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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on : 15th December, 2010*
Judgment pronounced on : 20th December, 2010

+ **W.P.(C) 1157/2010**

GOVT.OF NCT OF DELHI & ORS. Petitioner
Through: Ms.Jyoti Singh, Advocate.

versus

DR.DEEPAK KUMAR Respondent
Through: Mr.P.P.Khurana, Senior Advocate
with Ms.Tamali Wad, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J.

1. Undisputably, we say so for the reason, learned senior counsel for the respondent conceded during arguments that the respondent Dr.Deepak Kumar was appointed on contract basis as a Medical Officer by the Government of NCT Delhi and was assigned to perform work at the Tihar Jail Complex. Initial contractual engagement was with effect from 16.1.2004 and the duration for which services had to be rendered was 6 months. Needless to state, a fixed monthly payment was made to Dr.Deepak Kumar as consideration for contractual service rendered by him.
2. It may be highlighted that no permanent, temporary or ad-hoc post was available and further it needs to be noted that the engagement was purely on contractual basis.

3. From time to time the tenure of the contract was extended by 6 months each and the contract for employment was valid up to 30.9.2006 but was terminated vide a communication dated 3.7.2006 which reads as under:-

“No./70/34/2005/H&FW/2053-55 Dated:3.7.2006

O R D E R

The Lt.Governor, of NCT of Delhi is pleased to terminate the services of Dr. R.K.Govila & Dr.Deepak Kumar, Medical Officer, on contract basis working in Central Jail Hospital with immediate effect.

Sd/-
(DEVENDRA SHARMA)
SUPDT.(HEALTH)”

4. It is apparent to the reader that the order terminating the contract of service is non-stigmatic and casts no aspersion upon Dr.Deepak Kumar. It may be noted that the order is composite qua two doctors i.e. Dr.R.K.Govila and Dr.Deepak Kumar, but we are concerned only with Dr.Deepak Kumar in the instant writ petition.

5. Being given contractual employment on 21.1.2004 for a period of 6 months, as noted herein above, the term of the contract was extended for a duration of 6 months each; relevant would it be to state that reason why term of the contract was extended was the fact that Dr.Deepak Kumar was rendering service to the satisfaction of his superiors evidenced by the fact that not only was the tenure of the contract periodically extended but also the fact certificates were issued certifying that services rendered by Dr.Deepak Kumar were ‘Very Good’.

6. It is apparent that something happened which necessitated the order dated 3.7.2006 to be issued. Was it that there was no requirement to continue with the services of

Dr.Deepak Kumar or was it something else? Nobody acts without a cause or a reason.

7. The pleadings of the parties show that the reason which led to Dr.Deepak Kumar's contractual engagement being terminated prematurely was an incident which took place in Jail No.3 of the Central Jail Tihar and not the reason that there was no work to be performed.

8. The incident was dated 13.2.2006 when Dr.Deepak Kumar was deputed to medically examine a convict named 'Kamran' who was feeling unwell. The convict was not taken to the jail hospital within the premises of the Central Prison Tihar. Dr.Deepak Kumar was deputed to visit the cell in which Kamran was lodged.

9. As per the pleadings of the parties it is not in dispute that various convicts in Tihar Jail, commensurate with their educational or technical qualifications, are assigned various jobs to be performed by the convicts in Tihar Jail and the convicts who are deputed to render services for the benefit of other convicts and under-trial prisoners are called 'Sewadars'. One Dr.Vipin holding a MBBS degree was lodged in Central Jail Tihar on being convicted for an offence punishable under Section 498-A IPC. It is apparent that the services of the convict Dr.Vipin, as a sewadar, would be best utilized to serve such convicts or under-trials who became sick at the Tihar Jail Prison Complex and thus on the day in question i.e. 13.2.2006, convict Dr.Vipin was placed at the disposal of Dr.Deepak Kumar, to function as a sewadar and assist Dr.Deepak Kumar.

