

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 504 OF 2017

Laxmikant D. Kolvekar,
Chief Electrical Engineer,
Electricity Department,
Vidyut Bhavan, Panaji, Goa.

..... Petitioner.

Versus

1. The State of Goa,
through the Secretary,
Electricity Department.

2. Secretary,
Department of Personnel and Training,
Having office at Secretariat,
Porvorim, Goa.

3. N. Neelakanta Reddy,
Additional Chief Engineer-II,
Electricity Department,
Vidyut Bhavan, Panaji.

..... Respondents.

Mr. S.D. Lotlikar, Senior Advocate with Mr. C. Padgaonkar,
Advocate for the Petitioner.

Mr. Dattaprasad Lawande, Advocate General with Mr. Deep
Shirodkar, Additional Govt. Advocate for Respondents No.1 and 2.

Mr. Nitin Sardesai, Senior Advocate with Ms. Gautami Kamat,
Advocate for Respondent No.3.

*Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.*

Reserved on : 20 June 2018.

Pronounced on : 28 June 2018.

JUDGMENT: (Per N.M. Jamdar, J.)

Controversy in this petition pertains to the post of Chief Electrical Engineer in the Electricity Department of Government of Goa. The Petitioner- Laxmikant Kolvekar and Respondent No.3- N.Neelakanta Reddy are the only two Superintending Engineers in the feeder post for the promotion to the Chief Electrical Engineer. Both of them do not have the requisite experience and are not qualified to be promoted. The Petitioner was appointed on officiating basis to the post of the Chief Electrical Engineer. Thereafter, Respondent No.3 was appointed on the officiating basis. The Petitioner has challenged this action of the State Government. During the pendency of the present Petition, the Respondent No.3 superannuated, he was given extensions and the charge of the post of Chief Electrical Engineer was continued. By amending the Petition, the Petitioner has also challenged the orders of extensions.

2. Both, the Petitioner and the Respondent No.3 are

engineers by qualification. Respondent No.3 joined the services of the Electricity Department of Government of Goa as a Junior Engineer on 25 May 1981. The Petitioner joined the Government service on 1 April 1982 as a Junior Engineer in the Irrigation Department. Respondent No.3 was promoted as Assistant Engineer in the Electricity Department on 22 June 2000. The Petitioner was rendered surplus in the Irrigation Department, was deployed and joined the Electricity Department as Assistant Engineer on 2 February 2001. By the order dated 30 October 2001, Respondent No.3 came to be promoted as Assistant Engineer. Both, the Petitioner and Respondent No.3 continued to work as Assistant Engineers in the Electricity Department. On 4 December 2008, the Petitioner and Respondent No.3 were promoted as Executive Engineers on regular basis. Having worked as Executive Engineers for almost four years, the Petitioner and Respondent No.3 were both promoted on *ad hoc* basis as Superintending Engineers. On 11 June 2015, the Petitioner and Respondent No.3 were both promoted on regular basis as Superintending Engineers.

3. The next stage in the career of both, the Petitioner and Respondent No.3, was the promotion to the post of the Chief Electrical Engineer. As per the Government of Goa, Electricity

Department, Group 'A', Gazetted Posts, Recruitment Rules, 2011 ("Recruitment Rules" for short) the post of Chief Electrical Engineer has to be filled in by way of promotion from the Superintending Engineers who have completed 5 years of regular service in the grade, failing promotion, the post of the Chief Electrical Engineer has to be filled in on deputation, and failing both, by appointment on short term contract. The period of probation for the post of Chief Electrical Engineer is two years. The Recruitment Rules mandate consultation with the Goa Public Service Commission for making promotions, confirmation, selecting an officer for appointment on transfer on deputation, or short term contract, or for amending and relaxing any of the Rules. The Departmental Promotion Committee is contemplated as Group 'A' DPC which consists of Member of the Goa Public Service Commission as a Chairman, Chief Secretary or his nominee and the Administrative Secretary/Head of Department as a Members.

4. When the post of Chief Electrical Engineer was to be filled in from the Superintending Engineers, the State was faced with a situation that the two Superintending Engineers, that is the Petitioner and Respondent No.3 did not qualify as they had not completed five years regular service as Superintending Engineer. On

30 July 2015, the Petitioner was appointed on officiating basis as the Chief Electrical Engineer with effect From 1 August 2016. Within a month thereafter, one Mr. Deepak Bhajekar came to be appointed as the Chief Electrical Engineer on deputation from an outside agency on 21 September 2015. Mr. Bhajekar worked on the post of Chief Electrical Engineer and was relieved from the post with effect from 13 September 2016 by an order dated 1 July 2016.

