



IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: November 20, 2023

+ W.P.(C) 7060/2016, CM APPL. 29049/2016

DR. ABHAY KUMAR SRIVASTAVA

..... Petitioner

Through: Mr. Sanjeev Ralli, Sr. Adv. with
Mr. Shubham Yadav, Mr. Ravi Kant
Yadav and Mr. Chetanya Baweja,
Advs.

versus

UNION OF INDIA AND ANR

..... Respondents

Through: Mrs. Bharathi Raju, Sr. Panel Counsel
for UOI

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

J U D G M E N T

V. KAMESWAR RAO, J

1. This petition has been filed impugning the order of the respondents dated December 11, 2012 terminating the services of the petitioner and the order of the Central Administrative Tribunal, Principal Bench, New Delhi ('Tribunal', hereinafter) dated August 10, 2015 affirming the termination.

2. At the outset, we may briefly narrate the facts of the case, as set out in the petition. The petitioner on being selected by Public



Enterprises Selection Board and upon approval from Appointments Committee of the Cabinet (ACC) was appointed as the Chairman and Managing Director (CMD) of National Aluminium Company Limited (NALCO) w.e.f. October 1, 2009. As per the terms of appointment, the petitioner was appointed for a period of five years or till the age of superannuation or until further orders, whichever was earlier. Further, the terms of appointment stated that his services could be terminated by either side by giving three (3) months' notice or payment of salary in lieu thereof. Further the terms of appointment stipulated review of performance after completion of one year of service. The NALCO Conduct, Discipline and Appeal Rules, 1984 ('CDA Rules', hereinafter) were made applicable to the services of the petitioner and the petitioner was eligible for superannuation benefits/benefits as per the Office Memorandum dated November 26, 2008 and February 4, 2009. Upon joining as CMD, NALCO, the service benefits the petitioner had earned with his previous employer- Cement Corporation of India Ltd. (CCI), including an earned leave of ₹6,81,480/- and gratuity of ₹2,24,130/- were transferred to NALCO on a requisition made by NALCO in that regard.

3. The petitioner successfully completed first year of his service and as per the terms of appointment, the administrative Ministry assessed the performance of petitioner as "*outstanding*" and cleared him for continuing in service for the remaining tenure/period. On the basis of clearance proposal by the Ministry, the Public Enterprises Selection Board recommended confirmation of services of the petitioner till his superannuation i.e., till January 31, 2014.



4. In the meanwhile, on February 25, 2011 the petitioner was implicated in a case under the Prevention of Corruption Act, 1988 ('PC Act', hereinafter) pursuant to which the respondents placed the petitioner under suspension with effect from February 26, 2011. The stand of the petitioner is that as the case itself was false and ill motivated, the subsequent suspension is faulty. The respondent initiated an internal assessment to hold disciplinary proceedings against the petitioner, with advice solicited and received even from the Central Bureau of Investigation (CBI) *vide* letter dated March 21, 2012. The respondent with the approval of the Minister of State (Independent Charge), Mines, who happened to be the disciplinary authority of the petitioner, as per the powers delegated to him by the President of India under the Government of India (Transaction of Business) Rules, 1961, invoked the provisions of Rule 33 of CDA Rules *vide* note dated April 27, 2012, sought to be placed before the ACC, which provides special procedure such as, in the eventuality it is impracticable to hold a regular enquiry, the same may be dispensed with before taking action under Regulation 26, which prescribes for imposition of penalties including the major penalty of termination. The reason for premature termination of the applicant was mentioned as "*due to vigilance matter*". No reason was given for invoking the special clause, which is required to be recorded in writing.

5. However, the actions as per the CDA Rule 5(2) "*taking or giving bribes or any illegal gratification*" were set at nought and the respondent realising that disciplinary action would be a time consuming exercise, dropped the same and invoked clause 1.1 of the terms of



appointment. Subsequently, the respondents *vide* order dated December 11, 2012 terminated the services of the petitioner by giving three months' salary in terms of clause 1.1 of the terms of appointment read with Article 63 of the Articles of Association of NALCO and removed the petitioner from the post of CMD, NALCO.

6. The petitioner challenged the order dated December 11, 2012 before the Tribunal on the grounds *inter alia* that the clause 1.1 of the terms of appointment and Article 63 (f) of the Articles of Association are unconstitutional and that appointment made on a permanent basis cannot be done away without following the due process of law, and that curtailment of fixed tenure so as to financially curtail the benefits being punitive in character mandates appropriate disciplinary action, besides other relevant grounds including the illegal forfeiture of retiral benefits of service already earned.

SUBMISSIONS

7. Mr. Sanjeev Ralli, learned senior counsel appearing for the petitioner submitted that the Tribunal failed to appreciate that as can be seen from paragraph 8 of the note for ACC dated April 27, 2012 it was decided to terminate the services of the petitioner in line with the provisions of the terms of appointment which makes CDA Rules applicable. Rule 33(ii) and (iii) of CDA Rules were invoked with the approval of the Minister of State (Independent Charge), Mines, who has been delegated with this power by the President of India under the Government of India (Transaction of Business) Rules as the disciplinary authority. Rule 33(ii) provides for imposition of penalty



including major penalty specified in Rule 26 without inquiry where it is not practicable to hold the same by recording the reasons in writing. No reason was recorded in writing as to why the disciplinary authority was satisfied that it was not reasonably practicable to hold an inquiry. In the absence of recording of any reason for invoking Rule 33(ii), only the regular procedure of inquiry under Rule 28 for imposing major penalty could have been resorted. Further, the respondents invoking the provisions of the terms of appointment after already invoking CDA Rules to terminate the services of the petitioner is bad in law.

8. The policy underlying Article 311(2) of the Constitution is that when it is proposed to take action against a public servant by way of punishment that will entail forfeiture of benefits already earned by him, he should be heard and given an opportunity to show cause against the action. Thus, the real criterion for deciding whether an order terminating the services of a public servant is one of dismissal or removal is to ascertain whether it involves any loss of benefits already earned. In the present case the petitioner has been deprived of his pay, gratuity, leave encashment, pension and Performance Related Pay ('PRP', for short). The Tribunal totally failed to appreciate that forfeiture of benefits earned by the petitioner during the service with NALCO was punitive ramification of removal and as such the removal cannot be held to be *simplicitor* but stigmatic and punitive, requiring a proper enquiry. Reliance in this regard is placed on the judgments in ***L.P. Agarwal (Dr) v. Union of India, (1992) 3 SCC 526*** and ***Nina Lath Gupta v. Union of India & Anr., WP(C) 10385 of 2021*** decided on May 01, 2023.



9. The contention of Mr. Ralli is that clause 1.1 of the terms of appointment and Article 63(1) (f) of the Articles of Association are arbitrary, void and in violation of Articles 14 and 16 of the Constitution, and therefore, could not have been invoked for premature removal of the petitioner. Such clauses /provisions forming part of the terms of employment or the rules and regulations of different Public Sector Enterprises have already been declared void and struck down/set-aside by various courts. He has referred to the judgment in the case of *Delhi Transport Corporation v. DTC Mazdoor Congress and Ors., (1991) 111 J 395 SC* wherein a Constitution Bench of the Supreme Court considered the question of constitutional validity of the right of an employer to terminate the services of permanent employees without holding any inquiry in certain circumstances by giving a reasonable notice or pay in lieu of notice, and held that the regulation granting such a right is arbitrary, unfair, unjust, unreasonable, opposed to public policy and is in violation of Articles 14, 16(1), 19(1)(g) and 21 of the Constitution. Reliance is also placed on the judgments in *West Bengal State Electricity Board and Ors. v. Desh Bandhu Ghosh & Ors., (1985) 3 SCC 116; O. P. Bhandari v. India Tourism Development Corporation Ltd. and Ors., 1987 AIR 111; M. Gopalakrishnaiah v. Union Of India, 1994 SCC OnLine Del 308; M.K. Agarwal v. Gurgaon Gramin Bank, 1987 Supp SCC 64; Uptron India Ltd. v. Shammi Bhan, (1998) 6 SCC 538 and Dr. L.P. Aggarwal (supra)* in this regard.

10. According to him, the Tribunal erred and misdirected itself while discussing the challenge of the petitioner to the validity of the



above two clauses. The discussion in the impugned order of the Tribunal would show that the Tribunal has grossly erred by discussing the subject pertaining to the scope of judicial review of the Tribunal/Courts in the matters of policy decision of the government which has no relevance in the context of the contention of the petitioner challenging the validity of the aforesaid two clauses contained in the terms of appointment and Articles of Association. In fact, there is no discussion in the impugned order in the relevant context of the real challenge of the petitioner to the validity of the above two clauses raised by him.

11. Mr. Ralli has placed reliance upon the judgment in ***Central Inland Water Transport Corporation and Anr. v. Brojo Nath Ganguly and Anr., (1986) 3 SCC 156*** wherein the rule providing for termination of employment for acts other than misdemeanor was held to be void under Section 23 of the Contract Act, 1872 being opposed to public policy and also *ultra vires* Article 14 of the Constitution, it being arbitrary and unreasonable and ignoring the doctrine of *audi alteram partem*.

12. Clause 63 (f) of the Articles of Association of NALCO which confers the President with absolute discretion to remove the CMD is highly arbitrary, and in contravention with Section 388 (B) of the Companies Act, 1956 which grants power to the Central Government to remove managerial persons from office on recommendation of the Company Law Board. If there is a conflict between an Article of Association of a Company and the Companies Act, the later shall prevail. In the present case, since Article 63 (f) is in contravention to



Section 388 (B), the same cannot be applied for removing the petitioner.

13. He stated that, premature termination under the doctrine of pleasure in case of fixed tenure appointment is subject to judicial review, as has been held in *Union of India v. Sharbandu, (2007) 6 SCC 276*.

