Supreme Court of India
Jagdish Mitter vs Union Of India on 20 September, 1963
Bench: P.B. Gajendragadkar, K. Subbarao, K.N. Wanchoo, J.C. Shah, R. Dayal

CASE NO.:
Appeal (civil) 718 of 1962

PETITIONER:
Jagdish Mitter

RESPONDENT:
Union of India

DATE OF JUDGMENT: 20/09/1963

BENCH:
P.B. GAJENDRAGADKAR & K. SUBBARAO & K.N. WANCHOO & J.C. SHAH & R. DAYAL

JUDGMENT:

JUDGMENT 1964 AIR (SC) 449 The Judgment was delivered by GAJENDRAGADKAR, J Per Gajendragadkar, JThe short question which arises in this appeal is whether the order passed by the Director of Postal Services on 28 October, 1949 terminating the services of the appellant amounts to his dismissal under S. 240(1) so as to attract the provisions of S.240(3) of the Government of India Act, 1935.

The appellant was appointed as a temporary second division clerk in the General Post Office, Lahore, for a period of six months, on 9 October, 1946. At the end of the initial period of six months, his appointment was continued from time to time until he was posted in the office of Postmaster-General at Ambala on 12 August, 1947. Whilst he was working in that post, the impugned order was passed by which his services were terminated. That led to the present suit filed by the appellant on 11 November, 1952 in which he claimed a declaration that the termination of his services was illegal on the ground that rule 126 of the Posts and Telegraphs Manual, Vol. II. General Regulations, had been contravened, and no enquiry had been held against him after furnishing him with a chargesheet in that behalf. It is from this suit that the present appeal arises.

The claim made by the appellant was disputed by the respondent, the Union of India, on several grounds. It was alleged that the appellant was a temporary servant and as no declaration had been made in his favour that he had acquired the status of quasi-permanent servant, it was urged that his services could be terminated on a month's notice in terms of his contract. In such a case, no enquiry was required to be held and not chargesheet had to be supplied to the appellant.

The respondent also averred that prior to the discharge of the appellant, a complaint had been received in July, 1949, from one Sham Lal which led to an enquiry in respect of the conduct of the appellant. Sham Lal had alleged that he had posted four reply - paid postcards to the Postmaster-General, Ambala, in connexion with a claim application for National and Defence Certificates originally registered in Pakistan; he however, received no reply to the said letters except a bare acknowledgement. On 7 July 1949 Sham Lal received a reply written on a portion of one of his

reply postcard; the contents showed that the said card was written by Vishwa Mitter, the brother of the appellant, to his mother. Vishwa Mitter had failed to score off the address of the original sender written on the postcard, and so, it was delivered to Sham Lal instead of the mother of Vishwa Mitter. In the course of investigation that followed, Vishwa Mitter admitted that he had written the said postcard to his mother using for that purpose the reply paid card sent by Sham Lal.The Sub-Judge at Ambala who tried the suit held that since the appellant was a temporary Government servant, his service could be terminated without holding any enquiry and that the provisions of S.240(3) of the Government of India Act, 1935, were, therefore inapplicable and so, he dismissed the appellant's suit. The appellant appealed against the said decree and his appeal was allowed by the learned District Judge at Ambala. The learned District Judge held that the order passed against the appellant was one of dismissal, and so, it attracted the provisions of S.240(3) of the Government of India Act, 1935. He found that the said provisions had not been complied with, and so, he held that the order of dismissal passed against the appellant was invalid.

