
(2014) 12 AHC CK 0234
In the Allahabad High Court
Case No : Writ A. No. 61670 of 2010

Shashi Prabha Singh

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 18-12-2014

Acts Referred:

Constitution of India, 1950 — Article 311, 311(2)

Citation : (2015) 3 ADJ 633 : (2015) 2 ESC 958 : (2015) 2 UPLBEC 1204

Hon'ble Judges : Rajan Roy, J

Bench : Single Bench

Advocate : P.K. Upadhyay, Ajay Singh and Jay Singh, Advocate for the Appellant; B.R. Maurya, Advocate for the Respondent

Judgement

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Rajan Roy, J.—This matter was heard by this court on 08.09.2014 and the judgment was dictated in the open court, however, before signing the same, I found that certain issues required clarification, accordingly, the matter was posted for rehearing. Thereafter, the matter was heard and the judgment was reserved on 10.11.2014.

2. Heard Sri P.K. Upadhyay, learned counsel for the petitioner and the learned standing counsel for the State.

3. The petitioner was appointed as assistant teacher in government primary school vide appointment letter dated 30.11.1999. After completing the requisite BTC course, she joined on her post on 22.12.1999. She worked until February, 2000. From March, 2000, she was absent from her duties. The petitioner claims that she appeared in the institution in question on 18.08.2001 and offered to join after regaining health, but, was not allowed. It is also admitted to the petitioner that, thereafter, she again fell ill and it was only on 05.04.2004 that she submitted a representation by registered post along with a medical certificate for being allowed to join on her post, but, was not allowed. On 02.07.2004, a show

cause notice was issued to her, inter alia, stating that her absence was indicative of her disinclination to work in the service and that there was no provision in the Rules under which leave of such a long duration could be granted after having put in such a short duration of service. The petitioner submitted a reply on 24.07.2004. As nothing happened, thereafter, she filed a writ petition bearing Writ-A No. 53900 of 2006, which was disposed of by this court on 26.03.2010 with a direction to the District Basic Education Officer to look into the matter and take a decision. The said judgment was not complied, which led to the initiation of contempt proceedings by the petitioner against the respondents. Thereafter, the impugned order dated 25.08.2010 was passed terminating her services w.e.f. March, 2001, on account of her long absence as there was no Rule under which leave of such a long duration could be sanctioned as the petitioner had put in only two months of service. Her representation dated 04.04.2010 was accordingly rejected.

4. The contention of the learned counsel for the petitioner was that the services of the petitioner could not have been terminated in such a manner without initiating regular disciplinary proceedings against her in accordance with the U.P. Government Servants (Discipline and Appeal) Rules, 1999, which were applicable in view of Rule 5(3) of the U.P. Basic Education Staff Rules, 1973. The petitioner could not join her duties on account of compelling circumstances based on her medical condition, for which, she was undergoing treatment. A requisite medical certificate was duly submitted to explain the absence. The impugned order virtually amounts to dismissal/removal of the petitioner from service. The leave application has also been rejected arbitrarily. The petitioner had, in fact, applied for medical leave during the period of absence, which was not considered. After offering to join on 05.04.2004, she sought leave without pay instead of medical leave. The case of the petitioner fell within the purview of FR-18 of the Financial Handbook (Vol. -II Part-ii to iv). The petitioner was absent for only four years and two months and not for nine years and two months as has wrongly been mentioned in the impugned order. Leave upto five years is permissible under FR-18 read with FR-85, but, this aspect was not considered. He further submitted that in fact such leave should have been considered only after exhausting the other leaves, which could be sanctioned in her favour.

5. On the other hand, the learned sanding counsel submitted that the period of absence was not satisfactorily explained and was wilful, therefore, the impugned action was justified. After serving for only two months, the petitioner remained absent for more than four years, which was impermissible.

6. The following questions arise for consideration in this case:

"(i) Whether initiation of regular departmental proceedings in accordance with the provisions of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 was necessary for dispensing the services of the petitioner who was appointed on probation of one year?

(ii) Whether leave could be granted to the petitioner under the Rules for the period of her absence and whether the termination of her services w.e.f. March 2001 was justified?

