

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.11.2019

CORAM :

THE HON'BLE MR.A.P.SAHI, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.A.No.3783 of 2019

1. The Manager (Administration and Personnel)
Footwear Design and Development Institute
Ministry of Commerce and Industry
Government of India
A-10/A, Sector-24, Noida
Uttar Pradesh - 201 301.
2. Shailendra Kumar Saxena
Chief Technologist (Incharge)
Footwear Design and Development Institute
Footwear Component Park
7th Main Road, Plot No.PB13
Irungattukottai, Sriperumbudur
Kancheepuram - 602 105. ... Appellants

Vs.

Dr.Kaushik Ghosh .. Respondent

PRAYER: Appeal under Clause 15 of the Letters Patent against the order dated 7.8.2019 passed by the learned Single Judge in W.P.No.7418 of 2018.

Prayer in W.P.No.7418 of 2018:-

Petition filed under article 226 of the constitution of India praying to issue a writ of certiorarified mandamus calling for the records relating to the proceedings of the first respondent in FDDI/ADMN/PERS/2009, dated 23.08.2016, suspending the writ petitioner and consequentially followed by proceedings in FDDI/ADMN/PERS/2009, dated 7th February'2017, terminating the writ petitioner and quash the same and reinstate the petitioner as the chief Technologist, International testing centre, Chennai with back wages and all other benefits.

For Appellants : Mr.P.H.Aravindh Pandian
Senior Counsel
for M/s.Thriyambak
J.Kannan

For Respondent : Mr.K.M.Vijayan
Senior Counsel
for M/s.N.V.N.Margandeyan

JUDGMENT

THE HON'BLE CHIEF JUSTICE

This intra-court appeal by the appellants employer arises out of the impugned judgment dated 7.8.2019, whereunder the respondent/petitioner has been extended the relief as prayed for in the writ petition by setting aside the order of suspension dated 23.8.2016 and the termination order dated 7.2.2017 with a further direction to the appellants to reinstate the respondent/petitioner as Chief Technologist forthwith and pay him all consequential and other attendant benefits.

2. At the outset, we may point out that Contempt Petition No.1894 of 2019 has been instituted by the respondent/petitioner, where notices were issued on 1.11.2019 calling upon the appellants to answer the notice.

3. The appeal was heard by us on 20.11.2019 and again on 21.11.2019, whereafter we have posted it for delivery of judgment today.

4. Learned Senior Counsel for the appellant Institute has advanced broadly a two-fold submission, firstly that the respondent/ petitioner is not entitled to any relief as he was a contractual appointee on the post of Chief Technologist, the contract of his appointment having come to an end on 31.3.2018. It is, therefore, submitted that keeping in view the Service Agreement and the terms and conditions of appointment, the respondent/petitioner was not entitled to any relief, hence, the impugned judgment is liable to be set aside.

5. The second argument advanced on merits is that the termination was resorted to as per the terms of the Service Agreement. The decision was taken after assessing the entire material on record and after holding a preliminary enquiry, followed by a regular proceeding, even though not required as the respondent/petitioner was only a contractual employee. The services of the respondent/petitioner resulted in termination on

account of his continued unauthorized absence in spite of the revocation of the suspension order on 28.11.2016.

6. It is the contention of learned Senior Counsel for the appellants that as a matter of fact, keeping in view the nature of appointment, it was not necessary to conduct any disciplinary enquiry, but the appellant employer in order to ensure fairness took into account only relevant facts for terminating the services of the respondent/petitioner without being influenced by any previous litigation.

7. It is submitted that the learned Single Judge while allowing the writ petition has erroneously construed the nature of engagement to be continuous and regular, inasmuch as the said findings are against the weight of evidence on record, including the terms of engagement and the General Service Rules applicable to the appellant Institute.

8. Responding to the said submissions and inviting the attention of the Court to the terms of appointment, the continuance of the respondent/petitioner and his status of employment, learned Senior Counsel has urged that the respondent/petitioner was appointed against a sanctioned post on probation and his services having been confirmed, he could not have been terminated without holding a regular enquiry in terms of the General Service Rules.

9. It has also been urged that there is a valid reason to assume the nature of services of the respondent/petitioner to be permanent, inasmuch as he was confirmed on his post after completion of probation period of one year on 8.1.2010 during his first stint between 2008-11 and the services were continued under three consecutive agreements thereafter without any further confirmation. That clearly reflects that the services of the respondent/petitioner did not require any further confirmation, as it had already been confirmed by a written declaration as required under the General Service Rules on the completion of period of probation. The continuity of services for the past almost ten years, therefore, leaves no room for doubt that the conclusion drawn by the learned Single Judge that the respondent/petitioner was a regular employee does not suffer from any infirmity. Thus, the status of employment of the respondent/petitioner being regular, against a sanctioned post, his services could not have been terminated in the manner it was done.

10. On the issue of absence without authority, learned Senior Counsel for the respondent/petitioner has urged that the

appellants themselves revoked the suspension on 28.11.2016, but while reinstating the respondent/petitioner, subjected it to tendering of apology by the answering respondent. This was objected to on the ground that respondent/petitioner had not committed any insubordination or misdemeanor, so as to attract any penalty and therefore, vide letter dated 1.12.2016, he declined to tender an apology.