5. The Government of Goa amended the Recruitment Rules on 7 April 2016 and two new posts of Additional Chief Electrical Engineer-I and Additional Chief Electrical Engineer-II were created. By an order dated 2 September 2016, the Petitioner and Respondent No.3 were promoted on *ad hoc* basis to the posts of Additional Chief Engineers. The Petitioner was promoted on *ad hoc* basis to the post of Additional Chief Engineer-I and the Respondent No.3 was promoted to the post of Additional Chief Engineer-II. A meeting was held by the Chief Secretary, Secretary (Power) and Additional Secretary (Personnel) on 30 December 2016. They met in the chamber of the Chief Secretary to consider the appointments to the post of Chief Electrical Engineer in the Electricity Department. They noted that as per the Recruitment Rules the post had to be filled in by way of promotion, failing which, by transfer on

deputation and failing both, by short term contract and that there is no officer fulfilling the criteria for filling up the post on regular basis by promotion. They also noted that after Mr. Bhajekar, who was on deputation, was relieved on 13 September 2016, the post has fallen vacant. They noted that the Petitioner being the senior-most Superintending Engineer, he may be given charge of the Chief Electrical Engineer on officiating basis. They treated the meeting as a Local Departmental Promotion Committee and recommended that the Petitioner be appointed on officiating basis as the Chief Electrical Engineer. An order was issued accordingly on 2 January 2017. It was stated in the said order issued by the Under Secretary (Personnel-II) in the name of Governor of Goa that in view of the recommendation of the Local Departmental Promotion Committee, the Petitioner is appointed on officiating basis as Chief Electrical Engineer in Electricity Department with effect from 13 September 2016.

6. On 1 June 2017, an order was passed in the name of Governor of Goa, by the Additional Secretary (Personnel) that in public interest the charge of the post of Chief Electrical Engineer be given to Respondent No.3, relieving the Petitioner who was holding the same on officiating basis. Challenging this order, the Petitioner

moved the present Petition on 5 June 2017. The Petitioner sought a mandamus to direct Respondent No.1 to withdraw the order dated 1 June 2017. The Petitioner prayed for an interim relief to stay the execution of the order dated 1 June 2017. The Petitioner complained that the order was not formally communicated to the Petitioner and Respondent No.3 has forcibly tried to take the charge away from him. On 6 June 2017, the Division Bench of this Court (*Reis & Chavan, JJ.*) issued notice to the Respondents and directed that no action be taken based on the impugned order, subject to further orders in the Petition. The Petition was heard on 19 July 2017. The Division Bench (*Reis & Sardesai, JJ.*) issued Rule and stayed the operation of the impugned order dated 1 June 2017. In view of the stay granted by the Division Bench, the Petitioner was given back the officiating charge of the post of Chief Electrical Engineer. A Special Leave to Appeal was filed in the Apex Court. The Apex Court, by an order dated 18 August 2017, disposed of the Special Leave Petition by vacating the interim stay granted by the Division Bench. On 24 August 2017, a formal order was issued re-allotting the charge of the post of Chief Electrical Engineer to Respondent No.3. In the meanwhile, Respondent No.3 who was due to retire on superannuation on 31 July 2017, was granted an extension in service till 31 October 2017. On 31 October 2017, Respondent No.3 was

granted further extension with effect from 1 August 2017 till 31 July 2018.

7. Position as on today is that the Petitioner is due to retire on superannuation in August 2018 and the extension period of Respondent No.3 comes to an end on 31 July 2018. The Petitioner has challenged the orders of extensions granted to Respondent No.3 by amending the petition.

8. We have heard Mr. S.D. Lotlikar, the learned Senior Advocate appearing for the Petitioner, Mr. Dattaprasad Lawande, the learned Advocate General appearing for Respondents No.1 and 2 and Mr. Nitin Sardesai, the learned Senior Advocate appearing for Respondent No.3.

9. There are two parts of the challenge raised by the Petitioner. First is regarding the order dated 1 June 2017 whereby the officiating charge has been taken away from the Petitioner and given to Respondent No.3. Second component of the challenge is to the extensions given to Respondent No.3 and continuation of the officiating charge.

10. We take up the challenge to the order dated 1 June 2017 first. In the context of this challenge, it is necessary to recapitulate the factual position.

11. In the Electricity Department of the State of Goa at present there are only two Superintending Engineers working on regular basis. They are, the Petitioner and Respondent No.3. Two posts of Additional Chief Engineers have been created and the Petitioner and Respondent No.3 are working on the said posts on *ad hoc* basis. There is no qualified person to be promoted as the Chief Electrical Engineer on regular basis in State of Goa. It is an admitted position that neither the Petitioner, nor the Respondent No.3 qualifies to be promoted as the Chief Electrical Engineer. The Recruitment Rules governing appointment to the post of Chief Electrical Engineer have been referred to earlier and for the sake of completeness, we reproduce them as below:

SCHEDULE

1	<i>Serial number</i>	1.
2.	<i>Name/Designation of post</i>	<i>Chief Electrical Engineer.</i>
3.	<i>Number of posts</i>	<i>1 (2011) (subject to variation dependent on work load.</i>
4.	<i>Classification</i>	<i>Goa General Service Group 'A' Gazetted.</i>