10. Both of them, in their respective capacity as the Jail Visiting Doctor and the Sewadar respectively, reached the cell where Kamran was lodged. Dr.Deepak Kumar examined Kamran but found no apparent manifestation which could be clinically diagnosed as the cause of the stated chest pain

which Kamran complained of being felt by him. As per Dr.Deepak Kumar, he formed an opinion that Kamran could be given a 'Voveron' injection. Relevant would it be to note that voveron is an analgesic, anti-inflammatory and pain-relieving medicine.

11. Kamran developed fever and complained of extreme pain after he was given the injection of voveron and this he claimed lasted for 2 days. As per Kamran the injection was administered to him in a manner which could be best described by him as the manner in which beasts are injected. He complained to the jail authorities that it was convict Dr.Vipin who administered the injection to him and further did not even take the basic precaution of using a cotton swab while injecting him. Though not expressly stated by Kamran as to what he intended to convey by saying that a cotton swab was not used, commonsense guides us that what Kamran intended to convey was that the place where injection was administered to him was not cleaned with cotton dabbed in spirit, a phenomenon we all are familiar with when an injection is administered. Further, the complaint of Kamran suggests that the needle of the syringe was jabbed inside his muscles and not with the deftness of the fingers as is usually to be observed when an injection is administered to a patient.

12. Kamran's complaint was taken seriously on the issue of Dr.Deepak Kumar delegating the function of an injection being administered by a sewadar.

13. To comply with the minimum requirements of natural justice, Dr.Deepak Kumar as also convict Dr.Vipin were called upon to submit, in writing, their explanation pertaining to the incident in question. Dr.Deepak Kumar gave his version, in writing, under his signatures as under:-

"To

The Petition Officer
Central Jail
Tihar

Subject: Medical treatment of Kamran S/o Md.Shafi
As per telephonic message from petition
Officer on 13.2.2006.

Respected Sir,

It is to inform you that on 13.2.2006, there was a call to attend High Security Ward. I went to attend the call.

As per record, the above patient Kamran S/o Md.Shafi presented to me with body-ache and diffuse chest pain with no history of Hypertension, Diabetes or pulmonary tuberculosis. On examination his vitals was within normal limit.

For the above complaint he was advised inject voveron 100 im. stat along with other required medicines which was advised by the undersigned and given to him by the undersigned. However, I was being assisted by Vipin (who has been deployed in CJ 30P5 as sewadar of the assistance) in giving medicine.

Vipin (sewadar) possess the degree of MBBS as per his C.T Card.

It is repeated that the above patient was given the above injection by the undersigned under the proper aseptic condition and by the convict (Vipin).

This is for your kind information.”

14. The response of convict Dr.Vipin was as under:-

“I, Dr.Vipin Kumar (convict) working as Sewadar in OPD. During the visits to the High Security Ward under the Advise of Doctor I also visit the HSW along them. I carry out instructions like Dressing, injections, under their supervision.

I have given Inj. to Mr.Kamran Gohar under the supervisions of Dr.Deepak on 13th Feb 2006.”

15. Juxtaposing the response by Dr.Deepak Kumar and convict Dr.Vipin Kumar, with reference to the complaint of the convict Kamran; as per Dr.Deepak Kumar the sewadar convict Dr.Vipin Kumar made Kamran's condition aseptic meaning thereby, the place where the injection was administered was cleaned with spirit dabbed on a cotton swab, and thereafter he i.e. Dr.Deepak Kumar administered the injection. But as per convict Dr.Vipin Kumar, it was he i.e. Dr.Vipin Kumar who administered the injection. Further, it would be relevant to note that as per convict Dr.Vipin Kumar, he had been doing likewise even in the past while working as a sewadar under instructions of the jail doctor.