11. It is urged that the appellants did not permit the respondent/petitioner to join unconditionally, more so in the background that the respondent/petitioner had informed the appellants about the previous dispute being sub judice and a review pending before the High Court of Chhattisgarh. It is, therefore, the case of the respondent/petitioner that he was nowhere responsible for any such alleged unauthorized absence and to the contrary, it was the appellants who prevented the respondent/petitioner from joining duties and performing his services.

12. It is also contended that the appellants have erroneously not paid salary to the answering respondent since November, 2016 onwards and, therefore, the learned Single Judge was justified in directing reinstatement and commanding the appellants to make payment of salary with all arrears on that count.

13. Learned Senior Counsel for the appellants has relied on the judgment in the case of Gridco Limited and another v. Sadananda Doloi and others, reported in (2011) 15 SCC 16 to support his contentions, coupled with the judgment in the case of State of Uttar Pradesh and another v. Kaushal Kishore Shukla, reported in (1991) 1 SCC 691.

14. Learned Senior Counsel for the respondent/petitioner has urged that none of the aforesaid decisions would apply on the facts of the present case, inasmuch as the employment of the respondent/ petitioner is not merely contractual but is regular, as is evident from the facts on record. The disciplinary proceedings being also vitiated due to non compliance of the procedure prescribed under the General Service Rules, the termination order is otherwise also invalid.

15. We have gone through the records and have also perused the General Service Rules as framed and made applicable by the appellant Institute in respect of its employees and the judgments cited at the bar.

16. After the arguments had concluded, we had also called upon learned Senior Counsel for the appellants to seek instructions in the background as to whether the appellants are ready to make good the payments to the respondent/petitioner for the full tenure of the contract in the event this Court finds the disciplinary proceedings culminating in cessation of service to be invalid. Learned Senior Counsel for the appellants, after obtaining his instructions, has made a statement at the bar that without prejudice to the contest raised herein, the appellants are ready and willing to release all payments to the respondent/petitioner as admissible under the Service Agreement till 31.3.2018 as a measure of a one time golden hand shake. We have recorded this concession made on behalf of the appellants and we now proceed to answer the submissions raised.

17. We propose to deal with the second argument relating to the validity of the disciplinary proceedings and the termination order dated 7.2.2017. For this, it would be appropriate to trace the background of the facts giving rise to the disciplinary proceedings.

18. The respondent/petitioner was appointed as a Chief Technologist on 22.12.2008 for a period of three years with a stipulation of one year on probation. This was followed by a confirmation of the services on 8.1.2010, whereafter the contractual appointment came to be extended in three spells, the last extension vide Service Agreement dated 30.3.2015, ending on 31.3.2018.

19. While the respondent/petitioner was working as a Chief Technologist, a notice inviting tenders for supply of Footwear (Slippers) for Tendupatta Leaf Collectors was floated by the Chhattisgarh State Minor Forest Produce (Trading and Development) Co-operative Federation Limited. One M/s.XO Footwear participated in the tender and the samples offered by the said firm were tested by the appellants. The test was carried out by the answering respondent, the report whereof was issued on 7.1.2016. Since the test report was against the tenderer, he filed Writ Petition (C) No.239 of 2016 before the Chhattisgarh High Court to set aside the test report and the tender. While disposing of the said writ petition, the Chhattisgarh High Court made observations against the appellant Institute with adverse comments on the report submitted that was associated with the answering respondent.

20. Taking notice of the said comments, the appellant Institute suspended the respondent/petitioner on 23.8.2016 and disciplinary proceedings were instituted on 12.9.2016. This

letter dated 12.9.2016 has been placed in the typed set of documents filed by the appellants themselves, which recites as follows:

"FDDI/22(2015)/DC/HR
12th September 2016

OFFICE MEMORANDUM

Sub: Disciplinary proceedings to be initiated re-suspension
of Dr. Kaushik Ghosh, Chief Technologist,
ITC Chennai
Lab.

The undersigned has been directed to intimate the following:

Further to the constitution of Special Lab Committee (vide Office Order No.FDDI/ED(VS)OO/Lab-All/2016 dated 8th August 2016) and subsequent inspection of the ITC Chennai Lab Case in light of Orders from the Hon'ble High Court, Chattisgarh, Dr.Kaushik Ghosh was suspended from the services of the Lab vide letter dated 23rd August 2016 until further orders (based on approval note dated 9th August 2016).

With reference to the above, the Special Lab Committee is hereby intimated to further examine the matter under the chairmanship of Mrs.Satyam Srivastava and provide further recommendations for the functioning of the lab and services of Dr.Ghosh, so that a suitable action may be taken in-respect of the services of Dr.Ghosh, which are currently suspended. The Committee shall function in similar lines with the Disciplinary Committee.