This decision of the learned District Judge was challenged by the respondent by preferring an appeal before the Punjab High Court. Capoor, J., who heard this appeal upheld the pleas raised by the respondent and came to the conclusion that the order passed against the appellant was no more than a mere order of discharge, and so, it fell outside the purview of S. 240(3). In the result, the appeal preferred by the respondent was allowed and the appellant's suit was ordered to be dismissed. Against this decision, the appellant preferred a Letters Patent Appeal before a Division Bench of the said High Court, but the said Letters Patent Appeal appeal was dismissed in limine. The appellant then applied to the said High Court for a certificate of fitness, but since the said certificate was refused, he moved this Court for special leave, and it is with the special leave granted to him by this Court that he has brought the present appeal before us. On his behalf, Sri Ramamurthi has contended that the High Court was in error in holding that the impugned order passed against the appellant did not amount to dismissal within the meaning of Art. 311 of the Constitution, or S.240(3) of the Government of India Act, 1935. Since the provisions of S. 240(3) and those of Art. 311 are substantially similar in regard to the point of controversy between the parties in the present appeal, we propose to refer to Art. 311 in the course of our judgment.The true legal petition in regard to the scope and effect of the provisions of Art. 311 in respect of persons employed in civil capacities under the Union or a State on a temporary or probationary basis is now fairly well-established. It is, however, necessary to state the said legal position briefly before dealing with the merits of the dispute between the parties in the present appeal.

Having regard to the legislative history of the provisions contained in Art. 311, the words "dismissed,"" removed"and" reduced in rank" as used in Art. 311(1), have attained the significance of terms of art. As has been observed by Das, C.J. in Parshotam Lal Dhingra v. Union of India 1958 (1) LLJ 544 at 599] :

"both at the date of the commencement of the 1935 Act and of our Constitution the words 'dismissed' 'removed' and 'reduced in rank' as used in the service rules, were well-understood as signifying or denoting the three major punishments which could be inflicted on Government servants. The protection given by the rules to the Government servants against dismissal, removal or reduction in rank, which could not be enforced by action, was incorporated in Sub-sec. (1) and (2) of

S. 240 to give them a statutory protection by indicating a procedure which had to be followed before the punishments of dismissal, removal or reduction in rank could be imposed on them and which could be enforced in law. These protections have now been incorporated in Art. 311 of our Constitution."

It is thus clear that every order terminating the services of a public servant who is either a temporary servant, or a probationer, will not amount to dismissal or removal from service within the meaning of Art. 311. It is only when the termination of the public servant's services can be shown to have been ordered by way of punishment that it can be characterized either as dismissal or removal from service.It is also now settled that the protection of Art. 311 can be invoked not only by permanent public servants, but also by public servants who are employed as temporary servants or probationers, vide Parshotam Lal Dhingra case 1958 (1) LLJ 544 ] (vide supra) and so, there can be no difficulty in holding that if a temporary public servant or a probationer is served with an order by which his services are terminated, and the order unambiguously indicates that the said termination is the result of punishment sought to be imposed on him, he can legitimately invoke the protection of Art. 311 and challenge the validity of the said termination on the ground that the mandatory provisions of Art. 311(2) have not been complied with. In other words, a temporary public servant or a probationer cannot be dismissed or removed from service without affording him the protection guaranteed by Art. 311(2).

It is true that the tenure held by a temporary public servant or a probationer is of a precarious character. His services can be terminated by one month's notice without assigning any reason either under the terms of contract which expressly provide for such termination or under the relevant statutory rules governing temporary appointments or appointments of probationers. Such a temporary servant can also be dismissed in a punitive way; that means that the appropriate authority possesses two powers to terminate services of a temporary public servant; it can either discharge him purporting to exercise its power under the terms of contract or the relevant rule, and in that case, it would be a straightforward and direct case of discharge and nothing more; in such a case, Art. 311 will not apply. The authority can also act under its power to dismiss a temporary servant and make an order of dismissal in a straightforward way; in such a case, Art. 311 will apply.This simple position is sometimes complicated by the fact that even while exercising its power to terminate the services of a temporary servant under the contract or the relevant rule, the authority may in fairness enquire whether the temporary servant should be continued in service or not. It is obvious that the temporary servants or probationers are generally discharged, because they are not found to be competent or suitable for the post they hold. In other words, if a temporary servant or a probationer is found to be satisfactory in his work, efficient, and otherwise eligible, it is unlikely that his services would be terminated, and so, before discharging a temporary servant, the authority may have to examine the question about the suitability of the said servant to be continued and acting bona fide in that behalf, the authority may also give a chance to the servant to explain, if any complaints are made against him, or his competence or suitability is disputed on some grounds arising from the discharge of his work; but such an enquiry would be held only for the purpose of deciding whether the temporary servant should be continued or not. There is no element of punitive proceedings in such an enquiry; the idea in holding such an enquiry is not to punish the temporary servant but just to decide whether he deserves to be continued in service or not. If as a result of such

