will be too inequitous not to pay to the plaintiff the pay that he would have earned in normal course as it is because of wholly illegal attitude of the appellant that he was deprived of his service career spanned over a period of about 40 years during which he could have reached the highest ladder as also his livelihood for all these years. The equities, in our view, would heavily tilt in favour of the plaintiff. That being so, the order passed by the learned Single Judge in compensating the plaintiff, as mentioned above, deserves to be upheld.

(16) Before we may part with this order, we would like to mention that nothing based upon the preliminary objections, as detailed above, or for that matter the present being a case of service contract between the parties and the plaintiff, thus, being entitled to only damages and not reinstatement has been urged before us.

(17) Finding no merit in this appeal, we dismiss the same with costs quantified at Rs. 5,000.

R.N.R.

Before G.S. Singhvi, J

PUNJAB STATE & OTHERS—*Appellants/Defendants*

versus

ANIL KUMAR—*Respondent/Plaintiff*

R.S.A. No. 1684 of 1994

23rd November, 2001

Punjab Police Rules, 1934—Rls. 12.21 & 16.24—Constitution of India, 1950—Arts. 226 & 311—Discharge of Constable from service under rule 12.21—Satisfaction of the SSP that constable is not likely to prove an efficient police officer is final—There is no bar in rule 12.21 from discharging a Constable if opinion is formed on assessment and relevant material—Even in the face of specific allegation of misconduct constable can be discharged—Merely because while forming an opinion on the issue of suitability of the constable his absence from duty taken into consideration is no ground to declare the order of discharge simpliciter to be punitive—Pleadings—Written Statement—Averments made in written statement in defence of discharge cannot

be relied upon for recording a finding that order of discharge or termination simpliciter is punitive—Appeal allowed and order of discharge upheld.

Held, that the Courts below committed serious illegality by declaring the order of discharge simpliciter to be punitive simply because in the written statement filed on behalf of the appellants, the respondent's absence from duty was cited as the cause for exercise of power of Senior Superintendent of Police, Amritsar under Rule 12.21 of the Rules. The absence of the respondent might have been taken into consideration by S.S.P. for forming an opinion that a person, who had twice absented from duty within a short span of 4 months, would not prove to be an efficient Police Officer but, by no stretch of imagination, this could be taken into consideration for declaring an order of discharge simpliciter an punitive.

(Para 13)

Further held, that the averments contained in the written statement cannot always be made basis for recording a finding on the true nature of the termination of service. If an employee challenges the order of termination simpliciter by asserting that it is arbitrary and capricious, the employer is bound to place material before the Court to show that the power vested in him was exercised in good faith and the action was founded on cogent reasons. At times, this is done by making averments in the written statement. If such averments were to be relied upon for recording a finding that the order of discharge or termination simpliciter is punitive, then in a majority of cases, the action taken by the employer to terminate the services of the employees in accordance with the terms and conditions of employment or the relevant rules would be rendered punitive. However, that is not a correct approach. The Court can examine the order of termination of service along with attending facts and circumstances for taking the view that it is punitive but the averments contained in the wirtten statement cannot, ordinarily, be made basis for granting such a declaration.

(Para 14)

N.D.S. Mann, Deputy Advocate General, Punjab *for the appellants*

Sudeep Mahajan, Advocate, *for the respondent.*

JUDGMENT

G.S. SINGHVI, J

(1) Whether order dated 8th September, 1989 passed by Senior Superintendent of Police, Amritsar under Rule 12.21 of the Punjab Police Rules, 1934 (for short, 'the Rules') to terminate the services of the respondent could be treated as punitive solely on the basis of averments contained in the written statement filed by the appellants in the trial Court is the substantial question of law which arises for determiniation in this appeal.

The facts :

(2) Respondent—Anil Kumar joined service as Constable in District Police, Amritsar on 9th March, 1989. He absented from duty from 6th July, 1989 to 8th July, 1989 and again from 25th July, 1989 to 29th July, 1989. After considering his record, Senior Superintendent of Police, Amritsar discharged him from service,—*vide* order dated 8th September, 1989 passed under Rule 12.21 of the Rules with the observation that he is unlikely to become an efficient Police Officer. The same read as under :

> "Constable Anil Kumar No. 871/ASR of this district is discharged from service with effect from 8th September, 1989 after-noon under PPR 12.21 as he is unlikely to become an efficient Police Officer.
>
> Issue orders in O.B. and all concerned to note or necessary action."

