
(2003) 05 DEL CK 0092
In the Delhi High Court
Case No : Civil Writ No. 6972 of 2002

A.N. Gupta

APPELLANT

Vs

Public Enterprises Selection Board (PESB) and Others

RESPONDENT

Date of Decision : 08-05-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(1), 311, 311(2)
Contract Act, 1872 — Section 23
Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 — Regulation 25(2), 9
Tourism Development Corporation (Conduct, Discipline and Appeal) Rules, 1978 — Rule 31

Citation : (2003) 5 AD 364

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : V.K. Makhija, K.K. Rai, A.P. Sinha and Bankey Bihari, for the Appellant; Mukul Rohtagi, A.S.G., Rajinder Dhawan and Rajeev Sharma, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Mahajan, J.—The petitioner was appointed as Director (Finance) in the Housing and Urban Development Corporation Limited (in short referred to as 'HUDCO'). This corporation is wholly owned by the Government of India and functions under the administrative control of the Government. The appointment of the petitioner was initially made on 08th January, 2001 for a period of five years leaving the option with the appointing authority to terminate the services of the petitioner by giving him three months notice or on payment of three months salary in lieu thereof. The appointment was on the terms and conditions as conveyed to the petitioner on 15th October, 2001. Clause I of the terms and conditions provided that the period of petitioner's appointment was five years, which may be terminated even during this period by either side on three months' notice or on payment of salary in lieu thereof. It also provided that the performance of the petitioner shall be reviewed after the expiry of the first year to

enable the government to take a view regarding the continuance or otherwise for the balance period of tenure. In terms of the guidelines issued by the Government of India on top posts in public enterprises the Government should assess the work of the person appointed on a tenure at the end of a year in five years contract and terminate the contract if his performance was found to be not quite satisfactory. The procedure for review of performance or appraisal of work has also been laid down in the said guidelines.

2. On 04th October, 2002, the petitioner was asked to proceed on leave with immediate effect and was directed to hand over charge to Dr.P.S. Rana, Senior Executive Officer. This order was challenged by the petitioner by filing a writ petition in this Court. By an order passed on 09th October, 2002 in the said writ petition, the operation of the order dated 04th October, 2002 was stayed. It appears that the respondent had simultaneously started appraising the work of the petitioner which, according to the petitioner, was an illegal act on their part having been resorted to after the stay was granted by this Court on 09th October, 2002. Petitioner, Therefore, filed the present writ petition for a declaration that the appraisal of the work of the petitioner was illegal and that he was entitled to continue for full term of five years for which he was appointed vide the letter dated 08th January, 2002. While the writ petition was pending, the services of the petitioner were terminated by the respondent w.e.f 14th December, 2002. On such termination of services of the petitioner, the Court granted liberty to the petitioner to file an amended writ petition challenging the order of termination dated 14th December, 2002. Liberty being granted by the Court, the petitioner filed the amended writ petition seeking declaration that Clause II of letter dated 08th January, 2001 and similar Clause of letter dated 15th October, 2001, was void in view of the law laid down by the Supreme Court of India. Petitioner also prayed for quashing the letter of termination dated 14th December, 2002, terminating the services of the petitioner as Director (Finance).

3. The case set up by the petitioner in the writ petition is that in terms of the guidelines issued by the respondent the appraisal of his work could be carried out only within three months of the completion of one year of the date of his appointment and any exercise, Therefore, carried out by the respondent for appraisal of his work after a lapse of about 22 months of his joining the respondent was clearly illegal and no action could be taken against the petitioner on the basis of the alleged appraisal. It is also the case of the petitioner that the Secretary who had seen the working of the petitioner had recommended the continuance of the petitioner as Director (Finance) and after the recommendations of the then Secretary, there was nothing more left for the respondents to appraise the work of the petitioner and that the Secretary who recommended the termination of the petitioner could not be a party to the appraisal done by the Public Enterprises Selection Board (in short referred to as 'PESB') as he could not be a judge in his own case. It is also the case of the petitioner that the material on which the PESB has acted in not recommending the continuance of the petitioner was never disclosed to the petitioner and in the

absence of such disclosure the principles of natural justice were clearly violated and no action could be taken on the basis of the said material. One of the main grounds on which the order of termination has been challenged is that the Clause giving an option to the respondents to terminate the services of the petitioner by giving him three months notice or by paying salary for three months in lieu of such notice was opposed to public policy and violative of Section 23 of the Contract Act.