16. It is thus apparent that with respect to one facet of the complaint made by Kamran the same found corroboration in the written response of convict Dr.Vipin Kumar i.e. it was Dr.Vipin Kumar who administered the injection to Kamran and not Dr.Deepak Kumar. Further relevant would it be to note that on the issue of Dr.Deepak Kumar taking the assistance of convict Dr.Vipin Kumar to make the condition of Kamran aseptic he highlighted that though a sewadar, the medical qualification of Dr.Vipin Kumar had to be kept in mind.

17. Taking a serious view of Dr.Deepak Kumar permitting a sewadar to administer a voveron injection to a convict, the file was processed with a note penned for consideration by the Competent Authority i.e. the Lt.Governor of the Union Territory of Delhi. The note placed for consideration before the Hon'ble Lt.Governor reads as under:-

"Matter in brief is that 2 orders were received in this office from the Prison Headquarters, in which it was ordered that Dr.R.K.Govila, and Dr.Deepak Kumar, both Medical Officers are surrendered and relieved of their duties with the direction to report to the Department of Health & Family Welfare. A letter dated 26.4.06, was written in this regard to DIG

(Prisons) in which the reasons for surrendering these doctors was sought.

A letter dated 24.4.06, in this regard was also received from the Prison Headquarters in which it was stated that Dr. R.K.Govila, M.O., while going inside District Jail, Rohini, for his duties, was searched by security personnel, and was found carrying Swagat brand tobacco 03 packets (60 gms.), Rajdarbar Gutka 01 packet (10 gms.) and empty syringe 01 from inside his shoe bottom and the same was seized vide seizure memo No.1185121 dated 5.4.06. It has also been stated that the aforesaid act of Dr.Govila is in contravention of the provisions of Delhi Jail Manual, and instructions issued by the Prison Department from time to time. It has also been stated that Dr.Govila has admitted his guilt and a copy of his confessional statement has also been enclosed with the above said letter.

Further in response to this office letter dated 26.4.06, another letter dated 23.5.06, was received in this office in which the above said facts were mentioned in respect of Dr.R.K.Govila. As regards the case of Dr.Deepak Kumar it has been mentioned that while working as Medical Officer in Central Jail No.3, he was giving work of dressing and injection to the convict sewadar in High Security Ward which is against the norms of medical profession and security reasons.

In this regard it is submitted that these doctors were appointed by this Department in the year 2000 and 2004 respectively on contract basis, and their contract has been extended from time to time. However from the above said report from the Prison Headquarters it is evident that their conduct has not been up to the mark. Therefore we may if so approved place the matter before Hon'ble L.G., Delhi, termination of their services.

Submitted please.

Sd/- (23.6.2006)
O.S.(H)."

18. The file shows that the note was thereafter approved by 4 other officers and finally by the Hon'ble Lt.Governor and pursuant thereto the order dated 3.7.2006 was issued.

19. If true, qua Dr.Govila, the charge is fairly serious, but we need not ponder on the same inasmuch as we are not concerned with the alleged misdemeanor of Dr.Govila. Pertaining to Dr.Deepak Kumar, he questioned his contractual service being terminated alleging that he was penalized and since the order is by way of penalty the safeguard envisaged by the Constitution of India of an inquiry preceding the verdict of guilt being not held, the order dated 3.7.2006 was vitiated in law.

20. He filed a writ petition registered as WP(C) No.11872/2006 in this Court in which he relied upon various decisions of the Supreme Court commencing from the locus classicus reported as 1958 SCR 828 Purushottam Lal Dhingra vs. UOI where even a temporarily appointed government servant was entitled to the constitutional protection afforded by Article 311 of the Constitution of India if the termination order was found to be stigmatic or if the order was innocuous on its face, upon lifting the veil it could be detected that the order was by way of penalty.

21. The learned Single Judge held that this protection would not be available to a contractual appointee and de-hors the same, noting the distinction between an act allegedly committed being treated as a motive or foundation for an action, held that the instant case showed that the misdemeanor of Dr.Deepak Kumar was the motive and not the foundation to terminate the contractual employment. The result was the writ petition being dismissed vide judgment and order dated 13.5.2008.

