IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5256 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

TUSHAR D BHATT

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 5256 of 2002

MR YN OZA, SR. ADVOCATE with MR BP GUPTA for Petitioner

MR SN SHELAT, LD. ADVOCATE GENERAL with MISS MAITHILI MEHTA, AGP for Respondent No. 1

MR DS NANAVATI for NANAVATI & NANAVATI for Respondent 2

MR SB VAKIL, SENIOR ADVOCATE with MR AS VAKIL for Respondent No. 3 - Deleted vide order dtd. 4/5/2004.

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 14/05/2004

CAV JUDGEMENT

1ss. The petitioner has approached this Court under Article 226 of the Constitution of India to challenge the order of dismissal from service passed against him dated 22nd May, 2002 by the Deputy Secretary, Health & Family Welfare Department, Government of Gujarat, in the name of the Governor of Gujarat State. The said order has been passed against the petitioner in view of the fact that all the charges except one levelled against him in the departmental inquiry were proved beyond reasonable doubt. One was partly proved. The charge-sheet issued against the petitioner contained in all seven charges, details whereof will be stated in due course of the judgment.

2. To appreciate the controversies that have been raised in this petition relevant facts in brief are required to be stated as under :-

2.1. The petitioner joined service of respondent no. 1 as Food Inspector on 1st December, 1982 and since then he had been working in the Food & Drugs Control Administration, Government of Gujarat. He was appointed and posted at Ahmedabad and for almost 14 years he worked in Ahmedabad as well as Gandhinagar Circle. He was thereafter transferred to Rajkot in the year 1996 where he remained for 3 years. Later on by order dated 13th September, 1999 the petitioner was transferred to Bhuj. He, however, did not join duty at Bhuj and on 4th October, 1999 he sent a fax message regarding the illness of his mother. He also thereafter did not report for duty at the transferred place inspite of the fact that he was relieved from his duty at Rajkot on 5th October, 1999. The petitioner entered into correspondence with respondent no. 2. He was, therefore, granted personal hearing by respondent no. 2 on 17th November, 1999. On 30th November, 1999 also he had a personal meeting with respondent no. 2. Inspite of the same, it appears that petitioner did not join the duty since on 4th January, 2000 the Assistant Commissioner, Bhuj called upon him to join service. He was thereafter given in writing on 10th January, 2000 that he was flouting the order of respondent no. 2 by not joining the service at Bhuj. He was on the same day served with a show cause notice for remaining absent without authority. The petitioner submitted his reply dated 17th January, 2000 to the said show cause notice expressing his inability to join at Bhuj. He was thereafter suspended from the service by order dated 8th March, 2000. It was only on 27th April, 2000 he joined at Bhuj, but it was conditional joining.

He was, therefore, served with a charge-sheet dated 5th May, 2000 containing seven charges, in short, which can be described as (1) remained unauthorizedly absent between the period 11th October, 1999 and 27th April, 2000, (2) he on his own decided the place of discharging his duty without receiving any prior permission of the competent officer instead of reporting at transferred place, (3) he exerted mental pressure and also gave threats by writing letters to the head of the department for transferring him to a place of his choice, (4) he acted beyond his official authority by giving notice to his superior officer under the provisions of Gujarat Civil Services (Discipline and Appeal) Rules (for short 'the Rules'), (5) he flouted and disobeyed the orders of head of the department as well as the head of the office, (6) ignoring the office orders issued by the Government, he directly represented to his head of the department regarding his transfer, and (7) he used intemperate language not befitting a Government employee.

2.2. The petitioner in response to the said charge-sheet filed his written reply dated nil. Thereafter, respondents appointed one Mr. J.G. Mehta, a retired Joint Secretary, Government of Gujarat as Inquiry Officer. After a detailed inquiry, the Inquiry Officer prepared his report holding the petitioner guilty of the charges levelled against him. He forwarded the entire material placed before him including the statement of defence submitted by the petitioner dated 4th October, 2001 in respect of the brief submitted to him and his report to the Disciplinary Authority. The respondent no. 2 by communication dated 29th October, 2001 forwarded copy of the inquiry report to the petitioner and called upon him to show cause why in view of the findings given by the Inquiry Officer, one of the punishments indicated in rule 6 of the Rules should not imposed, within 15 days of the receipt of the said letter. In response to the said show cause notice, the petitioner submitted two replies, viz. one dated 12th November, 2001 and other dated 10th December, 2001. It also appears that he has forwarded his further reply dated 30th April, 2002, which now according to him, has not been taken into consideration by the Disciplinary Authority. It appears from the record that though aforesaid show cause notice was given by respondent no. 2, the impugned order regarding dismissal from the service against the petitioner was passed by the Deputy Secretary, Health and Family Welfare Department of the Government of Gujarat in the name of the Governor of Gujarat State. Thus, the said order has been passed by respondent no. 1 in view of rule 6 (8) of the Rules. It is this order which is

now sought to be challenged by the petitioner.

3. It is the say of the petitioner that respondent no. 2 has been keeping grudge against him since long as he alongwith several other Food Inspectors had expressed complete dissatisfaction against the Department for not framing proper recruitment rules and for not opening proper promotional avenues for the Food Inspectors. It is the say of the petitioner that he had been taking a leading part in agitating this issue and they had even preferred various petitions before this Court for fixing the seniority and for grant of promotion, etc. It is his say that on account of this he had been entering into constant conflict not only with respondent no. 2 but even respondent no. 3 also, who then was Minister for Health and Family Welfare. It is his say that he had, while at Rajkot, detected certain tobacco vendors flouting the provisions of the Prevention of Food Adulteration Act (for short 'P.F.A. Act') and, therefore, he had collected samples of the commodities which they were selling. He had also registered cases against some oil millers and he had sought sanction u/S. 20 of the P.F.A. Act for prosecution by filing complaint in the Court against those persons, but the same was not accorded by respondent no. 2. On account of this also there was conflict and ultimately as a measure of vengeance he had passed order transferring him from Rajkot to Bhuj inspite of the fact that he had asked him to post him at Ahmedabad as there were about 65 cases filed by him under the P.F.A. Act and his attendance in the Court was very necessary. It is his say that because of the malafide order passed against him, he had not joined duty at Bhuj but he had been attending the Court proceedings at Ahmedabad whenever there was date of hearing. It is his case that the impugned order has been passed by respondent no. 1 at the instance of respondent no. 2, who himself is guilty of committing several acts of misconduct for which respondent no. 1 has ultimately served him with a charge-sheet. All these acts of misconduct had been brought to light by the petitioner. He has, therefore, prayed for quashing the order.

3.1. As against that, the say of the respondent is that the petitioner was behaving in a manner which did not befit a Government employee. He initially remained at Ahmedabad and Gandhinagar for almost 14 years and thereafter he was transferred to Rajkot where he had discharged duty for 3 years. According to respondents, his transfer to Bhuj was in the course of routine administrative exigencies. He had, however, flouted the orders of the superior and had not

reported for duty at Bhuj. Not only that but he had even written letters threatening respondent no. 2 that if he did not transfer him to Ahmedabad, he would summon a press conference and reveal his misdeeds to the public and also to the Government. He had even threatened respondent no. 2 to file P.I.L. against him in this Court. All this was done with a view to exercise mental pressure on respondent no. 2 to cancel his transfer order for Bhuj and to place him at Ahmedabad. Thus, according to the respondents, the petitioner had committed several acts of serious misconduct for which he was required to be departmentally proceeded with. Hence, he was served with the charge-sheet, suspended, departmentally proceeded against and upon finding him guilty, in view of the serious misconduct, dismissed from service. According to the respondents, no illegalities have been committed by the respondents either in issuing the order of transfer against the petitioner or in passing the order of dismissal from service. The say of the respondents is that though show cause notice was issued by respondent no. 2 as Disciplinary Authority, it was respondent no. 1 which had to pass the impugned order because the petitioner had made number of allegations against respondent no. 2 including an allegation to the effect that the order of transfer was passed malafide by respondent no. 2. It is also the say of the respondents that looking to the gravity of the established guilt, penalty of dismissal from service was the only appropriate punishment which could be awarded to the petitioner.