Question No. (i):-

7. The concept of probation was introduced to overcome the difficulty faced by the employer in dispensing the services of an unsuitable employee without following certain procedural safeguards like natural justice, regular inquiry etc. as incompetence or inefficiency is easier to allege but difficult to prove. The new recruit is put on test for a prescribed period before he is confirmed. During the period of probation, the employer has an opportunity to observe and assess the suitability of the recruit for the job and if he is not found suitable, the master has the right to dispense with his service during or at the end of the prescribed period of probation. A probationer does not have any right to the post. He acquires such right only on being confirmed. Reference may be made in this regard to the authority of the Supreme Court reported in *Ajit Singh and Others Vs. State of Punjab and Another*, *Parshotam Lal Dhingra Vs. Union of India (UOI)*, .

8. The question of confirmation in service depends upon the language used in the Rules. In a given case, services may be treated as impliedly confirmed, if there is a stipulation in the Rules that it would be so deemed, on completion of a particular period or the Rule is capable of such interpretation. In other cases, even after completion of the period of probation, confirmation will not impliedly follow unless a specific order of confirmation has been passed by the competent authority and in the absence of such an order, the probationer would be treated as on extended probation.

9. After confirmation normally services can be dispensed with only after holding a regular departmental inquiry as per Rules.

10. The answer to the question whether the services of a probationer in government service can be dispensed without holding a regular departmental inquiry hinges upon another question, i.e. whether the dispensing of service is by way of punishment or not? As a probationer does not have a right to the post, therefore, in a given situation, the employer may dispense with his services by an order simpliciter, which is non-stigmatic and it does not require any other thing to be done such as show cause notice etc. The employer may not want to punish the probationer for any act of misconduct which may form the motive for an action simpliciter, alternatively he may want to punish him and in such an eventuality, the employer has to proceed to hold a regular departmental inquiry against him and in such cases the misconduct shall form the foundation for such action. It is in this context that the concept of motive and foundation was developed by the Supreme Court in the case of *Purshottam Lal Dhingara (supra)*, wherein, it was also observed that the use of the word "termination" or "discharge" was not conclusive of the matter. In spite of use of such innocuous

expressions, the court can still hold it to be punitive.

11. After the pronouncement in the case of Purshottam Lal Dhingra, the aforesaid issue was considered by the Supreme Court in the case of The State of Bihar Vs. Gopi Kishore Prasad, , wherein, the test of "factum of inquiry" was laid down. It was a case of a probationer. Paragraphs-5 & 6 of the said judgment are reproduced hereinbelow:

"The main point in controversy before us turns on the question whether the provisions of Art. 311(2) of the Constitution are attracted to the case of a public servant who was still a probationer and had not been confirmed in a substantive post. The question whether there had or had not been a violation of the principles of natural justice, which was the basis of the decision in the High Court as indicated above, was not raised before us. The judgment of the High Court could be allowed to rest on that basis alone, but as it appears that this Court granted special leave to determine the controversy based upon the interpretation of Art. 311(2) of the Constitution, we think it necessary to express our opinion on that part of the case. The decision of this Court in Parshotam Lal Dhingra Vs. Union of India (UOI), , had not been given till then. If that decision were in existence then, perhaps the special leave would not have been granted. In our opinion, the controversy raised in this case is completely covered by the decision of the Constitution Bench of this Court in Parshotam Lal Dhingra Vs. Union of India (UOI), . The main question for decision in that case was whether the appellant Dhingra had been reduced in rank by way of punishment as a result of the order of the General Manager of the Railway. Though, in that case, this Court decided that the order impugned had not that effect, this Court went elaborately into all the implications of the service conditions, with particular reference to the Railway Service Rules and the constitutional provisions contained in S.240 of the Government of India Act, 1935, and Art. 311 of the Constitution. The elaborate discussion in that judgment has reference to all stages of employment in the public services including temporary posts, probationers, as also confirmed officers. In so far as those observations have a bearing on the termination of service or discharge of a probationary public servant, they may be summarized as follows:

1. Appointment to a post on probation gives to the person so appointed no right to the post and his service may be terminated, without taking recourse to the proceedings laid down in the relevant rules for dismissing a public servant, or removing him from service.
2. The termination of employment of a person holding a post on probation without any enquiry whatsoever cannot be said to deprive him of any right to a post and is, therefore, no punishment.
3. But, if instead of terminating such a person's service without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct or inefficiency or for some similar reason, the termination of service is by way of punishment,

because it puts a stigma on his competence and thus affects his future career. In such a case, he is entitled to the protection of Art. 311(2) of the Constitution.