14. Additionally, the petitioner had a legitimate expectation of completing the tenure of his service, and therefore, any curtailment thereof is an infraction of the principle of legitimate expectation, and therefore is liable to be set aside. In this regard he has relied upon the judgment in *Union of India and Ors. v. Hindustan Development Corporation and Ors., AIR 1994 SC 988*.

15. Mr. Ralli further contended that the impugned termination was in fact punitive and stigmatic in nature as the same was influenced by pending criminal proceedings which are false and fabricated in which no finding has been recorded against the petitioner till date. There was nothing else which could be the reason for premature and illegal removal/termination of service of the petitioner. The Tribunal failed to appreciate that there was a direct nexus between the termination of the petitioner and the charges leveled by the CBI. The general suitability of the petitioner was very well established as he was adjudged to be an outstanding performer and was allowed to continue beyond one year. Therefore, his performance cannot be a reason / motive for termination. The stand of the respondents that the entitlement of the petitioner to his terminal benefits will depend upon the outcome of the chargesheet filed against him under Section 120-B of the Indian Penal Code, 1860 (IPC)



read with Sections 7 & 12 of the PC Act, is illegal. Withholding of terminal benefits pending a decision in the charges filed before a Court of law indicates that the respondents treated the allegations in the CBI case as foundation for his termination. The order of termination is a colourable exercise of power, and as such is stigmatic.

16. The Tribunal also failed to appreciate that the proposal for termination of the petitioner was moved by the Ministry of Mines on April 27, 2012 indicating the reason for termination as “due to vigilance case”. No show-cause notice was issued nor was any inquiry initiated. The order has been made in the form of punitive action for the alleged criminal charges which are the reason and foundation for the termination.

17. Further, the services of the petitioner were in league with other employees of NALCO. He had been cleared for extension of full service of 5 years / till superannuation and as such cannot be treated similar to a temporary employee or a probationer. In the matter of tenure, appointment and termination, Rule 26 of the CDA Rules excludes within the ambit of penalty, termination of services of an employee on probation, temporary capacity, appointment on contract and also on reduction of establishment. The termination resorted to in the case of the petitioner is not covered in any of the exceptions. Further, the appointment of the petitioner was not on account of an agreement but a statutory appointment for a tenure approved by the ACC on recommendations of the Public Enterprises Selection Board. Continuity of service was maintained and all the service benefits were transferred to NALCO. The terms and conditions of appointment do not



amount to a contract or an agreement.

18. Once the petitioner was appointed, it is statutory rules and regulations that govern his service and not the terms of the appointment. The respondents cannot pick and choose the rules governing services at their whims and fancies. It cannot be held that suspension was governed by the CDA Rules whereas the termination is governed by clause 1.1 of the terms of appointment.

19. Further, nothing prevented the respondents from following the procedure regarding disciplinary enquiry under the relevant Rules soon after passing of the suspension order on February 26, 2011. It is pertinent to mention that documents sought from CBI were provided to respondent No. 1 by CBI in the month of April 2011 itself, whereas the impugned termination order was passed after one year and eight months. There is no reason given by the respondents for not conducting the inquiry proceedings during this time.

20. He also submitted that the Tribunal erred in holding that the petitioner was only entitled to service benefits admissible to him before joining NALCO. All the service benefits earned during the earlier tenure with his previous employer- CCI stood transferred to NALCO upon joining in 2009. The petitioner had continuity of service as he did not resign from CCI to join NALCO. Thereafter the petitioner has earned various service benefits during his service in NALCO, which accumulated over and above the benefits earned during service with CCI viz. eared leaves, gratuity, benefits under the New Pension Scheme etc. for which deductions were made from his salary till removal. The Tribunal erred by negating the claim of service benefits during the



course of employment with NALCO, including PRP. The Tribunal has not attributed any reasons to substantiate its rejecting the petitioner's plea of service benefits.

21. He also contended that despite the fact that the termination of services was not a voluntary act of petitioner but was brought about by the action of respondents, the benefit of post-retirement medical benefits was denied stating that the petitioner did not complete his tenure. It is submitted that curtailment of a beneficial scheme which the petitioner had legitimately earned resulted in a loss to the petitioner, thus making the termination punitive in nature. It is further stated that notwithstanding the same, the Tribunal failed to appreciate that the petitioner was eligible for the contributory scheme for post-retirement medical facilities as the tenure could be said to have been completed on December 11, 2012. The eligibility criteria of "tenure" under the medical scheme cannot be read as to mean whole term of 5 years or till the date of superannuation, as the same was curtailed by the respondent as an administrative decision. The petitioner is entitled to post-retirement medical benefits.

22. The decision of the respondents to terminate the services and withhold the dues of the petitioner is apparently punitive in nature inasmuch as despite the petitioner vide letter dated August 18, 2015 addressed to the Secretary of Mines, Government of India followed by reminder dated October 12, 2015, seeking the release of benefits transferred from the petitioner's previous employer, the said amount has not been released till date.

23. There was no provision, law and/or rules either available or



cited by the respondents for withholding retiral benefits/dues of the petitioner. Retiral benefits is property under Article 300 of the Constitution of India, and withholding of the same has been held to be illegal by the Supreme Court in *State of Jharkhand v. Jitender Kumar Srivastava*, CA 6770/2013 dated August 14, 2013, reiterated by this Court in *Shri Ashok Kumar v. NDPL & Anr*, W.P.(C) No. 510/2012 decided on September 5, 2013.

24. Mr. Ralli further submitted that the termination vide order dated December 11, 2012 required payment of three months' salary, however the respondent merely paid a part of the said three months salary on December 11, 2012 while deferring the balance payment to February 20, 2013. In the absence an order indicating any revised date of termination, the termination order dated December 11, 2012 is void and the applicant continues to be in service till superannuation. Further, the suspension was also not revoked before the termination and the salary due was not paid before removal.

25. That apart, he has contended that the respondents resorted to colourable exercise of powers in dispensing with the services of petitioner. The reason cited by the respondents as to absence of a CMD in NALCO affecting its functioning is totally superfluous and cooked up in as much as in absence of petitioner, the senior-most Director was given the charge of CMD and later on the Director holding the charge was confirmed as CMD. There was neither any adverse effect on performance of the company nor was the smooth functioning of the company hampered. There have been instances in the past where Navratna and Mahanavratna companies have functioned without CMDs



for long intervals with senior-most Director operating as CMD (In-charge). Even NALCO ran for almost five years without a regular CMD and without any visible impact on performance. The respondents acted in a *mala fide* manner to terminate the services of the petitioner on the alleged premise of unavailability of CMD. There is no public interest involved.

26. He has sought the prayers as made in the petition.

27. Ms. Bharathi Raju, learned senior panel counsel appearing for the respondents has while largely admitting the facts, contested the submissions made by the counsel for the petitioner. She stated that the Articles of Association of NALCO, through Article 63(1)(f) explicitly provides that the President may at any time remove the Chairman/Chairman-cum-Managing Director /Managing Director or any whole-time Director, from office at his absolute discretion. Chairman and whole time Directors may be removed from office in accordance with the terms of their appointment, or if no such terms are specified, on the expiry of three months notice issued in writing by the President or with immediate effect on payment in lieu of the notice period. As an administrative action, the services of the petitioner were terminated by the President, by invoking the provisions of clause 1.1 of the terms and conditions of his appointment, issued vide letter no.2/5/2009-Met.I dated 28/01/2010, as CMD, NALCO. The petitioner stood removed from the post in terms of Article 63(1) (f) of the Articles of Association of NALCO with immediate effect, vide Ministry of Mines Order No.11(11)/2011-Met-I dated December 11, 2012, by payment of three months' salary in lieu of three months notice.



Therefore, the decision of the Tribunal is in accordance with provision of Article 63(1)(f) of the Articles of Association of NALCO and of clause 1.1 of the terms and conditions of his appointment.

28. The service benefits that the petitioner earned with his previous services from CCI has already been remitted as per the directions of this Court vide order dated December 06, 2017. NALCO has credited an amount of ₹8,97,462/- towards 120 days' Earned Leave (EL), 181 days' Half Pay Leave (HPL) and ₹2,24,1301- towards gratuity, as received from CCI in the account of the petitioner.

29. However, with regards to his benefits during the services with NALCO up to December 11, 2012 i.e. the date of removal, has been withheld for the reason that the petitioner was arrested by the CBI on February 25, 2011 in a trap case for receiving illegal gratification. A case was registered by CBI bearing case No. RC AC 1 2011 A0001 on under Section 120B of the IPC r/w Sections 7 & 12 of the PC Act against the petitioner. As per the chargesheet filed by the CBI, serious allegations of illegal gratification have been leveled against the petitioner. The case is pending trial at the Court of the Special Judge, RADC, New Delhi. For this reason, the respondents are not in a position to calculate the exact damages incurred to the Government of India during the tenure of the petitioner as CMD, NALCO, and as such are constrained to withhold the service benefits as a precautionary measure till the disposal of the CBI case. She has drawn our attention to an inter office memo of NALCO dated April 24, 2012 to justify withholding the petitioner's PRP, and to Rules 3.1.20.3.4, 3.1.20.4 and 31.20.5 to contend that in case of termination of the services of an



employee for whatever reason; any amount due to the company can be recovered from the amount of leave encashment.

30. Insofar as the contention of Mr. Ralli that a proposal has been sent confirming the continuation of services of the petitioner, Ms. Raju states that though such a proposal had been forwarded to the Public Enterprises Selection Board, as vigilance clearance was not received at the time, the order confirming the continuation of services was not issued by the Ministry.