3.2. At this juncture, it may be noted here that the petitioner, on 4th May, 2004 before the commencement of the hearing, sought permission to delete respondent no. 3 and also to withdraw the averments made against him in the petition. In view of the same, the petitioner was directed to put on record a pursis praying for deletion of respondent no. 3 and also to identify the averments which were made against him in the petition and which were sought to be withdrawn by him. Such pursis has been put on record by the petitioner. In view of the said request, this Court has permitted to delete respondent no. 3 from the petition. Hence, respondent no. 3 stands deleted vide order dated 4th May, 2004 and so do the averments that have been made against him in the petition and duly identified by the petitioner in his pursis.

4. Mr. Y.N. Oza, Ld. Senior Advocate appearing with Mr. B.P. Gupta for the petitioner has submitted that the impugned order is bad in law mainly

for three reasons. The first reason he has advanced is that the show cause notice dated 29th October, 2001 issued by respondent no. 2 clearly indicates that he had already made up his mind without even receiving the reply from the petitioner believing the charges to be proved beyond reasonable doubt. Thus, according to Mr. Oza, if respondent no. 2 had already prejudged the issue, there was hardly any scope for him to take a different view even after receiving the representation of the petitioner against the proposed penalty. The second reason advanced by Mr. Oza is that the Disciplinary Authority respondent no. 2 has issued the show cause notice; whereas the impugned order has been passed by respondent no. 1 i.e. authority higher than the respondent no. 2, which is not the one who had issued a show cause notice. It is his submission that when the show cause notice was issued by respondent no. 2 and when the representations against the proposed punishment had been submitted by the petitioner to respondent no. 2, it was respondent no. 2 who alone could have taken this decision and passed the impugned order. The order passed by respondent no. 1 is, therefore, against principles of natural justice, null and void and it is required to be quashed and set aside. The third reason advanced by him is that in the Rules, provision of the appeal is made against the impugned order and appeal lies to respondent no. 1 against the order of respondent no. 2. However, respondent no. 1 has passed the impugned order and, therefore, his valuable right of appeal is lost and that too without the knowledge of the petitioner since no prior intimation was given to him regarding change of Disciplinary Authority. He has further submitted that in the alternative, the punishment imposed by respondent no. 1 is grossly disproportionate to the guilt established against the petitioner. According to him, neither the unauthorized absenteeism nor use of intemperate language against superior officer is considered to be so serious act of misconduct that it should require imposition of punishment of dismissal from the service. According to him, stoppage of increments for limited period or even with permanent effect would be just and proper punishment. In support of his aforesaid submissions he has also placed reliance on various decisions of the Apex Court and this Court. I will refer to them in due course of the judgment.

4.1. As against that, Mr. S.N. Shelat, the Ld. Advocate General appearing with Miss Maithili D. Mehta for the respondents has submitted that respondents have not committed any illegality and no injustice has been caused to the petitioner. Respondent no. 1 under

peculiar circumstances was required to pass the impugned order because though the respondent no. 2 was the disciplinary authority, he could not have passed the order of punishment against the petitioner since the petitioner had made serious allegations against him right from the beginning. He has further submitted that it was to safeguard the interest of the petitioner also, respondent no. 1 had decided to consider the issue of imposition of punishment and to pass appropriate order on basis of material of inquiry held against the petitioner. According to him, such decision was just and proper because under the Rules respondent no. 1 was the main Disciplinary Authority and it could certainly act when such circumstances required it to pass the order. He has also submitted that respondent no. 1 was required to act because of the compelling circumstances and in such situation the doctrine of necessity would apply because respondent no. 1 had no other alternative but to pass the impugned order itself. He has also submitted that it is quite possible that in such circumstances a right of appeal may not be available to the delinquent. However, when there is no other alternative, such recourse has to be taken. He has further submitted that so far the penalty imposed by respondent no. 1 is concerned, it is just and proper calling for no interference by this Court. He has also advanced submission with regard to limited scope of judicial review of such order in a petition under Article 226 of the Constitution of India. Lastly he has submitted that there is no merit in allegations that government i.e. respondent no. 1 is protecting respondent no. 2 and in any case it has no relevance when misdeeds of petitioner are being assessed. Lastly he has submitted that the petition be dismissed as there is no merit in it.

4.2. Mr. D.S. Nanavati, learned advocate appearing for respondent no. 2 has adopted most of the submissions of Mr. Shelat. He has further submitted that when the petitioner has deleted respondent no. 3 and also deleted the allegations/averments made in relation to respondent no. 3, nothing has remained against respondent no. 2 also, because all his allegations are to the effect that it was respondent no. 3 at whose behest respondent no. 2 had acted against the petitioner. He has, therefore, submitted that the petition be dismissed. Mr. Shelat as well as Mr. Nanavati have also placed reliance on several decisions.

4.3. The first contention of Mr. Y.N.Oza regarding prejudging issue by respondent no.2 while issuing show cause notice on the question of proposed

punishment is concerned, no doubt it is stated by respondent no. 2 that he accepted the findings of the Inquiry Officer regarding the charges levelled against the petitioner as proved beyond reasonable doubt and he also believed them to be so, it is respondent no. 1 who has ultimately decided the issue regarding the imposition of punishment after taking into relevant material. The question of imposition of punishment comes only when the entire material is placed before the Disciplinary Authority or the authority taking action against the delinquent and after taking it into consideration, such authority concurs with the findings given by the Inquiry Officer, ofcourse subject to what the delinquent has to say about the proposed punishment. In such circumstances, merely because it was stated by respondent no. 2 in the show cause notice that he believed the findings of the Inquiry Officer to be true, it would not mean that decision to dismiss the petitioner was already taken and issuance of show cause notice was merely an idle formality. In any case, petitioner is not prejudiced by such observations because it is respondent no. 1 who has ultimately taken the final decision and has passed the impugned order. In other words, it is respondent no. 1 who has acted as the Disciplinary Authority.

4.4. The second contention of Mr. Oza is that so far as the show cause notice dated 29th October, 2001 is concerned, admittedly, it has been issued by respondent no. 2, whereas, it is respondent no. 1 who has ultimately passed the impugned order on 22nd May, 2002, which cannot be permitted. He has submitted that when the show cause notice is issued by one authority, the authority other than the said authority cannot impose punishment. For that purpose, he has also placed reliance on the decision of the Apex Court rendered in the case of G.Nageshwara Rao v. A.P.S.R.T. Corpn. reported in A.I.R. 1959 S.C. p.308. In the said case hearing was done by the Secretary of the State Government, incharge of the Transport department and the final decision was taken by the Ministry incharge. In the circumstances, it was held by the Apex Court that the principles of natural justice were violated and the decision was vitiated.

