**BEFORE HONOURABLLE THE CIVIL JUDGE**
**SENIOR DIVISION AT JUNAGADH**

**Regular civil suit no: _________of 2013**



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| | **Fakir Mahammad Noormahamad Baloch** | )) | |
| | Adult, Muslim, Serving as Forest Guard, | )) | |
| | Gir (West) Una, District Junagadh… | )) | **Plaintiff** |

Versus

| | | | |
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| 1) | **The State of Gujarat** | )) | |
| | Notice to be served through the Secretary | )) | |
| | Forest Department, Sachivalaya, Gandhinagar | )) | |
| | | )) | |
| 2) | **The Conservator of Forest** | )) | |
| | Office of the Conservator of Forest, | )) | |
| | Forest Department, Sardarbaugh, Junagadh | )) | |
| | | )) | |
| 3) | **The Disciplinary authority** | )) | |
| | Office of the Deputy Conservator of Forest, | )) | |
| | Forest Department, Dhari, Dist. Amreli | )) | |
| | | )) | |
| 4) | **The Departmental inquiry Officer** | )) | |
| | Appointed as special officer for Departmental | )) | |
| | Inquiry, Sachivalaya, Gandhinagar (Gujarat) | )) | **Defendants** |

Subject: Suit for a declaration that the action of the Disciplinary authority indicated under the relevant Disciplinary Rules reviewing and forming an opinion to conduct the second departmental proceeding on the "*self-same charges*" for which the delinquent was already awarded the punishment of dismissal from service, but the delinquent was reinstated in service based on the judgment and decree passed by the Civil Judge, Senior Division, Junagadh and confirmed up to the Supreme Court of India is unjust, unfair, unreasonable, arbitrary and patently lacking in jurisdiction, and therefore, orders in relation to second inquiry and such subsequent communications and proceedings are all without jurisdiction and produce unsustainable illegality and for a further declaration based on the judgment of the Supreme Court that held that the doctrine of merger is based on the principle that there cannot be, at one and the same time more than one operative order governing the same subject matter. Therefore, the judgment of an inferior court, if subjected to an examination by the superior court ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court. And a declaration that the Impugned order of dismissal based on departmental inquiry is illegal and void.

**Most respectfully submitted:**

1) The Plaintiff prefers to file the present suit for a declaration that the action of the Disciplinary authority indicated under the relevant Disciplinary Rules reviewing and forming an opinion to conduct the second departmental proceeding on the "*self-same charges*" for which the delinquent was already awarded the punishment of dismissal from service, but the delinquent was reinstated in service based on the judgment and decree passed by the Civil Judge, Senior Division, Junagadh and confirmed up to the Supreme Court of India is unjust, unfair, unreasonable, arbitrary and patently lacking in jurisdiction in the absence of any rule to so review, and therefore, orders in relation to second inquiry and such subsequent communications and proceedings are all without jurisdiction and produce unsustainable illegality and for a further declaration based on the judgment of the Supreme Court that held that the doctrine of merger is based on the principle that there cannot be, at one and the same time more than one operative order governing the same subject matter. Therefore, the judgment of an inferior court, if subjected to an examination by the superior court ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court[1]. And that for further declaration that the impugned order of dismissal passed by the Disciplinary authority is illegal and void and that the Plaintiff continues in service irrespective of the order of dismissal and such similar order.



[1] **Gojer Bros. Private Limited vs Ratan Lal Singh decided on 1st May, 1974 and reported in AIR 1974 SC 1380=1975 SCR (1) 394 Bench: Honourable Justice YV Chandrachud.**

**2) The facts of the case:**



2.1 After the public advertisement for recruitment issued by the Forest Department for the post of Forest Guard as also the recommendation of the Social Welfare Officer, Junagadh under the scheme of the State Government for offering the job to the jobless, Plaintiff was interviewed on 10.03.1980.

2.2 The Plaintiff was appointed on clear and substantive post of the Forest Guard on and with effect from 08.04.1980 after undergoing the *due interview test and following the procedure prescribed in this behalf.*

2.3 After considerably long span of services, the Plaintiff was arbitrarily suspected of submitting a false school certificate at the time of interview and thus cheated the Government.

2.4 The Plaintiff was summarily dismissed from service. The Plaintiff was never told of the charges upon which the action was taken and such summary dismissal from service was declared illegal and void.

2.5 Thereafter, the Deputy Conservator of Forest collected the alleged relevant material and as a result, Forest Department criminally prosecuted the present Plaintiff. However, the Plaintiff was acquitted of the charges levelled in a criminal trial.

2.5 While, the Criminal trial was pending before the Learned Chief Judicial Magistrate at Junagadh, the Disciplinary authority at that point of time also ordered simultaneous proceeding in the form of departmental inquiry.

2.6 Lastly, the Plaintiff was dismissed from service by an order dated: 24.09.1999. The Plaintiff preferred an appeal under the rules on 03.10.1999, but the same was dismissed.

2.7 The Plaintiff filed a Regular Civil Suit NO: 536 of 1999 before the Civil Judge, Senior Division at Junagadh wherein the Plaintiff raised various factual aspects and the legal grounds.



2.8 The said suit came up for final hearing before the Learned Civil Judge, Senior Division, Junagadh and after taking into account the evidence placed on record by both the parties and hearing on the issues involved, the Learned Civil Judge, Senior Division, Junagadh pronounced the judgment and drew a decree accordingly.

The Learned Judge passed the following final order:

"The Plaintiff's suit is partly decreed. It is to be declared that the impugned departmental inquiry and dismissal order and such similar order confirming the punishment are illegal and void. The Plaintiff is hereby ordered to be reinstated in service with consequential benefits as per the Government rules. The *Department is directed to reinstate* the Plaintiff within one month from the order of this court *with all consequential benefits.* Parties have to bear their own cost. Decree to be drawn accordingly."

Copy of the said judgment Dated: 15.09.2005 pronounced by the Learned Civil Judge, Senior Division, Junagadh is produced on the record of this Honourable Court.

2.9 Being aggrieved and dissatisfied with the said judgment pronounced and the decree drawn, the Forest Department preferred a Regular Civil Appeal NO: 31 of 2006 before the Learned District Judge at Junagadh as provided under Section 96 of the Civil Procedure Code. Learned District Judge, Junagadh dismissed the Regular appeal.

The Learned District Judge, Junagadh passed the following order in a judgment dated: 29.04.2009.

"The appeal is hereby dismissed. The order of the Learned trial Court in RCS NO: 536 of 1999 declaring the departmental inquiry as illegal and void is hereby upheld. <u>It would be open for the appellants to hold inquiry against the respondent plaintiff in accordance with law</u>. No order as to cost. Decree to be drawn accordingly."

Copy of the said judgment Dated: 29.04.2009 pronounced by the Learned District Judge, Junagadh is produced on the record of this Honourable Court.



2.10 Being aggrieved and dissatisfied with the said judgment and decree passed by the Learned District Judge, Junagadh confirming the judgment of the Learned Civil Judge, Senior Division, Junagadh, the Forest Department carried the matter in Civil Second Appeal 230 of 2009 before the High Court as provided under Section 100 of the Civil Procedure Code.

2.11 The said Civil Second Appeal NO: 230 of 2009 came up for hearing before his Lordship Justice HB Antani, who was pleased to dismiss the appeal so preferred by the State.

The following judgment is reproduced below for ready perusal of this Honourable court. Said judgment is copied and produced from the Gujarat High Court website source.

This Appeal under Section 100 of Code of Civil Procedure ["Code"for short] preferred by the appellants-original defendants is directed against the judgment and decree dated 29th April 2009 passed by the learned Principal District Judge, Junagadh in Regular Civil Appeal No. 31 of 2006 whereby, the learned Judge upheld the judgment and decree dated 15th September 2005 passed by the learned 3rd Additional Senior Civil Judge, Junagadh in Regular Civil Suit No. 536 of 1999.

2. Facts of the case in brief are that interview for recruitment for the post of Forest Guard was held by appellant no.2 on 11.3.1980. Respondent-original plaintiff appeared in the interview and also produced School Leaving Certificate of Manaj School, Mangrol at the time of his interview. Eligibility criteria for the post of Forest Guard was that a candidate should have passed 7th Standard examination and should be aged between 18 to 25 years. After some time, somebody drew attention of the department that the plaintiff had produced bogus School Leaving Certificate at the time of his interview. The appellant-authority requested the District Primary Education Officer, to verify the genuineness of the School Leaving Certificate produced by the plaintiff. Authority replied that there was no such School Leaving Certificate issued by the school. Thereafter, appellant no.2 made an

inquiry at the primary school, Sasan-Gir who gave information that the certificate in question was issued by the said school on 19.1.1973. The authority, after the inquiry, came to a conclusion that at the time of interview, respondent-original plaintiff was aged about 25 years and had secured the appointment by committing fraud and by producing false and forged certificate. Criminal case was lodged against the respondent-plaintiff, wherein, he was acquitted. After completing full-fledged departmental inquiry, Deputy Conservator of Forest, passed an order dated 24.9.1999 dismissing the respondent from service. Being aggrieved and dissatisfied with the order of dismissal dated 24.9.1999, the respondent preferred Regular Civil Suit No. 536 of 1999 for declaration that departmental inquiry as well as the order of dismissal dated 24.9.1999 are illegal and void. The respondent further prayed that he may be reinstated in service with consequential benefits. Learned 3rd Additional Civil Judge, Junagadh, after recording evidence in the matter, passed judgment and decree dated 15th September, 2005 in favour of the respondent-plaintiff and declared that departmental inquiry and dismissal order and such similar order confirming punishment are illegal and void. Appellants-defendants were directed to reinstate the plaintiff-respondent in service with all consequential benefits as per the govt. rules within one month from the date of the order passed by the court. Being aggrieved by the said judgment and decree, the defendants, appellants herein, preferred Regular Civil Appeal No. 31 of 2006 before the learned Principal District Judge, Junagadh who, after going through the entire gamut of oral depositions as well as documentary evidence on the record of the case, dismissed the Appeal and confirmed the judgment and decree passed by the Trial Court. Being aggrieved by the said judgment and decree passed by the learned Appellate Judge, the appellants have preferred the present Second Appeal.

3. Ms V.S. Pathak, learned AGP representing appellants submitted that the respondent had obtained employment by producing false certificate and by playing fraud on the appellant State and, therefore, it is a fit case to quash and set aside the judgment and decree passed by the courts below. Placing reliance on the reasoning given by the courts below, learned advocate submitted that the courts below have not considered the evidence in its true perspective while decreeing the suit of the plaintiff. The courts below have also erred in considering the question with regard to violation of the principles of natural justice as the respondent has not shown any prejudice caused to him during the departmental proceedings. Thus, it is submitted that considering the aforesaid aspect and the reasons assigned by the courts below, it is a fit case to quash the judgments and decree passed by the courts below.

4. Mr M.D. Rana, learned advocate appearing for the respondent submitted that the courts below have taken into account the entire evidence on the record of the case and come to a conclusion that the order of departmental inquiry and dismissal order were not just and proper and, therefore, quashed and set aside the order of inquiry as well as dismissal order and directed reinstatement of the respondent with all consequential benefits. It is submitted that there is no infirmity in the impugned judgments passed by both the courts. Trial Court had given direction to the appellants to reinstate the respondent within a period of one month from the date of the order with all the consequential benefits. Judgment was passed by the Trial Court on 15th September, 2005 and thereafter, appeal was preferred by the State which also came to be dismissed by the learned Appellate Judge. However, the respondent has not been reinstated into service in spite of the orders passed by the courts below. Learned advocate submitted that the courts below have rightly considered that even during the departmental inquiry, principles of natural justice were violated and order of dismissal was passed by the Deputy Conservator of Forest without giving any opportunity of hearing to the respondent. In view of the aforesaid facts and circumstances, the courts below have rightly come to a conclusion that the order of departmental inquiry as well as dismissal are illegal and void and there is no reason to interfere with the order passed by the courts below as no substantial question of law is involved in the present appeal. Learned advocate placed reliance on the documentary evidence in support of the aforesaid submission made at the bar. Thus, it is submitted that considering the totality of the facts and circumstances, the Appeal does not call for interference and it deserves to be dismissed.