The Committee composition (as per the aforementioned Order) is reflected below:

1. Mrs.Satyam Srivastava, Sr.Consultant (FT), FDDI Noida (Chairperson)
2. Mr.Navendu Shekhar - Jr.Consultant (FT), FDDI Noida (Member)
3. Mr.Vikas Teotia-Jr.Consultant (FT), FDDI Noida (Member)
4. Mr.Vivek Raina-Jr.Consultant (FT), FDDI Noida (Member)

Functions & Powers of the committee:

- Since a preliminary inquiry has already been conducted by the Special Lab Committee and suitable remedial action has been initiated by suspension of Dr.Ghosh. The recommendations of the Committee shall be taken as reference point and further investigation shall be conducted.
- A Show-Cause Notice may be issued to Dr.Ghosh who has been prima facie held responsible for the lapses in working of ITC Chennai, as per need. This shall allow him an opportunity to clear his stance and put forward his case before the proceedings can begin.
- Based on the fulfillment of above, the Committee shall examine the facts and may issue Charge-sheet if it finds the explanations given by Dr.Ghosh unsatisfactory & if it is able to comprehend and establish the charges against him.
- The Committee may then obtain the reply of Dr.Ghosh on the issued Charge-sheet and further scrutinize it. During the proceedings, the Committee shall have the authority to appoint/identify an Enquiry Officer and Presenting Officer from within the committee or any other employee as deemed fit. The Committee shall also have the power to nominate substitution in its composition in case of availability of any of its members due to other professional obligations.
- The case may be further enquired by the Enquiry Officer and a final report may be submitted to the Competent Authority with findings, recommendations and suitable punitive measures.

All members are hereby intimated to conduct an initial meeting and present the course of proceedings with the observations and recommendations, as the Inquiry proceeds.

This issues with the approval of Competent Authority.

Manager (Admin & Pers.)
For FDDI"

21. A perusal of the said Office Memorandum would demonstrate that a preliminary enquiry had been conducted and it was resolved to issue a show cause notice to the respondent/petitioner, and upon receipt of reply to further proceed to issue a charge sheet and to hold an enquiry with the appointment of an Enquiry Officer. It is, thus, clear from the said document that the appellants themselves resorted to initiate disciplinary proceedings against the respondent/petitioner.

22. In the meantime, the respondent/petitioner aggrieved by the order of the Chhattisgarh High Court, wherein observations had been made against him, filed a Special Leave to Appeal before the Apex Court, but that was withdrawn with liberty to move a review application before the High Court itself.

23. Before any orders could be passed by the Chhattisgarh High Court in the review matter, an enquiry report was submitted on 24.11.2016, whereafter the appellants issued orders on 28.11.2016 revoking the suspension order. The order revoking suspension was based on the said enquiry report dated 24.11.2016 that is extracted herein under:

"FDDI/22(2015)/DC/HR

24th November 2016

In pursuance to the enquiry conducted by the committee constituted vide OM No.FDDI/22(2015)/DC/HR dated 12.09.2016 to examine the irregularities in the functioning of ITC Chennai, the case was examined by the committee. The enquiry report is placed opposite as Annexure 1.

The following findings/observations have been made by the committee:-

1. There were procedural lapses in many lab tests conducted.
2. This appears to be a case of carelessness and casual approach whereby the laid down standard of Operating Procedure for the tests was not followed.
3. There is culpability which has to be apportioned to Dr.Ghosh for his indiscretion.

In the light of the above, the committee recommends the following:

1. The suspension may be revoked subject to submission of apology letter from Dr.Ghosh for the improper functioning and lapses in the Mechanism/Lab Tests performed by ITC, Chennai

under his leadership.

2. A warning letter may be issued for all the lapses which led to tarnishing the image of FDDI.

3. The possibility of transfer of Dr. Ghosh to some other domain may also be explored, if deemed fit.

As per the provisions of General Service rules of FDDI, Vide Section 9

Clause 17. RULES ON DISCIPLINARY ACTION FOR MISCONDUCT & APPEAL

Where a disciplinary proceeding against an employee is contemplated or is pending or where criminal proceedings against him/her in respect of any offence are under investigation or trial and the Institute authorities are satisfied after prima facie investigation and due opportunity of explanation given to the concerned employee, that it is necessary or desirable to place the employee under suspension, he may, by order in writing, be suspended by the appointing authority with effect from such date as may be specified in the order. A Statement setting out in detail the reasons for such a suspension will also be recorded.

An employee who is placed under suspension under clause (a) below shall, during the period of such suspension, be paid a subsistence allowance at the following rate namely:-

(a) Where the enquiry contemplated or pending in departments the subsistence allowance shall, for the first ninety days from the date of suspension, be equal to one half of the basic wage, dearness allowance and other compensatory allowance to which the employee would have been entitled if he was on leave with wages. If the departmental enquiry gets prolonged and the employee continues to be under suspension for a period exceeding ninety days, the subsistence allowance shall for such period be equal to three-fourths of such basic wages, dearness allowance and other compensatory allowances.

(b) Provided that where such enquiry is prolonged beyond a period of ninety days for reasons directly attributable to the employee, the subsistence

allowance shall, for the period exceeding ninety days, be reduced to one fourth of such basic wages, dearness allowance and other compensatory allowances.

Keeping all the above facts in view, it is proposed that:-

1. The suspension of Dr.Ghosh shall be revoked with immediate effect;
2. He should be issued a warning letter for the lapses and tarnishing the image of FDDI and;
3. Dr.Ghosh shall immediately submit an apology letter and shall ensure in writing that in future the procedures shall be followed as per the standard guidelines set for the International Testing Centre.
4. Since the testing labs are functional only at Noida and Chennai campus of FDDI, the possibility of transfer of Dr.Ghosh may be explored as deemed appropriate.

