

(13) Section 47 of the Act relating to offences by Companies which expression according to the explanation added to that Section includes a partnership firm lays down that where an offence under the Act is committed by any Company, every person who at the time the offence was committed was incharge of, and was responsible to the Company for the conduct of, the business of the Company, as well as the Company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. In order to fasten liability on Smt. Phoola Devi, all that the prosecution has been able to bring on record is an admission made by Subhash Chander, Manager and that of Smt. Phoola Devi herself in her statement under Section 313 that she is a partner of the firm. There is no other material on record to show that she was incharge of or was responsible to the Company for the conduct of the business of the Company. The burden of proving these facts is obviously on the prosecution. For this reason, it is not possible to convict Smt. Phoola Devi.

(14) For the foregoing reasons, we partly allow the appeal, set aside the acquittal in so far as the firm and the Manager are concerned, we do not interfere in the acquittal of Smt. Phoola Devi. As the sample was taken more than 10 years back we do not want to award any substantive sentence of imprisonment to Subhash Chander, accused. Neither counsel was in a position to confirm that Subhash Chander continued to be in service of the firm or had left the same. He is thus a mere whipping boy. For these reasons, we impose a fine of Rs. 3,000 on the firm, accused No. 1 and a fine of Rs. 2,500 on Subhash Chander, accused No. 2. In default of payment of fine by Subhash Chander, he shall undergo six months R.I.

R.N.R.

Before Hon'ble N. C. Jain, J.

THE PUNJAB STATE ELECTRICITY BOARD, PATIALA,  
—Petitioner.

versus

SHRI HARI KISHAN,—Respondent.

Regular Second Appeal No. 1100 of 1979

February 14, 1992.

*Code of Civil Procedure (V of 1908)—Suit for declaration—Suit filed on ground that order of removal is by way of punishment—Whether employee is entitled to be heard—Held that opportunity*

*to be heard must be granted—Order terminating services set aside.*

*Held, that the ratio of law, which can be culled out is this that the order of dismissal innocuous in nature in the case of probationer can always be given a go-bye if the same is proved to be founded on the basis of misconduct. In the instant case, as has been seen above, the order passed at a previous stage was withdrawn and it was ordered that the plaintiff be charge-sheeted. It was not open to the Board thereafter particularly after obtaining the report of the Inquiry Officer to terminate the plaintiff's services in terms of the appointment letter. The order of termination in this case is clearly by way of punishment and has been rightly set aside by the first appellate Court.*

(Para 13)

B. S. Wasu, Advocate with J. S. Wasu, Advocate, for the Appellant.

S. K. Sharma, Advocate with Ms. Gurparkash Kaur Sidhu, Advocate, for the Respondent.

#### JUDGMENT

*Naresh Chander Jain, J. (Oral)*

(1) This appeal has been directed against the judgment and decree of the appellate court by which the suit of the plaintiff-respondent has been decreed and the judgment and the decree of the trial Court has been reversed. The fact giving rise to the filing of the appeal may, briefly, be noticed.

(2) The plaintiff-respondent filed a suit against the Punjab State Electricity Board for declaration that the order dated 22nd November, 1968 Exhibit P. 23 passed by the Superintending Engineer removing him from service after the expiry of one month was illegal, unconstitutional and not binding upon him. According to the averments made in the plaint, the plaintiff-respondent was appointed as Meter Reader in pursuance of order dated 7th November, 1959. The Superintending Engineer (Ludhiana Circle) served a notice upon him,—*vide* order dated 19th January, 1968 terminating his services. The plaintiff-respondent filed an appeal before the Chief Engineer (Operation) and other members of the Punjab State Electricity Board as a result of which the notice of removal was withdrawn. The services of the plaintiff-respondent having been again terminated on 29th December, 1968, the present suit was filed.

(3) The precise allegation made in the suit is that since the order of removal is by way of punishment, the plaintiff-respondent was entitled to be heard.

(4) The defendant-appellant contested the suit. The removal of the plaintiff-respondent from the service at an earlier stage was admitted. The impugned order was defended on the ground that the same was legal and constitutional and in accordance with the terms of appointment. From the pleadings of the parties, the following issues were framed :

- (1) Whether the order removing the plaintiff from service is illegal for the reasons stated in para No. 5 of the plaint ?  
OPP
- (2) Whether the plaintiff was afforded reasonable opportunity before removing him from service ? OPD
- (3) Whether the suit for declaration is not maintainable and the provisions of the constitution are not applicable to the case and the plaintiff is not legally authorised to a decree for declaration ? OPD
- (4) Relief.

Under issue No. 1, the trial Court held that the order removing the plaintiff from service was not illegal. Under Issue No. 2, it was held by the trial Court that since the services of the plaintiff-respondent was not terminated by way of punishment, there could be no question of affording him opportunity of being heard. Issue No. 3 regarding maintainability of declaratory suit, was decided in favour of the plaintiff-respondent. The suit of the plaintiff-respondent having been dismissed, an appeal was preferred by him before the first appellate court.