4. In the last-mentioned case, if the probationer is discharged on any one of those grounds without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge, it will amount to a removal from service within the meaning of Art. 311(2) of the Constitution and will, therefore, be liable to be struck down.

5. But, if the employer simply terminates the services of a probationer without holding an enquiry and without giving him a reasonable chance of showing cause against his removal from service, probationary civil servant can have no cause of action, even though the real motive behind the removal from service may have been that his employer thought him to be unsuitable for the post he was temporarily holding, on account of his misconduct or inefficiency or some such cause.

6. It would thus appear that, in the instant case, though the respondent was only a probationer he was discharged from service really because the Government had on enquiry come to the conclusion, rightly or wrongly, that he was unsuitable for the post he held on probation. This was clearly by way of punishment and, therefore, he was entitled to the protection of Art. 311(2) of the Constitution. It was argued on behalf of the appellant that the respondent, being a mere probationer, could be discharged without any enquiry into his conduct being made and his discharge could not mean any punishment to him, because he had no right to a post. It is true, if the Government came to the conclusion that the respondent was not a fit and proper person to hold a post in the public service of the State, it could discharge him without holding any enquiry into his alleged misconduct. If the Government proceeded against him in that direct way, without casting any aspersion on his honesty or competence, his discharge would not, in law, have the effect of a removal from service by way of punishment and he would, therefore, have no grievance to ventilate in any Court. Instead of taking that easy course, the Government chose the more difficult one of starting proceedings against him and of branding him as a dishonest and an incompetent officer. He had the right, in those circumstances, to insist upon the protection of Art. 311(2) of the Constitution. That protection not having been given to him, he had the right to seek his redress in Court. It must, therefore, be held that the respondent had been wrongly deprived of the protection afforded by Art. 311(2) of the Constitution. His removal from the service, therefore, was not in accordance with the requirements of the Constitution."

12. In nutshell, it was held that if the employer initiates an inquiry against the probationer into the alleged misconduct or inefficiency or some similar reason and thereafter dispenses the services without providing opportunity of hearing to the probationer, then it would be punitive, as, the Government could not brand him dishonest and incompetent without inquiry, but, it would not be so if simply terminates the services of a probationer without holding inquiry and without

giving him a reasonable chance of showing cause against his removal from service, even though the real motive behind the removal from service may have been that he was not found suitable for the post on account of such misconduct or inefficiency etc. In the case of *The State of Orissa and Another Vs. Ram Narayan Das*, , a new test which required that one should look into the object or purpose of the inquiry and not merely the factum of an antecedent inquiry, to come to a conclusion as to whether the dispensing of service by the employer was by way of punishment. Paragraphs 12 & 15 of the aforesaid judgment is being quoted hereinbelow:

"12. The respondent had no right to the post held by him. Under the terms of his employment, the respondent could be discharged in the manner provided by r. 55-B. Again mere termination of employment does not carry with it " any evil consequences " such as forfeiture of his pay or allowances, loss of his seniority, stoppage or postponement of his future chances of promotion etc. It is then difficult to appreciate what " indelible stigma affecting the future career " of the respondent was cast on him by the order dis- charging him from employment for unsatisfactory work and conduct. The use of the expression " discharge " in the order terminating employment of a public servant is not decisive : it may, in certain cases amount to dismissal. If a confirmed public servant holding a substantive post is discharged, the order would amount to dismissal or removal from service; but an order discharging a temporary public servant may or may not amount to dismissal. Whether it amounts to an order of dismissal depends upon the nature of the enquiry, if any, the proceedings taken therein and the substance of the final order passed on such enquiry.

15. This proposition, in our judgment, does not derogate from the principle of the other cases relating to termination of employment of probationers decided by this court nor is it inconsistent with what we have observed earlier. The enquiry against the respondent was for ascertaining whether he was fit to be" confirmed. An order discharging a public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification, may appropriately be regarded as one by way of punishment, but an order discharging a probationer following upon an enquiry to ascertain whether he should be confirmed, is not of that nature. In *The State of Bihar Vs. Gopi Kishore Prasad*, , the public servant was discharged from service consequent upon an enquiry into alleged misconduct, the Enquiry Officer having found that the public servant was " unsuitable " for the post. The order was not one merely discharging a probationer following upon an enquiry to ascertain whether he should be continued in service, but it was an order as observed by the court "clearly by way of punishment". There is in our judgment no real inconsistency between the observations made in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, and *The State of Bihar Vs. Gopi Kishore Prasad*, . The third proposition in the latter case refers to an enquiry into allegations of misconduct or inefficiency with a view, if they were found established, to imposing punishment and not to an enquiry whether a probationer should be confirmed. Therefore the fact of the

holding of an enquiry is not decisive of the question. What is decisive is whether the order is by way of punishment, in the light of the tests laid down in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, "