4. In the counter affidavit filed by the respondents, it is submitted that action to terminate the services of the petitioner was taken in terms of the letter of appointment. It is submitted that the appointment letter did not confirm a blanket right upon the petitioner to continue in services for full five years and the appointment could be terminated by either side by giving three months notice or by giving three months salary in lieu thereof. It is also submitted that the right to review the performance of an employee is inherent in every employer and in the present case the same is specifically provided by the service contract. It is submitted that the provision regarding appraisal to enable the Government to take a view regarding continuance of the petitioner in service or otherwise for the balance period of tenure clearly indicates that the right to continue in service for the full tenure was not absolute. It is submitted that there was no question of either being a mala fide intent on the part of the respondent or any extraneous consideration for appraisal of the work of the petitioner; that the appraisal was conducted by the PESB which is an independent body and final decision on the recommendation made by PESB was taken by the Appointments Committee of the Cabinet on the basis of material on record. It is submitted that there is no mandate that the appraisal must be carried out within three months of the expiry of the first year. It is submitted that the guidelines issued by the Government only provide that review should be carried out within a period of three months after the expiry of the first year but the same would not mean that review could not be done or continued after the expiry of the said period. It is also the case of the respondents that guidelines framed for guidance of its officers are non-statutory guidelines and it cannot be said that the process of appraisal which had begun in time, if not completed within a period of three months, was illegal nor it would mean that the entire exercise of review was impermissible. It is submitted that there is chain of authorities involved in the evaluation of performance by the Appointing Authority, Review Authority and the Disciplinary Authority etc. and recommendation for confirmation made by any one of the Authorities, as has been done in the present case by the then Secretary, cannot be said to be paramount or binding on the other authorities and it is the collective decision of the PESB which must prevail. It is submitted that the report made by the petitioner against the Chairman-cum-Managing Director of HUDCO in May 2002, had no linkage whatsoever with the appraisal of his work. It is submitted that much earlier to the report of the petitioner, the Chairman-cum-Managing Director had on 02nd March, 2002 submitted his special report about the performance of the work of the petitioner. Even otherwise the appraisal exercise involved

evaluation and deliberations by PESB where the petitioner was given a detailed hearing and it was only after granting an opportunity of hearing to the petitioner that the recommendations made by PESB were placed before the Appointments Committee of the Cabinet. It is, Therefore, submitted that action has been taken against the petitioner strictly in accordance with law and no case was made out for interference with the decision of the respondents

5. Before I deal with the respective contentions of learned counsel for the parties, it will be useful to have a look at the letter of appointment and the terms and conditions by which the appointment was governed. The appointment was made vide the letter dated 08th January, 2001, however, by a subsequent letter dated 15th October, 2001, the petitioner was informed that his appointment was on the terms and conditions as contained in the said letter. The letter of appointment dated 08th January, 2001 reads as under:-

"I am directed to state that in exercise of powers conferred upon him by virtue of the Memorandum and Articles of Association of the Housing and Urban Development Corporation (HUDCO) Ltd., the President is pleased to appoint you to the post of Director (Finance) in HUDCO in Schedule 'C' scale of pay of Rs. 22,500-600-27,300/- (revised) in IDA pattern on immediate absorption basis, for a period of five years from the date you take over charge of the post or till the date of superannuation, whichever is earlier.

2. The appointing authority shall have the option to terminate your services with three months notice or on payment of three months salary in lieu thereof.

3. Formal orders giving the details of the terms and conditions of appointment shall be issued in due course in consultation with Department of Public Enterprises (DPE)."

Clause I of the terms and conditions as contained in the letter dated 15th October, 2001 which govern the appointment of the petitioner and which is relevant for deciding the present petition reads as under:-

CLAUSE - I

PERIOD - The period of his appointment will be five years w.e.f 11.1.2001, in the first instance or till the age of superannuation whichever is earlier and in accordance with the provision of the Companies Act. The appointment may, however, be terminated even during this period by either side on three months notice or on payment of three months salary in lieu thereof.

6. After the expiry of the first year, the performance of Sh. A.N. Gupta will be reviewed to enable the Government to take a view regarding continuance or otherwise for the balance period of tenure.

7. Mr. Vijay Makhija, learned senior advocate appearing on behalf of the petitioner has vehemently contended that Clause II of the letter of appointment and Clause I of the terms and conditions governing his appointment giving an

option to the appointing authority to terminate the services of the petitioner on three months notice or on payment of three months' salary in lieu thereof, was on the face it arbitrary and conferred powers on the Board which were capable of discrimination. It is submitted that this was a naked rule of 'hire and fire' which could not be permitted to be approved. Reliance in support of his arguments that such a Rule which confers absolute and arbitrary power on the corporation to terminate the services of an employee by issuing a notice or on payment of three months salary in lieu thereof without assigning any reason, is wholly arbitrary and violates the principle of natural justice as well as Article 14 of the Constitution of India. Reliance for this has been placed upon the judgments of the Supreme Court reported as Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , West Bengal State Electricity Board and Others Vs. Desh Bandhu Ghosh and Others, , Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, , Reserve Bank of India and Another Vs. S. Jayarajan, and two others judgments of this Court reported as M. Gopalakrishnaiah Versus Union of India 1994 (30) DRJ and Indian Railway Construction Company Ltd. and Others Vs. A.K. Dogra, .