(5) The first appellate court while reversing the findings under Issue Nos. 1 and 2 held that the plaintiff-respondent was removed from service by way of punishment and, therefore, he was entitled to an opportunity of being heard and since no opportunity was granted, the suit was decreed. The Punjab State Electricity Board feeling aggrieved against the judgment and decree of the first appellate Court has come up in appeal.

(6) The Plaintiff-respondent has filed an application dated 4th February, 1992 before this Court stating therein that in pursuance of the decree of the appellate court dated 3rd November, 1978 he was reinstated on 13th February, 1980 and continued to work uptill 31st December, 1984 when he retired from service; that he was getting

pension from 1st January, 1985 in accordance with the order No. 176 of 1985 of the Chief Accounts Officer of the Punjab State Electricity Board, Patiala and that he has been paid his gratuity plus the benefits of 30 years' service. On the basis of the afore-mentioned factual position, it has been prayed in the application that the appeal has become infructuous and the same may be dismissed as such. Notice was issued in the application to the counsel for the appellant. At the very outset, it can be observed that the re-instatement of the plaintiff, his retirement from service, the factum of getting regular pension etc. are no grounds by themselves to dismiss the appeal. However, on the basis of the arguments advanced at the Bar which are to be dealt with in the later part of the judgment, no case for interference with the findings recorded by the first appellate court has been made out.

(7) On merits, the counsel for the appellant has argued that the impugned order of the plaintiff's removal from service is simpliciter in nature and, therefore, no stigma is attached to the delinquent employee. The precise argument of the counsel for the appellant is that the services of the plaintiff, who was on probation, could be terminated by a simple order of removal, and therefore, he was not entitled to the grant of any opportunity of being heard. In support of his argument, the learned counsel has referred to the following rulings *Deepak Bhandari v. D.A.V. College Managing Committee, New Delhi* and another (1) and the *State of U.P. v. Ram Chandra* (2).

(8) The learned counsel for the plaintiff while countering the arguments of the counsel for the Board has argued that a bare perusal of several documents produced on the record of the case goes to prove that the order of dismissal is by way of punishment. The attention of this Court was pointedly drawn to that part of the documentary evidence in which it was recommended that the plaintiff be charge-sheeted. With reference to the documentary evidence brought on the record of the case, it is argued that may be the order of dismissal is innocuous but the same has been issued by way of punishment in the light of the documentary evidence and, therefore, the plaintiff was entitled to be heard. The attention of this Court was also drawn to Regulation No. 11 framed by the Punjab State Electricity Board which envisages the grant of opportunity even to the probationer whose services are going to be terminated for any specific

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(1) 1991 (3) Recent Services Judgments 146.

(2) A.I.R. 1976 S.C. 2547.

fault or on account of the unsuitability for the service. In support of his arguments, the learned counsel referred to the following judicial rulings *Shamsher Singh v. State of Punjab and another* (3), *The State of Punjab v. Parkash Singh* (4), *Anoop Jaiswal v. Government of India and another* (5) and *Punjab Agro Industries Corporation v. Mandeep Singh* (6). Before appreciating the respective submissions of the counsel for the parties, it is necessary to have a look at the relevant Regulation. It has remained an undisputed fact before me that the Punjab State Electricity Board,—*vide* Regulation No. 11 adopted the Punjab Civil Services Rules for its employees which reads as under :

“Where is it proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of the unsatisfactory record or unfavourable reports implying the unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show-cause against it, before orders are passed by the authority competent to terminate the appointment.”

(9) After hearing the learned counsel for the parties and after going through the entire evidence, I am of the view that there is no error in the finding recorded by the appellate court to the effect that the order or removal Exhibit P. 23 dated 22nd November, 1968 though simpliciter in wording yet it is by way of punishment. Each and every document produced by the plaintiff on the record of the case is a pointer to one and only one conclusion that the plaintiff was removed by way of punishment. In the first instance this Court proposes to deal with the report Exhibit P. 29 of the Deputy Vigilance officer dated 20th October, 1967 which was given on the complaint of one Atma Singh against Harbans Lal Chhabbra and the plaintiff-respondent was indicted by recording the following findings :

“He never demanded Rs. 200 or any other illegal gratification from the complainant in the office directly or through somebody else. The complaint against him has been manouvered by Shri Hari Kishan, Meter Reader, who was

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(3) 1974 Service Law Weekly Reporter 643.

(4) 1975 Service Law Weekly Reporter 300.

(5) 1984 (1) All India Service Law Journal 428.