22. Dr.Deepak Kumar questioned the decision of the learned Single Judge by filing LPA No.352/2008 which was disposed of vide order dated 15.7.2008. The order reads as under:-

“Learned counsel appearing for the Appellant seeks

leave to withdraw the appeal with liberty to apply to the learned Single Judge to permit him to withdraw the writ petition on the ground that his remedy lies before the Central Administrative Tribunal. Liberty granted.

The appeal is dismissed as withdrawn.”

23. Thereafter, an application was moved before the learned Single Judge, who vide order dated 19.9.2008 recalled his order dated 13.5.2008 and permitted the writ petition to be withdrawn with liberty to approach the Central Administrative Tribunal.

24. Dr.Deepak Kumar thereafter filed OA No.2503/2008 which has been allowed by the Tribunal vide impugned judgment and order dated 8.12.2009. The Tribunal held that in view of a decision dated 27.7.2007 deciding OA No.2663/2006 Des Raj vs. Govt. of NCT of Delhi & Ors., where services of a temporary employee were terminated under Rule 5(1) of CCS (Temporary Service) Rules 1965 and the termination being founded on an alleged misconduct and being punitive was set aside as the termination was not preceded by an inquiry, relief had to be granted to Dr.Deepak Kumar, in respect of whom the Tribunal likewise held that services were terminated by way of penalty and were founded on a misdemeanor.

25. The Tribunal set aside the order dated 3.7.2006 but granted liberty to initiate an inquiry as also to place Dr.Deepak Kumar under suspension and for which it was held that subsistence allowance should be paid. Back-wages were paid limited from 6.11.2008 till Dr.Deepak Kumar was suspended.

26. The instant writ petition challenges the order dated 8.12.2009.

27. At the outset it may be noted that the Tribunal has skirted the basic issue before it, being whether a contractual

employee could claim status at par with that of a temporarily appointed employee. Suffice would it be to state that in Des Raj's case (supra), the Tribunal was concerned with the termination of an employee who was yet to be confirmed and was working under the status of the temporary employee during the period of training. Des Raj was issued a letter of appointment after he was selected for a regular post and status was that of a temporary employee inasmuch as Des Raj had yet to successfully complete the probation. Unfortunately, the Tribunal glossed over said relevant fact.

28. Sh.P.P.Khurana, learned senior counsel for Dr.Deepak Kumar cited the decision reported as (1979) 1 SCC 477 The Manager, Government Branch Press & Anr. vs. D.B. Belliappa to urge that Dr.Deepak Kumar would be entitled to the benefit of an inquiry and notwithstanding his engagement being on contractual basis, principles enunciated pertaining to temporary employees in government service would apply.

29. We do not agree for the reason, the decision in D.B.Belliappa's case (supra) shows, vide para 1 thereof, that D.B.Belliappa was appointed temporarily to a non-gazetted Class-IV post as defined in Clause-IV of Sub-Rule (3) of Rule 5 of the Mysore Civil Services (Classification, Control & Appeal) Rules 1957 and the appointment was till further orders. It was for the reason D.B.Belliappa had the status of a temporary civil servant and the statutory rules governed his service that the Supreme Court extended benefit of the Constitutional protection envisaged by Article 311 of the Constitution to him.

30. A Co-ordinate Division Bench of this Court had considered whether protection available to a government servant under Article 311 of the Constitution would be available to a contractual employee. The decision dated 2.11.2010 decides WP(C) 6423/2010 Neena Shad vs. MCD and

a connected writ petition. The law was discussed in paras 50 to 70 of the said decision, which read as under:-

“50. Whether MCD was required to hold an inquiry in terms of Article 311(2) of Constitution of India before issuing Office Order(s) dated 03.07.2008 dispensing with the services of the petitioners?

51. Part XIV of Constitution of India deals with “Services under the Union & the States”. Articles 310 and 311 contained under the said part read as under:-

“310. Tenure of office of persons serving the Union or a State.—(1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.”