5.	<i>Scale of Pay</i>	<i>PB-4 Rs.37,400-67000 + Grade Pay Rs.8,700/-</i>
6.	<i>Whether Selection post or non selection post</i>	<i>Selection.</i>
7.	<i>Age limit for direct recruits.</i>	<i>Not applicable.</i>
7a.	<i>Whether benefit of added years of service admissible under rule 30 of C.C.S. (Pension) Rules, 1972.</i>	<i>Not applicable.</i>
8.	<i>Educational and other qualifications required for the direct recruits.</i>	<i>Not applicable.</i>
9.	<i>Whether age and educational qualifications prescribed for the direct recruit will apply in the case of promotees.</i>	<i>No.</i>
10.	<i>Period of promotion, if any.</i>	<i>Two years.</i>
11.	<i>Method of recruitment, whether by direct recruitment or by promotion or by deputation/ transfer/ contract and percentage of the vacancies to be filled by various methods.</i>	<i>By promotion, failing which, by transfer on deputation and failing both, by short term contract.</i>
12.	<i>In case of recruitment by promotion/deputation/trans-fer grades from which promotion/deputation/trans-fer is to be made.</i>	<i>Promotion: Superintending Engineers with 5 years regular service in the grade. Transfer on deputation (including short-term</i>

		<i>contract): Officers of the Central Government/ Central Public Sector Undertaking connected with power sector, or officers of the State Government/Union Territories/State Electricity Boards/State Public Sector Undertakings connected with power distribution, possessing a Degree in Electrical Engineering and holding analogous post or with at least 5 years regular service in the grade of Superintending Engineer or equivalent (Period of deputation shall ordinarily not exceed 4 years).</i>
13.	<i>If a D.P.C. exists, what is its composition.</i>	<i>Group 'A', D.P.C. consisting of:–</i> <i>1. Chairman/ /Member of the Goa Public Service Commission – Chairman.</i> <i>2. Chief Secretary or his nominee – Member.</i> <i>3. Administrative Secretary/ Head of Department– Member.</i>
14.	<i>Circumstances in which the Goa Public Service Commission is to be consulted in making</i>	<i>Consultation with the Goa Public Service Commission is necessary for making promotion, confirmation,</i>

	<i>recruitment.</i>	<i>selecting an Officer for appointment on transfer on deputation (including short term contract) and for amending/relaxing any of the provisions of these Rules.</i>
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As can be seen from the above quoted Rules, the eligibility criteria for promotion is five years regular service as a Superintending Engineer. Appointment can be done on deputation and on the short term contract. The Departmental Promotion Committee is specified and consultation with the Goa Public Service Commission is necessary.

12. By the order dated 2 January 2017, the Petitioner was appointed on officiating basis as the Chief Electrical Engineer. This was not a regular appointment. Though it is accepted and reiterated by Mr. Lotlikar, learned Senior Advocate for the Petitioner, that the Petitioner has no right to the post of Chief Electrical Engineer, it does not mean that this issue need not be elaborated. Absence of right and its effect on maintaining a writ petition is stressed upon by Mr. Lawande, the learned Advocate General appearing for the State and Mr. Sardesai, the learned Senior Advocate appearing for Respondent No.3. The order dated 2 January 2017 does not state that the

*"Personnel Department
Government of Goa
Secretariat, Porvorim - Goa 403 521*

File No.4/4/205-PER/33 *Dated : 02/01/2017*

On recommendation of the Local Departmental Promotion Committee, the Government is pleased to appoint Mr. Laxmikant D. Kolvekar, Additional Chief Engineer-I to the post of Chief Electrical Engineer in Electricity Department on officiating basis with effect from 13/9/2016.

*By order and in the name of
the Governor of Goa,
Sd/-
(Shashikant V. Thakur)
Under Secretary (Personnel-II)”*

Two words employed in the order are important. First, there is no promotion, but appointment. Secondly, it is on officiating basis. The person holding the post on officiating basis has no right and, unless there are rules to that effect, under the general law, such appointments can be terminated/withdrawn and if a person is brought back to his original post, it does not amount to forfeiture of any right. Therefore, the Petitioner *per se* has no any right. The post was given to the Petitioner on officiating basis. In terms of the

Recruitment Rules, the Petitioner is not admittedly qualified and, therefore, no writ can be issued simplicitor to direct appointment of the Petitioner to the post of Chief Electrical Engineer. This position, as stated above, is accepted even by the Petitioner.

13. Mr. Lotlikar has assailed the order dated 1 June 2017 primarily on two counts. His main contention is that once the Petitioner was appointed on officiating basis, he could not have been replaced by Respondent No.3, who was also appointed on officiating basis, as that would mean replacing one *ad hoc* appointee by another, which position has been held to be an arbitrary exercise. According to Mr. Lotlikar, this position is compounded by the fact that not only the Petitioner is being sought to be replaced by Respondent No.3 on officiating basis, but Respondent No.3 is junior to the Petitioner, which is utter humiliation, and an arbitrary and high handedness on the part of the State Government.