5. I have heard Ms V.S. Pathak, learned AGP for the appellants as well as Mr M.D. Rana, learned advocate for the respondent at length and in great detail. I have also considered the reasons assigned by the courts below as well as depositions recorded by the Trial Court during the course of the trial. Learned AGP has produced relevant documents at the time of hearing of this Appeal. Document at Exh.24 is the recommendation of Social Welfare Officer dated 6.3.80 which is with regard to appointment of Forest Guard; document at Exh.25 is School Leaving Certificate dated 20.6.79; document at Exh.26 is deposition given by Gujuprasad Gokaldas; document at Exh. 32 is deposition of Nathalal Bhagvanji-Principal of Primary School; document at Exh.35 is deposition of Kalsing Babubhai Ninama working as Accountant in the office of Deputy Conservator of Forest and; document at Exh.36 is original School Leaving Certificate dated 17.7.53. Considering these documents and the reasoning given by the courts below, I am of the view that no substantial question of law is involved in the

appeal which would call for interference by this Court while exercising the powers under Section 100 of Code. It has been observed by the Appellate Court while deciding the Appeal that on perusal of the inquiry order, it appears that in the said proceedings none of the witnesses was examined in support of the charge and therefore, the Trial Court recorded that in the inquiry, the defendant has produced witness list as per Exh.23. Case was registered as Case No. 85 of 1997 and the hearing was fixed on 18.8.98. Respondent denied all allegations against him before the Inquiry Officer. Respondent appeared before the Inquiry Officer on 18.12.98 along with his well-wisher, but the Presenting Officer was not present and therefore, the matter was adjourned to 6.2.99. On 6.2.99, the parties were present, but the witnesses and Presenting Officer were absent and therefore, the matter was adjourned. On 13.4.99, both the parties were present but witness was not present. Presenting Officer has not given any deposition but filed an application that witness who was present before the Civil Court had given deposition and it was admitted and therefore, there is no question of further deposition of witnesses and no further evidence of the witnesses was recorded. It is held by the Appellate Court that depositions of the witnesses who had deposed in earlier suit on behalf of the government were produced before the Inquiry Officer and relying upon the same, the Inquiry Officer proceeded to decide the case and found the charge against the respondent to have been proved. In view of the aforesaid facts and circumstances of the case, the courts below held that the Inquiry Officer has committed serious error in relying upon the copy of depositions given by witnesses in another proceeding and therefore, the grievance of the respondent was justified and he was deprived of an opportunity to cross-examine the witnesses. Thus, during the course of the inquiry, depositions at Exhs. 33 and 34 which were given by two witnesses in Civil Suit No. 532 of 1989 were produced. The said suit was instituted by the respondent questioning the legality and validity of the inquiry against him and that suit came to be dismissed. On perusal of the depositions at Exhs. 33 and 34, it becomes clear that brief deposition is recorded of two witnesses; one of a Principal of Primary School, Menaj and another of Principal, Primary School, Sasan-Gir. These depositions were recorded in absence of the respondent and thereafter, cross-examination of the witnesses was closed. Thus, it was held that the deposition which was untested by cross-examination cannot be relied upon and, therefore, it would lose considerable force as evidentiary value. In view of the aforesaid facts and circumstances of the case, the courts below held that entire inquiry was vitiated and the courts below have rightly held that the order of Inquiry Officer suffers from the violation of principles of natural justice and thus, the suit of the plaintiff was decreed and the plaintiff was ordered to be reinstated into service with all consequential benefits.

> 7. For the foregoing reasons, *I see no reason to interfere with the findings recorded by the courts below as no question of law, much less substantial question of law is involved in the present Appeal and the same is, therefore, dismissed. Notice is discharged.*



> 8. As the Second Appeal is dismissed, Civil Application No. 9229 of 2009 for stay does not survive and the same is disposed of.
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> [H.B. ANTANI, J.]

2.12 The State Government and more particularly its officers believing in just speculative litigation despite the clear cut, unambiguous and unassailable findings of three courts preferred the Special Leave to Appeal before the Supreme Court of India. The Supreme Court "summarily dismissed the Special Leave to Appeal" against the judgment of the High Court. Thus the order of the High Court came to be confirmed and the Supreme Court order in SLP became final and binding between the parties.

2.13 The Plaintiff had to be reinstated in service based on the decree confirmed upto the level of the Apex court.

3) However, the officers of the State Government *appear to have committed abuse and misuse of power.* Officers and more particularly disciplinary authority "*misinterpreted the judgments and judicial orders passed* by the Learned District Judge, Junagadh in appeal. And in addition to this fact, the Plaintiff submits that both the Disciplinary authority and the Inquiry Officer have committed contempt of the court for the reasons to be stated hereafter.

4) The Plaintiff submits that the Deputy Conservator of Forest by his communication dated: 22.11.2012 issued a charge sheet against the Plaintiff in the second departmental inquiry leveling the "self-same charge", which was the subject matter in the previous departmental inquiry, which has been finally quashed and set aside and can never be re-opened.

5) Reason for holding the second inquiry with Department: And let us survey what can be the true interpretation of "in accordance with law", being a restrictive phraseology employed by the Learned District Judge:



The Plaintiff submits that the Gujarat Civil Service (Discipline & Appeal) Rules, 1971 does not provide or cloth the Disciplinary authority to review or initiate the second inquiry. And it is not a case of remand by the disciplinary authority, or the appellate authority. Hence, the second inquiry in the absence of the statutory rules or authority cannot be permitted to be proceeded against the present Plaintiff. Be it clearly noted that *it is a case of second departmental inquiry and not a case of de novo proceeding.* As such the "second departmental inquiry" is initiated keeping in mind the one line observation of the Learned District Judge, Junagadh in his judgment and order produced hereinabove. The relevant observation in the order dated: 29.09.2009 is reproduced below:

It would be open for the appellants to hold inquiry against the respondent plaintiff in accordance with law.

5.1 The Plaintiff submits that after the Learned District Judge gave the said judgment, the Deputy Conservator of Forest and the Disciplinary authority entertained a formation of opinion to the effect that the Forest Department is in fact permitted to hold and initiate the second inquiry. For this purpose, the Deputy Conservator of Forest and the said Disciplinary authority took into account the observation of the District Judge, Junagadh, but the Learned District Judge, Junagadh has passed such order very guardedly. What the Learned District Judge, Junagadh observed in the said concluding order is to the effect that "It would be open for the appellants to hold inquiry against the respondent plaintiff in accordance with law".

5.2 It is really a case of abuse and misuse or powers and as such the Deputy Conservator of Forest and the Disciplinary authority in this case has never applied his mind to the facts and circumstances of the case. Not only that, but improper interpretation of the said order of the Learned District Judge is made. The Disciplinary authority materially failed to take into account, while interpreting the order that the Learned District Judge has used the phrase "*in accordance with law*".

5.3 No court would ever say that such action or inquiry may be held irrespective of the legal sanction of law. If there is no legal sanction, the Departmental Inquiry can never be held against the delinquent. It is true that the Learned District judge has observed that it will be open for the appellants to hold inquiry against the respondent plaintiff, provided always that such inquiry may be held, if law provides and not otherwise.

5.4 The Learned District Judge, Junagadh by his order has never provided any licence to the Disciplinary authority to hold the inquiry, if the law does not permit such holding of the departmental inquiry.

5.5 The very simple interpretation of such a phrase should be that there should be an accord in law. "In accordance with law shall always mean "permitted by law" or "authorized by law" or "appointed, established and authorized by law" or deriving authority by law" or "recognized by law rather than in equity".

The synonyms of in accordance with would mean:

Be accord, conformity, agreement, conformance, Congruence, congruency, congruity, consonance, Harmony, tune

It is further submitted that accordance means "agreement" or "harmony" as stated, so the particular process should be only be "in agreement with" or "in harmony with" because agreeing with something or someone puts in a category or group with that person or thing.

5.6 Under the circumstances, let it be stated by the Plaintiff that "in accordance with" is "in line with", "in agreement with". Now that the Learned Judge has used the word "law". It is, therefore, that in accordance with means in line with law or in agreement with law. If, the law does not provide for the review and the second departmental inquiry, once it is finally quashed, no second initiation of the departmental inquiry as interpreted by the disciplinary authority is ever permitted. And the Learned District Judge has never said that it can proceed to hold the second inquiry even without the sanction of law. And that is why the Learned judge has prohibited or restricted the right of the authority to hold the inquiry by saying "in accordance with law".

5.7 It is true that the Learned District Judge made a general observation that "it will be open to hold…", but the earlier part of the said observation is completely prohibited and restricted by the Learned District Judge by further utilizing and continuing with the phraseology "in accordance with law". Under the circumstances, the formation of opinion, or an interpretation placed by the Deputy Conservator of Forest and the Disciplinary authority suffers from complete misinterpretation of the observation, non-application of mind to the subject involved, and taking into account totally irrelevant and extraneous considerations.

In so construing the words "applying in accordance with law to the proper Court for execution" learned Subordinate Judge has put upon them a construction not warranted by their plain meaning. To apply for the execution of a decree <u>in accordance with law is to apply in the manner provided for by the law relating to execution of decrees</u>. And that law is embodied in the Code of Civil Procedure, which is for its purposes an exhaustive Code[2].

**[2] Bombay High Court : Bando Krishna Kunbargi vs Narasimha Konher Deshpande and decided on 16 July, 1912 : Reported in (1913) ILR 37 Bom 42 Author: Chandavarkar Bench: Chandavarkar, Batchelor**

5.8 If, an illustration is discussed by the Plaintiff for the sake of properly conveying the meaning of what is in accordance with law, it may be stated that every creditor has a right to file an application for execution of decree in accordance with law. This right is a statutory and procedural right of every creditor. But, at the same time, it should not be lost sight of the fact that the application for execution should be in accordance with law. If the application for execution is not in accordance with law, it is not tenable and no such right can be asserted by the Creditor.

5.9 Now, in this connection, it may be stated that if the time is allowed to lapse for years and if the claim based on the decree so passed is time barred, the claim is not sustainable. And despite the bar of limitation of time barred debt, if the creditor files an application for execution of the time barred debt, it cannot be said that the said application for execution of decree is in accordance with law.

5.10 What the present Plaintiff attempts to drive at is that *if the action is not authorized, or no power, authority and jurisdiction is derived under the Disciplinary rules for holding second inquiry and thus to review for the purpose of booking the delinquent without the sanction of rule or law, it cannot be said that the said action is in accordance with law and second inquiry as such is impermissible.*

5.11 It will be profitable to refer to the judgment of the Gujarat High Court, where the installation of fire safety and matter in relation to Building Usage permission came up for consideration. The regulations have been framed in this behalf and that the said regulations should be complied with. At the same time, the erection or construction should be made in accordance with law and not otherwise. In this connection, if the erection or construction is not in accordance with law or in accordance with regulations, the act would be in violation of the law.

This is what the Court observed:

> "Court cannot encourage illegal activities but it would issue directions strictly in accordance with law. Unauthorized construction may be a small house, a bungalow or a chawl, a slum or a high- rise building, but in view of the meaning of the word 'building', there cannot be different treatment. All constructions buildings must be erected in accordance with law and Building Use Permission is a must for use of the building. No authorities can act contrary to law[3]".

6) It may be recalled that after the second charge sheet was issued against the delinquent, the delinquent with utmost diligent at his command submitted a detailed representation to the Disciplinary authority and the Forest Department contending to the effect that the second inquiry on the self-same charge, once the penalty of dismissal is awarded, is never permitted under any administrative, statutory or legal norms and as such the "exercise of such power" despite the absence of such power is without jurisdiction. Plaintiff submits that here is a case of "patent lack of jurisdiction", and it is really a "lack of power, authority and jurisdiction" because no authority or the department of the Government can contemplate actions, or take any actions so as to affect the citizens, if the rules do not so empower the authority.

7) It is submitted that the Governor, while enacting the statutory rules called Gujarat Civil Service (Discipline and Appeal) Rules, 1971 never intended to provide or provided under any rules or the body of the rules permitting the "second inquiry after the delinquent is either exonerated or punished" or when the punishment is finally set aside under the judgment of the Court.

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**[3] Gujarat High Court : Lok Adhikar Sangh vs State Of Gujarat and ors decided on 17 February, 2000 : Reported in AIR 2002 Gujarat 59 : Author: B Patel " Bench: B Patel, D Mehta**

Assuming for the time being without admitting that "interpretation" placed by the Disciplinary authority keeping in mind the observation of the Learned District Judge in relation to second inquiry is justified, although impermissible, then secondly and very importantly, the Plaintiff submits that such an interpretation placed by the Disciplinary authority in relation to second departmental inquiry against the Plaintiff is barred and the observation of the Learned District Judge empowering the second inquiry is not sustainable in view of the settled legal principle of doctrine of merger of the order or judgment passed by the lower court into the judgment of the higher court and this is what the Apex Court has said.

Hence, impugned inquiry sought to be challenged and even the observation of the Learned District Judge permitting the second inquiry is deemed to have been vanished.

**Doctrine of merger:**

8) The Honourable the Supreme Court has laid down a law to the effect that the doctrine of merger is based on the principle that there cannot be, at one and the same time more than one operative order governing the same subject matter. Therefore, the judgment of an inferior court, if subjected to an examination by the superior court ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court[4]. In that view of the settled legal position as laid down by the Honourable the Supreme Court of India, the unbending attitude of the Defendants and the inquiry officer holding the departmental inquiry by taking into aid the observation of the Learned District Judge, Junagadh in Regular Civil Appeal does not survive. And as such the judgment of the inferior court loses its identity by its merger with the judgment of the superior court.

**[4] Gojer Bros. Private Limited vs Ratan Lal Singh decided on 1st May, 1974 and reported in AIR 1974 SC 1380=1975 SCR (1) 394 Bench: Honourable Justice YV Chandrachud.**

In appeal by special leave from the judgment of a learned single Judge of the High Court of Calcutta, two questions are raised for our consideration on behalf of the appellants who have obtained against the respondent a decree for eviction:

(1) whether the decree of the trial court has merged in the decree of the High Court and

(2) whether by reason of section 17 D of the West Bengal Premises Tenancy Act, 1956 the decree for eviction is incapable of execution.

Long, long back on May 19, 1953 Messrs Hind State Private Ltd., the predecessors-in-title of the appellants, filed against the respondent a suit for eviction on the ground of non-payment of rent. On November 24, 1958 the learned Second Munsif, Alipore, passed a decree for possession in favour of the plaintiffs holding that by reason of defaults in the payment of rent, the respondent was not entitled to the protection of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. That decree was confirmed in appeal by the learned Subordinate Judge, 4th Court, Alipore, on April 12, 1967. During the pendency of the appeal, the appellants had purchased the right, title and interest of the plaintiffs in the suit premises and they had also obtained an assignment of the decretal rights in their favour. They were therefore brought on the record of the appeal in place of the original plaintiffs.

