
(1991) 10 GUJ CK 0013
In the Gujarat High Court

Ratansing Pratapsinh Baria

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 14-10-1991

Acts Referred:

Bombay Police Act, 1951 — Section 14
Constitution of India, 1950 — Article 14, 16
Gujarat Police Manual, 1975 — Rule 89
Industrial Disputes Act, 1947 — Section 25F

Citation : (1992) 2 GLR 1216

Hon'ble Judges : S.M. Soni, J

Bench : Single Bench

Judgement

S.M. Soni, J.—Petitioner by this petition challenges the order of termination of his service. The petitioner further challenged the order on the ground that the said order of termination is in breach of provisions of Article 14 of the Constitution of India inasmuch as relying on certain rules as the grant of grace marks, other employees are declared and retained in service. However, he is not given the benefit of such rules and grace marks thereunder, and is removed from service on the ground that he has failed in the alleged examination. The order of termination is also challenged on the ground that it is bad in law inasmuch as the same is passed without a notice required under Rule 89 of the Gujarat Police Manual, 1975. The order is also challenged on the ground that the same is passed with retrospective effect in as much as the order is dated 14th May, 1984, while the termination thereby is with effect from 1st May, 1984. The petitioner has also challenged the order Annexure 2 dated 21-4-1984 on the ground that the same is without authority, beyond the jurisdiction of the authority, being in contravention of the provisions of the Manual and also that the said resolution does not apply to the Police force. It also discriminates between Police and Police appearing at the examination. It is in contravention of principles of natural justice in as much as the same was not brought to the notice of the examinees, and in particular the petitioner, and not applicable in any case to the case of the petitioner.

2. The order of termination is supported by the learned A.G.P. Ms. Rekha Doshit on the ground that in view of the provisions of the rules, circular and G.R. the petitioner is not entitled to any grace marks as claimed and the petitioner as declared fail is proper and just and according to law. She contended that the instance cited by the petitioner cannot be taken into consideration to compare with the case of the petitioner for the reason that in the alleged instances the grace marks were given by mistake and the State is not required to continue that mistake in perpetuity and for the same necessary order for correcting the same mistake is issued. The petitioner is, therefore, declared fail as was not entitled to grace marks as claimed. Ms. Doshit also contended that the petitioner is not an employee of the State or a Government servant as defined in the Bombay Civil Services Rules ("BCSR" for short) and, therefore, is not entitled to notice before termination under Rule 23 of the BCSR or Rule 89 of the Gujarat Police Manual. She also contended that the order of termination is not with retrospective effect. The petitioner stood relieved from 1st May, 1983 as per the order of the Principal of the Training School and thus the order of termination Annexure "A" is not an order with retrospective effect.

3. Few facts necessary to appreciate the contention of the petitioner are in precise as under.

4. Petitioner, in response to the recruitment requirements of the Police Force was directed to appear before the District Superintendent of Police after undergoing necessary tests pertaining to physical fitness etc. He was recruited as an unarmed police constable by respondent No. 2-Deputy Commissioner of Police, by order dated 1st March, 1982, No formal order of appointment was issued. After the said appointment, petitioner was sent to the Police Training Centre at Baroda for training under respondent No. 3-Principal of Police Training School, Lalbaugh, Baroda. Petitioner was first enlisted for trained in batch No. 166. On completion of the training period, he was required to appear in the examination held. As per practice prevailing, he was required to secure 50% marks in individual subject and 60% marks in aggregate of the subjects. Petitioner as he could not secure requisite marks in the examination held for batch No. 166, was declared fail. Petitioner was permitted to appear as second chance in examination held for trainees in batch No. 167, however, he failed there. As per the practice and procedure prevailing and as per the necessary circular and resolution of the Government, the petitioner was not entitled to grace marks in both the examinations of batch Nos. 166 and 167, and was declared fail. As per the rule, his services were then terminated as the same were liable to be terminated on his failure in the final examination. In substance, he was discharged from the service as per the Rules. The petitioner has challenged this order of termination being illegal, arbitrary, unreasonable and inviolation of Articles 14 and 16 of the Constitution of India as referred hereinabove. There is no dispute of the fact that on being enrolled on the constabulary and enlisted as constable and clearing the necessary requirements as to physical fitness etc., he was sent to training school at Baroda. Rule 129 of the Gujarat Police Manual

reads as under:

129. Recruits training at the Police Training School, Baroda: (I) Every recruit for the armed as well as unarmed Branch of District is sent to the Police Training school, Baroda where he receives training in musketry, drill, law and Police duties.