4.5. This submission of Mr. Oza cannot be accepted. It is an undisputed fact that right from the beginning the petitioner has been making allegations against respondent no. 2. It is his case that because of the strong prejudice and feeling of vengeance, respondent no. 2 had passed the order of transfer against him. It is also clear from the record of the

petition that at every stage, the petitioner has made allegations against respondent no. 2. It is the case of the respondents that in such circumstances, even with a view to protect the interest of the petitioner, respondent no. 1 had taken upon it the role and responsibility of Disciplinary Authority and to issue the impugned order. There is much substance in the say of the respondents. Record of the petition shows that according to the petitioner himself, he had been entering into constant conflict with respondent no. 2 for one reason or the other. The petition also discloses that various litigations have been filed in this Court by the present petitioner and others to challenge the Recruitment Rules and fixation of seniority etc., where respondent no. 2 is made party. It is also clear from the record of the petition that even after the departmental inquiry was initiated against the petitioner he had been complaining about the alleged acts of misconduct having been committed by respondent no. 2. It is true that respondent no. 1 has setup inquiry against respondent no. 2 in relation to the acts of misconduct which were complained of by the petitioner. However, the question that remains to be considered is whether in such circumstances, especially when several of the charges levelled against the petitioner were relating to respondent no.2, can respondent no. 2 be allowed to judge the guilt of the petitioner. It is elementary principle of legal jurisprudence that a person cannot be allowed to act as Judge, even in quasi judicial proceedings, if it is found that such person had reason to be biased against the concerned delinquent. The Apex Court in the decision rendered in the case of G. Nageshwara Roa v. A.P.S.R.T. Coprn. (Supra) has observed as under :-

> "It is a fundamental principle of natural justice that in the case of quasi judicial proceedings, the authority empowered to decide the dispute between opposing parties must be one without bias towards one side or other in the dispute. It is also a matter of fundamental importance that a person interested in one party or the other should not, even formally take part in the proceedings though in fact he does not influence the mind of the person, who finally decides the case. This is on the principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

It is to be noted that, here the situation is slightly graver than the one before the Apex Court because in the

instant case there is direct conflict between the Judge i.e. Disciplinary Authority and the accused i.e. delinquent Certainly such Judge cannot be permitted to decide the guilt or innocence of the person making allegations against him. There is, therefore, nothing wrong even when the show cause notice was issued by respondent no. 2, and it was responded to by the petitioner by submitting his explanation to the office of respondent no. 2 but ultimately, it was respondent no. 1 who took the decision regarding imposition of penalty of dismissal against the petitioner. Further the aforesaid decision of the Apex Court will not be of help to Mr. Oza because unlike in the case before the Apex Court, respondent no. 2, except for issuing notice has not done anything more. It is respondent no. 1 who has done rest of the things. The impugned order reflects that every bit of material that was required to be taken into consideration has been considered by the concerned Officer of respondent no. 1. Not only that, he has also taken into consideration the representations that were made in response to the show cause notice dated 29th October, 2001 by the petitioner. These representations are dated 12th November, 2001 and 10th December, 2001. Thus, so far as the application of mind to the entire issue is concerned by the concerned authority, it is adequately revealed or manifested from the text of the impugned order. In no way it has caused any prejudice to the petitioner. Further even the petitioner has not stated what prejudice has been caused to him, when the notice has been issued by respondent no. 2 and the impugned order has been passed by respondent no. 1. Mr. Oza has tried to submit that, had the petitioner been called upon by respondent no. 1 to show cause against the proposed imposition of punishment by it, he could have put his case differently before respondent no. 1. I fail to understand, what difference that would make when the petitioner has to confine himself to the question of imposition of punishment which has been duly prescribed in Rule 6 of the Rules and which is required to be imposed when a Government servant is found guilty of committing acts of misconduct of the type alleged to have been committed by the petitioner. The petitioner has nowhere pleaded what difference that would have made. In fact with a view to avoid any injustice being caused to the petitioner by allowing respondent no. 2 to act as Disciplinary Authority, respondent no. 1 had thought it fit to withdraw the entire material from him and decide the question of imposition of the appropriate penalty by itself. This argument of Mr. Oza therefore, has no merit.

4.6. Similarly he has placed reliance on the decision of the Division Bench of this Court rendered in the case of M/s.Shree Rama Packaging, Ahmedabad & Anr. v. Union of India reported in 1990 (2) G.L.R. 1239. In the said decision the contention of the petitioners of that case was to the effect that hearing was made by one Assistant Collector and the order was passed as regards tariff heading by another Assistant Collector, the same definitely violated the principles of natural justice. This Court accepted the contention and held that in such event, principles of natural justice did stand violated and the impugned order was required to be quashed. On the facts of this case, this decision of Division Bench will not help Mr. Oza, simply because in the instant case, no personal hearing was granted to the petitioner in response to the show cause notice dated 29th October, 2001 by respondent no. 2. He was only called upon to submit his written explanation within 15 days from the date of the receipt of the notice and the same had been done by the petitioner by submitting replies dated 12th November, 2001 and 10th December, 2001. It is also to be noted that the concerned officer of respondent no. 1, while passing the impugned order had taken into consideration these replies. Thus, there is no question of grant of personal hearing by respondent no. 2 and passing of the impugned order by respondent no. 1. Whatever that was said in his defence by the petitioner has been duly considered by respondent no. 1, though the replies were submitted to the office of respondent no. 2.

4.7. While giving his final reply to the submissions of Mr. Shelat and Mr. Nanavati, Mr. Oza has submitted that the petitioner had also forwarded representation dated 30th April, 2001 to the office of respondent no. 2 but the same has not been taken into consideration by respondent no. 1. That has caused serious prejudice to the petitioner. It is pertinent to note here, that by the show cause notice dated 29th October, 2001, the petitioner was called upon to submit his representation against the proposed punishment within 15 days from the receipt of the said show cause notice. Two of his replies to the said show cause notice are dated 12th November, 2001 and 10th December, 2001, meaning thereby, the petitioner had received the notice atleast before 12th November, 2001. He ought to have submitted his reply to the said show cause notice within stipulated time. It clearly appears that the second reply was submitted after the expiry of the stipulated time, but since it was within reasonable time, it was accepted. The order of Disciplinary Authority is dated

22nd May, 2002 and in the said order first two replies have been taken into consideration. Since the third reply was submitted after considerable delay, it was not obligatory upon the Disciplinary Authority to take it into consideration. Further the petitioner has not stated what prejudice has been caused to him when his third reply has not been taken into consideration. The petitioner had been given adequate chance and ample time to submit his reply. He was even furnished with the report of the Inquiry Officer. In light of the same, he had already submitted the aforesaid two replies. It was, therefore, proper for the respondent no. 1 to accept the same and take into consideration. That however, would not mean that the petitioner should repeatedly go on submitting replies whenever a new thought occurred to him. The Apex Court in the case of Managing Director, ECIL v. B. Karunakar reported in A.I.R. 1994 S.C. p. 1074, has laid down that unless a definite prejudice is shown by the petitioner, such contention cannot be paid any countenance to. The Apex Court has also held as under :-

> "The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report has to be considered on the facts and circumstances of each case."