14. The second head of challenge is that the Petitioner was considered along with others in the DPC and considered meritorious and senior, and as the affidavit filed by the State would show that reversion is based on the allegations of ineptitude, incompetence and negligence of the Petitioner. According Mr. Lotlikar, such stigmatic

order, without any inquiry, is violative of Article 311 of the Constitution of India, which grants protection to the government servant appointed even on officiating basis.

15. In support of first contention that one *ad hoc* employee cannot be replaced with another, Mr. Lotlikar relied upon a decision of the Bench of three Judges of the Apex Court in the case of *State of Haryana and ors. vs. Piara Singh and ors.*¹. He relied upon the following observations :

“ 44. Before parting with this case, we think it appropriate to say a few words concerning the issue of regularisation of *ad hoc*/temporary employees in government service.

45. The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an *ad hoc* or temporary appointment to be made. In such a situation, effort should always be to replace such an *ad hoc*/temporary employee by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an *ad hoc*/temporary

¹ AIR 1992 SC 2130

employee.

46. Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.”

Upon this reliance of Mr. Lotlikar on the above passage, Mr. Lawande, submitted that the decision in the case of *Piara Singh* is no longer a good law, in view of the decision of the Constitution Bench in the case of *Secretary, State of Karnataka & Ors. vs. Umadevi (3) and ors.*² Mr. Lotlikar also relied upon a decision in the case of *Aman Shah Hussain Shah, Sk. Salim Sk. Mohammad and Wasim Khan Hussain Khan vs. The Chief Officer, Municipal Council and ors.*³ of the Nagpur Bench of this Court and *Rajendra s/o. Vitthalrao Kamble vs. Government of Maharashtra and ors.*⁴ of the Aurangabad Bench of this Court.

16. In the case of *Piara Singh*, the Apex Court was considering a batch of petitions in respect of *ad hoc*, temporary employees, members of work-charged establishments, daily wagers,

² (2006) 4 SCC 1

³ 2013 (4) Mh.LJ 255

⁴ 2012 (4) Mh LJ 505

casual labour and those engaged temporarily in temporary schemes. A large number of appointments were made to Class III and Class IV services in the State of Punjab and Haryana on *ad hoc* basis, without reference to Public Service Commission or the Subordinate Services Selection Board, or without adhering to the Employment Exchange requirement. Initially they were appointed for a period of six months or continued for years together, under various orders. The question of appointment of such *ad hoc* temporary, work-charged, daily wagers, casual labours appointments had arisen for consideration. The Apex Court categorized different types of employees and issued certain directions regarding their regularisation of services. After having passed directions to that effect, before parting with the case, the Apex Court made an observation that an *ad hoc* or temporary employee should not be replaced by another *ad hoc* or temporary employee and he must be replaced by a regularly selected employee. It was emphasized that this was necessary to avoid arbitrary action on the part of the appointing authority.

17. In the case of *Umadevi*, the Constitution Bench considered the various directions issued by the High Courts for regularisation, under Article 226 of the Constitution of India. The Constitution Bench took a review of various decisions and one of the

decisions under consideration was the decision in the case of *Piara Singh*. An argument was also advanced based on the decision in the case of *Piara Singh* that legitimate expectation has arisen regarding regularisation in service. Rejecting the contention, Constitution Bench observed that when a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature and such a person cannot invoke the theory of legitimate expectation for being confirmed in the post and further the State cannot constitutionally make such a promise. Based on the decisions of the two Division Benches of this Court in the case of *Aman Shah Hussain Shah*, *Sk. Salim Sk. Mohammad* of Nagpur Bench and *Rajendra s/o. Vitthalrao Kamble* of Aurangabad Bench, it was further debated before us as regards the effect of the decision of *Umadevi* on the decision of *Piara Singh* on the principle of one *ad hoc* employee cannot be replaced by another.

18. In our opinion, this debate need not detain us to consider the case at hand, as the factual matrix is completely different. Firstly, in the above decisions what was before the Apex

Court and the Division Benches were the initial appointments to the public service. In the case of *Piara Singh*, it was observed by the learned Judges that once one *ad hoc* or temporary person is appointed, he should not be replaced by appointing another *ad hoc* or temporary employee and this principle was evolved to check arbitrary action on the part of the State. The context in which the observation was made is entirely different. We have not been shown any decision where the same principle has been *ipso facto* extended to the case where an officiating charge of a higher post while working on a substantive post .

19. The principle that one *ad hoc* appointee in public service should not be replaced by another *ad hoc* appointee, in our opinion, cannot be straight away applied to all situations in public service, even to include an officiating charge to a higher post, without reference to facts. Therefore, we are unable to accept the absolute proposition advanced by Mr. Lotlikar that without reference to any factual situation, based on the observations in the case of *Piara Singh*, which essentially refers to initial appointments in public service, the impugned order be set aside since a person holding officiating charge cannot be replaced by another person holding officiating charge. Such absolute proposition would mean that the appointment on

officiating post would be almost akin to a regular promotion. Such absolute proposition, without reference to any factual situation, would create various administrative difficulties. Generally, need to appoint a person on officiating basis arises due to administrative exigencies. Administrative exigencies can arise in myriad forms and an application of an inflexible principle, such as the one propounded, will be entirely inappropriate. The principle that generally one person on *ad hoc* basis should not be replaced by another is evolved to check arbitrariness on the part of the State. It will have to be seen in the facts of the present case whether any arbitrariness exists.