The respondent filed Second Appeal No. 1255 of 1967 against the decree of the 1st appellate court and that appeal, after a contested hearing, was dismissed by a Division Bench of the High Court of Calcutta on January 8, 1969. While dismissing the appeal, the High Court granted to the respondent time to vacate the suit premises till the end of January, 1970 on the respondent giving a written undertaking to the court that he will hand over quiet and peaceful possession of the premises to the appellants on the expiry of the aforesaid period.

The West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 was repealed by section 40 of the West Bengal. Premises Tenancy Act, XII of 1956. During the Proclamation, of emergency issued by the President of India on February 20, 1968, Act XII of 1956 was amended by the West Bengal Premises Tenancy (Amendment) Act, President's Act 4 of 1968, which was given retrospective effect from August 26, 1967. After the cessation of the emergency, 'the West Bengal legislature passed the West Bengal Premises Tenancy (Amendment) Act, 1969 with a view to re-enacting with modification President's Act 4 of 1968.

In between the decree for possession passed by the High Court in the appellants' favour on January 8, 1969 and the expiry of the period allowed to the respondent to vacate the premises, several amendments were made to the West Bengal Premises Tenancy Act, XII of 1956, ("The Act of 1956") by the West Bengal Premises Tenancy (Second Amendment) Act, 1969 ("The Act of 1969") which came into force on November 14, 1969. We are concerned in this appeal with the provisions of section 17 D which was introduced in the Act of 1956 by the Act of 1969. That section, in so far as material, reads thus:

“17 D. Power of Court to set aside, decrees passed on account of default in the payment of rent.

(1) Where before the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968, a decree for the recovery of possession of any premises was passed:

> (b) in a suit under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, by reason only of clause (i) of the proviso to subsection., (1) of section 12 of that Act, but the possession of such premises had not been recovered from the tenant by the execution of the decree, the tenant may within a period of sixty days from the date of commencement of the West Bengal Premises Tenancy (Second Amendment) Act, 1969, make an application to the Court which passed the decree to set aside the decree.

Explanation:-Where the decree was passed in the exercise of appellate jurisdiction, an application under this sub-section shall be made to the Court of first instance.

(2) Where-an application has been made under sub-section (1) for setting aside a decree, all proceedings in execution of the decree shall remain stayed until the application is disposed of."



Sub-section (3) of section 17 D provides that on receipt of an application under sub-section (1) the court shall cause a notice thereof to be served on the landlord and after hearing such evidence as the parties may adduce, determine the questions referred to in clauses (a) and (b) of that sub-section. The court is then required to give to the tenant further time not exceeding sixty days to deposit the amount found due under clauses (a) and (b) of sub-section (3) together with such costs as the court may allow. If the tenant deposits the amount within the time granted under subsection (3), the court under subsection: (4) has to allow the application of the tenant, set aside the decree for the recovery of possession and dismiss the' suit. On January 12, 1970 which was a few days before he had under taken to vacate the Premises, the respondent made an application under section 17 D Asking that the decree for possession passed Against him be set aside.' By a judgment dated July 15, 1970 the learned Munsif, Second Court, Alipore, dismissed that application on the ground that the decree for possession passed by the trial court on November 24, 1958, had merged in the decree passed by the High Court on January 8, 1969, that in truth and in substance the operative decree was the one passed by the High Court and as that decree was, passed after August 26, 1967, being the date of the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968, the application filed by the respondent under section 17 D of the act of 1956 was not maintainable.

The respondent filed a revision application in the High Court of Calcutta against the judgment of the learned Munsif. By a judgment dated May 31, 1971 a learned single Judge of the High Court allowed the revision application, granted the application filed by the respondent under section 17 D and directed the dismissal of the suit. The learned Judge has taken the view that in case where, an appellate, court dismisses the appeal, the principle of merger of the decree of the lower court with that of the appellate court has no application and therefore the effective decree in the case was the one passed by the trial court on November, 24, 1958 which was before the commencement of the President Act 4 of 1968. This Court has granted to the appellants special leave to appeal, from the judgment of the High Court. it is not in dispute that the decree dated November 24, 1958 for possession of the suit premises was passed by the trial court in a suit filed by the appellants' predecessors-in- interest under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, by reason only of clause (1) of the proviso to sub-section (1) of section 12 of that Act, that is to say, on the ground that the respondent had defaulted in the payment of rent. Clause (b) of section 17 D(1) is therefore complied with.

The question which arises for consideration is whether the decree for the recovery of possession can be said to have been passed against the respondent "before the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968", that is, before August 26, 1967. If it was passed before that date, the respondent would be entitled to claim the benefit of section 17 D, in which event the decree passed in the suit has to be set aside and there would be then no out- standing decree to execute.

It is indisputable that a decree for possession was in fact passed in favour of the appellant’s predecessors-in-interest by the trial court on November 24, 1958 which was before the commencement of the Act of 1968. But that decree was taken in appeal first to the court of the Subordinate Judge which confirmed the decree and taken to the High Court which, after a contested hearing, dismissed the defendants' appeal and confirmed the decree passed by the Subordinate Judge. The decree of the High Court is dated January 5, 1969 and was passed after, not before, the commencement of the Act of 1968. <u>The question to be considered is whether the decree passed by the trial court can be deemed to have merged in the decree passed by the High Court</u>.

Learned counsel for both the sides have cited before us a large. number of decisions bearing on the principle of merger but a few preliminary observations will facilitate a better understanding of those decisions.



The <u>juristic justification of the doctrine of merger may be sought in the principle that there cannot be at one and the same time more than one operative order governing the same subject-matter. Therefore the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court</u>.

Stated in this form the principle may appear to be unexceptionable but the problem has many facets. What, if the higher court dismisses the proceeding before it summarily without a speaking order? Does the judgment of the lower court still merge in the unspeaking order of the higher court? What, if the powers of the higher court are invoked in the exercise of its revisional and not appellate jurisdiction? Does a judgment or an order passed in the exercise of a severally restricted jurisdiction like that under section 115 of the Code of Civil procedure wipe out of existence a decree or order passed in the exercise of a wider jurisdiction as may be exercised by a court possessed of a suit? Does it make any difference to the application of the doctrine of merger that the higher court has not modified or reversed the judgment of the lower court but has merely affirmed it? These nuances had once raised issues on which conflicting views were expressed by the courts. Over the years, the area of conflict has considerably narrowed down and most of the problems touched by us have been resolved by this Court.

It is only proper that we keep ourselves within the bounds of the issue arising in the case. We are not concerned to determine whether a decree passed in a suit can merge with an order passed in the exercise of revisional jurisdiction because the decree of the trial court in the instant case was challenged first by an appeal filed in the District Court and then is a Second Appeal filed in the High Court. We are also not concerned to determine whether the decree passed by a trial court can merge in an unspeaking order passed by the higher court while summarily dismissing the proceeding because the High Court has given a considered judgment after a contested hearing. The Principle, therefore, that there is no decree as such of the appellate court if it dismisses the appeal for default of appearance or for want of prosecution or on the ground that the appeal has abated or is withdrawn or that the appellant has failed to furnish security for costs as provided in Order 41, Rule 10 of the Code of Civil Procedure, can have no application to the instant case. Nor indeed are we concerned with that class of cases in which the suit covers a horizon wider than the appeal, which happens when only a part of the decree passed in the suit is carried in appeal to the higher court. Here, the decree in its entirety was challenged before the appellate courts.

Section 17 D of the Act of 1956 confers power on the court “to set aside decrees” passed on account of the tenant's default in the payment of rent. This power was conferred evidently in order to give further relief to defaulting tenants, as stated in the Statement of Objects and Reasons of the Bill (Calcutta Gazette Extra Ordinary, dated August 2, 1969). An effective and meaningful exercise of the power to set aside the decree for possession postulates a power to set aside an operative decree; for, to set aside the decree of the court of first instance and to allow the decrees of the appellate courts to remain outstanding would be but an empty exercise of the beneficent power given by the section. Therefore, the power to set aside the decree for possession must be construed to mean a power to set aside the decree which can be put into execution.

The decree which affects the rights of the defendant is the decree which is capable of execution for it is in that decree that the rights and obligations of the parties are crystallised. Section 17 D in terms speaks of the power of the court to set aside "a decree for the recovery of possession of any premises" if, "the possession of such premises had not been recovered from the tenant by the execution of the decree". The decree to be set aside is thus that decree which is capable of execution and in execution of which the landlord has not yet obtained possession of the premises. What is important for the purposes of section 17D is to find which is the decree capable of execution. The section enables the judgment-debtor to "make an application to the Court which passed the decree to set aside the decree", provided that where the decree is passed in the exercise of appellate jurisdiction, an application for setting aside the decree may be made to the Court of first instance. By sub-section (2) of section 17 D, if an application is made for setting aside a decree, "all proceedings in execution of the decree shall remain stayed until the application is disposed of". This provision emphasis what is clear from the other provisions of the section that the concern of the law is to arm the court with the power to set aside the operative decree by executing which alone the judgment-creditor could obtain teal and effective relief.

<u>In cases where the decree of the trial court is carried in appeal and the appellate court disposes of the appeal after a contested hearing, the decree to be executed is the decree of the appellate court and not of the trial court</u>. In *Jowad Hussain vs. Gendan Singh & Ors*[5] the Privy Council while holding that the limitation of three years within 'which an application for a final decree must be made runs from the date of the decree of the appellate court, quoted with approval the statement of law contained in the judgment of a learned judge of the Allahabad High Court to the following effect :

[5] **53 I.A. 197**

*"When an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the cause*[6]*"*

The *Privy Council also adopted the statement* contained in a judgment of Tudball J to this effect :



"When the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the Appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties."

Thus, when the decree of the court of first instance is confirmed by the High Court and the latter decree is confirmed by the Privy Council, the decree capable of execution is the decree of the Privy Council[7]. In that case the decree passed by a District Judge in 1887 awarded "future mesne profit" to the plaintiff. That decree was reversed by the High Court, but was confirmed by the Privy Council on May 11, 1895. When the matter came back in execution proceedings the Privy Council held that the decree which the courts had to execute was the one Passed by it in 1895 and since by that decree the District Judge's decree was confirmed, the decree of 1895 clearly carried the mesne profits up to its own date.

An application of this very principle yields the result that if the court of appeal confirms, varies or reverses the decree of the lower court, the decree of the appellate court is the only decree that can be amended, or that the limitation for executing a decree runs from the date of the decree capable of execution and that is the decree of the appellate court which supersedes that of the court of first instance; or that if mesne profits are ordered from the date of suit until the expiry of three years after the date of the decree, the decree to be considered is the decree capable or execution so that if the decree of the trial court is confirmed in appeal, three years will begin to run from the date of the appellate decree.

**[6] Per Banerji J. in Gajandhar Singh v. Kishan Jiwan Lal I.L.R. 39 All. 641**

**[7] Bhup Inder v. Bijai, 27 I.A. 209. (4) Brij Narain v. Tejpal; 37 I.A. 70,**

The decree, therefore, which section 17 D empowers the court to set aside is the decree which is capable of execution which, in this case, is the decree passed by the High Court on January 8, 1969.The fundamental reason of the rule that where there has been an appeal, the decree to be executed is the decree of the appellate court is treat in such cases the decree of the trial court is merged in the decree of the appellate court. In course of time, this concept which was originally restricted to appellate decrees on the ground that an appeal is a, continuation of the suit came to be gradually extended to other proceedings like Revisions and even to proceedings before quasi-judicial and executive authorities. it will now be appropriate to refer to the decisions bearing on the principle of merger.

In Commissioner of Income-tax Bombay vs. M/s. Amritlal Bhogilal & Co[8] the question which arose for decision was whether the order passed by the Income-tax Officer allowing the registration of a firm merged in the order passed by the Appellate Assistant Commissioner in the appeals filed by the firm against the order of assessment. If it did, the Commissioner of Income-tax could not in the exercise of his revisional powers under section 33B(1) set aside the order of registration passed by the Income-tax Officer. This Court held on the merits, of the matter that though the appellate order of the Appellate Assistant Commissioner was the only order which was valid and enforceable in law, what merged in the appellate order was the Income-tax Officer's order under appeal and not his order of registration which was not and could not have become the subject-matter of an appeal before the appellate authority. The position in regard to the doctrine of merger was stated thus by Gajendragadkar J. who spoke for the Court:

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[8] **[1959] S.C.R. 713.**

"There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement."

Collector of Customs, Calcutta vs. East India Commercial Co. Ltd[9] is a typical example of that class of cases in which prior to the amendment of Article 226 of the Constitution by the insertion of clause IA, the High Courts were faced with the question whether a writ could issue against an authority whose seat was situated beyond the territorial jurisdiction of the High Court. The respondent led a writ petition in the Calcutta High Court against the decision of the Central Board of Revenue which had dismissed his appeal. A Full Bench of the High Court held that though it had no jurisdiction to issue a writ against the Central Board of Revenue which was permanently located outside its territorial jurisdiction, the Board having merely dismissed the respondent's appeal against the order passed by the Collector of Customs, the real effective order was that of the Collector whose seat was located within the jurisdiction of the High Court and therefore a writ could issue as against him. After referring to the decisions of the High Courts of Allahabad, Nagpur, PEPSU and Rajasthan which had taken the view that the order of the original authority merges in the appellate order even when the appellate authority dismisses the appeal without any modification of the order appealed against, Wanchoo J. speaking for the Constitutional Bench observed thus:

[9] **[1963] 2 S.C.R. 563.**

"The question therefore turns on whether the order of the original authority becomes merged in the order of the appellate authority even where the appellate authority merely dismisses the appeal without any modification of the order of the original authority. It is obvious that when an appeal is made, the appellate authority can do one of three things, namely,

(i) it may reverse the order under appeal,

(ii) it may modify that order, and

(iii) it may merely dismiss the appeal and thus confirm the order without any modification. It is not disputed that in the first two cases where the order of the original authority is either reversed or modified it is the order of the appellate authority which is the operative order and if the High Court has no jurisdiction to issue a writ to the appellate authority it cannot issue a writ to the original authority... It seems to us that on principle it is difficult to draw a distinction between the first two kinds of orders passed by the appellate authority and the third kind of order passed by it. In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it...