“311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.—(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

[(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges

[Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.”

52. What is the extent of protection available to the government servants under Article 311?

53. Clause (1) of Article 311 is quite explicit and hardly requires any discussion. The scope and the ambit of clause (1) is that government servants are entitled to the judgment of the authority by which they

were appointed or some authority superior to that authority and that they should not be dismissed or removed by a lesser authority in whose judgment they may not have the same faith. The underlying idea obviously is that a provision like this will ensure to them a certain amount of security of tenure. Clause (2) protects government servants against being dismissed or removed or reduced in rank without being given a reasonable opportunity of showing cause against the action proposed to be taken in regard to them. It is to be noted that in clause (1) the words "dismissed" and "removed" have been used while in clause (2) the words "dismissed" "removed" and "reduced in rank" have been used.

54. What is meant by the expressions "dismissed", "removed" and "reduced in rank" occurring in Article 311(2)?

55. This aspect of the matter was examined in great detail by Supreme Court in the decision reported as Parshotam Lal Dhingra v Union of India 1958 SCR 828. After tracing the history of service rules, Supreme Court observed as under:-

"It follows from the above discussion that both at the date of the commencement of the 1935 Act and of our Constitution the words "dismissed", "removed" and "reduced in rank", as used in the service rules, were well understood as signifying or denoting the three major punishments which could be inflicted on government servants. The protection given by the rules to the government servants against dismissal, removal or reduction in rank, which could not be enforced by action, was incorporated in sub-sections (1) and (2) of Section 240 to give them a statutory protection by indicating a procedure which had to be followed before the punishments of dismissal, removal or reduction in rank could be imposed on them and which could be enforced in law. These protections have now been incorporated in Article 311 of our Constitution. The effect of Section 240 of the 1935 Act reproduced in Articles 310 and 311, as explained by this Court in *S.A. Venkataraman v. Union of India*²⁵ has been to impose a fetter on the right of the government to inflict the several punishments therein mentioned. Thus under Article 311(1) the punishments of dismissal, or removal

cannot be inflicted by an authority subordinate to that by which the servant was appointed and under Article 311(2) the punishments of dismissal, removal and reduction in rank cannot be meted out to the government servant without giving him a reasonable opportunity to defend himself. The principle embodied in Article 310(1) that the government servants hold office during the pleasure of the President or the Governor, as the case may be, is qualified by the provisions of Article 311 which give protection to the government servants. The net result is that it is only in those cases where the government intends to inflict those three forms of punishments that the government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. It follows, therefore, that if the termination of service is sought to be brought about otherwise than by way of punishment, then the government servant whose service is so terminated cannot claim the protection of Article 311(2) and the decisions cited before us and referred to above, insofar as they lay down that principle, must be held to be rightly decided.”
(Emphasis Supplied)

56. There are different species of government service. The strength of a service or a part of a service sanctioned as a separate unit is, in the Fundamental Rules, Section 3, Chapter II, Rule 9(4), called the cadre. Each cadre consists of a certain number of posts. According to Rule 9(22) of the Fundamental Rules, a permanent post means a post carrying a definite rate of pay sanctioned without limit of time. Due to rush of work or other exigencies some “temporary posts” are often created. A temporary post is defined in Rule 9(30) to mean a post carrying a definite rate of pay sanctioned for a limited time. These temporary posts are very often outside the cadre and are usually for one year and are renewed from year to year, although some of them may be created for a certain specified period. The conditions of service of a government servant appointed to a post, permanent or temporary, are regulated by the terms of the contract of employment, express or implied, and subject thereto, by the rules applicable to the members of the particular service.

57. Article 311 does not make any distinction between permanent and temporary members of service or between persons holding permanent or temporary posts in the matter of their tenure. The protection envisaged in Article 311 is equally available to both the classes of government servants.

58. The appointment of a government servant to a permanent post may be substantive or on probation or on an officiating basis.

