

(2010) 11 AHC CK 0111

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 51378 of 2008

Ram Shankar Sharma

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 01-11-2010

Acts Referred:

Cantonments Board Service Rules, 1937 — Rule 11, 12, 12(1), 12A, 6
Central Civil Services (Conduct) Rules, 1964 — Rule 3(1)

Citation : (2011) 1 ADJ 248 : (2011) 1 UPLBEC 156

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—Heard learned Counsel for the Petitioner and Shri M.I. Khan, for the Respondents and perused the record.

2. With the consent of the learned Counsel for the parties, this writ petition is being finally heard and decided at this stage under the Rules of the Court.

3. The Petitioner is aggrieved by the order dated 10.9.2008 which though apparently states that the same is being passed under Rule 8(5) of "The Cantonment Fund Servant Rules, 1937" (hereinafter referred to as "1937 Rules") but as a matter of fact is an order of punishment of removal or dismissal which is a punishment under Rule 11 and that too without holding any enquiry in accordance with the procedure laid down in Rule 12 of 1937 Rules.

4. The facts in brief giving rise to the present dispute are that the Petitioner is appointed by order dated 24.1.2003 on probation for a period of six months. Rule 6 provides that probation is liable to be extended but this is an admitted position that no specific order of extension was ever passed by the authority concerned. Be that as it may, it is admitted that a show-cause notice was issued to the Petitioner on 23.7.2008 for certain misconduct and the Petitioner submitted his reply on 5.8.2008. Thereafter, the impugned order has been

passed and the relevant extract of the said order is reproduced hereinbelow:

AND WHEREAS Board after taking an impartial and a clear view on the overall conduct of Mr. Ram Shankar Sharma find him guilty of unbecoming of a Govt. Servant and exhibited lack of devotion in duty, which is in violation of Rule 3(1) (ii) and (iii) of CCS (Conduct) Rules, 1964 and resolved to terminate his services being a temporary servant of the Cantt. Board Mathura under the provisions of Rule 8(5) of CFSR, 1937 readwith SRO 296, dated 9.11.1981 vide CBR No. 58 dated 29.8.2008.

AND WHEREAS it is further resolved that the above termination lacks the period of 30 days, therefore, Mr. Ram Shankar Sharma is entitled to claim the sum equivalent to the amount of his pay plus allowances for the period of the notice, at the same rates at which he was drawing immediately before the termination of his service or as the case may be for the period for which such notice falls short of one month.

NOW THEREFORE, in accordance with the above resolution, his services are terminated w.e.f. 11th sept. 2008(A/N).

5. A counter affidavit has been filed on behalf of Respondent Nos. 2 and 3 wherein it is stated that the Petitioner used to commit several omissions and was negligent in discharging duty from time to time for which warning letters were issued to the Petitioners on various dates. He was placed under suspension on 6.9.2006. A charge-sheet was issued on 13.10.2006 containing four charges but during the course of enquiry, the Petitioner gave an undertaking on 21.6.2007 before the Chief Executive Officer, Cantt. Board, Mathura that the Board, if drop enquiry against him, he shall not commit any further mistake and work properly. Consequently, the order of suspension was revoked on 28.6.2007. The enquiry was dropped against the Petitioner. Thereafter, the authorities notice that the Petitioner after revocation of the suspension, again resorted damaging the reputation of the Cantonment Board, Mathura and therefore, the Cantonment Board, Mathura was left with no choice but to suspect his integrity that he is no more loyal, dedicated and interested in the job of the Board for which he has been engaged/employed. Thereafter, before taking a final decision he was given an opportunity to establish and prove the allegations as mentioned in para 5 of the show-cause notice which is quoted below:

(1) vide letter No. 47 dt 24.11.2006 you wrote to the Hon'ble Defence Minister that the employees had no alternative but to commit suicide or self-immolation.

(2) Which staff have been prevented from performing a religious or marriage by not allowing them to put up a tent.