(2) The training at the School, extends over 8 months. It is divided into four terms of two months each.

(3) Sample form of application for enlisting as Constable, is given vide Form No. 4 in Appendix-I.

(4) The instruction given and the answering of examination papers should be in the regional language.

(5) An examination will be held at the end of each term. Two successive failures in any of the terminal examination will result in the discharge of the recruit. At the end of eight months training, a final examination will be held. Two failures in the final examination will result in the discharge of the recruit.

(6) The Principal, the Vice-Principal and other officers should take keen interest in the training of the recruits and they should make a point to see them at work play and to generally supervise and guide their training by personal contacts with the recruits and instructors.

With a view to see that the Instructor and the supervisory staff take keen interest in the recruits and their training they should make remarks in progress roll at the end of each term.

(7) The syllabus for training during eight months is given in Appendix-XL

5. Persons enrolled for constabulary on being selected are required to be sent for training as per the provisions of Rule 129 referred above. As and when there is a provision to accommodate such enlisted constables, they are sent to their schools by the concerned district, batch wise.

6. Petitioner being enlisted was sent for training in batch No. 166. Before the petitioner was due for batch No. 166, he was trained in drill etc. at the district station. Petitioner, then for enlisting as constable was required to fill an application in Form No. 4 of Appendix-1. In the final examination of batch No, 166 the petitioner secured the following marks:

Paper No. 1 ... Marks 46 out of 100 Paper No. 2 ... Marks 37 out of 75 Paper No. 3 ... Marks 43 out of 50 Total ... Marks 126 out of 225 As he failed in two subjects and as he could not secure the aggregate marks as required as per the practice prevailing, he was given a second chance. Petitioner has not at any point of time demur for grace marks as per the circular as well as G.R. both at the relevant time when this result of batch No. 166 was declared. Petitioner then appeared in the second trial with examinees of batch No. 167, where he secured the following marks:

Paper No. 1 ... Marks 46 out of 100 Paper No. 2 ... Marks 41 out of 75 Paper No. 3 ... Marks 34 out of 50 Total ... Marks 121 out of 225 Even as per the resolution and the circular prevailing at the time, petitioner was not entitled to grace marks and was declared fail in his final examination even of batch No. 167.

7. After the result of batch No. 166, some of the unsuccessful examinees filed a Civil Suit in the Court of Civil Judge (S.D.), Vadodara, being Regular Civil Suit No. 391 of 1984. In the course of hearing of that suit, it was suggested by the Court that if grace marks were given even wrongly or otherwise to the examinees of batch No. 165, the examinees of batch No. 166 also should be given benefit of that earlier rule as to grace marks. Considering it from the humanitarian ground, it appears that the Rules under which grace marks were given to the examinees of batch No. 165, the benefit of this rules was also be extended to the examinees of batch No. 166. Thus, the benefit of the alleged rules given to the examinees of batch No. 165 be either wrongly or under misconception of some facts, was extended to the examinees of batch No. 166 and some of the examinees were declared pass. It is the case of the petitioner that on extending of benefit to examination of batch No. 166 he was also entitled to be declared pass, yet respondent have not declared him pass in batch No. 166. It is the case of the petitioner that when benefit of certain rules was given to the examinees of batch No. 165 and the same were extended to the examinees of batch No. 166, the same should have been extended to the examinees of batch No. 167 and in particular to the petitioner. If the said benefit be given to the petitioner in his examination in batch No. 167 of procuring grace marks, he could also be declared pass in the examination. The respondent has thus committed an error in not declaring the petitioner passed in batch No. 166 as well as batch No. 167.

8. The question, therefore, is whether the petitioner was entitled to the benefit of grace marks as claimed by him as given to the examinees of batch No. 165 and extended to the examinees of batch No. 166. The circular under which the grace marks are given is dated January 1st, 1973 at Annexure "L" page 35. As per that circular, it is clear that the minimum marks required for passing the examination in individual subject with books or without books is 50%. Whoever secures more than 60% marks in one or two subjects but fails in the examination will be entitled to exemption for that subject in the subsequent examination. If an examinee fails in only one subject, then he can be declared pass by adding grace marks, but such grace marks shall not exceed 5% of the maximum marks of that subject. The benefit of grace marks will not be available to a candidate, who has availed of the exemption in any of the subjects. If a candidate secures more than 50% marks in aggregate and secures less than minimum marks required to pass one of the subjects, then he will be entitled to one mark per cent in excess of 50% of the aggregate with a maximum of 10 marks. It is clear that if a candidate fails in one of the subjects, then he will be entitled to grace marks to the maximum of 5 marks for that subject. The circular does not suggest that the candidate will be entitled to grace marks in individual subject as well as in the aggregate also. This also does not suggest that if the candidate fails in two