(3) The representation submitted by the respondent against the order of discharge was rejected by the Deputy Inspector General of Police, Boarder Range, Amritsar,—*vide* memo No. 111/BR-5/5th November, 1990 and this was conveyed to him,—*vide* order dated 9th November, 1990 passed by Senior Superintendent of Police, Amritsar. The respondent challenged his discharge from service by filing a suit for declaration in the Court of Sub Judge Ist Class, Amritsar. He pleaded that termination of his service was punitive in character because the real motive for exercise of power under Rule 12.21 was

to punish him on account of alleged absence from duty and the same was liable to be invalidated because the Senior Superintendent of Police had not held any enquiry into the allegation of absence from duty. Paragraphs 2, 3 and 4 of the plaint, which contain the averments suggesting that the order of discharge was punitive, read as under :—

> "(2) That it was to be the sheer misfortune of the plaintiff that during service, he developed sudden health problems on 2 or 3 occasions and when he left for consulting a doctor, he was marked absent. Though such an absence was for an hour or so, the arrival of the plaintiff was recorded only after 2/3 days thereby implying that the plaintiff was absent for more times than actual. However, no explanation was called for these absence from the plaintiff.
>
> (3) That it was against this background that suddenly,—*vide* order No. 23884—87, dated 8th September, 1989, the Senior Superintendent of Police, Amritsar discharged the plaintiff from service while invoking provisions of P.R. 12.21. The provisions of P.R. 12.21 were resorted to as a short-cut and only with a view to make the order of discharge look innocuous on the face of it, whereas the reality is that this order was passed by way of a penalty for the alleged absence from duty by the plaintiff (as referred to in para [2] above. Since the plaintiff had not completed his three years in service, the provisions of P.R. 12.21 came handy with the authority to punish the plaintiff while at the same time dispensing with the formalities of conducting a regular inquiry under P.R. 16.24.
>
> (4) It is significant to note that no inquiry was ever conducted into the plaintiff's work and conduct to ascertain whether he (the plaintiff) was likely to become an efficient Police Officer or not neither at the plaintiff's back nor in his presence. No independent mind was applied to assess the work and conduct of the plaintiff and to arrive at a conclusion whether the plaintiff

should or should not be retained in service. Thus, there was nothing for the authority to form opinion regarding likeliness or otherwise of the plaintiff becoming an efficient Police Officer. In the circumstances, the only reason/motive for discharging the plaintiff from service was his absence from duty. Thus, the plaintiff was punished for his absence from duty and was not actually discharged because of the fact that he was unlikely to become an efficient Police Officer. The very purpose of discharge order (discharging the plaintiff) was punitive. Thus, the authority while discharging the plaintiff from service made a colourable exercise of power and in fact punished him under the garb of discharging him from service."

(4) In the written statement filed on behalf of the appellants, it was averred that after joining the duty, the petitioner had remained absent from 6th July, 1989 to 8th July, 1989 and again from 25th July, 1989 to 29th July, 1989 and, therefore, the Senior Superintendent of Police concluded that he was not likely to prove to be an efficient Police Officer and ordered his discharge under Rule 12.21. Paragraphs 2, 3 and 4 of the written statement are also reproduced below :

"2. That the content of para No. 2 of the plaint is vague and hence denied. It is denied being incorrect that due to illness he was to consult the doctor and in this process, his absence was recorded. There is no document on the file from which it can be gathered that the plaintiff was seriously ill and that it has rendered him unable to join duty. He remained absent from 6th July, 1989 to 8th July, 1989 and then from 25th July, 1989 to 29th July, 1989. There is no solid grounds for his absence.

3. Para No. 3 of the plaint is wrong, vague and hence denied. The order dated 8th September, 1989,—*vide* which the plaintiff was discharged from service under Punjab Police Rules 12.21 is legal, valid and binding upon the plaintiff. The plaintiff was discharged from service according to terms and conditions of service.

Moreover, at the time of passing the order dated 8th September, 1989, the plaintiff was temporary Govt. employee and Rule 16.24 is not applicable to this case. This rule is only applicable to permanent government employee. The service of the plaintiff was less than 3 years at the time of passing order dated 8th September, 1989, so he was discharged under PPR 12.21.

4. That the contents of para No. 4 of the plaint is wrong, vague and hence denied, in view of assertion given in the preceding paragraphs. He was habitual absentee during his short period of service, within a period of three years under Punjab Police Rules 12.21, a Constable can be discharged at any time if he is found not to be a good Police Official and is unlikely to become an efficient Police Officer. On account of long and wilful absence without purpose, he was discharged under PPR 12.21 being a member of the disciplinary force."

(5) On the pleadings of the parties, the trial Court framed the following issues :—

(1) Whether the orders dated 8th September, 1989 and 5th November, 1990 are illegal, void and inoperative against the rights of the plaintiff ? OPP

(2) Whether the suit is not maintainable ? OPD

(3) Whether a legal and valid notice under section 80 C.P.C. was issued to the defendant, before filing the present suit. If so what is its effect ? OPP

(4) Whether the plaintiff is entitled to the declaration and consequential relief prayed for ? OPP

(5) Relief."

