PETITIONER:
STATE OF U.P & ANR.

Vs.

RESPONDENT:
RAM KRISHNA & ANR.

DATE OF JUDGMENT: 30/08/1999

BENCH:
G.T.Nanavati S.N. Phukan

JUDGMENT:

PHUKAN,J.

Delay condoned. Leave granted. Two appeals have been filed against the judgment and order dated 21.05.97of the High Court of Allahabad in Writ Petition ( c ) No.7150/93 as also against the order dated 27.02.98 in CMA No. 81970/97 wherein the High Court upheld the judgment and order dated 24.11.92 passed by the U.P. Public Service Tribunal, Lucknow. A review petition filed by the present appellants was also dismissed by the High Court vide order dated 27.2.98. Respondent No.1 Ram Krishna was appointed as Nalkoop Chalak w.e.f.15.5.77.As he was found absent from his duty without obtaining leave a notice dated 26.7.79 was given to him and then by an order dated 6.8.79 his services were terminated with effect from 26.7.79. His services were terminated by order dated 6.8.79 w.e.f. 26.7.79. Respondent filed a representation against the above order before the Authority and on an assurance given by the respondent that he would not commit any mistake in future he was given a fresh appointment on 1.9.79 for three months and again on 18.12.79 for three months. As the respondent did not improve his work and again absented himself from duty without any application, his services were terminated by order dated 29.2.80. He, therefore, approached the Tribunal and challenged both the orders of termination of his services. It was contended by the appellants before the tribunal that the appointment of the respondent was purely on temporary basis and his services were liable to be terminated at any time without notice. It was also contended before the tribunal that

the impugned order of termination did not cast any stigma and his services were not terminated by way of punishment but in accordance with the terms and conditions of the appointment. The tribunal took the view that the termination order dated 6.8.79 was given back effect from 26.7.79 i.e. it was passed with retrospective effect, therefore, the order was bad as it was not permissible in law. On this count the above termination order was set aside. The Tribunal, however, did not grant the relief that he continued in service after 6.8.79. Regarding the second termination order dated 29.2.80 the tribunal was of the view that it was not an order of termination simpliciter but it was sitgmatic as it was passed on the ground that the respondent was an irresponsible employee and he was

unauthorisedly absent. As no inquiry was held before passing the order, the second order of termination was held to be bad in law by the tribunal and accordingly the tribunal allowed the petition filed by the respondent and both the termination orders dated 6.8.79 and 29.2.80 were quashed. The High Court was of the view that the appointment of respondent w.e.f. 01.12.79 on the post of Tube Well Operator was on a regular establishment. The High Court also recorded that respondent according to the appellants did not make any improvement in his performance and being irresponsible, due to absence in work, his services were terminated. On these facts the High Court relying on the decision of this Court in D.K.Yadav Vs. J.M.A. Industries 1993 (3) J.T. 617 held that absence without leave is a misconduct and, therefore, as no opportunity was given to the respondent the termination was bad in law and accordingly the dismissed. writ petition filed by the present appellants was We have heard Mr. A.K.Goel, Learned Addl. Advocate General of U.P. and Mr. R.B. Mehrotra, learned senior counsel for the parties. The learned counsel for the respondent has drawn our attention to the letter dated 2.5.77 and has urged that the respondent was appointed on regular basis after being selected by the Selection Committee for the post of Tube Well Operator, therefore, it was regular appointment and not temporary as contended by the appellants. On reading the same letter we find that the respondent was selected as Training Tube Well Operator and condition No.10 of the said letter clearly indicates that services of the respondent could be terminated at any time without notice. Therefore, the contention of the learned counsel that respondent was appointed on regular basis as Tube Well Operator is not sustainable. From the record we find that the second appointment dated 18.12.79 is an office order issued by the Executive Engineer, Civil Division , Allahabad appointing respondent as Tube Well Operator purely on temporary basis with the condition that his services could be terminated without any prior intimation. A copy of the letter was sent to the Assistant Engineer asking him to submit a progress report of working capacity of the respondent to enable the Executive Engineer to take decision regarding future course of action. In view of the above expressed condition directing the Assistant Engineer to report regarding performance of the work of the respondent, we are of the opinion that it was not a regular appointment on a clear vacancy, but it was a temporary appointment for a period of three months and was made conditional upon his showing progress during that period. This appointment was to take effect from 1.9.79 as respondent was working from that date as Tube Well Operator. In the second order of termination dated 29.2.80 it was recorded that having made no improvement in work as being irresponsible the services of the respondent were not needed in the department and , therefore, terminated with immediate effect. But as stated earlier, the Tribunal had not granted the relief that he continued in service even after 6.8.79. The respondent had accepted his fresh appointment and, therefore, had to be treated as a fresh appointee. The Tribunal had also proceeded on that basis. Therefore, the nature of his earlier appointment and validity of the termination order need not be considered any further. Now the question is whether the services of the respondent could be terminated as he did not make any improvement in work and further he was found absent from work? From the appointment letter we find that the second appointment of the respondent was for a