subjects, he is entitled to the benefit of this circular for grace marks. Ms. Doshit has contended that this circular is not for the trainee, who are appearing in the examination under Rule 129 of the Gujarat Police Manual. This circular is meant for the examination held for the departmental examination. Examination for trainee under Rule 129 of the Gujarat Police Manual are different than the departmental examination in the Government as well as in Police Force. Chapter V of the Gujarat Police Manual provides for examination and it pertains to departmental examination and language examinations. From Chapter V of the Gujarat Police Manual, it is clear that no such departmental examinations are provided for constabulary. I find much substance in the say of M/s. Doshit that Annexure "L" dated 1st January, 1973 is a circular pertaining to the departmental examination and not the examination after training as provided in Rule 129 of the Gujarat Police Manual.

9. Resolution dated 19th December, 1979 Annexure "B", on which the petitioner relies also pertains to the departmental examination as it clear from the first line of that resolution. Annexure "B" resolution dated 19th December, 1979 begins with the following preface:

Departmental examinations are held by the Head of the Departments under the administrative control of Sachivalay Departments for the continuation and promotion and service in Government employees. It then provides in substance the same provision of the resolution dated 1st January, 1973 referred hereinabove with a further discretion to the Secretary concerned to give further grace marks to the extent of 2 marks only in case a candidate fails for such a marginal marks. The advantage of the circular dated 1st January, 1973 and Resolution dated 19th December, 1979 was given to the examinees of batch No. 165. Realising the mistake, benefit of such grace marks were not given to the candidates, who appeared in batch No. 166. In view of settlement in civil suit, benefit of grace marks given to the candidates of batch No. 165, was further extended to the candidates of batch No. 166. Examination of batch No. 166 was taken in February, 1984. Realising the situation, the Principal, Police Training School, issued on Office Order dated 21st April, 1984, declaring a policy for grace marks. I will consider the legality of this Office Order later on. I would like to consider whether even considering the applicability of circular dated 1st January, 1973 and Resolution dated 19th December, 1979, whether the petitioner was entitled to grace marks or not. Considering the examination of batch No. 166, it is clear that the petitioner has failed in two subjects-viz. papers first and second. He is also not able to secure aggregate marks of 60%. Therefore, on bare reading of the circular as well as Resolution of 1st January, 1973, and 19th December, 1979 respectively, petitioner will not be entitled to grace marks, as he has failed in two subjects as well as he is not able to secure 50% of the aggregate marks. So far as the examination in batch No. 167 is concerned, he has failed in one subject, but he is also not able to secure 50% of the aggregate marks required as per the practice prevailing. Petitioner has no where disputed that the minimum marks required to pass a subject is 50% of the marks of the

subject and 60% of the aggregate marks. Thus, on bare reading of resolution dated 19th December, 1973, even if the petitioner is entitled to grace marks in one subject, then also he is not able to procure aggregate marks required under the practice.

10. In the examinations held after training of constabulary, the rule nowhere provides for grace marks. It is, therefore, clear that the Government has no intention to provide for grace marks in the examinations held for the constabulary after being trained in the school. The question of grace marks in absence of specific rule is normally required to be considered in the following circumstances, viz. (1) if the result is very poor because the papers drawn are found difficult to answer, (2) answer papers are very strictly checked, or (3) there were some adverse circumstances within the knowledge of the department holding examination and have affected the results. The grace marks cannot be a matter of rights except under the Rules therefor. In absence of any rule as to grace marks the same cannot be given to anybody. The alleged circular dated 1st January, 1973 and the Resolution of 19th December, 1979, in my opinion, are not applicable. Thus, there are no rules pertaining to grace marks. Therefore, the petitioner is not entitled to the benefit of grace marks. Even if the benefit of said circular and resolution are extended, then also the petitioner does not get any benefit on its proper construction though on the basis of the same benefits were extended to the examinees of batch Nos. 165 and 166 on intervention of the Court.