(6) 1991 (1) S.L.R. 795.

in the habit of getting false complaints made against the office employees, just to terrorise them and to create his own importance. He and Shri Subhash Chander, L.D.C. had seen the complainant and his nephew Shri Santokh Singh, coming out from the house of Shri Hari Kishan, Meter Reader on 4th August, 1967 at 9.00 A.M. When the Vigilance Inspector was at Bhatinda. The Complainant wanted that his M.C.G. should be waived in the light of the instruction issued by the Chief Engineer (Sales Section),—vide Memo. No. 19152/19589/SS/R-117-M dated 19th April, 1966. It could not be done so as that concession was applicable only to the border districts, which do not include Bhatinda.

Shri Hari Kishan, Meter Reader was contacted by the Vigilance Inspector. He admitted that he had asked Shri Atma Singh, to make a complaint against the U.D.C. because the said U.D.C. was not co-operating with the complainant”.....

Shri Hari Kishan, Meter Reader is responsible for instigating the complainant to make the false complaint against the U.D.C. If approved he may be shifted from Bhatinda to some far off place.”

In Exh. P. 29 the plaintiff was indicted but the copy of the report was never communicated to the plaintiff. It has also remained undisputed before me that the plaintiff's services were sought to be terminated by issuance of a letter dated 15th January, 1968 Exh. P. 28 in terms of paragraph 2 of the appointment letter and this letter was served upon the plaintiff but the same was later on withdrawn.—vide letter dated 15th February, 1968 Exh. P. 27 and instead thereof the Executive Engineer was directed by the Superintending Engineer in Exh. P. 27 itself that the plaintiff be charge-sheeted or suspended according to the gravity of the charges. Not only that the Superintending Engineer,—vide letter dated 13th March, 1968 Exh. P. 26 had informed the Administrative Member of the Punjab State Electricity Board that the Executive Engineer, Bathinda Division had been advised to prepare a charge-sheet according to the gravity of the offence and that the Executive Engineer,—vide his letter dated 27th July, 1968 Exh. P. 25 directed the Sub-Divisional Officer, Suburban Bhatinda to intimate the details of the complaint against the plaintiff about his work and conduct for preparing a statement of allegations to be submitted to the higher authorities followed by a demi-official reminder dated 27th September, 1968 Exh. P. 24 asking the

S.D.O. to send the statement of charges. The Chief Engineer (Construction) wrote demi-official letter dated 3rd October, 1968 Exh. P. 13 to the Superintending Engineer, Ludhiana Circle, for taking suitable action against the plaintiff for making false complaints as desired by the Board and again reminded the Superintending Engineer.—*vide* Exh. P. 12 while forwarding the copy of the inquiry report.

(10) In view of the above-mentioned documentary evidence, it cannot be said that the order Exh. P. 23 can be described to be simpliciter. The order may be innocuous in nature but certainly the dismissal of the plaintiff was by way of punishment. Once the plaintiff's services were terminated by an order dated 19th January, 1968 and the same was withdrawn and that too with the observation that the plaintiff be charge-sheeted, the subsequent order Exhibit P. 23 does not remain a simple order of termination in accordance with letter of appointment. If the plaintiff's services were to be terminated in pursuance of the order simpliciter in nature, then his services were terminated.—*vide* letter dated 19th January, 1968 and once the order Exh. P. 28 was withdrawn and the plaintiff was ordered to be charge-sheeted, the defendant cannot take shelter behind the order Exh. P. 23. If the services of the plaintiff were to be terminated by an order simpliciter in nature and in accordance with the terms of the appointment letter, the defendant could have insisted upon earlier dismissal and forgotten to take disciplinary action. Once the charge-sheet was in the offing, the Board cannot turn round and say that the plaintiff's services should be terminated by another order of the same nature.

(11) After taking into consideration the entire documentary evidence, an impression has been left upon this Court that the plaintiff's services were terminated on account of certain charges against him and the Board might have thought that it may not be possible for it to substantiate those charges. The Board might have been of the opinion that instead of going into lengthy procedure of terminating the services by way of punishment, they devised a simple way to terminate the service in accordance with appointment letter. The plaintiff was admittedly not served with the inquiry report nor any opportunity of being heard was afforded and, therefore, the order of termination has got to be held to be illegal.