13. Thus, if the inquiry was for ascertaining as to whether the probationer was fit for confirmation or being continued in service, the resultant action would not be by way of punishment. It would be so, only if the inquiry was initiated with the object to find if he was guilty of any misconduct and punish him for the same. In the latter event, opportunity to the probationer as per Rules was necessary.

14. Even if an order is couched in a language simpliciter, the court can lift the veil to find out as to whether the foundation for the said order was any finding of misconduct recorded in an inquiry *Madan Gopal Vs. State of Punjab*, .

15. In the case of *Champaklal Chimanlal Shah Vs. The Union of India (UOI)*, , the Supreme Court held that a termination order passed soon after the completion of the preliminary inquiry was not punitive, as, after such inquiry, it was open to the employer not to make a regular inquiry for proving the guilt of the employee. The employer could stop at this stage and pass a simple order of termination. The facts gathered in the preliminary inquiry would be "the motive" and not "the foundation".

16. The relevant law on the subject was considered by the Supreme Court once again in the case of *Radhey Shyam Gupta Vs. U.P State Agro Industries Corporation Ltd. and Another*, and their Lordships held as under:

"27. In other words, it will be a case of motive if the master, after gathering some prima facie facts, does not really wish to go into their truth out besides merely not to continue a dubious employee. The master does not want to decide or to direct a decision about the truth of the allegations, but if he conducts an inquiry only for purpose proving the misconduct and the employee is not heard, it is a case where the inquiry is the foundation and the termination will be bad.

.....

30. We shall now refer to a different type of cases where a departmental inquiry was started, then dropped and a simple order of termination was passed. In *State of Punjab and Another Vs. Shri Sukh Raj Bahadur*, , the charge-memo was served, reply given and at that stage itself, the proceedings were dropped and a termination order was passed. The High Court felt that the "object of departmental inquiry, being to punish the employee, the order of termination must be treated as punitive. This was not accepted by a three Judge Bench consisting of Justice Shah (as he then was) who had laid down in *Madan Gopal Vs. State of Punjab*, the principle of "object of the inquiry". This court reversed the High Court Judgment and held that neither *Madan Gopal's* case nor *Jagdish Mitter Vs. The Union of India (UOI)*, applied. This was because in the case before them the inquiry did not go beyond the stage of the explanation. No findings were given and no inquiry report was submitted as in the above two cases. In

that case (i.e. Sukh Raj Bahadur) this Court felt that the decision in A.G. Benjamin v. Union of India (Civil Appeal No. (341 of 1966 dated 13.12.1966) (SC) was more direct. In Benjamin's case, a charge memo was issued, explanation was received and an Enquiry Officer was also appointed but before the inquiry could be completed, the proceedings were dropped stating that: "departmental proceedings will take a much longer time and we are not sure whether after going through all the formalities, we will be able to deal with the accused in the way he deserves." There also, the order was held not to be punitive. Following the above case, this court in Sukh Raj Bahadur case stated that the position before them was similar to what happened in Benjamin's case and concluded as follows: "[T]he departmental inquiry did not proceed beyond the stage of submission of a chargesheet followed by the respondent's explanation thereto. The inquiry was not preceded with, there were no sittings of any inquiry officer, no evidence recorded and no conclusion arrived at in the inquiry." (emphasis supplied)

31. The underlined words are very important and demarcate the line of distinction. If the inquiry officer held no sittings, did not take evidence nor record any conclusions and if at that stage the inquiry was dropped and a simple order of termination was, passed, the same would not be punitive.

.....

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's 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 inquiry is held because the purpose of a preliminary inquiry is to find out if there is prima facie evidence or material to initiate a regular departmental inquiry. It has been so decided in Champaklal's case. The purpose of the preliminary inquiry 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 inquiry is started, a charge memo issued, reply obtained, and an enquiry Officer is appointed - if at that point of time, the inquiry 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's case and in Benjamin's case. In the latter case, the departmental inquiry 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 inquiry 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 principles of natural justice inasmuch as the purpose of the inquiry 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 inquiry. 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 employees conduct but are cases where the employer has virtually accepted the definitive and clear findings of the Inquiry 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."

