

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**  
**R/LETTERS PATENT APPEAL NO. 721 of 2022**  
**In R/SPECIAL CIVIL APPLICATION NO. 5748 of 2018**  
**With**  
**CIVIL APPLICATION (FOR STAY) NO. 1 of 2019**  
**In R/LETTERS PATENT APPEAL NO. 721 of 2022**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR. JUSTICE A.S. SUPEHIA**  
**and**  
**HONOURABLE MRS. JUSTICE MAUNA M. BHATT**

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|---|---|-----|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ?  | Yes |
| 2 | To be referred to the Reporter or not ?   | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ?   | No  |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | No  |

MAHESHBHAI TEJABHAI DESAI & ANR.  
 Versus  
 STATE OF GUJARAT & ORS.

**Appearance:**

MR VAIBHAV A VYAS(2896) for the Appellant(s) No. 1,1.1

MR ADITYA PATHAK, for the Respondent(s) No. 1

for respondent no.2

MR MAUNISH T PATHAK(5892) for the Respondent(s) No. 3

**CORAM: HONOURABLE MR. JUSTICE A.S. SUPEHIA**  
**and**  
**HONOURABLE MRS. JUSTICE MAUNA M. BHATT**  
**Date : 11/06/2024**  
**ORAL JUDGMENT**  
**(PER : HONOURABLE MR. JUSTICE A.S. SUPEHIA)**

- The present appeal, filed under Clause 15 of the Letters Patent, 1865 is directed against the order dated 30.09.2019

passed in Special Civil Applicant No.5748 of 2018, wherein and whereby, the learned Single Judge has dismissed the writ petition of the appellant (original petitioner) assailing his termination. During the pendency of the Letters Patent Appeal, the appellant has passed away on 06.09.2022 and he is represented by his wife – Rekhaben wd/o. Maheshbhai Desai.

2. As the facts unravel, the husband of the petitioner was appointed under the respondent-University as a driver on 01.08.2014 on contractual appointment on a fixed salary of Rs.9,000/- per month and after rendering almost 3 years of service, vide Office Order dated 16.02.2018, he has been terminated with immediate effect by resorting to Condition No.3 of the appointment order. He assailed his termination in the captioned writ petition, however, the learned single judge has not held in his favor and, hence, the present appeal.
3. Learned Advocate Mr.Vyas, at the outset, has submitted that the respondent-University has terminated the petitioner from service only for the reason that he was suffering some neurological ailment and no misconduct or any complaint alleged against the functioning / service rendered by the petitioner as a driver. He has referred to the averments made in the affidavit filed by the respondent authorities and has contended that in fact, the petitioner was sent to the Medical

Board Examination, and in the opinion dated 10.01.2018, it was recorded that he was not suffering from any neurological deficit and he was considered fit for a driver's job. Thus, it is contended by learned advocate, Mr.Vyas that the petitioner could have been accommodated in an alternative job, however, the respondent resorted in terminating his services. It is urged that since the petitioner has passed away and his case is represented by his wife, who is the legal heir of the deceased petitioner, a suitable compensation may be paid to her looking to the salary, which was being paid to her husband i.e. the deceased petitioner i.e., Rs.9,000/- per month and the years of service, which he has rendered as a driver.

4. Learned advocate for the respondent, Mr.Maunish T. Pathak, has urged that the present appeal may not be entertained since several opportunities were given to the late husband of the appellant to resume his work, but he remained absent. He has referred to the communication dated 15.11.2017 issued by the respondent–University and has submitted that despite the aforesaid communication, when he was orally instructed and allocated the office work, he did not remain present and ultimately, the respondent–University had no option but to terminate his services. He has also placed reliance on the appointment order of the respondent–University, appointing the original petitioner on service and has submitted that he is

governed by such condition and hence, the respondent-University has not committed any error in terminating his services.