59. A substantive appointment to a permanent post in public service confers normally on the servant so appointed a substantive right to the post and he becomes entitled to hold a "lien" on the post. This "lien" is defined in Fundamental Rule Section 3, Chapter II Rule 9(13) as the title of a government servant to hold substantively a permanent post, including a tenure post, to which he has been appointed substantively. The Government cannot terminate his service unless it is entitled to do so (1) by virtue of a special term of the contract of employment, e.g., by giving the requisite notice provided by the contract, or (2) by the rules governing the conditions of his service, e.g., on attainment of the age of superannuation prescribed by the rules, or on the fulfillment of the conditions for compulsory retirement or on abolition of post or on being found guilty of misconduct, inefficiency, indiscipline or any other disqualification.

60. Termination of service of such a servant so appointed must per se be a punishment, for it operates as a forfeiture of the servant's rights and brings about a premature end of his employment.

61. An appointment to a permanent post in government service on probation means, as in the case of a person appointed by a private employer, that the servant so appointed is taken on trial. 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.

62. 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.

63. It is, therefore, quite clear that appointment to a permanent post in a 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.

64. Likewise an appointment to a temporary post in a government service may be substantive or on probation or on an officiating basis. Here also, in the absence of any special stipulation or any specific service rule, the servant so appointed acquires no right to the post and his service can be terminated at any time except in one case, namely, when the appointment to a temporary post is for a definite period. In such a case the servant so appointed acquires a right to his tenure for that period which cannot be put an end to unless there is a special contract entitling the employer to do so on giving the requisite notice or the person so appointed is, on enquiry held on due notice to the servant and after giving him a reasonable opportunity to defend himself, found guilty of misconduct, negligence, inefficiency or any other disqualification.

65. To put it simply, the principle is that when a servant has right to a post either under the terms of

the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant is by itself and prima facie a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. But if the servant has no right to the post, as where he is appointed to a post, permanent or temporary either on probation or on officiating basis, the termination of his employment does not deprive him of any right and cannot, therefore, by itself be a punishment.

66. It does not, however, follow that, except in the two cases mentioned above, in all other cases, termination of service of a government servant who has no right to his post. e.g., where he was appointed to a post, temporary or permanent, either on probation or on officiating basis, the termination cannot, in any circumstance, be a dismissal or removal from service by way of punishment. Cases may arise where the government may find a servant unsuitable for the post on account of misconduct, negligence, inefficiency or other disqualification. If such a servant was appointed to a post, permanent or temporary, either on probation or on officiating basis, then the very transitory character of the employment implies that the employment was terminable at any time on reasonable notice given by the Government. In such cases the Government may proceed to take action against the servant in exercise of its powers under the terms of the contract of employment, express or implied, or under the rules regulating the conditions of service, if any be applicable, and ordinarily in such a situation the Government will take this course. But the Government may take the view that a simpliciter termination of service is not enough and that the conduct of the servant has been such that he deserves a punishment entailing penal consequences. In such a case the Government may choose to proceed against the servant on the basis of his misconduct, negligence, inefficiency or the like and inflict on him the punishment of dismissal or removal carrying with it the penal consequences. In such a case the servant will be entitled to the protection of Article 311 of Constitution of India for the reason the same puts an indelible stigma on the officer affecting his future career.

67. In order to determine whether an order terminating the service of a government servant amounts to punishment following two tests needs to be applied namely, (1) whether the servant had a right to the post, or (2) whether he has been visited with penal consequences of the kind hereinbefore referred to? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a punishment.

68. Sometimes due to rush of work or other exigencies of service the government makes contractual appointments. Such appointments are made in respect of non-sanctioned posts and de-hors the recruitment rules. A person appointed on contractual basis does not enjoy the protection of Article 311(2) for the simple reason he is not member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State. (See the decision of Supreme Court reported as Union Public Service Commission v Girish Jayanti Lal Vaghela (2006) 2 SCC 482)

69. But the 'State' is expected to act fairly, reasonably and non-arbitrarily even in contractual matters. (See the decision of Supreme Court reported as Ramana Dayaram Shetty v International Airport Authority of India (1979) 3 SCC 489). Therefore, in the matters of termination of contractual employment by the government, the courts are under a duty to ensure that the government has not acted in an arbitrary and whimsical manner.