(6) After recording evidence and hearing the arguments, the trial Court decreed the suit. It held that even though order dated 8th September, 1999 was not stigmatic *per se* but was liable to be declared punitive because it was founded on the misconduct allegedly committed

by the petitioner, i.e., remaining absent from duty. The finding recorded by the trial Court on the main issue reads as under :—

> "The perusal of the order shows that the plaintiff was discharged from service with effect from 8th September, 1989 after noon as he was unlikely to become an efficient Police Officer. The order, on the face of it, appears to be innocuous, but when it is scrutinised in the light of the facts, circumstances and evidence on record, it becomes clear that it was passed by way of punishment. The perusal of the order dated 5th November, 1990 passed by the Deputy Inspector General of Police, Border Range, Amritsar, clearly goes to show that the plaintiff was discharged from service, as he remained absent from duty from 6th July, 1989 to 8th July, 1989, and then from 16th July, 1989 to 29th July, 1989. Not only this, in the written statement, in para No. 4, it was admitted by the defendants, in clear cut terms, that on account of long and wilful absence from duty, the plaintiff was discharged from service under Rule 12.21 of the Punjab Police Rules, as he was unlikely to become an efficient Police Officer. It means that the plaintiff was discharged from service on account of absence from duty. It is now to be seen as to whether the absence from duty constitutes misconduct or not. In **Bahadur Singh** *versus* **The State of Haryana, 1988 (1) Services Law Reporter 650,** the principle of law laid down was to the effect that absence from duty amounts to misconduct, on the part of a government servant. His services cannot be terminated straightway on account of absence from duty. Disciplinary proceedings, contemplated by rules, are required to be initiated. In the instant case, no inquiry, whatsoever was held by the department against the plaintiff, affording him an opportunity to defend his case. It means that the order dated 8th September, 1989 was passed by the competent authority in utter violation of the mandatory provisions of law. The order dated 8th September, 1989 is, therefore, illegal and void and inoperative against the rights of the plaintiff. The principle of law laid down

in ***P. Jaya Chandra Rao** versus **State of Bank of Hyderabad and others,*** 1991(1) All Indian Services Cases Today 75 was that the original order gets merged with the appellate order. If the original order suffers from illegality and is set aside, the appellate order will be equally bad and liable to be set aside. The principle of law laid down in the said authority, aptly applies to the facts of the present case. Since the original order, in this case, has been held to be illegal and set aside, the order dated 5th November, 1990 passed by the Appellate Authority, being equally bad, is also liable to be set aside."

(7) The learned Additional District Judge dismissed the appeal filed by the State and confirmed the judgment and decree passed by the trial Court by recording the following observations :—

"On the face of it, the order appears to be innocuous. But if scrutinised properly it becomes clear that the same was passed by way of punishment on the ground of his wilful absence. If the absence from duty constitutes misconduct, then the service of the employee cannot be terminated straightway as provided under Rule 16.24 of the Punjab Police Rules. The disciplinary proceedings are required to be initiated in the present case. No inquiry was held against the plaintiff. The order thus is in violation to the mandatory provisions of law. Reference be made to Recent Service Judgments, 1950-88 (1) page 556—Rajinder Kumar *versus* State of Punjab and another and 1991 (2) Recent Service Judgments 705—Paramjit Singh *versus* State of Haryana and others. Thus, the order under Rules 12.21 of the Punjab Police Rules is not sustainable and the same is illegal and void. The finding of the trial court on issue No. 1 is confirmed."

(8) Shri N.D.S. Mann argued that the courts below have committed a serious illegality by treating the order of discharge simpliciter to be an order of punishment simply by relying upon the averments contained in the written statement filed on behalf of the

appellants suggesting that the Senior Superintendent of Plice had formed adverse opinion on the suitability of the respondent by taking into consideration his frequent absence from duty. He argued that the order of discharge similiciter passed under Rule 12.21 of the Rules cannot be treated as punitive simply because while exercising power under the said rule, the competent authority takes into consideration the work and conduct of the employee. In support of his argument, Shri Mann relied on the decision of the Full Bench in ***Sher Singh*** versus ***State of Haryana, (1).***

(9) Shri Sudeep Mahajan supported the judgments under appeal and argued that the concurrent findings recorded by the courts below about the true nature of the order passed by Senior Superintendent of Police, Amritsar does not call for interference in the second appeal. He relied on the decisions of the Supreme Court in ***State of Haryana and another*** versus ***Jagdish Chander, (2) Prithipal Singh*** versus ***State of Punjab and others, (3) Major Singh*** versus ***State of Punjab, (4) V.P. Ahuja*** versus ***State of Punjab and others, (5) Nar Singhpal*** versus ***Union of India and others, (6)*** and ***Chander Parkash Sahi*** versus ***State of U.P. and others, (7).***

(10) At this stage, it will be useful to notice Rule 12.21 of the Rules. The same reads as under :—

> **"12.21 Discharge or inefficients.**—A constable who is found unlikely to prove an efficient police officer may be discharged by the Superintendent at any time within three years of enrolment. There shall be no appeal against an order of discharge under this rule."