(3) vide letter No. 102 dt. 16.3.2007, you have stated that Rs. 500/- to Rs. 1000/- are being charged from other caste people for not doing the conservancy job.

(iv) vide letter No. 103 dt. 19.3.2007, you have stated that for taking the Govt.

accommodation, Rs. 2000/- to Rs. 4000/- have to be paid whereas you yourself have recommended a case repeatedly to allot a house to one Mr. Sanjeev Kumar, Mali.

(V) Please prove to which other caste servants do not perform the Govt. duty and keep sitting in the office.

(VI) You have alleged to the PD, DE, CC, Lucknow that Shri Narayn, S/O Shri Ram Bharose who damaged the Govt. vehicle was not penalized by recovering the damages from him.

(VII) You have alleged that Mr. Madan Mohan Sharma cuts the water, electricity supply to your quarter.

(VIII) You have alleged that Mr. Madan Mohan Sharma has occupied the Govt. accommodation unauthorisedly.

(ix) vide letter No. 215 dt. 21.4.2008, you have alleged that S/Shri Raju, Vijay, Harjari, sons of Shri Vasudev who had occupied the defence land unauthorisedly which was removed on 17.4.2008 with the help of police and military police was not a defence land. And whereas because of your provocation these persons after having admitted their unauthorized occupation of the defence land have again occupied unauthorisedly and constructed thereon. This shows that you are acting against the interest of the Govt. property/interest.

(x) On 19.4.2008 without any information, you provoked the Members of your Union to go on a strike and prevented the staff of the Cantt. Board, Mathura from performing their duties against the said procedure of the Industrial Disputes Act and as per the procedure laid down by the Supreme Court and High Court judgments without giving any opportunity to the management to make alternative arrangements.

(xi) You have stated that on 21.4.2008 when the President, CEO & Mr. Anant Sharma, the Ex-member of the Cantt. Board gave a patient hearing to you and whereas you have alleged you were threatened of dire consequences.

(xii) You have alleged that in the last 18 months, no Cantt. Board servant has been issued with an Identity Card.

(xiii) You have alleged that 19 Cantt. Board servants do not perform the Govt. duties and keep sitting.

(xiv) You have alleged that to promote Mr. Anil, S/o Mr. Munshi Lai, Safari Karamchari to the post of Driver a conspiracy is being made with a bribe of Rs. 1.00 lac. Whereas you have in the last recruitment have recommended a case of Mr. Sanjeev Kumar and again this time you had recommended the case of the same person for the post of Driver.

(xv) You have xeroxed the Govt. documents (Attendance Register, Driver's testing report) unauthorisedly which you have to prove under what authority and

provision has been done by you vide letter No. 147 dated 3.4.2008.

(xvi) You have made confidential report open to the public which is very serious and has to prove under what authority it has been done.

(xvii) On 30.5.2008 in the A/N, you provoked the Members of your Union to attack the office premises and manhandled the Sanitary Supdt. Sanitary Inspector and Sanitary Zamedar and obstructed the performance of the Govt. work by the Govt. Officers against which a Police report has been filed.

(xviii) You also remain absent from duty unauthorized.

(xix) It has been brought to the notice of the undersigned that you are using a Motor Cycle No. UP 85R 9856 of TVS Star City make which is a new vehicle. Please establish legal and valid position of the moveable property and whether you informed to the administration.

(xx) Reference to your letter dated 14.1.2008, you had represented to the PD, DE, CC, Lucknow that you are entitled to get the remaining half pay of your suspension period directly. You had concealed the fact that only suspension was revoked and the inquiry is still going on against you. When your explanation was called by this office vide letter No. CBM/SN/512/19 dated 23.4.2008 and you have not replied satisfactorily under the Rule provisions.

6. In paras 6, 7 and 8 of the show-cause notice, the Chief Executive Officer, Cantt. Board, Mathura Cantt. states as under:

6. Your frequent use of abusive language to the staff and preventing them from discharging the Govt. duties is not only against the conduct Rules but is a criminal Act which is a serious offence which also establishes your activities against the Govt. Rules & regulations and against the interest of the Cantt. Board, Mathura.

