IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 6952 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE SANGEETA K. VISHEN

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
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

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MAHESHBHAI BHURJIBHAI DAMOR
Versus
STATE OF GUJARAT & 3 other(s)

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Appearance:
MR DIPAN DESAI(2481) for the Petitioner(s) No. 1
MR DHAWAN JAYSWAL, ASSISTANT GOVERNMENT PLEADER for the Respondent(s) No. 1,2,3,4

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CORAM:**HONOURABLE MS. JUSTICE SANGEETA K. VISHEN**
Date : 08/02/2022
ORAL JUDGMENT

With the consent of the learned advocates appearing for the respective parties, the matter is taken up for final disposal.

2. Issue Rule, returnable forthwith. Mr Dhawan Jayswal, learned Assistant Government Pleader waives service of notice of rule on behalf of the respondents.

3. The observations made by this Court in the case of *Bodu Tarmamad vs. Dist. Suptd. Of Police, Jamnagar & Anr.* reported in 1988 (1) GLH 406 bearing analogous facts are very much apt to decide the present controversy,

> *"Is the phrase 'unbecoming of a Government servant' occurring in Rule 3(1)(iii) of the Gujarat Civil Services (Conduct) Rules, 1971 so much elastic that it can take within its sweep certain behaviour which may cause some displeasure to his superior and which may not be in accord with the personal beliefs and liking of the superior officer ? Assumed vagueness of the phrase has rendered an unfortunate Head Constable jobless. Hence the necessity to interpret and understand the precise meaning of the same."*

4. This Court has held that while branding a particular behaviour as misconduct, the first question which is required to be posed is, has this conduct any nexus with the duty to be performed by the Government servant? If so, is it merely a matter of personal belief regarding morals or immoral of the officer concerned? Even so, has it any direct or indirect bearing on the duties to be performed by the employee concerned? Answers to all these questions would determine whether the particular behaviour is misconduct or not. This Court, while allowing the writ petition, quashed and set aside the charges levelled against the petitioner therein holding that the same do not amount to misconduct. Keeping the afroesaid principle in the forefront, and principles laid down in other judgments with almost similar facts, the issue raised in the present writ petition is required to be determined.

5. By this petition, *inter alia,* under Article 226 of the Constitution of India, the petitioner has prayed for quashing and setting aside the impugned orders dated 27.11.2013 passed by the Joint Police Commissioner, i.e. the respondent no.4; order dated 19.7.2014 passed by the Police Commissioner, i.e. respondent no.3 and the order dated 2.12/1.2014/2015 passed by the Inspector General of Police, i.e. the respondent no.2.

6. Tersely stated are the facts:

6.1 The petitioner was appointed as armed police constable and residing in quarter no.12/206 in Police Headquarters, Shahibaug with his family. It is the case of the petitioner that the petitioner had developed relation with widow – Surekhaben Rajubhai Mahida, (hereinafter referred to as 'the lady') residing at quarter no.12/208, who was residing with her two children and mother-in-law. According to the petitioner, it is alleged that when the mother-in-law of the lady went to her native in village Gothila, district Panchmahals on 2.11.2012 and 3.11.2012, the petitioner and the lady contacted each other and during the night hours, had spent some time together at the quarter of the lady.

6.2 Shailesh Kalubhai Mahida, brother-in-law of the lady, registered a complaint on 7.12.2012 to the Police Commissioner to take a disciplinary action against the petitioner for the said conduct on his part. Apropos complaint dated 7.12.2012, statements of the complainant, mother-in-law of the lady, petitioner and the lady were taken. In the statement of the lady, it was admitted that she has developed a relationship with the petitioner and the same was with her consent. Further, the petitioner has not exploited her in any manner and on the date of the incident, she herself has called the petitioner from her mobile.

6.3 Based on the said complaint of Shaileshbhai Mahida, the respondent no.3 issued a show-cause notice dated 10.10.2013 requiring the petitioner to show cause as to why he should not be dismissed from the service on the ground of misconduct of exploiting the widow. The petitioner submitted his reply dated 25.10.2013, *inter alia,* pointing out that straightaway issuance of said notice is unwarranted and departmental inquiry has to be conducted as per the provisions of Gujarat Civil Services (Discipline and Appeal) Rules, 1971 (hereinafter referred to as the 'Rules of

1971') and it is only thereafter that major penalty can be imposed against the petitioner. In the reply, it has also been set out that the petitioner has never exploited the lady nor has taken advantage of his position for, the relationship between the petitioner and the lady was mutual.

6.4 The respondent no.4 while not considering the reply, straightaway proceeded to pass the order dated 27.11.2013 dismissing the petitioner from service. The appeal preferred by the petitioner before the respondent no.3 also was dismissed vide order dated 19.7.2014. Similar was the fate of revision filed by the petitioner before the respondent no.2, who passed the order dated 2.12/1.2015, dismissing the revision. Consequent thereupon, the petitioner received the letter dated 30.3.2015 asking the petitioner to vacate the quarter no.12/206. Being aggrieved, the petitioner has filed the present writ petition praying for quashing and setting aside all the three orders passed by the respective respondents.

7. Affidavit-in-reply is filed on behalf of respondent no.4 raising objection against the entertainment of the present writ petition. It has been pointed out that the statements of all the concerned, namely, the petitioner, the lady, the mother-in-law of the lady were taken and the petitioner in his statement, has admitted of having relationship with the lady. Though the petitioner claims the same to be mutual, it is stated that once there is an admission on the part of the petitioner, there will be no useful purpose for conducting an inquiry and even otherwise, the evidence contained in the form of DVD and photographs were not capable of being examined or placed before any individual because, the same would put the petitioner and the lady in embarrassing position.

8. It is further stated that the case of the petitioner is covered by the decision of the Division Bench of this Court in the case of *Prabhatsinh Samatsinh vs. District Superintendent of Police & Anr.*

reported in 2009 (3) GLR 2499, wherein while interpreting sub-rule (1) of Rule 3 of the Gujarat Civil Services (Conduct) Rules, 1971 (hereinafter referred to as 'the Conduct Rules') held that the expression *"do nothing which is unbecoming of a Government servant"* has wide amplitude and large number of actions of the Government servant would be covered under the said expression. It is stated that considering the principle laid down by this Court, the conduct on the part of the petitioner, would amount to unbecoming of a Government servant and therefore, misconduct, rendering him to be dismissed from service. It is further stated that he had illicit relation with the lady. The said charge, is therefore, found to be proved by mere statements of both the petitioner and the lady and therefore, full-fledged departmental inquiry is not necessitated. It is also pointed out that the respondents are disciplined force and the person who is employed in disciplined force, carrying out important functions of maintaining law and order and if such person is found to have illicit relationship with another lady, would definitely amount to misconduct under the Conduct Rules and therefore, is not entitled for any relief more particularly, equitable relief under Article 226 of the Constitution of India. It is requested that the petition be dismissed without grant of any relief.

9. Mr. Dipan Desai, learned advocate for the petitioner has submitted that the premise on which the order dated 27.11.2013 has been passed is that the petitioner has committed a misconduct and has tarnished the image of the police department instead of providing safety and security to women, which is erroneous. In fact, the petitioner and the lady both have confessed in their statements that they were having an affair and everything was done on their own volition. In support of such contention, attention is invited to the statement dated 12.1.2013 of the lady whereby, in response to one of the queries, there is acceptance and the contents being true, however, she has also stated that she has on her own volition

inculcated the relationship with the petitioner. It is next submitted that under the circumstances, the petitioner has in his representation dated 5.12.2013, requested that considering the family circumstances and the impact on the family, the petitioner may be exonerated.