(11) A reading of the above quoted rule shows that a Constable can be discharged from service within 3 years of his enrolment if the Superintendent of Police is satisfied that he is not likely to prove an

(1) 1994 (3) SCT I
(2) (1995) 2 SCC 567
(3) J.T. 2000 (8) S.C. 26
(4) J.T. 2000 (9) S.C. 571
(5) (2000) 3 S.C.C. 239
(6) (2000) 3 S.C.C. 588
(7) (2000) 5 S.C.C. 152

efficient police officer. The plain language of the rule suggests that the power vested in the Superintendent of Police is absolute and can be exercised at any time within 3 years from the date of appointment of the Constable provided that the concerned authority has some material before it on the basis of which an opinion can be formed about his suitability.

(12) If order dated 8th September, 1989 is examined in the light of the above analysis of the rule, there does not appear to be any difficulty in holding that it is an order of discharge simpliciter passed in accordance with the plain language of Rule 12.21 of the Rules and cannot be treated as stigmatic per se. However, the Courts below have treated it as punitive by relying upon the averments contained in the written statement and the argument of Shri Sudeep Mahajan is that the courts below had rightly lifted the veil and declared the order of discharge as punitive because it was founded on the allegation of misconduct, namely, absence from duty. He referred to the averments contained in the plaint, written statement and evidence of the parties to show that motive behind the exercise of power under Rule 12.21 was to punish the respondent because Senior Superintendent of Police, Amritsar thought that by remaining absent from duty, he had violated the discipline of the force.

(13) In my opinion, the courts below committed serious illegality by declaring the order or discharge simpliciter to be punitive simply because in the written statement filed on behalf of the appellants, the respondent's absence from duty was cited as the cause for exercise of power by Senior Superintendent of Police, Amritsar under Rule 12.21 of the Rules. The absence of the respondent might have been taken into consideration by Senior Superintendent of Police, Amritsar for forming an opinion that a person, who had twice absented from duty within a short span of 4 months, would not prove to be an efficient police officer but, by no stretch of imagination, this could be taken into consideration for declaring an order of discharge simpliciter as punitive.

(14) I am further of the view that the averments contained in the written statement cannot always be made basis for recording a finding on the true nature of the termination of service. If an employee challenges the order of termination simpliciter by asserting that it is arbitrary and capricious, the employer is bound to place

material before the Court to show that the power vested in him was exercised in good faith and the action was founded on cogent reasons. At times, this is done by making averments in the written statement. If such averments were to be relied upon for recording a finding that the order of discharge or termination simpliciter is punitive, then in a majority of cases, the action taken by the employer to terminate the services of the employees in accordance with the terms and conditions of employment or the relevant rules would be rendered punitive. However, that is not a correct approach. In my considered view, the Court can examine the order of termination of service along with attending facts and circumstances for taking the view that it is punitive but the averments contained in the written statement cannot, ordinarily, be made basis for granting such a declaration.

(15) In ***State of U.P. and others*** versus ***Krishna Kumar Sharma (8)*** their Lordships of the Supreme Court considered an exactly identical question and answered in favour of the employer. The facts of that case were that while he was working as a temporary Fireman Constable in Police Fire Brigade, the services of the respondent were terminated by paying him one month's pay in lieu of notice under the U.P. Temporary Government Servants (Termination of Services) Rules, 1975. The High Court held the termination order to be punitive and violative of Article 311(2) on the ground that in the State's counter affidavit, it had been stated that work of the respondent was not satisfactory and that he was a habitual absentee without leave and, therefore, his services had been terminated. Their Lordships of the Supreme Court reversed the order of the High Court and held as under :—

> "During the period prior to 1979 there were remarks indicating that his performance was not quite satisfactory. He was found to have overstayed from leave and a number of punishments were imposed on him. For the year 1979 there were remarks that he was most undisciplied and undesirable type of constable and that he was careless and habitual of leaving the fire station without leave or permission. These remarks reflect upon his performance in the earlier period. Keeping in view the said record of service of the

(8) (1997) 11 SCC 437

respondent, the competent authority came to the conclusion that the performance of the respondent, who was only a temporary employee was not satisfactory and for that reason his services were terminated. It cannot be said that the termination of the services of the respondent in these circumstances was by way of punishment which required compliance with the provisions of Article 311(2) of the Constitution.

