HIGH COURT OF GUJARAT

HIRABEN JIVANBHAI CHAUDHARI
Versus
R C RAVAL

Date of Decision: 22 June 1992

Citation: 1992 LawSuit(Guj) 134

Hon'ble Judges: S D Shah

Eq. Citations: 1993 1 GLR 66, **1994 1 GLH 582**

Case Type: Special Civil Application

Case No: 8496 and 8497 of 1991

Editor's Note:
SERVICE LAW - NATURAL JUSTICE - Gujarat Panchayats Act, 1961 (VI of 1962) - Sec. 305 - Gujarat Panchayat Service (Discipline & Appeal) Rules, 1962 - Contract of service entered into with a statutory body - Though based on contract, the service is governed by statutory provisions - Contract tainted with fraud - The other partyy has a right to avoid it - But principles of natural justice should be followed before terminating the service.
When voidable contract is said to be avoided it does not mean that the contract never existed but it would mean that it ceased to exist from the moment of avoidance. In the case of suppression of true facts or disclosure of untrue facts or non-disclosure of material facts it cannot be said that there is no consent at all from the other party acting on such representation but it can be said that the other party would not have consented if he had the facts before him. Therefore voidable transaction until it is avoided is valid and the things done under such contract cannot afterwards be undone. In other words when a voidable contract is voided by the party affected thereby avoidance takes effect from the time it is avoided and not from the date of the transaction. (Para 7) In case of contract of employment with the Government it has its origin always in contract but once he is appointed to a post or office he acquires a status and his rights and obligations thereafter are not governed by the terms of the contract but are governed by the statute or the Statutory Rules. A person who has acquired a status by virtue of contract of employment if it is voided on the ground that the consent of the State was

obtained by fraud misrepresentation or mistake stands on the same footing as a person who has acquired status pursuant to a contract of employment with the Government which is not otherwise vitiated. The only distinguishing feature is that the contract of employment of the first category can always be avoided or rescinded by the Government and therefore it is always open to the Government to take action for avoiding such contract. (Para 9) The case like the present one should be decided by resorting to second propo- sition namely of issuing notice to the employee calling upon him to show cause and to tender his explanation for his conduct. The employee should tender his explanation and his documentary evidence. Explanation of the employee along with documentary evidence tendered by him should be considered independently and not in a biased manner by the employer and after consideration the employer should take a positive decision as to whether it would like to avoid the contract and once such decision is taken the employer can by an order rescind the contract of employment. (Para 22A) East India Commission Co. v. Collector of Customs (1) and Roshanlal Tandon v. Union of India (2) relied on. Rita Mishra v. Director of Primary Education (3) dissented from. K. N. Gopalan v. Managing Director (4) U. P. Junior Doctors Action Committee v. Dr. B. Sheetal Nandwani (5) Anupsinh Jatubha v. V. K. Gupta. District Supdt. of Police (6) L.P.A. No. 506 of 1985 decided on 17-7-1989 by Guj. High Court (7) and Kunhikrishnan Nair v. State of Kerala (8) referred to.

Acts Referred:
Gujarat Panchayats Act, 1961 Sec 305

Final Decision: Rule made absolute

Advocates: K G Vakharia, G R Udhwani, R C Jani, Ajit Padiwal

Cases Cited in (+): 3
Cases Referred in (+): 5

SHAH, J.

[1] These two petitions filed under Art. 226 of the Constitution of India raise common questions of law based on almost common facts, and therefore, they are decided by this common judgment.

[2] The relevant facts giving rise to present petitions shortly stated are as under :

(i) Both the petitioners applied to District Primary Education Committee, Mehsana District, for appointment to the post of Primary Teacher.

(ii) The petitioner in Spl. C. A. No. 8496 of 1991 in her application stated that in the year 1984 she had obtained 711 marks out of 1000 marks in P. T. C. examination. She also stated in such an application that as per the procedure marks obtained in the subjects of Samuh Jivan, Buniyadi Udyog Yearly Work and Sahayak Udyog Yearly Work marks being 56, 66 & 33 respectively were required to be deducted and after such deduction she had obtained 560 marks. Such application was signed by the petitioner herself and is filled in by her in her own hand-writing.

(iii) The petitioner in Spl. C. A. No. 8497 of 1991 had also applied for appointment as Primary Teacher to District Education Committee, Mehsana and in her application she has stated that she had obtained 712 marks out of 1000 marks in P. T. C. examination and as per the procedure marks obtained by her in the subjects of Samuha Jivan, Buniyadi Udyog Yearly Work and Sahayak Udyog Yearly Work were to be deducted and after deducting such marks she has mentioned 558 marks as obtained by her in her own application in her own hand-writing and said application was signed by her.