9.1 It is further submitted that the conduct of the lady is not in question. The authorities were to take a decision that the incident, which is being alleged against the petitioner, constitutes misconduct. Moreover, there is a specific assertion made in the order that the lady has been exploited by the petitioner. Whether in wake of the consensual relationship between the lady and the petitioner, can it be said that the lady has been exploited. It is not even the case of the respondent that the petitioner has committed misconduct of physical gratification inasmuch as, it is not even the charge by the department. Therefore, the same would not apply so far as the petitioner is concerned. It has been observed that it is also the case of the respondent that the petitioner has indulged in illicit relationship and that is enough. It is submitted that the context and relevance with the duties is important. So far as the mutual relationship of the petitioner with the lady is concerned, it has no relevance or connection with the duties to be performed by the petitioner.

9.2 It is submitted that the lady herself has confessed in her statement that she has developed a relationship and it was at her behest that the petitioner had visited her house. Therefore, when the lady herself has stated in no uncertain terms that she has invited the petitioner, it cannot be said that the present is a case of exploitation. Hence, the entire charge against the petitioner is without any basis and deserves to be set aside. It is submitted that the ground on which the petitioner is removed, is clearly untenable in law because, the issue, is covered by various decisions rendered by this Court. In support of such contention, Mr. Desai has placed

reliance on the judgment in the case of Bodu Tarmamad (supra). It is submitted that in the said case, the petitioner was a married man and yet without performing any marriage ceremony, either as per Hindu rites or according to Mohammedan religion, he allowed one Hindu girl Bai Samu to stay with him in the police line quarter. It was alleged that act on the part of the petitioner was of immorality and against discipline, normal conduct and not befitting a police officer. It further held that as is evident from the record that the girl was staying in the quarter and it was known to the wife of the petitioner and that the girl wanted to marry the petitioner and therefore, she had left her parental house and had come to the house of the petitioner voluntarily and the petitioner had not exercised any undue influence over her. This Court, in the aforesaid background held that it can never be said that the petitioner has committed a misconduct 'unbecoming of a Government servant' inasmuch as, there is no finding that the aforesaid conduct of the petitioner had any nexus with the duty to be performed by him or that his conduct interfered or even tended to interfere with the honest discharge of his duties. This Court further observed that therefore, the disciplinary authority has completely misdirected himself while coming to the conclusion that the petitioner was guilty of misconduct 'unbecoming of a Government servant'.

9.3 Mr. Desai submitted that the principle laid down by this Court in the said case applies on all fours to the facts of the present case. As is discernible from the record, and more particularly, the statement recorded of the lady, that the relationship between the petitioner and the lady was mutual and has neither any nexus to the duty to be performed by the petitioner nor tended to interfere with the honest discharge of his duties. It cannot be said that the petitioner has committed the misconduct of unbecoming of a Government servant so as to dismiss him from service.

9.4 Further reliance is placed on the judgment in the case of *Daxaben Patel vs. State of Gujarat* reported in 2014 (13) GLH 14. It is submitted that the case pertains to widow government servant who conceived a child without getting married. Proceedings were initiated on the ground that bearing a child without getting remarried is a misconduct. The learned single Judge rejected the petition recording that the petitioner gave birth to a child without marriage, which act was not permissible under the Hindu Marriage Act and was also an offence under the Indian Penal Code. It is submitted that the Hon'ble Division Bench, while allowing the appeal, quashed and set aside the judgment of the learned single Judge so also the disciplinary proceedings. In paragraph 11, it has been held that by no stretch of imagination, it can be said that the act of the petitioner of giving birth to a child had any relation to her duty, particularly looking to her position of a Junior Clerk. It is submitted that this Court further observed that such act cannot be stated to be one of 'unbecoming of a Government servant'. Giving birth to a child when a woman is unmarried may be unacceptable to many people in the society; however, her conduct cannot be judged on the basis of societal morals. This Court in paragraph 13 has observed that the act of the petitioner of giving birth to a child even though she is not married, has no relation whatsoever with the discharge of the duty of a post of Junior Clerk and such act cannot constitute any misconduct against her.

9.5 Further reliance is placed on the judgment of Rajasthan High Court in the case of *Mahesh Chand Sharma vs. State of Rajasthan* rendered in S.B. Civil Writ Petition No.2067 of 1999. It is submitted that the petitioner was working as an Inspector in the Rajasthan Police, having rendered 18 years in Indian Air Force, was asked to get his DNA Test conducted, followed by initiation of departmental inquiry, alleging that petitioner was having illicit relations with one Dharma Rani, Constable working in the Rajasthan Police; and also of

having begotten a child from their illicit relations. While allowing the writ petition, in paragraph 43, it is observed that a human dignity attaches to itself also a right of concept of autonomy and also a right to take one's own decisions for himself or herself relating to his/her body and choices of his/per partner for whom he or she wishes to live or have sexual intercourse. These choices and selections cannot be a subject matter of departmental proceedings and no employer can be allowed to do moral policing on its employees which go beyond the domain of his public life. The Court further observed that act of relationship entered by an individual with another female or male as the case may be while his/her spouse is alive would be an act of amounting to adultery and would be considered as an immoral act so far as the Indian society is concerned. It is not to be appreciated. The same would, however, not be a ground for initiating departmental proceedings by the employer and it be left best for the person who may be affected individually to take remedy and proceed against him/her in civil law or for initiating divorce proceedings, as the case may be. It is, therefore, submitted that the Court has held that such act, may be an immoral act, but cannot be made subject to departmental proceedings by the employer. It is submitted that in the present case, when the relationship between the lady and the petitioner was mutual and that the lady was not subjected to any exploitation by the petitioner, passing of the orders by the respondents, are erroneous and deserve to be quashed and set aside.

9.6 While concluding this issue, it is submitted that the petitioner neither has exploited the widow nor has taken advantage of his position and therefore, the charges alleged against the petitioner cannot be sustained. It is submitted that the respondents did not consider the reply of the petitioner and in an absolutely high-handed manner, without holding any inquiry, dismissed the petitioner from Service.

9.7 While adverting to the another limb of submission, namely, dispensing with the inquiry while exercising the powers under sub-clause (b) of second proviso of clause (2) of Article 311 of the Constitution of India, it is submitted that Rule 9 of the Rules of 1971, provides for a procedure for imposing major penalties and what is provided in sub-clause (b) of second proviso of clause (2) of Article 311 is an exception. Article 311 (2) provides for dismissal only after an inquiry providing exception by virtue of clause (b). Sub-clause (b) provides that where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry, it can dispense with the inquiry. It is submitted that in the present case, the authority, has recorded in writing that it is not reasonably practicable to hold the inquiry and the only reason which has been assigned is that the conduct of the inquiry, will put the parties in an embarrassing position and therefore, it is not proper to conduct the departmental inquiry. While doing so, it has been observed that there are sufficient material available on record to *prima facie* come to a conclusion that the petitioner has committed misconduct. While inviting the attention to the show cause notice dated 10.10.2013, so also the affidavit, it is submitted that neither in the order or in the affidavit, the respondents have taken care of the said aspect and what has been observed is only on *ipse dixit*. It is submitted that exception provided in sub-clause (b) of second proviso of clause (2) of Article 311 of the Constitution cannot be invoked in such a manner, inasmuch as, no reason whatsoever is coming forth. Moreover, there is not a whisper whether the said act can be said to be a misconduct or not. The authorities ought to have appreciated that the petitioner is having a family to maintain and having rendered 13 years of unblemished career, the respondent authorities having passed the order of dismissal, is disproportionate

to the alleged misconduct. Therefore, the orders passed by the respondent authorities deserve to be quashed and set aside.