The averments in the State's counder-affidavit were in reply to the allegation made in the writ petition that by virtue of the order passed by the IG of the fire services on 16th January, 1980 all firemen stood confirmed with effect from 13th December 1978 but the respondent was not confirmed. In the said counter-affidavit, it has also been stated that confirmation was to be done only if the work and conduct was found to be satisfactory and up to the mark. The averments in the said counter-affidavit do not therefore, alter the nature of the order of termination which was termination simpliciter in accordance with the Rules."

(Underlining is mine).

(16) ***In State of U.P.*** versus ***Prem Lata Mishra*** **(9)** the Supreme Court held that whether the services of the respondent, who was a temporary appointee, were terminted after considering the fact that she was regularly irregular in her duties and left office without permission, the same could not be treated as punitive. The facts of that case were that the respondent was temporary appointed as Assistant Project Officer on 20th May, 1980 on the recommendations of the Selection Committee. In April and May, 1982, the Superior Officer reported that her work was not satisfactory. Consequently, her services were terminated by giving one month's pay and allowances in lieu of one month's notice. The High Court held that termination was punitive because it was based on the allegations of misconduct, namely, absence from duty. Their Lordships of the Supreme Court reversed the order of the High Court and held as under :—

"If misconduct is the foundation to pass the order, then an enquiry into misconduct should be conducted and an

(9) AIR 1994 SC 2411

action according to law should follow. But if it is (sic) motive, it is not incumbent upon the competent officer to have the enquiry conducted and the service of a temporary employee could be terminated in terms of the order of appointment or rules giving one month's notice or pay salary in lieu thereof. Even if an enquiry was initiated, it could be dropped midway and action could be taken in terms of the rules or order of appointment. The same principle applies to the facts in this case. It is seen that the respondent was appointed by direct recruitment by selection committee constituted by the government in this behalf and on finding about the suitability to the post as an Asstt. Project Officer, the respondent was appointed and was posted to the place where she had joined. Thereafter, her work was supervised by the higher officers and two officers have submitted their reports concerning the performance of the duties by the respondent. She was regularly irregular in her duties, insubordination and left the office during office hours without permission etc. On consideration thereof, the competent authority found that the respondent is not fit to be continued in service as her work and conduct were unsatisfactory under these circumstances the termination is for her unsuitability or unfitness but not by way of punishment as a punitive measure and one in terms of the order of appointment and also the Rules. Accordingly, the High Court has gone against settled law in allowing the writ petition."

(underlining is mine)

(17) I may now deal with the issue on a broader canvass.

(18) The question as to whether an order of discharge or termination of service simplicitor can be treated as punitive has confronted the Courts for a long time. The employees usually pleads that even though the order of termination does not contain express words of stigma, in reality it is punitive in nature because the employer has tried to get rid of him on the basis of alleged misconduct. On the

other hand, the employer relies on its right under the contract of employment or the rules governing the service and maintains that the employee, who does not have the right to hold the post, can be asked to go home at any time and without any reason. I***n State of U.P.*** versus ***Kaushal Kishore Shukla, (10)*** a three-Judges Bench of the Supreme Court considered the earlier decisions of ***Purshotam Lal Dhingra*** versus ***Union of India (11) State of Orissa*** versus ***Ram Narain Dass, (12) Jagdish Mittar*** versus ***Union of India, (13) A.G. Benjamin*** versus ***Union of India, (14) and State of Punjab*** versus ***Sukh Raj Bahadur, (15)*** and summarised the position of law in the following words :—

> "Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If it decides to take punitive action it may hold a formal enquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article 311 of the Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant, very often, the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. It is now well settled that the form of the order is not conclusive and it is open to the court to determine the true nature of the order. In Purshotam Lal Dhingra *versus* Union of India, a Constitution Bench of this

(10) (1991) 1 SCC 108
(11) AIR 1958 SC 36
(12) AIR 1961 SC 177
(13) AIR 1964 SC 449
(14) 1967(1) LLJ 718
(15) AIR 1968 SC 1089