Further, the draft letter to be issued is enclosed opposite for approval."

(emphasis supplied)

24. The revocation order dated 28.11.2016 is also gainfully reproduced herein under:

"FDDI/22(2015)/DC/HR
28th November 2016

Kind Attn: Dr.Kaushik Ghosh

I am directed to intimate that:

1. In pursuance to the enquiry conducted by the committee constituted vide OM No.FDDI/22 (2015)/ DC/HR dated 12.09.2016 to examine the irregularities in the functioning of ITC Chennai, the case was examined by the committee based on the observations of the Hon'ble High Court of Chhattisgarh
2. Since various lapses have been observed which are serious in nature and causing damage to the reputation of the Institute, you are required to submit an apology in writing, stating that in future you will be more careful in your professional conduct as well as follow the procedures as per the standard guidelines set for the International Testing

Centre.

3. The competent authority has been considered in pardoning you on this instance and therefore has decided to revoke your suspension with immediate effect subject to submission of apology in writing (as stated above in para 2). Further such instances of professional mis-conduct will lead to strict disciplinary action as deemed appropriate as per the rules and regulations of the institute.

You are hereby advised to resume your duties at Kolkata accordingly.

This issues with the approval of competent authority.

Manager (Admin & Pers)"
(emphasis supplied)

25. A perusal of the above would leave no room for doubt that the appellants subjected the revocation of the suspension order to certain conditions observing that various lapses had been observed that were serious in nature causing damage of reputation to the appellant Institute and, therefore, the respondent/petitioner was called upon to submit an apology in writing, giving assurance that he will not commit any such mistake in future. The revocation was, therefore, clearly conditional accompanied with punitive comments.

26. The respondent/petitioner instead of tendering an apology, wrote back to the appellants on 1.12.2016 declining to either accept any of the allegations of lapses or misdemeanor and refused to tender an apology. It is thereafter, it appears, that the appellants started treating the respondent/petitioner as being absent from duty as the joining did not take place.

27. Vide order dated 7.2.2017, the respondent/petitioner was informed that his services stood terminated with immediate effect keeping in view Clause 10.1(d) of the Service Agreement. The order of termination is extracted herein under:

"FDDI/ADMN/PERS/2009
07th February 2017

Dr.Kaushik Ghosh
Chief Technologist
ITC Chennai.

Subject: Termination Letter

The undersigned has been directed to intimate that your employment with FDDI is being terminated with immediate effect with reference to the terms and conditions of the service agreement dated 22nd December 2008, signed with you.

You were advised to resume your duties but you have failed to resume your duties or send any valid written communication in this regard. Moreover you have moved to another city without any intimation to the institute while your services are on suspension. On being contacted by the institute you have informed that you have visited West Bengal due to your father's illness. The same has been without prior approval. The supporting document received from you in this regard is deficient. All the above acts indicate the lack of negligence on your part and amounts to unprofessionalism. You have failed to comply with the rules and regulations of the institute as per the terms and conditions of your services with FDDI as per clause 10.1(d) of the service agreement. Therefore, as directed, your services are being terminated with immediate effect.

This issues with the approval of the competent authority.

Manager (Admin. & Pers.)
For FDDI"

(emphasis supplied)

28. A perusal of the said order indicates that since the respondent/petitioner failed to resume his duties in spite of advise to that effect, and since the respondent/petitioner had moved to West Bengal without prior approval of the appellants, it was not possible to accept the explanation about the ailment of his father, that remained unsupported by any relevant document. Accordingly, this was treated as lack of negligence and unprofessionalism leading to the termination of contract of employment.

29. The respondent/petitioner appears to have represented the matter before the authorities, but the said request was turned down.

30. On 14.12.2017, the review petition filed by the answering respondent before the Chhattisgarh High Court came to be considered and even though the review application was dismissed, yet observations were made in favour of the respondent/petitioner. The judgment on the review application dated 14.12.2017, being relevant to the controversy, is extracted herein under:

"1. The present Review Petition has been filed seeking review of the judgment dated 03.08.2016, passed by this Court in WPC No.239/2016. The writ petition was filed by the respondent No.1 before this Court challenging the tender proceedings invited for the supply of footwear. The grievance of the petitioner was that his bid was cancelled on the ground that the samples which the petitioner had submitted did not meet the required specifications with regard to the thickness of sole (forepart) and sole abrasion.

2. The writ petition was finally disposed of vide order dated 03.08.2016 holding that the manner in which the FDDI Chennai conducted the test and submitted the report leaves much to be desired and it was held that the test were not conducted properly and finally the report which was submitted by the FDDI Chennai was set-aside and it was directed that the samples of the other successful bidders be sent to some other laboratories for testing and if they meet the standards required, the respondent No.2 in the present review petition was free to place orders on them.

3. The applicant herein has filed the review petition seeking a relief of expunging the remarks made against the applicant in paragraphs No. 15, 16, 17, 19 & 20 of the judgment dated 03.08.2016. According to the applicant, the department of FDDI did not effectively contest the case before the High Court and in the process some observations have been made by the High Court in its judgment and the applicant has been placed under suspension from a service on 23.08.2016.