7. It has been frequently complained by the Sanitary Zamedar and Sanitary Inspectors that almost every time at the time of attendance, you report late, misbehave with the supervisory staff and always provoke the other staff not to perform the Govt. duties. It is also been reported that vehicle No. URR9740 which has been allotted to you is not properly handled and because of your mis-handling last time Rs. 1,523/- was spent on the maintenance of the said vehicle No URR 9740.

8. In view of the above the Board has come to the conclusion that instead of taking keen and dedicated interest in discharging the govt. duties, you are always involved in writing wrong, untrue, unsubstantial complaints to the higher authorities which damages the reputation of the Cantt Board administration. It is also noticed that you always tried to create some or the other problems to the administration thereby obstructing the smooth discharge of the Govt. work by the Cantt. Board staff and also using abusive and threatening language.

7. This notice was replied by the Petitioner. Thereafter the impugned order has

been passed without holding any regular oral enquiry against the Petitioner.

8. It is not in dispute that the services of the Petitioner are governed by 1937 Rules. Rule 6, Rule 11, Rule 12, 12(a) and 12(b) of 1937 Rules for the purpose of present case are quoted below:

Rule-6.

All first appointments under the Cantonment Board shall be made on probation for a period of six months in the case of lower grade servants and two years in the case of others:

Provided that no person shall be confirmed in his first appointment till the appointing authority is satisfied that he is fit to hold such appointment:

Provided further that the appointing authority may extend the period of probation by a further period not exceeding one year for reasons to be recorded in writing.

Rule-11

(1) The following penalties may for good and for sufficient reasons to be recorded in writing be imposed by the Executive Officer on a servant, namely:

Minor Penalties--

(1) Censure

(2) Fine

(2) The following penalties may, for good and for sufficient reasons, and as hereinafter provided, be imposed by the appointing authority on a servant, namely:

Minor Penalties--

(i) With holding of his promotion;

(ii) Recovery from his pay of the whole or part of any pecuniary loss cause by him to the Board by negligence or breach of order;

(iii) Withholding of increment of pay.

Major Penalties--

(iv) reduction to a lower stage in the time scale of pay for a specified period with further directions as to whether or not the servant will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay;

(v) reduction to a lower time-scale or pay, grade, post or service which shall ordinarily be a bar to the promotion of the servant to the time scale or pay,

grade, post or service from which he was reduced with or without further directions regarding conditions of restoration to the grade or post or service from which the servant was reduced and his seniority and pay on such restoration to that grade, post or service;

(vi) compulsory retirement;

(vii) removal from service which shall not be a disqualification for future employment under the Board in whose service he was at the time of such removal or any other Board.

(viii) dismissal from service which shall ordinarily be disqualification for future employment under the Board under whom he was employed at the time of dismissal or any other Board.

Explanation --The following shall not amount to penalty within the meaning of this rule, namely:

(vi) termination of services--

(a) of a servant appointed on probation during or at the end of the period of his probation, in accordance with the terms of his appointment or the Rules and orders governing such probation; or

(b) of a temporary servant in accordance with the provisions of Sub-rule (5) of Rule 8; or

(c) of a servant, employed under an agreement in accordance with the terms of such agreement:

Provided that--

(i) no fine shall be imposed on any servant Other than a lower grade servant and in no case shall the aggregate of fine in any month exceed such limit as may, from time to time, be specified by the Central Government.

(ii) a list of punishments, inflicted under this Rule by the Executive Officer, shall be submitted monthly to the Board.

Rule-12(1) No order imposing any of the penalties specified in Clause (iv) to (vii) of Rule 11 shall be made except after an enquiry held, as far as may be, in the manner provided in this Rule and Rule 12-A.

(2) Wherever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or mis-behaviour against a servant, it may itself inquire into, or appoint under this rule, as the case may be, any authority to enquire into the truth thereof.

