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**(2003) 09 OHC CK 0038**  
**In the Orissa High Court**  
**Case No : O.J.C. No. 8416 of 2001**

Smt. Manjushree Tripathy

APPELLANT

Vs

Secretary, Orissa Legislative Assembly

RESPONDENT

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**Date of Decision :** 10-09-2003

**Acts Referred:**

**Citation :** (2004) 97 CLT 111

**Hon'ble Judges :** M. Papanna, J;A.K. Patnaik, J

**Bench :** Division Bench

**Advocate :** A.K. Mishra, J. Sengupta, D.K. Panda, G. Sinha and P.R.J. Dash, for the Appellant; P.K. Roy, P.K. Panda, I. Sahoo, B.K. Mohanty, Jitamitra Mohanty, A.K. Panigrahi, A.N. Upadhaya and Mohadev Mishra, for the Respondent

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## Judgement

A. K. Patnaik, J.—In response to an advertisement dated 17.5.1993 the petitioner applied for a post of Junior Assistant in the Secretariat of the Orissa Legislative Assembly, Bhubaneswar and she appeared in a selection test conducted on 13.11.1997. She was informed by the opposite party by a letter dated 12.2.1999 that she has been provisionally selected for appointment as Junior Assistant but her appointment was purely temporary and terminable at any time and subject to the decision of this Court in O.J.C. Nos. 4735, 5174 and 5175 of 1998. The petitioner joined as Junior Assistant in the Secretariat of the Orissa Legislative Assembly on 12.2.1999. On 20.2.1999, an office order was issued that the petitioner was temporarily appointed as a Junior Assistant in the Secretariat with effect from 12.2.1999 on probation for a period of one year. Thereafter, by an office order dated 8.2.2000 the petitioner was allowed to continue on probation for a further period of one year with effect from 12.2.2000 subject to decision of this Court in O.J.C. Nos, 4735,5174 and 5175 of 1998. The petitioner continued as such Junior Assistant on probation in the Secretariat of the Orissa Legislative Assembly until her services were terminated by order dated 30.8.2000 by the opposite party on the ground that her appointment was irregular and was made in violation of the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act, 1975

ignoring the claims of candidates who had been selected earlier and who were senior in rank and without recommendation of the Employment Exchange. Aggrieved, the petitioner moved this Court under Article 226 of the Constitution in O.J.C. No. 8660 of 2000 and by order dated 5.4.2001 a learned Single Judge of this Court quashed the order dated 30.8.2000 on the ground that the petitioner had not been given an opportunity of being heard and the principles of natural justice had not been observed before she was terminated from service by the said order dated 30.8.2000. By the order dated 5.4.2001, however, the learned Single Judge observed that it will be open to the opposite party to take action in accordance with law after giving opportunity of hearing to the petitioner. Thereafter the opposite party issued an office order dated 24th of May, 2001 stating the grounds on which the services of the petitioner were sought to be terminated and giving opportunity to the petitioner to submit an explanation within fifteen days of the date of receipt of the said office order failing which the matter was to be decided ex parte. After receipt of the said office order dated 24th of May, 2001 the petitioner sent a letter dated 6.6.2001 to the opposite party requesting him to supply the documents listed in the said letter to enable the petitioner to give an effective explanation. In the said letter dated 6.6.2001, the petitioner also stated that after receipt of the said documents she may be granted one month's time for submission of her explanation. The opposite party, however, did not furnish the said documents and instead by order dated 26.6.2001 terminated the services of the petitioner on, inter alia, the ground that she was not selected for the four posts advertised on 17th May, 1993 on the basis of the test held on 30.11.1997 and she did not appear in the test held on 5.4.1998 and she was appointed ignoring the claims of others. Aggrieved, the petitioner has filed this writ petition under Article 226 of the Constitution for quashing the said order of termination dated 26.6.2001 and for directing the opposite party to pay the petitioner all service benefits including financial benefits retrospectively.