31. She stated that pursuant to the registration of the case by the CBI leading up to the arrest and suspension of the petitioner, as it was not possible to keep the possession of CMD, NALCO vacant, and as the petitioner's continuance in NALCO as the CMD was likely to cause further irreparable loss to the functioning and creditability of the Government / NALCO, which would be detrimental to public interest, a note dated April 27, 2012, from the Ministry of Mines was submitted to the ACC for premature termination of the services of the petitioner by giving him three months salary in terms of clause 1.1 of the terms and conditions of appointment issued with the approval of DPE. The ACC approved the proposal for premature termination on December 05, 2012. The proposal for premature termination reads as under:-

“Shri A K Srivastava continues to be under suspension since 26.2.20 11. Consequently, NALCO has been functioning without a regular CMD since 26.2.2011. NALCO a Navratna CPSE with over 7000 employees and a turnover of about Rs. 7000 crore at that time is facing tremendous administrative problem due to the absence of a regular CMD for the past fourteen months. Although additional charge arrangements have been made against



the post by entrusting the responsibility to the senior most functional Director, however, for lending the requisite vision, leadership and continuity in decision making in managing the complex day to day affairs of a Navratna Company like NALCO, it's is imperative that a regular CMD is appointed at the earliest. As the judicial proceedings in the case of Shri Srivastava are likely to be protracted and would involve time, it may not be practicable to wait for till such time the Court reaches a conclusion in the matter, to have a regular CMD at the helm of affairs of the Company.

Accordingly, for ending the stalemate in public interest, it is essential that an officer is appointed as CMD, NALCO on a permanent basis after due selection process.

In view of the circumstances mentioned above, the position of Shri A K Srivastava to continue as CMD of NALCO in future has become completely untenable and therefore it is in public interest to consider terminating his services in order to have a clear vacancy and appoint a fresh CMD on full time basis to run the administrative of NALCO in an efficient manner. Accordingly, in line with the provisions of the terms & conditions of the appointment of Shri Srivastava and Rule 33(ii) & (iii) of NALCO CDA Rules, it has been decided by the concerned Disciplinary Authority i.e., Minister of State (Independent Charge) for Mines to terminate the services of Shri A K Srivastava as CMD, NALCO."

32. She has stated that the petitioner has misconstrued the interpretation of clause 1.1 of the terms of appointment and Article 63(f) of the Articles of Association of NALCO. It is a matter of record the petitioner has agreed to the terms and conditions of appointment including clause 1.1 which clearly states that his services can be terminated by payment of three months' salary in lieu of three months notice. Further, Article 63(1)(f) of the Articles of Association was also



in existence when the petitioner was appointed CMD, NALCO in terms of which his services were terminated.

33. As for the submissions of Mr. Ralli that the provisions of the Articles of Association and the terms of appointment are in contradictions with Section 388B of the Companies Act, Ms. Raju would submit that the provisions of Section 388B is at the discretion of the Central Government and hence is not a mandatory clause. Moreover, the circumstances mentioned in the said provision are not analogous with the instant case and the CDA Rules and the Articles of Association of NALCO govern the service of the petitioner. Therefore, no parallel enquiry by the Company Law Board was required.

34. She submitted that by way of the present petition, the petitioner is attempting to seek a judicial review of an administrative action of the President / Government of India, which is tantamount to an attempt on the part of the petitioner to compel by means of a judicial order to interfere with administrative decisions which are entirely for the Government of India to make. Reliance in this regard is placed on the judgment of the Supreme Court in *Tata Cellular v. Union of India*, **AIR 1996 SC 11**. According to her, the principles laid down by the Apex Court in the said judgment can be summed up as below:-

- (a) The modern trend points towards judicial restraint in administrative action.
- (b) The Court does not sit in appeal but merely reviews the matter in which the decision was made.
- (c) The Court does not have the expertise to correct an administrative decision. If a review of administrative decision



is permitted, the Court will be substituting its own decision without a necessary expertise which itself may be fallible.

35. Further, as for the issue of Post Retirement Medical Benefits Scheme, she submitted that in respect of Board Level Appointment, the incumbent is eligible for the same only after completion of full tenure of service. In the instant case, as the petitioner did not complete his full tenure, it was held that he was not eligible for the said benefit.

36. She also stated that NALCO credited a sum of ₹4,21,763/- on December 11, 2012 to the account bearing No.07072191007994 of the petitioner with the Oriental Bank of Commerce, SSI Branch, NOIDA through RTGS which included subsistence allowance upto December 10, 2012 and three months' salary thereafter. He has been further paid a sum of ₹1,65,891/- through RTGS towards perks and HRA on three months' pay in lieu of notice period after necessary recovery towards private use of vehicle, medical and TDS from the total amount of ₹1,82,616/-. The petitioner was duly informed by NALCO about these two payments vide letter dated December 17, 2012 and February 20, 2013. That apart, even the respondents had informed the petitioner about the release of payment with regard to subsistence allowance perks and HRA by NALCO vide letter bearing No.11/11/2011-Met.I dated February 21, 2013.

37. Mr. Ralli in his rejoinder submissions would vehemently contest the stand of the respondents that the service benefits of the petitioner have been withheld as the government was unable to assess or calculate the loss / damage, caused to the Government of India due to actions / omissions on the part of the petitioner during his service at



NALCO. He states that the said plea of the respondents is imaginary and baseless and deserves to be rejected, as no such stand has been taken prior to the present proceedings. Even the charges for which the criminal proceedings are going on, does not allege any loss / damage to the Government of India. Even the provisions of the PC Act under which the petitioner has been charged makes no reference to any financial loss / damage to the Government of India.

38. Further, it is the case of the respondents themselves that the termination of the services of the petitioner was purely an administrative action and not on account of any misconduct. If that be so, the respondents cannot place any reliance on the allegations which are a subject matter of the criminal proceedings to deny service benefits to the petitioner.

39. In any case, it is a settled proposition of law that service benefits / dues of a government employee cannot be denied / withheld merely on the ground that criminal proceedings or disciplinary proceedings are pending against the employee. He laid stress on the facts that the suspension of the petitioner was not followed by any disciplinary proceedings even though there was no legal embargo against initiation of such proceedings, which would manifest that the respondents did not have any charge or case against the petitioner. As such he is entitled to full salary and other service dues up to the date of termination including the period of suspension, apart from the service benefits that have to flow to him from the date of termination till January 30, 2015 when he would have superannuated. He has sought the following service benefits to be granted to the petitioner:-



1. Balance amount of salary and allowances from February 26, 2011 till December 11, 2012 after adjusting the amount paid by Respondent No. 1 as suspension allowance.
2. Leave encashment and gratuity.
3. Any other service benefits payable under the rules.

40. The pending dues as claimed by the petitioner have been tabulated as under:-

Dues upto 26.02.2011 i.e., date of suspension

S.No.	Description	Amount (₹)
1.	Performance Related Pay/Variable Pay	11,04,186/-
2.	Leave Encashment	2,42,473/-
3.	Gratuity	3,63,402/-
	Total	17,10,061/-

Dues upto 11.12.2012 i.e., date of termination

S.No.	Description	Amount (₹)
1.	Basic Pay plus DA	8,21,989/-
2.	Perks	6,26,112/-
3.	Gratuity	3,63,402/-
4.	Performance Related Pay	11,04,186/-
5.	Leave Encashment	2,42,473/-
	Total	31,58,162/-



Dues upto 12.12.2012 till now

S.No.	Description	Amount (₹)
1.	Basic Pay plus DA	Rs.20,56,990/-
2.	Perks (45%)	Rs.9,25,646/-
3.	Gratuity	Rs. 91,285/-
4.	Performance Related Pay/Variable Pay	--
5.	Leave Encashment	--
6.	Medical reimbursement	--
	Total	Rs. 30,73,921/-

ANALYSIS AND FINDINGS

41. Having heard the learned counsel for the parties, we note that the petitioner had filed the O.A. before the Tribunal with the following prayers:-

“(i) allow the original application.

(ii) quash and set aside the order dated 11.12.2012 (AnnexureA-1) whereby services of the applicant had been terminated curtailing the tenure of appointment, and then reinstate the applicant in service with immediate effect along with complete back-wages and consequential benefits and the same be paid with 12% per annum interest from the date it has become due; and/or

(iii) alternatively the applicant be given complete back-wages/salary till completion of actual date of tenure/retirement and ail terminal and legal dues including pension, gratuity, PF, Leave in enhancement, incentive, performance relative PRP, Post retirement medical benefits etc. and all other dues and the same be paid with 12% per annum interest from the date it becomes due and/or;



(iv) call for. the original files/record from Ministry of Mines, GOI. and also Department of personnel and training (DoPT) in order to ascertain divisions for premature termination of services of the applicant.

(v) may also pass any further order(s), direction(s) as be deemed just and proper to meet the ends of justice.”

42. In substance, the claim of the petitioner before the Tribunal was to set aside the order dated December 11, 2012 by which the services of the petitioner were terminated as per provisions of clause 1.1 of the appointment letter issued to him and Article 63 of the Articles of Association of NALCO, with immediate effect by payment of three months' salary in lieu of three months notice; and to grant his reinstatement with all consequential benefits. He sought an alternative prayer that he be given complete back-wages/salary till completion of actual date of tenure/superannuation and all terminal/legal dues including pension, gratuity, PF, leave encashment, incentive, PRP, post retirement medical benefits etc. with interest. The Tribunal has upheld the termination by holding in paragraphs 3, 4 and 5 of the impugned order as under:-

“3. We heard counsels for parties and perused the record. The National Aluminium Company Limited (NALCO), was incorporated on 7th January, 1981 in the Public Sector, with its registered office at Bhubaneshwar, to exploit a part of the large deposits of bauxite discovered on the East Coast. The Company was conferred Navratna status on 28.4.2008. Its Articles of Association provides for a minimum of four and maximum of eighteen Directors. The Chairman-cum-Managing Director is the Chief Executive of the Company and is assisted by five functional Directors namely Director (Project & Technical), Director