Explanation--Where the disciplinary authority itself holds the inquiry any reference in Rules to the inquiring authority shall be construed as a reference to the disciplinary authority.

(3) Where it is proposed to hold an inquiry against a servant under this Rule and Rule 12-A the disciplinary authority shall draw up or cause to be drawn up--

(i) the substance of the imputations of mis-conduct or mis-behaviour into definite and distinct articles of charge.

(ii) a statement of the imputation of misconduct or mis-behaviour in support of each article of charge which shall contain;

(a) a statement of all relevant facts including any admission or confession made by the servant;

(b) a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained.

(4) The disciplinary authority shall deliver or cause to be delivered to the servant a copy of the articles of charge, the statement of the imputation of misconduct of mis-behaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require the servant to submit, within such time as may be specified, a written statement of his defence and to state whether he desires to be heard in person.

(5) (a) On a receipt of the written statement of defence, the disciplinary authority may itself inquire into such of the articles of charge as are not admitted or, if it considers it necessary to do so, appoint under Sub-rule (2) an inquiring authority for the purpose, and where all the articles of charge have been admitted by the servant in his written statement of defence, the disciplinary authority shall record its findings on each charge after taking such defence as it may think fit and shall Act in the manner laid down in Rule 12-A.

(b) If no written statement of defence is submitted by the servant, the disciplinary authority may itself inquire into the articles of charge or may, if it considers it necessary to do so, appoint under Sub-rule (2) an inquiring authority for the purposes.

(c) Where the disciplinary authority itself inquires into any article of charge or appoints an inquiring authority for holding any inquiry into such charge, it may, by an order, appoint a servant or a legal practitioner to be known as the "Presenting Officer" to present on its behalf the case in support of the articles of charge.

(6) The disciplinary authority shall, where it is not the inquiring authority, forward to the inquiring authority;

(i) a copy of the articles of charge and the statement of the imputations of misconduct or mis-behaviour;

(ii) a copy of the written statement of defence, if any, submitted by the servant;

(iii) a copy of the statement of witnesses, if any, referred to in Sub-rule (3);

(iv) evidence proving the delivery of the documents referred to in Sub-rule (3) to the servant; and

(v) a copy of the order appointing the Presenting Officer.

(7) The servant shall appear in person before the inquiring authority on such day and at such time within ten working days from the date of receipt by him of the articles of charge and the statement of the imputations of misconduct or misbehavior, as the inquiring authority may, by notice in writing, specify in this behalf, or within such extended time, not exceeding ten days, as the inquiring authority may allow.

(8) (a) The servant may take the assistance of any other servant to present the case on his behalf but may not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the disciplinary authority is legal practitioner, or the disciplinary authority, having regard to the circumstances of the case, so permits.

(b) The servant may also take the assistance of a retired servant to present the case on his behalf subject to such conditions as may be specified by the Central Government from time to time by general or special order in this behalf.

(9) If the servant who has not admitted any of the articles of charge in his written statement of defence or has not submitted any written statement of defence, appears before the inquiring authority, such authority shall ask him whether he is guilty or has any defence to make and if he pleads guilty to any of the articles of charge, the inquiring authority shall record the plea, sign the record and obtain the signature of the servant thereon.

(10) The inquiring authority shall return a finding of guilt in respect of these articles of charge to which the servant pleads guilty.

(11) The inquiring authority shall, if the servant fails to appear within the specified time or refuses or omits to plead, require the presenting officer to produce the evidence by which he proposes to prove the articles of charge, and shall adjourn the case to a later date not exceeding thirty days, after recording an order that the servant may, for the purpose of preparing his defence:

(i) inspect within five days of the order or within such extended time not exceeding five days as the inquiring authority may allow; the documents specified in the list referred to in Sub-rule (3);

(ii) submit a list of witnesses to be examined on his behalf;

(iii) give a notice within ten days of the order or within such extended time not exceeding ten days as the enquiring authority may allow, for the discovery or production of any documents which are in possession of the Board but not mentioned in the list referred to in Sub-rule (3).