8. It is also submitted that no adverse material was ever communicated to the petitioner. There is no adverse confidential report; no enquiry was held before terminating the services of the petitioner and even if there was any adverse remark, the same could not be relied upon for terminating the services of the petitioner as the same was never communicated to the petitioner. It is submitted that there ought to have been some material before the appropriate authority for taking the decision to cut short the services of the petitioner. For this Mr. Makhija has placed reliance upon the judgments reported as M. Gopalakrishnaiah Vs. Union of India, , Gurdial Singh Fijji Vs. State of Punjab and Others, , R.S. Tokas Versus UOI 10 (2002) DLT 746 and Sh. J.S. Garg Vs. Union of India (UOI) and Others, .

9. As already mentioned above, still another argument advanced by learned counsel for the petitioner is that the appraisal of the work of the petitioner, in terms of the guidelines, must be carried out within three months of the expiry of one year of the service of the petitioner and any appraisal thus carried out by the respondents after the expiry of the said period would have no sanctity and no action could be taken against the petitioner on the basis of such appraisal. It is submitted that these executive instructions/ guidelines may not have a force of law but it did not lie in the mouth of the respondents to contend that they had a right to deviate from such guidelines.

10. The guidelines relied upon by the petitioner in support of its contention that no appraisal of the work of the petitioner could be carried out after the expiry of three months from the end of the first year of his tenure read as under:-

Guidelines on Top Posts in Public Enterprises.

"The undersigned is directed to refer to the Ministry of Finance (BPE) Resolution

of even number dated 5.8.77 on the above subject and to refer to the guidelines relating to "tenure of appointment". It was stated therein that orders of appointment to Top Posts issued by the administrative Ministries should incorporate a suitable clause for review of performance of the appointee after a year. The intention is that the government should be able to assess the work at the end of a year in a five year's contract and terminate the contract if his performance is found to be not quite satisfactory.

2. The procedure for the review of performance after a year has been considered by the Government in consultation with the Public Enterprises Selection Board. It has been decided that the following procedure should be adopted for undertaking the review:

(i) Since each administrative Ministry is responsible for the performance of the Public Enterprises under its control, it should remain responsible for the proposed review of performance of appointees to top posts at the end of the first year of a longer term contract;

(ii) The review should be carried out by the Ministry in relation to the targets set out for the Corporation within a period of 3 months from the end of the first year of the tenure. The targets may have been included in the annual performance budget of the Corporation and/or may have been set out by the Board of the Company in terms of its corporate goals;

(iii) It is necessary for the PSEB to get first hand information regarding the performance of the candidates it recommends for first and second level appointments so that it can, where necessary attempt to improve its selection systems and procedure. It is, Therefore suggested that after the concerned Secretary has completed his assessment of the Chief Executive, he could orally convey his views to the Chairman, PESB. If the recommendation made by the Ministry is to withhold confirmation of a Chief Executive, the Secretary should meet the Chairman PESB to explain and discuss the areas in which the Chief Executive has failed.

(iv) A similar procedure can be adopted for the second level posts except that the consultation would be between the Chief Executive of the Company, Secretary of the Administrative Ministry and the Member of the PESB concerned with the selection."

11. Submission of Mr. Rohtagi, learned Additional Solicitor General, however, is that guidelines framed by the Government are only for purposes of guidance of the officials but they do not have any statutory force. It is submitted that unless the action taken by the respondents is actuated by mala fide or is made in violation of statutory provisions, the Court cannot set aside the same only on the ground that the guidelines did not permit the respondents to appraise the work of the petitioner after the expiry of three months of the end of the first year of his tenure. It is submitted that the process of appraisal which had begun in time would have to take its time to be completed and it cannot, Therefore, be said

that the appraisal having not been completed within three months of the end of the first year of the tenure of the petitioner, the same should not be completed.

12. While there cannot be any dispute about the proposition that the executive instructions do not have a force of law and it would not lie in the mouth of the State to say that it was not necessary for them to follow the same, however, a slight deviation or infraction of such guidelines would not give any right to the petitioner to challenge the order of termination only on the ground that the same has been passed in violation of the guidelines. Unless the order is actuated with mala fide or is made in violation of the statutory provisions, the same cannot be set aside only on the ground that the guidelines were not strictly followed by the respondents. Moreover, in the present case, the process of appraisal having already started and it having taken its time because of the transfer of the Secretaries, it cannot be said that the appraisal was actuated with malafide or could not be completed. It has been held by the Supreme Court in *Union of India and Others Vs. S.L. Abbas*, that while passing an order, the authority must keep in mind the guidelines issued by the Government on the subject, however, the guidelines do not confer upon the Government employee a legally enforceable right, I am, Therefore, not in agreement with learned counsel for the petitioner that the appraisal having not been completed within three months of the end of the first year of the tenure of the petitioner, the respondents could not appraise the work of the petitioner.

13. The main ground on which stress has been laid down by learned counsel for the petitioner is that the Clause in the letter of appointment that the services of the petitioner could be terminated by giving him three months notice or on payment of three months salary in lieu of notice was opposed to public policy and was hit by Section 23 of the Contract Act and that the same was also vocative of the principles of natural justice as well as of Articles 14 and 16(1) of the Constitution of India. In support of his contention, the petitioner has relied upon various judgments mentioned above.