(iv) The said applications submitted by the petitioners were checked by the Checking Officer and the petitioners were on the strength of details supplied in the application forms were called for interview.

(v) At the time of interview, both the petitioners have produced marks-sheets in which they have shown the total marks obtained by them as 711 out of 1000 and 712 out of 1000 respectively. The petitioners, at that time, did not produce original marks-sheets, but only produced the copy of marks-sheets.

(vi) The percentage of marks obtained by the applicants were worked out on the basis of the information supplied by the applicants in their application forms and accordingly the petitioner in Spl. C. A. No. 8496 of 1991 had obtained 597 marks while the petitioner in Spl. C. A. No. 8497 of 1991 had obtained-percentage of marks. The select-list included the candidates obtaining marks higher than 56.1%, and therefore, the names of both the petitioners came to be included in the select-list since as per the information supplied by them they had obtained marks more than 56.1%. The office of the District Primary Education Officer has, however, insisted for production of original marks-sheets and when the original marks-sheets of the two petitioners were received, it was found that the petitioner of Spl. C. A. No. 8496 of 1991 had obtained 643 marks out of 1000, i.e., 51.98% as per the procedure after deducting the marks of 3 subjects and therefore, her name was not required to be included in the select-list. The petitioner in Spl. C. A. No. 8497 of 1991 had obtained 654 marks out of 1000, i.e., 54.42% as per the procedure of

counting after deducting marks of three subjects, her name also was not liable to be included in the select-list.

(vii) On inclusion of their names in the select-list as and when the vacancies occurred the petitioners were appointed to the post of Primary Teacher vide orders of appointment, dated 15th November, 1986.

(viii) On coming to know about the fact that each petitioner has obtained appointment to the post of Primary Teacher by stating facts which were not true to their knowledge and the marks stated in the application when compared to the original marks-sheets of P. T. C. examination where not correct and hence by practising fraud upon the District Education Committee they have obtained appointments, the D.E.O., Mehsana the respondent No. 1 herein vide order, dated 22nd November, 1991 terminated the services of the petitioners removing each petitioner from the post of Primary Teacher with immediate effect.

(ix) These orders of removing the petitioners from service or terminating their services on the ground that they had obtained orders of appointment by fraud are under challenge in these petitions under Art. 226 of the Constitution of India.

[3] Mr. K. G. Vakharia, learned Counsel for petitioners has submitted that the appointment to the post of Primary Teacher in schools run by the District Education Committee of Mehsana District Panchayat is an appointment in Panchayat Services and appointment in Panchayat Services is an appointment to the post in State Government Service. He submitted that for the purpose of appointment to the said post of Primary Teacher and for all purposes thereafter the appointee is governed by the Statutory Rules framed by the State Government under the provisions of Gujarat Panchayats Act, 1961. The State of Gujarat, in exercise of powers conferred upon it by Sec. 305 of the said Act, framed rules known as 'Gujarat Panchayat Service (Discipline & Appeal) Rules, and these Rules hold the field and provide the procedure to be followed for imposing any penalty, major or minor, on a Panchayat servant. The petitioners were serving in the Panchayat since last five years, and therefore, if their services were to be terminated or they were to be removed from service, the procedure prescribed by the said service Rules was required to be followed. He, very vehemently, submitted that the petitioners having been lawfully appointed after following the procedure for such appointment by the authority, the petitioners have acquired status and their services cannot be straight-away terminated by order of termination simplicitor without following the procedure prescribed by the Statutory Rules of issuing notice to show cause, holding enquiry and affording a reasonable opportunity to defend to the petitioners, and thereafter, passing appropriate order of penalty. Since no such procedure worth the name was followed and since no opportunity to defend was

Licensed to : R. C. JANI & ASSOCIATES

afforded to the petitioners, the impugned orders were non-est and still-born orders and were required to be voided. In his submission, such an order terminating the services of the petitioners has adverse effects on the petitioners and such orders could not have been passed in blatant disregard of elementary rules of natural justice, and therefore, also the orders were null and void and were liable to be quashed and set aside.

[4] Mr. R. C. Jani, learned Advocate for respondent has, on the other hand, submitted that when the initial contract of appointment is obtained by the petitioners by practising fraud upon the respondents and when the petitioners are guilty of suppressing true facts, and stating facts which were incorrect to their knowledge, and but for the fraud perpetrated by them, they would not have been appointed to the posts of Primary Teacher and hence their services were lawfully terminated on respondent coming to know about the fraud committed by the petitioners, and there was no need to follow the rules of natural justice. According to him, those who are guilty of fraud or suppression of material facts cannot be entrusted with the writ of this Court and both public interest as well as maintenance of pure administration would require that such persons are terminated simplicitor.