It is this principle, viz., that the appellate order is the operative order after, the appeal is disposed of, which his in our opinion the basis of the rule that the decree of the lower court merges in the decree of the appellate court, and on the same principle it would not be incorrect to say that the order of the original authority is merged in the order of the appellate authority whatsoever its decisionwhether of reversal or modification or mere confirmation."

The decision of the High Court was accordingly set aside by this Court. In Madan Gopal Rungla vs. Secretary to the Government of Orissa[10] which also involved a similar question relating to the territorial jurisdiction of the High Court, the appellant, Madan Gopal Rungta, filed an application for review to the Central Government against the order passed by the Government of Orissa rejecting his application for grant of a mineral lease.

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[10] **[1962] Supp. (3) S.C.R. 906**

The judgment of this Court affirming the view of the High Court that it had no jurisdiction to issue a writ against the Central Government undoubtedly based on the terms of Rule 60 of the Mineral Concession Rules, 1949 under which whenever a matter is brought to the Central Government it is its order which is effective and final; but it was observed that "where there is a review petition and the Central Government passes an order on such petition one way or the other it is the Central Government's order that prevails and the State Government's order must in those circumstances merge in the order of the Central Government" (p. 914).

The principle that the decree of the trial court merges in the decree of the appellate court was held to be applicable in U.J.S. Chopra v. State of Bombay[11] to orders passed in criminal proceedings. In that case the High Court dismissed summarily an appeal filed by an accused against his conviction and sentence. Thereafter, the State of Bombay filed an application in the High Court for enhancement of the sentence. While holding that the summary dismissal of the appeal preferred by the accused did not preclude him from taking advantage of the provisions of section 439(6) of the Code of Criminal Procedure and showing cause against his conviction when he was subsequently called upon to show cause why the sentence imposed on him should not be enhanced, Bhagwati and Imam JJ. observed:

"A Judgment pronounced by the High Court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties... would replace the judgment of the lower Court, thus constituting the judgment of the High Court the only final judgment to be executed in accordance with law by the Court below." (pp. 133-134). Das J. agreed with the conclusion of the majority as regards the right of the accused to challenge the conviction under section 439(6) but he went a step further and said that there is a merger or replacement of the judgment of the lower court whenever the High Court disposed of the appeal or revision[12] and that "it makes no difference whether the dismissal is summary or otherwise". (p. 118).

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[11] **[1955] 2 S.C.R. 94**
[12] **[1970] 1 S.C.R. 322.**

An interesting question arose in *Shanker Ramchandra Abhyankar v. Krishnaji Dattatryaya Bapat* where after a single Judge had dismissed a Civil Revision Application filed by the tenant under section 115 of the Code of Civil Procedure, against a decree passed by the District Court, a Division Bench of the Bombay High Court entertained the tenant's writ petition under Articles 226 and 227 of the Constitution against the same decree and allowed it. The Bombay High Court had followed its earlier judgment in Sipahimalani's case[13] which had taken the view that an order passed by the lower court does not merge in the order passed by the revisional court because whereas a right of appeal is a vested right and an appeal is a continuation or rehearing of the suit, a revision is not continuation or re- hearing of the suit and it is not obligatory upon the revisional court to interfere with the order even if it is improper or illegal. This Court disapproved of that view and held following a judgment of the Privy Council in Nagendra Nath Dey v. Suresh Chandra Dey[14] that the revisional jurisdiction is a part and parcel of the appellate jurisdiction of the High Court and therefore the principle of merger would apply to orders passed in the exercise of revisional jurisdiction also.

In *Somnath Sahu v. The State of Orissa and others*[15] the principle of merger was extended to an executive order dismissing a Government servant. The appellant in that case was dismissed by an order passed by respondent No. 4, the Indian Aluminium Company Ltd., Calcutta. The appeal filed by the appellant to the State Government was dismissed on January 2, 1962. The appellant thereafter moved the Orissa High Court under Article 226 of the Constitution asking that the orders passed-by the, State Government and respondent No. 4 be quashed, on the ground that no notice was given to him for misconduct and no inquiry was held by respondent No. 4 into the alleged misconduct before passing the order of dismissal.

[13] **58 B.L.R. 344**
[14] **59 I.A. 283, 297.**
[15] **[1969] 3 S.C.C. 384**

This Court assumed in favour of the appellant that the order passed by respondent No. 4 was illegal, but it held that it merged in the appellate order of the State Government dated January 2, 1962 and unless the order of the State Government was shown to be defective, the appellant would not be entitled to any relief. Speaking on behalf of the Court Ramaswami J, observed:

"<u>There can be no doubt that if an appeal is provided by a statutory rule against an order passed by a tribunal the decision of the appellate authority is the operative decision in law if, the appellate authority modifies or reverses it. In law the position would be just the same even if the appellate decision merely confirms the decision of the Tribunal. As a result of the confirmation or affirmance of the decision of the Tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which is subsisting and is operative and capable of enforcement</u>."

The learned Judge of the High Court has referred to some of these decisions in his judgment but he took the view:

"<u>I am of opinion that in cases where the appellate court merely dismisses the appeal, the principle of merger have no application in cases of execution of the original decree except as to limitation and will not affect an executable decree passed by an inferior court, in so far as its execution is concerned. The position would be otherwise if the decree is modified or varied by such appellate authority as, in such event, the original decree, will be in executable.", This conclusion is clearly opposed the view taken by this Court in the decisions referred to above and the learned Judge was in error in making a distinction between an appellate judgment whereby an appeal is dismissed and an appellate judgment modifying or reversing the decree of the lower court. This distinction is unsound and is based on no discernible principle</u>.

Two more judgments of this Court must be noticed because the learned Judge has derived sustenance to his view from those judgments. Learned counsel for the respondent has also relied on them in support of his submission that in this case there can be no merger of the trial court's decree in that of the appellate court.
The first of these cases is:

The *State of Uttar Pradesh v. Mohammad Nooh*[16] On April 20, 1948 the District Superintendent of Police passed an order of dismissal against the respondent Mohammad Nooh who was a head constable. The respondent filed an appeal to the Deputy Inspector General of Police which was dismissed on May 7. 1949. He then filed a revision application to the Inspector-General of Police which was also dismissed on April 22, 1950. The respondent then filed a writ petition in the High Court of Allahabad under Article 226 of the Constitution praying that the order of dismissal be set aside. The High Court granted the writ on the ground that the violation of the rules of natural justice and fair play rendered the order of dismissal illegal. In an appeal by the State of U. P this Court held by a majority that Article 226 of the Constitution is not retrospective and the High Court could not exercise its powers under that Article 226 to quash the order of dismissal passed before the commencement of the Constitution.



It was contended before this Court on behalf of the respondent Mohammad Nooh that the order of dismissal dated April 20, 1948 had merged in the order passed on appeal on June 7, 1949, that both these orders merged in the order passed by the Inspector-General of Police on April 22, 1950 and since the order last mentioned was passed after the Constitution had come into force, the High Court had jurisdiction to issue, the writ under Article 226. This contention was negatived by the court on two grounds:

Firstly, that though departmental authorities holding an inquiry into charges made against an employee have the trappings of courts of law, they cannot be compared with regular courts manned by persons trained in law and therefore the order of dismissal, the order passed in appeal and the order passed in revision "can hardly be equated with any propriety with decrees made in a civil suit under the Code of Civil Procedure; secondly, that while it is true that a decree of a court of first instance may be said to merge in the decree passed on appeal therefrom or even in the order passed in revision, it does so only for certain purposes, namely for the

[16] **[1958] S.C.R. 595.**

purposes of computing the period of limitation for execution of the decree as in Batuk Nath v. Mune Dei[17] or for computing the period of limitation for an application for final decree in a mortgage suit as in Jowad Hussain v. Gendan Singh[18]."



The observations last quoted from the Judgment of Das C. J. do lend support to the contention of the respondent that the principle of merger has, at best, a limited application but we are of the view that the observations are evidently made in the context of the peculiar facts of the case and their application ought not to be extended beyond those facts. After making the observations extracted above, Das C.J. proceeded to say:

"The filing of the appeal or revision may put the decree or order in jeopardy but until it is reversed or modified it remains effective. In that view of the matter the original order of dismissal passed on April 20, 1948, was not suspended by the presentation of appeal by the respondent nor was its operation interrupted when the Deputy Inspector-General of Police simply dismissed the appeal from that order or the Inspector-General simply dismissed the application for revision. The original order of dismissal, if there was no inherent infirmities in it, was operative on its own strength and it did not gain any greater efficacy from the subsequent orders of dismissal of the appeal or the revision except for the specific purposes hereinbefore mentioned. That order of dismissal having been passed before the Constitution and rights having accrued to the appellant State and liabilities having attached to the respondent before the Constitution came into force, the subsequent conferment of jurisdiction and powers on the High Court can have no retrospective operation on such rights and liabilities."

[17] **[1914] L.R. 41 I.A. 104**
[18] **[1926] L.R. 53 I.A. 197**

This passage leaves no doubt that the judgment is based on the premise that the original order of dismissal was operative on its own strength and that since that order was passed prior to the Constitution, the High Court had no jurisdiction to set it aside under Article 226. In *Madan Gopal Vs. Secretary to the Government of Orissa*[19] a Constitution Bench of this Court held that "the facts in Mohammad Nooh's case were of a special kind" and therefore the reasoning in that case would not apply to the facts of the case before the Constitution Bench to which we have already made a reference. In *Collector of Customs, Calcutta vs. East India Commercial Co. Ltd*[20], the same Constitution Bench reiterated that Mohammad Nooh's case was a special case which stands on its own facts". As observed in that decision, even if the principle of merger were applicable the fact would still have remained that the dismissal of Mohammad Nooh was prior to the Constitution and therefore he was not entitled to take advantage of the provisions of the Constitution.



The other decision on which the respondent relies is State of Madras vs. Madurai Mills Co. Ltd[21]. It was held in that case that the order of assessment dated November 23, 1952, had not merged in the revisional order dated August 21, 1954 passed by the Deputy Commissioner of Commercial Taxes "because the question of exemption on the value of yarn purchased from outside the State of Madras was not the subject-matter of revision". The attention of the Court was drawn to Anzritlal Bhogilal's case (1), to which we have already referred, but Ramaswami J. who spoke for the Court said :

"But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the interior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. In our opinion, the

**[19] [1962] Supp. (3) S.C.R. 906**
**[20] [1963] 2 S.C.R. 563.**
**[21] [1967] 1 S.C.R. 732**

application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction." These observations cannot justify the view that in the instant case there can be no merger of the decree passed by the trial court in the decree of the High Court. The court, in fact, relied on Amritlal Bhogilal's case[22] while pointing out that if the subject- matter of the two proceedings is not identical, there can be no merger. Just as in Amritlal Bhogilal's case the question of registration of the assessee firm was not before the appellate authority and therefore there could be no merger of the order of the Income-tax Officer in the appellate order, so in the case of Madurai Mills[23] there could be no merger of the assessment order in the revisional order as the question regarding exclusion of the value of yarn purchased- from outside the State was not the subject-matter of revision before the Deputy Commissioner of Commercial Taxes.

In the instant case the subject-matter of the suit and the subject-matter of the appeal were identical. The entire decree of the trial court was taken in appeal to the first appellate court and then to the High Court. The appellate order also shows that the appeal after being heard on merits, was dismissed with the modification that the respondent should vacate the premises by the end of January, 1970. The decree of the High Court dated January 8, 1969, reads thus:

"It is ordered and decreed that the decree of the court of appeal below be and the same is hereby affirmed and this appeal dismissed subject to this that the defendant appellant, having duly filed the stipulated undertaking, through his, learned Advocate, is allowed time till the end of January, 1970, for vacating the disputed premises and delivering up quiet and peaceable possession thereof to the decree-holder respondent on condition that the said defendant appellant deposits in the trial court, to the credit of the decree-holder respondent, within two months from this date, the outstanding arrears, if any, on account of rents or mesne profits, as the case may be, and also goes on depositing, in the same court to the same credit, month by month, regularly, according to the English calendar., within the 15th of the next succeeding month according to the same calendar, a sum of Rs. 175/- (Rupees one hundred and seventy five) per month, on account of current rents or mesne profits.

[22] **[1959] S.C.R. 713.**

And it is further ordered that in the event of the said defendant's failure to make any of the above deposits, this, decree shall become executable at once."

"We are accordingly of the opinion that the decree of the trial court dated November 24, 1958 merged in the decree of the High Court dated January 8, 1969. Since the decree of the High Court was passed after the commencement of the West Bengal Premises Tenancy (Amendment) Act 1968, that is to say after August 26, 1967, section 17D of the Act of 1956 can have no application and therefore the decree of the High Court which is the only decree to be executed cannot be set aside under that section".

We therefore allow the appeal, set aside the judgment of the High Court dated May 31, 1971 and restore that of the Munsif, Second Court, Alipore dated July 15, 1970. The respondent shall pay to the appellants the costs of this appeal and of the Revision before the High Court. S. C. Appeal allowed".

