# Ishveralal J. Naik Vs S.C. Arya, Principal, Govt. Arts and Science College and Others

**Court:** Bombay High Court (Goa Bench)

**Date of Decision:** Aug. 8, 1983

**Acts Referred:** Central Civil Services (Temporary Service) Rules, 1965 â€" Rule 5(1)
Constitution of India, 1950 â€" Article 14, 16, 226, 311(2), 311(3)

**Citation:** (1984) 1 BomCR 122

**Hon'ble Judges:** G.F. Couto, J; A.A. Ginwala, J

**Bench:** Division Bench

**Advocate:** Party in person, for the Appellant; J. Dias, Govt. Pleader, for the Respondent

**Final Decision:** Allowed

## Judgement

A.A. Ginwala, J.
The petitioner who at the relevant time was serving as Lecturer in Gujarati in the Government College of Arts and

Science at Daman (""the College"" for brief) has by this writ petition involved the extraordinary jurisdiction of this Court under Articles 226 and 227

of the Constitution, Inter alia to challenge the order dated 5-6-1976 under which his services are terminated in pursuance of the proviso to sub-rule

(1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965 (""Temporary Service Rules"" for short).

2. The facts leading to this petition stated briefly are that some time in January 1966 the Collector of Daman issued a notification inviting

applications for the posts of Professors and Lecturers in various subjects including the posts of Lecturers in Hindi, for the College. It was stated in

this notification that ""the appointments are temporary for the present, but likely to be made permanent"". The petitioner applied for the post of

Lecturer in Hindi in pursuance of this notification and he was appointed. He joined the post on 12-5-1966.

3. On 23-9-1967 the Union Public Service Commission advertised ten posts of Lecturers in various subjects including Hindi and Gujarati for the

said College. In this advertisement it was stated that the posts were temporary ""but likely to continue indefinitely and be made permanent

eventually"". Though the petitioner was already serving as Lecturer in Hindi, he applied for the posts of Lecturer in Hindi and Lecturer in Gujarati in

response of this advertisement. The Union Public Service Commission selected him for the post of Lecturer in Gujarati and recommended his name

to the Government of Goa, Daman and Diu (hereinafter referred to as ""the fourth respondent""). On 1-4-1968 the fourth respondent by its

memorandum offered the said temporary post of Lecturer in Gujarati to the petitioner on certain terms specified in para 2 therein, which are as

follows:

(i) The post in temporary but likely to be made permanent. In the event of its becoming permanent his/her claim for ""Permanent Absorption"" will be

considered in accordance with the rules of force.

(ii) The appointment may be terminated at any time by a month''s notice given by either side viz., the appointee or the appointing authority, without

assigning any reason. The appointing authority, however, reserves the right of terminating the service of the appointee forthwith or before the

expiration of the stipulated period of notice by making payment to him/her of a sum equivalent to the pay and allowances for the period of notice or

the unexpired portion thereof.

(iii) The appointment carries with if the liability to serve in any part of Goa, Daman and Diu.

(iv) ''Other'' conditions of service will be governed by the relevant rules and order is in force from time to time.

By this memorandum, the petitioner was asked to communicate his acceptance of the offer on the above terms by 15-4-1968. In this

memorandum nothing was stated as regards the probation or the period thereof. The petitioner having accepted the offer the order of appointment

was issued on 10-7-1968. This order stated that the petitioner was temporarily appointed as Lecturer in Gujarati in the said College and that the

appointment was subject to the conditions specified in the memorandum dated 1-4-1968 and ""the rules and regulations laid down by the

Government from time to time"". In this order also nothing was stated as regards the probation. On 18-10-1966 the fourth respondent issued three

corrigendum in respect of the appointment of the incumbents on the posts of Lecturer in Biology, Political Science and Mathematics in the said

College stating that their appointments were on probation for a period of two years. No such corrigendum was however issued in respect of the

appointment of the petitioner.

4. Pursuant to the said appointment the petitioner started serving as Lecturer in Gujarati in the said College. It seems that pursuant to his being

selected as Lecturer in Gujarati the fourth respondent on 2-4-1968 gave a notice to the petitioner terminating his appointment as Lecturer in Hindi

but subsequently the order under which this notice was cancelled by the fourth respondent on 10-8-1971 and he was given the benefit of continuity

of service.

5. On 25-3-1971 the fourth respondent issued a certificate in respect of seven Lecturers in the said College, who appear to have been appointed

at or about the time when the petitioner was appointed at or about the time when the petitioner was appointed to the effect that they had

satisfactorily completed the period of probation for two years on the dates mentioned against their names. The petitioner was not one of these

Lecturers. The petitioner, therefore, made several representations to the authorities concerned between 19-4-1974 and 17-5-1976 requesting

them to issue a similar certificate with regard to him. However, there was no response from the authorities to these presentations.

6. In the meanwhile the Government of India (hereinafter referred to as ""the fifth respondent"") under its letter dated 18-7-1974 addressed to the

fourth respondent converted ten posts of Lecturers in the said College into permanent posts. These ten posts of Lecturers included the post of

Lecturer in Gujarati held by the petitioners.

7. On 5-6-1976 an order came to be passed under which the service of the petitioner was purported to be terminated in pursuance of the proviso

to sub-rule (1) of Rule 5 of the Temporary Service Rules. This order is in the following terms.

ORDER

In pursuance of the proviso to sub-rule (1) to Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965, I hereby terminate forthwith

the service of Shri Ishverlal J. Naik appointed temporarily as Lecturer in Gujarati in the Government Arts and Science College, Daman vide Order

No. DE/EST/A/66/XII dated 10-7-68 and direct that he shall be paid a sum equivalent to the amount of pay and allowances for a period of one

month (in lieu of the period of notice) calculated at the same rate at which he was drawing them immediately before the date on which this order is

served on or, as the case may be, tendered to him.

By order and in the name of the Administrator of Goa, Daman and Diu.

Sd/- S.S. Sukhtankar

Under Secretary (Revenue)

Admittedly the petitioner was not paid the sum specified in the said order simultaneously with the service thereof on him. This amount was paid to

him on 16-9-1976.

8. Admittedly no specific order confirming the petitioner in the post he was holding had been issued till the termination of his service under the

above said order. On 8-7-1976 i.e. after the service of the petitioner was terminated, the fourth respondent by its order of even date confirmed

eight Lecturers working in the said College on the recommendation of the Departmental Promotion Committee.

9. It is in this background that the petitioner filed the present petition on 18-10-1976 in the Court of Judicial Commissioner, Goa, Daman and Diu.

In the petition as filed then, the petitioner sought a writ in the nature of mandamus directing the respondents-(i) to add his name in the certificate

dated 25-3-1971 (ii) and his name in the confirmation order dated 8-7-1976 (iii) to treat him as a confirmed Lecturer in Gujarati in the said

College, (iv) to forbear from giving effect to the order dated 5-7-1976 (iv) to forbear from giving effect to the order dated 5-6-1976, and (v) to

pay him all pay, allowances, etc. to which he is entitled as a confirmed Lecturer with effect from 11-6-1976 with interest at 12% per annum.

