
(2015) 02 DEL CK 0233

In the Delhi High Court

Case No : Writ Petition (C) 5603/2013 and CM Appl. No. 12416/2013

Suresh Chand Jain

APPELLANT

Vs

Director General and Others

RESPONDENT

Date of Decision : 11-02-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 311

Citation : (2015) 2 SLJ 230

Hon'ble Judges : I.S. Mehta, J.;Kailash Gambhir, J.

Bench : Division Bench

Advocate : A.K. Behera, Niranjana Saha and Girish Kargeti, for the Appellant;
Pratap Shanker, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Kailash Gambhir, J.—In the present petition filed under Article 226 of the Constitution of India, the challenge is to order dated 07.09.2011 passed by the learned Central Administrative Tribunal (hereinafter referred to as the "CAT"), whereby the learned Tribunal has dismissed O.A. No. 935 of 2011 preferred by the petitioner. In the said O.A., the petitioner had challenged the order dated 2.4.2009 and 8.2.2011, respectively, whereby his services were terminated during the period of probation.

2. We may at the outset, set out the relevant facts before we advert to the controversy in detail. The petitioner had joined National Institute of Fashion Technology (NIFT) Head Office, New Delhi as a Junior Assistant on contract basis on 10.01.1999 at a consolidated pay of Rs.5,000/- per month for a period of five years. After completion of five years service, the petitioner was appointed in the same department as Junior Assistant (Grade C) on 19.5.2004 in the pay scale of Rs. 3050-75-3950-80-4590 for a period of three years. Before the completion of the three years period, the petitioner was again appointed as a Research Assistant (Grade B) on 5.12.2005 on a higher pay scale of Rs. 5500-175- 9000, for a period of three years. The petitioner was appointed against the regular post

of Research Assistant in the pay scale of Rs.5500-175-9000, purely on temporary basis w.e.f. 15.2.2008 and was posted at NIFT, Head Office on the recommendations made by Selection Committee and with the approval of DG, NIFT. In terms of the appointment letter dated 15.2.2008, the petitioner was to remain on probation for a period of two years w.e.f. 15.2.2008 forenoon and this period could be extended at the discretion of the appointing authority. The services of the petitioner were terminated during the period of his probation by the impugned order dated 2.4.2009. The said termination order was challenged by the petitioner by filing O.A. No. 1059/2010 wherein the learned Tribunal directed respondent No. 1 to consider the representation made by the petitioner, against the termination order, and to pass a speaking order to that effect. Respondent No. 1 decided the representation filed by the petitioner by passing a speaking order on 8.2.2011. Pursuant to this, petitioner filed fresh O.A. being OA No. 935 of 2011, to challenge the termination order dated 02.04.2009 and the speaking order dated 8.2.2011, respectively, passed by the respondents. The learned Tribunal on appreciation of the controversy found no fault with the decision of the respondents in terminating the services of the petitioner due to his unsatisfactory performance during his probation period. Placing reliance on the ratio of various judgments of the Hon'ble Supreme Court, the learned Tribunal held that there has to be some cause on the basis of which the services of an employee on probation are terminated and if the termination is only due to unsatisfactory performance then the question of abiding by the principle of natural justice would not arise. The learned Tribunal also found that the order of termination is not stigmatic rather it is termination simpliciter on the basis of unsatisfactory performance of the petitioner. Feeling aggrieved by the order of the learned Tribunal, the petitioner has filed the instant petition.

3. Mr. A.K. Bahera, the learned counsel for the petitioner, submits that the termination of the petitioner has been labelled as "simpliciter termination" but in fact the same is punitive in nature and foundation of the same can be traced from the speaking order dated 8th February 2011 passed by the respondent. Counsel further submitted that the petitioner had worked very efficiently and with complete devotion on each and every duty assigned to him during his tenure of ten years and never gave any cause or any sort of complaint to any of his seniors either with regard to his official duties or personal behaviour. Counsel also submitted that no memo, warning or any advisory note was ever issued against the petitioner pointing out any inability or incompetency on his part, in due discharge of his duties and in fact he was always appreciated and admired due to his discipline and devotion in every job entrusted to him. Counsel also submitted that no complaint was ever made by any student against the petitioner for late forwarding of assignments or lack of coordination or follows ups with the faculty.