2. Mr. Aswini Kumar Mishra, learned counsel for the petitioner, submitted that it is well settled in law that even a probationer is entitled under Article 311(2) of the Constitution to reasonable opportunity of being heard in an inquiry in respect of the charges on account of which he is sought to be removed from service. He submitted that Rule 9(2) of the Orissa Legislative Assembly Secretariat (Recruitment and Conditions of Service) Rules, 1983 expressly stated that the Orissa Civil Services (Classification, Control and Appeal) Rule, 1962 as modified from time to time shall mutatis mutandis apply to persons in service of the secretariat of the Orissa Legislative Assembly. He submitted that Rule 15 of the Orissa Civil Services (Classification Control and Appeal) Rules, 1962 laid down the procedure for inquiry into the charges against an employee for imposing a major penalty such as removal from service and in this case the said procedure laid down in Rule 15 has not been followed. He further argued that Sub-rule (3) of Rule 15 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 clearly provided that the delinquent employee shall be supplied with all

documents on which the allegations are based for the purpose of his defence and in this case the petitioner was not supplied with the documents which were relevant and necessary to enable the petitioner to submit an effective explanation. He vehemently argued that since the documents asked for by the petitioner in her letter dated 6.6.2001 in Annexure-10 to the writ petition were not furnished to the petitioner to enable her to furnish her explanation, the provisions of Rule 9 of the Orissa Legislative Assembly Secretariat (Recruitment and Conditions of Service) Rules, 1983 read with Rule 15 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 stood violated and the impugned order of termination is liable to be quashed on this ground. In support of his aforesaid submission, Mr. Mishra cited the decisions of the Supreme Court in U.P. Co-operative Federation Ltd, v. Ham Singh Yadav and Ors. AIR 1998 SC 413 Basudeo Tiwary Vs. Sido Kanhu University and Others, ; Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, and Chandra Prakash Shahi v. State of U.P. and Ors. AIR 2000 SC 1706. Mr. Aswini Kumar Mishra further submitted that admittedly the petitioner took the selection test on 30.11.1997 but no select list was prepared for the selection held on 30.11.1997, but subsequently another selection was held on 5.4.1998, and a combined select list was published on 17.8.1998 in which it was shown that the petitioner had been selected. He argued that on these facts the petitioner should be treated as having been selected on the basis of the test held on 30.11.1997 and the termination of services of the petitioner by the impugned order on the ground that her appointment was illegal and irregular is arbitrary and is liable to be quashed.

3. In reply, Mr. Mohadev Mishra, learned counsel appearing for the opposite party, submitted that the petitioner was neither a probationer nor a regular recruit as her very appointment to the post of Junior Assistant in the Secretariat of the Orissa Legislative Assembly was illegal and irregular inasmuch as she was never selected for such appointment in the selection held on 30.11.1997 and she had not appeared in the selection held on 5.4.1998 and the opposite party was not obliged to comply with the provisions of Rule 9 of the Orissa Legislative Assembly Secretariat (Recruitment and Conditions of Service) Rules, 1983 and Rule 15 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 before terminating her service or with the provisions of Article 311(2) of the Constitution. He submitted that in any case principles of natural justice were followed and reasonable opportunity was afforded to the petitioner as by office order dated 24th of May, 2001 in Annexure-9 to the writ petition the petitioner was asked to submit her explanation before termination of her services, but the petitioner did not avail of the opportunity and instead sent a letter dated 6.6.2001 to the opposite party requesting him to furnish the documents mentioned therein knowing fully well that the said documents were not available. He referred to the affidavit dated 6.9.2002 of the Joint Secretary of the Orissa Legislative Assembly and in particular paragraph 4 thereof in which it is sated that the written test was conducted during the period when Late R.N. Swain was

