatisfactory and the action of the petitioner in leaving the college premises without permission without an entry in the movement register; eating tobacco in the premises; neglecting to keep the premises clean; avoidance in completing the job entrusted, were examples of the same.

24. It is also to be noted that there was no enquiry conducted into the behaviour of the petitioner in relation to what has been stated in the above referred communications. Could it then be said that what is stated in the letters dated 07/11/2015; 21/09/2016 and 15/05/2017 can be construed as something which is stigmatic thereby rendering the termination punitive?

25. In my considered opinion, the answer has to be in the negative. The communications referred to in the notice of termination dated 12/07/2017, as stated above, merely indicate certain actions of the petitioner which were disapproved of by the management and the petitioner was given an opportunity to correct

himself. In spite of opportunities, when the performance of the petitioner in discharge of his duties was found by the employer to be unsatisfactory, by the impugned letter of termination, his services stood terminated. The language of the letter of termination is clearly innocuous and the termination letter merely states that in spite of opportunities afforded to the petitioner to improve his performance, as indicated in the communications referred to therein, which have been discussed above, the same had not improved to the satisfaction of the employer, as a result of which, on the recommendation of the College Development Committee, his services were being brought to an end w.e.f 13/08/2017, and does not indicate any language which could be considered as stigmatic. The requirement of an opportunity to improve his performance as required by ***Sumati P. Shere*** (supra) clearly stood afforded to the petitioner; the letter of termination, does not contain any statement, which can be said to cast any aspersion on the conduct or character of the petitioner; the motive for termination is the unsatisfactory performance of the petitioner during his period of probation; as noted above there was no enquiry conducted into the behaviour of the petitioner in relation to what has been stated in the above referred communications.

26. It would be thus apparent that the order of termination cannot to held to be casting any stigma on the petitioner so as to term it as punitive.

27. A perusal of the judgment of the Tribunal would indicate that the language of the order of termination as well as the three communications, as indicated therein, have been duly considered and the finding rendered that there was nothing stigmatic either in the termination letter or the communications referred to therein.

28. In view of the discussion made above, I do not find any reason to interfere in the impugned order. The writ petition is dismissed. Rule stands discharged. In the circumstances, there shall be no order as to costs.

(AVINASH G. GHAROTE, J.)

Wadkar