11. Can it be said that a person or authority has no right to correct the mistake? Is he bound to carry on the mistake in perpetuity despite having come to know the same? Is it not necessary that subsequent acts be done on correcting that mistake? As soon as the mistake comes to the knowledge of the person, he is bound to correct the same. Any resolution passed or any advantage given or obtained by anybody under misconception of some facts or under some mistake does not create a right in favour of that person to whom such advantage is not extended. As soon as it came to the notice of the department that they have been wrongly applying the circular dated 1st January, 1973 and Resolution of 19th December, 1979, they immediately stopped its application. This immediately affected the examinees of batch No. 166. However, the department was required to relax their decision at the suggestion of the Court, but it was only with a view to accommodate the examinees of batch No. 166, who had no knowledge or who were taken by surprise of such decision of the department. As the department learnt from that situation, under which they were required to accommodate the examinees of batch No. 166, they issued an office order dated 21st April, 1984 which was also announced in a general meeting dated 6th April, 1984. General meeting means the meeting held of all the examinees, who were to appear in the examination of batch No. 167. The policy is declared by the Principal, Police Training School, Vadodara by the said office order. The practice and procedure as to required marks to pass in individual subject and required marks in aggregate is put on paper by the said office order. The said office order

reads that indoor examination in Class-A of final examination, there shall be three papers. Then the subjects are mentioned-first paper will be of 100 marks, out of which minimum marks to pass as required to be secured are 50%, i.e., 50 marks. The second paper would be of 75 marks, out of which 50% i.e. 37 1/2 marks will be required to pass the same, and the third paper will be of 50 marks, out of which to pass the same 50% i.e., 25 marks are required. In all these papers, aggregate marks required are 60%, i.e., 135 marks in total. The examinees, who have not secured 60% i.e., 135 out of total 225 marks, may be added two marks obtained by them in general knowledge marks and such examinees will be declared as passed with grace marks. But, this office order does not provide for any grace marks for individual subject if an examinee has failed in it. The petitioner has challenged this office order on the ground that the same is declared without sufficient notice. According to him, the said office order was brought to the notice of the examinees only on 24th April, 1984 some hours before the examination of batch No. 167, which commenced on that day. It is the case of the petitioner that the said office order was made applicable immediately and without prior notice. It is alleged that the students must know well in advance about the standard of passing the examination. The said office order is challenged also on the ground that under the Gujarat Police Manual, passing standard for the examination held for Head Constable is only 45%. It is clear that the practice and procedure which was prior to this examination of batch No. 167 did not disclose that minimum requirement for passing in a subject is 50% and aggregate 60%. It is true that in the rule, such standards are not prescribed, but it will be pertinent to note that it is not the case of petitioner that such standard did not prevail in past also. When the rule does not provide for the minimum standard for passing the examination, then in that case the authority which takes the examination is entitled to prescribe some standard and it appears that the Principal of the Training School did prescribe such standard and has been holding examination on this standard since long. To show that the minimum standard of passing per subject is 50% and the aggregate is 60% is also clear from the result of batch No. 165 produced at page 30. Therefore, standard for passing are not introduced afresh by this office order dated 21st April, 1984. It is only that the same is placed on record, which was not in the past.

12. The question whether this office order can be said to be bad or not applicable to the examinees of batch No. 167 for the reason that the same came to their notice on the day of the examination. There appears a controversy as to this fact. The office order is no doubt dated 21st April, 1983. However, the earlier part in the nature of preamble suggests that this decision is taken as pronounced in general meeting of 6th April, 1984 as to the standard for passing the examinations. The standard for final examination and terminal examination commencing for batch No. 167 shall be 50% for individual subject and 60% of the aggregate. No doubt, the allegation of the petitioner that the said office order was displayed on Notice Board on 24th April, 1984 is not specifically denied, but

it is stated in the affidavit-in-reply of 4th October, 1985 that the said Circular dated 21st April, 1984 was also displayed on the Notice Board of the P.S.I., Baroda and the standard of passing and the policy of grace marks were made clear. Ms. Doshit contended that the petitioner has not come out with the case challenging this office order in the main petition, but has come out by way of an amendment in the petition. Ms. Doshit also contended that under the provisions of Evidence Act, it should be presumed that the official acts are regularly performed and according to rules. Accordingly, when it is admitted to have been at least pasted on the notice board, there will be no reason to disbelieve, the say that it was ordered to be pasted and presumed to have been pasted on the day of the office order. Apart from this, in view of the order it should be presumed that it was brought to the notice of the examinees of at least batch No. 166 on 6th April, 1984. Ms. Doshit contended that the petitioner has not denied anywhere that no such meetings were held on 6th April, 1984 as referred to in the office order and no such policy decision was declared therein. In view of this fact, I am not able to hold good the contention of the petitioner that office order dated 21st April, 1984 is bad on the ground alleged by the petitioner.