20. Further grievance of the Petitioner is that a junior to the Petitioner has been given officiating post. Mr. Lotlikar relied upon the extract from *Swamy's Handbook 2017* to contend that in case where *ad hoc* promotion is made, it should be from the feeder grade on the basis of seniority-cum-fitness. This stipulation in fact was adhered to in the present case. The Petitioner was appointed on officiating post on 2 January 2017 and his seniority was duly considered. In fact, considering him as senior that the Local Departmental Promotion Committee as styled, observed that the Petitioner be given the officiating charge. Apart from this position,

we have not been shown that the Local Departmental Promotion Committee has any statutory basis. It appears to be only an internal mechanism. Its decision cannot be held to be binding at all times on the State neither any right is created. If the Petitioner was to be replaced and somebody else was to be given the officiating charge, then there was no one else, except the Respondent No.3. It cannot be that the administration faced with a position that only two persons can hold the officiating charge from the feeder cadre and one is given the charge as per seniority, is rendered helpless in whatever circumstances that may arise, in giving the officiating charge to another. It is more of lament by the Petitioner that a junior is given the officiating charge, than a legal argument based on any substantive right.

21. Even while considering the above grievance in the context of arbitrariness, the argument that the Respondent No.3 being junior is brought in only to humiliate the Petitioner, has no merit. The Petitioner joined the Electricity Department on 2 February 2001, twenty years thereafter. Respondent No.3 was promoted on ad hoc basis as Assistant Engineer on 22 June 2000. When the Petitioner came to the Electricity Department from Irrigation Department as Assistant Engineer, he came as a regular

Assistant Engineer. It is on 30 October 2001, Respondent No.3 was promoted on regular post as Assistant Engineer i.e. eight months thereafter. As far as the entry in the Government service is concerned, Respondent No.3 joined the Government service before the Petitioner and joined the Electricity Department 20 years before the Petitioner. Respondent No.3, therefore, had 36 years of experience in the Electricity Department as against the 16 years of the Petitioner. It is not that a rank junior has been brought in with the sole intention to humiliate the Petitioner. The Petitioner's hue and cry that a junior has been involved to insult him is thus not warranted. It was either the Petitioner or Respondent No.3 in the feeder grade that could be given the officiating charge. The State was faced with the situation that there was no qualified Superintending Engineer to man the important post of Chief Electrical Engineer, head of the Department. Once the appointment of officiating post was withdrawn from the Petitioner, it was given to Respondent No.3. If it is in this context that the officiating post was taken away from the Petitioner and given to *"his junior"*, we do not find that the action of the State smacks of any arbitrariness. The Petitioner having appointed on officiating basis, had no right to continue on the same and for administrative exigencies he could be asked to work on the substantive post at any time.

22. The second ground on which the impugned order is assailed is based on Article 311 of the Constitution of India. The leading decision on this point is of *Parshotam Lal Dhingra vs. The Union of India* ⁵, which is expounded in the case of *State of U.P. and ors. vs. Sughar Singh* ⁶. Mr. Lotlikar relied upon the following passage in the case of *Sughar Singh* :

“9. The first decision which has now become a locus classicus on the subject is the decision in Parshotam Lal Dhingra v. Union of India. The principles that were laid down in that case are as follows:

“(1) Article 311 of the Constitution of India makes no distinction between permanent and temporary posts and extends its protection equally to all government servants holding permanent or temporary posts or officiating in any of them.

(2) The protection of Article 311 is available only where dismissal, removal or reduction in rank is sought to be inflicted by way of punishment and not otherwise.

(3) If the termination of service or reduction in rank is not by way of punishment, Article 311(2) is not attracted. To determine whether the termination or the reduction is by way of punishment one has to consider whether the servant

⁵ AIR 1958 SC 36

⁶ (1974) 1 SCC 218

has the right to hold the post from which he has been either removed or reduced. In the case of a probationary or officiating appointment to a permanent or temporary post there is no such right. This does not mean, however, that the termination of service or reduction in rank of a servant who has no right to the post can never be dismissal or removal or reduction by way of punishment. If government expressly chooses to penalise the servant for misconduct, negligence, inefficiency or the like by inflicting on him the punishment of dismissal, removal or reduction, the requirements of Article 311 must be complied with.

(4) A reduction in rank must be a punishment if it carries penal consequences with it and the two tests to be applied are:

(i) Whether the servant has a right to the post or the rank and

(ii) whether evil consequences such as forfeiture of pay and allowances, loss of seniority in his substantive rank, stoppage or postponement of future chances of promotion follow as a result of the order?

Where either of these tests apply, the reduction in rank must be one within the meaning of Article 311(2) of the Constitution and will attract its protection.”