Besides the fourth and fifth respondents, the Principal of the said College, the Under Secretary and the Development Commissioner cum

Secretary, Education Department of the fourth respondent have been impleaded as the first, second and third respondents respectively. One of the

ground of challenge is that the order of termination of his service had been made because of some animus and ill-will which the first respondent

bore against the petitioner and that is why he has been impleaded in the petition. In the petition as filed originally the petitioners based his challenge

on several grounds. Later on he amended the petition introducing dated 5-6-1976 and elaborating those which he had already taken. Though

appearance was put on behalf of all the respondents, a return has been filed only by the first respondent in reply to the petition as originally filed

and as amended. The petitioner has filed a lengthy rejoinder. Suffice it to say at this stage that inspite of specific averments being made which

required reply from the fourth respondent, no return has been filed on his behalf.

10. Though the said order of termination is assailed in the petition on numerous grounds, the petitioner who argued his own case before us very

ably being himself as Advocate by now, has confined his submissions to a few grounds only. We shall deal with them one by one.

11. The petitioner firstly contended that though the order dated 10-7-1958 under which he was appointed as the Lecturer in Gujarati in pursuance

of the recommendation by the Union Public Service Commission stated that he was appointed temporarily and made no mention of appointment

being on probation, in fact he was on probation for period of two years from the date of his appointment as Lecturer in Gujarati in as much as the

advertisement issued by the Union Public Service Commission specifically stated that the period of probations in request of the Lecturers

appointed thereunder would be two years. He submitted that he had not been communicated with at any time till his services were terminated that

his period of probation has been extended. Relying on clauses (v) in Memorandum No. F 44/1/59-Estts/A of April 15, 1969 of the Ministry of

Home Affairs of the Government of India, the petitioner contends that in any case he could not have been kept on probation for more than double

the normal period. Thus according to him at any rate the probationary period had expired on or about 10-7-1972, when he had completed from

10-7-1968 and not from 12-5-1966 when he took over a Lecturer in Hindi. He submits that on the expiry of the said period of probation he is

deemed to have been confirmed in the post of Lecturer in Gujarati with effect from 11-7-1972, if not earlier. Thus according to him, his service

could not have been terminated under the Temporary Service Rules since at the time of purported termination he was a permanent employee. In

short, therefore, his contention is that the said order of termination is bad because he was a permanent employee and his service could not be

terminated by the simple order of termination, much less under the Temporary Service Rules. For this proposition he heavily relies on the decisions

of the Supreme Court in State of Punjab Vs. Dharam Singh, and Samsher Singh Vs. State of Punjab and Another, and the decisions of the Delhi

and Gujarat High Courts in M.P. Pandey v. Union of India, 1979(3) S L R 72 and Akailesh Chandra v. Union of India, 1971(2) S L R 618.

12. It is true that neither in the memorandum dated 1-4-1968 under which the fourth respondent offered the post of Lecturer in Gujarati to the

petitioner on certain terms nor in the order dated 10-7-1968 under which the petitioner was appointed to that post any mention had been made

with regard to probation or the period thereof thought the advertisement issued by the Union Public Service Commission indicated that the period

of probation for the post advertised therein would be of two years. The order dated 10-7-1968 merely stated that the petitioner was ""temporarily

appointed as Lecturer in Gujarati"". This order if strictly construed would meant that the petitioner was not required to be as probation. It is true

that Clause 3 of this order states that the appointment was subject to the rules and regulations laid down by the Government from time to time.

However, we are told that no rules governing the recruitment of Lecturers had been made till the time of this appointment and thus the question that

the candidate would be on probation on his initial appointment could not have arisen because of such rules. We have also not been shown any

other rules and regulations under which a candidate entering the service of the fourth respondent was required to be on probation at the inception

of his service. Hence it would have been logical to conclude that the petitioner was not supposed to be controversy on this count has been set at

rest because the first respondent in his first return has admitted that the appointment of the petitioner on selection through the Union Public Service

Commission ""was temporary and on probation"". He further stated that the petitioner continued to be on probation. We, therefore, take it that it is

an admitted position that the petitioner was appointed on probation and we proceed on that basis.

13. We did not have the benefit of having the full text of the memorandum purported to have been issued by the Central Government on 15-4-

1959 on which reliance is sought to be placed by the petitioner. However, this memorandum has been reported at page 24 of the Compilation of

the Fundamental Rules and the Supplementary Rules, Volume II, 8th Edition by S. Lakhi Singh Choudhary. The portion which is relevant for our

purpose has also been extracted in para 19 of the judgment of learned Single Judge of the Delhi High Court in Pandey"s case cited (supra) and it is

in the following terms:

(vii) while the normal probation may certainly be extended in suitable case, it is not desirable that an employee should be kept on probation for

years as happens occasionally at present. It is, therefore, suggested that, save for exceptional reasons, probation should not be extended for more

than a year and no employee should be kept on probation for more than double the normal period.

From the opening portion of the memorandum as reproduced in the above said book it would appear that the Government of India reviewed all

the aspects of appointment on probation in various services and has made certain recommendations it appears that the various Ministries had to

adopt these recommendations in respect of services under their control by either suitably modifying their service rules or by issuing necessary

instructions. In our view, unless the recommendations contained in the said memorandum are implemented by the various Ministries as above, they

would merely remain as recommendations. In other words, in order to confer the status of instructions in respect of a particular service, they have

to be adopted and implemented by the Ministry concerned. Unless this is done in respect of a particular service, they would not be binding or have

the force of law as has been held in Pandey''s case. That this was the intention of the Government of India in issuing the memorandum can be

illustrated by the fact that the recommendations extracted above had been adopted by the Ministry of Home Affairs and incorporated in its circular

styles as Indian Police Service (Probation) Rules, 1954. General instruction, issued on 16-3-1973. The relevant portion from this circular is

extracted in para 3 of the judgment of learned Single Judge of the Gujarat High Court in Akailesh Chandra''s case cited (supra). This is also

evident from the word ""suggested"" used in the recommendation extracted above. With respect, therefore, we are unable to agree with the learned

Single Judge of the Delhi High Court in his view that the said memorandum of the Government of India contains ""instructions"" which are ""of a

binding nature and have the force of law"". It is not the case of the petitioner that Clause (viii) of the said memorandum had been adopted by the

fourth respondent in respect of the service controlled by it or for the matter of that by the Ministry of Education of the Government of India. It is,

therefore, not possible to uphold the contention of the petitioner that the period of his probation could not have been extended beyond four years.

14. The Supreme Court has consistently held that when a first appointment or promotion is made on probation for a specific period and the

employee is allowed to continue in the post after the expiry of the period without any specific order of confirmation, he should be deemed to

continue in his post as a probationer only, in the absence of any indication to the contrary in the original order of appointment or promotion or the

service rules. In such a case, an express order of confirmation is necessary to give the employee a substantive right to the post, and from the mere

fact that he is allowed to continue in the post after the expiry of the specific period of probation it is not possible to hold that he should be deemed

to have been confirmed. See State of Punjab v. Dharamsingh, cited (supra), In this connection the observations of the Supreme Court in Shri

Kedar Nath Bahl Vs. The State of Punjab and Others, may be extracted with advantage.