(Production), Director (Human Resources), Director (Finance) and Director (Commercial). The company has on its Board also eight Independent (non-official) Directors and two Government nominee Directors. The applicant was appointed as Chairman-cum-Managing Director, NALCO with the approval of ACC, vide Ministry of Mines order dated 11.08.2009 w.e.f. 1.10.2009 for a period of five years or till the date of his superannuation, or till further orders, whichever could be earliest. The date of superannuation of the applicant was 31.1.2014. Though vide communication dated 14.1.2011, PESB had recommended for his confirmation subject to vigilance clearance, but for want of vigilance clearance, the order could not be issued. In view of his arrest by CBI in a trap case and registration of a regular CBI case No. RC AC 1 2011 A0001 against him, he was placed under suspension vide order dated 26.2.2011. After his release on bail, the headquarters of the applicant was changed from Bhubaneswar to New Delhi vide order dated 22.9.2011. In the wake of suspension of the applicant, the NALCO had been functioning without there being a regular CMD since 26.2.2011. The Company in Navratna CPSE with 7000 employees and turnover of Rs.7000 crores faced tremendous administrative problem for a long period. Confronted with the crises, the concerned Ministry sent a note to Cabinet for termination of services of the applicant. Finally, in terms of the order no. 11(11)2011-Met.1 dated 11.12.2012, his services were terminated with immediate effect on payment of three months salary in lieu of notice. The first and foremost plea put forth on behalf of the applicant is that the order of termination of the applicant is consequence of registration of the criminal case (ibid) against him and is stigmatic, thus is liable to be set aside. In respect of the said plea, the learned counsel himself explained that in order to attract the provisions of Article 311 (2) once should see whether the misconduct or negligence was mere motive for the



order of removal or termination or was the very foundation of that order and if the basis of the order is not misconduct, the order should be saved. Para 5 (B) of the OA wherein such legal proposition has been espoused read thus:-

“B. Because the termination order is bad in law. Proposal for pre mature termination of the services of the applicant was moved by Ministry of Mines on 27.04.2012 due to vigilance case by CBI. No show cause has been issued, nor has any enquiry been initiated. No proper reason has been given for termination. It is submitted that the termination order has been made in the garb of punitive action. The alleged criminal charges, which are denied by the applicant, have been reason for the authority to terminate the applicant. Serious prejudice has been caused to the applicant due to non issuance of show cause and non conducting of enquiry. Thereby denying the applicant to defend himself based on the principal of natural justice. It is well settled that in such cases the courts have the power to lift the veil and to see the intention of the termination order. In this regard reference be made to the following judgments Chandra Prakesh Shahi Vs. State of UP & Ors on 25 Aril, 2000:

“R.S.Sial Vs. State of U.P (1974) 3 SLR 754=AIR 1974 SC 1317=(1975) 3 SCC 111 and it was laid down that in order to attract the provisions of Article 311 (2) it has to be seen whether the misconduct or negligence was a mere motive for the order of reversion or termination or whether it was the very foundation of that order. It was again reiterated that the form of the order was not conclusive of its true nature and the Court has to examine the entirety of circumstances proceeding or attendant on the order of termination. To the same effect is the decision of this Court in State of



U.P Vs. Sughar Singh (1974) 1 SCC 218= 1974(2) SCR 535=AIR 1974 SC 423, which related to reversion and in which reliance was placed on two earlier decisions in Madhav Laxman Vaikunthe Vs. State of Mysore AIR SC 8=1962 (1) SLR 886 and State of Bombay vs.F.A.Abraham AIR1962 SC 794= 1962 Supp. (2) SCR 92. It was, however, laid down that if the order visits the employee with penal consequences, the order would be punitive. It was for this reason that the order of reversion in that case was held to be bad. In the same year, came the Seven-Judge Bench decision of this Court in Samsher Singh Vs. State of Punjab (1974) 2 SCC 831=AIR 1974 SC 2192= 1975 (1) SCR 814, in which Motive and foundation theory was reiterated and it was laid down that the question whether an order terminating the services of a temporary employee or a probationer was by way of punishment or not would depend on the facts and circumstances of each case. The form of the order, it was observed, was not conclusive and an innocuously worded order, terminating the services of a temporary employee or a probationer may, in the facts of the case, be found to have been passed on account of serious and grave misconduct in utter violation of Article 311 (2) of the Constitution. This decision was followed in State of Punjab Vs. P.S.Cheema AIR 1975 SC 1096= (1975) 4 SCC 84 and the termination order, regarding which a concurrent finding of fact was recorded by the trial court, the lower appellate court and also by the High Court in second appeal that it was punitive in nature, was held to be bad. While the judicial pronouncements stood at that stage, the entire case law was reviewed by this Court instate of U.P Vs. Ram Chandra Trivedi AIR 1976 SC 2547=(1976) 4 SCC 52= 1977 (1) CR 462, in which it was



contended that the legal and Constitutional position with regard to an order of termination was not settled as there were conflicting decisions of this Court on that question. This contention was not accepted and on a review of the entire case, including the Seven-Judge Bench decision in Samsher Singh's case (supra), it was laid down that the Court has consistently held that the motive, in passing an order of termination or reversion, operating in the minds of the Govt. was not a relevant factor for determining whether the order was passed by way of punishment. What was determinative of the true nature of the order was not its exterior form but the foundation on which it was based. If misconduct or negligence was the foundation of the order of termination, or for that matter, reversion, the order would be punitive in nature...

....In Gujarat Steel Tubes Ltd. vs. Gujarat Steel Tubes Mazdoor Sabha (1980) 2 SCC 593= (1980) 1 LLJ 137= 1980(2) SCR 146=AIR 1980 SC 1896, it was laid down that a Court or Tribunal is entitled to find out the true nature of the termination order, namely, whether it is punitive or not. In this regard, the form of the order will not be decisive and the Court can lift the veil to see the true nature of the order. The Court observed that the substance not semblance, governs the decision. The Court further observed that what was decisive was the plain reason for the discharge and not the strategy of a non-enquiry. If the basis was not the misconduct, the order could be saved. The Court further observed that the mere fact that after being satisfied of the guilt the Govt. abandons the enquiry and proceeds to terminate the services by a simple order, would not be the relevant factor in considering the true nature of the order. Given an alleged misconduct and a live



nexus between it and the termination of service, the conclusion would be dismissal even if full benefit, as on simple termination, are given and non-injurious terminology is used.

....As we have already seen above, there has been total non-compliance with the provisions of Para 541 of the U.P. Police Regulations and services of the appellant were terminated without ever issuing him any notice terminating the grounds on which his services were proposed to be terminated nor was his explanation ever obtained. The services were terminated because he was found involved in a quarrel between two other Police Constables. For the reasons stated above, the appeal is allowed, the impugned judgment passed by the High Court is set aside and that of the U.P. Police Services Tribunal is restored, but without any order as to costs. Nepal Singh Vs. State of U.P. Ors 1985 AIR 84 (Supreme Court 3 judges bench Supreme Court):

“Proceeding from there, we may advert to a further aspect of the case. It would seem that the dominating factor which influenced the mind of the Deputy Inspector General of Police was the allegation that the appellant had married a second wife against the Government Servants Conduct Rules it is clear that a full-fledged enquiry was institute into the matter, evidence was recoded but before any findings could be rendered the enquiry was dropped for want of jurisdiction. No attempt was made thereafter to institute proper enquiry by the appropriate authority in the circumstances, it was not open to the Superintendent of Police to mention in his report, as a statement of fact, that the appellant had married a second time against the Government Servants Conduct Rules. With the dropping of the enquiry the allegation remained unverified. We may observe that where



allegations of misconduct are leveled against a Government servant, and it is a case where the provisions of Art.311(2) of the Constitution should be applied, it is not open to the competent authority to take the view that holding the enquiry contemplated by that clause would be a bother or a nuisance and that therefore it is entitled to avoid the mandate of that provision and resort to the guise of an ex facie innocuous termination order. The Court will view with great disfavor any attempt to circumvent the constitutional provision of Art.311 (2) in a case where that provision comes into play. For all the aforesaid reasons, we are unable to uphold the judgment and order of the High Court, and in the result the appeal must be allowed.

The appeal is allowed and the order dated April 27, 1970 of the Deputy Inspector General of Police, U.P Bareilly Circle is quashed.

The Divisional Railway Manager Vs. Presiding Officer (Madras High Court):

“68. As rightly pointed out by the learned counsel for the dismissal employee- writ petitioner, the Tribunal had not touched on this aspect of Article 311 (2) where the order is punitive in character, particularly when a specific issue was made before the Tribunal by the petitioner. The view of the Tribunal that contract labour or temporary employees are governed only by the terms of the contract would be acceptable if and only when the termination, as given in terms of what is listed in the order of appointment, is a ground for termination. Thus, if the order made by the second respondent had merely rested on the services of the petitioner found unsatisfactory without attributing any of those allegations as found in the show cause notice and even on lifting the veil one



finds no such allegation that tinkers with the character of an employee, then, the order of termination would pass the test that even without a regular departmental enquiry, an order of termination could be held as legally valid. However, when on the face of the order, one finds that misconduct has been the basis of the show-cause notice, the Tribunal committed a serious legal flaw in overlooking the law declared by the Apex Court. In the circumstances, the case pleaded by the petitioner is fully supported by the law laid down by the Apex Court as to what stigma means- (199) 3 SCC 60 (Dipti Prakash Banerjee Vs. Satvendra Nath Bose National Centre for Basic Sciences, Calcutta and Others). The fact that the appointment is for a fixed period, or under a contract, is of no relevance herein, in the context of the misconduct alleged. Thus, in view of the aforesaid, the termination order is liable to be set aside. It is quite apparent that the authority has been influenced by the criminal charges against the petitioner. The same is clear by the Cabinet note sent by the Ministry of Mines on 27.04.2012. The same is also apparent from the fact that as soon as the suspension case was dismissed by the Hon'ble Tribunal, the petitioner was terminated. Further the suspension order also refers to the criminal charges.

In para 28 and 29 of the judgment relied upon by the applicant himself, Hon ble Supreme could explain the concept of motive and foundation. Para 28 and 29 of the judgment read thus:-

"28. The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general



unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an enquiry is held and it is on the basis of that enquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an enquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that enquiry, the order would be punitive in nature as the enquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

29. "Motive" is the moving power which implies action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which implied the employer to take this action. If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary enquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary enquiry.