9.8 In support of the contention, reliance is placed on the judgment of the Apex Court in the case of *Jaswant Singh Nerwal vs. State of Punjab & Ors.* reported in *(1991) 1 SCC 362.* It is submitted that the Apex Court, while explaining the language of sub-clause (b) of second proviso of clause (2) of Article 311 of the Constitution of India has held that there must exist a situation which renders holding of any inquiry "not reasonably practicable"; and the disciplinary authority must record in writing its reasons in support of its satisfaction. It is submitted that as is clear from the order, except saying that the inquiry will put the concerned in an embarrassing position, no reasons are forthcoming as to how it would be reasonably impracticable to conduct the inquiry. In fact, the privacy of the petitioner has been jeopardized without his consent because of installation of CCTV. It is also submitted that merely referring to “subjecting the parties to embarrassing position”, will not absolve the authorities from conducting the inquiry more particularly, when the major penalty has been inflicted upon the petitioner dismissing him from service.

9.9 Further reliance is placed on the judgment of the Apex Court in the case of *Union of India vs. Tulsiram Patel & Ors.* reported in (1995) 1 SCC 398. It is submitted that the Apex Court has held that the disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the department's case against the civil servant is weak and must fail. It is submitted that it has also been held that recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty. In the present case, as can be culled out, except the fact that the inquiry will put the parties in an

embarrassing position, no further reasons are accorded for dispensing with the inquiry.

9.10 Reliance is also placed on the judgment of this Court in the case of *P.D. Kapadia vs. Superintending Engineer* reported in 2001 (0) GLHEL-HC-208904. It is submitted that this Court while relying upon the judgment of the Apex Court in the case of Jaswant Singh Nerwal (supra) in paragraph 10 held that since reasons were not recorded for holding summary proceedings, the proceedings awarding punishment of removal is in violation of the Constitution. This Court, allowed the writ petition on the ground that the reasons were not recorded indicating that it was reasonably impracticable to hold inquiry. The act on the part of the respondent authorities was held to be vitiated and not sustainable in the eyes of law.

9.11 Reliance is also placed on the judgment of this Court in the case of *Govindbhai Muljibhai Parmar vs. J. Mahapatra* reported in 1986 GLH 189. In the writ petition, the petitioner had challenged the order of dismissal and one of the contentions raised was that the power contained in sub-clause (b) of second proviso of clause (2) of Article 311 of the Constitution of India, were not properly exercised. The allegation against the petitioner was that the petitioner has beaten the complainant in a drunken condition and caused injury and committed robbery which is a shameful act of serious nature, not befitting to a police officer. Important witnesses were Jawans of Military, engaged in the national defence and since they were not likely to be available easily, the departmental inquiry was dispensed with on the ground that it is reasonably impracticable to hold inquiry. It has been observed that the said statement made by the disciplinary authority is in a light-hearted way and smells of arbitrariness in order to avoid holding of an inquiry. This Court held that the observation that the regular departmental inquiry is not reasonably impracticable cannot be countenanced at all.

9.12 Reliance is also placed on the judgment in the case of *Kantilal Gandalal Madhak vs. Union of India* reported in 1999 (1) GLH 925. The appellant before this Court was aggrieved by the action of the authority dispensing with the inquiry on the ground that it is not reasonably practicable to hold inquiry in the manner provided under Rule 44 R.P.F. Rules, 1959. This Court, held that as per Article 311 and the Rules of 1959, it is clear that it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and that it is not the outcome of whim or caprice. This Court held that the reasons recorded to dispense with the inquiry should be relevant; however, the reasons recorded were such that it amounts to abuse of power conferred upon the authority by Rule 47 and quashed the order with regard to the misconduct with a direction that the order shall not be passed without holding inquiry as provided under the rules.

9.13 Reliance is also placed on the judgment of the Allahabad High Court in the case of *Union of India vs. Shiv Mangal* reported in 1990 (0) AIJ-UP 315941. It is submitted that in similar set of facts, it has been held that punishing authority has patently erred in dispensing with the inquiry contemplated by Rule 47 of the RPF Rules, 1959 for, the reasons given are based on surmises and conjectures and on incorrect facts regarding non-availability of the evidence during the course of inquiry. The order of removal was quashed and the appeal filed by the Union of India was dismissed.

9.14 It is therefore, submitted that in the present case, the reasons recorded for dispensing the inquiry, is superfluous and therefore, abuse of exercise of powers conferred by sub-clause (b) of second proviso of clause (2) of Article 311 of the Constitution of India. It is submitted that the action on the part of the respondent authorities in passing the orders of dispensing the inquiry is bad, illegal and against the well-settled position. It is urged that on all counts, the orders passed by the disciplinary authority in the first instance, the

appellate authority in the second and revisional authority, are nothing but the result of non-application of mind, abuse of power and therefore, are unsustainable in the eyes of law and deserve to be quashed and set aside. It is urged that the petition be allowed and the petitioner be directed to be reinstated in service with all consequential benefits.

10. Per contra, Mr. Dhawan Jaiswal, learned Assistant Government Pleader opposed the writ petition, contending that the respondent authorities have done nothing wrong in passing the order. All the aspects have been duly considered while dispensing with the inquiry as well as passing the order dismissing the petitioner from service. At the outset, it is submitted that in the wake of admission on the part of the petitioner so also the lady, no full-fledged inquiry was necessitated.

10.1 It is submitted that petitioner being a police officer, is expected to maintain high standards of discipline and by indulging in such kind of act, the petitioner has brought disrepute to the police department. It is submitted that the police force, is a disciplined force and a person who is employed, is carrying out important functions of maintaining law and order and if that individual has indulged himself in having illicit relationship with another lady, would amount to misconduct under Rule 3 of the Conduct Rules, 1971.

10.2 Reliance is placed on the judgment of this Court in the case of Prabhatsinh Samatsinh (supra). It is submitted that as is discernible from the record, there is an admission on the part of the petitioner so also the lady. Therefore, it is by now well-settled that in the departmental inquiries, proof required is not one of beyond reasonable doubt, but of preponderance of possibilities. It is submitted that Rule 3 of the Conduct Rules of 1971, provides that every Government servant shall at all times, maintain absolute

integrity, maintain devotion to duty and do nothing which is unbecoming of a Government servant. It is submitted that this Court, while interpreting the expression 'do nothing which is unbecoming of a Government servant', has held that wide amplitude and large number of actions of the Government servant would be covered under the said expression. It is submitted that in the case before the High Court, the petitioner despite subsisting marriage, having five children had illicit relation with another lady with whom he cohabited for several years giving birth to two children and thereafter, once again while investigating into a complaint, he came in contact with another lady, developed illicit relationship with another lady and eloped with her and started staying together as husband and wife. This Court, held that such conduct of police official, employed in a disciplined force, carrying out important functions of maintaining law and order and investigating crimes, would certainly amount to act of unbecoming of a Government servant and therefore, misconduct. It is therefore, submitted that in the present case also, the petitioner was afforded sufficient opportunity and after considering the admission on the part of the petitioner so also the lady, the decision has been taken, removing the petitioner from service.