17. Paragraphs 53 & 54 of the judgment of the Supreme Court in the case of Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, are relevant, therefore, they are being quoted hereinbelow:

"53. Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psynic by terminological cover-ups or by appeal to psynic reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If thus scrutinised, the order has a punitive flavour in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the service of the delinquent servant, it is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceedings from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal, even if full benefits as on simple termination, are given and non-injurious terminology is used.

54. On the contrary, even if there is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simpliciter, if no injurious record of reasons or punitive pecuniary cutback on his full terminal benefits is found. For, in fact, misconduct is not then the moving factor in the discharge. We need not chase other hypothetical situations here.

(emphasis supplied)"

18. The law on the subject has also been considered by the Supreme Court in Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr, , wherein, the test of stigma "or the form of the order" test was also considered and it was observed that a mere recital in the order that the work and conduct were unsatisfactory will not amount to stigma. Paragraph-29 of the said judgment is quoted hereinbelow:

"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."

19. Thus, in view of the above discussion, it is evident that it is not necessary to hold a regular departmental inquiry before dispensing the services of a probationer. As the probationer does not have any right to the post, his services can be dispensed with by an order simpliciter without affording opportunity of hearing, but, without casting any stigma upon him by the said order. If he is proceeded with by a regular departmental inquiry, wherein, after the evidence has been led, findings of misconduct/guilt have been recorded against him then a subsequent order of termination, even if couched in a simple language, which is non-stigmatic, may lead to a conclusion of being punitive after the veil is lifted by the court, irrespective of the fact, whether such regular inquiry is taken to its logical conclusion by passing an order of punishment or is dropped.

20. In this context, the decisions cited by the learned Counsel for the petitioner have not been able to persuade me to take another view of the matter. The decision in Ali Akabar v. Zila Basic Shiksha Adhikari, Kaushambi and others, 2009 (5) ADJ 273 was not in respect of a probationer. It was a case, where, the

services of a regular employee had been treated as terminated automatically, without providing any opportunity of hearing on account of continuous absence from duty for more than five years, the observations contained therein have to be read and understood in this context.

21. The decision in the case of Committee of Management of N.R.E.C. College, Bulandshahar and another v. State of U.P. and others, 2008 (10) ADJ 71 (DB), is also not applicable as the facts in the said case were very different from those existing in this case. There was violation of principles of natural justice, which is not so in this case. In fact, in the said judgment notice has been taken of the decision of the Supreme court reported in Viveka Nand Sethi Vs. Chairman, J and K Bank Ltd. and Others, , wherein, it has been held that a limited inquiry as to whether employee concerned had sufficient explanation for not reporting to duties after the period of leave had expired amounted to sufficient compliance of such principles. In the decision rendered in the case of Jai Shanker Vs. State of Rajasthan, , the litigant was not a probationer, but, a permanent servant of the Government, therefore, observations made therein have to be read and understood in the said context. The decision in the case of Laxman Dundappa Dhamanekar and Another Vs. Management of Vishwa Bharata Seva Samiti and Another, also does not help the petitioner's cause as it was a case of automatic termination of service and in that context, it was held that even if teacher remains absent without any leave, her services could be terminated only after complying with the provisions of the Act and the Rules or principles of natural justice. In this case, the principles of natural justice have been fully complied with. Moreover the Constitution Bench judgments referred to hereinabove have clearly laid down the legal position which does not brook any interference in favour of the petitioner.

22. Learned counsel for the petitioner has also placed reliance upon the judgments reported in 2009 (5) ADJ 273, AIR 1966 SC 452, 2010 (1) ADJ 71 and Laxman Dundappa Dhamanekar and Another Vs. Management of Vishwa Bharata Seva Samiti and Another, , which are also of no help.

23. In view of the law on the subject, as discussed hereinabove, there was no legal requirement of initiating regular disciplinary proceedings against the petitioner under the U.P. Government Servants Discipline and Appeal Rules, 1999 before dispensing with her services. Indisputably, the petitioner was appointed on probation for one year as is evident from her appointment order dated 30.11.1999. She joined the service on 22.12.1999. She worked upto February, 2000, i.e. two months. Thereafter, she absented herself from duty from March, 2000 and remained absent for a period of four years and two months, i.e. till 05.04.2004, when she offered to join by sending a representation through registered post. In the interregnum she claims to have visited the institution on 18.08.2001 for being allowed to join, which, according to her, was declined.