14. In *Central Inland Water Transport Corporation Ltd. and another Versus Brojonath Ganguli (supra)* the Supreme Court was concerned with the rules framed by the Central Inland Water Transport Corporation governing the service conditions of its employees. Rule 9 of the Disciplinary and Appeal Rules of the said corporation provided that the employment of a permanent employee shall be subject to termination of three months notice on either side and that the notice should be in writing on either side and that the company may pay the equivalent of three months pay and allowances in lieu of notice or may deduct a like amount when the employee has failed to give due notice. While interpreting this Rule, the Supreme Court held that no guidelines whatever were laid down to indicate in what circumstances the power given by Rule 9 (i) could be exercised by the Corporation. It was observed that though Rule 36 of the rules provide for dismissal of a permanent employee on grounds of misconduct after holding the disciplinary inquiry, it was free to resort instead to Rule 9 (i) in order to avoid the

hustle of an enquiry; that Rule 9 thus conferred an absolute, arbitrary and unguided power upon the Corporation and it violated one of the two great Rules of natural justice viz. Audi-alteram-partem Rule. The Supreme Court in this case relied upon the observations of the Court in West Bengal State Electricity Board and others Versus Desh Bandu Ghosh and others (supra) where it was held that "a naked `hire and fire" rule, the time for banishing which altogether from employer employee relationship was fast approaching and its only parallel was to be found in the `Henry VIII Clause" so familiar to administrative lawyees."

15. In Delhi Transport Corporation Versus DTC Mazdoor Congress (supra) Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952 provided that a permanent employee could be removed from service without assigning any reason by giving reasonable notice or pay in lieu of notice but without holding any inquiry. While interpreting this regulation, the Supreme Court held that on a conspectus of the catena of cases decided by that Court, the only conclusion that follows was that Regulation 9 (b) which conferred power on the authority to terminate the services of a permanent and confirmed employee by issuing a notice terminating his services or by making payment in lieu of notice without assigning any reason in the order and without giving any opportunity of hearing to the employee before passing the impugned order, was wholly arbitrary, uncanalised and un-restricted violating principles of natural justice as well as Article 14 of the Constitution. It was held that Regulation 9 (b) of the DRTA Regulations which was in pari materia with Rule 9 (i) of the Rules in Central Inland Water Transport Corporation Ltd. and another Versus Brojonath Ganguli (supra), was void u/s 23 of the Contract Act as being opposed to public policy and was also ultra virus Article 14 of the Constitution. To the similar effect is the judgment of the Supreme Court in Reserve Bank of India and another Versus S. Jayarajan (supra) in which it was held that Regulation 25 (2) of the Reserve Bank of India (Staff) regulations providing for determination of the services of any employee on giving him three months notice or pay in lieu thereof, was vocative of the provisions of Articles 14 and 16(1) of the Constitution.

16. A Division Bench of this Court also in a judgment reported as Indian Railway Construction Company Versus Lt. Col. A.K. Dogra while dealing with the contractual appointment has held that even where the appointment of an employee was the result of a contract between the parties and one of the parties was an instrumentality of the State, the tenure of the employee cannot be cut short or brought to an end arbitrarily at the whims and caprice of the employer before the expiry of his contract and there must exist reasons for bringing to an end the services of an employee before the contractual period expires. It was held that if the order terminating the services of the officer was founded on complaints and charges against him then in that event his services could not be dispensed with without affording a reasonable opportunity of hearing to him in regard thereto.

17. In view of the aforesaid judgments of the Supreme Court there cannot be any dispute about the proposition that the Clause in the service conditions providing for termination of services of a permanent employee either in the service of the Government or in the employment of a public undertaking, by giving him reasonable notice or pay in lieu of notice is opposed the public policy and is violative of Articles 14 and 16 of the Constitution of India. The question, however, before the Court is whether the services of an employee who has been appointed on a contract for a fixed period and who is yet to be confirmed, could not be terminated by giving him three months notice or pay in lieu of notice. All the cases referred to by learned counsel for the petitioner except the judgment of this Court in *Indian Railway Construction Company Versus Lt. Col. A.K. Dogra* (supra) related to interpretation of a clause which provided for termination of services of permanent employees by giving them notice or pay in lieu of notice. The services of a permanent employee cannot be terminated otherwise than by following the principles of natural justice and the management cannot resort to the policy of "hire and fire" simply by giving notice provided by the contract of service. Such a clause, Therefore, will naturally be held to be violative of the principles of natural justice and also violative of Articles 14 and 16 of the Constitution of India. However, in the case of a contractual appointment where the confirmation of an employee is based upon the appraisal of his work, if the service conditions provided for termination of an employee before such confirmation and the termination of services are also not based on some misconduct, can it still be said that the employer does not have a right to terminate the services of such an employee because of his unsuitability, by giving him notice or salary in lieu of notice. The answer, in my opinion, has to be in upholding such a clause. Services of an employee who has not yet been confirmed and whose work is still under appraisal, in my opinion, can be dispensed with on his not being found suitable for being retained in service, strictly in accordance with the contract between the parties by giving notice or salary in lieu of notice and such a condition, in my opinion, cannot be said to be opposed to public policy or violative of Articles 14 and 16 of the Constitution. However, if the services of such an employee have been dispensed with not on the basis of the appraisal of his work but due to some misconduct, the action of termination of services of such an employee would clearly be violative of the principles of natural justice. The Court is, Therefore, required to examine whether it is a case of termination simplicities of the service of an employee who was yet to be confirmed on the ground of unsuitability or whether the services were terminated due to misconduct.