13. Mr. Supehia contended that the said office order should be quashed on the ground that it provides for rigid passing standard. He contended that the passing standard for the examination of Head Constables is only 45% as per Rule 165 of the Gujarat Police Manual. Rule 165 of the Gujarat Police Manual pertains to the departmental examination, which is for the purpose of continuity and promotion in service, while, these examinations are in the nature of qualifying examination for retention in service. It is clear from the Rule 129 that on second failure in final examination, the trainee is liable to be discharged. Thus two failures in the final examination makes him liable to be discharged from the service. The word used there is the discharge of the recruit. The word recruit means a service man or service woman namely enlisted and not yet fully trained. The Rule provides the consequences for the man who could not go through successfully the training prescribed by passing necessary examination in requisite trials. Thus, it is clear that the minimum marks prescribed by the office order is only the original standard prevailing for the examination held under Rule 129 of the Gujarat Police Manual and the same is only placed on paper, which was initially by way of practice in the department. I, therefore, do not find any substance in the say of Mr. Supehia that the office order dated 21st April, 1984 is bad in law and the petitioner is entitled to grace marks and liable to be declared pass. Mr. Supehia has also challenged the order on the ground that one Mr. Dashrath Jayram, who was already declared failed was then declared pass, in view of the settlement arrived in the Civil Court. Mr. Supehia contended that the refusal to give grace marks to the petitioner and declared him fail contravenes Article 14 of the Constitution of India because similarly situated Dashrath Jayram was given grace marks while the petitioner though entitled to was not given. The case of Dashrath Jayram stands on different footing on factual aspects. A person, who has failed in more than one subject is not entitled to grace marks. A person is

still less entitled to grace marks if he has failed in more than one subject and has not secured the requisite aggregate marks. In the instant case, petitioner has failed in his examination of batch No. 166 in two subjects and also has not secured the necessary aggregate marks. Said Dashrath Jayram failed in only one subject by 2 1/2 marks and in view of the policy for giving grace marks as followed in earlier examination and in view of the compromise arrived in the Civil Court, the said Dashrath Jayram was given 2 1/2 marks as grace. Thus as per the circular of the Government dated 19th December, 1979 as well as the practice prevailing then, the grace marks to the extent of 2 1/2 marks in one subject were added and the marks obtained by him in general quality were also added in total to make the requisite aggregate marks and that is how he was declared pass. Therefore, the case of Dashrath Jayram is not identical with the case of the petitioner so far as his result in batch No. 166 was concerned.

14. In view of the discussions hereinabove and my conclusion, the petitioner was not entitled to any grace marks and declared passed as alleged and contended by Mr. Supehia. Other contentions are required to be answered even though the petitioner has failed. This brings to the question whether the order of termination passed is bad inasmuch as the same is passed with retrospective effect and/or without notice contemplated under BCSR as well as the Gujarat Police Manual.

15. Ms. Doshit, in answer to this contention of the petitioner, contends that the petitioner is not at all appointed as a police official under Bombay Police Act and, therefore, he being not a Government servant, no notice to terminate his service is required. She contended that the order is not a retrospective one. In view of the fact of his failure in two trials in the final examination, the petitioner is liable to be discharged and is discharged accordingly on the basis of the intimation given by the Principal of the Training School.

16. To decide whether the petitioner is a Government employee, it is necessary to refer to certain provisions of the Gujarat Police Manual with the practice and procedure of appointment of Police Constables. Whenever, there are vacancies for the post of Armed and Unarmed Police Constables the names are called from Employment Exchange. On obtaining such names, the persons concerned are called for interview as to their physical fitness etc. and thereafter they are required to pass written as well as oral tests. Candidates who cleared the physical test as well as oral and written tests are recruited on purely temporary basis. He is, however, required to furnish necessary undertaking and pass certain departmental examinations. On such recruitment the candidates are required to undergo training as provided in Chapter III of the Gujarat Police Manual. Necessary provisions for training of a constabulary are provided in Rule 129, wherein the relevant rule for our purpose is Sub-rule (5) which reads as under:

An examination will be held at the end of each term. Two successive failures in any of the terminal examination will result in the discharge of the recruit. At the end of 8 months training a final examination will be held. Two failures in the final examination will result in the discharge of the recruit.