4. The counsel for the petitioner also expressed their apprehension of an adverse affect on his service career by virtue of the observations made by this Court in its judgment, so far as the applicant is concerned. It was also submitted by

the learned Senior counsel appearing for the applicant that pending the review petition before this Court, the services of the petitioner has also being subsequently terminated and the basis for the termination has been the observations by this Court in its order and thus prayed for the expunging of those remarks. The counsel for the applicant stressed hard to convince this Court that there has been no lapse whatsoever on the part of the applicant while submitting the report in respect of the test of the samples belonging to the petitioner in the writ petition. The learned counsel tried to provide emphasis on the fact that all due care was taken while the test were being conducted both in respect of time required for testing and the chemical test which were conducted and tried to canvas the fact that the observations were not proper and justified and the same have been made only on account of no proper assistance being provided by the FDDI, the contesting party before the writ Court.

5. It was further contended that the applicant also did not get an opportunity to speak for himself as regards the alleged lapse on his part and for this reason also the observations made in the judgment pertaining to the applicant may be expunged.

6. The perusal of the record would show that the applicant herein had filed an Special Leave to Appeal before the Hon'ble Supreme Court, which was registered as 19324/2016, which came up for hearing before the Supreme Court on 21.10.2016, where after hearing, the counsel for the petitioner (the applicant herein) withdrew the petition before the Supreme Court with liberty to file a review petition before the High Court.

7. Further, from the records it does not appear that any of the respondents before the writ Court including the FDDI or the Chhattisgarh State Minor Forest Produce Cooperative Federation Limited, which had floated the tender, have gone to the Hon'ble Supreme Court assailing the order. Thus, the judgment as such has attained its finality.

8. A plain perusal of the observations made by this Court while disposing of the writ petition would

clearly reflect that this Court had only scrutinized the report submitted by the FDDI Chennai which was signed by the present applicant. Further, in the course of the scrutiny being made, this Court found certain discrepancies in the procedure adopted for the test, which were conducted on the samples, supplied that of the petitioners before the writ Court. The discrepancies were pertaining to the date on which the present applicant had signed the report and also the duration and the technique used while testing the samples. It was also detected in the course of the scrutiny that the certain tests were not conducted at FDDI Chennai, but were outsourced and the details of which were not reflected in the report. Hence, the observations were made raising serious doubts on the report of FDDI Chennai and the reply which the FDDI had filed in the High Court and the affidavit of which was also signed by the present applicant.

9. It was also pertinent to mention that the counter affidavit on behalf of the FDDI was also sworn by the applicant herein and it was the contents of the counter affidavit of the FDDI and its report which was minutely scrutinized by this Court in the course of disposing of the writ petition. This Court while disposing of the writ Court had never made any adverse remark so far as the present applicant is concerned and that this Court never intended the present applicant to be subjected to a disciplinary action nor has the High Court called upon the FDDI to take any action against the present applicant. This Court had only considered the contents of the materials placed before the writ Court for its consideration and on perusal of record this Court did not find the contents of counter affidavit filed before the Writ Court and the report filed by the FDDI, Chennai worth accepting on account of large scale discrepancy and the Writ Petition was disposed off accordingly.

10. However, in case if the FDDI has initiated a disciplinary action against the applicant herein i.e. an entirely different cause of action to be agitated before the appropriate authority/forum independently without getting it connected with the

Writ Petition which has been disposed off by this Court on 03/08/2016 vide WPC No.239/2016.

11. If the respondent No.7 have taken any disciplinary action against the applicant herein, the same has to be looked into independently and separately without being influenced or guided by any of the observations made by this Court in WPC No.239/2016 decided on 03/08/2016.

12. It is made clear that, the respondent No.7 cannot and will not be permitted to take shelter of the observation made in the order by this Court in WPC No.239/2016 to be the sole basis for taking action against the applicant herein.

13. What is all the more relevant at this juncture to be mentioned is that, the grounds put forth by the learned senior counsel on behalf of the applicant are all those grounds which are beyond the purview of review jurisdiction, as those are the grounds which were never considered or looked into by this Court in the Writ Petition.

14. So far as the review is concerned, it is settled position of law that Review is entertainable only in case if there is an error apparent on the face of record and which is glaringly visible. Revision petition cannot be converted into a proceeding whereby the whole writ petition is to be heard on merits again. Neither can the review petition be treated as an appeal reconsidering the order on its merit.

15. For all the aforesaid reasons reserving the right of the applicant to assail the subsequent developments separately, this Court does not find any force in the present MCC seeking for review of the order dated 03/08/2016 in WPC No.239/2016.

16. The MCC thus being devoid of merits deserves to be and is accordingly rejected."

(emphasis supplied)

31. A perusal of the above quoted order on the review application would indicate that the Court had expressed its opinion about the observations made in the original judgment. The Court, however, indicated that it had never made any adverse remark on the respondent/petitioner and never intended that the

respondent/ petitioner should be subjected to disciplinary action. It then went on to observe that the disciplinary action initiated against the respondent/ petitioner was to be looked into unconnected with the proceedings before the Chhattisgarh High Court and it was further observed that if any disciplinary action was taken, the same shall be looked into independently and separately without being influenced by the observations made by the High Court in the judgment dated 3.8.2016. It was further emphasised that the appellants will not be permitted to take any shelter of the observations made in the judgment of the High Court. Thus, even though the review petition was dismissed, yet the aforesaid observations were made in favour of the respondent/petitioner.