4. He also contended that in fact the petitioner has been made a scapegoat on account of the lapses of other faculty members. Counsel also submitted that one of the grounds given by the respondent to terminate the petitioner from his

service was that he remained absent from his seat on 20th March 2009, for which no warning or memo was served upon the petitioner. The learned counsel also submitted that even the memo dated 5.3.2009 was never served upon the petitioner and this is so evident from the fact that there is no reference of memo dated 5.3.2009 in the other memo dated 20.3.2009. The learned Counsel also submitted that the memo dated 5.3.2009 did not contain the signatures of the petitioner while the memo dated 20.3.2009 has the signatures of petitioner. Counsel also submitted that the memo dated 5.3.2009 was created by the respondents so as to create a ground/foundation to terminate the services of the petitioner. The counsel submitted that there were serious allegations made against the petitioner for publishing the result late, which required the setting up of an inquiry by the respondent, and proper opportunity of hearing to the Petitioner to explain his role in the matter. Counsel also submitted that save and except such two false memos, no other memo was ever issued against the Petitioner during his entire tenure of ten years" service in NFIT, Head Office. Counsel also argued that the respondents had also terminated the services of one Mr. Darshan Singh, who was the member of the faculty and was responsible for teaching the subject "draping". Counsel also contended that the services of the petitioner as well as Darshan Singh were terminated so as to shield the permanent employees of the respondents. Counsel also argued that the services of the petitioner were terminated much before the expiry of the two years" probation period and had there been any complaint with regard to unsatisfactory performance of the petitioner, at least some caution or warning must have been given before putting an end to his long service career of ten years.

5. In support of the aforesaid submissions, learned counsel for the Petitioner placed reliance on the judgment of Hon"ble Supreme Court in Anoop Jaiswal Vs. Government of India and Another,

6. Per contra, Mr. Pratap Shanker, learned counsel for the respondent, contended that services of the petitioner were terminated during the period of his probation on account of his unsatisfactory performance and such a termination cannot be held to be stigmatic. Counsel also argued that the memos dated 05.03.2009 and 20.03.2009, respectively, were duly served upon the petitioner and the said memos clearly reflect that the petitioner was neither diligent nor was performing his duties satisfactorily. Counsel also argued that the petitioner, in his representation dated 06.04.2009, has not attributed any motive on the part of any of the officials of the respondents, behind the decision of terminating the petitioner from his service and therefore now, the petitioner cannot be allowed to do so. Counsel also submitted that the learned Tribunal has passed a well-reasoned order and the same may not be interfered with, by this court, in the exercise of its supervisory jurisdiction, in the absence of any illegality or perversity in its reasoning. In support of his arguments, counsel for the respondent has placed reliance on the Judgment of the Hon"ble Supreme Court in Chaitanya Prakash and Another Vs. H. Omkarappa, .

7. We have heard the learned counsel for the parties at a considerable length and given our thoughtful consideration to the arguments advanced by them.

8. The petitioner was appointed as Research Assistant on contract basis on the recommendation of the Selection Committee and with the approval of Director General, NIFT in the pay scale of Rs.5500-175-9000 on purely temporary basis. As per his appointment letter, the petitioner was to remain on probation for a period of two years w.e.f. 15.02.2008 (Forenoon), which could be further extended at the discretion of the appointing authority. We may reproduce the contents of the appointment letter dated 15.02.2008 for better appreciation of the controversy, as under:

National Institute of Fashion Technology NIFT Head Office, New Delhi
Establishment- II Department File No. NIFT/HO/Estt-II/Rect (Reg. and Cont) /
2007 15th February, 2008

ORDER

On the recommendation of the Selection Committee and with the approval of the DG-NIFT, Mr. Suresh Chand Jain working as Research Assistant on contract basis at NIFT Head Office is appointed on purely temporary basis against regular post of Research Assistant in the pay scale of Rs. Rs.5500-175- 9000/- w.e.f. 15th February, 2008 (Forenoon) and posted at NIFT Head Office.