This rule provides that after being recruited the candidate is sent for training and is required to undergo training and is also required to get through the examination held on completion of such training. Sub-rule (5) referred above provides the contingency on failure of the candidate in clearing the examination be terminal or final. If a candidate fails twice successively in terminal examination, he is liable to be discharged. If he is declared pass in the terminal examination but fails two times in the final examination, then also he is liable to be discharged from the recruitment. In the instant case, the petitioner failed for two times in final examinations and in view of the provision, he was liable to be discharged as a recruit. The question is whether during the tenure of his being a recruit and undergoing the training, or on completion of the training on issuance of necessary sanad as provided in Schedule 2 u/s 14 of the Bombay Police Act, he is an employee of the State Government. Before the issuance of said sanad, on completion of the preliminary selection test, a candidate is given appointment order. As per that appointment order, he has to give an undertaking that he shall have to serve with the Government for minimum three years. If, in case, he is removed for any misconduct or if he resigned from the service during the period of three years, then also he has to pay the amount of bond furnished by him. He is also prohibited from attending any institution or business without previous permission of the department. He, cannot prosecute his further studies during that period without the permission of the department. The last column of that order provides that the appointment is purely on temporary basis and his service can be terminated without any previous intimation. During this period, he is also paid necessary salary with permissible allowances. Now it is also clear that names of such selected candidates are also published in the Police Gazette as the persons recruited for constabulary. On a candidate being selected, he is then required to undergo the training under Chapter III of the Gujarat Police Manual. It may happen that on selection of the candidate, there may not be any immediate accommodation in the training schools. Therefore, till a new batch begins for the training, the petitioner is required to report at the headquarters, under which he is selected, and there, till his turn comes to join the school, he is trained in parade, law, etc. No doubt, the statutory duties of the Police Constable are not required to be discharged by such recruits though they are in the headquarters. As soon as the training period commences, the candidate is sent for training and on completion of the training and passing necessary examinations he is issued a sanad referred in Section 14 of the Bombay Police Act. Admittedly, the day on which the candidate is selected is required to stay in the headquarters and abide by the conditions of appointment referred above and entitled to get necessary salary. Despite this fact, it is contended by Ms. Doshit that unless the sanad u/s 14 of the Bombay Police Act is issued, the candidate does not become a regular employee of the Government, but he simply continued as a trainee and is not entitled to notice and can be removed without any notice.

17. If a person is to be appointed after the completion of the process of selection

inclusive of necessary training and getting through the examinations therefor, then I do not think that the Government will undertake for the expense for his training period. Normally, if a person is to be appointed after completion of training and getting through the necessary examinations after such training, he may at the most be paid stipend during the period of training, but no specific order of appointment with necessary conditions of employment will be issued. During the course of selection process, the person will not get any emoluments. If the petitioner was not required to be treated as a Government employee then till the petitioner clears physical fitness test, written and oral tests, undergoes training and on completion of training, passes the necessary examinations required under the Rules, the order of appointment will not be issued. At the most, the Government may undertake the expenses during the training period, but not from the date on which the appointment order is issued on having cleared up physical and written and oral tests. In the instant case, on completion of physical examination and passing the written and oral tests, the order of appointment is issued, which is normally a routine order for the appointment of a Government servant. If by this order, the petitioner was not to be appointed, then there was no reason to include in that order that his services are liable to be terminated without any previous intimation. Therefore, in my opinion, the petitioner is appointed as a Government servant from the date on which he was selected and recruited from 1st March, 1983. The appointment order is issued accordingly.

18. Ms. Doshit, to substantiate her contentions has relied on unreported judgment in the case of S.B. Sharma v. State of Gujarat, in Special Civil Application No. 139 of 1974, decided on 18th March, 1975 (Coram: A.D. Desai and T.U. Mehta, JJ.). Judgment was delivered by T.U. Mehta, J. as he then was. In that petition, the question was whether the services of the petitioner were terminated by the competent authority or not? There petitioner's initial appointment order was issued by the Inspector General of Police, while order on completion of training was issued by Deputy Inspector General of Police. His services were terminated by the order of Deputy Inspector General of Police. It was contended that his service cannot be terminated by the Deputy Inspector General of Police being an authority lower in rank than the Inspector General of Police, who appointed him. There, the Court has differentiated between two orders and held that subsequent order being the official order of appointment and signed by Deputy Inspector General of Police, it was held that the termination was not improper as the appointing authority as well as terminating authority are the same. Here in the present case, this is not the question. The question here is at what point of time, petitioner can be said to be a Government employee at the initial appointment as recruit or by the order of appointment on successfully completion of training. In the case, before the Division Bench, this question as to at what point of time the recruit becomes an employee was not there. Thus the judgment relied on by Ms. Doshit in my opinion if of no assistance. It is clear that on completion of the training and getting through the