[5] On the aforesaid submissions made by the learned Advocates for the parties, this Court was of the opinion that questions of wider importance would arise for consideration and therefore, notice was affixed on the notice board inviting the Advocates to intervene in the matter and to address the Court at length on the following questions :

> "When initial employment/appointment is allegedly obtained or procured by fraudulent/doubtful means, or by false representation or mis-representation of facts by the employee/appointee, and when such fraud/mis-representation is discovered by the employer, is the employer required to-
>
> (a) hold, before voiding the contract or rescinding contract of employment, regular enquiry under Art. 311(2) of the Constitution of India or under the relevant Service Rules providing procedure for imposition of penalty,
>
> (b) to issue show cause notice calling upon the employee/appointee to show cause as to why the contract of employment should not be terminated/rescinded for alleged fraud/mis-representation and to pass appropriate order after considering the reply/ explanation of the employee, or
>
> (c) to terminate/rescind the contract of employment by order of termination/ rescission simplicitor without holding inquiry and without affording opportunity of being heard to the employee/appointee."

[6] It may be stated that in response to the notice affixed on the notice board, Mr. Ajit Padiwal only has appeared as intervener and has addressed the Court at length.

[7] When consent of any of the parties to a contract is caused by fraud, mis-representation or mistake etc., it is not a free consent and under Sec. 19 of the Indian Contract Act such an agreement is a contract voidable at the option of the party whose consent was so caused or obtained. A party to a contract whose consent was so caused by fraud or mis-representation or mistake, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true. In India, statutorily, therefore, the effect of fraud, mis-representation or mistake in any contract is to render the contract voidable at the instance of the party against whom fraud, mis-representation or mistake is committed. The party entitled to set aside or avoid the contract has option to affirm it, if he thinks fit. If the party does not affirm, it has another choice of avoiding the contract. When voidable contract is said to be avoided it does not mean that the contract never existed, but it would mean that it ceased to exist from the moment of avoidance. In the case of suppression of true facts or disclosure of untrue facts or non-disclosure of material facts, it cannot be said that there is no consent at all from the other party acting on such representation, but it can be said that the other party would not have consented if he had the facts before him. Therefore, voidable transaction until it is avoided is valid, and the things done under such contract cannot afterwards be undone. In other words, when a voidable contract is voided by the party affected thereby, avoidance takes effect from the time it is avoided and not from the date of the transaction. This position of Law, which is statutorily accepted in India, is also accepted by the Supreme Court in the case of East India Commission Company v. Collector of Customs, reported in AIR 1962 SC 1893. The Supreme Court accepted the principle that mis-representation does not make a contract non-est, but it makes the contract only voidable and such right of voiding the contract must be exercised promptly and until it is so exercised, the contract is valid and things done under it cannot afterwards be undone. It, thus, becomes clear that when contract of employment is procured by the party by committing fraud or misrepresentation or by adopting fraudulent means, the transaction is voidable at the instance of other party and such a transaction can always be voided and from the date it is avoided it becomes ineffective or non-est. It follows therefrom that the other party is required to take some action to avoid the contract and transaction does not, ipso-facto become void ab-initio. The other party cannot be permitted to state that the transaction is null and void from its inception and that it is not required to be voided. A positive act of avoiding the contract is required from the other party, and therefore, in my opinion, when the contract of employment is vitiated by fraud, misrepresentation or mistake, it being a voidable transaction action is

required to be taken to avoid it by the other party to the contract and so long as such action is not taken the transaction continues.

[8] It shall have also to be accepted that when a contract of employment is entered into in case of Civil Service under the Union of India or the State or in case of Public Service, though originating in contract it becomes wholly statutory in status when the appointee enters the portals of Public Service. In the case of Roshanlal Tandon v. Union of India, reported in AIR 1967 SC 1889 the theory of status acquired by the Government servant is accepted in the following words :

> "It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered ultimately by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee...But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest."

[9] It is thus clear that in case of contract of employment with the Government it has its origin always in contract, but once he is appointed to a post or office he acquires a status and his rights and obligations thereafter are not governed by the terms of the contract, but are governed by the statute or the Statutory Rules. A person who has acquired a status by virtue of contract of employment if it is voided on the ground that the consent of the State was obtained by fraud, mis-representation or mistake, stands in the same footing as a person who has acquired status pursuant to a contract of employment with the Govt, which is not otherwise vitiated. The only distinguishing feature is that the contract of employment of the first category can always be avoided or rescinded by the Govt., and therefore, it is always open to the Govt, to take action for avoiding such contract.

[10] 3rd proposition :

(i) Mr. R. C. Jani, learned Counsel for respondents has submitted before me that once it is found that the contract of employment is secured by fraud or suppression of material facts or disclosure of untrue facts it a still-born or non-est contract and it could be terminated by the Government forthwith. He; submits that for avoidance of such contract the rules of natural justice are not required to be followed nor is a perpetrator of fraud required to be heard before the contract of employment is terminated. He submits that if the fraud or dubious considerations are established in obtaining the contract of employment, in the eye of law, no right or remedy can stem from such a fraudulent origin. Fraud vitiates everything and where source of right is rooted in fraud no enforceable right stricto sensu would arise in favour of employee.