10.3 While adverting to the aspect of dispensing with the inquiry, it is submitted that the petitioner, has accepted and admitted the fact that he had relationship with the lady and the same was with her consent. Not only that, even the lady has accepted in her statement before the authorities that she has developed a relationship with the petitioner. Therefore, the charge of the petitioner having illicit relationship with the lady is found to be true by mere statements of both petitioner and the lady. The department, therefore, was of the opinion that holding a full-fledged departmental inquiry is not required. While reiterating, it is submitted that the petitioner is a police officer working with the disciplined force for carrying out

important functions of maintaining law and order situation, investigating crimes etc. and he himself having been indulged in a relationship which, is not morally accepted by the society, would amount to misconduct under Rule 3 of the Conduct Rules, 1971 and therefore, considering the conduct of the petitioner, he is not entitled for any relief more particularly, any equitable relief under Article 226 of the Constitution of India.

10.4 While referring to the provisions of Article 311 (2), it is submitted that discretion is left to the disciplinary authority in some circumstances and that is how, the authority, has while issuing the notice dated 10.10.2013, in unnumbered paragraph 3, has observed that the petitioner is a police officer working in the police force and whose duty is to provide safety and security to the public at large, women, children and elders, providing social security; however, instead of performing the duty, the petitioner, having wife, three children; developed relation with widow and has physically exploited her and therefore, on the basis of material available on record, it is proved that the petitioner has committed the misconduct of moral turpitude. It is further submitted that the petitioner might have involved in the consensual relationship, but considering his status and duties to be performed, society will look down. Further, the said act is nothing but the act of physical gratification and resultantly, exploitation of a woman. Therefore, the decision to dispense with the inquiry is in a right earnest.

10.5 Reliance is placed on the judgment of the Apex Court in the case of *Pawan Kumar vs. State of Haryana* reported in (1996) 4 SCC 17. It is submitted that even otherwise, the order dispensing with inquiry has not been challenged by the petitioner at any point of time and what has been challenged by the petitioner is for quashing and setting aside the orders dated 27.11.2013, 19.7.2014 as well as the order passed in revision dated 2.12/1.2014/2015. In continuation, it is submitted that as is clear from the representation

dated 5.12.2013 of the petitioner it has been requested that the punishment imposed is too harsh and the dismissal may be reconsidered, as the same may have a severe repercussion on the family of the petitioner. Therefore, in the representation dated 5.12.2013, it was never the case of the petitioner to challenge the dispensing of the inquiry. It is submitted that so was the position in the proceedings before the appellate authority and in the proceedings before the revisional authority. The order dated 10.10.2013 has not been challenged by the petitioner neither in the appeal nor in the revision. He having accepted the said order, it would be impermissible for him to now raise the said contention.

10.6 Reliance is placed on the judgment of the Apex Court in the case of *Director, Navodaya Vidyalaya Samiti vs. Babban Prasad Yadav* reported in (2004) 13 SCC 568. It is further submitted that the petitioner is a police officer and admits the act, and the act does not suit the person posted as a police officer. Considering such aspect, the disciplinary authority thought it fit not to conduct the inquiry, otherwise it would have created an embarrassing position for all the concerned.

10.7 Reliance is placed on the judgment of this Court in the case of *Government of Gujarat vs. Shivabhai S. Makwana* reported in 1999 (1) GLR 881. At the cost of repetition, it is submitted that the petitioner is a police officer and is expected to maintain high standards of discipline and indulging in such kind of act, the petitioner has brought disrepute to the department. Considering the misconduct on the part of the petitioner, the petitioner is not entitled for any relief under Article 226 of the Constitution of India and the petition deserves to be dismissed.

11. Mr. Dipan Desai, learned advocate, in brief rejoinder, submitted that so far as the aspect of non-challenge to the order dispensing the inquiry, is misplaced. It is submitted that it ought to

have been appreciated by the authorities that the order dated 10.10.2013 has been merged with the final order, which order has been challenged on all the grounds. It is clearly a case of the petitioner before the authorities that the authorities could not have dispensed with the inquiry. It is submitted that even in the petition, a contention has been raised that the impugned orders are passed in violation of the principles of natural justice and contrary to statutory provisions as the full-fledged inquiry under the Discipline and Appeal Rules, has not been conducted, which mandates holding of departmental inquiry before imposing a punishment. It is next submitted that even in the representation dated 25.10.2013, it is a specific case of the petitioner that Article 311 (2) of the Constitution, mandates holding of inquiry and can be dispensed with only if it is reasonably impracticable to conduct the inquiry and that too after recording the reasons in writing. It is submitted that detailed submissions have been made in the said representation dated 25.10.2013; however, the authorities have not considered the same. Similarly, in the appeal filed before the respondent no.3, specific contention has been raised in the appeal memo dated 5.12.2013 pointing out that considering the provisions of Article 311 (2) (b) as well as Section 125 of the Gujarat Police Act, 1951 it mandates holding of the inquiry before imposing major punishment. Even the judgments have been brought to the notice of the authorities, including the judgment in the case of Bodu Tarmamad (supra). It is submitted that the challenge to the dismissal by the petitioner includes the challenge to the dispensation of inquiry. While concluding, it is submitted that the said contention raised by the respondent authorities is fallacious and without any basis and does not deserve to be accepted. It is therefore, urged that the petition deserves to be allowed and necessary directions be issued to the respondents to reinstate the petitioner with all consequential benefits.

12. Heard the learned advocates appearing for the respective parties and perused the documents available on the record.

13. The facts of the present case are to the effect that on 2.11.2012 and 3.11.2012, at the instance of the lady, the petitioner during the night hours, visited her quarter where she was staying and were having intimate moments, which were caught in the CCTV camera installed. The incident led to filing of a complaint dated 7.12.2012 by the brother-in-law of the lady to the respondent no.3, *inter alia*, stating that the petitioner had developed illicit relationship with a lady and has exploited her and has committed misconduct of moral turpitude, which is punishable. After the complaint was submitted to the respondent no.3 – Police Commissioner, statements of the petitioner, the lady and mother-in-law of the lady were recorded by the respondents and ultimately, it led to issuance of the show cause notice dated 10.10.2013. It has been alleged in the notice that the petitioner despite being married by committing such act has brought disrepute to the police department. It is further alleged that the petitioner has exploited woman instead of providing security and such act cannot be taken lightly. The notice further records that considering the incident in question, it is likely that during the inquiry proceedings, embarrassing position may arise and therefore, it would not be proper to conduct the inquiry under the Rules. The authority, in exercise of powers under sub-clause (b) of second proviso of clause (2) of Article 311 of the Constitution, dispensed with the inquiry and called upon the petitioner to respond as to why he should not be dismissed from service for commission of such a serious offence.