an enquiry, the authority comes to the conclusion that the temporary servant is not suitable to be continued, it may pass a simple order of discharge by virtue of the powers conferred on it by the contract or the relevant rule; in such a case, it would not be open to the temporary servant to invoke the protection of Art. 311 for the simple reason that the enquiry which ultimately led to his discharge was held only for the purpose of deciding whether the power under the contract or the relevant rule should be exercised and the temporary servant discharged.On the other hand, in some cases, the authority may choose to exercise its power to dismiss a temporary servant and that would necessitate a formal departmental enquiry in that behalf. If such a formal enquiry is held, and an order terminating the services of a temporary servant is passed as a result of the finding recorded in the said enquiry, prima facie the termination would amount to the dismissal of the temporary servant. It is in this connexion that it is necessary to remember cases in which the services of a temporary servant have been terminated directly as a result of the formal departmental enquiry, and cases in which such termination may not be the direct result of the enquiry; and this complication arises because it is now settled by decisions of this Court that the motive operating in the mind of the authority in terminating the services of a temporary servant does not alter the character of the termination and is not material in determining the said character-vide Parshotam Lal Dhingra 1958 (1) LLJ 544 ] (vide supra). Take a case where the authority initiates a formal departmental enquiry against a temporary servant, but whilst the enquiry is pending, it takes the view that it may not be necessary or expedient to terminate the services of the temporary servant by issuing an order of dismissal against him. In order to avoid imposing any stigma which an order of dismissal necessarily implies, the enquiry is stopped and an order of discharge simpliciter is served on the servant. On the authority of the decision of this Court in the case of Parshotam Lal Dhingra 1958 (1) LLJ 544 ] (vide supra) it must be held that the termination of services of the temporary servant which in form and in substance is no more than his discharge effected under the terms of contract or the relevant rule, cannot, in law, be regarded as his dismissal, because the appointing authority was actuated by the motive that the said servant did not deserve to be continued for some alleged misconduct. That is why in dealing with temporary servants against whom formal departmental enquiries may have been commenced but were not pursued to the end, the principle that the motive operating in the mind of the authority is immaterial, has to be borne in mind.But since considerations of motive operating in the mind of the authority have to be eliminated in determining the character of the termination of services of a temporary servant, it must be emphasized that the form in which the order terminating his services is expressed will not be decisive. If a formal departmental enquiry has been held in which findings have been recorded against the temporary servant and, as a result of the said findings, his services are terminated, the fact that the order by which his services are terminated, ostensibly purports, to be a mere order of discharge, would not disguise the fact that in substance and in law the discharge in question amounts to the dismissal of the temporary servant. That is why the form of the order is inconclusive; it is the substance of the matter which determines the character of the termination of services. In dealing with this aspect of the matter, we must bear in mind that the real character of the termination of services must be determined by reference to the material facts that existed prior to the order. Take a case where a temporary servant attacks the validity of his discharge on the ground of mala fides on the part of the authority. If in resisting the plea of mala fides the authority refers to certain facts justifying the order of discharge and these facts relate to the misconduct, negligence or inefficiency of the said servant, it cannot logically be said that in view of the plea thus made by the

authority long after the order of discharge, it should be held that the order of discharge was the result of the consideration set out in the said plea. What the Court will have to examine in each case would be, having regard to the material facts existing up to the time of discharge, is the order of discharge in substance one of dismissal ? If the answer is that notwithstanding the form which the order took, the appointing authority, in substance, really dismissed the temporary public servant, Art. 311 would be attracted.It would thus be noticed that the problem raised by complaints made by temporary public servants who have been discharged, presents several facts, and in dealing with one fact or the other presented to the Court by the special facts in each case, emphasis has naturally shifted. But the main principles, which have been accepted by this Court and applied in dealing with cases of temporary servants who have been discharged, are no longer in doubt. It would be convenient to illustrate this position by referring to some recent decisions of this Court on this point.