(ii) In support of his submission, Mr. Jani has placed strong reliance upon the decision of Full Bench of Patna High Court in the case of Rita Mishra v. Director of Primary Education, Bihar, reported in AIR 1988 Patna 26. Before the Patna High Court procedure for selection and recruitment of the teachers of elementary school was undertaken by the District Establishment Committee. After issuing advertisement and undertaking process of selection a list of selected candidates was to be prepared and it was required to be sent to the Regional Deputy Director, who after careful scrutiny was required to forward such list to Divisional Commissioner for his approval. Such list was thereafter required to be sent to the District Superintendent of Education who was to issue letters of appointment. There were large number of vacancies running into thousands or more. Despite aforesaid procedure it came to light that certain forged and bogus letters of appointment had been engineered on the basis of which some persons were claiming to have been appointed. A searching enquiry was conducted and it was revealed that the District Superintendent of Education had in consideration of illegal gratification received, engineered the issuance of innumerable forged, bogus and fraudulent letters of appointment and unauthorised persons were allowed to join the posts of teachers by dubious means. Actions were taken against all the persons. Even criminal complaints were also filed. The persons who got appointment by such dubious means approached the High Court by filing writ petition and prayed for issuance of writ directing to pay salary to them which was being withheld. It may be stated that because of vastness of the problem and wide ranging fraud committed in preparing the purported appointment letters the State Govt, resorted to the course of dispensing with the fraudulent and illegal appointments by issuing letters of termination simplicitor which were wholly unstigmatic.

[11] In the aforesaid factual matrics, two out of three judges (majority view) speaking through S. S. Sandhawalia, CJ. took the view that where the very original appointment

Licensed to : R. C. JANI & ASSOCIATES

to service is invalid, forged or fraudulent, in the eye of law, there is no appointment at all and declaration by the State that the alleged appointment is non-est does not attract any principle of natural justice. The Court also held that no notice is required to be given in a case of termination simplicitor. The Court found that no notice is required to be given even if the termination was on the ground that the appointment itself is invalid as it was obtained by fraud or forgery. The Court examined the issue in the context of three categories of cases where appointment letters were either (i) expressly forged and thus amounting to a crime, (ii) have been obtained fraudulently or for dubious considerations but not amounting to a criminal offence, or (iii) are otherwise illegal being flagrantly violative of the statutory procedure prescribed for selection and appointment.

[12] With respect to first category of cases the discussion was divided into two sub-categories, namely, (i) those where the appointee is directly a party or privy to the forgery and (ii) where he is not a party to the forgery. Dealing with first sub-category, the Court held that where a letter of appointment is a forgery and the appointee is a party and privy to the same no substantive right of salary would arise. No legal right can stem from a crime. Because of original factum of forgery such a person is not an employee at all. Even if on the basis of forged letter he has imposed himself on the post and worked thereon he cannot take advantage of his own wrong because he would not have worked lawfully thereon. The Court, therefore, took the view that in favour of such a person no substantive right to receive salary can be upheld nor can writ of the Court be entrusted for enforcement of such a claim. Even with respect to other sub-category where appointee is not a party or privy to the forgery the Court took the view that the very forged letter of appointment itself is non-est and nullity and therefore no right to salary can arise in favour of such an appointee. The Court also found that the Public Service is a matter of status and governed by Statute and no rights of this nature can stem from a crime, and therefore, no writ could be entrusted to such an appointee for payment of salary.

[13] With regard to the case of second category where the letter of appointment has been obtained fraudulently or for dubious considerations the majority held that if fraud or dubious considerations stand established then in the eye of law no right or remedy can stem from such a fraudulent base. The Court held that generically it is a maxim of law that fraud vitiates everything and that fraud would go to the root of the crime or would invalidate the same. The Court held that if active concealment of fraud is established the contract would stand vitiated. The Court referred to Sec. 23 of the Contract Act and found that if the consideration of the object of the agreement is fraudulent, the agreement is rendered vitiated. The Court thereupon posed following question :

"Could it be possibly said that in the higher realm of status, obligations and the liability of the State for public service rendered, fraud, which is now universally condemned in the eye of law, could nevertheless become the source of a legal right to salary stricto sensu against the State ?"

The aforesaid question was answered by the Court by citing following observation of Lord Denning in Lazarus Estate Ltd. v. Beasley :

"... I cannot accede to this argument for a moment. No Court in this land will allow a person to keep an advantage which be has obtained by fraud, No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever..."