Where a person is appointed as a probationer in any post and a period of probation is specified, it does not follow that at the end of the said

specified period of probation he obtains confirmation automatically even if no order is passed in that behalf. Unless the terms of appointment

clearly indicate that confirmation would automatically follow at the end of the specified period, or there is a specific service rule to that effect, the

expiration of the probationary period does not necessarily lead to confirmation. At the end of the period of probation an order confirming the

officer is required to be passed and if no such order is passed and he is not reverted to his substantive post, the result merely is that the continues in

his post as a probationer

This rule has been followed by the Supreme Court in State of Maharashtra v. V.R. Saboji : (1979)IILLJ393SC . It is, therefore, clear that in the

absence of anything to the contrary in the terms of the appointment or the rules or regulations governing the service of the employee concerned, he

cannot be deemed to be confirmed on the expiry of the period of probation. In such a case an order confirming the employee is required to be

passed and if no such order is passed he would be deemed to continue in his post as probationer. In the present case no order confirming the

petitioner in the post of Lecturer in Gujarati had been passed. The petitioner has not been able to show that there is any provision in the rules or

regulations governing his service to the effect that an employee on probation would be automatically confirmed on the expiry of the period of

probation. The terms on which he had been appointed as reproduced in para 3 above would also show that no such undertaking had been given to

the petitioner by the fourth respondent. In this situation, therefore, the rule which has been laid down by the Supreme Court would apply and it has

to be held that the petitioner continued to be on probation till his service was terminated by the impugned order.

15. As said above the petitioner relies for his proposition on the decisions mentioned in para 11 above. In State of Punjab v. Dharamsingh, cited

(supra) the Supreme Court was called upon to construe the provision contained in sub-rule (3) of Rule 6 of the Punjab Educational Service

(Provincialised Cadre) Class III Rules, 1961, which is in the following terms.

6(3) On the completion of the period of probation the authority competent to make appointment may confirm the member in his appointment or if

his work or conduct during the period of probation has been in his opinion unsatisfactory he may dispense with his services or may extent his

period of probation by such period as he may deem fit or revert him to his former post if he was promoted from some lower post :

Provided that the total period of probation including extensions, if any shall not exceed three years.

It was in the context of this rule that the Supreme Court made the following observations in para 5 of the report.

5. In the present case, rule 6(3) forbids extension of the period of probation beyond three years. Where, as in the present case, the service rules

fix a certain period of time beyond which the probationary period cannot be extended, as an employee appointed or promoted to a post on

probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he

cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negatived by the service rule

forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that

the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication.

However, at the same time is pertinent to note that in the same case the Supreme Court has stated the law as generally applicable to employees on

probation in para 3 of the report, as stated in para 14 of this judgment. It is apparent that what the Supreme Court has observed as extracted

above is on the basis of the specific provisions contained in the said sub-rule which not only provided that the total period of probation including

extensions should not exceed three years, but also provided that the competent authority could confirm the employee on the completion of period

of probation. We may state here that admittedly there is no similar provision governing the service of the petitioner. Hence what has been said by

the Supreme Court in Dharam Singh''s case would not apply to the present case.

16. In so far as the case of Shamsher Singh v. State of Punjab is concerned the petitioner relies on the observations of the Supreme Court in paras

70 and 71 of the report. It is difficult to see how these observations help the petitioner. In these paras the Supreme Court has distinguished

Dharam Singh''s case from the case before it on facts.

17. In so far as the decision of the Delhi High Court in M.P. Pandey v. Union of India is concerned, it proceeds on the assumption that there was a

prohibition for extension of the period of probation beyond double the normal period contained in the said memorandum of the Government of

India dated 15-4-1959. as we have pointed out in para 13 above, this assumption is not correct and hence this decision would also be of no avail

to the petitioner.

18. The case of Akailesh Chandra v. Union of India was decide on the basis of the specific instructions contained in the Indian Police Service

(Probation) Rules, 19564 read with instructions issued by the Government of Indian in its circular letter dated 16-3-1973 which, as we have

pointed out in para 13 above, adopted the recommendations of the Government of India contained in its memorandum dated 15-4-1959. Since

this case can be distinguished on facts in the present case the petitioner cannot draw any assistance from it.

19. However, we may proceed on the assumption that the period of probation was not extended and could not have been extended beyond the

period of four years as contended by the petitioner and then see what would be the effect thereof on the tenure of the petitioner''s service. The

question then would be if on the expiry of the probation the petitioner automatically became a permanent employee as contended by him or

whether he remained a temporary employee so that his services could be terminated under the provisions of the Temporary Service Rules.

20. For this purpose we may assume that the period of probation in respect of the petitioner expired on 1-7-1972. Admittedly on that date the

post which the petitioner was then holding, was not made permanent but was temporary. As we have pointed out in para 3 above in its

advertisement the Union Public Service Commission had specifically stated that the posts of Lecturers advertised therein were temporary ""but

likely to continue indefinitely and be made permanent eventually"". Even in the terms which were offered to the petitioner for appointment to the

post it was specifically stated that the post was temporary, but was likely to be made permanent and in the event of its becoming permanent, his

claim for ""permanent absorption"", would be considered in accordance with the rules in force. As seen above the spot of Lecturers in the said

College were mad permanent in July, 1974. The result, therefore, is that at the time when the period of probation including the extended period

expired, the post which the petitioner was holding was temporary, and there was no permanent post in which he could be absorbed or made

permanent. Hence at the most what cold be said is that on the expiry of the said period of probation the petitioner continued to occupy the

temporary post as a temporary employee. In these circumstances, he could not have been confirmed or deemed to have been confirmed even by

implication on the expiry of the period of his probation for want of a permanent post. Even if the post was made permanent in the middle of 1974,

it is not possible to say that the petitioner would automatically be confirmed on that post. There is a distinction between a post and its incumbent.

An employee who is officiating temporarily in a permanent post cannot claim confirmation in that post unless that is done by the competent

authority.

21. In The Director of Panchayat Raj and Another Vs. Babu Singh Gaur, , the Supreme Court has held that a Government servant temporarily

appointed does not get a right to the post merely because the post held by is converted in to a permanent post and that a temporary Government

servant does not become a permanent Government servant unless he gets that capacity either under some rule or he is declared or appointed by

the Government as a permanent Government servant. This rule has been followed by it in State of Uttar Pradesh v. Nand Kishore, AIR 19771

Supreme Court 1267.

22. Any argument that in the event of the post being made permanent the petitioner would automatically be confirmed in it is ruled out by what he

was told in the terms of appointment as extracted in para 3 above. He was specifically informed that in the event of the post becoming permanent,

his claim for permanent absorption would be considered in accordance with the Rules in force. There is thus no promise that the petitioner would

be confirmed ipso facto on the post being made permanent. As been above the petitioner has not pointed out any provision in any rule or

regulation under which he could be said to be absorbed permanently in the post when it was made permanent. In our view, therefore, looked at

from any angle it is not possible to say that the petitioner was, on the date when his service was terminated, a confirmed employee and hence his

service could not be terminated under the Temporary Service Rules.

23. As a second limb of this contention, the petitioner submitted that if it is held that he continued to be on probation till his service was terminated

by the impugned order, that could not have been done since the Temporary Service Rules would not be applicable to him as he was on probation.

Sub-rule (4) of Rule 1 of the Temporary Service Rules specifies categories of Government servants to whom these rules do not apply. A

Government servant on probation has not been included in this sub-rule and has, therefore, been excluded from the purview of the Temporary

Service Rules. Rule 5 of the rules applies to a temporary Government servant and excludes a Government servant who is quasi-permanent service.