2. The last pay drawn by him while holding the post of Research Assistant on contract basis shall be protected with date of next increment remaining same. He will continue to draw DA, HRA, CCA and TA as per GOI rules.

3. He will be on probation for a period of two year w.e.f. 15th February, 2008 (Forenoon) which may be extended at the discretion of the appointing authority. On the basis of his performance during the probation period his services will be considered for confirmation. During the period of probation his appointment may be terminated by paying one month pay and allowances in lieu of one month notice by either side, namely the appointee or the appointing authority, without assigning any reason.

4. He will not seek transfer to any other Centre other than the centre posted for a period of five years except in public interest, his services are liable to be posted and transferred to any of the NIFT Centre/ Head Office.

5. His contract for the post of Research Assistant shall stands automatically terminated on 15th February, 2008 unless otherwise advised by Head Office.

Sd/- (Munish Girdhar) Registrar (Establishment)

Mr. Suresh Chand Jain Research Assistant NIFT, Head Office

Cc:

1. Director (FandA), NIFT Head Office

2. DR (Estt.), NIFT Head Office True copy

9. Before the petitioner could complete the said probation period of two years, his services were terminated by order dated 02.04.2009 passed by the respondents and the said letter dated 02.04.2009 is reproduced hereby in verbatim:

National Institute of Fashion Technology NIFT Head Office, New Delhi
Establishment- II Department

File No. NIFT/HO/E.-II/Delhi Centre/ 2008

15th February, 2008

ORDER

The services of Shri Suresh Chand Jain, Research Assistant, NIFT Delhi Centre have not been found to be satisfactory by NIFT Delhi Centre. As per terms and conditions of his probation, his appointment can be terminated by giving one month notice or one month pay and allowances in lieu thereof, accordingly, with the approval of Competent Authority, his services are terminated w.e.f. 2nd April, 2009 (Afternoon) by paying him one month pay and allowances in lieu of one month notice period.

Sd/- (Munish Girdhar) Registrar (Establishment)

Mr. Suresh Chand Jain Research Assistant NIFT Delhi Centre

Copy to:

1. Director/Registrar, NIFT Delhi Centre- To disburse one month pay and allowances in lieu of notice period to Shr. Suresh Chand Jain after he submits No Dues Certificate from all concerned.

2. Deputy Registrar (FandA), NIFT Delhi Centre

3. Guard File True copy

10. In the said termination order, the respondents did not attribute any specific misconduct, negligence, inefficiency or dereliction of duty, on the part of the petitioner, before taking the said decision of terminating his probation period. The only reason given by the respondents in the termination order is that the services of the petitioner have not been found to be satisfactory by NIFT, Delhi Centre.

11. As per the learned counsel for the petitioner, the termination of the petitioner was not termination "simpliciter" but was "stigmatic" in nature and foundation for the same was laid by the respondents in two Memos dated 05.03.2009 and 20.03.2009. The learned counsel also took a stand that no proper inquiry or disciplinary proceedings were initiated against the petitioner by the respondents so as to afford him an opportunity to explain his version in response to the

allegations levelled by the respondents in the said two memos. The learned counsel also took a stand that even the memos were never received by the petitioner and both these memos were purposely created by the respondents to justify their act of illegal termination of the services of the petitioner.