5. We have heard the learned advocates appearing for the respective parties.
6. The aforestated facts are not in dispute. The petitioner was appointed vide order 01.08.2014 on the post of driver on a fixed salary of Rs.9,000/- per month on a contractual basis. The appointment order dated 01.08.2014 further refers that his appointment will be for one year on probation and on completion of the said probation period and upon satisfactory performance, the term will be extended for 4 years and thus, after completion of satisfactory service of total five years, the appellant will be placed in the regular pay-band of Rs.5,200-20,200 with grade-pay of Rs.1900/-, subject to the change of policy by the Government of Gujarat from time to time. It is not the case of the respondent authorities that his appointment was illegal and *de hors* the recruitment process. Thus, had the petitioner continued in service, he would have been placed in the regular pay-scale, after completion of five years' service in the year 2019.
7. At this stage, it would be apposite to refer to the contents of

the affidavit dated 22.09.2018 filed by the respondent-authorities, more particularly Paragraph Nos.12 and 13 thereof. The same are read as under:-

“12. That in such circumstances as per rules, university instructed the present petitioner to furnish a medical fitness certificate from medical board, Civil Hospital, Ahmedabad and medical board examination dated 10.01.2018 opined as under:

Neurophysician: This patient suffered from solitary seizures in June-2017, secondary to hemorrhagic Venous infect (CVST). Patient has no spells since then. On regular anti-epileptics drugs and he has no neurological deficit at present. He may consider fit for driver job with due risk.

Hence, it is certified that with a due risk he may consider fit for driver. Copy of the Medical Board Examination Report is attached at Page no 50 of the Petition Memo.

13. That the post of a driver is a very responsible job. The driver in university has to carry students, teachers and others and therefore, a driver who is found medically unfit and where Medical Board Examination report states that he may be considered fit for driver's job with due risk, certainly cannot be permitted to continue as a driver. The respondent no. 2 and 3, terminated the services of the petitioner vide order dated 16.02.2018. The respondent no.2 and 3 paid one month salary in advance at the time of termination which is also duly accepted by the present petitioner. In such circumstances the present petition is nothing but abuse of process of law and deserves to be quashed and set aside.”

8. From the contents of the affidavit, it is manifest that the petitioner was suffering from some ailment and he was referred to the Medical Board, Civil Hospital, Ahmedabad and the Medical Board, upon his examination, had opined vide communication dated 10.11.2018 that *“on regular anti-epileptics drugs and he has no neurological deficit at present. He may consider fit for driver job*

*with due risk.”*

9. Taking clue from the aforesaid observations of the Medical Board, the respondent terminated the service of the petitioner vide order dated 16.02.2018 by resorting to Condition No.3 of the appointment order and the Office Order, which reads as under:-

“With reference to the condition no. 03 of your Appointment Order, your services as a Driver are terminated with immediate effect with grant of one month fixed salary in advance”

10. Condition No.3 of the appointment order dated 01.08.2014 reads as under:-

“3. Your service shall be liable to be terminated during the contractual period at any time without citing any reason thereof. You can also tender resignation with one month's notice period or on payment of one month's fixed salary in lieu of.”

11. Though the order dated 16.02.2018, terminating the services of the original petitioner appears to be innocuous in view of Condition No.3 of the appointment order, the affidavit reveals that he has been terminated on the ground of medical unfitness. Albeit, the appointment order specifies Condition No.3, i.e. the services can be terminated during the contractual period at any time without citing any reason thereof, such condition has to be read keeping in mind the objective expressed in the appointment order i.e satisfactory performance rendered during five years. At this stage, we may refer to Condition no.7 of the appointment order, which reads as under:

“7. You will abide by the Discipline and Conduct Rules of Government

of Gujarat and Gujarat Forensic Sciences University in force as laid down by the University Act, Regulations or may be framed/amended from time to time.”

12. Thus, the petitioner was bound and governed by the Discipline and Conduct Rules of the Government of Gujarat and of the respondent-University. The respondent-University has not alleged any violation of its Discipline and Appeal Rules or of the Government of Gujarat, but the petitioner has been terminated on the ground of medical unfitness, which is impermissible. No rule or regulation is pointed out to us, which empowers the respondent authorities to terminate an employee on the ground of medical unfitness. The respondent cannot resort to Condition No.3 of the appointment order for terminating the service on the ground of medical unfitness in wake of the fact that the Medical Board has not suggested that he is totally unfit for the post of driver or any other equivalent post. Hence, the action of the respondent appears to be illegal and arbitrary.

13. There is no misconduct / unsatisfactory performance alleged against the petitioner and the affidavit as mentioned hereinabove, discloses the true reason of termination. The petitioner has been construed as medically unfit for doing the job of a Driver. In wake of the aforesaid facts, the respondent–University, instead of terminating the services of the appellant – original petitioner, could have accommodated him in any other department. It is also contended before us by the respondent that the original petitioner,

though on humanitarian ground or sympathetic ground was allocated office work, he did not remain present despite several oral reminders. Such intention of the respondent-University can be gathered from the communication dated 15.11.2017. The communication dated 15.11.2017 refers that till the receipt of opinion from the Medical Board, the petitioner was allocated the duty of Peon-cum-Lab Attendant at the exam section. In such circumstances, in wake of the aforesaid averments made in the communication dated 15.11.2017, the respondent–University was under an obligation to continue the petitioner on any other suitable post, after receipt of the opinion of the Medical Board.