In the present case, it is not so that the appointing authority could terminate the services of the applicant with the view that the charges leveled against the



applicant in the criminal case are established or his such alleged conduct warrant its termination. The termination of services of the applicant is not the result of the nature of charges against the applicant in the criminal case or the correctness of the charges. As has been ruled by Hon ble Supreme Court in the case of **Chandra Prakash Shahi Vs. State of UP and Others** (2000(5) SCC 152), relied upon by the applicant himself if there are allegation of misconduct and enquiry is held to find out the truth of that misconduct and order terminating the services is passed on the basis of that enquiry the order would be punitive in nature and in such situation, the order would be founded on misconduct and it will not be mere matter of motive. In such situation, the order would be held vitiated. In the cases where there are allegation of serious misconduct against an employee and a preliminary enquiry is held behind his back to ascertain the truth of the allegation and a termination order is passed thereafter, the order having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary enquiry. In such situation again the order can be said to be vitiated. In the present case, admittedly, no enquiry was held to find out the correctness of the allegation against the applicant in the criminal case and the trial in respect of the charges is pending before the Court of competent jurisdiction. Nevertheless, since in the wake of the criminal case, the applicant was under suspension and NALCO Navratna, CPSE with over 7000 employees and turn over of Rs.7000 crores was facing tremendous problem due to the absence of a regular CMD for a long period of fourteen months, the respondents could be stimulated to do away with the applicant as according to them he was not effectively available to discharge the function of the post, being under suspension. There is difference



between the termination based on the misconduct proved after the inquiry and the termination on account of the pending disciplinary proceedings and continuing suspension of an employee, irrespective of the correctness of the allegation in the enquiry. In second situation, these are the pending proceedings and the continuance suspension which is motive behind termination and the misconduct involved in the criminal case/disciplinary proceedings is not the foundation of the termination. Once in terms of the extant rules and instructions, an authority has power to terminate the services of an employee, the pendency of disciplinary proceedings against him or his continued suspension cannot operate as stay against such power of the authority.

4. In *Radhey Shyam Gupta Vs U.P.State Agro Industries Corporation and Another* (JT 1998 (8) SC 585), it could be ruled that even when an criminal enquiry is held against an employee because the purpose of preliminary enquiry to find out if there is prima facie evidence or material to initiate a regular departmental enquiry against him the termination ordered without giving an opportunity to concerned employee will not be bad. In the said case, it was further held that even in a case where a regular department enquiry is started, a charge-memo issued, reply obtained, and an enquiry officer is appointed, if at that point of time, the enquiry is dropped and simple notice of termination is passed, the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. In the said case, their Lordships of Hon ble Supreme Court conclusively ruled that in such cases the allegation of truth has not been found and are merely motive, the order of the termination cannot be held to be stigmatic. Para 33 of the judgment read thus:-

“33. It will be noticed from the above decisions



that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as the above facts are merely the motive and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the Officer, as stated by Shah, J. (as he then was) in Ram Narayan Das's case (AIR 1961 SC 177). It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary inquiry is held because the purpose of a preliminary inquiry is to find out if there is prima facie evidence or material to initiate a regular departmental inquiry. It has been so decided in Champaklal's case (AIR 1964 SC 1854). The purpose of the preliminary inquiry is not to find out misconduct on the part of the Officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental inquiry is started, a charge-memo issued, reply obtained, and an enquiry Officer is appointed - if at that point of time, the inquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry Officer has not recorded evidence nor given any findings on the charges. That is what is held in Sukh Raj Bahadur's case (AIR 1968 SC 1089) and in Benjamin's case (1967 Lab LJ 718) (SC). In the latter case, the departmental inquiry was stopped because the employer was not sure of establishing the guilt of the employee. In all these cases the allegations against the employee merely raised a cloud on his conduct and as pointed by Krishna Iyer, J. in Gujarat Steel Tubes case (AIR 1980 SC



1896), the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer, by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found, and were merely the motive.

In the present case though initially the applicant was suspended, but no departmental enquiry proceeding set in motion against him and a decision was taken to terminate his services in terms of the provisions of para 1.1 of the terms and conditions of the appointment as well as Clause 63 (1) (f) of the Article of Association, NALCO. Such decision taken by the respondents is in consonance with the law declared by Hon'ble Supreme Court in **Radhey Shyam Gupta Vs U.P. State Agro Industries Corporation and Another** (ibid) and cannot be held to be vitiated in any manner. At best the conduct of the applicant in criminal case can be treated as motive for termination which would not render the impugned order stigmatic or punitive. In the wake, we do not find any substance in the plea put forth by the learned counsel for applicant that the impugned order is liable to be set aside as punitive or stigmatic.

5. The next salient plea raised on behalf of applicant is that the services of incumbent of a tenure post cannot be terminated or brought to an end before completion of tenure. To buttress the plea, learned counsel for applicant relied upon the judgments of Hon'ble Supreme Court in **Union of India and Another vs. Shardindu** (



2007) 6 SCC 276) and **P.Venugopal Vs. Union of India** (2008) 5 SCC-1). As far as reliance placed by the applicant in the judgment of **UOI Vs. Shardindu** is concerned, in the said case the Hon ble Single Judge of the High Court after considering the matter took the view that there was no question of invoking the pleasure of doctrine under Article 310 of the Constitution in the facts of the case and the services of the petitioner could not be terminated. The view taken in the said case was that once the method of termination of service of an incumbent was provided under the Act, his services could only be terminated in such manner and not otherwise. Such view taken by the Hon ble Single Judge of High Court was upheld by the Division Bench and finally by Hon ble Supreme Court. Para 5 of the judgment read thus:

“5. Learned Single Judge after considering the matter took the view that there was no question of invoking the pleasure doctrine in the present case under Article 310 of the Constitution of India and the respondent was not on deputation, therefore, his services could not be terminated and he could not be repatriated back to the State of Uttar Pradesh. It was also held that since the incumbent was appointed under the Act of 1993 and he had not incurred any of the disqualifications mentioned in the Act, therefore, his services could not be terminated. It was also held that as per the method of termination of an incumbent as provided under the Act, his services could only be terminated in the manner as provided under the Act and none else. Learned Single Judge allowed the writ petition and set aside the order passed by the Union of India. Against the order passed by learned Single Judge of the High Court, a writ appeal was filed by the appellants before the Division Bench of the High Court which confirmed the order passed by the learned Single Judge, by order dated 27.7.2006. Hence aggrieved against the impugned order dated 27.7.2006 passed by the Division Bench of the High



Court of Delhi, the present Special Leave Petition was filed by the appellants .

*Ex-facie, the facts involved in the case relied upon by the learned counsel for the applicant are completely distinct from the facts and controversy involved in the present case. In the said case, the termination was ordered under Article 310 of the Constitution and a view was taken that Mr. Shardindu was entitled to the protection of the procedure enunciated in the Act of 1993. As far as the present case is concerned, the order of termination was passed in terms of the provisions of Article 63 (1) (f) of the Association of NALCO. If any support can be drawn from the aforementioned judgment of the Supreme Court, the same would be in favour of the respondents. As far as the judgment of **P. Venugopal Vs. Union of India & Ors** (ibid) is concerned, in the said case, Dr.P.Venugopal i.e. petitioner called in question the Constitutional validity of the proviso 1-A of Section 11 of the All India Institute of Medical Sciences (Amendment) Act, 2007 and contended that his services could not be terminated before completion of his five years term in the office of Director (AIIMS). In the said case, Hon ble Supreme Court found that the impugned proviso was manifestly designed to apply and was in fact applied only against the writ petitioner and was not intended and could not apply even, in principle or otherwise, to anybody else because there was only one AIIMS in the country, there was only one Director of AIIMS on the date of commencement of the amending Act and there could be none else who could conceivably be affected by its operation. Para 21 of the judgment read thus:-*

“21. Let us now look into the facts of the case in hand. In the instant case it was submitted that the impugned proviso was manifestly designed to apply and was in fact applied only against the writ petitioner and was not intended to and could not apply even, in principle or otherwise, to anybody else because there was only one AIIMS in the country,



there was only one Director of the AIIMS on the date of commencement of the Amending Act, and there could be none else who could conceivably be effected by its operation. It is claimed that reference to a similar proviso introduced in the PGI Chandigarh Act, 1956, is somewhat misleading as the term of appointment of the present Director of PGI Chandigarh was only upto the age of 68 years and accordingly there was no question under the PGI Chandigarh Act as the proviso is affecting the present incumbent or his successor.”

Finally having taken a view that proviso 1-A of Section 11 was inserted for termination of services of applicant, the Hon'ble Supreme Court could strike down the same. Para 37 to 40 of the judgment read thus:-

“37. Such being our discussion and conclusion, on the constitutionality of the proviso to Section 11(1-A), we must, therefore, come to this conclusion without any hesitation in mind, that the instant case is squarely covered by the principles of law laid down by this Court in the various pronouncements as noted hereinabove including in D.S. Reddi, Vice-Chancellor, Osmania University v. Chancellor D.S. Reddi, Vice-Chancellor, Osmania University v. Chancellor, AIR 1967 SC 1305 : (1967) 2 SCR 214.