the Secretary of the Assembly Secretariat and after Late R. N. Swain was relieved from office, attempt was made by his successor to get the documents relating to the written test from Late R. N. Swain, but Late R. N. Swain in his letter dated 31.1.2001 informed his successor Mr. J. P. Dash that the said documents relating to the written test were kept with Smt. Bishnupriya Sahu, Ex-Deputy Secretary, Orissa Legislative Assembly, who has also expired on 28.2.1999. Mr. Mishra next submitted that by the advertisement dated 7.5.1993 only four vacancies were notified, and the petitioner and other candidates who had applied, appeared in the test for the said four vacancies on 30.11.1997 but the select list dated 17.8.1998 annexed to the counter affidavit of the opposite party as Annexure-B would show that four other persons, namely, Shri Harsh Krishna Sahu, Shri Srikanta Kumar Routray, Kumari Jyotsnaram Ray and Kumari Mary Jasinta Dung Dung, were selected and the petitioner was not selected. He further submitted that thereafter for some more vacancies a fresh exercise was made by requesting the Employment Exchange to sponsor suitable candidates but the petitioner's name was not sponsored because at that time her Employment Exchange Certificate had become invalid and the same had not been renewed in time and therefore the petitioner did not appear in the test conducted on 5.4.1998 and yet in the select list of candidates for the test conducted on 5.4.1998, the name of the petitioner was shown in the ninth position. Mr. Mohadev Mishra argued that since the petitioner was not selected on the basis of the test conducted on 30.11.1997 and she had not taken the test conducted on 5.4.1998, she could not have been appointed to the post of Junior Assistant and her appointment was illegal and irregular and her services were therefore terminated by the impugned order. He relied on the decision of the Supreme court in Bihar Public Service Commission and another Vs. State of Bihar and others, , in which it has been held that where gross irregularities and illegalities have been committed in a selection, a person cannot claim enforceable right on the basis of such illegal or irregular selection and the High Court cannot issue a mandamus in his favour in a writ petition under Article 226 of the Constitution.

4. The first question to be decided in this writ petition is as to whether the petitioner had been selected in accordance with law for the post of Junior Assistant in the Secretariat of the Orissa Legislative Assembly and her appointment on probation to the said post with effect from 12.2.1999 was legal and regular. By the advertisement dated 17.5. 1993, copy of which is annexed to the writ petition, applications were invited for filling up only four posts of Junior Assistant in the Secretariat of the Orissa Legislative Assembly. Hence, only these four posts could be filled up pursuant to the advertisement dated 17.5.1993. While the case of the petitioner is that she appeared in the test held on 30.11.1997 and was selected in the said test, the case of the opposite party is that though she appeared in the test on 30.11.1997 for selection for the aforesaid four posts of Junior Assistant, she was not selected for any of the aforesaid four posts of Junior Assistant. The select lists dated 17.8.1998 signed

by the Secretary, Joint Secretary (Establishment), Deputy Secretary and three Under Secretaries of the Orissa Legislative Assembly on which both the petitioner and the opposite party rely on are extracted herein below :

"SELECT LIST OF THE WRITTEN TEST HELD ON 30.11.1997

1. Shri Harsh Krishna Sahu General. 2. Shri Srikanta Kumar Routray, 94800891 S.E.B.C 3. Km. Jyotsnarani Ray, CW/2626/93 General (W) 4. Km. Mary Jasinta Dung Dung, CW/352/89 S.T.(W) "SELECT LIST AS PER THE WRITTEN TEST HELD ON 5.4.1998

1. Shri Balaji Panda, C/3148/97 Un-reserved 2. Shri Ajit Kumar Nayak, 9505088 -do- 3. Km. Jyotiprava Panigrahi, C-9609928 -do- 4. Shri Pradipta Kumar Panda, 9608252 -do- 5. Mehr Krushna Chandra Khatai, 9588375 -do- 6. Shri Kali Shankar Mishra, PHC/291/92 -do- 7. Shri Pranab Kumar Panda, 9704229 -do- 8. Shri Sushil Kumar Patnaik, C/4326/91 -do- 9. Km. Manjushree Tripathy, TW/3456/91 -do- 1. Shri Prasant Kumar Sahu, C/617/88S.E.B.C. 2. Shri E. C. Baboo, C/1313/97 -do- 3. Km. Nilima Pradhan, 95010007 -do- 4. Km. Minati Mallia, 9706870 -do- 5. Shri Bhabani Sankar Nayak, 970777 -do- 6. Shri Niranjana Behera -do- 7. Km. Sabitri Sendha, -do- 1. Km. Anima Tirkey, CW/3799/96 Scheduled Tribe (W)