(12) The inquiring authority shall on receipt of the notice for the discovery or

production of documents, forward the same or copies thereof to the authority in whose custody or possession the documents are kept, with a requisition for the production of the documents by such date as may be specified in such requisition:

Provided that the inquiring authority may, for reasons to be recorded in writing, refused to requisition such of the documents as are, in its opinion not relevant to the case.

(13) On receipt of the requisition referred to in Sub-rule (12) every authority having the custody or possession of the requisitioned documents shall produce the same before the inquiring authority.

Provided that if the authority having" the custody or possession of the requisitioned documents is satisfied for reason to be recorded in writing that the production of all or any of such documents would be against the public interests, it shall inform the inquiring authority accordingly and the inquiring authority shall, on being so informed, communicate the information to the servant and withdraw the requisition made by it for the production or discovery of documents.

(14) On the date fixed for inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the disciplinary authority The witnesses shall be examined by or on behalf of the servant. The ""resenting Officer shall be entitled to reexamine the witnesses on any points on which they have been cross examined but not on any new matter, without the leave of the inquiring authority. The inquiring authority may also put such questions to the witnesses as it thinks fit.

(15) If it shall appear necessary before the close of the case on behalf of the disciplinary authority, the inquiring authority may, in its discretion, allow the Presenting Officer to produce evidence not included in the list given to the servant or may itself call for new evidence or recall and re-examine any witness and in such case the servant shall be entitled to have, if he demands it, a copy of the list of further evidence proposed to be produced and an adjournment of the inquiry for three clear days before the production of such new evidence exclusive of the day of adjournment and the day to which the inquiry is adjourned The inquiring authority shall give the servant an opportunity of inspecting such documents before they are taken on the record. The inquiring authority may also allow the servant to produce new evidence if it is of the opinion that the production of such evidence is necessary in the interest of justice.

(16) When the case for the disciplinary authority is closed, the servant shall be required to state his defence, orally, or in writing, as he may prefer. If the defence is made orally, it shall be recorded and the servant shall be required to sign the record. In either case a copy of the statement of defence shall be given to the Presenting Officer, if any, appointed.

(17) The evidence on behalf of the servant shall then be produced. The servant may examine himself in his own behalf if he so prefers. The witnesses produced

by the servant shall then be examined and shall be liable to cross examination, re-examination and examination by the inquiring authority according to the provisions applicable to the witnesses for the disciplinary authority.

(18) The inquiring authority may, after the servant closes his case, and shall, if the servant has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the servant to explain any circumstances appearing in the evidence against him.

(19) The inquiring authority may, after completion of the production of evidence, hear the Presenting Officer, if any, appointed, and the servant, or permit them to file written briefs of their respective case, if they so desire.

(20) If the servant to whom a copy of the articles of charge has been delivered, does not submit the written statement of defence on or before the date specified for the purpose or does not appear in person before the inquiring authority or otherwise fails or refuses to comply with the provisions of this rule, the inquiring authority may hold the inquiry ex parte.

1. (21)(a) Where a disciplinary authority competent to impose any of the penalties specified in Clause (1) and Sub-clauses (i) to (iii) of Clause (2) of Rule 11 (but not competent to impose any of penalties specified in Sub-clauses (iv) to (viii) of Clause (2) of Rule 11), has itself inquired into or caused to be inquired into the articles of any charge and that authority; having regard to its own findings or having regard to its decision on any of the findings of any inquiring authority appointed by it, is of the opinion that the penalties specified in Sub-clauses (iv) to (viii) of Clause (2) of Rule 11 shall be imposed on the servant, that authority shall forward the records of the inquiry to such disciplinary authority as is competent to impose the last mentioned penalties.

(b) The disciplinary authority to which the records are to be forwarded may Act on the evidence of the record or may, if it is of the opinion that further examination of any of the witnesses is necessary in the interest of justice, recall the witnesses and examine, cross-examine and re-examine the witnesses and may impose on the servant such penalty as it may deem fit in accordance with these rules.