24. As she worked only for two months, there was no question of confirmation of her services, not even impliedly. No rule has been placed before the court under

which she could be treated to have been impliedly confirmed in the aforesaid circumstances.

25. After she sent a representation to the respondents on 05.04.2004 for joining on her post, show cause notice date 02.07.2004 was issued to her asking her to explain as to why her services be not terminated as it appears that she was not interested in continuing in service and as there was no provision in the Rules, under which an employee, who had put in such a short duration of service could be granted leave of such long duration. The petitioner submitted her reply to the aforesaid show cause notice on 24.07.2004.

26. The show cause notice issued to the petitioner was not for the purposes of ascertaining her guilt regarding any misconduct committed by her nor for punishing her for the same. The show cause notice was only to solicit her explanation for the long period of absence, which was indicative of her disinclination to continue in service and also to enable her to show cause as to under which Rule, such a long period of absence by a probationer could be condoned. Neither the notice nor the impugned order can be said to be in any manner stigmatic or by way of punishment. In my view, it is clearly an action simpliciter. No regular inquiry was initiated against the petitioner nor any finding based on evidence was recorded against the petitioner regarding any alleged misconduct on her part. As she was a probationer her services could have been terminated by the respondents earlier by an order simpliciter, but, the fact that they did not do so till passing of the order dated 25.08.2010, does not mean that a regular inquiry was required to be held before passing such an order.

27. Her services could have been dispensed even without a show cause notice, but, the fact that such a notice was issued does not mean that a regular inquiry should have been conducted. By issuing such a notice, the respondents have only given an opportunity to the petitioner to explain her absence, which she has failed to do satisfactorily. Long period of unauthorized absence by a probationer establishes her unsuitability thereby justifying an action simpliciter. No regular departmental proceedings were required to be initiated under the U.P. Government Servants Discipline and Appeal Rules, 1999. The first question framed hereinabove is answered accordingly.

Question No. 2:-

28. Though the services of the petitioner could have been terminated by an action simpliciter without any notice, nevertheless, as the respondents have themselves considered the possibility of granting leave to the petitioner for the period of her absence, therefore, it is necessary to go into the second question which has been framed hereinabove. But, before doing so, it is necessary to state that the respondents have clearly erred in proceeding on the assumption that the period of absence of the petitioner was nine and a half years. The petitioner absented from duty from March, 2001. She claims to have visited the institution on 18.08.2001, but, even if this fact is ignored, the indisputable fact is that on

04.05.2004, she submitted a representation offering to join on her post along with a medical certificate issued by a Homoeopathic doctor, thus, at best, she was absent for a period of four years and two months, i.e. till 03.05.2004. As she had offered to join on 04.05.2004, she can not be treated as absent for the subsequent period, as, it is the respondents, who did not allow her to join. As the respondents had not terminated her service by then, therefore, the proper course should have been to allow her to join and thereafter, to take appropriate action against her, nevertheless, the fact is that she did not work since March, 2001.

29. Now coming to the question of leave permissible under the Rules. Prior to 12.09.1989, Fundamental Rule 18 of the Financial Handbook (Vol. II Part-II to IV) contained a provision for automatic cessation of service on account of five years continuous absence from duty, unless the government, in view of special circumstances of the case determines otherwise. W.e.f. 12.09.1989, FR-18 was substituted as under:

"Unless the Government, in view of the special circumstances of the case, otherwise determine, after five years" continuous absence from duty elsewhere than on foreign service in India, whether with or without leave, no Government servant shall be granted leave of any kind. Absence beyond five years will attract the provisions of rules relating to disciplinary proceedings."

30. It is this substituted/amended FR-18, which is relevant in the instant case. As per the said Rule, the maximum period of leave permissible to a government servant is five years unless the government in view of special circumstances of the case otherwise determines. Absence beyond five years attracts the provisions of Rules relating to disciplinary proceedings. The latter part of the provision of course would apply only in the light of the legal position already discussed hereinabove and not otherwise.