18. In *O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others*, the Court was concerned with Rule 31 (v) of the ITDC Rules, the constitutional validity of which was questioned in the writ petition. Rule 31 of the ITDC Rules provided that the services of an employee may be terminated by giving notice or notice pay as may be prescribed in the contract of service in the manner provided in the Rules. Rule also provided that the services of an employee who

had completed his probationary period and who has been confirmed or deemed to be confirmed may be terminated by giving him 90 days notice or pay in lieu thereof. It was argued that the said rule could not co-exist with Articles 14 and 16(1) of the Constitution of India and must, Therefore, die so that the fundamental rights guaranteed by the aforesaid provisions remain alive. The Supreme Court after noticing the observations of the Court in Central Inland Water Transport Corporation Ltd. and another Versus Brojonath Ganguli (supra) and West Bengal State Electricity Board and others Versus Desh Bandu Ghosh and others (supra) was of the view that there was no escape from the conclusion that Rule 31(v) of the ITDC Rules which provided for the termination of the services of the employees of the corporation simply by giving 90 days" notice or by payment of salary for the notice period in lieu of such notice, deserved to be quashed. However, after holding that the rule deserved to be quashed, the Court further observed "as that the occasion so demands, the Court feel constrained to place in focus and highlight an important dimension of the matter. The impugned regulation is extremely wide in its coverage in the sense that it embraces the 'blue collar' workmen, the 'white collar' employees, as also the 'gold collar' (managerial cadre) employees of the undertaking. In so far as the 'blue collar' and 'white collar' employees are concerned, the quashing of the rule does not pose any problem. In so far as the 'gold collar' (managerial cadre) employees are concerned, the consequence of quashing of the regulation calls for some reflection." The Court was of the view that "in the private sector, the managerial cadre of employees is altogether excluded from the purview of the Industrial Disputes Act and similar labour legislations. The private sector can cut the dead wood and get rid of a managerial cadre employee in case he is considered to be wanting in performance or in integrity. Not so in the public sector under a rule similar to the impugned rule. Public sector undertakings may under the circumstances be exposed to irreversible damage at the hands of a 'gold collar' employee (belonging to a high managerial cadre) on account of the faulty policy decision or on account of lack of efficiency or probity of such an employee. The very existence of the undertaking may be endangered beyond recall. Neither the capitalist world nor the communist world (where an employee has to face the death sentence if a charge of corruption is established) feels handicapped or helpless and countenances such a situation. Not being able to perform as per expectation or failure to measure up to the demands of the office is not misconduct. Such an employee cannot thus be replaced at all. Supreme Court observed that if the Rule was based on the performance or integrity of such an employee, perhaps it may not attract the vice of arbitrariness or discrimination. Some of the observations, the Court which are relevant to the present case may be reproduced as under:-

"Para 5 - There is, under the circumstances, no escape from the conclusion that R.31(v) of the aforesaid ITDC rules which provides for termination of the services of the employees of the respondent corporation simply by giving 90 days notice or by payment of salary for the notice period in lieu of such notice, deserves to

be quashed. As the occasion so demands, we feel constrained to place in focus and highlight an important dimension of the matter. The impugned regulation is extremely wide in its coverage in the sense that it embraces the "blue collar" workmen, the "white collar" employees, as also the "gold collar" (managerial cadre) employees of the Undertaking. In so far as the "blue collar" and "white collar" employees are concerned, the quashing does not pose any problem. In so far as the "gold collar" (managerial cadre) employees are concerned, the consequence of quashing of the regulation calls for some reflection. In the private sector, the managerial cadre of employees is altogether excluded from the purview of the Industrial Disputes Act and similar labour legislations. The private sector can cut the dead wood and can get rid of a managerial cadre employee in case he is considered to be wanting in performance or in integrity. No so the public sector under a rule similar to the impugned rule. Public sector undertakings may under the circumstances be exposed to irreversible damage at the hands of a "gold collar" employee (belonging to a high managerial cadre) on account of the faulty policy decisions or on account of lack of efficiency or probity of such an employee. The very existence of the undertaking may be endangered beyond recall. Neither the capitalist world nor the communist world (where an employee has to face a death sentence if a charge of corruption is established) feels handicapped or helpless and countenances such a situation. Not being able to perform as per expectation or failure to rise to the expectations or failure to measure up to the demands of the office is not misconduct. Such an employee cannot thus be replaced at all. If this situation were to be tolerated by an undertaking merely because it belongs to the public sector, it would be most unfortunate not only for the undertaking but also for the Nation. The public sector is perched on the commanding heights of the National Economy. Failure of the public sector might well wreck the National Economy. On the other hand the success of the public sector means prosperity for the collective community (and not for an individual Industrial House). The profits it makes in one unit can enable it to run a losing unit, as also to develop or expand the existing units, and start new units, so as to generate more employment and produce more goods and services for the community. The public sector need not Therefore be encumbered with unnecessary shackles or made lame. It is wondered whether such a situation can be remedied by enacting a regulation permitting the termination of the employment of employee belonging to higher managerial cadre, if the undertaking has reason to believe, that his performance is unsatisfactory or inadequate, or there is a bona fide suspicion about his integrity, these being factors which cannot be called into aid to subject him to a disciplinary proceedings. If termination is made, under such a rule or regulation, perhaps it may not attract the vice of arbitrariness or discrimination condemned by Arts. 14 and 16(1) of the Constitution of India, inasmuch as the factor operating in the case of such an employee will place him in a class by himself and the classification would have sufficient nexus with the object sought to be achieved. Of course it is for the concerned authorities to tackle the sensitive problem after due deliberation. We need say no more."