Similar view has been taken by the the Division Bench of this Court [Coram : R.K. Abichandani and D.A. Mehta, JJ.] in the case of G.D. Dave v/s. State of Gujarat reported in 2004 (1) G.L.H. page 603. It reads as under:

> "In relation to the contention regarding violation of principles of natural justice it is necessary to note that the learned Single Judge has rightly held that non-compliance will not per se be sufficient for holding that the order is invalid and striking it down, but, the person alleging such violation has to show whether any prejudice has resulted as a consequence of such violation."

Thus, unless prejudice is specifically pleaded and shown, it is no use, simply advancing argument regarding non compliance of principles of natural

justice.

It is interesting to note that even in the entire petition except mentioning the date of the third reply in para 3.15, not a word has been said. Thus, the petitioner himself has not attached any importance to this fact.

4.8. The third contention of Mr. Oza is that admittedly the Disciplinary Authority is respondent no. 2. Against his order appeal is provided in part V and in particular Rule 18 of the Rules. He, therefore, submitted that against the order of respondent no. 2 the appeal would lie to respondent no. 1. However, respondent no. 1 has acted as Disciplinary Authority and, therefore, his valuable right of appeal has been lost. He has in support of his contention placed reliance on the decision of the Apex Court in the case of Surjit Gosh v. Chairman & M.D. United Commercial Bank reported in A.I.R. 1995 S.C. 1053. This contention has been vehemently contested by Mr. Shelat by submitting that it was only because of compelling necessity and peculiar circumstances respondent no. 1 had taken upon it the task imposing punishment. Such circumstances have already been narrated above.

4.9. When these two submissions are considered, it would appear that in normal circumstances a person should not be deprived of his right of appeal, that being valuable right conferred upon him by the provisions of a Statute. However, the facts of this case cannot be termed "normal" or "usual". It is an admitted fact that main target of attack of the petitioner is respondent no. 2. It is the case of the petitioner as seen above, that the order of transfer at Bhuj was malafide passed against him by respondent no. 2 to take revenge. It is also an admitted fact that the petitioner had written letter to respondent no. 2 that if he did not cancel his order of transfer at Bhuj, and posted him at Ahmedabad, he would expose respondent no. 2 before the public by summoning press conference and also by filing Public Interest Litigation before this Court. This correspondence also forms basis of charges levelled against the petitioner, apart from charge regarding flouting the order of respondent no. 2 which according to the petitioner was passed malafide. It was, therefore, not at all advisable to permit respondent no. 2 to act as the Disciplinary Authority against the petitioner. It is also obvious that in this background, even if respondent no. 2 had taken any adverse decision against the petitioner, sole basis of his challenge to

such decision would have been bias of respondent no. 2 against him and in all probabilities no court would have allowed such order to exist. Even from the petitioner's point of view it was in his interest, that respondent no. 2 was not allowed to act as Disciplinary Authority. With a view to avoid any complication later on, if respondent no. 1 being a authority higher than respondent no. 2 had taken upon itself to act as the Disciplinary Authority, there was nothing wrong in it. It is also not in dispute that except respondent no. 2, there was no other authority inferior to respondent no. 1 and equivalent to respondent no. 2 which could have passed the order of punishment upon the petitioner. Admittedly, it was respondent no. 2 alone, apart from respondent no. 1 who could have imposed punishment of dismissal upon the petitioner. when his scope of making such order or acting as Disciplinary Authority vis-a-vis the petitioner had come under cloud, naturally respondent no. 1 had no other alternative but to act itself as Disciplinary Authority. It is difficult to appreciate that for this limited purpose, any other appointment on the post of Commissioner of Food and Drugs Control Administration could have been made.

5. In support of his contention, Mr. Oza has placed reliance on the decision of the Apex Court rendered in the case of Surjit Ghosh v. Chairman & M.D. United Commercial Bank reported in A.I.R. 1995 S.C.1053. In paragraph 5 of the said judgment, it has been held by the Apex Court as under :-

> "5. The respondent Bank in its submission contended that although it is true that the Deputy General Manager had acted as the disciplinary authority when he was in fact named under the Regulations as an appellate authority, no prejudice is caused to the appellant because the Deputy General Manager is higher in rank than the disciplinary authority, viz. the Divisional Manager/ AGM [Personnel]. According to the Bank, it should be held that when the order of punishment is passed by a higher authority, no appeal is available under the Regulations as it is not necessary to provide for the same. it was also contended that there is no right to appeal unless it is provided under the Rules or Regulations. Although the argument looks attractive at first sight, its weakness lies in the fact that it tries to place the Rules/ Regulations which provide no appeal on par with the Rules/ Regulations where appeal is provided.

> It is true that when an authority higher than the disciplinary authority itself imposes the punishment, the order of punishment suffers from no illegality when no appeal is provided to such authority. However, when an appeal is provided to the higher authority concerned against the order of the disciplinary authority or of a lower authority and the higher authority passes an order of punishment, the employee concerned is deprived of the remedy of appeal which is a substantive right given to him by the Rules/Regulations. An employee cannot be deprived of his substantive right. What is further, when there is a provision of appeal against the order of the disciplinary authority and when the appellate or the higher authority against whose order there is no appeal, exercises the powers of the disciplinary authority in a given case, it results in discrimination against the employee concerned. This is particularly so when there are no guidelines in the Rules/ Regulations as to when the higher authority or the appellant authority should exercise the powers of the disciplinary authority. The higher or appellate authority may choose to exercise the power of the disciplinary authority in some cases while not doing so in other cases. In such cases, the right of the employee depends upon the choice of the higher/ appellate authority which patently results in discrimination between an employee and employee. Surely, such a situation cannot savour of legality. Hence we are of the view that the contention advanced on behalf of the respondent Bank that when an appellate authority chooses to exercise the power of disciplinary authority, it should be held that there is no right of appeal provided under the Regulations cannot be accepted."

It is true that the Apex Court in no uncertain terms has laid down that an employee cannot be deprived of his substantive right of appeal against the order of Disciplinary Authority. It has also held that when the Rules and Regulations provided for appeal to the higher authority, the higher authority should not exercise powers under the Disciplinary Authority so as to avoid causing discriminatory treatment to the concerned employee. It however, does not appear from the facts of the case which have been narrated in the judgment of the Apex Court whether there was any plausible reason for which the authority higher than the Disciplinary

Authority had passed the order of punishment against the appellant of that case. It appears that unlike the present case, there were no compelling reasons there. The Apex Court has, therefore, precisely stated that "in a given case" it may cause discrimination. Thus, even according to the Apex Court, discrimination does not happen always, but there is every possibility of it happening when the higher or the appellate authority may choose to exercise power of the Disciplinary Authority in some case while not doing so in any other cases. Thus, what the Apex Court has said that the concerned higher authority cannot at its sweet will assume the role of Disciplinary Authority and pass the order of dismissal denying opportunity of appeal to the concerned employee. This is more so that there is right of appeal provided against the impugned order before the higher authority. It is, therefore, necessary to see whether in the present case, power was exercised by respondent no. 1 for any valid reason or it was merely his ipse-dixit. The reason is reflected in the impugned order itself and it has already been discussed above.

5.1. Merit of Mr. Oza's submission can also be tested in the light of provisions of statutory rules regarding Disciplinary Authority, right of appeal, etc. Rule 7 of the Rules deals with the Disciplinary Authority:

"Disciplinary Authority:- (1) The Government may impose any of the penalties specified in rule 6 on any Government servant.

(2) Without prejudice to the provisions of sub-rule () and (2) the Heads of Department may impose any of the penalties specified in items (1) and (2) of rule 6 on any Government Servant of State service, Class-II, under his administrative control.