14. Pertinently, the edifice on which the notice has been issued is exploitation of widow and hence, moral turpitude. As the record reveals, the relation between the petitioner and the lady was mutual. The said fact is strengthened by the statement recorded of the lady, wherein she has in no uncertain terms declared that she

has voluntarily entered into the relationship with the petitioner. Once the relation is voluntary and mutual between two adults, the observations made by the respondent no.4 to the effect that act of woman exploitation cannot be taken lightly, is erroneous and preverse. The question therefore arises is that if the relationship between two adults was mutual and on their own volition, whether the said act could be covered within the sweep of the term misconduct.

15. Apt is the judgment of this Court in the case of Bodu Tarmamad (supra). In the said case, the petitioner, constable was removed from service after conducting full-fledged inquiry. The facts were that the petitioner therein was a married man and yet without performing any marriage ceremony either as per Hindu rites or according to Mohammedan religion, allowed one Hindu girl Bai Samu to stay with him in the police quarter. It was alleged that such act on the part of the petitioner was of immorality and against discipline and not befitting a police officer, being a member of disciplined force. The Court while interpreting the provisions of Rule 3 (iii) of the Conduct Rules observed; relevant paragraphs whereof are reproduced herein below for ready reference:-

> “12. The aforesaid decision of the Supreme Court has been followed by this Court (Coram : N. H. Bhatt, J.) in the case of Karsanbhai D. Parmar & Others v. State of Gujarat & Others, in Special Civil Application No. 221 of 1983 decided on September 24, 1985, (1986) GLT 87 (G.H.C.). In that case it is observed to the effect that to keep a mistress is not misconduct for a policeman, and whatever is immoral or improper in a given society cannot necessarily be branded as misconduct. The learned Counsel for the respondents submits that in the aforesaid case before this High Court no advocate of either side appeared. Moreover, the observations of the Supreme Court in the case of Rasiklal (supra) have been applied out of context. In his submission it would be improper for a Government servant to keep a mistress and such conduct would certainly be unbecoming of a Government servant. Be that as it may. That is not these case before me. Therefore, even if the correctness of the aforesaid decision of this High Court is doubted, the principle laid down by the Supreme Court in Rasiklal's case (supra) are required to be followed and applied. Therefore, even if both the counts of charge against the petitioner are admitted or are held

proved, it can never be said that the same constitutes misconduct 'unbecoming of a Government servant.'

13. The word 'unbecoming' is not defined in the Rules in question. Therefore, we have to go by the dictionary meaning of the word. Dictionary meaning of the word 'unbecoming' is 'indecorous, not proper or befitting, not suited to the wearer'. In the context of the Rules it would mean either 'indecorous' or 'not proper or befitting'. However, while considering the conduct of a Government servant it is to be kept in mind that the conduct should be indecorous or improper as a Government servant. The disciplinary authority cannot determine the nature of conduct as indecorous or improper as per his own norms of behaviors and beliefs. Some guidelines are inherent in the Rules, and it is necessary that the same may be kept in mind. They are as follows :

(1) The aforesaid rule occurs in the Gujarat Civil Service (Conduct) Rules, 1971. Therefore the behaviour which is to be branded as misconduct should have nexus with the duties to be performed by the Government servant.

(2) Having regard to the office held by a Government servant he should be required to perform certain duties. If his conduct is such that it interferes or leads or interfere directly or indirectly with the honest discharges of his duty such conduct may be considered as unbecoming of a Government employee.

(3) The behaviour which is being viewed as misconduct may be a matter of personal belief or non-belief of the employee concerned. It may be such to the displeasure of the disciplinary authority concerned, but if the behaviour has no nexus with the duty to be performed by the Government employee, the same cannot be branded as misconduct under the rules.

(4) While considering a particular conduct as unbecoming of a Government servant one must bear in mind the status of Government employee as distinct from other employee and from other citizens. A Government servant must have taken oath under the Constitution or the might have been administered oath of secrecy, fidelity and sincerity while discharging his duty. A Government servant is bound by his oath; if his conduct is contrary to his oath, it may be considered indecorous or unbefitting to a Government servant.

(5) Is the behavior or conduct of the Government servant concerned, runs counter to the aims and objects of the Constitution or is it against the spirit and object of any provision of law which he, as Government servant, is supposed to uphold and implement as a part of his duty ?

(6) In a given case even though a particular behaviour may be a matter of personal life of the employee concerned it may have direct or indirect repercussions on the duty to be performed by the employee as a Government servant. To illustrate, normally it would never to objected to if a Government servant, in leisure

hours, visits the business premises of his relatives. But if a District Civil Supplies Officer every day visits and sits for couple of hours at the business premises of his relatives where the essential commodities are being stored and traded, this may be considered objectionable. Other traders may think that he might be passing on some important information in advance, or that he might act with partiality and with bias in the case of this particular trader who happens to be his relative. Something which is quite normal and innocuous for others may not be permissible in his case. In such case, the employee may have to justify his conduct which in absence of good and sufficient explanation may be considered as 'misconduct'. Such instance cannot be enumerated. Each case has to be judged on the basis of its facts and circumstances.

Therefore, while branding a particular behaviour as misconduct, the first question which is required to be posed is, has this conduct any nexus with the duty to be performed by the Government servant ? If so, is it merely a matter of personal belief regarding morals or immoral of the officer concerned ? Even so, has it any direct or indirect bearing on the duties to be performed by the employee concerned ? Answers to all these questions would determine whether particular behaviour is misconduct or not.

14. If these factors are not taken into consideration and any conduct which the disciplinary authority or the superior officer considers to be improper or indecorous for a Government employee is treated as misconduct, then the behaviour pattern, even in the personal life of Government employees, would be determined-rather dictated-as per the wishes and whims of the superior Government officers. This would create a society of sycophants. In such society top brass in service would behave as feudal lords and the employees in lower ranks, will have to mould their behaviour pattern so as to please their superior 'lords' (officers). In that case lower ranks in service will not be that of individual citizens having their own separate identity but they will become serfs or slaves. This can never be the intention of the Rules. If this interpretation is placed on the term 'unbecoming of a Government servant' it would simply mean 'behavior which causes displeasure to the superior's. Such absurd meaning cannot be ascribed to this phrase. If it is interpreted in that fashion, the provisions of the Rules would become arbitrary and ultra vires the Constitution. Therefore, the only interpretation which can be placed on the phrase 'unbecoming of a Government servant' would be as indicated hereinabove.

15. In the light of the aforesaid interpretation of the phrase 'unbecoming of a Government servant' what is stated in the report of the Inquiry Officer may be examined. It is evident from the record that the girl was staying in the premises and it was known to the wife of the petitioner. The girl wanted to marry with the petitioner and, therefore, she had left her parental house after informing her mother and brother. The girl was major. Everyone concerned knew that the girl had come to the

> house of the petitioner voluntarily and the petitioner had not exercised any undue influence over her. It is not the finding in the inquiry report nor was there any such charge that the petitioner exercised undue influence over the girl. From the record of the case it becomes clear that the girl had stayed at the house of the petitioner and was doing household work. The petitioner's wife was pregnant and she had gone to her parents' house. During this period the girl was doing the household work. This is clear from the deposition of Haziraben, wife of the petitioner, who has been examined as a witness in the departmental inquiry held by the department. It was under these circumstances that the girl had stayed with the petitioner in Police line quarter.
>
> 16. Even if the aforesaid finding is accepted in its entirety, it can never be said that the petitioner has committed any misconduct 'unbecoming of a Government servant'. There is no finding that aforesaid conduct of the petitioner had any nexus with the duty to be performed by him or that his conduct interfered or even tended to interfere with the honest discharge of his duties. Thus, the disciplinary authority has completely misdirected himself while coming to the conclusion that the petitioner was guilty of misconduct 'unbecoming of a Government servant'. ”

16. This Court, in paragraph 13 has observed that while branding a particular behaviour as misconduct, the first question which is required to be posed is, has this conduct any nexus with the duty to be performed by the Government servant? If so, is it merely a matter of personal belief regarding morals or immoral of the officer concerned? It has been further observed that even so, has it any direct or indirect bearing on the duties to be performed by the employee concerned? The answers to all these questions would determine whether particular behaviour is misconduct or not. In paragraph 14, it has been observed that these factors are not taken into consideration and any conduct which the disciplinary authority or the superior officer considers to be improper or indecorous for a Government employee is treated as misconduct, then the behaviour pattern, even in the personal life of Government employees, would be determined rather dictated as per the wishes and whims of the superior Government officers.