The petitioner cannot be deemed to be in quasi-permanent service as no declaration to the effect that the appointing authority was satisfied that the

petitioner was suitable for employment quasi-permanent capacity as required by Clause (ii) of Rule 3 of the said rules, was made by the appointing

authority. Sub-rule (3) of Rule 1 provides that the Temporary Service Rules shall apply subject to what has been said in sub-rule (4) to all persons

who hold a Civil post but do not hold a lien or a suspended lien on any post under Government of India or in State Government. In other words,

the rules will apply to all persons who hold a civil post under a Government except those who hold a lien or a suspended lien on any post. In other

words, the rules would apply to all Government servants who are not permanent. In these circumstances, therefore, it is not possible to hold as

contended by the petitioner that these rules do not apply to Government servants on probation.

24. The petitioner next contended that his service was not terminated by the authority which appointed him, namely, the fourth respondent, but by

the second respondent who was at the relevant time Under Secretary of the fourth respondent and was thus not his appointing authority. In support

of this contention the petition relies on the words ""I hereby terminate"" in the impugned order which has been reproduced in para 7 above.

According to the petitioner, the word ""I"" in the said order would mean the Under Secretary, who has signed the order and not the Administrator.

He submitted that in orders which are passed by or notices which are given by the administrator the words used are ""The Administrator of Goa,

Daman and Diu"" instead of the word ""I"". In order to support this contention, the petitioner has produced several orders at Annexures Q and T-1.

He has also produced copies of notices on annexures R, S and T, which were given by the officers concerned in their name and which according

to the petitioner, had been struck down by the courts. The petitioner submits that it was only in this case that a departure is made from the normal

practice and the words ''I hereby terminate'' have been used instead of the words ""The Administrator of Goa, Daman and Diu hereby terminates"".

Thus according to the petitioner, the impugned order of termination is vitiated because it has been made by an officer who had not appointed him.

25. We do not find any force in this contention. Perusal of the impugned order would show that it has been issued by order in the name of the

Administrator of Goa, Daman and Diu, the Under Secretary has signed it in authentication. Hence the order for all practical purposes has been

passed by the administrator and not the Under Secretary in his own name. Since the order has been issued in the name of the Administrator, the

word ""I"" occurring therein would mean the Administrator and not the Under Secretary, who has signed it only for authentication under the relevant

Rules. Much could have been said in favour of the petitioner had the impugned order been not issued in the name of the Administrator, but had

been signed merely by the Under Secretary. In that case it could be possible to say that the order has been issued by the Under Secretary in his

capacity as such and not by the Administrator. The notices at Annexures R, and T prima facie appear to have been issued not in the name of the

authority competent to appoint the officers concerned, but by the authorities subordinate to it and if in such circumstances those notices had been

struck down as urged by the petitioner, the same cannot apply to the order in question since it is issued in the name of the Administrator and has to

be taken to be his order of the under Secretary.

26. It is next contented by the petitioner that the order terminating his service is not in accordance with the terms of appointment. He puts his case

like this: He says that by term No. (ii) in para 2 of the memorandum dated 1-4-1968 under which he was offered the post it was stated that the

appointment may be terminated at any time by a month''s notice by either side but the appointing authority reserved to himself the right to

terminating the services of the petitioner forthwith or before the expiration of the stipulated period of notice by making payment to him of a sum

equivalent to the pay and allowances for the period of notice or the unexpired portion thereof. He submits that this is a specific term which

governed the termination of his services and any provision to the contrary contained in any rule or order at the time of such termination is excluded

by term No. (iv) which says that ''other'' conditions of service would be governed by the relevant rules and order in force from time to time. Thus

according to the petitioner even though by virtue of first proviso to sub-rule (1) of Rule 5 of the Temporary Service Rules it is possible for the

competent authority to terminated the service of a Government servant forthwith without simultaneously paying him the sum equivalent to the

amount to pay and allowances for the period of notice, the appointing authority in his case could not do so as by virtue of the specific term with

regard to termination of his services, as seen above, the appointing authority would not be in a position to take the benefit of this proviso. The

petitioner points out that the said proviso, as it stood before its amendment, enabled the appointing authority to terminate the services of a

Government servant ""by payment to him of a sum equivalent to the amount of his pay plus allowances"" and was similarly worded as term No. (ii)

under which he was appointed. Relying on the decision of Supreme Court in Senior Superintendent, R.M.S., Cochin and Another Vs. K.V.

Gopinath, Sorter, he contends that by virtue of the words ""by making payment"" if the order of termination has to be effective forthwith as in the

impugned order, such termination has to be simultaneously with the payment of the sum which is due to him in lieu of notice. In this connection he

relies on the decision of the Delhi High Court in Nandkishor Sharma v. Union of India 1977(1)K L L J 430 and the decision of a Division Bench

of this Court in Textile Committee v. K.A.Malani 1983 (1) S.L.R. 416.

27. On the other hand Mr. J., Dias the learned Counsel for the respondents submitted that at the time when term No.(ii) was incorporated in the

memorandum under which the petitioner was offered the appointment, it was in line with sub-rule would have been applicable to the petitioner even

in the absence of term No. (ii), the said term had been incorporated in the offer by way of abundant precaution and to draw pointed attention of

the petitioner of this proviso in the rule. Alternatively Mr. Dias submitted that consequent to the decision of the Supreme Court in Gopinath''s case

cited (supra) the proviso has been amended with retrospective effect by placing the words ""by payment to him of ""by the words ""and soon

termination the Government servant shall be entitled to claim"" and because of this amendment it is now not necessary to pay simultaneously the

dues of the Government servant in lieu of notice, if the services are terminated forthwith as laid down by the Supreme Court in Gopinath''s case

and in the case the Government servant would be merely entitled to the said sum and can claim it subsequently. Mr. Dias submits that at the time

when the services of the petitioner were terminated, the proviso, as amended was in force and it was not necessary for the appointing authority to

pay him the said dues simultaneously with the order of termination as the petitioner would be governed by the amended sub-rule as a part of

conditions of his service as against the terms of appointment. According to Mr. Dias, it is open to the Government to alter the conditions of service

unilaterally and if that is done the Government servant cannot bank upon the specific terms in his letter of appointment, which cannot be said to be

a contract between the Government and the Government servant.

28. In para 3 above, we have reproduced the terms of appointment as specified in para 2 of the memorandum dated 1-4-1968. As already stated,

the order of appointment was issued subsequent to this memorandum on 10-7-1968 and para 3 of this order is in following terms.

3. The appointment is subject to the conditions specified in this office Memorandum No. DE/EST/A/66 dated 1-4-68 and the rules and

regulations laid down by the Government from time to time.

It is, therefore, clear that the appointment of the petitioner is made subject not only to the rules and regulations laid down by the Government from

time to time, but also to the conditions specified in the memorandum dated 1-4-1968. let us then see what are these conditions.