32. We do not propose to delineate on the merits of the decision on the review application, but suffice it to say that the judgment in the review matter diluted the sting of the observations made in the main judgment.

33. It is based on the aforesaid judgment in the review application that the respondent/petitioner again made a request to the appellants to reconsider their decision. That was turned down by the order/communication dated 19.3.2018 reiterating that the termination order dated 7.2.2017 is valid.

34. It is the case of the respondent/petitioner that the termination order is clearly tainted and stigmatic, as the entire sequence of events leaves no room for doubt that the suspension order was based on the observations made by the Chattisgarh High Court and it is for this reason that the revocation order was made conditional, compelling the respondent/petitioner to tender an apology and accept the lapses. This was clearly rebutted by the respondent/petitioner through his letter dated 1.12.2016 and again reasserted through his request for setting aside the termination order, that has been refused by the appellants. The compulsion to apologize is clearly antithetical to any voluntary acceptance by the respondent/ petitioner.

35. In our opinion, once the appellants had themselves initiated disciplinary proceedings under the Office Memorandum dated 12.9.2016 and it called for an enquiry report, then there was a clear intention on the part of the appellants to take action against the respondent/petitioner on the basis of the allegations that were founded on the strength of the observations in the judgment of the Chattisgarh High Court. This was, therefore, an exercise undertaken treating the conduct of the respondent/petitioner sufficient to invite punitive

action. This is also confirmed by the words recited in the suspension order and the revocation order of suspension. Since the respondent/petitioner failed to acquiesce to the conditions set out by the appellants in the revocation order, he was treated to be absent without authority in law, and castigating his conduct as unprofessional and negligent, his services were terminated, taking recourse to the terms and conditions of the contract of service. The termination order even though does not mention about the orders passed by the Chhattisgarh High Court and its fallout, yet the same is clearly reflected therein and in continuity of the action taken by the appellants in the background indicated above.

36. Accordingly, we are convinced that the appellants had resolved to terminate the services vide order dated 7.2.2017 of the respondent/petitioner on account of his past conduct and the observations that had been made against him. This was without considering the stand of the respondent/petitioner in his letter dated 1.12.2016. The termination order erroneously records that no reply had been given by the respondent/petitioner. The fact of submission of a reply by the respondent/petitioner on 1.12.2016 has not been rebutted. The action of the appellants, therefore, to terminate the services was not a termination simpliciter on account of the terms of the contract, but was clearly punitive in nature, the foundation whereof was laid in the initiation of the disciplinary proceedings vide letter dated 12.9.2016. Even though the appellants have mentioned the termination of service to be an exercise of power under the terms of the contract, yet, in effect, the termination order itself recites about the misconduct of the respondent/petitioner compelling them to act punitively.

37. It is here that it would be appropriate to refer to the argument of learned Senior Counsel for the appellants, who contends that as a matter of fact, it was not necessary to hold any enquiry against the respondent/petitioner and, therefore, the letter of termination should be treated to be a simple termination of the contractual engagement of the respondent/petitioner.

38. We are unable to agree with the said submission, inasmuch as, if the appellants were of the opinion that no disciplinary proceedings were required to be initiated, then we do not find any explanation coming forth from the appellants for having issued the Office Memorandum dated 12.9.2016 and mentioning the misconduct of the respondent/petitioner as being negligent and unprofessional in the termination order. The

matter being one of contract of employment, it can safely be said that the principles of estoppel by conduct are also attracted inasmuch as we find a conclusive admission, without any denial of the letter dated 12.9.2016, which is the own document of the appellants describing their conduct. The appellants, therefore, cannot be permitted to turn around and advance an argument that they did not require setting up of disciplinary proceedings as the services could have been terminated under the contract of agreement itself. If that were so, then there was no occasion for the appellants to have compelled the respondent/ petitioner to tender an apology and to admit his lapses. This compulsive environment created expressly in words by the appellants therefore leaves no room for doubt that the appellants clearly intended to punish the respondent/petitioner through the disciplinary proceedings. The ultimate termination order, therefore, was a culmination of this entire process and the Court, therefore, is entitled to unveil the curtain and investigate the background of the termination order, which, in our opinion, has been rightly traversed by the learned Single Judge. The suspension and termination orders, therefore, in the above background have rightly been held to be invalid being punitive in nature and were rightly quashed by the learned Single Judge. We, accordingly, uphold the said part of the impugned judgment.

39. Having said so, it would be appropriate to reiterate that learned Senior Counsel for the appellants, on instructions, has conceded to making payments to the respondent/petitioner till the last date of his contractual appointment, i.e., 31.3.2018. We, accordingly, accept the said concession in terms of the directions issued herein after as the termination of the respondent/petitioner stands invalidated.