(3) Without prejudice to the provisions of sub-rules (1) and (2), Head of Departments and Heads of Offices may impose any of the penalties mentioned in rule 6 upon any Government Servant of subordinate or inferior service serving under them whom they have power to appoint.

(4) Without prejudice to the provisions of sub-rules (1) and (2), Head of Departments and Heads of Offices may impose any of the penalties specified in column 3 of the Appendix appended to these rules on any Government Servant of

Subordinate or Inferior serving under them, whom they have no power to appoint, to the extent specified against them in the corresponding column 4 of the said Appendix.

Sub-rule (1) shows that it is the Government which may impose any of the penalties specified in Rule 6 on any Government servants. Thus, it is the Government which can in all cases, where the penalty under Rule 6 is to be imposed, act as Disciplinary Authority in relation to any Government servant. This power has been further conferred upon certain officers by the Government to act as Disciplinary Authority. However, ultimate power of the Government to act as Disciplinary Authority remains the same. Admittedly, respondent no. 1 is a higher authority than respondent no. 2. In such circumstances, if respondent no. 1 acts as Disciplinary Authority, there is nothing wrong in it. There is no dispute on the principle of law that the authority higher than the Disciplinary Authority can take appropriate decision in the matter of imposition of punishment. Mr. Shelat has placed reliance on the decision of the Apex Court in the case of Balbir Chand v. The Food Corporation of India Ltd., reported in Judgment Today 1996 (11) S.C. 507.

"It is now well settled legal position that an authority lower than the appointing authority cannot take any decision in the matter of disciplinary action. But there is no prohibition in law that the higher authority, should not take decision or impose the penalty as the primary authority in the matter of disciplinary action. On that basis, it cannot be said that there will be discrimination violating Article 14 of the Constitution or causing material prejudice."

According to Mr. Shelat in such circumstances, doctrine of necessity would step in. It is not unknown that it is not in all cases respondent no. 1 acts in this manner, especially when appeal against the order of Disciplinary Authority lies before it. Here, because of the necessity and reasons beyond its control, respondent no. 1 had to take this decision and act as Disciplinary Authority even when right of appeal to it was provided for. In my opinion, when the circumstances are so peculiar, as in the present case, that they can be termed as "compelling", the Government can exercise its authority under sub-rule 1 of Rule 7 of the Rules and act as Disciplinary Authority in the matter of imposition of punishment.

5.2. It may also be worthwhile to refer to the doctrine of necessity in slightly different manner than the manner suggested by learned Advocate General. In a given case, there may not be any authority, not even alternative authority who could have taken such decision as Disciplinary Authority except the person against whom bias is alleged. In such circumstances, there is no other alternative for the Disciplinary Authority and inspite of accusations made and bias alleged against him, he would be required to perform the role of Disciplinary Authority by sheer necessity. In the instant case, it is no so. Rule 7 as stated above provides for Disciplinary Authority. Sub-rule (1) states that it would be respondent no. 1 and thereafter such power could be exercised by the Heads of the Departments and other such authorities. Thus, there is an alternative authority in the present case who could have assumed the role of Disciplinary Authority in view of the grave accusations made and strong bias alleged against respondent no. 2. This decision will not support the argument of Mr. Oza and therefore, argument cannot be accepted.

5.3. Apart from this, it is also interesting to note whether in fact any prejudice is caused to the petitioner with the loss of right of appeal. Rule 21 prescribes the manner in which the appeals are to be considered and the factors which are required to be examined in appeal.

"21. Consideration of appeals :- (1) In the case of an appeal against an order of suspension, the appellate authority shall consider whether in the light oft he provisions of rule 5 and having regard to the circumstances of the case the order of suspension is justified or not and confirm or revoke the order accordingly.

(2) In the case of an appeal against an order imposing any of the penalties specified in rule 6, or enhancing any penalty imposed under the said rule, the appellate authority shall consider-

(a) whether the procedure prescribed in these rules has been complied with;

(b) whether such non-compliance, if any, has resulted in any material irregularity or illegality so as to result in miscarriage of justice;

(c) whether the findings as justified, and

(d) whether, the penalty imposed is excessive, adequate or inadequate, and, after consultation with the Commission, if such consultation is necessary in the case, pass orders -

(i) setting aside, reducing, confirming, or enhancing the penalty, or

(ii) remitting the case to the authority which imposed the penalty or to any other authority for further inquiry or with such direction as it may deem fit in the circumstances of the case;"

The impugned order would show that all the factors prescribed in Rule 21, which are required to be kept in view while deciding the appeal have been duly considered by respondent no. 1. It may be noted here, that so far as the present petition is concerned, proceedings of the inquiry held against him have not been challenged by the petitioner. No submission challenging the validity of the inquiry has been advanced by the petitioner's counsel. The aspects which are required to be considered in appeal by the appellate authority are relating to the procedure of the inquiry, justification of the findings arrived at by the Inquiry Officer and whether the punishment imposed by the Disciplinary Authority was proportionate to the guilt established against the delinquent. The impugned order of respondent no. 1 would show that it has been passed by the concerned officer of respondent no. 1 after taking into consideration the entire material placed before it together with the replies of the petitioner. The text of the order also says that the aforesaid aspects have been duly taken into consideration including the aspect of quantum of punishment. If that has been done by respondent no. 1, which otherwise would have acted as appellate authority, I do not find any prejudice having been caused to the petitioner even with the deprivation of his right to appeal. It may also be noted here that there is a provision of filing review application before the Government. Rules 22 23, and 24 provide for review by the Government of its decision. Though this provision is not equally efficacious as the provision of appeal in absence of appeal, it may be an alternative remedy available to the petitioner to approach respondent no.

1. Be that as it may, the fact remains that the action of respondent no. 1 cannot be termed as violative of Article 14 of the Constitution of India and it cannot be struck down solely on the ground that the petitioner's right to appeal is lost. In this Court also it is our common experience that petitions of the Single Judge are placed before the Division Bench hearing petitions involving identical issue, causing loss of right of filing Letter Patent Appeal to some of the litigants, much to their dislike; but such course is permissible and many a times it is resorted to by this Court. Similarly in criminal appeals also, two appeals arising from the same judgment but one pending before Sessions Court and other before the High Court, appeal pending before Sessions Court is ordered to be placed before the High Court, depriving the concerned accused or the State of the right of appeal to this Court.

6. Since all the contentions in the nature of technical objections raised by Mr. Oza against the impugned order are not accepted, I will now examine the submissions made in the alternative by Mr. Oza with regard to proportionality of punishment imposed upon the petitioner. According to him looking to the nature of the charges which have formed the subject matter of departmental inquiry, it is clear that two kinds of charges have been levelled against the petitioner namely, remaining absent without authority and secondly behaving in a manner not befitting the Government servant; flouting the orders of the superior officer and using intemperate language against respondent no. 2. He has also submitted that even if these charges are held to be proved against the petitioner, they are not so serious so as to warrant his dismissal from the service. He has in support of his contention placed reliance on several decisions of the Apex Court as well as this Court.

6.1. As against that Mr. Shelat has submitted that looking to the gravity of the charges levelled against him, it is obvious that the acts of misconduct are serious and the petitioner who is found guilty of committing these acts deserves no leniency in the matter of imposition of punishment. He has also submitted that the scope of judicial review is very limited in the matter of punishment imposed by the Disciplinary Authority.