12. In the earlier OA filed by the petitioner to challenge the said order of termination, the learned CAT vide its order dated 01.10.2010 gave direction to the Director General, NIFT, Delhi Centre to consider the representation of the petitioner, as was preferred by him, against the termination order and to pass a speaking order within a period of three months. In pursuance to the said directions, the Director General, NIFT, Delhi Centre passed a speaking order vide order dated 08.02.2011 in which he disclosed the basis of forming a view apropos unsatisfactory performance of the petitioner on his duties, as were assigned to him. Relevant para of the order dated 08.02.2011 is reproduced as under:

...As informed by NIFT Delhi Centre, the performance of Sh. Suresh Chand Jain, Research Assistant, then posted in Exam Cell, NIFT Delhi Centre was not found to be satisfactory by NIFT Delhi Centre and they termination of his services.

As per report forwarded by NIFT Delhi Centre, regarding performance of Suresh Chand Jain, Research Assistant was assigned the work relating to receiving of assignment, preparation of result of FandA Department. He forwarded the assignment for evaluation to the subject faculty quite late. Consequently, assignment marks could not be forwarded by the subject faculty on time as well as marks could not be displayed on the notice board as per the scheduled dates. Further, he failed in coordinating and maintaining proper follow-up with the subject faculty in connection with obtaining the marks of assignment/ Mid Term/ End Term et., which hindered the process of forwarding marks to COE Cell, NIFT Head Office for tabulation of results expeditiously. Further, on number of occasions, he was found absenting from his seat during office hours and was issued warning letter to be punctual and more careful in his work approach. However, he showed no improvement in this regard. Due to lapse, as brought out above, on his part and unsatisfactory performance, he was removed from CEO Cell and as none of the department in Delhi Centre was willing to take his services, he was surrendered to NIFT Head Office. As such, his services were found to be absolutely dissatisfactory without any chance of improvement.

.....

13. Thus, the issue that arises for determination before this court is whether the services of an employee on probation can be terminated without holding any disciplinary proceeding and whether the termination of services of an employee on probation on the ground of non satisfaction would ipso facto amount to termination by way of punishment or whether the same can be held to be termination "simpliciter", with no stigma attached to it and with no evil consequences so as to attract Article 311 of the Constitution of India.

14. Before we proceed with dealing with these two issues, it will be important for us to understand when and how the concept of probation was devised. In the matter of *Ajit Singh and Others Vs. State of Punjab and Another*,¹ the Hon''ble Supreme Court while explaining this position held that when the master-servant relation was governed by the archaic law of hire and fire, the concept of probation in service jurisprudence was practically absent. With the advent of security in public service when termination or removal became more and more difficult and order of termination or removal from service became a subject-matter of judicial review, the concept of probation came to acquire a certain connotation. If a servant could not be removed by way of punishment from service unless he is given an opportunity to meet the allegations if any against him which necessitates his removal from service, rules of natural justice postulate an enquiry into the allegations and proof thereof. This developing master- servant relationship put the master on guard. In order that an incompetent or inefficient servant is not foisted upon him because the charge of incompetence or inefficiency is easy to make but difficult to prove, concept of probation was devised. To guard against errors of human judgment in selecting suitable personnel for service, the new recruit is put on test for a period before he is absorbed in service or acquires a right to the post. Period of probation gave a sort of *locus poenitentiae* to the employer to observe the work, ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserved a right to dispense with his service without anything more during or at the end of the prescribed period which is styled as period of probation. This judgment has also been reiterated in the matter of *State Bank of India and Others Vs. Palak Modi and Another etc.*,² .

15. Thus, it may well be seen that the concept of probation has been devised only to give an opportunity to the employer to observe the work and efficiency of the employee for the job. In light of this, let us examine the first issue i.e. whether an employee on probation can be terminated without holding any disciplinary proceeding. The position of law in this context has been eloquently explained in the matter of *Samsher Singh Vs. State of Punjab and Another*,³ wherein the Hon''ble Supreme Court speaking through Chief Justice Ray, held that before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any Rules governing a probationer in this respect, the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude, the probationer is unsuitable for the job and hence must be discharged. No punishment is involved, in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation.