17. Under the circumstances, this Court, while referring to the report of the inquiry officer observed that the girl was staying in the

quarter and it was known to the wife of the petitioner. The girl wanted to marry the petitioner and, therefore, she had left her parental house after informing her mother. Further, the girl was major and everyone concerned knew that the girl had come to the house of the petitioner voluntarily and the petitioner had not exercised any undue influence over her. This Court, therefore, in paragraph 16 has held and observed that even if the aforesaid finding is accepted in its entirety, it can never be said that the petitioner has committed any misconduct 'unbecoming of a Government servant'. There is no finding that aforesaid conduct of the petitioner had any nexus with the duty to be performed by him or that his conduct interfered or even tended to interfere with the honest discharge of his duties. The Court, further observed that thus, the disciplinary authority has completely misdirected himself while coming to the conclusion that the petitioner was guilty of misconduct 'unbecoming of a Government servant'.

18. The facts of the said case are very much analogous to the facts of the present case inasmuch as, there is no allegation by the lady or for that matter by the brother-in-law that the petitioner had exerted pressure or had exercised undue coercion to the lady to enter into any relationship. On the contrary, from the material available on record, so also the statement of the lady, it is clear that it was mutual. Therefore, it is difficult to come to the conclusion that the petitioner indulged himself in the act of exploiting the widow against her wish. Once it is held that the relation between the petitioner and the lady was mutual and that the lady was not subjected to any exploitation under duress or coercion, it was an error on the part of the respondent no.4 to have come to the conclusion that instead of providing security to woman, the petitioner has exploited the lady, thus perverse. In fact, a bare perusal of the complaint of the brother-in-law of the lady, also suggests that since he had doubt about the relationship of the

petitioner and the lady, he got CCTV camera installed in the quarter. If the relationship of the petitioner and lady was unacceptable to the family members or brother-in-law, it was open to him and family members to take recourse of the remedy permissible and available in law; however, for this act, the petitioner cannot be held guilty of misconduct of moral turpitude.

19. Yet in another decision in the case of Daxaben Patel (supra), this Court decided the issue of a woman employee's right to privacy and the State's inquisitiveness to inquire into her personal affairs. The Division Bench, while allowing the appeal, reversed the judgment of the learned single Judge, so also restrained the respondents to proceed further with the departmental inquiry. The facts of the case were that the appellant therein was a widow and gave birth to a boy child without getting remarried. The said act was construed as misconduct by the State Government, which led to initiation of the departmental inquiry. The woman employee approached this Court and the petition was dismissed. Aggrieved, the petitioner preferred appeal, and this Court held that the appellant being a Junior Clerk, the only fault on her part was giving birth to a child without remarriage. It has been further held that the said act by no stretch of imagination can be said to have any relation to her duty, particularly looking to her position of a Junior Clerk. The Court also observed that such act cannot be stated to be one of unbecoming of a Government servant inasmuch as, giving birth to a child where a woman is unmarried may be unacceptable to many people in the society; however, the conduct of the employee is not to be judged on the basis of societal morals. Relevant paragraphs no.10, 11, 13 and 16 of the judgment read thus:-

> “10. The petitioner was a Junior Clerk. Her only fault; if at all was of giving birth to a child without remarriage. Contrary to what was recorded by the learned Single Judge – neither the Hindu Marriage Act prohibits such act, nor the Indian Penal Code prescribes any

punishment for the same. There is no law which prohibits an unmarried women from giving birth to a child. Merely because the petitioner happened to be a government servant, no different yardstick would apply. It is true that many acts and omissions which are not necessarily criminal in nature may amount to acts unbecoming of a Government servant. There may also be cases where action may not constitute an offence, nevertheless, be one of moral turpitude. We neither can nor mean to generalize and enlist all such actions. We can only suggest that the consideration whether a particular action was one of unbecoming of a government servant or was one of moral turpitude, cannot be judged in isolation and must be judged on the basis of the position of a government servant, the nature of her responsibilities and duties as a government servant and the act alleged.

10.1 In case of Prabhatsinh Samatsinh v. District Superintendent of Police & Anr., reported in (2009) 3 GLR 2499, Division Bench of this Court observed as under :

> "23.From the above decisions, it can be seen that the concept of 'unbecoming of a Government servant' is sufficiently wide so asto cover variety of actions of an employee. It is not possible to lay down any rigid principles nor is it possible to enumerate exhaustively all such actions which would be covered under the said expression. It must depend on the facts and circumstances of each case particularly nature of allegations and duties being performed by the employee. However, no proposition of universal application can be laid down that every act of an employee in his private life must be excluded from the expression 'misconduct'. It must be judged on facts of each case."

10.2 In case of M.M Malhotra v. Union of India & Ors., reported in {2005}8 SCC 351, the Supreme Court observed that the word "misconduct" is not capable of precise definition and it must receive its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. The act complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the statute and the public purpose it seeks to serve.

10.3 In case of Inspector Prem Chand v. Government of NCT of Delhi & Ors., reported in (2007) 4 SCC 566, the Apex Court explained the term "misconduct" as under :-

> "9. Before adverting to the question involved in the matter, we may see what the term "misconduct" means.
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> 10. In State of Punjab v. Ram Singh, Ex-constable, [1992] 4 SCC 54,it was stated :"5.Misconduct has been defined in Black's Law Dictionary, 6th Edn.At p.999, thus :

'A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior; its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness'.

Misconduct in office has been defined as :

'Any unlawful behavior by a public officer in relation to the duties of his office, willful in character. Term embraces acts which the officeholder had no right to perform, acts performed improperly and failure to act in the face of an affirmative duty to act'."

11. In P. Ramanatha Aiyar's Law Lexicon, 3rd Edn., at pg.3027, the term "misconduct" has been defined as under :

"The term 'misconduct' implies a wrongful intention, and not a mere error of judgment.
** ** ** **
Misconduct is not necessarily the same thing as conduct involving moral turpitude.

The word 'misconduct' is a relative term and has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. 'Misconduct' liberally means wrong conduct or improper conduct."