14. After the receipt of Medical Board advice, the respondent-University could have maintained their stance of allocating the duty as Peon-Cum-Lab Attendant to the petitioner however, they unswervingly terminated him from services.

15. In the light of the aforesaid connected facts, we are of the opinion that the termination of the petitioner from service by resorting to Condition No.3 of the appointment order was uncalled for and was unjustified.

16. Since, we have found that the termination was illegal, now the question remains with regard to the grant of final relief to the widow of the late petitioner. It is noticed by us that the petitioner was appointed on 01.08.2014 in the fixed monthly salary of

Rs.9,000/- and after completion of 5 years, he was to be placed in the Pay-Band of Rs.5200-20200 with Grade Pay of Rs.1900/-. He has been terminated before completion of the said period on 16.02.2018 and during the pendency of this appeal, he passed away on 16.09.2022. Had he been continued in service, he was entitled to be placed in the regular pay-scale hence, as a sequel, his wife – the present appellant could have got terminal benefits, which are being paid on the demise of the regular employee.

17. At this stage, it would be apposite to refer to the observations of the Apex Court in the case of Manoj Kumar vs. Union of India, 2024 (3) S.C.C. 563, which read as under:

“20. We are of the opinion that while the primary duty of constitutional courts remains the control of power, including setting aside of administrative actions that may be illegal or arbitrary, it must be acknowledged that such measures may not singularly address repercussions of abuse of power. It is equally incumbent upon the courts, as a secondary measure, to address the injurious consequences arising from arbitrary and illegal actions. This concomitant duty to take reasonable measures to reconstitute the injured is our overarching constitutional purpose. This is how we have read our constitutional text, and this is how we have built our precedents on the basis of our preambular objective to *secure* justice.

21. In public law proceedings, when it is realised that the prayer in the writ petition is unattainable due to passage of time, constitutional courts may not dismiss the writ proceedings on the ground of their perceived futility. In the life of litigation, passage of time can stand both as an ally and adversary. Our duty is to transcend the constraints of time and perform the primary duty of a constitutional court to control and regulate the exercise of power or arbitrary action. By taking the first step, the primary purpose and object of public law proceedings will be subserved.

**22.** The second step relates to restitution. This operates in a different dimension. Identification and application of appropriate remedial measures poses a significant challenge to constitutional courts, largely attributable to the dual variables of *time* and *limited resources*.

**23.** The temporal gap between the impugned illegal or arbitrary action and their subsequent adjudication by the courts introduces complexities in the provision of restitution. As time elapses, the status of persons, possession, and promises undergoes transformation, directly influencing the nature of relief that may be formulated and granted.”

**18.** The Apex Court has observed that the constitutional courts are entrusted with the responsibility of ensuring the lawfulness of executive decisions and the primary purpose of quashing any action is to preserve order in the legal system by preventing excess and abuse of power or to set aside arbitrary actions, and the primary duty of the constitutional courts remains the control of power, including setting aside of administrative actions that may be illegal or arbitrary. It must be acknowledged that such measures may not singularly address repercussions of abuse of power, and it is equally incumbent upon the courts, as a secondary measure, to address the injurious consequences arising from arbitrary and illegal actions. It is held that in public law proceedings, when it is realised that the prayer in the writ petition is unattainable due to passage of time, the constitutional courts may not dismiss the writ proceedings on the ground of their perceived futility. In the life of litigation, passage of time can stand both as an ally and adversary, and the duty is to transcend the constraints of time and perform the primary duty of a constitutional court to control and regulate the exercise of power or arbitrary action. This is the fit case, wherein

the observations of the Apex Court are required to be followed for determination of final relief.

19. In the light of the abovenoted facts, we are of the considered opinion that to meet the ends of justice, a compensation of Rs.5,00,000/- would be appropriate, which shall be paid to the appellant - widow of the original petitioner within a period of 03 (three) month from the date of receipt of this order.

20. Hence, the present Letters Patent Appeal is allowed to the aforesaid extent. The connected Civil Application(s), if any, stand(s) disposed of.

**(A. S. SUPEHIA, J)**

**(MAUNA M. BHATT, J)**

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