Court held that the mere use of expression like 'terminate' or 'discharge' is not conclusive and in spite of the use of such expressions, the court may determine the true nature of the order to asertain whether the action taken against the government servant is punitive in nature. The court further held that in determining the true nature of the order the court should apply two tests, namely (1) whether the temporary government servant had a right to the post or the rank or (2) whether he has been visited with evil consequences; and if either of the tests is satisfied, it must be held that the order of termination of a temporary government servant is by way of punishment. It must be borne in mind that a temporary government servant has no right to hold the post and termination of such a government servant does not visit him with any evil consequences. The evil consequences as held in Parshotam Lal Dhinga case do not include the termination of services of a temporary government servant in accordance with the terms and conditions of service. The view taken by the Constitution Bench in Dhingra's case has been reiterated and affirmed by the Constitution Bench decisions of this Court in State of Orissa *versus* Ram Narayan Dass; R.C. Lacy versus State of Bihar, Jagdish Mitter versus Union of India; A.G. Benjamin *versus* Union of India, Shamsher Singh *vesrus* State of Punjab. These decisions have been discussed and followed by a three Judges Bench in State of Punjab *versus* Sukh Raj Bahadur."

(emphasis supplied).

(19) After 7 years, a two Judges Bench of the Supreme Court again considered the same question in ***R.S. Gupta*** versus ***U.P. State Agro Industries Corporation Ltd. and another, (16)*** analysed various judicial precedents on the subject including ***Parshotam Lal Dhingra*** versus ***Union of India*** (supra), ***State of Bihar*** versus ***Gopi Kishore Prasad, (17) State of Orissa*** versus

(16) JT 1998 (8) SC 585
(17) AIR 1960 SC 689

Ram Narayan Das, (18) Madan Gopal versus ***State of Punjab, (19) Jagdish Mitter*** versus ***Union of India*** (supra) ; ***Champaklal Chimanlal Shah*** versus ***Union of India, (20) State of Punjab*** versus ***Sukh Raj Bahadur*** (supra); ***Shamsher Singh*** versus ***State of Punjab, (21) State of U.P.*** versus ***Ram Chandra Trivedi, (22) Gujarat Steel Tubes*** versus ***Gujarat Steel Tubes Mazdoor Sangh, (23) Anoop Jaiswal*** versus ***Government of India, (24) Nepali Singh*** versus ***State of U.P.,(25) Trveni Shanker Saxena*** versus ***State of U.P., (26)*** and State of U.P. *versus* Prem Lata Mishra (supra) and laid down the following propositions :—

> "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 the case where a regular

(18) 1961 (1) SCR 606
(19) AIR 1963 SC 531
(20) AIR 1964 SC 1854
(21) 1974 (2) SCC 831
(22) 1977 (1) SCR 462
(23) (1980) 2 SCC 593
(24) (1984) 2 SCC 369
(25) J.T. 1988 (2) SC 473
(26) J.T. 1992 (1) SC 37

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 letter 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.

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 nature 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."

(20) In ***Dipti Prakash Banerjee*** versus ***Satvendra Nath Bose National Centre for Basic Sciences, Calcutta and others, (27)*** a two-Judges Bench of the Supreme Court referred to some of the decisions noted above including that of ***R.S. Gupta*** *versus* ***U.P. State Agro Industries Corporation Ltd.*** (supra) and held as under :—

"If findings were arrived at in inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as founded on the allegations and will be bad. But if the inquiry was not held, no finding were arrived at and the employer was not inclined to conduct an inquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want too inquiry into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

(21) In ***Sher Singh*** *versus* ***State of Haryana*** (supra), a Full Bench of this Court considered the question as to whether a Constable can be discharged from service under Rule 12.21 of the Rules at any time within 3 years of his enrolment in spite of the fact that there is a specific allegation which may even amount to misconduct against him. The Full Bench referred to the propositions laid down by the Supreme Court in ***Parshotam Lal Dhingra*** *versus* ***Union of India*** *(supra),* ***Jagdish Mitter*** *versus* ***Union of India*** (supra), ***Champaklal Chimanlal Shah*** *versus* ***Union of India*** (supra), ***A.G. Benjamin*** *versus*

(27) J.T. 1999 (1) SC 396

Union of India (supra) and ***State of U.P.*** versus ***Kaushal Kishore Shukla*** (supra) and culled out the following principles :—

> "(i) If a person has been employed on purely temporary basis and his services are terminated on account of his unsuitability or some alleged misconduct by a simple and innocuous order which carries no stigma/or penal consequences, the provisions of Article 311(2) are not attracted unless it is shown by some evidence that the authority actually intended to punish the employee.
>
> (ii) The employer is entitled to conduct a preliminary enquiry to determine the truth or falsehood of the complaint as also the suitability of the employee. Such an enquiry cannot by itself imply that the employer intended to punish the employee.
>
> (iii) In a case where allegations amounting to misconduct are made against a temporary employee, the employer has a two-fold choice. In can either choose to terminate the services of the employee in accordance with the terms of appointment and the rules governing the service or it can proceed to take punitive action. If it chooses to invoke its right under the contract of service and passes a simple order of termination/discharge, the provisions of Article 311 or the rules prescribing the procedure for imposition of a penalty are not attracted. However, if the employer feels that the employee deserves to be punished and proceeds to take punitive action, the prescribed procedure and the provisions of Article 311 of the Constitution of India have to be followed."