In State of Bihar v. Gopi Kishore Prasad 1960 (1) LLJ 577 ] this Court was dealing with the case of a Sub-Deputy Collector whose services were terminated by an order which set out elaborately the grounds on which the discharge in question was based. Upholding the probationer's plea that the order of discharge was, in substance, one of dismissal to which Art. 311(2) applied, this Court observed that he had been 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. It is significant that the order of discharge, in terms, referred to considerations which showed why the Government treated the probationer as corrupt and, therefore, unsuitable for the post he held on probation. In other words, on the face of the order, a stigma was attached to the probationer who was discharged. That is why this Court upheld the view taken by the Patna High Court that Art. 311(2) was applicable, and since, its mandatory provisions had not been complied with, the order was invalid. In this connexion, it is necessary to point out that the impugned order was preceded by an enquiry which had been held against the probationer and notice was served on him at the said enquiry calling upon him to show cause why his services should not be terminated forthwith.In dealing with this question, Sinha, C.J., who spoke for the Court summarized the effect of the decision of this Court in Parshotam Lal Dhingra case 1958 (1) LLJ 544 ] (vide supra) by formulating five propositions. Propositions 2 and 3 are relevant for our present purpose. They read as under :

"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."

It would be noticed that these propositions were laid down in a case where the order of discharge on its face attributed stigma to the probationer whose services were discharged and it was preceded by an enquiry held with a view to decide whether the said probationer's services should not be terminated forthwith; and so, with respect, in appreciating the effect of proposition 3 as enunciated

in the judgment, these material facts must be borne in mind. We do not think that the Court intended to lay down a broad and unqualified proposition that wherever any kind of enquiry is held by the authority before terminating the services of a probationer, the subsequent termination of such a probationer's services in whatever form it is couched, must always be deemed to amount to his dismissal. As we have already indicated, almost in every case where the question of continuing the probationer or a temporary servant falls to be decided by the authority, the authority has necessarily to inquire whether the said probationer or temporary servant deserves to be continued and that may sometimes lead to an enquiry. In fact, it would be an act of fairness on the part of the authority to make such an enquiry and give a chance to the servant concerned to explain his conduct before the authority reaches a conclusion in the matter. Such an enquiry is actuated solely by the desire to decide the simple question as to whether the temporary servant or the probationer should be continued or not, and is undertaken for that purpose alone without any desire to attach any stigma to him. An enquiry of this character must be distinguished from the formal departmental enquiry where charges are served on the servant and which is undertaken for the purpose of punishing him; otherwise it would lead to this anomalous result that in the case of a temporary servant or a probationer, the authority must discharge him without inquiring into his alleged inefficiency or unsuitability but if the authority chooses to act fairly and makes some kind of enquiry and gives an opportunity to the servant concerned to explain his alleged deficiency, the discharge becomes dismissal. We have no doubt that in laying down third proposition, this Court did not refer to such informal enquiries and did not intend to take in cases of simple and straightforward discharge of temporary servants which follow such informal enquiries.In State of Orissa v. Ram Narayan Das 1961 (1) LLJ 552 ] this Court was dealing with a case of a sub-inspector on probation in the Orissa Police Force, who had been discharged. His case that the discharge amounted to dismissal had been upheld by the Orissa High Court, but was rejected by this Court in appeal, because this Court came to the conclusion that the impugned order of discharge could not properly be held to be an order of dismissal. It is true that the impugned order of discharge did refer to the adverse comments made against the probationer's conduct and did say that it was, therefore, no good retaining him further in service and that, prima facie, would amount to attaching a stigma to the probationer who was discharged; nevertheless, the order was construed by this Court to be an order of discharge simpliciter and no more, because rule 55(b) of the Civil Services (Classification, Control and Appeal) Rules required that before the services of a probationer were terminated, an enquiry had to be held about his competence after giving him an opportunity to show cause against the grounds alleged against him; and it was because such an enquiry had to be held that the result of the enquiry was communicated to the probationer when he was discharged. In other words, the statements in the order of discharge on which the probationer had relied for the purpose of showing that the said order amounted to dismissal, had to be made in the order as a result of the requirements of rule 55(b), and so, this Court came to the conclusion that merely on the strength of the said statements, the impugned order could not be characterized as an order of dismissal. In dealing with this question, this Court observed that the enquiry against the respondent (probationer) was for ascertaining whether he was fit to be confirmed and so, "an order discharging a probationer following upon an enquiry to ascertain whether he should be confirmed."