(22) Whenever any inquiring authority, after having heard and recorded the whole part or any part of the evidence in an inquiry ceased to exercise jurisdiction therein, and is succeeded by another inquiring authority which has, and which exercises such jurisdiction, the inquiring authority so succeeding may Act on the evidence so recorded by its predecessor, or partly recorded by its predecessor and partly recorded by itself.

Provided that if succeeding inquiring authority is of the opinion that further examination of any of the witnesses whom evidence has already been recorded is necessary in the interest of justice it may recall, examine, cross-examine and re-examine any such witnesses as hereinbefore provided.

(23) (1) After the conclusion of the inquiry report shall be prepared and it shall contain:

(a) the articles of charge and the statement of the imputations of misconduct or mis-behaviour;

(b) the defence of the servant in respect of each article of charge;

(c) an assessment of the evidence in respect of each article of charge;

(d) the findings on each article of charge and reason therefore.

Explanation:

(i) If the opinion of the inquiring authority the proceedings of the inquiry establish any article of charge different from the original articles of the charge, it may record its findings on such article of charge:

Provided that the findings on such article of charge shall not be recorded unless the servant has either admitted the facts on which such article of charge is based or has had a reasonable opportunity of defending himself against such article of charge.

(2) The inquiring authority, where it is not itself the disciplinary authority, shall forward to the disciplinary authority the records of inquiry which shall included-

(a) the report prepared by it under Clause(1);

(b) the written statement of defence, if any, submitted by the servant.

(c) the oral and documentary evidence produced in the course of the inquiry;

(d) written briefs, if any, filed by the Presenting Officer or the servant or both during the course of the inquiry, and

(e) the orders, if any, made by the disciplinary authority and the inquiring authority in regard to the inquiry

12-A(1) The disciplinary authority, if it is not itself the inquiring authority may, for reasons to be recorded in writing remit the case to the inquiring authority for further inquiry and report and the inquiring authority shall thereupon proceed to hold the further inquiry according to the provisions of Rule 12.

(2) The disciplinary authority shall, if it disagrees with the findings of the inquiry authority on any article of charge, records its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose.

(3) If the disciplinary authority having regard to its findings on all or any of the article of charge is of the opinion that nay of the penalties specified in Sub-clauses (i) to (ii) of Clause (2) of Rule 11 should be imposed on the servant, it shall, notwithstanding anything contained in Rule 12, make an order imposing

such penalty.

(4) If the disciplinary authority having regard to its findings on all or any of the articles of charge and on the basis of the evidence adduced during the inquiry is of the opinion that any of the penalties specified in Clauses (iv) to (viii) of Clause (2) of Rule 11 should be imposed on the servant, it shall make an order imposing such penalty and it should not be necessary to give the servant any opportunity of making representation on the penalty proposed to be imposed.

....

12-B (1) Subject to the provisions of Sub-rule (3) of Rule 12-A, no order imposing on a servant any of the penalties specified in Sub-clauses (i) to (iii) of Clause (2) of Rule 11 shall be made except after-

(a) informing the servant in writing of the proposal to take action against him and of the imputations of mis-conduct or mis-behaviour on which it is proposed to be taken, and giving him reasonable opportunity of making such representation as he may wish to make against the proposal;

(b) holding any inquiry in the manner laid down in Sub-rule (3) to (23) of Rule 12, in every case in which the disciplinary authority is of the opinion that such inquiry is necessary.

(c) taking the representation, if any, submitted by the servant under Clause (a) and the record of inquiry, if any, held under Clause (b) into consideration: and

(d) recording a finding on each imputation of misconduct or mis-behaviour.