29. On 1-4-1968 when the fourth respondent offered the post to the petitioner under its said memorandum it had power under rule 5(1) of the

Temporary Service Rules to terminate the services of the petitioner forthwith by making payment to him of his pay and allowances for the period of

notice. Even in the absence of term No. (ii) the fourth respondent could have terminated the services of the petitioner by making the above said

payment to him, had the proviso to the said sub-rule not been amended retrospectively as said above. However, inspite of this power available to

the fourth respondent in the said sub-rule it inserted term No. (ii) in the offer of appointment. In doing so it seems that it meant to reserve to itself

the power of terminating the services of the petitioner forthwith by making payment to him of the said sum irrespective and independent of the

power it had under the said sub-rule. This intention on the part of the fourth respondent has been made clear by the use of the word ""other"" in term

No. (iv). What is meant by term No. (iv) is that the petitioner would be governed by the relevant rules and orders in force from time to time except

those which are specifically stated in the said memorandum. In other words, what was intended to be achieved was that the petitioner would be

governed by terms Nos. (i), (ii) and (iii) irrespective of any provision to the contrary in the relevant rules and orders. The use of the word ""other"" in

term No. (iv) cannot be explained on any other hypothesis. It may be that the petitioner is not engaged on contract as contemplated by Clause (c)

of sub-rule (4) of rule 1 of the Temporary Service Rules, but it is clear that he has been offered the post of certain terms and conditions which may

not be strictly in accordance with the rules, orders or regulations governing the conditions of his service. The fact that the terms on which he was

offered the post have become a part of the order under which he had been appointed, becomes undisputed by virtue of para 3 of this order which

had been reproduced in para 28 above. Now if the petitioner had been appointed on certain specific terms and conditions, it is difficult to see why

his service should not be regulated by those terms and conditions in so far as they are applicable as against other provisions contained in the rules,

orders or regulations. Normally there would not be any reason for the appointing authority to offer the post to the candidate on certain terms and

conditions, if it were intended that impending service of such candidate should be governed by the rules, orders or regulations in force from time to

time relating to the conditions of his service. But when the appointing authority does so and when the candidate accepts the offer on such terms and

conditions it is clear that the appointing authority intends that these terms and conditions should be an integral part of his conditions of service. It is

true as has been submitted by Mr. Dias that the conditions of service in respect of a Government servant can be unilaterally altered by the

Government. That is why the proviso to Rule 5(1) has been retrospectively amended, but in our opinion, this proposition would not apply to

certain specific terms on which the candidate is offered the post and he accepts the post agreeing with them. We fail to see why the appointing

authority should not be held by and bound by such specific terms and conditions.

30. We find support for the view which we take from the decision of the Delhi High Court in Nandkishor''s case cited (supra). There the fact were

practically identical with the facts of the present case. Nandkishore was offered the post of Air-port ticker Clerk on certain terms and conditions

which are set out in para 10 of the report and which are similar to terms Nos. (i) and (ii) contained in the memorandum dated 1-4-1968 in the

present case. In that case the appointing authority had reserved the right of terminating the services of the appointee forthwith or before the expiry

of the stipulated period of notice by making payment to him of the sum equivalent to the pay and allowances for the period of notice or unexpired

portion thereof. Nandkishor was appointed to the post on these terms. His service was terminated forthwith on 3-6-1971 without making payment

simultaneously of his pay and allowances for the period of notice. He challenged his termination on several grounds including the ground that his

services had not been properly terminated because he did receive the salary in lieu of notice at the time when his services were terminated. Now

by the time the writ petition came up for hearing before the Delhi High Court the proviso to sub-rule (1) of rule 5 of the temporary Service Rules

had been amended retrospectively as above, with the result that under the said rule it was no longer necessary to pay the salary for the notice

period at the same time when the termination order was served. The order of termination was sought to be justified on the basis of the amended

proviso since the amendment was retrospective with effect from 1-5-1965. In dealing with this contention the Delhi High Court gave effect to the

specific terms regarding the termination of service on which Nandkishor was appointed. The said term in the appointment letter was taken to be in

the nature of contract and relying on the interpretation of the words ""by payment"" by the Supreme Court''s case, it was held that the ratio of that

case will apply will full force to Nandkishor''s case.

31. Relying on what has been said by the Delhi High Court in para 13 of the report in Nandkishor''s case, Mr. Dias tried to distinguish that case

from the present case saying that there the Court held that the Temporary Service Rules were not applicable in the case of Nandkishor, by virtue

of rule 1(4) (d) his service being a contractual service. It may however be mentioned that this is not the only aspect which the Delhi High Court has

considered it would appear from the discussion in paras 9 to 12 of the report that the Delhi High Court considered the case from other aspect,

namely, that the terms and conditions were in the ''nature of contract''. It is because of this discussions and because the facts of this case are similar

to the present case that we respectfully agree with the decision of the Delhi High Court in Nandkishor''s case.

32. Reverting to the case in hand it may be noted that in para 2 of the memorandum dated 1-4-1968 in which the above said terms are stated

opens with the words ""The terms of appointment are as follows''. It is, therefore, evident that the fourth respondent itself calls these terms as terms

of appointment. In our view, therefore, the fourth respondent is as much bound by these terms as the petitioner. If that is so, the services of the

petitioner could be terminated only in accordance with term No. (ii) and not otherwise. Even though the impugned order is stated to have been

made in pursuance of the proviso to sub-rule (1) to rule 5 of the Temporary Service Rules, we may assume that it is made in pursuance of the

power which the appointing authority had reserved to itself under term No. (ii) to terminate the services of the petitioner forthwith by making

payment to him of a sum equivalent to pay and allowances for the period of notice. As said above, it is admitted that the petitioner was not paid the

said sum simultaneously with the service of the said order on him and was paid much later i.e. on 16-9-1976. The first respondent in para 6 of his

supplementary affidavit has tried to explain it by saying that the petitioner who was holding a gazetted post was himself authorised to and had to

draw the said pay and allowances for the period of notice and he deliberately failed and neglected to do so, and that is why the amount was given

to him by cheque on 16-9-1976, in paras 28-A and 28-B of the rejoinder the petitioner has explained as to why he could not have himself drawn

the amount. In short, he submits that on the termination of his service on receipt of the impugned order on 10-6-1976 he ceased to be a gazetted

officer with effect from that date and, therefore, he could not have drawn the pay himself from the Treasury for the period from 11-6-1976. There

appears to be much substance in this contention of the petitioner. The fact, therefore, remains that the said sum was not paid was not paid to the

petitioner simultaneously with the service of the order on him.

33. Term No. (ii) as above contemplates termination of service of the petitioner forthwith by making payment to him of the above said sum. The

second part of term No. (ii) under which the appointing authority has reserved to itself the right to terminate the services of the petitioner forthwith

is in pari materia with the proviso to sub-rule (1) of rule 5 of the Temporary service Rules as it stood before its amendment. This proviso came up

for consideration before the Supreme Court in Gopinath''s case. On the language of the said provision and particularly relying on the words ''by

payment to him of a sum equivalent to the amount of his pay plus allowances etc.'''' in the said provision the Supreme Court held that these are the

operative words of the provision and to be effective, the termination of service has to be simultaneous with the payment to the employee of

whatever is due to him. The Supreme Court rejected the contention that the termination of service becomes effective as soon as the order is served

on a Government servant irrespective of the question as to when payment to him is to be made. In view of the identical provision in terms No. (ii),

the ratio in Gopinath''s case would apply with equal force to the present case. It is true that the words in the provision which the Supreme Court

was considering were ''''by payment'''' and the words in term No. (ii) are ''''by making payment.'''' In our view, the word ''''making'''' would not make any

difference for arriving at this conclusion. In our opinion therefore, the impugned order is vitiated for the reason that the services of the petitioner

have not been terminated in accordance with term No. (ii) inasmuch as he has not been paid the pay and allowances in lieu of the period of notice

simultaneously with the service of order on him.