[14] As regards the cases of third category, where the letter of appointment was illegal, being violative of statutory procedure prescribed for selection of appointment, the Court held that appointment flagrantly contrary to statutory requirement is non-set and cannot be validated on any theory of factum valet. The appointment contrary to and in opposition to the teeth of law cannot confer any legal rights.

[15] On the aforesaid reasoning, the majority judgment thereafter, proceeded to record the basic conclusions in para 46 of the judgment. For the purpose of this judgment, it is not necessary to set out the ten conclusions recorded in the said para 46 of the judgment.

[16] It may be mentioned that the third Judge, namely, Justice Lalit Mohan Sharma (as he then was) has rendered dissenting judgment and has taken the view that the allegations made by the State against the appointees were seriously challenged and disputed by the appointees, and therefore, some enquiry was required to be held by the State in the presence of the appointees so that they can produce whatever evidence they wanted to produce or with a view to provide them at least a chance to establish that their appointments were made regularly and validly. His Lordship was of the opinion that by the impugned termination orders stigma is attached to the services of the teachers and therefore the action would become punitive and unless the procedure prescribed by Art. 311 of the Constitution of India is followed the action of the Government cannot be sustained.

[17] Based on the view of the majority in the aforesaid F.B. judgment of Patna High Court Mr. Jani, learned Counsel for respondents has strenuously urged that the very contract of employment with the petitioner was non-est and no right would flow in favour of petitioners from such a contract. Since the contract was invalid from its

inception no notice was required to be given before passing the order of termination simplicitor nor was principle of natural justice required to be followed.

[18] In the case of K. N. Gopalan v. Managing Director & Am., reported in 1979(2) SLR 408 the Division Bench of Kerala High Court was called upon to decide an identical question when a false information regarding previous employment was furnished by the petitioner and when appointment was secured on such false information. In his previous employment the employee was under suspension in connection with charge of fraud and temporary misappropriation and this fact was concealed by him from the subsequent employer. The employer, therefore, terminated his employment which was challenged before the High Court. The D.B. found that the case was governed by the decision of Mathew, J (as he then was) in the case of Kunhikrishnan Nair v. State of Kerala, reported in AIR 1965 Kerala 149 as well as in his judgment in another casein the said case Justice Mathew made following observations :

> "When a person who is ineligible for appointment to a post is appointed in ignorance of the fact that he is ineligible, the appointment is invalid. It was so held in Kunhikrishnan Nair v. State of Kerala, 1964 KLT 1066. There this Court followed the decision of the Court of appeal in Farmus v. Film Artists' Association, 1963 All ER 636 which was subsequently upheld by the House of Lords in Farmus v. Film Artists' Association, 1964 App. Case 925. Applying the reasoning in that case 1 think that since the petitioner did not possess one of the necessary qualifications for the post he was not validly appointed to it. The order of the Chairman in effect only declared that the petitioner was not validly appointed to the post and that he should be reverted. It was not an order cancelling a valid or even a voidable order. It was merely a declaration that there has been no appointment of the petitioner to the post. In the circumstances, I do not think that natural justice icquired that the petitioner should have been given an opportunity of being heard by the first or the second respondent. I also do not think that in the circumstances there was any manifest injustice, so that interference under Art. 226 is required."

> Applying the said principle the Kerala High Court held that the appointment of the petitioner was mistaken appointment in ignorance of his character and antecedents which he successfully kept away from the respondents not only by non-disclosure but also by making false declaration that he was not previously employed anywhere. It was a case not merely of suppressio veri but one of suggestio falsi.

[19] Mr. Jani lastly placed reliance on the decision of Supreme Court in the case of U. P. Junior Doctors' Action Committee v. Dr. B. Sheetal Nandwani, reported in AIR 1991 SC 909. It is true that the said case does not directly deal with the contract of employment. In the case before the Supreme Court admission to medical college for

post-graduate course was obtained by fake order. When the authority came to know about such order admission was cancelled. While dealing with the contention that opportunity of hearing was at least required to be afforded to the person before he was condemned, the Supreme Court observed that benefit of a fake order in a non-existent writ petition was taken and based on such an order admissions have been secured. The circumstances in which such benefit has been taken by the candidates concerned, do not justify attraction of application of rules of natural justice of being provided an opportunity to be heard. The Supreme Court therefore negatived the plea that rules of natural justice were required to be followed before cancelling the admission to the medical college which was based on fake order of High Court in a non-existent writ petition. Based on the aforesaid decision Mr. Jani has submitted that same principle should apply to the persons who secured the Government Service by fraudulent means and when it is established that appointment is secured by fraudulent means no procedure is required to be followed nor would the principle of natural justice apply.