70. Whether MCD had acted fairly, reasonable and non-arbitrarily while issuing Office Order dated 03.07.2008 dispensing with the services of the petitioners?"

31. Thereafter, the Division Bench discussed the fairness in the action taken against Neena Shad and the second respondent in the other writ petition which was decided.

32. We may only state that the view taken by the Co-ordinate Division Bench of this Court is premised on the

fairness founded on reason being the essence of the guarantee epitomized in Article 14 and 16(1) of the Constitution of India.

33. Reverting to the facts of this case we find that the principles of natural justice were followed when the complaint by Kamran was made known to Dr.Deepak Kumar and his response was elicited. Dr.Deepak Kumar gave a written response in which he admitted having utilized the services of the sewadar convict Dr.Vipin but limited the role to Dr.Vipin making the patient aseptic and taking on the roll of the doctor who administered the voveron injection to Kamran. Convict Dr.Vipin clearly corroborated Kamran when he responded by informing that it was he who administered the injection, but stated that it was under the supervision of Dr.Deepak Kumar.

34. Now, if facts are admitted, where is the need for an inquiry? In the instant case the limited point of variance: Whether after rendering Kamran aseptic, the injection was administered by Dr.Deepak Kumar or convict Dr.Vipin Kumar was the only area of dispute and for which we see no scope for any inquiry to be held inasmuch as there was sufficient material to hold that Dr.Deepak Kumar, after examining Kamran, and advising voveron injection to be administered, allowed the rest to be executed by Dr.Vipin.

35. We disagree with the Tribunal that instant case attracted Constitutional protections to be afforded to Dr.Deepak Kumar and that a full-fledged inquiry after serving a charge-sheet was required to be held.

36. We hold that the minimum requirement of natural justice was complied with.

37. But, one important aspect needs to be highlighted and for which we find an injury caused to Dr.Deepak Kumar.

38. It is settled law that a subjective satisfaction of the

authority concerned is not wholly immune from judicial reviewability. Under judicial decisions Courts have carved out an area, limited though it be, within which the validity of the subjective satisfaction can yet be subjected to judicial scrutiny. One such area of judicial scrutiny is to consider whether the satisfaction is grounded *on materials which are of rationally probative value* and further whether the authority has taken into account all relevant factors which it ought to have taken into account. It may even be that in spite of the best intention, a relevant factor may not be properly taken into account and if it is to be so found, corrective action has to be taken by the Court.

39. A perusal of the note sent for consideration by the Lt.Governor refers to the fact that Dr.Deepak Kumar was giving work of dressing and injection to a convict sewadar. We have noted the entire extract of the note in para 17 above. It strikes the reader at the outset that the Hon'ble Lt.Governor was not made aware of the fact that the sewadar was no ordinary prisoner but was a doctor by profession having MBBS degree. Surely, this fact was relevant to be brought to the notice of the decision making authority i.e. the Hon'ble Lt.Governor. Suffice would it be to state that reference to a person as a convict has a demeaning effect on the mind of the person to whom the convict is referred to as the subject matter of an opinion formation for the reason the lay mind tends to perceive a convict as a person who has committed a misdemeanor or a felony requiring his incarceration in the prison. It would be fairly horrifying to receive information that a convict was found administering injections. But, the moment it is informed that the convict is a doctor by profession, the raised eye-brows would normally be expected to fall.

40. Thus, we hold that the decision making process stands

vitiated on account of a relevant information not being disclosed to the Hon'ble Lt.Governor.

41. There is yet another taint, though not of a great magnitude, but nonetheless is sufficient to form an opinion of a possible poisoning of the mind of the decision making authority, or in the alternative, of a kind which gives rise to a reasonable possibility of a bias in the mind of the decision making authority.