6.2. He has placed reliance on several decisions of the Apex Court in support of his contention.

6.3. If the charges levelled against the

petitioner are perused closely, it becomes evident that he had remained absent for 218 days from the duty without any authority. The statement of charges also shows that he had not joined the duty when transferred at Bhuj only because he wanted respondent no. 2 to transfer him to Ahmedabad or Gandhinagar circle. Though Mr. Oza, has tried to defend the conduct of the petitioner by submitting that out of 218 days he had attended the Court proceedings at Ahmedabad for nearly 65 days and the cases in which he had given attendance have resulted into conviction. It is his say that the petitioner had not sat quietly at home enjoying his unauthorized leave. Be that as it may, the fact remains that inspite of the order passed by respondent no. 2 requiring him to work at Bhuj, he had not obeyed the said order and had insisted that he should be placed at Ahmedabad. Transfer is an unavoidable incident of Government service and whenever the order of transfer is passed, normally it is presumed that it is passed in routine course of administration and for administrative exigencies. It is also well established principle of law by now that if any Government servant intends to challenge the order of transfer on any count, he is first required to report at transferred place and resume duty there, thereafter he can raise challenge. In the instant case, for about five months he did not report for duty. It was only on 27th April, 2000 that he once reported on condition that he should be posted immediately to Ahmedabad as he would not be able to work for a minute at Bhuj. Further he decided on his own the itenary and travelled and performed duties at places not authorised by his superiors. Inquiry Officer has given a clear finding that for this purpose he was required to obtain prior authorisation of his superior officer which he had not done. Thus he has remained absent unauthorisedly for a period between 30th September, 1999 and 27th April, 2000. This attitude of the petitioner is also required to be kept in view while examining other charges which are levelled against him. He, after the order of transfer was issued against him, entered into correspondence with respondent no. 2 and even threatened him vide letter dated 5th November, 1999 that if he did not transfer him to Ahmedabad or Gandhinagar, by cancelling the order of transfer at Bhuj, he would not only expose his misdeeds in the press conference but he would also file Public Interest Litigation before this Court. Not only that but by another letter dated 17th January, 2000 he threatened respondent no. 2 that he should take appropriate decision regarding his transfer within four days otherwise he would expose before the High Court all the scandals relating to food and drug cases by producing

convincing evidence and also forward the same to the Chief Minister, Secretary, Health and Family Welfare Department and also the Minister of the said department. Further the language used by petitioner in his correspondence for this purpose is also not befitting the Government servant. Instances of use of intemperate language have been described in detail while discussing charge No. 7. Some of the items require special mention. They are : '(a) his transfer to Bhuj was not only illegal but disgusting, (b) respondent no. 2 runs the administration of Food & Drugs Control Department as his private concern, (c) the Commissioner is encouraging irregularities and corrupt practices in the department and by such corrupt administration he was damaging the health of people, (d) he was also creating scandals with the help of Food Inspectors, (e) whatever the other officers will have to suffer on account of scandals, respondent no. 2 would be responsible for the same, (f) whatever the scandals that have been done by the officers of this department in the past he (the petitioner) would be constrained to bring them to light even at the cost of the discipline (of the service), (g) respondent no. 2 should cancel his order of transfer, which is illegal and he should be immediately posted at Ahmedabad or Gandhinagar, (h) that respondent no. 2 is directly involved in corrupt practices and if the order of transfer was not cancelled, he would expose scandals to the public and whatever the consequences it would be sole responsibility of respondent no. 2, (i) if the order was not cancelled, he would be compelled to take such steps, (j) he would expose them by having a meeting with the Secretary, Health Department and the Chief Minister regarding the corrupt practices, the irregularities done with the help of the Health Minister with a view to harass him if his order of transfer was not cancelled within four days, and (k) kindly render your explanation why steps should not be taken against you (respondent no. 2) for the corrupt practices committed by him.' It is, therefore, to be seen that for what purpose and what type of intemperate language has been used. Before continuing further discussion it would be necessary to refer to certain decision cited by Mr. Oza. Firstly on the question of use of indecent language he has placed reliance on the decision of the Apex Court rendered in the case of Ved Prakash Gupta v. M/s. Delton Cable India (P) Ltd. reported in A.I.R. 1984 S.C. 914, wherein it has been held that for use of abusive language the imposition of punishment of dismissal from service was grossly disproportionate. The said decision is decided on the facts of that case where the appellant of that appeal was accused of having abused his co-workers

and others. The Apex Court further found that the evidence was not satisfactory. However, it said that even if it was presumed that he had spoken filthy language, the order of dismissal from service could not have been passed against him. This decision cannot apply to the facts of the present case. In that case it was in a heat of moment the appellant had spoken filthy language. It the present case, it is not so. The petitioner has not only used intemperate language, but it has been used with a calculated move to malign and blackmail respondent no. 2 so as to exert mental pressure on him to accede to his demand regarding his transfer to Ahmedabad or Gandhinagar. In a simple terminology, it can be said that he tried to extort the order of transfer in his favour by applying a mean method. Whether respondent no. 2 is guilty of committing the alleged acts of misconduct is totally different issue, with which this Court is at present not concerned. It is the manner in which efforts have been made by the petitioner to bring respondent no. 2 to his knees, that is under scrutiny. When the act is found to be true by the Inquiry Officer and confirmed by the Disciplinary Authority, it can certainly be termed as act of very serious misconduct.

6.4. Mr. Oza has also placed reliance on another decision of the Apex Court rendered in the case of Ramkishan v. Union of India reported in JT 1995 (7) S.C. 43. In the said decision in paragraph 11 it has been held as under :-

> "11. It is next to be seen whether imposition of punishment of dismissal from service is proportionate to the gravity of the imputation. When abusive language is used by anybody against a superior, it must be understood in the environment in which that person is situated and the circumstances surrounding the event that led to the use of the abusive language. No straight jacket formula could be evolved in adjudging whether the abusive language in the given circumstances would warrant dismissal from service. Each case has to be considered on its own facts. What was the nature of the abusive language used by the appellant was not stated."

Obviously, therefore, the said judgment has been passed by the Apex Court on the facts and circumstances of that case. It is on the contrary very specifically laid down that there cannot be any straight jacket formula which could be applied for this purpose. Every

case as such is required to be considered on its facts and it is to be found out in what circumstances and in which environment the delinquent used abusive language. As already stated above, it is not only because of the intemperate language the petitioner is sought to be penalized, but also for the purpose for which it was used and that factor was kept in the view while deciding the quantum of punishment. In the cases referred to above, abusive language appears to have been used by the concerned delinquent in a heat of moment on the spot as and when the concerned event took place. In the present case, it is not so. It has been used for similar purpose by the petitioner almost calling upon his superior officer that if you did not grant my demand, you would be totally ruined. It is that attitude which is required to be viewed with seriousness.

6.5. Mr. Oza has placed reliance on the decision rendered by the learned Single Judge of this Court [Coram: M.P. Thakkar, J.] in the case of H.P. Thakore v. State of Gujarat reported in 1979 G.L.R. 109. In the said judgment, several aspects which are required to be considered before imposition of the penalty are enumerated and the learned Judge has advised the authority imposing punishment to strike a neat balance and to determine a just penalty which cannot be characterized either as too lenient or as too harsh. There cannot be any dispute with the proposition of law laid down by the learned Judge in this judgment and the factors which are required to be kept in view before imposition of the punishment. In the instant case, while judging the question regarding gravity of the alleged misconduct and the proposed punishment, respondent no. 1 does not seem to have overlooked the aforesaid norms.