19. In *State of Uttar Pradesh Versus Ram Kishan JT 1999 (6) SC 399*, it was held that termination of an employees whose appointment was not regular but was a temporary appointment for a period of three months and was made conditional upon showing his progress during that period, will not attract the provisions of Article 311 of the Constitution as it was termination simpliciter. To the similar effects is the judgment of the Supreme Court in *H.F. Sangati etc. Vs. R.G. High Court of Karnataka and Others etc.*, wherein it was held that services of a probationer can be questioned only on the ground that it was arbitrary or punitive.

20. A conjoint reading of all the judgments referred to by the parties shows that in case of termination of services of an employees who is yet to be confirmed in service, the employer is not required to either give him an opportunity of hearing or hold an inquiry and the services can be terminated on the ground of unsuitability by merely giving him notice in terms of the letter of appointment. In the present case, the letter of appointment and conditions on which he was appointed clearly provided that though the appointment was for a period of five year, however, the same was subject to the review of the performance of the petitioner after the expiry of the first year so as to enable the Government to take a view regarding the continuance or otherwise for the balance period of tenure. Continuance for the entire period of five year was subject to the review of his performance regarding continuance or otherwise for the remaining period after the first year in service. The respondent after appraisal of the work of the petitioner having come to a finding that he was not suitable for being continued in service and having terminated the same by giving him three months notice in accordance with the letter of appointment and in terms and conditions of service, in my opinion, no fault can be found with the same. It was only if the petitioner had been confirmed in service after appraisal of his work in terms of the letter of appointment, that the petitioner might have some case to agitate against such termination. Prior to the confirmation of service, in my opinion, the petitioner cannot complain against the termination of his services. The right of the petitioner to challenge the termination would have accrued only if such termination was based upon a misconduct. If the services of the petitioner had been terminated on allegation of misconduct may be the petitioner get a right to challenge the same on the ground that the principles of natural justice were violated and the order of termination cast a stigma upon the petitioner, however, clause providing for termination of services by giving three months notice or salary in lieu thereof would not be opposed to public policy or vocative of Articles 14 & 16 of the Constitution of India, if the services are terminated on the ground of unsuitability before the confirmation of such an employee. If either an appraisal is done or a preliminary inquiry is held to determine the suitability of such an employee for confirmation to the post in question and on the basis of such appraisal or enquiry a decision is taken to terminate his services, in my opinion, the said order cannot be said to be punitive and the management will be at liberty not to confirm the services of such employee and terminate the same

by giving him notice or salary in lieu of notice in terms of the agreement between the parties.

21. The next question to be examined by the Court is whether the appraisal of the work of the petitioner was actuated with mala fide and if so, to what relief is the petitioner entitled and whether or not appraisal could be done even after three months of the end of the first year of tenure of the petitioner. As has been noticed by me above, the guidelines, though, provide a guide to the Government and its officials as to how the appraisal is required to be done but if the appraisal is not completed within three months of the expiry of the period of one year from the date of appointment of the petitioner, any action taken by the respondents not to confirm the services of such an employee on the basis of the appraisal (review) completed after the period of 3 months of the ends of the first year of the tenure, and to terminate the services of such an employee due to his not being found suitable on the basis of such appraisal, cannot be said to be illegal or void. Guidelines framed by the Government are in nature of a guide to work and an effort should be made not to deviate from the same but if the exigency of the work result in slight deviation the same cannot be said to be illegal. The alleged deviation has not in any manner prejudiced the employee and is not in any manner actuated with mala fide and no fault, Therefore, can be found with the same.