40. Coming to the dispute with regard to the status of employment and the direction given by the learned Single Judge to reinstate the respondent/petitioner treating him to be a regular employee with all consequential benefits, we may gainfully extract paragraphs (17), (20), (21) and (23) of the impugned judgment herein under:

"17. After going through the relevant records/materials and the pleadings, this Court has no doubt in holding that though the petitioner's appointment was extended every three years from 2008, it appears that his continuance as Chief Technologist has a flavour of regular employment. In fact, the petitioner's appointment was confirmed vide order dated 08.01.2010 by declaring successful completion of probation. Once he becomes a

confirmed employee, it is not open to contend on behalf of the first respondent that the petitioner is continued to be employed on a contractual basis. Such contractual terming of employment would at best be applied for the purpose of financial benefits and was made applicable to the petitioner from time to time, but it cannot take away the character of a regular employment, as the petitioner has been continued since his first appointment dated 22.12.2008.

....

20. The petitioner having been appointed on a regular basis, though his appointment is termed as contractual in nature, is entitled to protection under Article 311 of the Constitution of India. Merely because the petitioner's service has been extended for a period of three years every time, it is not open to the first respondent institute to invoke Clause 10.1(d) of the Service Agreement dated 22.12.2008 and his services can be dispensed without following the established principles of natural justice. The petitioner being a confirmed employee of the first respondent institute is entitled to the protection against arbitrary exercise of power by the first respondent institute.

21. Moreover, the facts would disclose that the post occupied by the petitioner, viz., Chief Technologist is a sanctioned post in terms of the service Rules and his services were continued ever since his original appointment dated 22.12.2008 and the last appointment was to end on 31.03.2018. The petitioner was therefore continued in service for almost 10 years and before his last employment could end on 31.03.2018, his services stood terminated on the basis of allegations. Therefore, by no legal standard, such abrupt and arbitrary action could be condoned. When the petitioner is visited with the extreme penalty of termination, which in fact amounted to wrongful dismissal of service, such action has to be preceded by the departmental action of conducting a full-fledged enquiry.

....

23. For the above said reasons, this Court has no hesitation in allowing the writ petition.

Therefore, the impugned suspension order dated 23.08.2016 followed by the termination order dated 07.02.2017 are hereby set aside. The respondents are directed to reinstate the petitioner forthwith and pay him all consequential and other attendant benefits."

41. Learned Senior Counsel for the respondent/petitioner defended the said findings on the ground that it is a sanctioned post; the employment is continuous and the period of probation being over, the status of employment of the respondent/petitioner cannot be treated to be a mere contractual engagement.

42. To test this argument, we may now advert to the General Service Rules of the appellant Institute. It would be appropriate to record that the Footwear Design and Development Institute has been set up and is under the deep and pervasive control of the Ministry of Commerce, Government of India and, therefore, is amenable to the jurisdiction of this Court within the meaning of Article 12 read with Article 226 of the Constitution of India. There being no dispute on this issue, we may now refer to the recruitment procedure and other conditions of service, including the status of employment which is presently involved.

43. The Rules provide for regular appointments or on contractual basis. Appointments can be made by promotion; direct recruitment; by deputation and by the Managing Director on a specific contract. Rule 7 of the Rules provides for the period of probation and it also provides for confirmation to be followed by the issuance of a separate letter of confirmation. Thus, there is a provision for confirmation even in respect of contractual appointments. Rule (9) of the Rules however defines "Substantive Appointments" as follows:

"9. Substantive Appointments

No employee shall be confirmed in any post unless such post is sanctioned and no other person has been confirmed in it.

a. Persons appointed under specific contract shall be governed by the terms and conditions of appointment contained in their letter of contract for service."

(emphasis supplied)

44. A perusal of the above said provision would indicate that persons appointed under a specific contract shall be governed by the terms and conditions of the appointment

contained in the letter of contract for service.

45. The contention of learned Senior Counsel for the respondent/ petitioner is that the respondent was appointed against a sanctioned post for which learned Senior Counsel also invited the attention of the Court to Section 18 which describes the sanctioned strength of employees. In Sub-Rule (4) under the heading "Laboratory", the post of Chief Technologist has been indicated within the sanctioned strength. It is urged that once the said post is contained within the sanctioned strength, the same should be treated within the cadre of employment thereby attaching with it a nature of permanency, as is available in other State services.

46. We are unable to accept this argument of learned Senior Counsel for the respondent/petitioner inasmuch as sanction of strength does not necessarily mean that the nature of the post is either permanent or temporary or upon being filled up on contract basis would subsequently by conversion or long continuity become a substantive engagement. Further, even if there is a post, the right of continuance claimed by a particular employee would be dependent on the nature of the terms of employment against such a post. For this, we have to advert to the Service Agreement of the respondent/petitioner. Clause (1) of the original Service Agreement dated 22.12.2008 clearly indicates that the respondent/petitioner was being employed for a period of three years on a probation period of one year. There is no doubt that upon the completion of one year, the services of the respondent/petitioner were confirmed under a letter dated 8.1.2010, which is extracted herein under:

"No.FDDI/ADMN/PERS/2010
Friday, January 08, 2010

To
Dr.Kaushik Ghosh
Chief Technologist
FDDI Chennai

Dear Dr. Ghosh

I am directed to intimate that you have completed your probation period successfully and you are confirmed to the post of Chief Technologist with effect from 8th January 2010 as per the service agreement dated 22nd December, 2008.