could not, in law, be treated as an order of dismissal. Thus, this decision illustrates the importance of the character of the enquiry held against a temporary servant which may ultimately lead to the

termination of his services. It also emphasizes that if the probationer's contention had been upheld, it would virtually have meant that every order of discharge passed against a probationer after complying with the requirements of rule 55 (b) would have to be treated as an order of dismissal and that obviously cannot be right.

The third decision to which we ought to refer is the decision of this Court in Sukhbans Singh (S.) v. State of Punjab [ 1963 (1) LLJ 671 ]. This case concerned a tahsildar who was recruited in the year 1936 and appointed as an extra Assistant Commissioner on probation in 1945. In 1952, he was reverted to the post of tahsildar by an order duly served on him. This order was followed by a warning served on him on 18 September, 1953, and in the warning in was clearly stated that the officer was guilty of misconduct in several respects. It appears that the officer challenged the validity of the order reverting him to the post of a tahsildar on the ground that it amounted to punishment, and he also alleged that it was the result of mala fides. This Court considered the relevant material adduced in the proceedings which showed that the record of the officer was extremely satisfactory and that the order reverting him showed that the Government was acting mala fide. Thus, the decision in this case was based mainly, if not solely on the ground that the reversion of the officer was mala fide. It is true that in the course of the judgment, this Court has observed that having regard to the sequence of events which led to the reversion followed by the warning administered to the officer considered in the light of his outstanding record, the reversion could also be held to be a punishment; but the officer's plea which proved effective was the plea of mala fides against the Government.The last case which was cited before us on this point is the decision of this Court in Madan Gopal v. State of Punjab and others 1964 (1) LLJ 68 ]. Madan Gopal was appointed an Inspector of Consolidation in 1953. This appointment was on temporary basis and terminable with one month's notice. It appears that in 1955, Madan Gopal was served with a chargesheet alleging that he had received Rs. 150 as illegal gratification from one Darbara Singh and had demanded Rs. 30 as illegal gratification from one Ude Singh. After the officer submitted his explanation, an enquiry was conducted and the enquiry officer made his report in which a finding was made against the officer in regard to the charge that he had received Rs. 150 as illegal gratification from Darbara Singh. This report was submitted on 22 February, 1955. The record of the said case shows that the Settlement Officer who apparently held the departmental enquiry against Madan Gopal had found that he was guilty of the charges and had recommended that he should be removed from service immediately. Soon thereafter, on 17 March, 1955, an order was passed terminating the officer's services forthwith and informing him that in lieu of notice he would get one month's pay as required by rules. It is significant that though the order in form purported to be one of discharge, the Deputy Commissioner who issued the said order in terms indicated that he agreed with the enquiry officer's finding that Madan Gopal had accepted bribes. In that connexion, this Court emphasized the fact that the enquiry made by the Settlement Officer was made with the object of deciding whether disciplinary action should be taken against Madan Gopal for his alleged misconduct, and it also observed that as a result of the said enquiry, and in consequence of the finding made at the said enquiry, the order of discharge was passed. Thus, notwithstanding the form which the order took, it was a case of dismissal in substance. That is why this Court set aside the order as being illegal inasmuch as it had contravened Art. 311(2). We ought to add that in his petition Madan Gopal had alleged that no reasonable opportunity was given to him to show cause against the order of dismissal as required by Art. 311; and in view of this Court's decision that the discharge of Madan Gopal was in