31. As per FR-104(b) read with subsidiary Rule 170 of the Rules made by the Governor under FR-104(b), leave may be granted to a probationer if it is admissible under the leave Rules, which would be applicable to him if he held his post substantively otherwise than on probation. FR-60 mentions that leave is earned by duty only. FR-66 mentions that except as expressly mentioned otherwise, leave, other than the special disability leave and extending beyond the date of compulsory retirement, may be granted by such authorities subordinate to the government as the Governor may by rules or orders specify. Rules made under FR-66 are known as subsidiary Rules, thus, the leaves under FR-66 read with subsidiary Rules can be granted by authorities subordinate to the Government as specified by the Rules or orders made by the Governor, but, under FR-18, the State Government in special circumstances can grant leave, that too, in excess of the maximum period of five years.

32. FR-67 mentions that leave cannot be claimed as of right, when the exigencies of the public service so require, discretion to refuse or revoke leave of

any description is reserved to the authority empowered to grant it. FR-73 provides that a Government servant who remains absent after the end of leave is entitled to no leave salary for the period of such absence and that period will be debited against his leave account as though it were leave on half average pay, unless his leave is extended by the Government. Wilful absence from duty after the expiry of leave may be treated as misbehaviour for the purpose of Rule 15.

33. FR-81-B relates to the leave Rules applicable to all government servants, inter alia, who enter the government service on or after 01.04.1966 and held a lien on a permanent post and would have held a lien on such post, had their lien not been suspended. It refers to earn leave, leave on medical certificate and thereafter sub-Rule 5 refers to extra ordinary leave. It also prescribes minimum and maximum period of leave permissible under the said heads. As per sub-Rule-5, a government servant to whom these Rules apply may be granted extra ordinary leave in accordance with the provisions of FR-85 read with FR-18. Sub-Rule 6 provides that any kind of leave under these Rules may be granted in combination with or in continuation of any other kind of leave.

34. FR-85(a) provides that extraordinary leave may be granted in special circumstances (1) when no other leave is by rule admissible, or (2) when, other leave is admissible, the Government servant concerned applies in writing for the grant of extraordinary leave. Such leave is not debited against the leave account. No leave salary is admissible during such leave. Under the said Rule, following is mentioned under the heading "Orders of Governor regarding Rule 85(b)":

"The power of commuting retrospectively periods of absence without leave into extraordinary leave is absolute and not subject to the conditions mentioned in Clause (a) of the rule; in other words, such commutation is permissible even when other leave was admissible to the Government servant concerned at the time his absence without leave concerned."

35. Under the subsidiary Rules, it is Rule 157-A, which is relevant as it deals with various kinds of leave earned by temporary and officiating service and it refers to various kinds of leave such as earned leave, leave on medical certificate, leave of private affairs and extra ordinary leave. In this case, we are, only concerned with extra ordinary leave as in her representation, the petitioner has stated that instead of medical leave, she has applied for leave without pay. This extra ordinary leave is without pay as is evident from FR-85.

36. Sub-Rule-4 of Subsidiary Rules 157-A provides that a government servant to whom this subsidiary Rule applies, may be granted the extra ordinary leave in accordance with the provisions of FR-85, where the post is likely to last till his return to duty, provided that the duration of extra ordinary leave on any one occasion shall not exceed the limits mentioned therein. Thereafter, the duration of leave permissible, based on the length of service has been mentioned. FR-157-A(4) is quoted below:

"(4) Extraordinary leave--(a) A government servant to whom this Subsidiary Rule

applies may be granted extraordinary leave in accordance with the provisions of Fundamental Rule 85 where the post is likely to last till his return to duty, provided that the duration of extraordinary leave on any one occasion shall not exceed the following limits:

(i) three months;

(ii) six months, in cases where the government servant has completed three years continuous service on the date of expiry of leave of the kind due and admissible under the rules [including three months extraordinary leave under (1) above] and his request for such leave is supported by a medical certificate as required under the rules;

(iii) eighteen months where the government servant has completed one year's continuous service and is undergoing treatment for:

(1) pulmonary tuberculosis or tuberculosis of any other part of the body in a hospital or sanatorium or at his residence by the Civil Surgeon or by a qualified tuberculosis specialist recognised as such by the Director of Medical and Health Services, U.P., or

(2) leprosy in a recognised leprosy institution or by the Civil Surgeon or a specialist in leprosy recognised as such by the Director of Medical and Health Services, U.P.;

subject to the condition that the extraordinary leave shall be granted on the production of a certificate from medical-officer-in charge of the hospital or sanatorium, as the case may be, or from the qualified tuberculosis/leprosy specialist or the Civil Surgeon if such patient is undergoing treatment at his residence and in each case the period for which leave is recommended shall be specified in the certificate.