(22) In my opinion, the ratio of the decisions of the Supreme Court in ***State of U.P. and others*** *versus* ***Krishan Kumar Sharma*** (supra) and ***State of U.P.*** *versus* ***Prem Lata Mishra*** (supra), the first part of the propositions laid down in ***R.S. Gupta*** *versus* ***Union of India*** (supra) and principles No. (i) and (ii) laid down in ***Sher Singh*** *versus* ***State of Haryana*** (supra) are fully applicable to the case in hand. Therefore, it must be held that termination of the service of the respondent by way of discharge under Rule 12.21 of the Rules was

not stigmatic or punitive and the Courts below committed a serious illegality by declaring the same to be punitive merely because in the written statement, reference had been made to the respondent's absence from duty on two occasions.

(23) The absence of the respondent must have been taken into consideration by Senior Superintendent of Police, Amritsar for forming an opinion on the issue of suitability of the respondent to continue in service, but that by itself could not lead to an inference that it was punitive in nature.

(24) I may now deal with the judgments relied upon by Shri Mahajan. In ***State of Haryana*** *v.* ***Jagdish Chander*** (supra), the Supreme Court partly upheld the order of this Court vide which the termination of the services of the respondent was quashed by being treated as punitive. A reading of the order of discharge passed in that case was in the following words :—

> "A constable who is found unlikely to prove an efficient police officer may be discharged by the Superintendent of Police at any time within three years of enrolment. There shall be no appeal against an order of discharge under this rule."

(25) The High Court had treated the order to be stigmatic. The Supreme Court affirmed the view of the High Court and observed as under :—

> "It would thus be clear from the order of discharge that it is not an order of discharge simpliciter. On the other hand, the SP considered the record and found him to be a habitual absentee, negligent to his duty and undisciplined. The findings of habitual absence and indiscipline necessarily cast a stigma on his career and they would be an impediment for any future employment elsewhere. Under those circumstances, the principles of natural justice do require that he should be given an opportunity to explain the grounds on which the SP proposes to pass an order of discharge and then to consider the explanation submitted by the police officer. Then the SP is competent to pass

appropriate orders according to the rules. Since this part of the procedure had not been adopted, the order of discharge is vitiated by manifest error of law."

(26) In *Chander Prakash Sahi* v. *State of U.P. (supra),* the termination of the service of the appellant, who was holding the post of Constable on probation, was declared as punitive because it was founded on the report of preliminary enquiry which was conducted to find out the appellant's involvement in the incident of quarrel. The facts of that case were that the appellant was recruited as Constable on 1st October, 1985. After completion of training on 6th September, 1986, he was placed on probation for two years. He completed the period of probation on 5th September, 1988, but a year later, his services were terminated on 19th July, 1989 under Rule 3 of the U.P. Temporary Government Servants (Termination of Service) Rules, 1975. The U.P. Public Services Tribunal quashed the order of termination by recording the following observations :

"The preliminary inquiry File No. JA-2/89 relating to the petitioner and other Constables of the 34th Battalion, PAC, Varanasi from pp. 21/34 to 22/33 dated 26th June, 1989 shows that the inquiry was conducted by Shri Kailash Chaube, Assistant Commandant, 34th Battalion, PAC, Varanasi and in the preliminary inquiry report he concluded at pp. 21/34 to 22/37 that the petitioner along with others had indulged in a misconduct of hurling blows and used filthy language to the superior officers of the Department and he was found guilty along with others for the said misconduct and misbehaviour. Thereafter, on internal p.6 the impugned order of termination dated 19th July, 1989 was passed in respect of the petitioner and on the same day he was served the copy of the order."

(27) The High Court allowed the writ petition of the State and set aside the order of the Tribunal. Their Lordships of the Supreme Court referred to most of the decisions, referred to hereinabove, and held as under :—

"Applying these principles of the facts of the present case, it will be noticed that the appellant, who was recruited

as a Constable in the 34th Battalion, Pradeshik Armed Constabulary, U.P. had successfully completed his training and had also completed two years of probationary period without any blemish. Even after the completion of the period of probation under para 541 of the U.P. Police Regulations, he continued in service in that capacity. The incident in question, namely, the quarrel was between two other Constables in which the appellant, to begin with, was not involved. When the quarrel was joined by few more Constables on either side, then an inquiry was held to find out the involvement of the constables in that quarrel in which filthy language was also used. It was through this inquiry that the appellant's involvement was found established. The termination was founded on the report of the preliminary inquiry as the employer had not held the preliminary inquiry to find out whether the appellant was suitable for further retention in service or for confirmation as he had already completed the period of probation quite a few years ago but was held to find out his involvement. In this situation, particularly when it is admitted by the respondent that the performance of the appellant throughout was unblemished, the order was definitely punitive in character as it was founded on the allegations of misconduct."