10.4 In case of Union of India & Ors. v. J. Ahmed, reported in AIR 1979 SC 1022, the Supreme Court considered what could be stated to be misconduct in the context of Rule 3 of the All India Services [Conduct] Rules which provides that every member of the service shall at all times maintain absolute integrity and devotion to duty and Rules 4 to 18 which prescribe code of conduct for members of the service. It was observed that, "...The inhibitions in the Conduct Rules clearly provides that an act or omission contrary thereto so as to run counter to the expected code of conduct would certainly constitute misconduct. Some other act or omission may as well constitute misconduct. Allegations in the various charges do not specify any act or omission in derogation of or contrary to Conduct Rules save the general Rule 3 prescribing devotion of duty. It is, however, difficult to believe that lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would themselves constitute misconduct. If it is so every officer rated average would be guilty of misconduct. Charges in this case as stated earlier clearly indicate lack of efficiency, lack of foresight and indecisiveness as serious lapses on the part of the respondent. These deficiencies in personal character or personal ability would not constitute misconduct for the purpose of disciplinary proceedings."

10.5 In case of W.M Agnani v. Badri Das & Ors., reported in {1963} 1 LLJ 684, the Supreme Court considered whether a private dispute by an employee outside the workplace can be categorized as misconduct. It was observed that it would be difficult to lay down any general rule to consider what would constitute misconduct. It was further observed that, "..acts which are subversive of discipline amongst the employees would constitute misconduct; rowdy conduct in the course of working hours would constitute misconduct; misbehavior committed even outside working hours but within the precincts of the concern and directed towards the employees of the said concern, may, in some cases, constitute misconduct; if the conduct proved against the employees is of such a character that he would not be regarded as worthy of employment, it may, in certain circumstances, be liable to be called misconduct. It may, however, be relevant to observe that it would be imprudent and unreasonable on the part of the employer to attempt to improve the moral or ethical tone of his employees' conduct in relation to strangers not employed in his concern by the use of the coercive process of disciplinary jurisdiction. As we have already observed, it is not possible and we do no propose to lay down any general rule in that behalf. When standing orders are framed, there is no difficulty because they define misconduct. In the absence of standing orders, the question will have to be dealt with reasonably and in accordance with common sense."

10.6 However, in case of Daya Shankar v. The High Court of Allahabad &Ors., reported in AIR 1987 SC 1469, the Supreme Court considered a situation where a judicial officer was found guilty of using unfair means in the University examination. In such context, it was observed that, "the judicial officers cannot have two standards – one in the Court and another outside the Court. They must have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy. A judicial officer, who has been found guilty of using unfair means in the LL.M examination, is undoubtedly not a fit person to be retained in judicial service."

10.7 In case of Government of Tamil Nadu & Ors. v. Badrinath & Ors.,reported in AIR 1987 SC 2381, the Supreme Court considered a situation where an employee holding the post of Commissioner of Archives & Historical Research gave speech at a function organized by a College. Apparently, in the speech, he criticized certain time capsule buried in the precincts of the Red Fort describing it neither historic nor fiction. The Supreme Court held that the speech delivered by him on the occasion could not be treated to be an official act of his.

10.8 In case of State of Punjab & Ors. v. Ram Singh, Ex. Constable, reported in AIR 1992 SC 2188, the Supreme Court observed that, "..Thus, it could be seen that the word 'misconduct' though not capable of precise definition, its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behavior; unlawful behavior, willful in character, forbidden act, a

transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve."

10.9 In the facts of the case, when a police constable was found drinking heavy alcohol on duty and became uncontrollable, while on duty, even once amounts to misconduct of gravest nature.

11. Reverting back to the facts of the case, by no stretch of imagination, can it be stated that the act of the petitioner of giving birth to a child had any relation to her duty, particularly looking to her position of a Junior Clerk. By no stretch of imagination, such act can be stated to be one of 'unbecoming of a Government servant'. Giving birth to a child when a woman is unmarried maybe unacceptable to many people in the society. We are, however, not judging her conduct on the basis of societal morals. We are only called upon to decide whether the act can be categorized as one of moral turpitude. Even though the society still puts great value on the family ties and the institution of marriage, the option of a woman to be a single mother is neither taken away by the law or by the Constitution.

13. When the act of the petitioner of giving birth to a child even though herself not being married has no relation whatsoever with the discharge of the duty of a post of Junior Clerk that she was holding, in our opinion, such act cannot constitute any misconduct against her. If a lady government servant giving birth to a child without marriage constitutes misconduct, we wonder what would be the position of the father of the child !! Interestingly, in the present case itself, the father of the child also happens to be a government servant. Learned counsel Ms. Pandya pointed out from the record that the father of the child was questioned under communication dated 20th January2006. He replied to such communication on 21st March 2006. He pointed out that he was married to one Gauriben in the year 1990, who had left matrimonial home in the year 1993 and never returned. He subsequently also obtained a decree of dissolution of marriage. Interestingly, no further action was initiated against him by the Department.

16. Additionally, we also find that the fact of the petitioner having given birth to a child was known to the respondents. That she was not married was also known at least in the year 2005. In fact, it has come on the record that after conducting preliminary inquiry, through a conscious decision, the employer decided not to proceed further. It was only much later when the first wife of Hemant Raval made representations to the Government that the chargesheet came to be issued in November 2010. Considering all these aspects, we see no reason to permit the respondents to proceed further with the departmental inquiry. The same is, therefore, quashed. Judgment of the learned Single Judge is reversed. Appeal is allowed and disposed of accordingly."

Therefore, this Court treated the act of giving birth by the Junior Clerk, an employee not to constitute misconduct.

20. In another decision, cited by the learned advocate for the petitioner in the case of Mahesh Chand Sharma (supra), the petitioner was working as an Inspector in the Rajasthan Police. After having served for 18 years in Indian Air Force, was asked to get his DNA test conducted and was subsequently subjected to initiation of departmental inquiry. The allegation against the petitioner was that he had an illicit relationship with one another lady officer working with Rajasthan Police and also of having begotten a child from that relationship. While allowing the writ petition, it has been observed that an act of relationship entered by an individual with another female or male as the case maybe while his/her spouse is alive, would be an act amounting to adultery and would be considered as an immoral act so far as the Indian society is concerned. It is not to be appreciated. The Court further observed that the same would, however, not be a ground for initiating departmental proceedings by the employer and it be left for the person who may be affected individually to take a remedy and proceed against him/her in civil law or for initiating divorce proceedings as the case may be.

21. Common thread running through all the judgments, *inter alia,* is that if the conduct interferes or tends to interfere directly or indirectly with the honest discharge of his duty; such misconduct be considered as unbecoming of a Government employee and that the conduct has any nexus with the duty to be performed by the Government servant. The said factors are to be kept, uppermost in mind, and matter of personal belief regarding morals and immorals of the officer concerned is to be avoided. Any conduct which the disciplinary authority or the superior officer considers to be improper or indecorous for a Government employee, treating it as a misconduct, can never be the intention of the Rules.

22. As discussed herein above, it is nobody's case that the petitioner has exerted undue influence or his act was of physical gratification. The learned Assistant Government Pleader has argued that the petitioner has committed misconduct, which is nothing but a moral turpitude even if it is a consensual relationship and considering the status of the petitioner, he being in the police force, the society will look down and therefore, the said conduct is definitely a misconduct on the part of the petitioner. He also argued that physical gratification will become the aspect of women exploitation and therefore, the authorities have rightly concluded that the lady has been exploited. It is true that the petitioner is a part of a disciplined force, however, his act which otherwise is immoral in the eyes of the society at large, would be difficult for this Court to bring it within the purview of misconduct, considering the fact that the act was a private affair and not result of any coercion pressure or exploitation, applying the aforesaid principles to the facts of the present case, the act on the part of the petitioner at the most, can be considered as immoral act, viewed from the standpoint of the society; however, to term it as misconduct as per the Conduct Rules, 1971, would be too far-fetched.