38. In D.S. Reddi²⁰, the facts of that case are somewhat similar to that of the writ petitioner. In that decision, D.S. Reddi was already a Vice-Chancellor for the past seven years and had not challenged the fixation of term from five years to three years. He was aggrieved by the second amendment in the University Act whereby Section 13-A was introduced to make the provision of Section 12(2) providing for inquiry by an Hon'ble Judge of the High Court/Supreme Court and hearing before premature termination of the term of the Vice-Chancellor inapplicable to the incumbent to the office of the Vice-Chancellor on the commencement of the second Amendment. The core



contention of D.S. Reddi was that this amendment was only for his removal and therefore was a case of "naked discrimination" as it also deprived the protection of Section 12(2) to him when Section 12(2) was applicable to all other Vice-Chancellors and there being no distinction in this regard between the Vice-Chancellor in office and the Vice-Chancellors to be appointed. In that situation, the plea of the respondent Government was that the provision similar to Section 13-A was also incorporated in two other enactments relating to Andhra University and Shri Venkateswara University and was, therefore, not a one-man legislation. It was further contended by the State that it was always open and permissible to the State Legislature to treat the Vice-Chancellor in office as a class in itself and make provisions in that regard. All the contentions on behalf of the State Government were rejected by the Constitution Bench judgment of this Court in D.S. Reddi and it was held that it was a clear case of "naked discrimination" for removal of one man and by depriving him of the protection under Section 12(2) of the Act without there being any rationality of creating a classification between the Vice-Chancellor in office and the Vice-Chancellor to be appointed in future.

39. It was further held in D.S. Reddi²⁰ that such a classification was not founded on an intelligible differentia and was held to be violative of Article 14 of the Constitution of India. Accordingly, the provision of Section 13-A was held to be ultra vires and unconstitutional and hit by Article 14 of the Constitution. Similarly in the present case, the impugned proviso to Section 11(1-A) itself states that it is carrying out premature termination of the tenure of the writ petitioner. It is also admitted that such a premature termination is without following the safeguards of justifiable reasons and notice. It is thus a case similar to D.S. Reddi. D.S. Reddi, Vice-



Chancellor, Osmania University v. Chancellor, AIR 1967 SC 1305 : (1967) 2 SCR 214 and other decisions cited above that the impugned legislation is hit by Article 14 as it creates an unreasonable classification between the writ petitioner and the future Directors and deprives the writ petitioner of the principles of natural justice without there being any intelligible differentia.

40. In view of our discussion made hereinabove and for the reasons aforesaid, we are of the view that this writ petition is covered by the decisions of this Court in D.S. Reddi and L.P. Agarwal L.P. Agarwal (Dr.) v. Union of India, (1992) 3 SCC 526 : 1992 SCC (L&S) 731 : (1992) 21 ATC 249 and the impugned proviso to Section 11(1-A) of the AIIMS Act is, therefore, hit by Article 14 of the Constitution. Accordingly, we hold that the proviso is ultra vires and unconstitutional and accordingly it is struck down. The writ petition under Article 32 of the Constitution is allowed. In view of our order passed in the writ petition, the writ petitioner shall serve the nation for some more period i.e. up to 2-7-2008. We direct the AIMS Authorities to restore the writ petitioner in his office as Director of AIIMS till his period comes to an end on 2-7-2008. The writ petitioner is also entitled to his pay and other emoluments as he was getting before premature termination of his office from the date of the order of termination. Considering the facts and circumstances of the present case, there will be no order as to costs."

The ratio decendi of the judgment was that the naked discrimination for removal of one man and depriving him of statutory protection without there being any rationality of creating a classification between the one in office and the one to be appointed in future could not be sustained. In the present case, it is not so that the respondents incorporated any provision of law subsequent to appointment of the applicant to bring an



end to his services. The Articles of Association of NALCO in terms of which the impugned order has been passed was very much in existence before the applicant was appointed as its CMD. It is *stare decisis* that a judicial precedents cannot be followed as statute and has to be relied upon with reference to the facts of the case wherein the precedent is laid down. In **Collector of Central Excise, Calcutta v. M/s Alnoori Tobacco Products & another** (2004 (6) SCALE 232), Hon ble Supreme Court ruled thus:

“12. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. V. Horton* (1951 AC 737 at p.761), Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

13. In *Home Office v. Dorset Yacht Co.* (1970 (2) All ER 294) Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition It will require qualification in new circumstances."



Megarry, J in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

14. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

15. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

In the wake, we are unable to take a view that the services of incumbent of a tenurial post cannot be terminated. It is the case of the applicant himself that he could be removed from service after following the procedure laid down in Rule 28 of NALCO Conduct and Discipline Rules. As far as the plea of deep rooted conspiracy hatched against him raised by the applicant is concerned, what he mean to say is that he could be falsely implicated in the criminal case registered under Section 7, 12, 13 (2) (b) of the PC Act. The issue is



subject matter of Trial by the concerned Court and in the present proceedings we cannot comment upon the correctness of the charges involved therein. The applicant has also raised the plea of non payment of his legal dues. In the counter reply filed on behalf of respondents, it has been specifically stated that the dues for the period of notice were already paid to him. The plea was not pressed by the learned counsel for the applicant during the course of hearing. It is also the case of applicant that the Ministry of Mines has been intended to bring to an end to his services (premises) under Rule 33 of NALCO Conduct and Discipline Rules, thus the termination under Article 63(1)(f) is without any due application of mind. We find that when in para 8 of the note for appointment Committee of the Cabinet, a reference is made to Rule 33 (ii) & (iii) of NALCO CDA Rules, in para 6 thereof, a reference is also made to para 1.1 of the terms and conditions of the appointment of applicant as CMD, NALCO. Merely because in the said note, a reference was made to Rule 33 (ii) & (iii) it cannot be held that the service of the applicant could not have been terminated in terms of para 1.1 of the terms and conditions of appointment read with Article 63 (1)(f) of Articles of Association of NALCO. It is stare decisis that the ramification of the content of note is not more than discussion and deliberation on the subject matter in issue. For easy reference para 6 and 8 of the note are reproduced hereinbelow:-

“6. As per para 1.1. of the terms & conditions of the appointment of Shri Srivastava as CMD, NALCO (Ann-VII) issued with the approval of Department of Public Enterprises (DPE), his appointment will be for a period of 5 years w.e.f. 1.10.2009(FN) in the first instance or till the date of superannuation or until further orders, whichever event occurs earlier and in accordance with provisions of the Companies Act, 1956 as amended. The appointment may however be terminated even during this period by either side on



three months notice or on payment of three months salary in lieu thereof. Further, it follows from para 1.15.1 of the terms & conditions of appointment that the Conduct, Discipline and Appeal Rules of NALCO are applicable mutatis mutandis to Shri Srivastava with the modification that the Disciplinary Authority in his case is the President.

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8. In view of the circumstances mentioned in para 5 above, the position of Shri A.K.Srivastava to continue as CMD of NALCO in future has become completely untenable and therefore it is in public interest to consider terminating his services in order to have a clear vacancy and appoint a fresh CMD on full time basis to run the administration of NALCO in an efficient manner. Accordingly, in line with the provisions of the terms & conditions of the appointment of Shri Srivastava and Rule 33(ii) & (iii) of NALCO CDA Rules, it has been decided by the concerned Disciplinary Authority, i.e. Minister of State (Independent Charge) for Mines to terminate the services of Shri A.K.Srivastava as CMD, NALCO."

As far as the plea of violation of principles of natural justice and Rule 26(i) and 28 of CDA Rules is concerned, the rules provide for imposition of penalty after enquiry. In the present case, the respondents have not brought the tenure of the applicant as CMD, NALCO to an end by inflicting upon him any penalty and have terminated his services in terms of the provisions of para 1.1 of the terms and conditions of his appointment read with Article 63 (1)(f) of the Articles of Association, NALCO. In Article 63 (1) (f), it has been categorically provided that the Chairman-cum-Managing Director, Director/Managing Director of the NALCO may be removed from office in accordance with the terms of appointment, or if no such terms are specified, on the expiry of 3 months of the notice required to be issued in



writing or with immediate effect on payment of the pay in lieu of the notice period. Also in para 1.1 of the terms and conditions of the appointment of the applicant, it was specified that his appointment might be terminated even during the period of tenure by either side on 3 months notice or on payment of three months salary in lieu thereof. The contents of Article 63 1)(f) and para 1.1 of the terms and conditions of appointment are reproduced hereinbelow:-

“63 (1)(f).The President may from time to time or at any time remove the Chairman /Chairman-cum-Managing Director, Director /Managing Director or any whole time Director from office at his absolute discretion Chairman and whole time Directors may be removed from office in accordance with the terms of appointment, or if no such terms are specified, on the expiry of 3 months notice issued in writing by the President or with immediate effect on payment of the pay in lieu of the notice period.

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1.1 Period: His appointment will be for a period of 5 years w.e.f. 1.10.20009(FN) in the first instance or till the date of superannuation or until further orders, whichever event occurs earlier and in accordance with the provisions of the Companies Act, 1956 as amended. The appointment may. However, be terminated even during this period by either side on 3 months notice or on payment of three months salary in lieu thereof.”

During the course of hearing, learned counsel also raised the plea that once after the expiry of the first year of tenure, the performance of the applicant was reviewed and he was further continued in service, the order of termination could not have been passed. We find that the provisions of para 1.1 are independent of those of para 1.2 and Clause. Para 1.1 provide for termination of services at any time during the tenure. Though neither there is any ground raised in the OA or amended OA to



*this effect nor during the course of argument, learned counsel for applicant could make out any case, but since in the Original Application there is prayer to quash the provision of para 1.1 of the appointment letter and Articles 63 (1) (f) of the Articles of Associations, NALCO, we need to deal with the same. It is stare decisis that the Court while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies and the judicial review lie only on certain well defined grounds. It is also well settled that the Courts should not ordinarily interfere with a policy decision of the State. The judicial review is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law and is not a tool of substituting its own decision for that of some other body. Once it is the policy decision taken by the respondents to have a provision for termination of services of CMD of NALCO before expiry of the tenure, it is not open for this Tribunal to interfere with the same. Moreover, as has been noted hereinabove, the learned counsel for applicant could not make out any case far less sufficient one to persuade us to interfere with in para 1.1 of the appointment letter or Article 63 (1)(f) of Articles of Association of NALCO. In **State of U.P. and Another Vs. Johri Mal** (2004 (4) SCC 714), Hon ble Supreme Court ruled thus:-*

“28. The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi judicial or administrative. The power of judicial review is not intended to assume a supervisory role or done the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the Courts step into the areas exclusively reserved



by the supreme lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review Court. The limited scope of judicial review succinctly put are:

(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies.