period of 3 months and this is also the finding of the High Court. The High Court relied upon a decision in D.K.Yadav(Supra). That was a case of termination of services on the basis of standing orders in an industrial establishment. Therefore, in our opinion the ratio of that case is not applicable to the case of the respondent. Our attention has been drawn to the Five Judges-Bench decision of this Court in Jagdish Mitter Vs. The Union of India AIR 1964, 449. The Bench reiterate the settled position of law that protection of Article 311 can be invoked not only by permanent public servants, but also by public servants who are employed as temporary servants, or probationers and so, if 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 upon him, he can invoke the protection of Article 311 claiming that the mandatory provisions of Article 311(2) have not been complied with. Regarding powers of the appropriate authority to terminate services of a temporary public servant it was held that 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 and, therefore, Article 311 do not get effected. The Authority can also act under its power to dismiss a temporary servant and make an order of dismissal and in such an event Article 311 will apply and it would necessitate a formal departmental inquiry. In the opinion of the Bench while discharging a temporary government servant on probation sometime inquiry may have to be made only to find out whether the temporary servant on probation should be continued in service or not, and in such an event such government servant will not be entitled to the protection of Article 311 as the inquiry was done only to find out the suitability the of person and there was no element of punitive proceeding. The learned counsel for the appellants has drawn our attention in State of Uttar Pradesh and Anr. Versus Kaushal Kishore Shukla 1991 (1) SCC 691. This Court inter alia held that a temporary government servant has no right to hold the post and where the competent authority is satisfied that the work and conduct of a temporary servant are 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. It is further held that if the services of a temporary government servant is terminated in accordance with the terms and conditions of service it will not visit him with any evil consequences. If on perusal of the character roll entries or on the basis of preliminary inquiry on the allegations made against an employee, the competent authority is satisfied that the employee is not suitable for the service whereupon the services of the temporary employee are terminated, no exception can be taken to such an order of termination. If however, the competent authority decides to take punitive action it may hold a formal enquiry by framing charge and giving opportunity to the government servant in accordance with article 311(2) which is applicable to temporary government servant. The learned counsel for the respondent has drawn our attention to the case Uptroln India Ltd. Vs. Shammi Bhan and another, 1978 SCC 538. It was a case of unauthorised absence from duty and that too in case of an industrial establishment. More

over the services of the employee were duly confirmed. Under the above facts this ratio is not applicable to the case in hand. As we have already stated earlier, by the second appointment letter, respondent was appointed only for a period of three months purely on temporary basis subject to termination without notice, therefore, we come to the conclusion that the respondent was not in regular government service. Moreover, his position was like that of a probationer. As during the period of service of the respondent the authority found that the services of the respondent were not satisfactory and accordingly terminated, it cannot be said that the termination order was bad in law. This fact is sufficient for us to hold that the impugned order was an order of termination simpliciter of a temporary government servant namely the respondent, , therefore, the provisions of Article 311 would not b e attracted. ' Accordingly, the present appeals are allowed and impugned orders of the High Court as well as of the Tribunal are set aside. costs. No order as to