[20] In my opinion, the extreme proposition of law canvassed by the learned Advocate for respondents to the effect that when the impugned order of employment is obtained or procured by fraudulent/ doubtful means or by false representation it could be terminated or rescinded by an order of termination simplicitor without holding any enquiry and without affording any opportunity of being heard to the employee cannot be accepted. Firstly, under law of contract in India, a contract of employment obtained by fraud, misrepresentation or mistake is not ab-initio void, but it is voidable at the instance of party whose consent was caused or obtained by fraud, misrepresentation or mistake. Such contract is rendered voidable at the instance of the party against whom fraud, misrepresentation or mistake is committed. Such a party has option to affirm the contract. It has another choice of avoiding the contract. Once the employer decides to avoid the contract and takes action to avoid the contract, it would cease to exist from the moment of avoidance. Therefore, unless the contract of employment is avoided by the employer such a contract exists and the things done under such contract cannot afterwards be undone. Therefore, I cannot hold that such a contract is ab-initio null and void and or it is non-est. With utmost respect to the majority view of Patna High Court in Rita Mishra 's case (supra) I am not in position to subscribe to the view that an appointment obtained by fraud or forgery is non-est and that in the eye of law no right or remedy can stem from a fraudulent base. In my opinion, such a transaction cannot be regarded as not-est or nullity. It is a voidable transaction which would be voided by the party against whom fraud or misrepresentation or mistake is committed. Secondly, in case of contract of employment with Union of India or State Govt., or with other public statutory authorities, on appointment of a person to a post he acquires status. His rights and obligations are thereafter not governed by initial contract of employment but by the statute or statutory rules which may be framed and

altered by the appropriate Government. The relationship between the employer and the employee and the rights and duties flowing from such relationship are no longer a matter of agreement between the parties, but are imposed by the Public Law. Such an employee who has acquired status cannot be straight-away denied that status. In the case of permanent employment, the employee acquires a right over the post and he cannot be terminated from such employment by an order of termination simplicitor. Even in case of temporary employee, such an action of repudiating appointment or terminating the contract on the ground that the contract of employment was obtained by fraud, misrepresentation or mistake is not permissible because in my opinion such an order is stigmatic and would leave a stigma on the career of employee. Same view is taken by Justice L. M. Sharma (as he then was) as a third Judge in the aforesaid Patna case in his dissenting opinion. I am in respectful agreement partially with the aforesaid dissenting opinion and I would prefer it partially to the extent of holding that at least a notice calling upon the employee to show cause as to why his services should not be terminated as it was obtained by fraud, misrepresentation or mistake and giving an opportunity to the employee to submit his explanation and tender his evidence (documentary only) for consideration of the employer and consideration of such an explanation and material produced by the employee and subsequent decision reached by the employer would meet the ends of justice. Thirdly, termination of such an employee by an order of termination wherein allegations of fraud, misrepresentation or mistake are stated would amount to visiting the employee with evil consequences and permanently stigmatise him without following the rudimentary principles of natural justice. It would not be an order of termination simplicitor but it would be an order of termination based on the allegations of fraud, misrepresentation or mistake which would disentitle the employee from future employment in any public employment. Such an order therefore cannot be passed without following rudimentary principles of natural justice, namely, of informing the party the reason for his termination and providing the opportunity to tender his explanation with evidence and consideration of such an explanation and evidence by the employer. The regular departmental enquiry, in my opinion, is not necessary nor is any oral evidence required to be adduced or permitted to be adduced. The explanation of the employee together with whatever documents he has in his possession should be entertained and considered and action should be taken thereafter to avoid the contract of employment on the ground that it was obtained by fraud, misrepresentation or mistake. Fourthly, I am of the opinion that the procedure contemplated by Art. 311 (2) of the Constitution of India or relevant provisions in statutory rules is not required to be followed because it is not for a misconduct committed after entering into employment that the services of the employee are terminated. The unworthy conduct has preceded the contract of employment. In the absence of such conduct, perhaps, employee would not have obtained the contract of employment. It is the conduct prior to the contract of