Based on this passage, it was contended by Mr. Lotlikar that protection of Article 311 extends even to those Government servants holding a post on officiating basis. He contended that the averments

made in the affidavit-in-reply clearly state that the order is stigmatic and amounts to punishment and, therefore, it is in breach of Article 311. It is contended that the stand taken by the State clearly shows that the alleged misconduct and incompetence of the Petitioner is the foundation of the impugned order dated 1 June 2017.

23. To appreciate the law laid down by the Apex Court in the case of *Sughar Singh*, the decision will have to be examined in its entirety. The facts were that the respondent-Sughar Singh was a permanent Head Constable in the U.P. Police Force. He was appointed as an officiating Platoon Commander. He was served with a notice to show cause as to why an adverse entry should not be entered in his character roll that he was suspected to have got entries of date of birth and educational qualifications altered on the authority of a fictitious certificate which had to be corrected later on, and he was severely warned. His explanation was not found acceptable and Sughar Singh was reverted from his officiating post to the substantive post of Head Constable. Sughar Singh challenged his order of reversion. The order was quashed by the High Court and the State of U.P. filed an appeal. The question that arose for determination of the two learned Judges of the Apex Court was whether the order was in violation of Article 311 of the Constitution

of India. The learned judges noted that the appointment of Sughar Singh was never on substantive basis and merely on officiating basis. Then the Apex Court referred to the decision of *Parshotam Lal Dhingra* and culled out the principle as above. The passage, which we have quoted, shows that the reduction in rank must be a punishment if it carries penal consequences with it and the two tests to be applied are : (i) whether the servant has a right to the post or the rank; and (ii) whether any evil consequences ensued such as forfeiture of pay and allowances, loss of seniority in his substantive rank, stoppage or postponement of future chances of promotion. It was noted by the Apex Court that all these situations did not arise in the case of *Sughar Singh*. A clear imputation was made against Sughar Singh, an adverse entry was made and he was reverted. In that context, the Apex Court observed that the order merely states that Sughar Singh is reverted and that he is reverted to his substantive post of Head Constable and by no stretch of imagination can this be construed as casting a stigma on the respondent. It was noted that there was nothing to show that Sughar Singh had lost his seniority in the substantive rank. It was held that the order was not an order attended with penal consequences. Thus, the learned Judges observed that no evil consequences that ensued. In the present case, the first test is not satisfied, that there any substantive right in the

Petitioner. The second test is also not satisfied as there is absolutely no effect on the seniority or pay and allowances of the Petitioner. There is no question of affecting further chances of promotion as the Petitioner is not qualified to be promoted. The chances of appointing on officiating post cannot be considered as chances contemplated in these tests which clearly contemplates a regular promotion.

24. In the case of *State of Bombay vs. F.A. Abraham*⁷, the Apex Court considered an appeal by the State of Maharashtra in respect of setting aside the order of reversion of the Respondent from the rank of officiating Deputy Superintendent of Police to the rank of Inspector of Police. The order of reversion simply stated that the Respondent was reverted to the rank of Inspector. Reasons were sought by the Respondent, which were not communicated. A confidential memorandum was sent by the District Superintendent of Police, Parbhani to the Deputy Inspector General of Police, Aurangabad. Allegations of corruption were made against the Respondent and an enquiry was held, The High Court had followed its earlier decision in the case of *M.A. Waheed vs. State of Madhya Pradesh*, (1954) NLJ 305 and held that if a person officiating on a

⁷ AIR 1962 SC 794

higher post is reverted to the original post, it may not amount to reduction in rank, but he is reverted for his unsatisfactory work, it would. Setting aside this decision, the Apex Court held that the observations in *M.A. Waheed* case that when a person officiating in a post, is reverted for unsatisfactory work, that reversion amounts to a reduction in rank, were not correct. A person officiating in a post has no right to hold it for all times and that no reduction in rank for it was the very term on which he had been given the officiating post. Referring to the case of *Parshotam Lal Dhingra* the Apex Court held 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 very 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. It was observed that 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. The Apex Court further observed that the High Court was in error in holding that the Government's refusal to supply the respondent with the reasons why action was taken against him proved that the

reversion was a reduction in rank by way of punishment, as only the refusal cannot prove that. It was further observed that if the action is justifiable under the terms of the employment, then the motive inducing the action is irrelevant in deciding the question whether the action had been taken by way of punishment.

25. The decisions in the case of *Parshotam Lal Dhingra and F.A. Abraham* were reiterated by the Apex Court in the case of *State of Mysore and ors. vs. M.K. Gadgoli and ors.*,⁸ In this case, the Respondent was holding a substantive post of Clerk in Bombay Government and had been appointed as an officiating Aval Karkun. He was reverted with an order clearly stating that his work was reviewed, his confidential sheet was examined and it was found that his work was unsatisfactory. The High Court taking note of these observations in the order, held that if the Respondent's work was remarked as unsatisfactory and that his record was stated to be not good, was a clear stigma on his work as an Aval Karkun and entailed penal consequences since his future chance of promotion was imperiled. The Apex Court did not accept this view taken by the High Court and reiterated the principle laid down in *F.A. Abraham*, that a person officiating in a post has no right to hold it for all times. A person is given higher officiating post to test his suitability

⁸ (1977) 1 SCC 469.

and he holds it on the implied term that he would be reverted if he was found unsuitable and had there been any disciplinary inquiry against the Respondent and instead of punishing him, the action was masked as a reversion simpliciter, there might have been some force in the contention that it was punitive. The Apex Court noted that all that happened was that a person was not found suitable on account of his record.