examination, the successful candidate is to be allotted to different Police Stations and then sanad u/s 14 is issued. He is then entitled to discharge the duties under the Police Act. Simply because the candidate is not authorised to discharge certain duties under the Police Act cannot be lead to infer that he is not a Government employee. It may be that after undergoing successfully through certain training, he was required to be invested with necessary statutory powers of the Police Constable. Till that time, the person selected is appointed as a Police Constable, but he is not invested with those powers. In the present case an order of recruiting the petitioner as Unarmed Police Constable is issued on 1st March, 1983. By the said order the appointment is purely on temporary basis incorporating usual conditions of appointment. If the petitioner was not a Government servant, then there was no reason for the appointing authority to include certain conditions and in particular a condition as to termination without previous notice. The question of termination does not arise unless the appointment is made. It was not necessary for Government to obtain necessary bond to serve for a period of three years. If the appointment was to be made on completion of training and passing the examination, such a bond should have been taken after the completion of the training on issuance of appointment order on passing the examination after training. All these factors lead to conclude that the petitioner was appointed and then was sent for training. He was thus the Government employee from that date. Therefore, in my opinion, petitioner is a Government servant with effect from 1st March, 1983, the date of his recruitment.

19. The question, there-fore, is when the petitioner is a Government servant, can his service be terminated with retrospective effect. Ms. Doshit made an attempt to support the order stating that the Principal of the Training School has intimated about the result on 1st May, 1984 of the failure of the petitioner. On failure in the examination, after training, this petitioner or a trainee was liable to be removed from the service and therefore the petitioner had no right to continue as recruit on his failure being declared. Thus the formal order for the same if passed subsequently does not make an order of termination with retrospective effect. It is a settled principle of law and practice too that the things which are done cannot be undone. At the most they can be ignored. In the present case, the order of termination Annexure "A" is dated 14th May, 1984 and the services of the petitioner are ordered to be terminated with effect from 1st May, 1984. To answer the contention of the petitioner, it is necessary to decide as to what was the status of the petitioner for the period of 1st May, 1984 upto 14th May, 1984. The petitioner was a Government employee and bound under the bond given by him. If the petitioner has committed the breach of any of the condition of the bond or any of the condition of the appointment order during the period of 1st May, 1984 till 14th May, 1984 the question would be, could he have been dealt with as per the conditions of appointment order and or the bond. In my opinion, petitioner could be dealt with for such breach till 14th March, 1984. The petitioner stood relieved by the respondent from the undertaking and bond

and the conditions of appointment, only with effect from 14th May, 1984, and therefore the order with retrospective effect in my opinion is a bad one and cannot be sustained. To substantiate this contention, Mr. Supehia has relied on the judgment in the case of Sri Assaram Raibhah Dhage Vs. Executive Engineer and others, . In that case, the petitioner's services were terminated by letter dated 11th March, 1986 with effect from 1st March, 1986. There also, the termination shows with retrospective effect and the Division Bench of the Bombay High Court has held as under:

The petitioner's learned Counsel Miss Purohit is perfectly justified in making a grievance that it is unthinkable that an employee's services can be terminated with retrospective effect, as done in the present case. We joint learned Counsel in her astonishment. For that matter, one of the conditions in the letter of appointment is that if the petitioner desired to resign he was liable to pay one month's salary or give one month's notice. It is therefore ironical that on the other hand, the petitioner's services were terminated with retrospective effect.

Mr. Bhatkar now takes refuge that the petitioner's appointment was merely temporary. However, he is unable to say under what provisions of law the petitioner's employment, even if temporary, could be terminated with retrospective effect.

There the Division Bench has held the termination order bad in law and have set aside the same. Here in the instant case, the services of the petitioner are terminated with effect from 1st May, 1984 by an order dated 14th May, 1984. Admittedly, in view of the appointment order, the proforma produced by Ms. Doshit shows that the petitioner was admittedly appointed as a temporary servant and, therefore, such an order, in my opinion is bad and is liable to be quashed.