22. The respondents have placed before the Court, the office file relating to the appraisal of the work of the petitioner. As per the file the appraisal of the work of the petitioner was initiated on 23.2.2002; the report of the Chairman and Managing Director of HUDCO was not positive; despite this report the then Secretary made a favorable report for retention of the petitioner and for his confirmation in service. However, since the appointment of the petitioner was made by the Appointments Committee of the Cabinet, any recommendation made by the then Secretary for confirmation of the petitioner cannot be said to be paramount or binding on the other authorities. There are chain of authorities involved in the evaluation of performance of the petitioner, namely, the Appointing Authority, the Reviewing Authority and the PESB and recommendations made by any one of the authorities would not create any right in favor of the petitioner to claim confirmation. As already mentioned above, after the new Secretary had taken over, he made his own report which was adverse. In the meantime, the matter had gone to the Minister who made his notes on the file. Both the notes of the Minister were adverse. Matter was placed before the PESB for appraisal of the work of the petitioner. Joint appraisal was done by PESB by associating the petitioner in the same. Detailed hearings were given to the petitioner on 5.11.2002 and 13.11.2002. After hearing the petitioner, the PESB on appraisal of the work of the petitioner was of the opinion that the petitioner was not suitable to be retained in services and it, Therefore, recommended his termination.

23. Recommendations of PESB were sent to the Appointments Committee of the

Cabinet which approved the same on 14.12.2002. The sequence of facts narrated above shows that the assessment made by the respondent was an objective assessment and this Court while exercising the power of judicial review would not substitute its opinion for the opinion of the Joint Appraisal Committee which is an expert body. The petitioner being not a permanent Government employee, had no vested right to hold the post and the provisions of Article 311 of the Constitution were not applicable in his case. The order, in my opinion, does not cause any stigma and the appraisal having been done strictly in accordance with the guidelines applicable in the case, no fault can be found with the same. I am, Therefore, not in agreement with learned counsel for the petitioner that the appraisal was actuated with malice or there was any violation of the guidelines framed by the respondent for such appraisal.

24. The next argument advanced by learned counsel for the petitioner is that no adverse material was communicated to the petitioner nor there was any adverse entry in his confidential report. It is submitted that no inquiry was held against the petitioner and there ought to have been some material before the Appropriate Authority for taking a decision to cut short the tenure of the petitioner. It is submitted that the adverse remarks, if any, relied upon by the respondents for cutting short the tenure of the petitioner could not be relied upon as they were not communicated to him. This argument of the petitioner, in my opinion, has no force inasmuch as, it is not a case where the services of the petitioner have been cut short nor his services have been terminated on the ground of some misconduct or on the basis of an adverse material against him.

25. Clause 1 of the terms and conditions applicable to the case of the petitioner, clearly provides that after the expiry of the first year, the performance of the petitioner would be reviewed to enable the Government to take a view regarding his continuance in service or otherwise for the balance period of his tenure. This provision clearly shows that the status of the petitioner till such time the Government took a view regarding his continuance in service or otherwise for the balance period of tenure, was akin to that of an employee who was appointed temporarily or akin to that of a probationer. His continuance in service, Therefore, was dependent upon the Government finding him suitable for the remaining period of his tenure on appraisal of his work. As the work of a temporary employee or a probationer is evaluated to find his suitability in service to enable the employer to take a decision about his confirmation, the performance of the petitioner in the present case was also to be evaluated by undertaking a special appraisal in terms of Clause I of terms and conditions governing his appointment. The Supreme Court in a judgment reported as *State of U.P. Vs. Ram Kishan & another*, JT (1999) 6 SC 291, while interpreting the powers of the Appropriate Authority to terminate the services of the public servant has 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 of the person and there was no element of punitive proceeding."

26. Similarly in *H.F. Snagati Versus Registrar General, High Court of Karnataka & Ors.* (supra) where the probationers were discharged from service during the probation period and no order was passed declaring the period of probation having been successfully completed and confirming them on service, it was held by the Supreme Court that the High Court was justified in discharging the employees from service during the period of probation, it was not necessary that there should have been a charge and an enquiry on his conduct since the employee was only a probationer and it was open to the High Court to consider whether he was suitable for confirmation or should be discharged from service. The Supreme Court held that:

It is well settled by a series of decisions of this Court including the Constitution Bench decision in *Parshotam Lal Dhingra Vs. Union of India* and seven-Judge Bench decision in *Samsher Singh Vs. State of Punjab*, that services of an appointee to a permanent post on probation can be terminated or dispensed with during or at the end of the period of probation because the appointee does not acquire any right to hold or continue to hold such a post during the period of probation. In *Samsher Singh* case it was observed that the period of probation is intended to assess the work of the probationer whether it is satisfactory and whether the appointee is suitable for the post; the competent authority may come to the conclusion that the probationer is unsuitable for the job and hence must be discharged on account of inadequacy for the job or for any temperamental or other similar grounds not involving moral turpitude. No punishment is involved in such a situation. Recently, in *Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Centre for Basic Sciences*, having reviewed the entire available case-law on the issue, this Court has held that termination of a probationer's services, if motivated by certain allegations Tanta mounting to misconduct but not forming foundation of a simple order of termination cannot be termed punitive and hence would be valid. In *Satya Narayan Athya Vs. High Court of M.P.* the petitioner appointed on probation as a Civil Judge and not confirmed was discharged from service in view of the non-satisfactory nature of his service. This Court held that the High Court was justified in discharging the petitioner from service during the period of probation and it was not necessary that there should have been a charge and an inquiry on his conduct since the petitioner was only on probation and it was open to the High Court to consider

whether he was suitable for confirmation or should be discharged from service.