34. The petitioner next contended that the impugned order has been made by the fourth respondent due to mala fide, ill-will, malice, prejudice and

bias on the part of the first respondent. He has made allegation in this respect in para 24 of his petition. The first respondent has refused these

allegations in para 18 of his affidavit in reply. It is pertinent to note that the petitioner has not attributed any hostile motive to the fourth respondent

who had made the impugned order. It does not appear to be his case that the first respondent as a result of ill-will and bias persuaded the fourth

respondent to make this order. In our opinion, there, the impugned order cannot be quashed on this ground.

35. It is further contended by the petitioner that the impugned order has been made by way of punishment in violation of the provisions of Clause

(2) of Article 311 of the Constitution for the alleged misconduct that he used the word ""proved liar"" in respect of the first respondent, without

affording him any reasonable opportunity of being defended. He submitted that the Collector of Daman had held an inquiry with regard to the

alleged misconduct and the impugned order was based and founded on the report which the Collector made to the fourth respondent. These

contentions are found in grounds Nos. 10 and 16 of the petition. They may be reproduced verbatim in order to properly understand the version of

the petitioner. They are as follows :

Ground No. 10

(Violation of Art. 311(2) )

The petitioner says that before passing the impugned order of purported termination, an ''Inquiry'' was held against the petitioner at the hands of the

then Collector of Daman, in regard to an alleged misconduct on the petitioner''s part that he had used the words ""PROVED LIAR'' for the

Principal of the College i.e. for the respondent No. 1. The petitioner had submitted the petitioner''s Explanation dated 15-9-75 justifying his having

used the words ''PROVED LIAR'' for the 1st respondent i.e. for the Principal and that :

after considering his ''Written Explanation'' the order of purported termination was issued WITHOUT GIVING A CHARGE SHEET, Since the

respondents construed the petitioner''s having used these words as a misconduct meriting the penalty of dismissal/removal from service. As such,

the said termination is punitive and is in flagrant violation of the Constitutional guarantee enshrined in Article 311 of the Constitution of India ; and

that the said termination is also arbitrary, in so far as the respondents relied upon the Report of the Inquiry Officer alone, and did not give to the

petitioner an opportunity to show cause why his services should not be terminated. The then Collector of Daman, Shri Satischandra subsequently

had a talk with the petitioner, wherein he remarked : ""Prof. Naik respects me so much, as he was respecting me before I sent report against him,

which report resulted into the termination of his services. He should not have used the words ""PROVED LIAR"" for the Principal.

Ground No. 16

''(Stigma'' on the character of the petitioner)

(A) The petitioner states that it is a fact on record that the petitioner had repeatedly used the words ''PROVED LIAR'' for the Principal i.e. for

respondent No. 1 . While writing letters to the Higher Authorities, and while sending telegrams to the Chief Minister, and in communication with

other superior Officers including the Development Commissioner the Ministers and so on.

(B) The petitioner also states that it is also a fact on record that the Collector of Daman did call the petitioner, and held an inquiry, by asking him to

submit an ''Explanation'' as to why he used ''PROVED LIAR'' for the Principal. The petitioner submitted his ""written Explanation"" dated 15-9-

1975. The petitioner says that it is only after the Collector submitted his report of the Inquiry that the Government construed the petitioner''s said

act (of using the said words for the Principal) as an act of misconduct on the petitioner''s part, and they issued the order of purported termination

as and by way of punishment of removal/dismissal, with colourable exercise of power, and ''without considering the petitioner''s said Explanation

dated 15-9-1975. This act was committed during the period of Emergency, without holding a'' Proper Inquiry'' as contemplated under the rules,

and without affording to the petitioner, a reasonable opportunity to cross-examine, and without issuing him a show cause notice, and then without

complying with the requirements of Article 311 of the Constitution of India, they dismissed/ removed the petitioner. In reality and truth, the

petitioner says that he had not done anything as a Lecturer in Gujarati, to merit the removal/dismissal.

(C) The petitioner, therefore, submits that the impugned order of purported termination Exh. ''P'' was on the basis of the alleged misconduct, and

on the complaint of the Principal against the petitioner. The petitioner says that the alleged misconduct was the very foundation of the impugned

order, and that the failure of the respondents to give any reason for the purported termination of the services. Does not make it any the less a

punishment. No reasonable opportunity to answer the charge, was given to the petitioner. The said termination, therefore, casts a stigma on the

character of the petitioner, and acts as a punishment, without complying with the requirements of Article 311 of the Constitution of India.

36. Though it is the fourth respondent which is concerned with the allegations contained in the above-said grounds, as stated earlier it has not filed

any return or counter-affidavit either in respect of the petition as originally filed or in respect of the extensive amendments which the petitioner

carried out subsequently. The only returns on record are those of the first respondent. The reply to grounds Nos. 10 and 16 can be found in para

11 of the supplementary affidavit filed by the first respondent consequent to the amendment of the petition. It is in the following terms.

11. With reference to grounds 10 and 16 of the amended para 21-C of the petition, it is denied that the formal enquiry was conducted by the

Government under the Central Civil Services (Classification, Control and Appeal) Rules, 1965 against the petitioner. It is submitted that the

petitioner was temporary and he had no right to the post and termination of his service does not amount to dismissal, or removal, by way of

punishment, and hence Art, 311 is not attracted.

The reply is not only cryptic but is also vague and does not amount to any denial of averments of facts which the petitioner has made in the above

said two grounds. As we have said earlier, it was for the fourth respondent to have said if in terminating the service of the petitioner it had acted on

the alleged report of the Collector. Since the impugned order has been passed by the fourth respondent, it would be that respondent, and not the

first respondent who would know in what circumstances the impugned order of termination came to be passed. Hence the reply which is given by

the first respondent as quoted above would be of no avail to the fourth respondent. Since the averments of facts made in the said two grounds

have not been specifically denied, it can be assumed that they are true and it would not be wrong to proceed on that assumption.

37. As to when a seemingly innocuous order terminating the service of a temporary Government servant or discharging a probationer in

accordance with the rules applicable to him can be said to be punitive has been considered by the Supreme Court in a number of cases beginning

with Parshotam Lal Dhingra Vs. Union of India (UOI), which as said by Krishna Iyer, J., in Samsher Singh Vs. State of Punjab and Another, is

the launching pad. ""In the words of Krishna Iyer, J., the decision of the Supreme Court in Purshottam Lal Dhingra''s case is the Magna Carta of

the Indian Civil servant although it has spawned diverse judicial trends, difficult to be disciplined applicable to termination of probation of freshers

and of the services of temporary employees into one single simple, practical formula."" The elaborate discussion in Purshottam Lal Dhingra''s case

has reference to all stages of employment in public service including temporary posts, probationers and confirmed officers. In so far as these

observations have a bearing on the termination of service or discharge of a probationer, they have been summarised by Singh, C.J., in State of

Bihar v. Gopi Kishore, AIR 1960 S C 589 in the following terms :

1. Appointment to a post on probation gives to the person so appointed no right to the post and his service may be terminated, without taking

recourse to the proceedings laid down in the relevant rules for dismissing a public servant, or removing him from service.