1. Km. Manjushree Behera, CW/3210/93 Scheduled Caste (W) 2. Shri Ganesh Patra, C/2790/97 Scheduled Caste 3. Shri Birendra Kumar Naik, C/4624/9 -do- As per the direction of Hon'ble High Court in the matter of OJC No. 4735/98, the result of Shri Ambika Prasad Mishra, petitioner is not declared.

Sd. Illegible. Sd. Illegible. Sd. Illegible. 17.8.98 17.8.98 17.8.98 JOIN.T SECRETARY DEPUTY SECRETARY UNDER SECRETARY (ESTT) (ESTT)

Sd. Illegible: Sd. Illegible. Sd. Illegible. 17.8.98 17.8.98 17.8.98 UNDER SECRETARY UNDER SECRETARY SECRETARY Orissa Legislative Assembly"

From a plain reading of the select lists extracted above, it will appear that four persons other than the petitioner have been selected for the four posts advertised on 17.5.1993 on the basis of the written test held on 30.11.1997. The name of the petitioner Srimati Manjushree Tripathy, however, has been shown against serial No. 9 of the candidates selected as per the written test held on 5.4.1998, but it is stated in paragraph 5 of the counter-affidavit on behalf of the opposite party that the petitioner has not taken the written test held on 5.4.1998 and this statement has not been denied in the rejoinder of the petitioner. The contention of Mr. Aswini Kumar Mishra, learned counsel for the petitioner, that the aforesaid select list is a combined select list for the written tests held on 30.11. 1997 and 5.4.1998 is not correct, as it will appear on a bare perusal of the lists dated 17.8.1998 extracted above that two separate lists of candidates selected on the basis of written test held on 30.11.1997 and of candidates selected on the basis of written test held on 5.4.1998 have been prepared, although the two separate lists for the two tests held on 30.11.1997 and

5.4.1998 have been prepared and signed on one date, i.e. 17.8.1998. The fact that two select lists have been prepared and signed on one date does not make the two lists a combined select list. If two separate selections are held from among the candidates who may not be all common for the two selections, two separate select lists of candidates will have to be prepared on the basis of their performance in the two selections and a combined select list cannot be prepared for two separate selections. It is thus clear that the petitioner was not selected for the four posts of Junior Assistant advertised on 17.5.1993 and her appointment to the post of Junior Assistant on probation with effect from 12.2.1999 by the Secretary of the Orissa Legislative Assembly was illegal and irregular.

5. The next question to be decided in this writ petition is whether the procedure for inquiry laid down in Rule 15 of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 and the provisions of Article 311(2) of the Constitution were required to be followed before the impugned order of termination of the service of the petitioner was passed by the opposite party. The contention of Mr. Aswini Kumar Mishra, learned counsel for the petitioner is that the aforesaid Rule 15 of the Orissa Civil Services" (Classification, Control and Appeal) Rules, 1962 has to be followed before termination of service of any employee of the Orissa Legislative Assembly Secretariat by virtue of the provisions of Sub-rule (2) of Rule 9 of the Orissa Legislative Assembly Secretariat (Recruitment and Conditions of Service) Rules, 1983. The said rule 9 of the Orissa Legislative Assembly Secretariat (Recruitment and Conditions of Service) Rules, 1983 is quoted herein below :

"9. Disciplinary control - (1) The disciplinary control of the service shall vest :

(a) in the Speaker in respect of the officers of whom he is the Appointing Authority ;

(b) in the Secretary in respect of other employees of Secretariat.