Note--The Medical Officer-in-charge of the hospital or of the sanatorium or leprosy institution, the tuberculosis/leprosy specialist or the Civil Surgeon, as the case may be, shall while recommending leave bear in mind the provisions of Subsidiary Rules 87.

(IV) twenty-four months, subject to a maximum limit of thirty-six months in all during entire temporary service, where the leave is required for the purposes of prosecuting studies in India or abroad certified to be in the public interest, provided that--

(1) the government servant concerned has completed three years of continuous service on the date of expiry of leave of the kind due and admissible under the rules [including three months of extraordinary leave under sub-rule (I) above];

(2) before grant of the extraordinary leave the government servant concerned gives an undertaking by executing a bond prescribed in Form No. 10 to the effect that he would, if required, serve the Government after returning from leave in the same post or in any other capacity as may be required for a period of at least

three years and, in default, pay to Government an amount equal to ten times the monthly pay which he was drawing at the time of proceeding on leave, and other expenses, if any, which may be incurred on him together with interest thereon from the day following the expiry of the sanctioned leave at the rate of one per cent over and above the Bank rate in force on the first day of April of the financial year in which the leave may commence.

Note--The expression "Bank rate" mentioned above means the rate made public by the Reserve Bank of India as the standard rate at which it is prepared to buy or rediscount bills of exchange or other commercial paper eligible for purchase under the Reserve Bank of India Act.

(b) Unless the Governor in view of the special circumstances of the case otherwise determines no Government servant, shall be granted extraordinary leave on any one occasion in excess of the limits mentioned in sub-rule (a). Absence from duty after the expiry of leave will attract the provisions of rules relating to disciplinary proceedings."

37. In the instant case, the petitioner claims to have sent an application for medical leave during the period of her absence, i.e. on 16.03.2000 and thereafter also claims to have sent an application for extension of the said leave, however, in her reply dated 24.07.2004 to the show cause notice dated 02.07.2004, she has mentioned about her joining after availing medical leave and thereafter has gone to state that though her medical condition was real and not fictitious, but, she had applied for leave without pay instead of medical leave. Obviously, she has referred to some leave application filed by her subsequent to her offer to join on 04.05.2004, may be, considering the fact that medical leave may not be permissible to her for such a long duration.

38. In the impugned order, the concerned respondent has recorded a finding that there is no Rule under which leave for such a long duration could have been granted after having put in only two months of service. In this regard, he has referred to FR-18, 85 and Subsidiary Rule 157-A. As already held earlier, the period of the petitioner's absence is four years and two months and not nine years and two months as has wrongly been held by the respondents.

39. As far as the subordinate authorities are concerned, it is evident especially on a reading of FR-157A(4), that there is no provision under which they could have granted leave without pay to the petitioner for such a long duration after having put in only two months of service. No such provision could be pointed out by the learned counsel for the petitioner. However, having said so, the court notices that under FR-18, the State Government could grant such leave, in special circumstances, even in cases of absence in excess of five years. Nevertheless there were no such special circumstances, for invoking FR-18. From the records I find that the explanation for her absence, as given by the petitioner, is not at all acceptable. She claims to be suffering from migraine and vertigo. These ailments are not such as to justify the continued absence of the

petitioner for four and a half years. The certificate merely states that she was under the treatment of the concerned doctor from 16.03.2000 to 15.08.2001 and that she had been advised to take bed rest during the aforesaid period. The other medical certificate is also issued by some Homoeopathic doctor and it is for the period from 16.08.2001 to 03.05.2004 and contains the same recital to the same effect. The dates of medical treatment surprisingly coincide with the exact dates of her absence, though the same also belie her stand that she appeared before the concerned institution on 18.08.2001 and offered to join. Moreover, the only document which she filed in support of her contention, was a certificate issued by a practitioner of Homoeopathic Medicine, neither any prescription of medicines nor any document relating to any pathological examination etc. has been annexed. The respondents were justified in not accepting her explanation for the period of her absence and not sanctioning her extraordinary leave, I also do not find any "special circumstance" for relegating the matter to the State Government for grant of leave to the petitioner for exercising of power under FR 18. The termination of her services w.e.f. March, 2001 was justified. The question No. 2 is answered accordingly.

40. For the reasons mentioned hereinabove, I do not find any merit in the writ petition, the same is accordingly dismissed.