

(1951) 11 MAD CK 0003

In the Madras High Court

Case No : Civil Miscellaneous Petition No. 14078 of 1950

C. Sambandam

APPELLANT

Vs

The General Manager, South Indian Railway, Tiruchirapalli

RESPONDENT

Date of Decision : 13-11-1951

Acts Referred:

Constitution of India, 1950 — Article 226, 310, 311, 311(2)
Government of India Act, 1935 — Section 240(3)
Railway Establishment Code — Rule 148
Safeguarding of National Security Rules, 1949 — Rule 3, 4

Citation : AIR 1953 Mad 54 : (1953) ILR (Mad) 220 : (1952) 65 LW 377 :
(1952) 1 MLJ 540

Hon'ble Judges : Rajamannar, C.J; Venkatarama Ayyar, J

Bench : Division Bench

Advocate : K.V. Venkatasubramania Aiyar, for Row and Reddy, for the Appellant;
O.T.G. Nambiar, for King and Partridge, for the Respondent

Final Decision : Allowed

Judgement

Venkatarama Ayyar, J.—The petitioner was employed as a wireman in the Marine Department of the South Indian Railway Co. On 11-3-

1950 he was served with a notice dated 27-2-1950 issued by the respondent under the Railways Services (Safeguarding of National Security)

Rules, 1949. The contents of that notice so far as they are material for purposes of this petition are as follows: ""Whereas in the opinion of the

"competent authority" as denned in Rule 2 of the Railway Services (Safeguarding of National Security) Rules, 1949 (who in your case is the Chief

Mechanical Engineer, S. I. Railway, Golden Rock) there are reasonable grounds (which are given below) for believing that you are engaged in

subversive activities and that consequently you are liable to have your services terminated under Rule 3 of the said rules;

You are hereby required to state within 14 days of the receipt of this notice whether you accept or deny the accuracy of the above allegation. If

you do not reply within that period, it would be assumed that you admit "the allegation. In either case, you may, within the same period, submit any

representation you wish to make as to why your services should not be terminated under the said rules. (copy attached.)

If after considering your representation the competent authority decides that no further action should be taken against you, you will be informed

accordingly.

If after considering your representation the competent authority considers that there are sufficient grounds for taking further action, the materials on

record together with your representation will be referred to the Committee of Advisers set up by the Government of India for this purpose.

You are further asked to state whether you wish to be heard in person by me or by the Committee of Advisers before orders are passed on your

case.

Four charges were set out in this notice. On 16-3-1950 the petitioner sent a written explanation to the several charges. On 6-9-1950 the

respondent passed the following order: ""I have considered your representation in reply to my letter No. S. 37/3 dated the 27th February 1950 and

am of the opinion that you are engaged in subversive activities in such a manner as to raise doubts about your reliability and am satisfied that your

retention in public service is prejudicial to national security. I have decided with the prior approval of the President that your services should be

terminated under Rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1949.

You are, therefore, given a month's pay in lieu of notice in accordance with para 6 of your service agreement dated 6-2-1942 and your service

will terminate on the 16th September 1950.

2. It is the validity of this order that is the subject-matter of this application. The contention of the petitioner is that on a proper construction of the

Safeguarding of National Security Rules and of Article 311 of the Constitution he was entitled to a further notice of the action proposed to be

taken against him and as none such was given the order of dismissal dated 6-9-1950 is illegal. He accordingly prays that a writ might be issued

under Article 226 quashing the order dated 6-9-1950. The contention of the respondent is that the notice dated 27-2-1950 given to the petitioner

was a sufficient compliance of the requirements of the law and that further the services of the petitioner were terminated by payment of a month's

wages in accordance with the terms of the services and that consequently the order dated 6-9-1950 was not open to question under Article 311 of

the Constitution. It was also urged that the petitioner had a remedy by way of a suit and that, therefore, the application for the issue of a writ of

certiorari was not maintainable.

3. The first question that arises for determination is whether the order dated 6-9-1950 is in accordance with the provisions of the Safeguarding of

National Security Rules. Rules 3 and 4 which alone are relevant for the present purpose are as follows:

A member of the Railway service, who, in the opinion of the competent authority is engaged in or is reasonably suspected to be engaged in

subversive activities or is associated with others in subversive activities in such a manner as to raise doubts about his reliability may be compulsorily

retired from service;

Provided that a member of the railway service shall not be so retired, unless the competent authority is satisfied that his retention in the public

service is prejudicial to national security, and unless where the competent authority is a head of a department, the prior approval of the Governor

General has been obtained.