42. The note clubs a very severe misdemeanor of Dr. Govila, who, if the contents of the note are true, had no business to smuggle in intoxicating material inside the precincts of the jail. The note highlights the serious misconduct of Dr. Govila and thereafter clubs the misdemeanor of Dr.Deepak Kumar. The possibility of the Hon'ble Lt.Governor being swayed by the gravity of the first misdemeanor and thus being insidiously biased against Dr.Deepak Kumar can also not be ruled out.

43. We need to deviate a little at this stage. We have our doubts whether at all the instant dispute could be the subject matter of adjudication before the Tribunal inasmuch as the Administrative Tribunal's Act 1985 envisages a service dispute between an employee and the Government to be the subject matter of adjudication before the Tribunal and unless the status acquired is that of a Government Servant, whether permanent, temporary or ad-hoc, a service related dispute which pertains to a contract of service or a contract for service would not be within the domain of the Tribunal. Section 3(Q) of the Act defines as to what would be 'Service Matters'. But, we need not take the debate to the logical conclusion, in the peculiar facts of this case, where Dr.Deepak Kumar filed a writ petition in this Court and the learned Single Judge held his status not that of a government servant, yet in spite thereof the Letters Patent Bench permitted the Letters Patent Appeal

to be withdrawn with liberty granted to re-approach the learned Single Judge with a prayer that the order dismissing the writ petition be recalled and the writ petition be dismissed as withdrawn with liberty granted to approach the Central Administrative Tribunal. The learned Single Judge recalled his decision and permitted the writ petition to be withdrawn with liberty to approach the Central Administrative Tribunal and thus we cannot leave Dr.Deepak Kumar without any remedy.

44. Reverting back to the journey we must further complete, holding that a very relevant aspect i.e. of convict Dr.Vipin Kumar who was acting as a sewadar and was assigned to assist Dr.Deepak Kumar being a qualified doctor having MBBS degree not being brought to the notice of the Hon'ble Lt.Governor, fairness in action requires the matter to be reconsidered by the Hon'ble Lt.Governor and for which we shall be passing an appropriate direction, but would be noting that the directions given by the Tribunal are wholly unsustainable.

45. The Tribunal has required a contractual employee to be placed under suspension. The concept of suspension is alien to a contractual employment. In a contractual employment if there is a fundamental breach of the condition of service to be rendered by the contractual employee it justifies immediate termination of the contract by the employer. Assuming the termination of the contract to be illegal the remedy of the employee is to sue for damages. Under no circumstances can a contract for employment or a contract of employment be specifically enforced.

46. We set aside the impugned decision passed by the Tribunal and dispose of the Original Application filed by the respondent as also the instant writ petition with a direction to the petitioner that a note be re-prepared for consideration by

the Hon'ble Lt.Governor and in the note it should be highlighted with clarity that sewadar convict Dr.Vipin assigned for help to Dr.Deepak Kumar was a qualified doctor having MBBS degree. It should be informed in the note to the Lt.Governor that contractual service rendered by Dr.Deepak Kumar was found to be 'Very Good' commencing from the year 2004 till contractual employment was determined and that the misdemeanor alleged against Dr.Deepak Kumar was of permitting Dr.Vipin (a sewadar convict), to administer injections.

47. Fresh decision would be taken by the Hon'ble Lt.Governor and the same would be communicated to Dr.Deepak Kumar and needless to state if the decision would be to continue with the contractual employment the same would be conditional upon requirement of a contractual doctor at the Tihar Jail Complex or the Rohini Jail Complex at Delhi. We clarify that Dr.Deepak Kumar would not be entitled to any remuneration for the period he has not worked and if the decision is favourable to him it would be treated as a case of fresh contractual re-engagement of a person who had rendered satisfactory contractual service in the past. The decision would be taken within 4 months from today and communicated to Dr.Deepak Kumar.

48. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

DECEMBER 20, 2010
dk