With Best Wishes,

Shilpa Jianani
Dy. Manager (Admin &

Pers) ”

47. Nonetheless, the terms of Service Agreement nowhere indicate that it was a permanent engagement on substantive basis or at the end of probation the engagement becomes substantive or permanent. To the contrary, Clause (10) of the Service Agreement provides for termination without any compensation or damages. The entire Service Agreement nowhere envisages any permanency of tenure. To the contrary, the remedy of arbitration has also been indicated in Clause (17) in the event a dispute arises with regard to the status of employment. Not only this, the terms and conditions of employment were retained as amended from time to time in the last extension order of the services of the respondent/petitioner dated 30.3.2015, which is extracted herein under:

“Ref.No.FDDI/ADMN/PERS/2009

Date: 30th March, 2015

To:

Dr.Kausik Ghosh
Chief Technologist
FDDI Chennai.

Dear Dr. Kausik Ghosh,

The undersigned is directed to intimate that the competent authority has approved the extension of your services for three years i.e. upto 31st March 2018 as 'Chief Technologist'. All other terms and conditions shall be applicable as amended from time to time.

This issues with the approval from competent authority.

With best wishes,

Manager (Admin & Pers)”
(emphasis supplied)

48. Learned counsel for the respondent/petitioner contends that this continuance has to be read with the confirmation, inasmuch as the appellants did not find it necessary to issue any further confirmation orders and, therefore, this extension of services in the manner aforesaid should be treated to be a strong circumstance for considering the nature of employment as a regular engagement.

49. We are unable to agree with this submission as well, inasmuch as once the General Service Rules make a provision for contractual appointment, then the period of probation is only to ensure that if the services of the employee are not satisfactory, even during the period of contract, they can still

be terminated. The confirmation of a contractual employment cannot travel beyond the nature of the employment, which is essentially contractual and not on permanent basis. There is nothing on record to indicate that the respondent/ petitioner was appointed or continued on a permanent or substantive basis and was confirmed as such. To draw an inference that the continuance will amount to a regular engagement having a flavour of a regular appointment is an erroneous approach. In our opinion, the learned Single Judge was not justified in construing the nature of employment as a regular engagement. The said conclusion drawn by the learned Single Judge is against the terms and conditions of the General Service Rules as well as the Service Agreement and the letter of continuance extending the services of the respondent/petitioner.

50. The advertisement that was uploaded online nowhere indicates that the appointment was being offered against a substantive post or the nature of appointment would be a substantive appointment. Thus, the holding of the post consecutively under renewed contracts would not convert the nature of the engagement from a contractual appointment to that of a regular appointment. The summation of the learned Single Judge is therefore against the terms of employment as spelt out in the rules and documents of engagement on record.

51. A faint argument was also advanced that the respondent/ petitioner was being victimized and hunted only in order to accommodate another person. Such an argument is unsupported by any facts and a Court cannot proceed on the strength of unaccounted prejudices and unalleged malafides.

52. Learned Senior Counsel for the respondent/petitioner has also relied on paragraph (53) of the judgment in the case of Secretary, State of Karnataka and others v. Umadevi (3) and others, reported in (2006) 4 SCC 1 to contend that even if the appointment of the respondent/petitioner was labelled as a contractual appointment, but was continued for almost ten years, the said ratio should be applied to declare the appointment of the respondent/petitioner as regular. He has also relied on a judgment in the case of Veer Kunwar Singh University Ad hoc Teachers Association and others v. Bihar State University (C.C.) Service Commission and others, reported in (2009) 17 SCC 184 to substantiate his submissions.

53. As already held by us herein above, the very nature of engagement of the respondent/petitioner was never intended to be on a permanent basis, nor the status of appointment could be treated as substantive or permanent even if the post was

sanctioned under the General Service Rules. The ratio of the aforesaid judgments are, therefore, nowhere attracted on the facts of the present case.

54. We are, therefore, of the opinion that the relief of further continuity in service beyond the period of contract could not have been granted by the learned Single Judge directing his reinstatement with all consequential benefits. To that extent, the appeal deserves to be allowed.

55. The appeal is, accordingly, allowed in part and the directions to reinstate the respondent/petitioner and to pay all consequential benefits beyond the period of contract, i.e., after 31.3.2018, is set aside. Simultaneously, we uphold the quashing of the termination order and direct that the appellants shall treat the respondent/ petitioner to have continued till 31.3.2018 and in view of the concession already made by learned Senior Counsel for the appellants, we direct that all such payments admissible to the respondent/ petitioner till 31.3.2018 shall be paid to him within one month from today. No costs. Consequently, C.M.P.No.23918 of 2019 is closed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

sasi
To

1.The Manager(Administration and personnel)
Footwear Design and Development Institute
Ministry of Commerce and Industry
Government of India, A-10/A, Sector-24,
Nodia, Uttar Pradesh-201 301.

2.The Chief Technologist (Incharge)
Footwear Design and Development Institute
Footwear Component Park,
7th Main Road, Plot No.PB-13,
Irungattukottai, Sriperumbudur,
Kancheepuram-602 105.

+2cc to M/s.N.V.N.Margandeyan, Advocate SR.92865
+1cc to M/s.Thriyambak J.Kannan, Advocate SR.98491

W.A.No.3783 of 2019

CP(CO)
CB(13/12/2019)