7. With regard to the second charge regarding unauthorized absenteeism, Mr. Oza has placed reliance on several decisions, wherein it has been held that remaining absent without leave is not a serious offence and it should not be visited with extreme punishment of dismissal from service. First of such decisions is rendered by the Division Bench of this Court in the case of Rajesh M. Jani v. Registrar, Metropolitan Magistrate Court, Ahmedabad reported in 2001 (2) G.C.D. 953. In that case, the concerned employee was charged of remaining absent from duty without leave on various occasions. He was working as Assistant in the Metropolitan Magistrate Court, Ahmedabad. He was, therefore, served with show cause notice for remaining absent persistently. The explanation rendered by him was not acceptable and hence his service ultimately came to

be terminated. In the facts and circumstances, the Division Bench held that the punishment imposed upon the concerned employee was quite harsh and ends of justice would have met if the punishment of stoppage of two increments without future effect, was imposed.

7.1. The second decision that has been relied on by M. Oza is rendered by the learned Single Judge of this Court in the case of Sardarsingh Devisingh v. District Superintendent of Police Sabarkantha reported in 1985 G.L.H. 940. In that case a constable was charged for remaining absent for 150 days without leave. He was departmentally proceeded against and ultimately dismissed from service. While holding that the said punishment was very harsh, the learned Judge has observed as under :-

> "7. In the instant case no punishment was imposed on the petitioner for remaining absent without leave in the past. He remained absent without obtaining leave from the disciplinary authority. That means that the misconduct proved is that he remained absent without leave for 150 days. The question then is what punishment should be imposed on him for this misconduct? Is the misconduct so grave or gross that the petitioner cannot be tolerated in service? Is it such that an opportunity to improve would be a futile exercise? If the petitioner is visited with a penalty which is short of removal or dismissal from service, is there evidence to suggest that he will not learn a lesson and improve in future? The answer is there is no such evidence. The guilt established against the petitioner can never fall in that category which would necessitate termination of service. In my opinion, the guilt would fall in the category where an opportunity to improve by visiting the petitioner with a lesser penalty would serve the ends of justice. No one says that such conduct of remaining absent without leave should be tolerated, nay, a person guilty of such conduct must suffer punishment. But it is not necessary to be so harsh as to throw him out of service. It may be realised that being a petty police constable, his absence may not be even felt as much as it would be felt if a higher level officer behaves in this fashion. In a case like this, I think the ends of justice would be met if instead of terminating the services of the petitioner by an order of dismissal, the petitioner is visited with the penalty of

withholding of two increments with future effect."

The punishment of dismissal was, therefore, quashed and it was substituted by a penalty of withholding of two increments with future effect.

7.2. The third decision is also rendered by the learned Single Judge of this Court in the case of Varsinh Bhagwan v. State of Gujarat reported in 1992 (2) G.L.H. 311. In the said decision the concerned delinquent who was Unarmed Constable in Prohibition Task Force of Junagadh was dismissed from service on the charge that he had remained absent without leave or permission, for 101 days. In the facts and circumstances of the said case including the fact that there was no past record of remaining absent, the punishment imposed by the department was very harsh and it suffered from non application of mind. While deciding the said matter, the learned Judge also placed reliance on the decision of this Court rendered in the cases of H.P. Thakore v. State of Gujarat; Sardarsingh Devisingh v. District Superintendent of Police, referred to above. The learned Judge by way of punishment deducted 40% back wages awarded to the said employee.

7.3. Mr. Oza has placed heavy reliance on the decision of the Apex Court rendered in the case of Secretary, School Committee, Thiruvalluvar, Higher Secondary School v. Government of Tamil Nadu & Ors. reported in (2003) 5 S.C.C. at pg. 200. In the said decision the concerned employee was appointed as PG Assistant for teaching English. He was issued memo for having not attended the school for a very long period without obtaining prior permission and also for cancelling classes and leaving for home early. This was considered to be deficiency in service, misconduct and permission was, therefore, sought for imposition of punishment of dismissal from service on the ground that the concerned employee had not denied charges levelled against him. The said permission was sought by the D.E.O. from the C.E.O. Inquiry was, therefore, held and the C.E.O. ultimately, found that the person was psychic and, therefore, he refused permission for termination on the ground that the allegations which constituted foundation for the proposed order of termination were not so grave as to warrant punishment like dismissal. The matter ultimately went upto Apex Court and it declined to interfere with the decision which was taken by the C.E.O. The Apex Court held that argument regarding non application of mind by the C.E.O. in not according approval to the proposed punishment of dismissal and

judicial review could not be sustained. Thus, according to Mr. Oza, this Court has repeatedly said that the punishment of dismissal for unauthorized absenteeism is quite harsh and disproportionate to the gravity of the alleged misconduct. In the instant case also, according to him, there was no need for the authorities to impose harsh punishment and causing economic death of the petitioner.

7.4. This submission of Mr. Oza has been vehemently opposed by Mr. Shelat and he has submitted that even remaining absent without authority or proper leave is a serious misconduct for which strict view is required to be taken. According to Mr. Shelat, it was incumbent upon the petitioner to resume at the place where he was transferred after the petition was dismissed, but he had not done so and deliberately flouted the order of his superior officer. In support of his contention, Mr. Shelat has placed reliance on several decisions. First decision is rendered by the Apex Court in the case of Union of India v. Shri B. Dev reported in JT 1998 (5) S.C. 480. In the said case, a Government servant, not complying with the order of transfer was considered to be act of grave misconduct. While quashing the finding of the Tribunal, the Apex Court held as under:-

> "12. The Tribunal has held that no charge of grave misconduct was framed or found proved against the respondent. This is clearly incorrect looking to the express language of the charge as framed and the enquiry report. The charge as framed expressly charged the respondent with having committed grave misconduct by remaining absent from duty without authorization and by continuing to disobey Government orders issued to him for joining duty. He was charged with lack of devotion to duty and of conduct unbecoming a Government servant, and this was violative of the provisions of rule 3 (1) sub-clause (ii) and (iii) of CCS (Conduct) Rules. The finding also is that this charge of grave misconduct has been proved in the enquiry report. The conduct, therefore, of the respondent falls under Rule 9 and the order of the President dated 18th December, 1984, cannot be faulted."

7.5. Further he has placed reliance on the decision rendered in the case of Mithilesh Singh v. Union of India reported in A.I.R. 2003 S.C. at pg. 1724. In the said case, the delinquent employee was

posted in a terrorist affected area. However, he had remained absent from the duty without leave and he had also not placed arms and ammunition in proper custody. He was, therefore, charged of committing grave misconduct and ultimately, the punishment of dismissal from the service was imposed upon him after holding due inquiry. The question regarding proportionality of the order of punishment came for consideration before the Apex Court and it held that it would not be characterized as disproportionate and/or shocking and, therefore, it had declined to interfere with the same holding that the scope of interference with the decision of the Disciplinary Authority was very limited. He has also placed reliance on the decision rendered by the Apex Court in the case of Gujarat Electricity Board v. Atmaram Sungomal Poshani reported in A.I.R. 1989 S.C. at pg. 1433. In the said case, the respondent who had joined as Technical Assistant with G.E.B. was transferred to Ukai. He, therefore, made a representation stating that it would be very difficult for him to join at Ukai because of the ailing mother. It appears that he thereafter did not join on the ground that his representation was not decided. Ultimately, his continued absence prompted G.E.B. to pass the order discharging from the service under Regulation No. 113. The said decision was challenged before this Court and the learned Single Judge of this Court quashed the order of termination of the service of the petitioner. Against the said decision of the learned Single Judge, G.E.B. preferred Letters Patent Appeal before the Division Bench. The Division Bench confirmed the order of reinstatement in service, but modified the order with regard to payment of back wages and reduced it from 100% to 50%. The Board carried the matter to the Apex Court and while allowing the appeal, the Apex Court held as under :-

"4. Transfer of a Government servant appointed to a particular cadre of transferable posts from one place to the other is an incident of service. No Government servant or employee of Public Undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation

> to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has not justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant Rules, as has happened in the instant case. The respondent lost his service as he refused to comply with the order of his transfer from one place to the other."