(2) The Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 as modified from time to time, shall mutatis mutandis apply to persons employed in the service and particularly as hereinafter specified -

(i) subject to provisions of Article 311 of the Constitution the power to inflict any punishment on any member of the service shall vest in the Appointing Authority and consultation with the State Public Service Commission in this regard shall not be necessary ;

(ii) any person aggrieved by the order of punishment inflicted by the Secretary shall have the right to appeal against such order to the Speaker within 90 days from the date of the order;

(iii) any person aggrieved by the original order of Speaker inflicting penalty shall have the right to appeal to the Governor within 90 days from the date of the order."

It will be clear from the aforesaid provisions of rule 9 of the Rules, 1983 that the said rules relate to disciplinary control of the service of the Orissa Legislative Assembly Secretariat and Sub-rule (2) of Rule 9 provides that the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 will mutatis mutandis apply to persons employed in service. Hence, where a person employed in the service of the Orissa Legislative Assembly Secretariat is sought to be removed from service as a disciplinary measure for a misconduct, the provisions of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 including Rule 15 thereof relating to procedure for imposing major penalties will have to be followed. But where the very appointment of a person to the service of the Orissa Legislative Assembly Secretariat is found to be illegal or irregular, the said provisions of the Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 and in particular Rule 15 thereof, are not required to be followed before termination of his/her service. In the present case, as we have found, the very appointment of the petitioner on probation to the post of Junior Assistant in the Orissa Legislative Assembly Secretariat with effect from 12.2.1999 has been found to be illegal and irregular and the petitioner has not been terminated from service as a disciplinary measure for any misconduct on her part. Similarly, the very language of Article 311(2) of the Constitution would show that the said provision will have to be followed where a member of the Civil Service of the Union or a State or a person holding a civil post under the Union or a State is sought to be removed on some charges of misconduct and not otherwise. In the present case, the petitioner has been terminated from service not on charges of misconduct but on the ground that her very appointment to service has been found to be illegal and irregular.

6. This is not to say that principles of natural justice were not required to be followed before termination of the service of the petitioner and that the petitioner was not entitled to an opportunity of hearing. As a matter of fact, in the earlier writ petition O.J.C. No. 8660 of 2000 filed by the petitioner against the opposite party, a learned Single Judge of this Court while quashing the earlier order of termination of the petitioner has held in his order dated 5.4.2001 that before termination of the service of the petitioner principles of natural justice were required to be followed and the petitioner is entitled to an opportunity of being heard. Thus, the last question to be decided in this writ petition is as to whether after the said order dated 5.4.2001 of the learned Single Judge of this Court in O.J.C. No. 8660 of 2000, the opposite party has followed the principles of natural justice and given an opportunity of hearing to the petitioner before terminating the service of the petitioner by the impugned order dated 26th of June, 2001. After the order dated 5.4.2001, the opposite party served a notice dated 24th of May, 2001 annexing thereto as Annexure-1 the advertisement dated 17.5.1993 in which four posts of Junior Assistant were advertised and also annexing thereto the select lists dated-17.8.1998 extracted in this judgment above. In the said notice, the opposite party stated that the petitioner was not selected for the four posts advertised on 17.5.1993 on the basis of the written test held on 5.4.1998.