26. These decisions would clearly indicate that even if the order appointing on officiating basis to a higher post is recalled has imputations in respect of the service, generally it as a matter of suitability. In the present case, the impugned order on the face of it, is clearly innocuous and attributes no stigma whatsoever. The order is plain and simple. It only states that in public interest Respondent No.3 is appointed to hold the post of Chief Electrical Engineer on officiating basis and the Petitioner has been brought back to his substantive post i.e. the Additional Chief Engineer which he is holding on *ad hoc* basis. There is absolutely no stigma that can be seen from the order. There is no loss of seniority and there are no evil consequences that ensue.

27. Much was sought to be made in respect of the averments

made in the affidavit-in-reply filed by the Respondent-State in respect of the work of the Petitioner. As stated earlier, the order itself does not cast any stigma on the Petitioner. It is also not the case that any enquiry is held and instead of taking any punitive action, simpliciter action of reversion is taken. Because the Petitioner insisted that the action of the State is arbitrary and that there is nothing against the Petitioner, that the Respondent-State was provoked to answer these assertions of the Petitioner. Since clean and meritorious work was made the foundation of the challenge by the Petitioner, the Respondent-State in its reply had to answer the same. Had it not replied to the assertions, the Petitioner would have then claimed that the State has accepted his assertion. It is in this context that the State has pointed out that the work of the Petitioner as Chief Electrical Engineer was not up to the level which was expected of the Head of the Department. There was loss to the Department. There was infighting amongst the seniors and absence of command and the Department had to pay extra amount to the tune of Rs.200 crores on account of overdrawing from the grid. There was no proper control and planning. Therefore, what the State has pointed out is that the Petitioner, who was entrusted with the highest post in the Department on officiating basis, failed to maintain the level of the standard expected of that post, as there were various problems in the

Department and loss was caused. This is not to say that there was any direct allegation against the Petitioner that he misappropriated any amount.

28. The post of the head of a Department entrusted with distribution of electricity in the entire State, is a not a trivial post and requires high dedication. If the State, the Appointing Authority, comes to the opinion that the work of the Petitioner on that particular post on officiating basis was not satisfactory, it is not possible to sit in appeal over the said decision. The post is not a one where the incumbent would expect memos and warnings pointing out lapses in discharge of duties. The expectations and responsibilities for the work of the Chief Electrical Engineer are important and often subjective, the quality of work to be decided by the appointing authority. If it is in this background the impugned order was issued and Respondent No.3 who was the only other person from the feeder post, with longer experience, was appointed on officiating basis, we do not find that there was any stigma or imputation cast on the Petitioner so as to hold that the order was in breach of Article 311 of the Constitution of India, nor there was any arbitrariness. Therefore, on both, as far as right of the Petitioner and challenge to the impugned order in his individual capacity, there is

no merit in the challenge to the order of 1 June 2017.

29. Now we turn to the challenge of the Petitioner to the extensions given to Resplendent No.3. Respondent No.3 was to retire on superannuation on 31 July 2017. He was given extension on 27 July 2017, till 31 October 2017 and the second extension was given on 30 October 2017 which is slated to expire on 31 July 2018. As regards the order of extension dated 27 July 2017, it has worked itself out as the extension was up to 31 October 2017. The challenge thus remains to the order dated 30 October 2017.

30. While we consider this challenge, the question is whether the Petitioner has any right in his individual capacity to challenge the order of extension. The answer is, none. The Petitioner can lay no claim to the post of Chief Electrical Engineer, having not qualified to hold the said post. He was given the officiating charge and the later as *ad hoc* Additional Chief Engineer. The Petition, which the Petitioner has initiated in his own private cause, cannot be converted into a public interest litigation. What is before us is a *lis* in the realm of service law. It is settled that public interest litigations in the matters of service law are generally not to be entertained. According to Mr. Lotlikar, genesis of the impugned order was to somehow give

extension to Respondent No.3, which has come true. As far as right of the State, nothing is shown to us to show that the State has no power in law to grant extension to a government servant. During the arguments Mr. Lotlikar showed us some Office Memorandum dated 2 September 1991, 30 December 2014 and 10 March 2016. There are absolutely no pleadings whatsoever in the Petition in respect of these memorandums. They have been produced during the course of arguments, when the matter was part-heard. We have perused the latest memorandum, which notes earlier two. This Memorandum is issued by the Under Secretary (Personnel). It states that the Government has decided not to grant any extension beyond the age of superannuation in future so as to ensure that the promotional avenues of the officers who are eligible for promotions are not blocked. This, according to us, is an internal guideline and primarily based on the anxiety that the promotional avenues of others are not blocked by indiscriminate extensions. In the present case, there is no question of promotional avenue of any person being affected. There is no qualified person in the entire Electricity Department to be appointed as Chief Electrical Engineer. Had this been the case, the challenge of the Petitioner to the grant of extension in individual capacity could hold some merit.