Having regard to the settled law as above, it may be humbly stated that the observation made by the Learned District Judge in the judgment and order that it will be open for the Appellant to hold an inquiry in accordance with law that is again in the nature of a decree in appeal under Section 96 of the Code of Civil Procedure merges with the judgment and decree of the High Court passed in the Second appeal and the Special Leave Petition before the Supreme Court of India. Under the circumstances, the Disciplinary authority cannot pick and choose from the said judgment and decree of the Learned District Judge, Junagadh to satisfy his ego and hold an inquiry. The principle of merger as aforesaid would apply and consequently, no departmental inquiry can be held at all. The Honourable the High Court and the Honourable the Supreme Court have nowhere stated or observed that the second inquiry be held against the Plaintiff. The judgment and order of the Learned District Judge, Junagadh has thus merged and no interpretation according to what suits the Departmental authority can be made by the Disciplinary authority and no reliance can be placed on it.

**Objection against second inquiry**
**Invocation of principle of double jeopardy:**

*9)* ***Nomo debet bis suniri pre uno deliete*** that is to say, that no person should be twice vexed for the same offence. Principle does not rest on any doctrine of estoppel, but embodies the well-established rule of common law that a man may not be put twice in peril for the same offence. One has to appreciate that it is not a question of *"de novo proceeding"*, but the same charge and the allegation intended to be proceeded with in a *"different and successive departmental inquiry"* against the delinquent.

10) Precisely, same colour is given to the present inquiry substantially covering the past misconduct for which the delinquent was already charge sheeted in a departmental inquiry under the rules, where the order of ***dismissal*** came to be quashed and set aside upto the level of Supreme Court and it is found that neither the High Court, nor the Supreme Court of India ever permitted the Department to hold and initiate either de novo inquiry or fresh Departmental inquiry against the delinquent.

11) And as such the departmental inquiry is impermissible having regard to the fact that genesis of dispute and witnesses are same and therefore, it has to be concluded as impermissible. Otherwise also, the Plaintiff heavily relies upon the "principles of merger" of the judgment of the Courts below with the judgments of the High Court and the Supreme Court.

12) Where an issue of fact has been decided on merits either by the competent authority in a former departmental inquiry and as a result of decision making process, the delinquent is punished in such a former departmental inquiry by competent authority and acquitted by the competent Court on a former occasion and a finding has been reached in favour of the delinquent such a finding would constitute an "barring of action" under the principle of issue estoppel and double jeopardy.

13) Once the issue on the same facts was determined in a former departmental inquiry and the decision has been set aside, the authority cannot switch on the successive departmental inquiry on the self-same charge and as such law of merger and estoppel preclude the evidence being led to prove a fact in issue about which a finding has already been recorded at an earlier enquiry in a competent forum. Beside this, taking shelter of double jeopardy, it is barring reception of evidence to disturb the finding of fact already reached in a subsequent or different inquiry or a trial against the delinquent and accused. The inquiry is barred under well-known rules. Estoppel and double jeopardy.

14) It would have been a different matter altogether had it been like a course of a transaction, where several misdeeds are committed for which separate charges could have been made, but if a person is tried and proceeded in respect of some of these charges, and not all, and is acquitted or punished, he may be tried and proceeded for any "distinct offence" for which at the former inquiry a separate charge may have been, but was not, made.

15) *Principle of double jeopardy would apply in this case*, more particularly, because a *thorough inquiry was previously conducted* against the delinquent by the competent authority and *as a result delinquent was punished on the same charge and an allegation, which is now forming the subject matter of second departmental inquiry.* If the administrative report was submitted earlier to someone in the department without thorough departmental inquiry, it may not turn to be a case of double jeopardy. Can the Disciplinary authority at this stage prove against the delinquent that no thorough inquiry was done in the

whole matter? It is not a case of previous simple administrative report, but rather a case of a proper inquiry, which was initiated where evidence came on record to prove or disprove the very involvement of delinquent on the basis of which the delinquent was punished.



**Second inquiry barred: [Summary of case law]**
**Dwarkachand vs. State of Rajasthan, AIR 1958 Rajasthan 38:**

Petitioner filed a Special Civil Application under Article 226 of the Constitution against the State of Rajasthan and its officers for a writ in the nature of prohibition to drop the second inquiry. A report was made against the Petitioner that he accepted the illegal gratification and accordingly, the Petitioner came to be arrested, but subsequently released. Collector held a departmental enquiry immediately after the report. According to circular, a departmental enquiry was to be first held as expeditiously as possible. After such enquiry, only such cases were to be put in Court in which there was reasonable chance of conviction.

This was ordered in order to give the head of the department a chance to take whatever action he deemed proper on the basis of the departmental enquiry even if the case did not result in conviction on some technical ground or the other. It seems that in view of this circular, the Collector made a departmental enquiry and came to the conclusion on the 19th of July 1955 that no case had been made out against the applicant. The Collector, therefore, reinstated the applicant and refused to sanction prosecution.

This was in accordance with the circular of 1953 mentioned above. It seems, however, that thereafter the matter was taken up by the Anti-Corruption Officer and the Collector was asked for various reasons into which we need not go to re-open the matter and hold a fresh departmental enquiry. Thereupon, the Collector framed a charge against the applicant on the 6th of July 1956 under Rule 16 of the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1950 and asked the applicant to give his explanation and to cross-examine witnesses and to produce defence.

The present application was made by the applicant *after this charge was served on him and his contention is that a fresh departmental enquiry under* Rule *16 cannot be held against him when a similar enquiry was already held by the Collector previously, resulting in his exoneration. He, therefore, prays that the State, the Collector and the Anti-Corruption Officer be prohibited from holding a fresh departmental enquiry.*

The facts were not disputed. *The contention on behalf of the State was that the then Collector, who held the departmental enquiry against the applicant, made certain irregularities inasmuch as he did not follow the* procedure *prescribed by Rule 16 and did not examine certain witnesses. Therefore, it was open to the higher authorities 'in this case the Government) to order a fresh departmental enquiry even after the exoneration of the applicant and his being reinstated.* It is urged that a public servant holds office during the pleasure of the Governor and not during good behavior and so long as the State observes the restrictions under Article 311 of the Constitution, *there is nothing to preclude it from ordering a fresh enquiry into the conduct of its servants when the previous enquiry was not full and complete.*

The question raised in this application is undoubtedly of great importance both to public servants and to the State which employs them and is a matter of first impression, for; we have not been able to find any authority one way or the other on this point. The contention on behalf of the applicant is that *it is against fundamental principles of natural justice to hold such enquiries again and again after one enquiry has resulted in exoneration and that no such re-enquiry is contemplated under the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1950.*

On the other hand, *it was submitted on behalf of the State that there is no law or rule which lays down that no further enquiry of this nature can be made and as such, as all public servants hold their office at the pleasure of the Governor, such re-enquiry at the instance of the master is not barred.* There was no dispute that the Collector who held the first departmental enquiry had complete authority to do so. The full power to appoint and dismiss public servants of the class to which the applicant belongs had been delegated to all Collectors by the rules. It is in this background that the point raised was to be considered.

*The Court observed that there is no doubt that there is no provision* corresponding *to Section 11 of the Civil Procedure Code (res judicata), Section 403 of the Criminal P. C. (autrefois acquit or autrefois convict) or Article 20 of the Constitution in existence anywhere in the Service Rules; nor has any law or rule been pointed out which bars a second departmental enquiry after the first enquiry has resulted in favour of the public servant.*

The Court observed that 'we are also not unaware that it is open to the State to prosecute a person who had been found guilty in a departmental enquiry and given departmental punishment (*vide S.A. Venkataraman v. Union of India*, AIR 1954 SC 375). But the question that still falls for consideration is whether it is the intention of the Classification and Control Rules, under which this enquiry has been held, that a second departmental enquiry should follow a previous departmental enquiry in which a public servant has been exonerated.

It is true that a public servant like the applicant holds office during the pleasure of the Governor vide Article 310 of the Constitution. But this matter was examined by this Court in *Union of India v. Askaran*, First Appeal No. 25 of 1954, Dated 19-4-1957 (Raj) (B) and it was pointed out there that Article 310 is subject to two restrictions. One of these restrictions is contained in Article 311 and the other in Article 309 which provides for framing rules.

Reliance in that case was placed on the observations of their Lordships of the Privy Council in *B. Venkata Rao v. Secretary of State*, AIR 1937 PC 31 (C), where it was observed that Section 96B of the Government of India Act contained a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule. It was pointed out in Askaran's case that Article 309 has the same effect as Section 96-B of the Government of India Act and there is a constitutional guarantee' that the pleasure of the Governor provided in Article 310 shall be exercised according to law or rules framed under Article 309 and not arbitrarily or capriciously.

"6. *Accepting that as the correct exposition of the law as between the State and its employees, we have to see whether the State can order a fresh departmental enquiry after an earlier departmental enquiry has resulted in the exoneration of a public servant. We have no hesitation in coming to the conclusion that in the absence of any specific rule in the Service Rules giving power to a higher authority to set aside an order exonerating a public servant in a departmental enquiry and ordering fresh enquiry, it is not open to a higher authority to order a fresh departmental enquiry ignoring the result of an earlier enquiry exonerating the public servant*."

*It was urged on behalf of the State that if this view is taken, it might result in great prejudice to the State inasmuch as the person holding the first enquiry might have held it in a very slipshod manner (as alleged in this case) or even dishonestly and the State would be helpless. We must say that we are not impressed by this argument for two reasons. In the first place, if a superior officer holds a departmental enquiry in a very slipshod manner or even dishonestly, the State can certainly take action against that superior officer and in an extreme case even dismiss him for his dishonesty in the departmental enquiry which he conducts.*

*That would, in our opinion, be a salutary check which would prevent those holding departmental enquiries from acting in a slipshod manner or dishonestly. In the second place, if the case is one like the present, it would, in our opinion, be open to the State to prosecute a person like the applicant in a Court of law in spite of what departmental officer might have decided in the departmental enquiry, for, a Court of law is not bound by the results of a departmental enquiry one way or the other.*

Therefore, the danger to the State is really not as great as has been submitted. On the other hand, if we were to hold that a second departmental enquiry could be ordered after the previous one has resulted in the exoneration of a public servant, the danger of harassment to the public servant would, in our opinion, be immense. If it were possible to ignore the result of an earlier departmental enquiry, then there will be nothing to prevent a superior officer, if he were so minded, to order a second or a third or a fourth or even a fifth departmental enquiry after the earlier ones had resulted in the exoneration of a public servant.

We are not unmindful of the fact that such a thing is not likely to happen generally; but we cannot also overlook that it may. If for example, some higher authority is determined that a certain person should be dismissed, it may go on ordering one departmental enquiry after another till it can find someone who will do what it wishes. Therefore, of the two possible courses, we are of opinion that the one in which there is no second departmental enquiry after exoneration in the previous enquiry is the safer of the two.

"7. Let us look at the spirit of the rules framed under Article 309 or its corresponding provision in the Government of India Act. These rules may be compendiously called Service Rules. In most of them, so far as we know, there is no provision for reviewing an order of exoneration after a departmental enquiry. The rules have been in existence for many years and if there was a real danger of departmental enquiries resulting in dishonest exonerations or exonerations due to slipshod methods, some rule providing for a fresh departmental enquiry could have been framed.

The very fact that the rules exist for such a long time and no such rule has apparently been framed, so far as we know, anywhere, shows that the intention was that there should be only one departmental enquiry against a public servant and if he is exonerated, that should be the end. The rules also provide for appeals where a public servant is punished after a departmental enquiry, but no rule anywhere, so far as we know, provides for a review by a higher authority of an order of exoneration of a public servant in a departmental enquiry. It seems to us, therefore, that it is not contemplated that the order of exoneration passed in a departmental enquiry should be reviewed.



*What the rules contemplate apparently is that if there is an order of exoneration, the matter should end there finally.* In some of the rules, there is provision for enhancement vide rule No. 10 of the Punjab Subordinate Services Punishment and Appeal Rules and we have no doubt that if such a provision for enhancement did not exist, it would not be open to the higher authority to enhance the punishment in case it considered that the punishment was inadequate.

*Therefore, the more we consider the matter, the more we are satisfied that it was not the intention of the Service Rules that the exoneration of a public servant in a departmental enquiry should be open to review in the same manner as the acquittal of an accused is open to appeal in the Criminal Procedure Code. As we have said already, if that was the intention, it could have been provided in the rules Somewhere in India, considering that the rules have been in existence for such a long time.*

We, therefore, come to the conclusion that the *"pleasure" mentioned in Article 310 has to be exercised according to law or rules framed under Article 309 or analogous law. If there is no rule or law which lays down that an order exonerating a public servant in a departmental enquiry is open to revision and a fresh enquiry ordered, it is not, in our opinion, open to the State to assume such a power on the ground that Article 310 provides the tenure of public service is at the pleasure of the President or the Governor or on the ground that the State is the master and the public servant is the employee and the master can do anything to his employee.*

8. We have already mentioned that we have been unable to find any case taking the view which we have taken above. We have, however, been able to lay our hands on one case and would like to quote some observations from that though the facts of that case are not on all fours with the facts of the present case. In Kanakchandra Bairagi vs. Superintendent of Police AIR 1955 Assam 240 at p. 242 the learned Judges made the following observation though they appear to be obiter for the purposes of the case before them:

"There is considerable force in the contention of Mr. Sen that a second departmental proceeding may not be drawn up against any Government officer"

9. *On a careful consideration, therefore, of the entire matter, we are of opinion that once, a departmental enquiry is over and a public servant has been exonerated, no second departmental enquiry on the same facts can be ordered unless there is a specific provision for reviewing an order of exoneration of this kind in the Service Rules or any law to that effect.*

10. It is faintly urged on behalf of the State that the first enquiry in this case was not a departmental enquiry or that in any case, many irregularities were committed in it and important witnesses were not examined. It is enough to say that the order of the Collector dated 19th July 1955 *definitely says that it is made in a departmental enquiry.* It is in accordance with the Circular of the Home Department, 1953 which we have mentioned above. Assuming that there were some irregularities in the conduct of the enquiry, it hardly lies in the mouth of the State, which was making this enquiry through its servants, to complain of it.