In the said notice dated 22.5.2001 to the petitioner, the opposite party also stated that although the name of the petitioner appears against serial No. 9 in the select list prepared on the basis of the written test held on 5.4.1998, she had in fact not taken the said written test as her name was not sponsored by the Employment Exchange and yet her name had been placed against serial No. 9 of the list of General candidates selected on the basis of the written test held on 5.4.1998. In the said notice dated 22.5.2001, the opposite party also informed the petitioner that to solve the riddle of inclusion of her name in the select list, he called for the answer papers and the mark list from his predecessor who conducted the selection, but he was informed that the same should be available with Smt. Bishnupriya Sahu, Ex - Under Secretary but she has expired on 28.2.1999. In the said notice dated 22.5.2001, the opposite party took the view that the petitioner had not been selected for the four posts of Junior Assistant advertised on 17.5.1993 on the basis of the written test held on 30.11.1997 and she could not and did not appear in the written test held on 5.4.1998 and the appointment order was issued to the petitioner ignoring the claim of candidates who had been placed against serial Nos. 7 and 8 in the select list on the basis of the written test held on 5.4.1998 and the petitioner was asked to give an explanation as to why her services should not be terminated. In the last paragraph of the said notice, the opposite party stated.

"9. As pointed earlier as per the kind direction of Hon"ble High Court opportunity is now given to Smt. Manjushree Tripathy and her explanation, if any must reach me within 15 days of the date of receipt of this order failing which the matter will be decided ex parte."

By the said notice therefore the petitioner was given an opportunity to submit her explanation within 15 days failing which the matter was to be decided ex parte. But the petitioner did not submit her explanation and sent a letter dated 6.6.2001 to the opposite party requesting him to furnish the list of candidates in the tests held on 30.11.1997 and 5.4.1998, lists of kith and kin candidates whose names were incorporated in the select list, answer papers, mark-sheets, etc. of the examination which was conducted on 30.11.1997 and 5.4.1998, copy of the Roster "Register maintained for the Jr. Asst. Grade in the Secretariat of the Orissa Legislative Assembly, the mode and calculation of reserve candidates, copy of the reply of Late R. N. Swain, Ex,-Secretary, Orissa Legislative Assembly, document to show that she neither appeared in the examination nor was selected for appointment and copy of marks secured by the candidates who have appeared in the written test/interview and the list showing the respective position in the interview as held on 30.11.1997 and 5.4.1998. The argument of Mr. Aswini Kumar Mishra, learned counsel for the petitioner, is that without the aforesaid documents the petitioner was not in a position to submit an effective explanation. The opposite party has not relied upon the aforesaid documents and has instead clearly stated in the notice that the answer papers, mark lists, etc. of the candidates for the two tests conducted on 30.11.1997 and 5.4.1998 were not available. The opposite party has relied on the advertisement annexed to the

notice as Annexure-I and the select lists dated 17.8.1998 annexed to the notice as Annexure-II and other materials and has found that the petitioner was not selected on the basis of the written test taken by her on 30.11.1997 for the four posts advertised on 17.5.1993 and the petitioner had not taken the written test held on 5.4.1998 and on these grounds proposed to terminate the services of the petitioner. Thus, the grounds for termination of the service of the petitioner and the materials in support of the said grounds on which the opposite party relied had been clearly indicated in the notice dated 22.5.2001 and the petitioner had been afforded an opportunity to submit her explanation within 15 days failing which the matter was to be decided ex parte by the opposite party and only after the petitioner did not avail the said opportunity and submit her explanation, the opposite party decided ex parte to terminate the services of the petitioner by the impugned order dated 26.6.2001. It has been held by the Supreme Court in *Ashwani Kumar and Others Vs. State of Bihar and Others*, that principles of natural justice cannot be subjected to a straightjacket formula and vary from case to case, from circumstance to circumstance and from situation to situation, and in the facts and circumstances of this case, it is difficult to hold that the Principles of natural justice were not followed and the petitioner was not afforded an opportunity of hearing.