31. Thus, the challenge of the Petitioner to the extension of Respondent No.3 is more or less in public interest. The Division Bench of this Court in the case of *Kashinath Shetye & ors vs. the State of Goa and ors.*⁹, had an occasion to consider the challenge to the powers of the State to grant extensions in service. One of the arguments that was made before the bench, which is also made by Mr. Lotlikar in the present case, was that till the mode of recruitment stipulated in the recruitment rules i.e. transfer on deputation, or short term contract are exhausted, the Government should not extend services of an employee. This contention was repelled by the Division Bench by holding that the recruitment rules do not specify extending the services of an incumbent as one of the modes of filling up vacancies and does not denude the Government of the power to do so. The Division Bench, in the case of *R.R. Tripathi vs. Union of India*¹⁰ also laid down that power to extend services of an incumbent is an inherent power vested in the State. Such power would exist even in absence of a rule. It would, however, be a different matter if the rules prohibit extension. We have not been shown any statutory rule prohibiting exercise of power of extension.

⁹ Writ Petition No.438/2009

¹⁰ 2008 (4) BomCR 688,

32. Once there is inherent power in the Government to grant extension of services, subject to certain limitations in public interest, there cannot be absolute fetter on such power as, otherwise, it would prevent the functioning of the State and the State would not be able to overcome the difficult situations faced by the administration, such as the present one where there is no qualified person to man the post. One of the contentions that was advanced by Mr. Sardesai was that no public interest litigation should be entertained in the matter of extension and the cases where the court entertained the petitions were in respect of the high posts such as Chief Secretary and the post of Chief Electrical Engineer is not one such post. While it is true that courts in the cited decisions was considering the challenge to the extensions granted to high functionaries in the State, we are not ready to devalue the post of Chief Electrical Engineer as inconsequential post. It is an important post. Continuous uninterrupted electricity supply is an essential requirement necessary for overall development of the State and the failure affects the daily life and has a potential of throwing the State in turmoil. Therefore, only the ground that the post of Chief Electrical Engineer is not a significant post and, therefore, public interest litigation should not be entertained in the matter of extension, is far too wide a proposition.

33. Reverting back to the power of the State to grant extension, though there exists as inherent power, it is obviously subject to certain limitations. It has to be used in public interest and an extension, such as the present one, can be questioned in public interest. In the present case, apart from the fact that we are not inclined to examine the challenge at the behest of the Petitioner by converting the Petition into a public interest litigation, we also do not find that there is any abject arbitrariness. We have not been shown anything adverse against Respondent No.3. Respondent No.3 has worked 36 years in the Electricity Department. He holds the substantive post of Superintending Engineer. The only other experienced person was the Petitioner, who was given chance and was not found suitable. Faced with this peculiar situation in the Electricity Department, the State appears to have chosen to give extension to an experienced person. It is not that the State has not given any reason whatsoever. In the affidavit, the work of the Respondent No.3 is commended. His involvement in arbitration proceedings has been referred to. It is not possible for us to dissect and minutely analyse these reasons. The extension granted to Respondent No.3 is coming to an end on 31 July 2018. At this stage, if we quash and set aside the order of extension, there would be

serious repercussions on the functioning of the Department. The State has placed on record an advertisement that has been issued on 14 June 2018, inviting applications for filling up the post of Chief Electrical Engineer and the last date is 30 June 2018. Keeping this position in mind, we do not find that interference in the order of extension up to 31 July 2018 is required and, that too at the behest of the Petitioner.

34. It was urged by Mr. Lotlikar that the State will again arbitrarily grant extension which exercise will continue and this will be done only to dole out favours to the Respondent No.3. As on today, what is before us is an order of extension which ends on 31 July 2018. We have narrated the reasons why we are not inclined to interfere with the order of extension which is till 31 July 2018. We have noted and accepted the commitment on the part of the State that the procedure for filling up the post on regular basis is in process. Since the State is required to act in larger public interest, it is expected that the process would be completed expeditiously. We are not called upon to comment what would be the legality of further extension if granted to Respondent No.3 at this stage and, therefore, we do not comment on the same in this judgment. However, as reiterated by the Division Bench in the case of *R.R. Tripathi* that

every action of the State in grant of extension cannot be arbitrary and must be in public interest. If an eventuality as the one referred to above occurs, its challenge will be considered with reference to the facts attendant at that time. As far as the present petition is concerned, the reasons given by the State for extension of Respondent No.3 till 31 July 2018 are enough to sustain the order.

35. As a result of the discussion, we have to hold that the Petitioner is not entitled to the reliefs prayed for. The petition is dismissed. Rule is discharged. No order as to costs.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.