(12) Once it is held that the order of dismissal is not simpliciter in nature and the same is by way of punishment, in the light of the evidence brought on the record of the case, the well settled principles of law come into play. It has been held as far back as in **the**

year 1974 in *Shamsher Singh's case* (supra) by the Hon'ble Supreme Court that the form of order is not decisive as to whether the order is by way of punishment and that even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provisions of Article 311. The order of termination before the apex Court was innocuous but the same was held to be by way of punishment. The apex court was dealing with the case of a probationer. The Hon'ble Supreme Court while dealing with the case of *Parkash Singh's case* (supra) following the dictum of law laid down in *Shamsher Singh's case* (supra) again reiterated that the form of order is not conclusive and the substance of the matter has to be looked into. The apex court again while setting aside the termination order of a probationer—like petitioner held that whether the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee. A Single Judge of this Court in *Mandeep Singh v. The Punjab & Agro Industries Corporation Ltd.* (Civil Writ Petition No. 7389 of 1988) decided on 28th July, 1989 set aside the order Annexure P. 1 dated 6th August, 1987 attached with the afore-mentioned writ petition which reads as under :

“THE PUNJAB AGRO INDUSTRIES CORPORATION LIMITED  
S.C.O. No. 315-16, SECTOR 35-B,  
CHANDIGARH.  
OFFICE ORDER

Shri Mandeep Singh who was appointed as Manager Grade III,—vide order No. PAIC/P&A/87/17184, dated 13th April, 1987 on probation for a period of one year is hereby discharged and relieved from the service of the Corporation with immediate effect, in terms of stipulation contained in his letter of appointment.

Chandigarh  
Dated 6th August, 1987

Sd/-  
Gokul Patnaik,  
Managing Director.”



The Division Bench of this Court in Letters Patent Appeal against the judgment of the Single Judge after referring to Annexure R. 5 and Annexure R. 6 wherein it was contained that the delinquent employee knew nothing held that the order which simpliciter in wording was in fact by way of punishment. The following observations of the Division Bench can be reproduced with advantage :—

“There is no quarrel with the proposition that if the work and conduct of a temporary employee or a probationer are not upto the mark, his service can be terminated. However, it has to be seen whether the termination is simpliciter or it is based on the allegation of misconduct for which no opportunity is given to the probationer. If the order is founded on allegations of misconduct, the order will certainly be by way of punishment. It would be interesting to note here that as a matter of fact on 13th April, 1987 (Annexure P. 3) an order was issued appointing the petitioner as Manager Grade-III with effect from 3rd October, 1986. In fact, the petitioner had been working as Manager Grade III, with effect from 3rd October, 1986 and nothing wrong had been found upto 13th April, 1987 otherwise, there was no idea of issuing an appointment letter with retrospective effect. This would lead to a conclusion that upto 13th April, 1987 there was nothing wrong with the work and conduct of the writ petitioner. However, in the reports Annexure R. 5 and R. 6, it is being said that as if the writ petitioner knew nothing. Obviously, the conclusion is that the order of termination was by way of punishment which was passed after about four months of the issuance of letter Annexure P. 3. We find no ground to differ with the findings of the learned single Judge on this point.”

(13) The ratio of law, on the basis of the perusal of the aforementioned rulings, which can be culled out is this that the order of dismissal innocuous in nature in the case of a probationer can always be given a go-bye if the same is proved to be founded on the basis of misconduct. In the instant case, as has been seen above, the order passed at a previous stage was withdrawn and it was ordered that the plaintiff be charge-sheeted. It was not open to the Board thereafter particularly after obtaining the report of the Inquiry Officer to terminate the plaintiff's services in terms of the appointment letter. The order of termination in this case is clearly by way of punishment and has been rightly set aside by the first appellate court. The mandate of Regulation No. 11 is also this that if the services of a probationer are to be terminated on account of his unsatisfactory record or unfavourable reports implying his unsuitable for the post, he has

to be apprised of the grounds of such proposal and granted an opportunity of being heard. The use of the word 'shall' denotes that the grant of opportunity is mandatory. This is only interpretation which can be put upon Regulation No. 11 and in my view no other interpretation is possible.

(14) Before parting with the judgment, it is necessary to deal with *Deepak Bhandari's case* (supra) which was cited by the learned counsel for the appellant. The perusal of the facts of *Deepak Bhandari's case* (supra) would make it clear that the ratio of law laid down therein has got the least application to the facts of the instant case. The services of Deepak Bhandari were terminated during the probation period on the basis of an order strictly in accordance with the terms of appointment. Nothing was stated in the order of termination whether his work and conduct was satisfactory or not. No inquiry was even initiated regarding the work and conduct of the delinquent employee. Simply because a plea was taken in the written statement by the Management that his work was not found satisfactory would not mean that the services of the delinquent employee could be terminated by way of punishment. In view of the factual position available in the decided case, it was held that the employer was entitled to judge the work and conduct of the employee during the period he remained in service but since the order was simpliciter in its form and there was nothing on the record of the case that the order was by way of punishment, the same was upheld by this Court. In view of the peculiar facts and circumstances available in *Deepak Bhandari's case* (supra), I am of the view that the ratio laid down therein is inapplicable to the facts of the instant case. On the other hand, on the facts as proved by the plaintiff, I am of the view that he was entitled to the grant of opportunity of being heard and, therefore, the judgment given by the appellate court is correct.

(15) For the reasons, recorded above, the appeal filed by the Punjab State Electricity Board is hereby dismissed with no order as to costs.

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