16. Similarly in the matter of Parshotam Lal Dhingra Vs. Union of India (UOI), , it was held by the Hon"ble Apex Court as follows:

The period of probation may in some cases be for a fixed period, e.g., for six months or for one year or it may be expressed simply as "on probation" without any specification of any period. Such an employment on probation, under the ordinary law of master and servant, comes to an end if during or at the end of the probation the servant so appointed on trial is found unsuitable and his service is terminated by a notice. An appointment to officiate in a permanent post is usually made when the incumbent substantively holding that post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. Such an officiating appointment comes to an end on the return of the incumbent substantively holding the post from leave in the former case or on a substantive appointment being made to that permanent post in the latter case or on the service of a notice of termination as agreed upon or as may be reasonable under the ordinary law. It is, therefore, quite clear that appointment to a permanent post in Government service, either on probation, or on an officiating basis, is, from the very nature of such employment, itself of a transitory character and, in the absence of any special contract or specific rule regulating the conditions of the service, the implied term of such appointment, under the ordinary law of master and servant, is that it is terminable at any time. In short, in the case of an appointment to a permanent post in a Government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time. 17. Thus, it is amply clear that during the period of probation, an employee may be removed without holding any disciplinary proceeding. The period of probation is, truly speaking, a period of one"s trial. During this period the employee does not acquire any substantive right to the post and consequently cannot complain anymore than a private servant employed on probation.

18. Coming to the second issue, whether the termination of services of an employee on probation, on the ground of non satisfaction would ipso facto amount to termination by way of punishment. In the matter of Krishnadevaraya Education Trust and Another Vs. L.A. Balakrishna, the Hon"ble Supreme Court noted that the services of the respondent, who was appointed as Assistant Professor on probation were terminated on the ground of unsuitability and observed:

There can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the recruit/appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job, then the employer has a right to terminate the services as a reason thereof. If the termination during probationary period is without any reason, perhaps such an order would be

sought to be challenged on the ground of being arbitrary. Therefore, naturally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged, without assigning any reason. If the order on the face of it states that his services are being terminated because his performance is not satisfactory, the employer runs the risk of the allegation being made that the order itself casts a stigma. We do not say that such a contention will succeed. Normally, therefore, it is preferred that the order itself does not mention the reason why the services are being terminated.

If such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer were terminated. Mere fact that in response to the challenge the employer states that the services were not satisfactory would not ipso facto mean that the services of the probationer were being terminated by way of punishment. The probationer is on test and if the services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services.

In the instant case, the second order which was passed terminating the services of the respondent was innocuously worded. Even if we take into consideration the first order which was passed which mentioned that a Committee which had been constituted came to the conclusion that the job proficiency of the respondent was not up to the mark, that would be a valid reason for terminating the services of the respondent. That reason cannot be cited and relied upon by contending that the termination was by way of punishment.

19. Similarly, in *Ajit Singh (Supra)*, the Hon'ble Supreme Court held as follows:

.. that termination of service of a probationer during or at the end of a period of probation will not ordinarily and by itself be a punishment because the servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to. The period of probation therefore furnishes a valuable opportunity to the master to closely observe the work of the probationer and by the time the period of probation expires to make up his mind whether to retain the servant by absorbing him in regular service or dispense with his service. Period of probation may vary from post to post or master to master and it is not obligatory on the master to prescribe a period of probation. It is always open to the employer to employ a person without putting him on probation. Power to put the employee on probation for watching his performance and the period during which the performance is to be observed is the prerogative of the employer. 20. Also, in *Pavanendra Narayan Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences and anr*, , the Hon'ble Apex Court again considered the question whether termination of the service of probationer can be termed as punitive merely because it is preceded by an inquiry for the purpose of judging his suitability and answered the same in negative. The two-Judge Bench referred to a large number of precedents and observed:

29. Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job. 21. Again in *Progressive Education Society and Another Vs. Rajendra and Another*, , the Hon'ble Apex Court examined the correctness of the order passed by the School Tribunal constituted under Section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, which was approved by the High Court, quashing the termination of the service of respondent No. 1 on the ground of unsatisfactory performance during the period of probation and observed:

The law with regard to termination of the services of a probationer is well established and it has been repeatedly held that such a power lies with the appointing authority which is at liberty to terminate the services of a probationer if it finds the performance of the probationer to be unsatisfactory during the period of probation. The assessment has to be made by the appointing authority itself and the satisfaction is that of the appointing authority as well. Unless a stigma is attached to the termination or the probationer is called upon to show cause for any shortcoming which may subsequently be the cause for termination of the probationer's service, the management or the appointing authority is not required to give any explanation or reason for terminating the services except informing him that his services have been found to be unsatisfactory. 22. We may also make reference to the decision of the Supreme Court in the case of *Abhujit Gupta Vs. S.N.B. National center, Basic Sciences and Others*, , wherein a similar letter was issued to the concerned employee intimating that his performance was unsatisfactory and therefore, he is not suitable for confirmation, negating the contentions raised by the employee that the termination on the ground of alleged misconduct was stigmatic, the Hon'ble Supreme Court held that the order of termination due to unsatisfactory performance is a termination "simpliciter" and not "punitive" in nature.

23. In *Chaitanya Prakash and Another Vs. H. Omkarappa*, , the Supreme Court reiterated the same principles after placing reliance to the settled legal position in some of its previous judgments. In the facts of this case as well the services of the probationer were terminated as he failed to improve upon his misconduct despite the fact that he was informed, time and again, during the period of his probation, about his deficiencies and the view taken by the Apex Court was that the termination of such an officer was termination "simpliciter" due to unsatisfactory conduct/performance and not a case of "punishment" for misconduct.

24. In *Abhijit Gupta (Supra)*, the Apex Court had even gone to the extent of stating that the expression like "want of application", "lack of potential" and "found not dependable" when made in relation to the work of an employee would not be sufficient to attract the charge that they are stigmatic and intended to dismiss the employee from service.

25. Thus in the light of the aforesaid legal position, it can be concluded that this issue is no more *res integra* that an order of termination due to unsatisfactory performance of the probationer, cannot be ipso facto termed as "stigmatic" or "punitive" in nature. During the probation period, an employee has to be extra careful and diligent while discharging his assigned duties, so that he can successfully complete his probation period to get confirmation against the post he has been selected for and he does not give any chance or reason to his superiors to terminate his services. Any kind of insufficiency, negligence, indiscipline or misconduct can prove fatal to an employee on probation. Before the probationer is confirmed, the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. If during the period of probation, the performance of a probationer is not found satisfactory or suitable for a particular job, as per the assessment of the employer, he may be terminated from the service and such termination would be termed as termination "*simpliciter*" and cannot be held to be "punitive" in nature.

26. Adverting back to the facts of present case. In the case at hand, two memos dated 05.03.2009 and 20.03.2009 were issued against the petitioner, which reflect that the Petitioner was neither diligent nor was performing his duties satisfactorily. The speaking order dated 08.02.2011, passed by Respondent No. 1, in compliance of the directions given by the Tribunal, amply demonstrates that the petitioner was in the habit of absenting himself from the office very often and had failed to improve despite many verbal warnings. The reasons disclosed in the speaking order were sufficient for the respondent to have taken a decision to terminate the services of the petitioner. If the contentions raised by the learned counsel for the petitioner are accepted, then in every case of unsatisfactory performance or lack of interest in the discharge of duties by a probationer, setting up of an enquiry would be required, which will defeat the very purpose and the concept of probation as the period of probation furnishes a valuable opportunity to the employer to closely observe and monitor the work and efficiency of the probationer for the job.

27. In the light of the legal position and factual matrix discussed above, we do not find any merit in the contentions raised by the learned counsel for the petitioner. The order passed by learned CAT is upheld.

28. Finding no merit in the present writ petition, the same is hereby dismissed.