*For the rest, if the enquiring officer has left out important evidence and the State feels that he had not acted efficiently or honestly, it has got two remedies open to it. In the first place, it can make an example of such an enquiring officer so that others may do better. In the second place, it can even now, in a case of this kind, give sanction for the prosecution of the applicant and let the matter be tried out in a court of law. But we are of opinion that on principles of justice, equity and good conscience it is wrong in the absence of provision in the Service Rules to permit a second departmental enquiry on the exoneration of a public servant on an earlier enquiry of the same kind.*

11. We, therefore, allow the application and order the opposite parties not to proceed with the second departmental enquiry which has started against the applicant on the basis of the charge dated 6th July 1956. The applicant will get his costs from the State."



**Similar cases of double jeopardy:**

**Azizullahkhan vs. Member (P) Postal Service Board,** 2005 (3) SLJ 186 CAT (Mumbai): an original application was filed for quashing and setting aside the order passed by the Disciplinary Authority imposing the penalty of reduction in pay. The charge against the civil servant was with regard to non-delivery of postal cover to the recipient.

It was submitted that the applicant was already warned by SSPO in respect of the complaint. *The Departmental inquiry was initiated on the same fact and the applicant was imposed penalty as alleged. Counsel submitted that no person can be punished twice for the same fact, which is barred by principle of double jeopardy. The authorities have over looked the principle of double jeopardy.* Counsel for respondents submitted that the *question of double jeopardy is not applicable in this case as there is no inquiry held when he was warned.* Counsel further submitted that the Tribunal cannot re-appreciate the evidence and disturb the findings arrived by the authority and come to its own conclusion.

It has come on record that SSPO had got the matter inquired through complaint inspector under his control. On the basis of the inquiry report SSPO *had severely warned the applicant. He had openly given his finding about the guilt of applicant; it has been brought on record.* The SSPO *got re-investigated the matter*. It has also come on record that the charge sheet has been issued by the SSPO, *who had given his opinion regarding guilt of the applicant and had severely warned.* SSPO who had formed opinion about the guilt of applicant should not have acted as Disciplinary Authority and should not have issued the charge sheet as per Rule 12 of CCS (CCA) Rules, 1965.

*The person who had already formed his opinion regarding the guilt, after issuing the charge sheet, cannot be expected to change his opinion.* The inquiry vitiates as the charge sheet has been issued by SSPO in contravention to Rule 12 of CCS (CCA) Rules.

It has also come on record that SSPO had made inquiry through J.D. Kulkarni on the complaint and on the basis of inquiry held, he has warned the applicant holding him guilty. *The applicant was charge sheeted on the same set of facts and has been imposed the punishment. Once the inquiry was conducted and the person is punished by way of warning issued to him, then on the principle of natural justice it is not proper to punish the said person again for the same misconduct. General principle is that no one is put to double jeopardy on the same set of facts. Once a properly constituted forum had arrived at a decision and issued the warning, then its successor in the office cannot enter upon reconsideration of the matter and to impose some other penalty in addition to earlier one already imposed. In the instant case the applicant has been held guilty and has been warned* by…*disciplinary authority regarding the incident of delivery of articles, he cannot be put in double jeopardy on the same set of facts*.

In view of the foregoing discussion…SSPO who had already formed the opinion regarding guilt of the applicant and the double jeopardy meted out to the applicant, the impugned orders are required to be quashed and set aside. Accordingly we quash and set aside the impugned orders. Applicant stands exonerated. No order as to costs.

**Bhupindersinh Ratan vs. State of Punjab and others**[24]:

Having heard learned… The period from 21.10.1971 to 22.11.1974 was already subject matter of disciplinary proceedings for which the petitioner had been inflicted with punishment of stoppage of two increments with future effect. The second order declaring the aforesaid period as a 'dies non' could not be passed because it would amount to inflicting double punishment for the same lapse. The opinion expressed by the learned Single Judge in Bhim Singh's case (supra) would be attracted to the facts of the present case as in para 4 it has been observed that after inflicting the punishment of warning for unauthorized absence from duty the order treating the period of absence as break in service was not warranted. Therefore, order dated 14.7.1987 (P-10) cannot be sustained in the eyes of law. The same is accordingly set aside. The period from 21.10.1971 to 22.11.1974 shall be treated as period of extra ordinary leave. The petitioner shall be entitled to all consequential benefits and re-fixation of his pay which may result into revision of his pension. The needful shall be done within a period of three months from the date of receipt of a certified copy of this order.

Similar issue was also considered by the Honourable the Supreme Court of India in case of **AL Karala vs. Project & Equipments Corporation of India, AIR 1984 SC 1361=1984 (3) SCR 646;** In that case, the employee raised the housing loan and conveyance loan, but the object of purchasing the housing loan could not be fulfilled and as far as the conveyance loan was concerned, the employee did purchase, but submitted the proof lately. The employee was already asked for the refund and for a charge at a penal rate of interest. Hence, the company had already proceeded against him and achieved the things what it wanted. It was argued that it amounts to double jeopardy, if the Company is allowed any departmental inquiry. The relevant passage is reproduced below:

[24] **C.W.P. No. 3900 of 1988**

"…Therefore, the order of removal passed by the Disciplinary Authority is illegal and invalid for the reasons (i) that the action is thoroughly arbitrary and is violative or Article 14; (ii) that the alleged misconduct does not constitute misconduct within the 1975 Rules; (iii) *that the inquiry officer himself found that punishment was already imposed for the alleged misconduct by withholding the salary and the appellant* ***could not be exposed to double jeopardy*****;** and (iv) that the findings of the inquiry officer are unsupported by reasons and the order of the Disciplinary Authority as well as the Appellate Authority suffer from the same vice.

Honourable the Supreme Court held that there was already an agreement where the mode for recovery was provided and as such the penalty in terms of interest over the capital is charged. Beside this, the Supreme Court said that the penalty that is not specified or defined cannot be imposed. The question of double jeopardy was, therefore, not decided as the act complained of was never specified as misconduct and the employee was winning on that issue.

**AIR 1970 Rajasthan 210**
**Shikharchand Sethi vs. Divisional Mechanical Engineer,**

"10. In the light of these facts, I have now to consider the objection of learned counsel for the respondents whether the judgment of the trial Court can be construed as a judgment setting aside the order of dismissal on merits or the dismissal was simply set aside on preliminary objection. It is true that while deciding Issue No. 1 which relates to the competence of the Inquiry Officer, the trial Court came to the conclusion that the person who was deputed to enquire into the charges levelled against the petitioner was not competent and therefore, the inquiry was illegal; but the learned Munsiff went on to decide all the issues that were framed by him even though he could have set aside the order of dismissal on the finding of Issue No. 1 alone. In view of this fact that the learned Munsiff decided all the issues in the suit relating to the technical defects in the conduct of the enquiry and also touching the merits of the dismissal on facts, can it be said that the dismissal in such circumstances has been set aside only on preliminary points and not on merits and therefore after this judgment was pronounced by the Civil Court the Railway authorities were still competent to re-open the issue and order a fresh enquiry on the same allegations which have been once adjudicated by a competent Court of civil jurisdiction?

11. This matter that if the final decision in any case is given by a Court and that decision rests on consideration of more than one point each of which by itself would be sufficient for the ultimate decision of that case; then the decision on each one of those points would be binding on the parties to the litigation is not in controversy now (See Abdul Majid v. Province of Bihar, AIR 1950 Pat 17 and Annamalai Chettiar v. Lakshmanan Chettiar, AIR 1939 Mad 433). The Supreme Court has finally set at rest this controversy by pronouncing its judgment in Vithal Yeshwant v. Sikandarkhan, AIR 1963 SC 385 wherein their Lordships observed:

"It is well settled that if the final decision in any matter at issue between the parties is based by a Court on its decision on more than one point each of which by itself would be sufficient for the ultimate decision; the decision on each of these points operates as res judicata between the parties."

In view of this state of law of the land, I do not find any escape from the conclusion that by disposing of issue No. 4, the Civil Court had decided the dismissal of the petitioner on merits as illegal which finding binds both the parties to the suit equally.

In my opinion, the respondent Union of India cannot wriggle out of that position by saying that the dismissal was and could be set aside merely on a technical error that the enquiry officer was not competent to hold the enquiry and therefore, decision on merits could be overlooked by the Union of India as no decision of the Court. The finding of a Court regarding the merits of the dismissal bound the railway authorities and they could not annul that finding by one stroke of pen by saying that the order of dismissal was liable to be quashed on a technical defect which went to the root of the matter. The position taken by the railway authorities in ignoring the judgment of the Civil Court is wholly untenable and I am definitely of the opinion that after the judgment of the Civil Court the authorities were left with no alternative but to reinstate the petitioner.

The order passed by the D.M.E. to hold fresh enquiry on the same charges stands in callous disregard of the Railway officer towards the pronouncement of the Court of competent jurisdiction. This Court In Dwarkachand v. State of Rajasthan, AIR 1958 Raj 38 has laid down the law in clear terms whether second enquiry is permissible when once the delinquent officer has been exonerated in the departmental enquiry. Their Lordships in this Court observed, as follows:

"On a careful consideration, therefore, of the entire matter, we are of the opinion that once a departmental enquiry is over and a public servant has been exonerated, no second departmental enquiry on the same facts can be ordered unless there is a specific provision for reviewing an order of exoneration of this kind in the Service Rules or any law to that effect."



In that case, the learned Judges discussed this question from all aspects and have also considered the theory of the pleasure of the Governor or the President of India as embodied in Article 310 of the Constitution.

Their Lordships while discussing the question that the Government servant, holds office during the pleasure of the Governor, made certain observations placing reliance on what has been said by their Lordships of the Privy Council in R. Venkata Rao v. Secy. of State, AIR 1937 PC 31 in connection with the scope of Section 96B of the Government of India Act, 1935 (a provision analogous to Article 309). In the above referred case, their Lordships have laid down that the pleasure of the Governor shall be exercised in accordance with the rules framed under Article 309, and not arbitrarily or capriciously.

In this connection, it will be convenient to quote the exact words of the learned Judges:

"We, therefore, come to the conclusion that the "pleasure" mentioned in Article 310 has to be exercised according to law or rules framed under Article 309 or analogous law. If there is no rule or law which lays down that an order exonerating a public servant in a departmental enquiry is open to revision and a fresh enquiry ordered. It is not in our opinion, open to the State to assume such a power on the ground that Article 310 provides, the tenure of public service is at the pleasure of the President or the Governor or on the ground that the State is the master and the public servant is the employee and the master can do anything to his employee."

In the above case the delinquent officer was exonerated by the Collector, Parmer in the departmental enquiry but subsequently the Collector was prevailed upon by the Police authorities to institute a fresh enquiry into the same allegations.

The present case, in my opinion, stands on a higher level because here the exoneration comes from a Court of law and the pronouncement of the Civil Court was unequivocal that the petitioner was penalized purely on conjectures or the guess of the Inquiry Officer. In such circumstances, the matter having been once determined by a competent Court on merits, the dismissal was declared as illegal and the railway authorities were not competent to institute a fresh enquiry in those very charges and put the petitioner again under suspension.

I would like to refer in this connection to a few authorities of other High Courts in India who have fully endorsed the view expressed by the learned Judges in AIR 1958 Raj 38. The learned Judges of the Assam High Court in Kanak Chandra Bairagi v. Supdt. of Police, Sibsagar, AIR 1955 Assam 240 and that of the Madhya Pradesh High Court in The State v. Mansinghrao, AIR 1958 MP 413 and Ramswaroop Sharma v. Divisional Commercial Supdt. Ratlam, AIR 1964 MP 155 have *expressed their complete agreement on this question* with the learned Judges of this Court and have taken the view that once a person is exonerated in the departmental enquiry on merits. It will be wrong in the absence of any provision in the Service Rules to permit on the basis of justice, equity and good conscience a second departmental enquiry on the same charges.

In my opinion, the railway authorities in the present case showed a scant regard to the pronouncements of the Civil Courts which deserved all respects and ordered a fresh enquiry by again putting the petitioner under suspension. Mr. Sharma could not point out any reason which actuated the DME to behave in such a manner. It appears that the power had gone through his head which compelled him to resort to such vindictive attitude towards the petitioner which not only put the petitioner to harassment but shall ultimately put the department to pecuniary losses if the petitioner chooses to drag the Union of India in further litigation to make good the losses sustained by him because of the patent illegal order of the D. M. E.

I may also mention here that neither Rule 1706(1) nor Rule 2004 on which reliance has been placed by Mr. Sharma empowers the D. M. E. to order fresh enquiry and suspend the petitioner for the same charges from which the petitioner has been exonerated from the Civil Court. In these circumstances, the Impugned order of suspension cannot in any way be upheld by this Court.

13. This case presents peculiar circumstances which create difficulty for this Court to grant proper relief to the petitioner. The petitioner has not sought by amending his writ application the quashing of the subsequent order of removal which has been passed by the authorities because the petitioner had left during the suspension period his headquarters without permission. The respondents in spite of the direction issued by this Court have not placed any material on record to show whether the subsequent enquiry was done after giving notice to the petitioner.