The Apex Court thus, restored the order of the Disciplinary Authority holding that by remaining absent without leave, the said employee had exposed himself to the serious consequences under Regulation No. 113.

7.6. These aforesaid decisions cited by Mr. Shelat will undoubtedly show that in certain circumstance, deliberate absence without due authority or proper leave is to be viewed seriously. If the facts of the case on hand are reconsidered in view of the decision cited above by both the learned advocates, it clearly appears that there was not justification whatsoever for the petitioner, not to join the duty at Bhuj upon receiving the order of transfer and he could not have disobeyed the said order on the ground that he had filed many cases at Ahmedabad and in all those cases, his presence was required. This cannot be a ground for not joining the duty. It may be noted here, that according to the respondents, against the order of transfer passed by respondent no. 2, the petitioner had preferred petition before this Court challenging the said order, but the same was dismissed. This fact is not disputed by the petitioner. Unfortunately, the details of that petition are not furnished to this Court by any of parties. It is again worthwhile to note that when on 27th April, 2000, he joined the duty at Bhuj, it was a conditional joining stating that in no circumstances it would be possible for him to work at Bhuj. The petitioner had completely forgotten at that time that he was a Government servant who could be transferred to different places in accordance with the exigency of the administration. He himself had no authority to select his own centre for work. He should not have pressurized

his superior that he would work only if he was transferred to Ahmedabad and he would not be able to work at Bhuj. To me, this reason appears to be without any substance and it was being advanced only with a view to come back to Ahmedabad or Gandhinagar where he had worked for 14 years without being transferred. Such indiscipline in any service much less in a Government service cannot be tolerated. In some of the decisions of this Court cited by Mr. Oza, lenient view seems to have been taken considering the facts of those cases and also that there was reason of illness etc., for remaining absent. The facts of this case therefore, cannot be equated with the facts of those cases. On the facts of the present case, act of petitioner flouting the order of transfer and remaining absent without leave can by itself termed as act of grave misconduct and it has to be viewed very seriously.

8. As already stated above, that the charges levelled against the petitioner and the conclusions drawn by the Inquiry Officer are not only to be considered in isolation for assessing their gravity but even the conjoint effect is required to be seen. Use of intemperate language, the purpose of using such language, attempt to malign respondent no. 2 and thereafter to make him submit to his demand, deliberately flouting the order of respondent no. 2 by remaining absent at the transferred place, all these acts of misconduct not only are of serious nature, but cumulative effect of the same, in my opinion, cannot invite lesser punishment than dismissal from the service. Thus, alternative submission of Mr. Oza cannot be accepted.

9. Lastly, the submission of Mr. Devang Nanavati for respondent no. 2 is that the allegations that have been made against respondent no.2 do not survive since they are completely dependant on the allegations made against the deleted respondent no. 3. In other words, according to him, respondent no. 2 is alleged to have acted at the instance of the deleted respondent no. 3 and when averments against him and the said respondent are deleted from the proceedings, nothing remains on the record against respondent no. 2. He further submitted that it is the burden of the petitioner when he alleges bias and malice against respondent no. 2 to prove them by making proper averments in the pleading. He has submitted that when no particulars emerge from the pleadings, the Court cannot take any notice of such allegations. For that purpose, he has placed reliance on the decision rendered by the Apex Court in the case of Bipin Vadilal Mehta v. Ramesh B. Desai reported in

(1996) 3 G.L.R. at pg 147.

" In all cases in which the party relies on fraud, the particulars thereof should be provided in the pleading. When the pleading in the petition is examined in view of the abovesaid statutory provision, it shall have to be said that, the requirements of this Rule have not been complied with. At more than one place, the petitioners do say in the petition that, there has been a fraud upon the statute, upon the Company and upon the Shareholders. But this repeated recitals regarding the existence of the fraud are devoid of any particulars, whatsoever. It should be appreciated that, the law of pleadings require that an allegation of fraud is to be made specifically and that the particulars thereof are to be furnished and later on, with a view to succeed on the basis of the plea of fraud, the fraud as alleged requires to be established.

General allegation regarding fraud without the necessary particulars would even not amount to an averment of fraud of which the Court ought to take notice."

This decision has been subsequently confirmed by the Division Bench by its decision reported in 2001 (2) G.L.R. at pg 1224. He has also placed reliance on the decision by the learned Single Judge to submit that once this Court had refused his petition, challenging the order of transfer, it was necessary for him to resume duty at transferred place. He should not have remained absent thereafter. In the submission of Mr. Nanavati the alleged acts of misconduct of respondent no. 2 and the alleged partial attitude shown by respondent no. 1 towards respondent no. 2 are not the subject matter of scrutiny of this Court in this case. There is much substance in Mr. Nanavati's submission. In the petition it has been stated at more than one place that respondent no. 2 acted illegally at the behest of deleted respondent no. 3. When these averments are withdrawn, they would not survive even qua respondent no. 2. Apart from that, the allegations made against respondent no. 2 regarding scandals, etc. are not at all relevant for the purpose of this petition. Further there is also no substance in the allegation that it is at the instance of respondent no. 2, respondent no. 1 pass the order of dismissal against the petitioner. In fact the averment pleaded in the petition was that at the instance of

respondent no. 3 (deleted) respondent no. 2 referred the matter to respondent no. 1 for its decision.

10. It is well established proposition of law that scope of judicial review of the action taken by disciplinary authority against the delinquent is very limited. It is only when such order of punishment is found to be so perverse that no reasonable person can pass such order or the punishment imposed is shockingly disproportionate to the guilt established or there is violation of any fundamental rights or the principles of natural justice. The facts of this case do not warrant any such conclusion to be drawn by this Court and no interference with the decision of the disciplinary authority is warranted. If the petitioner is allowed to escape with minor penalty as suggested by Mr. Oza, it will certainly form a bad precedent and in a given case, some other unscrupulous Government employee would resort to arm twisting of his superior for extorting a decision in his favour. Such leniency cannot be permitted. On the question of unauthorized absenteeism also Mr. Oza has placed reliance on several other decisions. However, they are on the same line, hence dealing with them would be mere repetition. Further he has been held guilty not only of that charge, but composite charge of in all seven different nature which have been adequately prescribed in the chargesheet.

11. In that view of the matter, no leniency can be shown. Further when the order of penalty is passed in accordance with the procedure, the scope of judicial review is very limited and I do not see any reason for interference with the order of punishment even on the ground of disproportionality.

12. In the result, this petition fails and it is hereby dismissed. Rule is discharged with no order as to costs.

[AKSHAY H. MEHTA, J.]

* Pansala.