(2) Notwithstanding anything contained in Clause(b) of Sub-rule (1), if in a case it is proposed after considering the representation, if any, made by the servant under Clause (a) of that Sub-rule to withhold increments of pay and such withholding of increments is likely to effect adversely the amount of pension payable to the servant or to withhold increments of pay for a period exceeding three years or to withhold increments, if any, with cumulative effect for any period, an inquiry shall be held in the manner laid down in Sub-rule (3) to (23) of Rule 12, before making any order imposing on the servant any such penalty.

(3) The record of proceedings in such cases shall include:

(i) a copy of the intimation to the servant of the proposal to take action against him;

(ii) A copy of the statement of imputations of misconduct or mis-behaviour delivered to him;

(iii) his representation; if any

(iv) the evidence produced during the inquiry,

(v) the findings on each imputation of misconduct or mis-beahviour; and

(vi) the orders on the case together with the reasons therefore:

9. The dismissal or removal from service is a kind of termination. The expression termination has a very wide terminology. It includes all kind of termination i.e. termination when read in a wider sense, it means that the employment coming to an end. More than one manner and methods are possible. However, when termination is given effect to in a manner that it cause stigma it is considered to be a termination by way of punishment which is clearly of two types i.e. dismissal or removal. It is only when it is given effect with the intention to cause or to inflict stigma to punish the employee concerned, it comes within the terms "dismissal" or "removal". The legally recognised distinction between "dismissal" or "removal" is that a dismissal results in disqualification for future employment whereas removal from service ordinarily does not. *Khem Chand Vs. The Union of India (UOI)and Others, In Union of India (UOI) Vs. Jeewan Ram, ,* it was held that a cessation of service brought about by exercise of a contractual right is not per se dismissal or removal If the termination of service is brought about otherwise than by way of punishment, no claim for protection under Article 311(2) can be made. It is also true that a mere use of the words "termination of service" by itself is not decisive but the various facts and circumstances and other relevant factors, which are to be taken into consideration by a Court of law when such an order is challenged, to find out whether a termination is a termination simplicitor or by way of punishment amounting to dismissal or removal.

10. In *Smt Tasneem Fatma v. State of U.P and Ors.* 2009 (1) LBESR 726 this Court, after considering number of authorities beginning from *Parshotam Lal Dhingra Vs. Union of India (UOI)*, upto *Abhujit Gupta Vs. S.N.B. National center, Basic Sciences and Others, ,* summed up the principles discernible to find out whether a simple order of termination/discharge of a temporary employee or probationer is punitive or not. Para-57 of the judgment is quoted:

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 snail be held unless there is some material to show certain circumstances, preceding or attending, shadowing the simplicitoriness 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) Whether 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 simpliciter 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.

11. Same view has been taken by a Division Bench of this Court (in which I was a member) in *Paras Nath Pandey v. Director, N.C.Z.C.C, Allahabad* 2008(10) ADJ 283.

12. In the case in hand under the garb of termination simplicitor under Rule 8(5) of 1937 Rules, the Chief Executive Officer infact removed or dismissed the Petitioner, which is a punishment under Rule 8(5) without following the procedure prescribed under Rules 12, 12(a) and 12(b). Rule 8(5) has no application in the present case as the kind of termination contemplated therein is a termination simplicitor which is not attracted where incumbent is said to be removed from service on account of proven misconduct. Since it is admitted position that no enquiry under Rule 12 before passing the impugned order was held, the impugned order of termination is infact an order of dismissal/removal by way of punishment. Considering the nature of the order passed in the case in hand and also the provisions, this Court has no hesitation in holding that the impugned order is punitive in nature and is an order of termination by way of

punishment. Since such an order has been given effect to without following the procedure prescribed in law, it amounts to denial of adequate opportunity of defence and therefore, cannot sustain.

13. In view of above, the writ petition is allowed.

14. The impugned order dated 10.9.2008, annexure-1 to the Writ petition is hereby quashed. The Petitioner shall be entitled for all consequential benefits. The Petitioner shall also be entitled for cost which is quantified to Rs. 10,000/- However, it is made clear that this order shall not preclude the Respondents from passing a fresh order after holding inquiry in accordance with law.