Licensed to : R. C. JANI & ASSOCIATES

Lawsuit®
The Unique Case Finder
www.lawsuitcasefinder.com

employment based on which the employer has acted. For such a conduct which has given rise to the contract of employment which has become liable to be avoided on account of fraud, misrepresentation or mistake no reasonable opportunity in the wider sense of term as interpreted by the Supreme Court in the context of Art. 311(2) of the Constitution of India is required to be given. Since such an employee has acquired status and since he has to be deprived of that status because of conduct which may stigmatise him he is required to be informed of his conduct for which the contract is to be repudiated and is required to be afforded an opportunity of being heard by way of his explanation and documentary evidence. The employer is, thereafter, required to take a positive decision as to whether he should accept the explanation of the employee or he should avoid the contract on the ground that charge of fraud, misrepresentation or mistake is made out which would entitle him to avoid the contract. In my opinion, once such a positive decision is taken after compliance with the rudimentary principles of natural justice the contract of employment can be terminated. In fact, the charge of fraud or misrepresentation in obtaining public employment is serious charge. Such a person cannot be and should not be permitted to continue in public service. Therefore, when such a person is to be deprived of his right to be in public employment, ipso-dixit, of employer about fraud, misrepresentation or mistake cannot be as such accepted unless the employer has acted fairly of at least knowing the explanation or stand of the employee and thereafter taking a decision to repudiate the contract. True it is, that fraud vitiates the contract, and it unravels everything, but that wider proposition laid down by the English Courts cannot, ipso-facto, apply to the contract of employment in India in view of the principles of contract underlying Secs. 17, 19, 23 & 24 of the Contract Act. I am, therefore, of the opinion that the extreme and broad proposition, being proposition No. 3 canvassed by Mr. Jani learned Advocate for respondents cannot be accepted and the same shall have to be rejected.

[21] The Division Bench of this Court in the case of Anupsinh Jatuba v. V. K. Gupta, Dint. Police Officer, Jamnagar, reported in 1986 (2) GLR 753 has taken the view that it the case of a probationer who is found indulging in malpractices during departmental enquiry and when his services were terminated without assigning any reason with payment of one week's salary, the order was passed by way of penalty and was passed in violation of principles of natural justice and therefore the order of termination was vitiated. Applying the ratio of said decision the D. B. of this Court in L. P. A. No. 506 of 1985 decided on 17th February, 1989 (J. P. Desai, J.) has dealt with a case of employee who was appointed on probation. At the time of his appointment he was required to state in the attestation form whether any prosecution was pending against him in any Courts of law. The employee did not disclose in the said form the fact that prosecution was pending against him. The employer subsequently came to know that

the employee was really involved in a criminal offence and therefore the employer decided not to continue the employee in service and terminated his services on the ground that his antecedents were rot found to be satisfactory. Such an order was challenged in this Court and the learned single Judge took the view that the order was not passed by way of penalty and dismissed the said petition summarily. While allowing the L.P.A. filed by the employee the D.B. found that from affidavit-in-reply filed by the employer it became clear that the appointment of the employee and his continuation in service was subject to his character and antecedents being found satisfactory on verification. Since the employer found that the criminal case was pending against the employee the employer terminated the services of the employee without holding any enquiry or issuing any notice to the employee to give an opportunity to explain as to what he has to say. The D.B. found that the employee was already acquitted by the Criminal Court in both the criminal cases filed against him. The D.B. also found that the employer has relied upon the Police Report showing involvement of the employee in two criminal cases, and therefore, the order of termination can be said to be founded on the factum of involvement of employee in criminal cases, and therefore the D.B. took the view that the order cannot be said to be an order of termination simplicitor. The D.B. found that the rules of natural justice were required to be followed. Applying the aforesaid principle to the facts of this case I am of the opinion that when the services of the petitioners are terminated on the ground of non-disclosure of true facts or disclosure of facts which were false to the knowledge of the petitioners, it would unduly stigmatise the petitioners and would visit them with evil consequences. Such orders of termination therefore could not have been passed simplicitor. Petitioners were required to be served with notice and also they must be required to be afforded an opportunity of being heard by calling upon them to tender their explanation and the employer was at liberty to take a decision to rescind the contract or not after taking into consideration such explanation of the employees and documentary evidence, if any, which they wanted to produce.

[22] First Proposition :

(i) Mr. K. G. Vakharia, learned Advocate for petitioners has submitted that even in case where public employment is procured by fraudulent/ doubtful means or by false representation the employee acquires status and he cannot be deprived of such status unless by following the procedure prescribed by statutory rules/regulations or by complying with the Art. 311(2) of the Constitution of India. He submits that once a person is appointed in public employment, i. e., in State service. Union service or service under statutory authorities, the initial contract of employment and the terms and conditions thereof would cease to operate and employee would acquire status. In case of State service and service under Union of

Lawsuit® The Unique Case Finder
www.lawsuitcasefinder.com

India, employee would hold the civil post while in case of other statutory authorities employee would hold the post in public service. Such employee would immediately acquire status, submits Mr. Vakharia. Therefore, when such an employee is to be deprived of his status the procedure prescribed by the statutory rules/regulations shall have to be followed, and he submits, that in this case the respondent was required to follow the procedure prescribed by Gujarat Panchayat Service (Discipline & Appeal) Rules.