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasions miscarriage of justice.

*(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies. (See *Ira Munn v. State of Ellinois*, 1876 (94) US (Supreme Reports) 113).*

*Also in **Mullikarjuna Rao and Others etc etc. Vs. State of A.P. and Others** (AIR SC 1251), it has been ruled thus:-*

*“11. This Court relying on *Narender Chand Hem Raj v. Lt. Governor, Union Territory, Himachal Pradesh* (1972) 1 SCR 940 : (AIR 1971 SC 2399) and *State of Himachal Pradesh v. A Parent of a Student of Medical College, Simia* (1985) 3 SCC 169 : (AIR 1985 SC 910) held in *Asif Hameed v. State of Jammu & Kashmir*, 1989 Supp. (2) SW364:(AIR 1989SC 1899) as under (Para 19):*



"When a State action is challenged, the function of the Court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of Policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive."

12. The Special Rules have been framed under Art. 309 of the Constitution. The power under Art. 309 of the Constitution to frame rules is the legislative power, This power under the Constitution has to be exercised by the President or the Governor of a State as the case may be. The High Courts or the Administrative Tribunals cannot issue a mandate to the State Government to legislate under Article 309 of the Constitution. The Courts cannot usurp the functions assigned to the executive under the Constitution and cannot even indirectly require the executive to exercise its rule making power in any manner. The Courts cannot assume to itself a supervisory role over the rule making power of the executive under Article 309 of the Constitution.

Once the services of the applicant could be terminated before completion of tenure, he cannot be held entitled to the terminal benefit as CMD, NALCO. Nevertheless, he would be at liberty to work out his claim for all terminal benefits admissible to him with reference to the post held by him before joining as CMD, NALCO and nothing noted hereinabove would stand in his way to work out



such right.”

43. On the aspect of termination, the submission of Mr. Ralli is primarily that clause 1.1 of the terms of appointment and Article 63(1) (f) of the Articles of Association are void being in violation of Articles 14 and 16 of the Constitution of India, inasmuch as any stipulation facilitating termination of services of an employee without holding any enquiry, by giving notice or pay in lieu thereof is arbitrary, unfair, unjust and in violation of Articles 14, 16(1), 19(1)(g) and 21.

44. We are not in agreement with the said submission of Mr. Ralli. It is an admitted fact that the appointment of the petitioner as CMD of NALCO was for a period of five years, *vide* order dated January 28, 2010. Clause 1.1 of his terms of appointment clearly stipulates that the appointment may, however, be terminated even during the said period by either side on three months' notice or on payment of three months' salary in lieu thereof. Article 63 (1)(f) authorizes the President of India to remove the Chairman or any Whole Time Director at his discretion and according to the terms of appointment. It is necessary to note here that the service of the petitioner was governed by the terms of his appointment, accepted without any protest or demur. In fact, the entire case of the petitioner rests on the fact that he was appointed to a tenure post by virtue of the appointment order. Normally, he would be precluded from challenging the very terms of appointment he is relying upon to support of his case. Be that as it may, since the appointment of the petitioner was on a purely contractual basis, and not based on any statutory rules/instructions, he cannot successfully mount a challenge to



the said provisions.

45. The question now would be whether *de hors* the provisions in the appointment letter/ terms of appointment, the respondents were required to hold an enquiry against the petitioner before terminating his services. Before we answer this issue, it is necessary to deal with the judgments relied upon by Mr. Ralli. In the case of ***Delhi Transport Corporation (supra)*** a stipulation providing for termination by giving notice for a particular period or pay in lieu thereof was held to be arbitrary and in violation of Articles 14 and 16. The said judgment may not be applicable to the facts of this case inasmuch as in the said case, the Supreme Court was concerned with a stipulation in the appointment letter of a person who was appointed on a permanent basis. Similar is the position in the cases of ***West Bengal State Electricity Board (supra)***, ***M. Gopalakrishnaiah (supra)***, ***Central Inland Water Transport Corporation (supra)***, ***O.P. Bhandari (supra)***, ***N.K. Aggarwal (supra)*** and ***Uptron India (supra)***. In the present case, the appointment was for a period of five years i.e., on a tenure basis. It is not a permanent appointment in the sense that the employee continues in service till the age of his superannuation resulting in grant of pension to him.

46. The termination order issued to the petitioner reads as under:-

“The President was pleased to appoint in terms of Article 63 of the Articles of Association of National Aluminium Company Limited (NALCO), Shri Abhay Kumar Srivastava Chairman-cum-Managing Director, National Aluminium Company Limited w.e.f. 01.10.2009 for a period of 5 years or till the date of superannuation or until further orders, whichever is the earliest, vide



Ministry of Mines' Order No.2(2)/2007-Met. Dated 11.8.2012, Inter-alia, with the stipulation that detailed terms and conditions shall be issued separately.

2. The terms and conditions of appointment, issued vide Ministry of Mines letter No. 2(5)/2009-Met.1 dated 28.1.2010, at para 1.1 stipulated as hereunder Period: His appointment will be for a period of 5 years w.e.f.1.10.2009(FN) in the first instance or till the date of superannuation or until further orders, whichever event occurs earlier and in accordance with the provisions of the Companies Act, 1956 as amended. The appointment may, however, be terminated even during this period by either side on 3 months notice or on payment of three months salary in lieu thereof."

3. The President after careful consideration by invoking the provisions of para 1.1 of the of the terms and conditions of appointment of Shri Abhay Kumar Srivastava, as Chairman-cum-Managing Director, National Aluminium Company Limited (presently under suspension) hereby terminates his services as Chairman-cum-Managing Director National Aluminium Company Limited Shri Abhay Kumar Srivastava thus stands removed from the said post in terms of Article 63 of the Articles of Association of NALCO with immediate effect by payment of three months salary, in lieu of three months notice."

47. A perusal of the said order reveals that in paragraphs 2 and 3 thereof, a reference has been made to clause 1.1 of the order of appointment dated January 28, 2010 and Article 63 of the Articles of Association. No reasons have been given by the respondents for terminating the services of the petitioner, making it an order *simplicitor*.

48. Though, the letter of termination is *simplicitor* and not stigmatic or punitive, since a challenge has been made to the



termination order before this Court to find out the foundation leading to termination of the services of the petitioner, it is necessary to examine what the motive was for the said order. In *State of U. P. & Anr. v. Kaushal Kishore Shukla*, (1991) 1 SCC 691, the Supreme Court upheld an order of termination which implied that the employee is unfit for job and observed that mere fact that an enquiry was held against the employee prior to the termination, does not turn an order of termination into one of punishment.

49. The Supreme Court in the case of *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and Another*, (2002) 1 SCC 520 has clearly laid down the law as to when a removal/termination letter is an order *simplicitor* and not stigmatic. In paragraph 28 of the judgment, in the context of a probationer challenging his termination, it was held that the Court has to first apply the “stigma” or the “form” test. If the order survives then the “substance” of the termination will have to be found out. In other words, it follows that if the order of termination is not stigmatic but *simplicitor*, though the foundation for such an order is the unsuitability of the government servant/employee, then such termination cannot be held to be illegal. Having said that, now coming to the question posed for our consideration, whether, as stated by Mr. Ralli, an enquiry was required to be held before terminating the services of the petitioner, an enquiry becomes relevant only when the termination order is punitive. In other words, if the order of termination refers to any misconduct committed by the employee, then the termination cannot be effected without an enquiry following the principles of natural justice.



50. The Supreme Court in *Pavanendra Narayan Verma (supra)* has in paragraphs 21 to 32 referring to its various judgments, held as under:-

“21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.

22. The three factors are distinguishable in the following passage in Samsher Singh v. State of Punjab [Samsher Singh v. State of Punjab, (1974) 2 SCC 831 : 1974 SCC (L&S) 550] where it was said: (SCC p. 851, para 64)

“64. Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an inquiry on charges of



misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection.”

(emphasis supplied)

23. Thus in Benjamin case [(1967) 1 LLJ 718 (SC)] complaints had been received against a temporary employee. A notice had been sent to the employee to show cause why disciplinary action should not be taken against him. The inquiry officer was appointed but before the inquiry was completed, the services of the employee were terminated with one month's salary in lieu of notice. The Constitution Bench upheld the order of termination and drew a distinction between a preliminary inquiry and a departmental inquiry. It was held that a preliminary inquiry held to satisfy the Government whether there was no reason to dispense with the services of the temporary employee should not be mistaken for a departmental inquiry held to decide whether punitive action should be taken.

24. In State of U.P. v. Kaushal Kishore Shukla [(1991) 1 SCC 691 : 1991 SCC (L&S) 587 : (1991) 16 ATC 498] the employee had been appointed on a temporary basis for a fixed tenure. During the period of his service, adverse entries were made in his character roll. Complaints were also received by the auditors of the employer. A summary inquiry was held. It was found that the auditor's complaint was correct. The employee was transferred to another post. He did not join and the employer terminated his services. This Court, while upholding the order of termination, said that the mere fact that prior to the issue of the termination an inquiry was held against the employee did not make the order of termination into one of punishment.

25. In Radhey Shyam Gupta v. U.P. State Agro Industries Corpn. Ltd. [(1999) 2 SCC 21 : 1999 SCC (L&S) 439] a full-scale inquiry was held into the allegations of bribery against a temporary employee. The Court set aside the



termination because it found that the report submitted was not a preliminary inquiry report but it was in fact a final one which gave findings as to the guilt of the employee.

26. In Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta [(1999) 3 SCC 60 : 1999 SCC (L&S) 596] the termination order itself referred to three other letters. One of the letters explicitly referred to misconduct on the part of the employee and also referred to an Inquiry Committee's report, which report in its turn had found that the employee was guilty of misconduct. The termination was held to be stigmatic and set aside.