2. The termination of employment of a person holding a post on probation without any enquiry whatsoever cannot be said to deprive him of any

right to a post and is, therefore, no punishment.

3. But, if instead of terminating such person''s services without any enquiry, the employer choose to hold an enquiry into his alleged misconduct or

inefficiency, or for some similar reason, the termination of services 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 Article 311(2) of the Constitution.

4. In the last mentioned case, if the probationer is discharged on any one of these grounds without a proper enquiry and without his getting a

reasonable opportunity of showing cause against his discharge, it will amount to a removal from service within the meaning of Article 311(2) of the

Constitution and will, therefore, be liable to be struck down.

5. But, if the employer simply terminates the services of a probationer without holding an enquiry and without giving him a reasonable chance of

showing cause against his removal from service, the probationary civil servant can have no cause of action, even though the real motive behind the

removal from service may have been that his employer thought him to be unsuitable for the post he was temporarily holding, on account of

misconduct or inefficiency, or some such cause.

Das, C. J., speaking for the Court in Dhingra''s case said that where a person is appointed to a permanent post in Government service on

probation the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment because the

Government servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private

employer is entitled to do so, and that such a termination does not operate as a forfeiture of any right of a servant to hold the post, for he has no

such right, and such a termination cannot be a dismissal, removal or reduction in rank by way of punishments. Das, C.J., further observed that if a

right exists under a contract or service rules to terminate the service, the motive operating on the mind of the Government is wholly irrelevant. But if

the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and

violates Article 311 of the Constitution. The learned Chief Justice said that the reasoning why motive is said to be irrelevant is that it inheres in the

state of mind, which is not discernible. But on the other hand, if termination is founded on misconduct it is objective and is manifest. These

observations of the learned Chief Justice in Purshottam Lal Dhingra''s case have been cited with approval by Ray, C.J., in Shamsher Singh v. State

of Punjab cited supra.

38. In State of Punjab and Another Vs. Shri Sukh Raj Bahadur, , the following propositions on consideration of numerous decisions on the

question of termination of service of a temporary Government servant or probationer have been laid down :

1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without

anything more would not attract the operation of art. 311 of the Constitution.

2. If the circumstances preceding or attendant on the order of termination have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to

be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities to ascertain whether the

public servant should be retained in service does not attract the operation of art. 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged by Art. 311 i.e. an Enquiry Officer is appointed, a charge sheet submitted, explanation

called for and considered, any order of termination of service made thereafter will attract the operation of the said Article.

39. The position of probationer came to be considered in Shamsher Singh"s case by seven-member Bench of the Supreme Court. Ray, C. J.

following some earlier decisions enunciated the following principles.

1. No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of

termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is

discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable

opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of

the Constitution.

2. Before a probationer is confirmed, the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory

or whether he is suitable for the post. In the absence of any Rules governing a probationer in this respect the authority may come to the conclusion

that on account of inadequacy for the job or for job or for any temperamental or other object not involving moral turpitude the probationer is

unsuitable for the job and hence must be discharged. No punishment is involved, in this. The authority may in some cases be of the view that the

conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may

simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination

of probation. If on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption and if his

services are terminated without following the provisions of Art. 311(2) he can claim protection.

3. The fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment. If there is an

enquiry the facts and circumstances of the case will be looked into in order to find out whether the order is one of dismissal in substance.

4. A preliminary inquiry to satisfy that there was reason to dispense with the services of a temporary employee does not attract Article 311. But a

statement in the order of termination that the temporary servant is undesirable imports an element of punishment.

5. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment than a

probationer is entitled to attract Article 311. The substance of the order and not the form would be decisive.

6. An order terminating the services of a temporary servant or probationer under the rules of employment and without anything more will not

attract 311, Where a departmental enquiry is contemplated and if an enquiry is not in fact proceeded with Article 311 will not be attracted unless it

can be shown that the order though unexceptionable in form is made following a report based on misconduct.

In The State of Bihar and Others Vs. Shiva Bhikshuk Mishra, it has been observed that the form of order is not conclusive of its true on

misconduct. It was further said that it may be that an order which is innocuous on the face and does not contain and imputation of misconduct is a

circumstances or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of

circumstances preceding or attendant on the impugned order must be examined and overriding test will always be whether the misconduct is a

mere motive or is the very foundation of the order.

40. It is in the background of these principles that we have to test the validation of the impugned order. As has been seen above, the petitioner has

specifically pleaded that the Collector of Daman had held an inquiry against him on the complaint of the first respondent in regard to the alleged

misconduct on the part of the petitioner in using the words ""proved liar"" in respect of the first respondent and that the petitioner had submitted his

explanation justifying the use of these words. The petitioner specifically alleges that is only after the Collector submitted his report of the inquiry to

the Government that the latter construed the said act of the petitioner as an act of misconduct and issued the impugned order as and by way of

punishment of removal/dismissal. He alleges that the impugned order was passed on the basis of the alleged misconduct and on the complaint of

the first respondent against him and hence the alleged misconduct was the very foundation of the impugned order. As said above, inspite of specific

allegations and averments the fourth respondent has not come forward to deny them. In other words, the fourth respondent has not denied that

there was no inquiry be the Collector as alleged by the petitioner or that even if there was such an inquiry, impugned order passed by it was not

founded on the report of the Collector. The silence maintained by the fourth respondent in this respect is eloquent. It would not be unreasonable to

hold that the impugned order was preceded by an inquiry by the Collector in respect of the alleged misconduct by the petitioner in using

unbecoming language against the first respondent who his superior and that the fourth respondent in terminating the services of the petitioner relied

and acted on the report of the Collector. Even though the impugned order is innocuously worded, the facts and circumstances preceding it as

alleged and established by the petitioner do necessitate our going behind it. The question, therefore which has to be considered is whether the said

inquiry by the Collector and his thereon was merely a motive or was a foundation for the subsequent order of termination. It may be noted that

even the first respondent in his affidavit in reply does not deny that he had made a complaint with regard to the alleged misconduct of the petitioner

and that the Collector had held an inquiry pursuant thereto and had submitted a report to the Government. What he denies is that there was any

formal inquiry by the Government under the General Civil Services (Classification, Control and Appeal ) Rules 1965. That also is not the case of

petitioner. It may be that the inquiry which was held by the Collector was a preliminary inquiry on the complaint of the first respondent for finding

out whether the complaint was true. In such case the conclusion of the Enquiry Officer may not be accepted by the disciplinary authority. That

authority may consider the case in the light of the inquiry and the conclusion of the Enquiry Officer, and may either accept or reject or find itself

unable to say whether was a prima facie case against the Government servant or not. If the authority does not accept the conclusion of the Enquiry

Officer, no further question would arise. If the authority is unable to make up his mind one way or the other, the alleged misconduct can be said to

inhere in the state of mind which is not discernible. But if he authority accepts the conclusion arrived at the by Enquiry Officer, the said conclusion

becomes the conclusion or decision of the disciplinary authority, whether, it is reduced to writing or not, and the subsequent order terminating the

services of the Government servant, though innocuous on the face of it, has to be held to have been founded on the alleged misconduct. See

Controller & A.G. of India v. Singh, 1976(1) Labour and Industrial Cases 806. The fourth respondent which is the disciplinary authority has not

come forward to say that it did not accept the conclusion arrived at by the Collector on inquiry or that it was unable to make up its mind one way

or the other. It is, therefore, not possible to say that the alleged misconduct is inhered in the state of mind which is not discernible. On the other

hand in the absence of denial of the allegation of the petitioner that the impugned order was based or founded on the report of the Collector, it can

be said that the fourth respondent accepted the conclusion arrived at by the Collector and the said conclusion became its own conclusion or

decision, thus making the alleged misconduct as foundation for the impugned order. If that is so, there is no difficulty in holding that the impugned

order has been passed in violation of the provisions contained in Clause (2) of Article 311 of the Constitution inasmuch as the petitioner had not

been given a reasonable opportunity of being defended before the order of termination, which amounted to removal or dismissal, was passed, for

this reason also. We find that the impugned order has to be struck down.