fact and in substance one of dismissal, the plea made by him under Art. 311(2) succeeded. This case illustrate the proposition that in dealing with the complaints made by public servants against their discharge from public service, what matters is not the form of the order by which their services are terminated but the substance of it. It would thus be noticed that the four cases which we have considered by way of illustration dealt with different aspects of the problem pertaining to temporary servants who are discharged or reverted and naturally, on each occasion, observations were made in relation to the particular aspect with which the Court was concerned. We are satisfied that the principles laid down in all these decisions are in no sense inconsistent.Let us now revert to the facts of the present case. We have already stated that before the service of the appellant were terminated, some enquiry was held on the complaint of one Sham Lal and at this enquiry it transpired that Vishwa Mitter, the brother of the appellant, had used a reply-paid postcard sent by Sham Lal without scoring the address of Sham Lal written on it by him. In fact, it appears that Vishwa Mitter admitted that he had illegally used the said card. But we do not know when this enquiry was held, how it commenced and what was the final order passed as a result of it. Unfortunately, the paper book filed by the appellant who has been allowed to appeal as a pauper does not include the relevant papers and so, it would not be possible to hold that the enquiry in question was held with a view to take a disciplinary action against the appellant, or that the order of discharge which was ultimately passed against him flowed from the finding made at the said enquiry. It is quite possible that even if the respondent intended to hold a formal enquiry with a view to take disciplinary action against the appellant, it may have thought that a preliminary investigation in that behalf may first be conducted and then a decision may be taken as to whether a formal enquiry should be held or not. If that was the scope of the enquiry which was apparently held in this case, the appellant cannot rely upon the said enquiry in support of his plea that his discharge amounts to dismissal.

However, the appellant's contention that the order of discharge passed against him on the face of it shows that it is not discharge by dismissal, cannot be rejected. We have already observed that Art. 311 applies to temporary servants or probationers, so that if it is shown that instead of terminating their services by one month's notice under the terms of the contract or the relevant rules, the authority proceeds to dismiss them, it is incumbent on the authority to afford to the said temporary servants or probationers the protection guaranteed by Art. 311(2). The appellant's contention is that in the present case the order itself shows that it is not a discharge but a dismissal, and that naturally involves the question as to the construction of the order. The order reads thus :

"Jagdish Mitter, a temporary second division clerk of this office, having been found undesirable to be retained in Government service, is hereby served with a month's notice of discharge with effect from 1 November 1949."

No doubt the order purports to be one of discharge and as such, can be referred to the power of the authority to terminate the temporary appointment with one month's notice. But it seems to us that when the order refers to the fact that the appellant was found undesirable to be retained in Government service, it expressly casts a stigma on the appellant and in that sense, must be held to be an order of dismissal and not a mere order of discharge. The learned Additional Solicitor-General attempted to argue that what the order really meant was that Government did not think it desirable or necessary to continue the appellant in its employment. He fairly conceded that the words used in

the order were somewhat unfortunate, but he urged that the order should be liberally construed and should be held to have been passed by the authority by virtue of its power to terminate the services of the appellant on one month's notice. We are not prepared to accept this argument. It is obvious that to say that it is undesirable to continue a temporary servant in very much different from saying that it is unnecessary to continue him. In the first case, a stigma attaches to the servant, while in the second case, termination of service is due to the consideration that a temporary servant need not be continued, and in that sense, no stigma attaches to him. It seems that anyone who reads the order in a reasonable way, would naturally conclude that the appellant was found to be undesirable, and that must necessarily import an element of punishment which is the basis of the order and is its integral part. When an authority wants to terminate the services of a temporary servant, it can pass a simple order of discharge without casting any aspersion against the temporary servant or attaching any stigma to his character. As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it would be idle to suggest that the order is a simple order of discharge. The test in such cases must be : Does the order cast aspersion or attach stigma to the officer when it purports to discharge him ? If the answer to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance, to amount to dismissal. That being so, we are satisfied that the High Court was in error in coming to the conclusion that the appellant had not been dismissed, but had been merely discharged. It is conceded that if the impugned order is construed as one of dismissal the appellant has been denied the protection guaranteed to temporary servants under S.240(3) of the Government of India Act, 1935 or Art. 311(2) of the Constitution, and so, the order cannot be sustained.In the result, the appeal is allowed and the decree passed by the lower appellate Court is restored with costs throughout. The appellant will pay the court-fees which he would have had to pay if he had not been allowed to appeal as a pauper.

The learned counsel for the appellant is entitled to his fees.