In the two cases at hand we find that the Administrative Committee of the High Court took into consideration all the relevant material and thereafter formed an opinion as to the unsuitability of two appellants to hold the post of Munsifs, which opinion as communicated to and upheld and accepted by the Full Court of the High Court. Pursuant thereto, the State Government issued the impugned order of discharge from service.

In our opinion the impugned order does not cast any stigma on the appellants. All that has been said in the impugned order is that the appellants were unsuitable to hold the post of Munsifs. It is pertinent to note that Rule 6 contemplates a probationer being discharged from service on one or more of the following grounds: (i) in terms of a condition imposed by the Rules, (ii) in terms of the order of appointment, or (iii) on account of unsuitability of the appointee for the service or post. Sub-rule (2) of Rule 6 requires an order discharging the probationer to indicate the grounds for the discharge. It also provides that such indicating of the grounds for the discharge in the order would not require any formal proceedings under the Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957 being held. The impugned order of discharge has been passed in strict compliance with the requirements of Rule 6. It does not cast any stigma on the appellants nor is it punitive. There was, thus, no requirement to comply with the principles of natural justice, much less to be preceded by any formal proceedings of inquiry before making the order.

27. In another judgment reported as 1998 (1) PLJR 77 (SC) the Supreme Court again while examining the termination of services of a probationer held that in case of termination for unsuitability the principles of natural justice are not attracted and there is no obligation to communicate the adverse remarks to the probationer before taking decision to terminate his services on the basis of the adverse material and un-communicated adverse material can be taken into consideration for assessment of suitability of the probationer and forming decision to terminate his services and such consideration cannot be said to be arbitrary. The Supreme Court while dealing with the services of the probationer held as under:-

"The remarks for the years 1976-77 and 1979-80 had been communicated to respondent 1 prior to the High Court took the decision on 19-6-1985 that respondent 1 is not fit for retention in service. The other remarks mentioned about were, however, communicated to respondent 1 after the said decision had been taken. The question is whether the non-communication of the said adverse remarks vitiates the action that has been taken against respondent 1, viz., thus termination of his services on the ground that he was not fit for confirmation on the post of Munsif. As regards a probationer, the law is well settled that he does not have a right to hold the post during the period of probation. The position of a probationer cannot be equated with that of an employee who has been substantively appointed on a post and has a right to hold that post. An order

terminating the services of a probationer can be questioned only if it is shown that it has been passed arbitrarily or has been questioned only if it is shown that it has been passed arbitrarily or has been passed by way of punishment without complying with the requirements of Article 311(2) of the Constitution. Since a probationer has no right to hold the post on which he has been appointed on probation, he cannot claim a right to be heard before an order terminating his services is passed. The obligation to communicate the adverse material to a person before taking action against him on the basis of the said material is a facet of the principles of natural justice. But principles of natural justice have no application in the case of termination of the services of a probationer during the period of probation since he has no right to hold the post. It is, Therefore, not possible to hold that there is an obligation to communicate the adverse material to a probationer before a decision is taken on the basis of the said material that he is not fit for being retained in service. Such material can be relied upon to show that such a decision does not suffer from the vice of arbitrariness and is not capricious. In this context it may be mentioned that even with respect to persons who have been substantively appointed on a post and have a right to hold that post, it has been held that the failure to communicate the adverse remarks in the service record would not vitiate the order of compulsory retirement. (See: Union of India Vs. M.E. Reddy and Baikuntha Nath Das Vs. Chief Distt. Medical Officer.)"

28. The special appraisal of the performance of the work of the petitioner done by the respondents having been considered by the Appropriate Authority and on such appraisal the Appropriate Authority having not found him suitable for continuation in service and his services having not confirmed and having terminated his services by taking recourse to the contract of service, in my opinion, the same cannot be challenged in the present writ petition. Learned counsel for the petitioner has cited a few judgments in support of his contention that adverse material not communicated to the petitioner could not be relied upon for terminating his services. In my opinion, the decision to terminate the services of the petitioner is not based upon any allegations of misconduct nor the same is punitive in character and it also does not cast any stigma upon him the decision being based on appraisal of his work regarding suitability to continue on the post, the judgments cited by learned counsel for the petitioner that adverse material not communicated to the petitioner could not be relied upon are not relevant and I have, Therefore, not discussed the said decisions in this judgment.

29. For the foregoing reasons, I do not find any infirmity in the order of the respondents to terminate the services of the petitioner by giving him three months notice as the same is neither arbitrary nor mala fide nor the same has been taken by way of punishment against the petitioner. The order having been passed after the Competent Authority was satisfied that the petitioner was not suitable to continue in service, cannot be set aside. The petition is, accordingly, dismissed with no order as to costs.