(ii) Such a broad proposition of law, in my opinion, cannot be accepted. Firstly, public administration and services under the Union of India or State in order to be upright, efficient and above board or suspicion must be manned by persons of good moral character. Those who seek entry to public employment by perpetrating fraud, misrepresentation, false representation, or by dubious means are, but for their reprehensible conduct not entitled to enter public employment. Had such persons not committed fraud or misrepresentation by suggestio vari or suppresio falsi or by non-disclosure of true facts or disclosure of facts which are false to their own knowledge or by partial non-disclosure or partial disclosure solely with a view to seek public employment they would not have got the entry in the public employment. The contract of employment would not have been entered into. Secondly, they would not have acquired status, and therefore, rights flowing from the Statutory Rules or Regulations, would not come to their rescue. The very first step towards entry into public employment is vitiated by their conduct. It may be noted that for such a conduct which has preceded the contract of employment the employer is not seeking to impose any penalty. The employer is merely exercising right given to him by law, namely, of avoiding contract. The employer on coming to know about the fraud perpetrated or misrepresentation practised by the employee wants to avoid the contract since it is avoidable at the instance of employer. For exercising such a right, for a conduct which has preceded the contract of employment, the employer has obvious right under the Law of Contract. The employer does not want to resort to its right or power under the Statutory Rules or Regulations. The Statutory Rules which provide for imposition of penalty for misconduct committed by the employee are, in my opinion, not required to be followed because it is not the exercise of penal or punitive power on the part of the employer but it is the exercise of right flowing from the Law of Contract, namely, that of avoiding the contract for fraud, misre-presenration practised by the employee while seeking entry into public employment. For such a power the source is not to be found in the Statutory Rules or Regulations. The source is also not to be found in Art. 311(2) of the Constitution of India. The source is to be found in the power of one of the contracting parties under Sec. 19 of the Contract Act to avoid the contract when the contract is obtained by fraud, misrepresentation, mistake

etc. I am, therefore, of the opinion, that there is no need for the employer, when the employer seeks to terminate or rescind the contract of employment on the ground that the contract is obtained by the employee by fraud, misrepresentation, mistake etc. to hold a regular departmental enquiry as contemplated by Art. 311(2) of the Constitution of India or as contemplated by Statutory Rules/Regulations before imposing any penalty. The employer, in my opinion, in cases like present one, is not imposing any penalty. The employer is exercising his right to avoid the contract which is obtained by fraud, misrepresentation or mistake. His right is referable to the period prior to the employee acquiring the status. It is a right which stems from the initial contract of employment because of which employee got entry into public employment. That initial contract of employment itself being vitiated because of fraud the employer gets right of avoiding the contract and for such avoidance of contract, in my opinion, there is no need for the employer to follow the procedure prescribed by Art. 311(2) of the Constitution of India or by Statutory Rules/Regulations. I, therefore, do not accept the submission of Mr. Vakharia. In my opinion, the respondent is not required to hold regular departmental enquiry for imposition of penalty stipulated by Panchayat Service (Discipline & Appeal) Rules. Such a contract of employment can be avoided by the employer simply by notice To show cause and opportunity to the employee to tender his explanation and his documentary evidence and after coasidiring such explanation and evidence by positive decision of the employer to avoid the contract. Once such decision is taken in good faith considering the explanation of the employee the employer has exercised his right of avoiding the contract and public interest and public administration demands that such person is not permitted to pitch his case in an higher pedestal, than this.

22A. The findings on first and third propositions would thus make it clear that the cases like present one should be decided by resorting to second proposition, namely, of issuing notice to the employee calling upon him to show cause and to tender his explanation for his conduct. The employee should tender his explanation and his doumentary evidence. Explanation of the employee along with documentary evidence tendered by him should be considered independently and not in biased manner by the employer and after consideration the employer should take a positive decision as to whether it would like to avoid the contract and once such decision is taken the employer can, by an order, rescind the contract of employment.

[23] In these two petitions, it is found that the respondent has straightaway without issuing any notice and without afording opportunity to the petitioners to show cause or to tender their explanation and without considiring such explanation proceeded to pass

the impugned orders of termination which are prima facie stigmatic in character. Admittedly, the respondent has not followed the elementary rules or rules of natural justice and therefore the orders of termination passed against the petitioners are required to be quashed and set aside with liberty to the respondent to issue notice to the petitioners calling upon the petitioners to tender his/her explanation and to produce his/ her evidence in support of his/her explanation, and after considering such explanation and evidence to pass appropriate order avoiding the initial contract of employment on the ground that it was obtained by fraud, misrepresentation or mistake as the case may be.

[24] In the result, both the petitions succeed and the orders, dated 22-11-1991 passed against the petitioners are quashed and set aside with liberty to the respondnent to issue proper notice to the petitioners and to pass appropriate orders in view of the directions contained in the judgment in accordance with law.

[25] Rule, in both the petitions, is made absolute with no order as to costs.

Rule made absolute.

Lawsuit®
The Unique Case Finder
Levons Technologies Pvt. Ltd.