The contention of Mr. Jain is that if the order of suspension is declared illegal then any charge arising out of that suspension order would automatically be vitiated and the subsequent order passed for violating the illegal order of suspension would not afford any ground to the respondent to terminate the petitioner's service. The petitioner, as is apparent from the averments made by him in his application dated 24th January, 1969, had tendered his resignation to the Railway authorities In the month of January, 1968, before the second enquiry regarding the charge of absenting himself from the headquarters without permission was actually started by giving a fresh charge to the petitioner. Mr. Jain therefore, urged that a proper relief that can be given to the petitioner in such circumstances would be to set aside the order of suspension and declare that all the proceedings taken by the respondent after suspending the petitioner were illegal.

In my opinion, subsequent enquiry instituted by the Railway authorities against the petitioner for leaving the headquarters during the suspension period would automatically be hit if this Court passes the order that the order of suspension was without jurisdiction. A man who was put under suspension since 1960 and who in spite of the judgment and decree of a competent court was kept under suspension in utter disregard of the binding order of the Court cannot be allowed to be penalized on a pretext that he left the headquarters during suspension period without the permission of the authorities. It is really strange that no enquiry was really conducted on the charge for which the petitioner was suspended and he was removed from service on a pretext that he left without permission the headquarters during suspension period. Mr. Sharma could not point out to me a rule in the Railway Code under which a person is required to obtain permission for leaving headquarters while he is not required to discharge any duty. The plight of a young man who has become the victim of the caprices of his superior officers and kept out of employment for such a long period in spite of the judgment pronounced in his favour of a Court of competent jurisdiction can very well be imagined by one who possesses human heart.

In my opinion any proceeding which emanate from the illegal order of suspension of the petitioner is vitiated and cannot be allowed to hold the field. In such circumstances the impugned order of suspension is quashed and any proceedings taken against the petitioner which are connected with the order of suspension are also set aside.

The aforesaid objections are submitted with authorities on the point and it is desirable that the appropriate authority in the State or in the Forest Department shall immediately refer the matter to the competent authority, who may after taking into consideration the objections and more particularly the law in existence can withdraw and annul the charge sheet Dated: 22.12.2012 issued in the second inquiry forming the same subject matter that was substantially the subject matter of a former inquiry."

16) However, it appears to the delinquent that the Disciplinary authority or the Forest Department has not applied its mind to the facts and circumstances of the case and thus the representation made on very vital points is ignored, or not complied with. It may be further stated that the Disciplinary authority has not even cared to communicate any reasons as to why the said representation remains pending for communication of legal and valid reasons.

17) The delinquent had specifically raised an issue that the punishment of dismissal was already inflicted in the previous departmental inquiry, and once the punishment was inflicted, no second inquiry on the same-self charge can be held or initiated. In support of his submission, the delinquent had cited the judgment of AL Karla, where his lordship justice DA Desai sitting in the Supreme Court held that no punishment can be imposed once the employee is dealt with previously and for which a punishment is awarded. It is really surprising that the Disciplinary authority despite the precedent in this behalf leaves out the rule of law and sticks to the law of jungle.

6) **Assistance of lawyer:**

It may be stated that the Plaintiff substantially challenges the second inquiry, and there is no room for the Defendants to hold a second inquiry on the grounds stated hereinabove. However, without prejudice to his rights and contentions, the Plaintiff submits that a plea for engaging the lawyer remains unattended and there is no reply whatsoever. The statement of fact is made so that this Honourable court can scrutinize the conduct of the Defendants. Although, the Plaintiff enforces his right for postponement and dropping of inquiry, the Plaintiff without admitting the continuation of Departmental inquiry submits that if ultimately, the Defendant succeeds in the suit or application for injunction, the Plaintiff should be granted the assistance of lawyer at his cost.

But in substance, the departmental inquiry should be dropped against the delinquent in view of the aforesaid position of law. Still, however, if the authority adopts an unbending attitude in violation of the provisions of law, the delinquent would submit that he should be allowed to hire the services of the lawyer in a departmental inquiry so that the delinquent can effectively establish his innocence in the said inquiry.

The following are some grounds upon which the said request should be allowed and hopefully, the inquiry officer would exercise his sound discretion otherwise exercised by any prudent person to reach at a rational conclusion.

(1) Allegations levelled against the delinquent are very serious in their nature, where it is alleged that the delinquent has practiced fraud and or misrepresentation and that the said delinquent had produced false and frivolous certificate to get the employment in Government service.

The charge that has been served upon the delinquent is that of criminal nature for which the delinquent was already prosecuted in a criminal proceeding, where the delinquent was exonerated.

Under the circumstances, the delinquent should be allowed to hire the services of the lawyer in a departmental inquiry so that the delinquent can effectively defend his case where a very serious charge has been levelled against him.

(2) There is really involved an art of presenting, representing and defending the issue. Beside this, the art of performing the function with the witnesses cited is obviously attracted by legal technicalities, and therefore, the delinquent who hardly knows the trappings of the Departmental inquiry should be allowed to hire the services of the lawyer in the said departmental inquiry.

(3) There are various documentary evidences involving the legal technicalities and serious issues of their interpretations, and therefore, the delinquent should be allowed to hire the services of the lawyer in a departmental inquiry.



A person with designation of Forest Guard would hardly be able or competent enough to make the proper interpretation of documentary evidence or even examine or cross examine the witnesses.

(4) It may be further noted that the delinquent is at a loss to understand as to who may be the "star witnesses" in the said departmental inquiry. The reason is that some of the witnesses have died, and therefore, it would be a case of great importance as to whether the inquiry can still proceed or such inquiry or consequent actions would be fatal. This issue can very well be pleaded by the lawyer permitted in a departmental inquiry.

(5) It is submitted that the "Special inquiry officer" appointed for the purpose of conducting the departmental inquiry and to submit the report has got "arts of multi specialties in relation to the departmental inquiry". Beside this, the said inquiry officer is so trained in the field that he has developed a skill for examining, cross examining and confronting the witnesses. In addition to it, he is performing the only role of conducting the inquiries against the Civil Servants of the State.

Now, when the inquiry office is such a trained legal mind or a mind with quasi-judicial trappings, it would be just, fair and reasonable to allow the said delinquent to be represented by a lawyer in a departmental inquiry, so that the delinquent can draw up his proper defence in inquiry. And, if he is not so allowed, it would be more a case of denial of reasonable opportunity.

(6) As far as the legal position is concerned, it may be stated that in United States, the legal representation is permitted to secure fair play in action in view of the provision of "due process clause" under the Constitution coupled with the fact the administrative procedure Act makes such right effective and meaningful. Australia is more liberal and it accepted the same as a rule before the tribunals. England covers up the same as rule of "natural justice".

The assistance of lawyer is permitted throughout the world. The reason to allow the representation by lawyer is to secure "fairness in action" and to grant an effective opportunity of defence.

Lord Denning in Pett's Case[25] observed that:

"I cannot accept this connotation. The Plaintiff is here facing a serious charge. He is charged either with giving the dog drugs or with not exercising proper control over the dog so that someone else drugged it. If he is found guilty, he may be suspended or his license may not be renewed. The charge concerns his livelihood. On such an inquiry I think that he is entitled not only to appear by himself but also appoint an agent to act for him. Even a prisoner can have his friend.. I should have thought therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor."

Even in India, the assistance of lawyer is now accepted as a "due process". The Indian Supreme Court has had an opportunity to interpret the principle of fairness enshrined under Article 14 of the Constitution of India and it has specifically laid down that no action of the Government should be unjust, unfair, unreasonable or arbitrary. Comparatively, the new judicial dimension followed the line indicated by Lord Denning in the foregoing cases. Here, the discretion is made subject to judicial review. The review is undertaken on various factors. *They have now said that not exercising such discretionary powers would violate the principles of natural justice.*

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**[25] Pett V/s Greyhound Racing Association 1968 (2) All ER at page 545**

Every Governmental body or institution has its own set of rules that provide discretionary jurisdiction to the authorities either to allow or not to allow the assistance of lawyer. Taking the illustration of service jurisprudence, the manner is provided as to how the inquiry should be conducted and how to exercise the discretion for extending permission to hire a lawyer. Rules provide that normally the employees may be allowed to retain a representative of their choice, but in harder cases, even the lawyers are also permitted to be engaged in a departmental inquiry.

Justice D. A. Desai in case of the Board of Trustees of the port of Bombay[26] had the occasion to interpret Regulation 12 (8) of the Bombay Port Trust Employees' regulations of 1976. The said regulation reads like this:

"The employee may take the assistance of any other employee or, if the employee is a Class III or a Class IV employee, of an "Office-Bearer" as defined in Clause (d) of Section 2 of the Trade Unions Act, 1926 (16 of 1926) of the union to which he belongs, to represent the case on his behalf, but may not engage a real precaution practitioner for the purpose unless the said Presenting Officer appointed by the disciplinary authority, having regard to the circumstances of the case, so permits."

The Court observed that:

"Where in an inquiry before a domestic tribunal the delinquent officer is pitted against a legally trained mind, if he seeks permission to appear through a legal practitioner the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated.

Supreme Court approvingly quoted Lord Denning and held that:

"The trend therefore is in the direction of permitting a person who is likely to suffer serious civil or pecuniary consequences as a result of an enquiry, to enable him to defend himself adequately, he may be permitted to be represented by a legal practitioner…"

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[26] **Board of Trustees of the port of Bombay V/s Dilipkumar AIR 1983 SC page 109**

And lastly the Court in Para 12 observed that: -



"In our view we have reached a stage in our onward march to fair play in action."

Thus the Indian Supreme Court has accepted that refusal to permit a lawyer in a domestic inquiry would offend the "principles of natural justice". Setting finally, the Court employed the clinching language that "We have reached a stage in our onward march to fair play in action." And while deciding the issue, the Court ruled that when the delinquent is to suffer serious civil or pecuniary consequences, such request would be reasonable and must be entertained.

In A. J. Vaswani[27] the facts were gross arising out of Custom Department where the officers developed an art of examining and cross examining the variety of persons and discharging quasi-judicial functions. Due to complicated issues in inquiry, the Court held that non-granting of such assistance in departmental inquiry suffers from serious infirmity of principles of natural justice. That shall mean that where the facts are so complicated or a trained officer is conducting the inquiry such assistance is fundamentally covered under the well-founded principles of natural justice.

18) The Plaintiff submits that he addressed two communications to the Defendants and the inquiry officer. It was requested that he may be permitted to engage a lawyer to defend effectively in the said departmental inquiry, but the authorities have refused such assistance in violation of principles of natural justice.

[27] **A. J. Vaswani V/s Union of India 1983 LIC page 624 High Court of Calcutta.**

19) At the same time, the Departmental inquiry officer went on to fix the departmental inquiry, but the Department stopped to make the payment of salary despite the fact that the Plaintiff was neither suspended, nor removed or dismissed. The Plaintiff did receive the arrears, but the arrears is exhausted in view of the fact that the huge debt was raised by the Plaintiff during his forced idealness. Now that the Plaintiff has to pull on and bank upon the regular salary. In the absence of payment, the Plaintiff cannot attend the departmental inquiry at a far station like Gandhinagar.



20) The Plaintiff also relies upon the judgment in case of RS Nayak Vs. AR Antulay, which will be explained at the time of hearing of the application for interim order and the suit on merits.

21) The Plaintiff submits that after the aforesaid second departmental inquiry was determined to be conducted against the Plaintiff, the Disciplinary authority appointed special officer for departmental inquiry to hold the inquiry against the Plaintiff to find out the truth based on the evidence.

22) The Plaintiff, as aforesaid submitted the objections in writing that the Second inquiry by issuing a fresh charge sheet is unauthorized and as such never permitted under the Disciplinary rules. The Disciplinary authority has no power to review under the rules. Despite the clear situation in law, the Disciplinary authority overruled the objections filed by the plaintiff and directed to proceed with the inquiry.

23) The Plaintiff submits that since the action is without jurisdiction and without any authority of law, the Plaintiff filed a civil suit for a declaration to such an effect before the Learned Civil Judge, Senior Division at Junagadh. The said suit is pending before such court. However, during the pendency of the said suit, the decision to dismiss the Plaintiff is taken, and therefore, the Plaintiff is constrained to bring the present suit for challenging the dismissal too.

24) The Plaintiff submits that since the order of dismissal is passed against him, the aforesaid suit only challenging the inquiry without any more and particularly dismissal is meaningless. The said suit is being withdrawn with a liberty to file the fresh suit and this is how the combined reliefs are prayed in the present suit. The certified copies of the orders in previous suit that is going to be withdrawn will be placed on record of this Honourable court during the trial of this suit.



25) The Plaintiff submitted to the Inquiry Officer and the Disciplinary authority that he may be provided with the relevant record of the matter and that he may be given the colour Xerox copy of the certificate upon which the authorities rely upon. At the same time, the Plaintiff had requested that all the original of the copies of the documents produced in the record of the departmental inquiry be shown to him. However, the presenting officer in presence of the inquiry officer at Bhavnath was unable to show the original. This is how the Plaintiff presumed and estimated that the authorities are bent upon to commit breach of the principles of natural justice.

26) The Plaintiff submitted that he may be provided with all relevant record of criminal case including the deposition, but the same were never furnished to the Plaintiff. The Plaintiff was furnished few papers, but the set of the documents was never complete. The Plaintiff was furnished with the brief sent by the presenting officer, but the Plaintiff was never provided with the deposition and chief examination conducted by the presenting officer during the course of departmental inquiry.