7. In *Bihar Public Service Commission and Anr. v. State of Bihar and Anr.* (supra) cited by Mr. Mohadev Mishra, learned counsel for the opposite party, the Supreme Court found that there were irregularities and illegalities committed by the Subordinate Services Selection Board in the matter of making selections and recommending the names for different posts in Class III and yet the High Court had issued a mandamus requiring the Public Service Commission and the State to give appointment to the selected candidates and the Supreme Court held that the respondent had no enforceable right for which a mandamus could have been issued by the High Court and set aside the impugned order of the Patna High Court and dismissed the writ petition filed by the respondent. In this case, having found that the petitioner was not selected for one of the four posts of Junior Assistant advertised on 17.5.1993 on the basis of the selection test held on 30.11.1997 and having further found that the petitioner did not appear in the selection test held on 5.4.1998 for the subsequent vacancies in the post of Junior Assistant, the opposite party terminated the service of the petitioner by the impugned order. Unless it is clearly established by the petitioner before the Court that the petitioner was really selected for appointment in the post of Junior Assistant and on the basis of such selection was appointed as such Junior Assistant in the Secretariat of the Orissa Legislative Assembly, the Court cannot quash the impugned order of termination and issue a mandamus in favour of the petitioner for her reinstatement in service.

8. In *U.P. Co-operative Federation Ltd. v. Ram Singh Yadav and Ors.* (supra) cited by Mr. Aswini Kumar Mishra, learned counsel for the petitioner, the service of an employee was terminated by the Joint Managing Director of U. P. Co-operative Federation Ltd. on the grounds that he abandoned the service from 21st of July,

1977 and he was absent from duty and the High Court set aside the said order of termination on the ground that no disciplinary proceedings were initiated against the employee and his services could not have been terminated without there being an enquiry by an enquiry officer. The Supreme Court upheld the judgment of the High Court holding that the impugned order of termination was in fact an order of removal of the employee from the service and the procedure prescribed in Regulations 84 and 85 relating to penalty of removal from service in disciplinary proceedings had not been followed. But in the present case, the termination of the service of the petitioner by the impugned order is not for any misconduct, but for irregular and illegal appointment of the petitioner despite the fact that she was not selected for appointment. Hence the said decision of the Supreme Court in *U.P. Co-operative Federation Ltd. v. Ram Singh Yadav and Ors.* (supra) is not applicable to the facts of the petitioner's case.

9. In *Basudeo Tiwary v. Sido Kanhu University and Ors.* (supra) cited by Mr. A. K. Mishra, there was a clear provision in Section 35(3) of the Bihar Universities Act that any appointment or promotion made contrary to the Act, Statutes, Rules or Regulations or in an irregular or unauthorized manner shall be terminable at any time without notice and the Supreme Court held that to arrive at a finding that any, appointment or promotion was contrary to the provisions of the Act, Statutes, Rules or Regulations or was made in an irregular and unauthorized manner, necessarily an enquiry will have to be held and in holding such enquiry the person whose appointment is under enquiry will have to be issued with an enquiry notice. The Supreme Court found in the said case that admittedly no notice had been given to the appellant and quashed the order of termination. Paragraph 13 of the said judgment of the Supreme Court in *Basudeo Tiwary v. Sido Kanhu University and Ors.*, is quoted herein below :

"13. Admittedly in this case notice has not been given to the appellant before holding that his appointment is Irregular or unauthorized and ordering termination of his service. Hence the impugned order terminating the services of the appellant cannot be sustained."

But in the present case, admittedly a notice dated 22.5.2001 had been issued to the petitioner and the petitioner was asked to give an explanation as to why her services should not be terminated on the grounds that she was not selected for the four posts of Junior Assistant advertised on 17.5.1993 on the basis of the written test held on 30.11.1997 and she did not appear in the written test held on 5.4.1998 and yet the petitioner did not avail the said opportunity of filing an explanation and instead sent a letter dated 6.6.2001 requesting the opposite party to furnish her some documents on which the opposite party did not rely in support of the proposal to terminate her services. The aforesaid decision of the Supreme Court in *Basudeo Tiwary v. Sido Kanhu University and .others* (supra) therefore does not apply to the facts of the present case.