(28) In *V.P. Ahuja* v. *State of Punjab (supra),* the Supreme Court considered the legality of order dated 2nd December, 1998,—*vide* which the services of the appellant were terminated. The same read as under :—

"Shri V.P. Ahuja S/o late Shri H.N. Ahuja was appointed on probation for 2 years as Chief Executive of the Coop. Spg. Mills Ltd.,—*vide* orders Endst. No. Spinfed/CCA/ 7844-45, dated 29th September, 1998 and posted at Bascospin. However, he failed in the performance of his duties administratively and technically. Therefore, as per clause 1 of the said appointment order, the services of Shri V.P. Ahuja are hereby terminated with immediate effect."

(29) Their Lordships referred to the judgments in *Dipti Prakash Banerjee's case (supra)* and held that even though the appellant was on probation, his services could not have been terminated by casting aspersion on his efficiency.

(30) In *Narpal Singh* v. *Union of India (supra),* their Lordships of the Supreme Court found that the order of termination was founded on the allegation of assault and, therefore, it was liable to be treated as punitive.

(31) In *Prithipal Singh* v. *State of Punjab (supra),* the Court noted that the appellant had been discharged from service after 9 years of employment. Their Lordships took notice of the averments contained in the counter-affidavit which revealed that the petitioner-appellant had not only absented from duty from time to time for which he was warned but had also disobeyed the order of transfer. The observations made in paragraph 7 of the judgment read as under :—

> "The aforesaid record plainly reveals recording of misconduct of the Appellant. It records, he has disobeyed the orders of his superiors. Once this is recorded in the service record, which is disclosed by the Respondent, it cannot be said there is no stigma attached to the order of discharge. Once there is stigma, the principle is well settled, an opportunity has to be given before passing any order. Even where an order of discharge looks innocuous, but on close scrutiny, by looking behind the curtain, and if any material exist of misconduct and which is the foundation of passing of the order of discharge, or such could be reasonably inferred, then it leaves to no room of doubt that any consequential order, event of discharge would be construed as stigmatic. Then opportunity has to be given. It is also not in dispute that no opportunity was given to the Respondent before passing the impugned order of discharge. On the facts of this case, we are deliberately not going into the wider question, whether any opportunity is necessary or not before passing an order under the aforesaid Rule, but suffice it to say that on

the facts of this case, as we have recorded above it was obligatory for the Respondent to have given an opportunity to the Appellant before passing the discharge order. Hence, the impugned order of discharge dated 22nd February, 1997 is unsustainable and is set aside."

(32) In *Major Singh* v. *State of Punjab and others (supra),* their Lordships of the Supreme Court reversed the order of the High Court and approved the view taken by the trial Court and the appellate Court that termination of services of the appellant by way of discharge under Rule 12.21 of the Rules was punitive. Some of the observations recorded in the judgment of the Supreme Court are as under :—

"6. If any order under Rule 12.21 has to be passed which can stand scrutiny of Court and can be said to be legal, valid and falling within the four corners of the said Rule without casting any aspersion or stigma on the person concerned, simplicitor mentioning that his work as constable is found not satisfactory, can suffice. But that, unfortunately, is not the language in which the impugned order was couched. It went beyond the four corners of Rule 12.21 and clearly stigmatised the appellant and tried to dismiss him from service for the alleged misconduct for which appropriate enquiry under Rule 16.24 against the appellant was required to be initiated. It is interesting to note that such an enquiry was initiated but was intercepted and was given a go-by for un-understandable reason. Consequently, even on morits the impugned order in second Appeal cannot be sustained."

(33) In my opinion, the decisions of ***Jagdish Chander's*** case (supra), ***Chander Prakash Sahi's*** case (supra), ***V.P. Ahuja's*** case (supra), ***Prithipal Singh's*** case (supra) and ***Major Singh's*** case (supra) turned on their own facts and the same cannot be relied upon for approving the view taken by the courts below.

(34) Hence, the appeal is allowed, Judgments and decrees passed by the courts below are set aside and the suit filed by the respondent is dismissed. The parties are left to bear their own costs.

R.N.R.