41. The next contention of the petitioner is that the impugned order is arbitrary and discriminatory. He puts his case in this respect in ground No. 8

in the following words.

Ground No. 8 (Violation of Articles 14 and 16)

''The petitioner says that in the ""Tentative Seniority List'' of the Lecturers of the College, he was placed at Serial No. 1; and thereafter in the ''Final

Seniority List'' he was placed at Serial No. 3; and that there were placed 8 other Lecturers ""below the petitioner "" from Serial Nos. 4 to 11. He

was, thus, undisputedly senior to 8 Lecturers of the college. The respondents purported to terminate only the petitioner''s services without assigning

any reason, while relating his 8 juniors in service. The petitioner, therefore, submits that the impugned order of purported termination of his service

is arbitrary and discriminatory and therefore, is liable to be quashed. Reliance placed on 1979 S.L.J. pg. 233 paras 10, 20 and 22.

The reply is contained in para 9 of the supplementary affidavit of the first respondent in the following words.

9. With reference to ground No. 8 of the amended para 21-C of the petition it is denied that the said order is arbitrary and discriminatory.

It would therefore, appear that there is no specific denial that in the final seniority list the petitioner was placed at Serial No. 3 and that eight

lectures were below him in the seniority list, and that the services only of the petitioner were terminated retaining the services of the said eight

juniors to him.

42. Mr. Dias on behalf of the respondent submitted that there was a solitary post of Lecturer in Gujarati which was being held by the petitioner and

hence there was no question of terminating his services and retaining his juniors. However, there is no foundation for this submission in any of the

returns submitted by the first respondent. On the other hand, as seen above, the petitioner specifically alleges that there were eight juniors to him

and this has not been denied. It is, therefore, not possible to uphold the submission of Mr. Dias that the post which the petitioner was holding was

a solitary post and the question of discrimination would not arise.

43. To support his contention in this respect the petitioner relies on the decision of the Supreme Court in The Manager, Government Branch Press

and Another Vs. D.B. Belliappa,

44. If it is held that the petitioner was a temporary Government servant on the date when his services were terminated and if it is found that his

services were not terminated on the unsuitability or other reasons such as misconduct, the question would arise whether terminating his services art

the same time retaining his juniors in service would not amount to discrimination under Articles 14 and 16 of the Constitution.

45. In Bellappa''s case cited supra the Supreme Court held that if the services of a temporary Government servant are terminated in accordance

with the conditions of his service on the ground of unsatisfactory conduct or his unsuitability for the job and/or for his work being unsatisfactory or

for a like reason which marks him off as a class apart from other temporary servants who have been retained in service, there is no question of the

applicability of Article 16, But if the services of a temporary Government servant are terminated arbitrarily, and not on the ground of his

unsuitability, unsatisfactory conduct or the like which would put him in a class apart from his juniors in the same service, a question of unfair

discrimination may arise notwithstanding the facts that in terminating his service, the appointing authority was purporting to act in accordance with

the terms of the employment. The following observation in that case are apt and may be reproduced.

Where a charge of unfair discrimination is levelled with specificity, or improper motives are imputed to the authority making the impugned order of

termination of the service, it is the duty of the authority to dispel that charge by disclosing to the Court the reason or motive which impelled it to

take the impugned action Excepting, perhaps, in cases analogous to those covered by Article 311(2), Proviso (c), the authority cannot withhold

such information from the Court on the lame excuse, that the impugned order is purely administrative and not judicial, having been passed in

exercise of its administrative discretion under the rules governing the conditions of the service. ""The giving of reasons"" as Lord Denning put it in

Breen v. Amalgamated Engineering Union (1971)1 All.E.R. 1148 is one of the fundamentals of good administration "" and to recall the words of

this Court in Khudiram Das Vs. The State of West Bengal and Others, in a Government of laws ""there is nothing like unfettered discretion immune

from judicial reviewability"". The executive, no less than the judiciary is under a general duty to act fairly. Indeed fairness founded on reason is the

essence of the guarantee epitomised in Arts. 14 and 16(1).

46. As seen a above, the petitioner, has levelled the charge of unfair discrimination with specificity and has also imputed improper motives to the

fourth respondent, It is no where stated by any of the respondents that the services of the petitioner were terminated on the ground of his

unsuitability for the job or for his work being unsatisfactory or for, his unsatisfactory conduct. As a matter of fact, the first respondent, who alone

has filed the affidavits in reply does not say as to why the services of the petitioner were terminated even though he has come out with several

allegations in this respect against the authorities concerned. Now if the services of the petitioner were not terminated on the ground of his

unsuitability, unsatisfactory work or the like, which would put him as a class apart from his juniors, the question of discrimination would arise even

though in terminating his service the fourth respondent purported to act in accordance with the terms of appointment. Though as has been said by

the Supreme Court in Belliappa''s case a charge of unfair discrimination is levelled with specificity or improper motives are imputed to the authority

making the order of termination of service, it is the duty, of that authority to dispel that charge by disclosing to the Court the reason or motive

which impelled it to take the impugned action, the fourth respondent has not done so for reasons best known to it. It is really enigmatic as to why

the fourth respondent has maintained the silence inspite of several allegations and averments made in the petition, which required to be answered

by it. In the circumstances, therefore, we find that the principles which have been laid down by the Supreme Court in Belliappa''s case squarely

govern the petitioner''s case and in the absence of the fourth respondent disclosing the reason or motive which impelled it to take the impugned

action, it has to be held that the impugned order is arbitrary and discriminatory. For this reason also the impugned order requires to be quashed.

47. There were the only grounds which had been urged by the petitioner in support of his challenge to the impugned order. For the reasons which

are stated above, we hold that the said order is null and void, and requires to be quashed. As stated above, beside seeking the relief for quashing

the order the petitioner also claims other writs, which we have reproduced in para 9 above. Since we have held that the petitioner cannot be

deemed to have been confirmed in the post of Lecturer in Gujarati as contended by him, we cannot grant him the relief in terms of prayer clauses

(A) or (B)(ii) and (v) of para 37 of the petition. Since it is for the authority concerned to issue a certificate with regard to the satisfactory

completion of the probationary period by the petitioner on being satisfied after considering the work and service of the petitioner, the relief in terms

of prayer Clause (B)(i) cannot be granted in the view which we take, we can make the rule absolute only in terms of prayer Clause (B)(iv) and (vi).

48. The result, therefore, is that the writ petition is allowed and the rule is made absolute in terms of prayer Clause (B)(iv) and (vi). In the

circumstances of the case, there shall be on order as to costs.