27. The case of Chandra Prakash Shahi v. State of U.P. [(2000) 5 SCC 152 : 2000 SCC (L&S) 613] related to a constable who was on probation after successfully completing his training. The constable completed his period of probation without blemish. One year later, his services were terminated by issuance of a notice in terms of Rule 3 of the U.P. Temporary Government Servants (Termination of Service) Rules, 1975. An inquiry was held into the allegations of misconduct. The Court found as a fact that the inquiry was not held to judge the suitability of the constable but with a view to punish him. The order was held to be punitive and set aside.

28. Therefore, whenever a probationer challenges his termination the court's first task will be to apply the test of stigma or the "form" test. If the order survives this examination the "substance" of the termination will have to be found out.

29. Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although



strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job.”

30. As was noted in Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences [(1999) 3 SCC 60 : 1999 SCC (L&S) 596] : (SCC p. 73, para 28)

“28. At the outset, we may state that in several cases and in particular in State of Orissa v. Ram Narayan Das [AIR 1961 SC 177] it has been held that use of the word ‘unsatisfactory work and conduct’ in the termination order will not amount to a stigma.”

31. Returning now to the facts of the case before us. The language used in the order of termination is that the appellant's “work and conduct has not been found to be satisfactory”. These words are almost exactly those which have been quoted in Dipti Prakash Banerjee case [(1999) 3 SCC 60 : 1999 SCC (L&S) 596] as clearly falling within the class of non-stigmatic orders of termination. It is, therefore safe to conclude that the impugned order is not ex facie stigmatic.

32. We are also not prepared to hold that the enquiry held prior to the order of termination turned this otherwise innocuous order into one of punishment. An employer is entitled to satisfy itself as to the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of any allegation that may have been made about the employee. A charge-sheet merely details the allegations so that the employee may deal with them effectively. The enquiry report in this case found nothing more against the appellant than an inability to meet the requirements for



the post. None of the three factors catalogued above for holding that the termination was in substance punitive exists here.”

51. In the case in hand, as stated above, the order of termination is *simplicitor* and does not cause any stigma and as such is not punitive. Hence, no enquiry was required to be held against the petitioner before terminating his services. The Tribunal is justified in rejecting the O.A. insofar as the challenge to the termination is concerned.

52. Mr. Ralli has relied upon the judgment in ***Dr. L.P. Agarwal (supra)*** to contend that even a tenure appointee cannot be removed from service before the completion of his tenure. In that case, the petitioner was appointed as the Director of All India Institute of Medical Sciences for a period of five years, but was later compulsorily retired from service in public interest by giving him three months pay and allowances *in lieu* of notice. The Supreme Court observed that ‘tenure’ means a term during which an office is held, and that it is a condition of holding such office. Such a person does not superannuate, he only goes out of office on completion of his tenure. As the concept of superannuation which is well understood in service jurisprudence is alien to tenure appointments, which has a fixed lifespan, the Court was of the view that the question of prematurely retiring the petitioner does not arise. Though the Court also observed that once a person is appointed to the tenure post his appointment to the said office begins when he joins and comes to an end on completion of the tenure unless curtailed on justifiable grounds, the circumstances under which a tenure appointment could be cut short was not gone into in the factual



circumstances. In the present case, the tenure of the petitioner was terminated and no question of retiring him ever arose. As such this judgment is clearly distinguishable.

53. Insofar as the judgment in *Nina Lath Gupta (supra)* is concerned, therein the petitioner was aggrieved by the actions of the respondent who terminated her services by a punitive and stigmatic order laying down the reasons for her termination, without affording her any opportunity of hearing or conducting an inquiry. Though the stigmatic part of the order was later withdrawn, this Court was of the view that the order was founded on certain allegations and was not an innocuous or a *simplicitor* order of termination. Though the order was withdrawn in order to wriggle out of legal implications, the allegations initially made were not wiped out and the impugned order was held to be a camouflage, founded on the same allegations, as there was no fresh reason / trigger for truncating her tenure. Suffice it to state, the judgment has no applicability to the facts of the present case, as we have already held the order to be *simplicitor* and not punitive in character.

54. The question as to whether the services of a person appointed on a contractual basis can be terminated prematurely had come up for consideration before the Supreme Court in the case of *Indian Railway Construction Company Limited v. Lt. Col. AK Dogra (Retd.) 1993 SCC OnLine Del 125* on which reliance has been placed by Mr. Ralli. The Apex Court while holding that even where the appointment is contractual, the tenure of the employee cannot be cut short or brought to an end arbitrarily at the whim and caprice of the employer, observed



that there must exist adequate reasons for bringing an end to the services of an employee, for such an appointment to be terminated before the contractual period expires. Therefore, an inference can be drawn that if adequate and cogent reasons exist, the services of a person engaged/appointed on a contractual/tenure basis can be lawfully terminated by the employer.

55. Now coming to the other pleas as advanced by Mr. Ralli, the same are primarily regarding payment of gratuity, leave encashment and PRP. Insofar as the payment of gratuity is concerned, there is no dispute that an amount of ₹2,24,130/- as received from CCI- the erstwhile office of the petitioner, has been released to the him. The claim of the petitioner is primarily on the balance amount of ₹3,63,402/-. The plea of Ms. Raju in this regard is primarily relying upon the criminal proceedings initiated against the petitioner, inasmuch as in the charge sheet filed by the CBI, there are serious allegations of illegal gratification leveled against the petitioner and the case is pending trial at the Court of the Special Judge, New Delhi. The respondents are not in a position to calculate the exact damages incurred by Government of India during the tenure of the petitioner as CMD, NALCO and are constrained to withhold the service benefits as a precautionary measure till the disposal of the CBI case.

56. There can be no dispute that gratuity is payable to the petitioner under the Payment of Gratuity Act, 1972. Section 4(6) of the Act lays down certain conditions for forfeiture of gratuity.

“4.xxx

(6) *Notwithstanding anything contained in sub-section*



(1),—

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee 17 [may be wholly or partially forfeited]—

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.”

57. It is only on the above instances that the gratuity of an employee can be withheld/ forfeited. None of the above instances are applicable in the case in hand as it is not the case of the respondents that the services of the petitioner has been terminated for any misconduct, act, willful amount or negligence causing any damage or loss to, or destruction of, property belonging to the employer. Nor has the petitioner been terminated for any offences involving moral turpitude. In other words, in the absence of any ground for terminating the services of the petitioner as contemplated under Section 4 of the Payment of Gratuity Act, the respondents cannot withhold the gratuity of the petitioner.

58. Insofar as the payment of leave encashment is concerned, Ms.



Raju has relied upon the following provision of certain rules which according to her shall be applicable in case of the petitioner. Clause 3.1.20.3.4 as relied upon by Ms. Raju reads “*Where the services of an employee are terminated on disciplinary ground, no encashment of Earned Leave, Half Pay Leave and Sick Leave will be permitted.*” Suffice to state, the petitioner has not been terminated on disciplinary grounds. In fact it is the case of the respondents themselves that the removal of the petitioner is for administrative reasons. If that be so, leave encashment of the petitioner cannot be withheld.

59. Similarly, on the aspect of PRP, as per Ms. Raju, the same can be withheld if the employee is under suspension or any disciplinary proceedings have been initiated against him. In that regard, she has relied upon a clarification dated April 24, 2012 issued by NALCO, relevant part whereof reads as under:-

- “1. PRP for the reckoning year i.e. year when disciplinary proceedings are initiated will be withheld.*
- 2. However, once the reckoning year passes without completion of process and without imposition of penalty, PRP for the year passed will be released and the ‘reckoning year’ will move on to the next year, in order to ensure that the condition on release of PRP i.e. no payment for the year of imposition of major penalty or 10% deduction from PRP for the year of imposition of minor penalty is fulfilled. This would, however, be ensured that one full year’s PRP is withheld till the process is complete.*
- 3. Hence, all cases of pending enquiry in which no penalty has been imposed till the date of issue of Circular on PRP, i.e. 12/04/2012, the ‘reckoning year’ will be 2012-13 and PRP for the past years will be released, subject to above conditions.”*



60. The above state that during the period of suspension or pendency of disciplinary proceedings, PRP shall be withheld. In the case in hand, though no disciplinary proceedings were initiated, as the petitioner was suspended on February 26, 2011, and continued to be under suspension till the date of his termination, he shall only be entitled to PRP till the date of his suspension. In fact, his claim for PRP is also only till February 26, 2011. We hold that PRP as due on the date of his suspension, is payable to the petitioner.

61. Mr. Ralli has placed reliance on the judgments in *State of Karnataka v. R.S. Naik, 1983 SCC OnLine Kar 56* and *S.P. Jain v. Punjab National Bank, 1992 SCC OnLine Del 479* to contend that the suspension period of the petitioner should be treated as period spent on duty and consequential financial benefits be granted. We have seen the said judgments. In both the cases, the petitioners who were placed under suspension due to their involvement in criminal cases, later retired from service, and subsequently sought the suspension period to be treated as 'on duty'. Considering the fact that the petitioners were permitted to voluntarily retire/retire in due course, the Court held that their previous orders of suspension ceased to operate, and allowed the petitions. In the present case, though the petitioner was placed under suspension, he was neither allowed to retire or complete his tenure, but was removed from office by an order *simplicitor*. The facts being different, these judgments would not help the cause of the petitioner.

62. In view of our above discussion, it must be held that the Tribunal had rightly refrained from interfering with the termination of



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the petitioner. However, we hold that the petitioner shall be entitled to PRP and leave encashment (except for the period of suspension), and gratuity.

63. The respondents shall calculate the dues payable under the three heads as per rules and release the same to the petitioner along with interest at the rate of 7% per annum, within a period of eight weeks from today.

64. The petition is disposed of in the aforesaid terms, without any order as to costs.

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65. In view of our decision, this application has become infructuous. It is dismissed as such.

V. KAMESWAR RAO, J

ANOOP KUMAR MENDIRATTA, J

NOVEMBER 20, 2023*/ds/aky*