10. In *Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Ors.* (supra) cited by Mr. Aswini Kumar Mishra, the

appellant therein was appointed as Office Superintendent on 11.1.1995 in the respondent organization on probation for one year and the appointment order further stipulated that he might be confirmed after one year provided the administration is satisfied with the quality of the appellant's service. On 11.12.1995, the Director of the respondent organization informed the appellant that the appellant's work was not satisfactory on several counts mentioned therein. The appellant submitted his explanation. The period of probation was extended to enable the appellant to improve his performance. Finally, the appellant was informed by the Director that the Management of the respondent organization was unable to confirm his services and is unable to continue him in service on the expiry of the stipulated period for probation on the 1st May, 1977 and that his services shall stand terminated after the close of working hours of 1 May, 1977. The Supreme Court held that the order of termination was not an order of termination simpliciter and contained stigma and quashed the order of termination and directed that the appellate should be reinstated with back wages till the date of his reinstatement leaving it open to the respondent to take such action as they may deem fit in accordance with law against the appellant. In the present case, the service of the petitioner was not sought to be terminated on the ground that her performance was not satisfactory or that she was not suitable. Her services were sought to be terminated by the impugned order on the ground that she had not been selected for appointment to any of the four posts of Junior Assistants advertised on 17.5.1993 on the basis of the selection test conducted on 30.11.1997 and that she had not taken the selection test held on 5.4.1998 and hence her very appointment even as a probationer in the post of a Junior Assistant in the Secretariat of the Orissa Legislative Assembly was illegal and irregular. The decision of the Supreme Court in the said case of *Dipti Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and Ors.* (supra) is also not applicable to the facts of the present case.

11. In *Chandra Prakash Shahi v. State of U.P. and Ors.* (supra) cited by Mr. Aswini Kumar Mishra, the Supreme Court found that the appellant was recruited as a Constable in 34th Battalion, Pradeshik Armed Constabulary, U.P. and successfully completed his training and had also completed probationary period of two years and after completion of such period of probation as provided in para 541 of the U.P. Police Regulations, he continued in service. Thereafter his services were terminated in connection with an incident relating to a quarrel between two other Constables and an enquiry was held to find out the involvement of the Constables in that quarrel and in the said enquiry the involvement of the appellant was established and the service of the appellant was terminated. The Supreme Court held that the order of termination was punitive in character as it was founded on the allegation of misconduct and quashed the order of termination as no notice had been served on the appellant intimating him the grounds on which his services were proposed to be terminated nor his explanation was ever obtained.

In the present case, on the other hand, the services of the petitioner are not

sought to be terminated by the impugned order on allegation of misconduct by the petitioner but on the ground that she was not selected for the four posts of Junior Assistant advertised on 17.5.1993 on the basis of the selection test held on 30.11.1997 and she had not taken the selection test held on 5.4.1998 for the remaining posts of Junior Assistants and hence her appointment was illegal and irregular and a notice had also been issued to the petitioner asking her as to why her services should not be terminated on the aforesaid grounds and yet the petitioner did not avail the said opportunity. Hence, the said decision of the Supreme Court in Chandra Prakash Shahi v. State of U.P. and Ors. (supra) is also not applicable to the facts of the present case.

12. In the result, we are not inclined to interfere with the impugned order dated 26.6.2001 terminating the service of the petitioner. But considering the fact that the petitioner was in fact appointed as a Junior Assistant in the Secretariat of the Orissa Legislative Assembly with effect from 12.2.1999 and continued in the service till the impugned order of termination was passed on 26.6.2001 and she might have now crossed the maximum age for employment and by an interim order dated 5.3.2003 passed in Misc. Case No. 333 of 2003 we have directed that one post of Junior Assistant advertised by the advertisement in Annexure-A to the misc. case application will be kept vacant and will not be filled up, we direct that the petitioner will be allowed to participate in the selection for the said vacant post or any other post of Junior Assistant of the Orissa Legislative Assembly for which the next recruitment will take place relaxing the requirement of the rules relating to the age in the case of the petitioner.

13. With the aforesaid observation, the writ application stands disposed of. Considering the facts and circumstances of the case, parties shall bear their own costs.

M. Papanna, J.

14. I agree.