23. So far as the reliance placed on the judgment in the case of Prabhatsinh Samatsinh (supra), the proposition is not disputed that in departmental inquiry, proof required is not one of beyond reasonable doubt but of preponderance of possibilities. There is no quarrel to such proposition. The facts in the said case, were that the petitioner despite subsisting marriage, had illicit relation with another lady with whom he cohabited for several years giving birth to two children and thereafter, while investigating into a complaint, he came in contact with Dhuliben, again a married woman and developed illicit relation with the said Dhuliben and eloped with her. The facts in the said case were gross inasmuch as, the petitioner therein had during the investigation into a complaint, came in

contact with another lady and eloped with her. The facts are not in near proximity with the facts of the present case and therefore, the principle cannot be pressed in service.

24. While adverting to the aspect of manner in which the reply of the petitioner has been dealt with, it is required to be noted and as has been rightly pointed out by the learned advocate for the petitioner that the contents of the show cause notice dated 10.10.2013, vis-à-vis the contents of the order dated 27.11.2013, are verbatim same except the four lines in the penultimate paragraph. The order is a reproduction of the contents of the show cause notice; however, there is not a whisper as to how the respondent no.4 has considered the reply of the petitioner. Therefore, there is a sheer non-application of mind on the part of the respondent no.4 in passing the order dated 27.11.2013. Respondent no.3 in appeal, committed similar mistake inasmuch as, the contents are cut, copied, pasted. It has been observed that upon careful consideration of the reply of the appeal memo of the petitioner, nothing new has been stated in the application and there is no substance in the reply. Except observing this and without considering the reply of the petitioner, the order dated 19.7.2014 was passed, so also by the revisional authority. Though he has set out issues; however, the findings in concluding paragraph 4 are nothing but an eyewash. The order neither contains the discussion nor does it provide as to how the act on the part of the petitioner is misconduct. Further, the statement of the widow is not considered. The observations are repetitive in nature with no independent application of mind and reasons. Therefore, the orders dated 27.11.2013, 19.7.2014 by the appellate authority and order dated 2.12/1.2014/2015 are unjust and arbitrary. It is well settled proposition of law that reasons are the flesh and blood of judicial adjudication and such reasons must be shown in the orders which are liable to be challenged in the superior court. At this stage, apt

would be the judgment of the Apex Court in the case of *Ravi Yashwant Bhoir v. District Collector* reported in (2012) 4 SCC 407. The Apex Court, pointed out that right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the court. Reference has been made to the judgment of the Apex Court in the case of *Sant Lal Gupta v. Modern Coop. Group Housing Society Ltd* reported in (2010) 13 SCC 336 wherein, it has been held that *not only administrative but also judicial orders must be supported by reasons recorded in it*. The authorities are expected to furnish the reasons so as to enable the higher Courts to determine as to what weighed with the authority in coming to the conclusion. The authorities have chosen not to set out any reasons. When the authorities are dealing with the career of the petitioner having severe ramification not only on the petitioner himself, but also on the family consisting of father, three children and wife, it was expected of the authorities to have offered reasons for the conclusion. Therefore, as discussed hereinabove, the orders are perverse and tainted with arbitrariness, deserving to be quashed and set aside.

26. This Court, though had come to the conclusion that the orders does not fulfill the test of fairness, the issue as regards dispensing with the inquiry, need not be gone into; however, for the sake of completeness, let me deal with the said aspect as well. The respondent no.4, in the show cause notice dated 10.10.2013, was of the opinion that considering the act in question, if inquiry is conducted, then it is likely to create an embarrassing position and therefore, in the interest of all the concerned, the departmental inquiry is dispensed with. The respondent no.4, in third paragraph of the show cause notice has observed that the petitioner is a person working with the police force and his duty is to provide safety to the women, children and elders; despite having the family of aged

father, wife and three children, the petitioner has indulged in the act of exploitation of widow and therefore, has committed the misconduct of moral turpitude. The respondent no.4 further observes that such act cannot be considered lightly and continuation of the petitioner would not be in the interest of police department inasmuch as, the same is likely to hurt the trust of the public at large reposed in the police department. The respondent no.4, however, while observing thus, has also concluded that on the basis of material available on record, *prima facie*, the petitioner is likely to be terminated if the inquiry is conducted, and hence, the inquiry is not necessitated. When the respondent no.4 had come to the conclusion that it is not possible to conduct the inquiry that it would put all the concerned in an embarrassing position, the respondent no.4 could not to have concluded that the petitioner is likely to be convicted. The findings recorded by the respondent no.4, is logically unacceptable. This Court, is mindful of the fact that so far as the reasons given by the authority, is not available for judicial review; however, when the reasons are tainted with unreasonableness, it would be very much permissible for the Court to interfere with the said reasons.

27. Also to say that parties would be put in an embarrrassing position, cannot be a ground to dispense with the inquiry. The Apex Court in the case of Union of India vs. Tulsiram Patel (supra) has held that the reasons for dispensing with the inquiry need not contain detailed particulars, but the reasons must not be vague or repetition of the language under sub-clause (b) of second proviso of clause (2) of Article 311 of the Constitution of India. Simply stating that he is satisfied that it is not reasonably practicable to hold any inquiry, is no compliance. Further, this Court in the case of Kantilal Gandalal Madhak (supra), while referring to the judgments of the Apex Court, held that disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of

ulterior motives or merely in order to avoid the holding of an inquiry because the department's case against the Government servant is weak and likely to fail. This Court, held that in dispensing with the departmental inquiry, the authority will have to arrive at a satisfaction that it is not reasonably practicable to follow the procedure and it must record reason to show that such satisfaction is arrived at on objective facts and not on whims and caprice. Recording of the reasons is inevitable. Considering the said principle, in the present case, except recording that the conduct of inquiry is likely to create an embarrassing position, nothing has been recorded either in the order or have been placed on record of the Court to substantiate that the reasons were recorded by arriving at a satisfaction on objective facts. Therefore, such observation by the authority is nothing but an empty formality. Hence, on this count as well, the order dated 27.11.2013 deserves to be quashed and set aside. In the appeal, though a specific contention was raised by the petitioner as regards dispensing the inquiry, the appellate authority as discussed herein above, except reproducing the paragraphs verbatim, has not assigned any reason as to why the inquiry was required to be dispensed with. The revisional authority, after reproducing the issues raised by the petitioner, has also not bothered to deal with the said aspect, except using the language of proviso to sub-clause (b) of second proviso of clause (2) of Article 311.

28. In view of the above-mentioned discussion and applying the principles laid down by the Apex Court as well as this Court to the facts of the present case, the order dated 27.11.2013 passed by the respondent no.4, order dated 14.7.2013 passed by the respondent no.3 and the order dated 2.1.2015 passed by the respondent no.2, are quashed and set aside. The respondents are directed to reinstate the petitioner, with 25% backwages within a period of four weeks from the date of the receipt of the copy of this order.

29. The petition succeeds and is accordingly allowed. Rule is made absolute. No order as to costs.

(SANGEETA K. VISHEN,J)

BINOY B PILLAI