20. Mr. Supehia has also attacked this order on the ground that no notice either under Rule 33 of the Bombay Civil Services Rules or Rule 89 of the Gujarat Police Manual is served. Admittedly in the instant case, in view of the provisions of Rule 2 of the Bombay Civil Services Rules, the said Rules are not applicable to the constabulary appointed under the Bombay Police Act. Therefore, the question of applicability of Rule 33 is out of question. Rule 89 of the Gujarat Police Manual is identical *pari materia* with Rule 33 of the Bombay Civil Services Rules. Clause (c) of Sub-rule (1) of Rule 89 of the Gujarat Police Manual reads as under:

Where the temporary Government servant has put in service for a period exceeding one year, the period of such notice shall be one month and where such Government servant has put in service for one year or any period less than one year, the period of such notice shall be one week; Provided that the services of any such Government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice, at the same rates at which he was drawing pay and allowances immediately before the termination of his service, or as the case may be, for the

period by which such notice falls short of the notice period.

It is, therefore, clear that the petitioner is appointed, and is a temporary Government servant. His services are liable to be terminated at any time by notice in writing given by the appointing authority as per Clause (b) of Sub-rule (1) of Rule 89 of the Gujarat Police Manual. In the instant case, the services of the petitioner are terminated by the respondent No.1-State and under the provisions of Clause (b) of Sub-rule (1) of Rule 89 of the Gujarat Police Manual, the respondent No. 1 was required to give one month notice, as petitioner has completed one year's service commencing from 1st March, 1983 till 14th May, 1984. Thus Mr. Supehia contended that as no such notice is given, the order of terminating his services is bad. Mr. Supehia, to substantiate his argument, relied on two judgments-one in Spl. Civil Application No. 3159 of 1988, decided on 7th March, 1991 (Coram: A.N. Divecha, J.), and the other in Spl. Civil Application No. 2213 of 1981 with Spl. Civil Application No. 3358 of 1981, decided on 5th February, 1982 (Coram: N.H. Bhatt, J.). In both these cases, the termination was without notice and in non-compliance of Rule 33 of BCSR. Therefore, as no notice is served before termination of the service of the petitioner, the order of termination is liable to be quashed and I hereby hold that order is bad. Mr. Supehia has also relied on the judgment in the case of Santosh Gupta Vs. State Bank of Patiala, . There according to the workman the termination of her services was retrenchment with the meaning of Section 2(oo) of the Industrial Disputes Act, and as it was covered by the provisions of Industrial Disputes Act, the employer was required to comply with the provision of Section 25F of the Industrial Disputes Act, and therefore, for non-compliance by way of no notice, the order was held to be bad. I have also held that in view of the specific provision of Sub-rule (2) and (3) of Rule 89, the petitioner was entitled to a requisite notice before the issuance of the termination order. Principle laid down in Santosh Gupta case does apply to the present case.

21. The petitioner has failed in the examination after training and as per Sub-rule (5) of Rule 129 of the Gujarat Police Manual, he was liable to be discharged from the service. Therefore, the question is whether in view of the fact that the order of termination being bad and the petitioner having failed twice in the final examination being liable to be discharged as a recruit, what final order should be passed in this petition. Ms. Doshit contended before this Court that even if the order is held to be bad on the ground that no notice was given, then also at the most, the petitioner shall be entitled to salary of the notice period, but not entitled to reinstatement, for the simple reason that he was otherwise also, not entitled to be continued in service-as he has failed in the requisite examinations and requisite trials after training. She also contended that in view of the latest judgment of the Supreme Court in the case of Smt. Saran Kumar Gaur and Ors. v. State of Uttar Pradesh and Ors., the principle of no work no remuneration should be attracted and the order of reinstatement cannot be passed. Normally, when the order of termination is set aside, the employee is entitled to be reinstated in the service, but in the present case, the petitioner is not entitled to

be re-employed at all in the facts and circumstances of this case for the reason that he has not passed necessary examinations after training and also within stipulated trials. In view of the special fact that petitioner having failed cannot be continued in service even on reinstatement, the order of reinstatement cannot be passed. At the most, the petitioner is entitled to one month salary for the notice period and this will serve the purpose. The principle of no work no remuneration does not arise as the petitioner is not required to be reinstated. In the instant case, as the petitioner has not passed the necessary examination, his services were also liable to be discharged and he could not be continued in service. Under the circumstances, the order of reinstatement with or without backwages does not arise in the instant case. The petitioner is however entitled to a salary of notice period. I, therefore, pass the following order.

22. The petition is partly allowed. The order of termination dated 14th May, 1984 is confirmed with a direction to the respondent No. 1 to pay one month salary to the petitioner in lieu of notice period. Rule made absolute accordingly. No order as to costs.