27) It may be pointed out that whether the Plaintiff appears in the inquiry or not is not very relevant, but the Plaintiff had preferred to make representation and submission from time to time. Here, when the inquiry officer was duty bound to provide the record of chief examination to the Plaintiff. The reason is that the Plaintiff was expected to defend him in relation to the tentative reasons of the Disciplinary authority. The defence could be effectively made only if the Plaintiff is provided with the record of inquiry and the chief examination conducted by the presenting officer during the course of departmental inquiry.

28) The Plaintiff would submit during the course of trial as to how the principles of natural justice were violated. The Plaintiff submits that the Impugned order of dismissal is also unjust, unfair, unreasonable, arbitrary and violative of Article 311 (2) of the Constitution read with well founded principles of natural justice. In short, the Plaintiff submits that:



(1) The Disciplinary authority has not applied his mind to any of the representations made by the Plaintiff. The Disciplinary authority materially failed to consider that he has had no power, authority and jurisdiction to order the second departmental inquiry.

(2) The Disciplinary authority has never considered the effect of various judgments cited by the Plaintiff where it has been clearly laid down that no such second inquiry could be held as there is no such power to review and the rules never permit such an action.

(3) The Disciplinary authority has materially failed to consider the phrase "in accordance with law". The inquiry can be ordered only if permissible under the law. Such second inquiry is never permissible and therefore the inquiry ought not to have been conducted.

(4) The Disciplinary authority has recorded vague reasons in the tentative agreement. The Disciplinary authority failed to provide the relevant record of the inquiry.

(5) The Disciplinary authority materially failed to consider the plea of the Plaintiff in relation to assistance of the lawyer. The authority ought to have considered that the inquiry officer, who is only dealing with the inquiry as a special officer has developed an art of examination and cross examination and that he is expert. Whereas, the Plaintiff hardly knows the quashi judicial trappings.

(6) The Disciplinary authority and the inquiry officer ought to have considered that ultimately, it is a question of proper interpretation of relevant documents, the rules and the intricacies.



(7) The Inquiry Officer has also materially failed to afford reasonable and proper opportunity of being heard. The inquiry Officer has committed breach of the principles of natural justice during the course of inquiry. The evidence in relation to chief examination is never provided to the Plaintiff.

(8) The Disciplinary authority and the Inquiry Officer have never applied their mind to the facts and circumstances of the case. Both the authorities have not taken into account relevant considerations. That the extraneous or irrelevant considerations are impermissible under the law.

(9) In any case, the impugned order of dismissal is illegal and void of the principles of natural justice.

**29) Cause of action:**

Cause of action arises when the Disciplinary authority indicated under the relevant Disciplinary Rules reviewing and forming an opinion to conduct the second departmental proceeding on the "*self-same charges*" for which the delinquent was already awarded the punishment of dismissal from service, but the delinquent was reinstated in service based on the judgment and decree passed by the Civil Judge, Senior Division, Junagadh and confirmed up to the Supreme Court of India and it also arises when the Defendants arbitrary decided to hold the inquiry based on the charge sheet dated: 02.12.2011 where the Defendants are patently lacking in jurisdiction, and therefore, orders in relation to second inquiry and such subsequent communications and proceedings are all without jurisdiction and produce unsustainable illegality and it further arises when the Defendants act in breach of the settled legal position as laid down by Honourable the Supreme Court of India that the doctrine of merger is based on the principle that there cannot be at one and the same time more than one operative order governing the same subject matter. Therefore, the judgment of an inferior court, if subjected to an examination by the superior court ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court. And it further arises when the Defendants have instead of dropping the Departmental inquiry informed the present Plaintiff to remain present in the inquiry by a letter and thereafter conducted the departmental inquiry which has culminated into the order of dismissal Dated: April, 2013. The Plaintiff has also preferred an appeal Dated: April, 2013 to the Conservator of Forest, Junagadh but no interim order is passed touching him within the jurisdiction of this Honourable Court at Junagadh.

**30) Notice under Section 80 of Civil Procedure Code & waiver:**

Plaintiff submits that the action of the Defendants, the Disciplinary authority and the inquiry officer are patently without jurisdiction and in breach of the principle of merger as decided by the Supreme Court and therefore no notice under Section 80 of Civil Procedure Code is required to be served or given at all.

However, it is submitted that since the suit involves an urgency of a great kind, where the Plaintiff also brings an application for interim relief as provided under Order 39 Rules (1) and (2) read with Section 151 of Civil Procedure Code, the statutory notice as contemplated under Section 80 of the Code of Civil Procedure be waived or dispensed with as empowered under Section 80 (2) of the Code.

31) The Plaintiff prays for the following declaration and connected reliefs keeping in mind the provisions of the Specific Reliefs Act and the contentions raised in the present suit:

(a) That this Honourable court may be pleased to grant a declaration that the action of the Disciplinary authority indicated under the relevant Disciplinary Rules and precisely the Gujarat Civil Service (Discipline & Appeal) Rules, 1971 reviewing and forming an opinion to conduct the second departmental proceeding on the "*self-same charges*" for which the delinquent was already awarded the punishment of dismissal from service, but the delinquent was reinstated in service based on the judgment and decree passed by the Civil Judge, Senior Division, Junagadh and confirmed up to the Supreme Court of India is unjust, unfair, unreasonable, arbitrary and patently lacking in jurisdiction, and therefore, orders in relation to second inquiry and such subsequent communications and proceedings are all without jurisdiction and produce unsustainable illegality and for a further declaration based on the judgment of the Supreme Court that held that the doctrine of merger is based on the principle that there cannot be, at one and the same time more than one operative order governing the same subject matter. Therefore, the judgment of an inferior court, if subjected to an examination by the superior court ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court. And accordingly, the inquiry against the Plaintiff should have been dropped finally and irrevocably.

(b) That this Honourable Court may be pleased to declare that the charge sheet is not binding to the Plaintiff and accordingly quash and set aside the said charge sheet dated: 02.12.2011 holding and conducting second inquiry against the Plaintiff that was not permissible under Disciplinary rules, and even otherwise, the said action is contrary to the settled position of law and the principle of merger of the decree of the lower courts in appeals.



(c) This Honourable Court may be pleased to grant a declaration that the impugned order of dismissal passed against the Plaintiff based on second departmental Inquiry is null and void and that the Plaintiff is entitled to all consequential benefits irrespective of the order of dismissal. The orders in appeal are equally so and they be quashed accordingly.

(d) That this Honourable court may be further pleased to issue injunction against all the defendant, Disciplinary authority restraining from further operating the impugned order of dismissal based on the charge sheet dated: 02.12.2011.

(e) Such other and further reliefs may also be granted looking to the facts and circumstances of the present case.

(f) Cost of the litigation may be awarded.

**32) Court fees and valuation:**

The Plaintiff challenges the holding and conducting the second departmental inquiry based on the charge sheet dated: 02.12.2011. The reliefs claimed by the Plaintiff is not admissible of any market value, and therefore, the reliefs prayed by the Plaintiff is falling and being covered under Section 6 (IV)(J) of the Bombay Court Fees Act read with relevant amendments made by the State of Gujarat. The Plaintiff brings the fixed court fees with process prescribed.

**33)** **Vakalatnama and documentary evidence:**



The Plaintiff has duly signed the Vakalatnama authorizing the Advocate named therein and produces the relevant sets of the documentary evidence to prove his case and also to furnish the said documentary evidence to the Defendants with the summons and the notices.

**AND FOR THIS ACT OF KINDNESS, THE PLAINTIFF AS IN DUTY BOUND SHALL PRAY FOREVER.**

**Dated:**
**Place: Junagadh** **Fakirmahamad Noormahamad Baloch**
**Signature of the Plaintiff**

**Verification:**

I, Fakirmahamad Noormahamad Baloch, Adult, Muslim, serving as Forest Guard, Forest Department, State of Gujarat and residing at Plot Vista, Sasan Gir, District Junagadh do hereby verify that the facts stated in plaint paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19,20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 are true to my knowledge and belief and in token whereof I set my hands on this ______ day of the month May of year 2013 at Junagadh.

**Dated:**
**Place: Junagadh** **Fakirmahamad Noormahamad Baloch**
**Signature of the Plaintiff**

**Affidavit:**

I, Fakirmahamad Noormahamad Baloch, Adult, Muslim, serving as Forest Guard, Forest Department, State of Gujarat and residing at Plot Vista, Sasan Gir, District Junagadh do hereby solemnly affirm and declare on oath that I am filing a suit for declaration that the action of the Disciplinary authority indicated under the relevant Disciplinary Rules and precisely the Gujarat Civil Service (Discipline & Appeal) Rules, 1971 reviewing and forming an opinion to conduct the second departmental proceeding on the "*self-same charges*" for which the delinquent was already awarded the punishment of dismissal from service, but the delinquent was reinstated in service based on the judgment and decree passed by the Civil Judge, Senior Division, Junagadh and confirmed up to the Supreme Court of India is unjust, unfair, unreasonable, arbitrary and patently lacking in jurisdiction, and therefore, orders in relation to second inquiry and such subsequent communications and proceedings are all without jurisdiction and produce unsustainable illegality and for a further declaration based on the judgment of the Supreme Court that held that the doctrine of merger is based on the principle that there cannot be, at one and the same time more than one operative order governing the same subject matter. Therefore, the judgment of an inferior court, if subjected to an examination by the superior court ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court. The impugned order of dismissal was attempted to be communicated, but the same is in transit and is not received by the Plaintiff so far.

I have raised various contentions, which have been read over and explained to me in vernacular language by my advocate retained and engaged in this matter. I have not supressed any fact much less material facts from this Honourable Court.

The facts stated are true to my knowledge and belief and the facts mentioned in plaint paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and all such sub paragraphs are true to my knowledge and belief and in token whereof I set my hands on this ______ day of the month May of year 2013 at Junagadh.

**Dated:**
**Place: Junagadh** **Fakirmahamad Noormahamad Baloch**
**Signature of the Plaintiff**

**Identified and interpreted in**
**Vernacular language by me:**

**HS Khiraiya**
**For DS Rana & Associates, Advocates**

**Suit drawn by me under instructions:**

**Hemang D. Rana, Advocate**
**For DS Rana & Associates, Advocates**

**MEMO OF ADDRESS**



**BEFORE HONOURABLLE THE CIVIL JUDGE**
**SENIOR DIVISION AT JUNAGADH**

**Regular civil suit no: _________of 2012**

| | | | |
|---|---|---|---|
| | **Fakir Mahammad Noormahamad Baloch** | )) | |
| | Adult, Muslim, Serving as Forest Guard, | )) | |
| | Gir (West) Una, District Junagadh… | )) | **Plaintiff** |

Versus

| | | | |
|---|---|---|---|
| 3) | **The State of Gujarat** | )) | |
| | Notice to be served through the Secretary | )) | |
| | Forest Department, Sachivalaya, Gandhinagar | )) | |
| | | )) | |
| 4) | **The Conservator of Forest** | )) | |
| | Office of the Conservator of Forest, | )) | |
| | Forest Department, Sardarbaugh, Junagadh | )) | |
| | | )) | |
| 3) | **The Disciplinary authority** | )) | |
| | Office of the Deputy Conservator of Forest, | )) | |
| | Forest Department, Dhari, Dist. Amreli | )) | |
| | | )) | |
| 4) | **The Departmental inquiry Officer** | )) | |
| | Appointed as special officer for Departmental | )) | |
| | Inquiry, Sachivalaya, Gandhinagar (Gujarat) | )) | **Defendants** |

Accurate addresses available with the Plaintiff have been indicated in the cause title as well as this memo of address as mandated under the Code of Civil Procedure.

**Dated:**
**Place: Junagadh** **Fakirmahamad Noormahamad Baloch**
**Signature of the Plaintiff**

**BEFORE HONOURABLLE THE CIVIL JUDGE**
**SENIOR DIVISION AT JUNAGADH**

**Regular civil suit no: _________of 2013**



| | | | |
|---|---|---|---|
| | **Fakir Mahammad Noormahamad Baloch** | )) | |
| | Adult, Muslim, Serving as Forest Guard, | )) | |
| | Gir (West) Una, District Junagadh… | )) | **Plaintiff** |

Versus

| | | | |
|---|---|---|---|
| 5) | **The State of Gujarat** | )) | |
| | Notice to be served through the Secretary | )) | |
| | Forest Department, Sachivalaya, Gandhinagar | )) | |
| | | )) | |
| 6) | **The Conservator of Forest** | )) | |
| | Office of the Conservator of Forest, | )) | |
| | Forest Department, Sardarbaugh, Junagadh | )) | |
| | | )) | |
| 3) | **The Disciplinary authority** | )) | |
| | Office of the Deputy Conservator of Forest, | )) | |
| | Forest Department, Dhari, Dist. Amreli | )) | |
| | | )) | |
| 4) | **The Departmental inquiry Officer** | )) | |
| | Appointed as special officer for Departmental | )) | |
| | Inquiry, Sachivalaya, Gandhinagar (Gujarat) | )) | **Defendants** |

# VAKALATNAMA

**I, Fakir Mahammad Noormahamad Baloch,** Adult, Muslim, Serving as Forest Guard, Gir (West) Una, District Junagadh and being the Plaintiff in the aforesaid suit do hereby authorize Shri Hemang D. Rana, B.Com, LL.B, Advocate and Shri HS Khiraiya, Advocate to act, appear and plead the case on my behalf. And in token of having provided full authorities sign on this ____ day of the month May of year 2013 at Junagadh.

**Dated:**
**Place: Junagadh** **Fakirmahamad Noormahamad Baloch**
**Signature of the Plaintiff**

**Accepted by us:**

**Hemang D. Rana, Advocate** **HS Khiraiya, Advocate**