4. Where in the opinion of the competent authority, there are reasonable grounds for believing that a member of the railway service is liable to

compulsory retirement under Rule 3 it shall-

(a) by order, in writing, require the Government servant to proceed on such leave as may be admissible to him and from such date as may be

specified in the order;

(b) by notice in writing inform him of the action proposed to be taken in regard to him under Rule 3;

(c) give him a reasonable opportunity of showing cause against that action; and

(d) before passing a final order under Rule 3 take into consideration any representation made by him in this behalf.

4. The contention of Mr. K.V. Venkatasubramania Aiyar the learned advocate for the petitioner is that before a final order could be passed under

Rule 3 there must be a notice "in terms of Rule 4, Clause (b) informing him of the action proposed to be taken against him and giving him an

opportunity under Rule 4(c) for showing cause against the proposed action and as that had not been done, the order of dismissal dated 6-9-1950

was in contravention of the rules and, therefore, illegal and he relies on a decision of the Privy Council reported in --"High Commissioner for India

v. I.M. Lall", 1948 F. C. R. 44 in support of this proposition. That was a case in which the validity of an order of the Punjab Government

dismissing an officer of the Indian Civil Service came up for consideration. On 2-9-1937 the Punjab Government framed a number of charges

against one Mr. Lall. a District Judge belonging to the Indian Civil Service and gave intimation to him that a departmental enquiry would be held in

respect of those charges. He was asked to furnish a written statement of defence which he did on 9-1-1938. Then there was an enquiry and acting

on the report of the enquiry, the Government removed Mr. Lall from service by an order dated 31-8-1939.

He then filed a suit challenging the validity of the order of dismissal on the ground "inter alia" that no notice had been given to him of the proposed

action and no opportunity afforded to show against the same as required by Section 240(3) of the Government of India Act, 1935, and that the

procedure was illegal and the order was vitiated thereby. Section 240(3) is in these terms:

No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the

action proposed to be taken in regard to him.

The suit was decreed by the Punjab High Court on the ground that there was no proper inquiry. Vide -- "I.M. Lall v. Secretary of State", AIR

1944 Lah 240. The matter was taken on appeal to the Federal Court. The learned Judges disagreed with the finding of the High Court that there

was no proper enquiry but held by a majority that on a proper construction of Section 240(3) of the Government of India Act, 1935, there must

have been a further notice to the civil servant informing him of the order proposed to be passed, that an opportunity should have been given to him

to make representation against the proposed action and that final order could be passed only thereafter and as that was not done the order was illegal.

The learned Judges observed as follows: ""But the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed. That in our judgment involves in all cases where there is an enquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, that the person concerned shall be told in full, or in adequately summarised form, the results of that enquiry, and the findings of the enquiring officer, and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction in rank.

Vide -- "Secy. of State v. I.M. Lall", 1945 2 Mad L J 270.

5. Against this decision there was a further appeal to the Privy Council. In affirming the judgment of the Federal Court, Lord Thankerton observed that there was a distinction between giving information to the civil servant about the ""grounds on which it is proposed to take action"" and giving an opportunity of ""showing cause against the action proposed to be taken in regard to him""; that the former would be appropriate in a stage anterior to the enquiry, the object being to afford adequate opportunity of defending oneself while the latter would arise only after the enquiry was held and punishment decided on; and further observed

In the opinion of their Lordships no action is proposed within the meaning of sub-section until a definite conclusion has been come to on the charges and actual punishment to follow is provisionally determined on. Prior to that stage the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which Sub-section (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage.

If the civil servant has been through an enquiry under Rule 55 of the Civil Services (Classification Control and Appeal) Rules, it would not be

reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right and he would still be

entitled to represent against the punishment proposed as the result of the findings of the inquiry." Vide -- "High Commissioner for India v. I.M.

Lall", 1948 F. C. R. 44,

6. In other words, in a case governed by Section 240(3) there will be two stages; firstly an inquiry after notice into the charges against the civil

servant and this is the rule of natural justice that no person should be condemned without a hearing and secondly after the enquiry is over and a

punishment decided on a further notice in terms of Sub-section (3) informing the civil servant of the action proposed to be taken and giving him an

opportunity to show cause against that action and this is a statutory requirement.

7. It is argued for the petitioner that this decision will govern the present case because Rule 4(b) of the Safeguarding of National Security Rules

provides that the servant should be informed in writing "of the action proposed to be taken in regard to him under Rule 3", that "reasonable

opportunity of showing cause against that action" ought to be given under 4(c) and that under Rule (4) any representation made by him in that

behalf should be taken into consideration before final order is passed under Rule 3. Mr. Nambiar the learned advocate for the respondent could

not convincingly assail the soundness of this contention but he argued that the notice dated 27-2-1950 satisfies the requirements of Rule (4),

because it stated that the petitioner was liable to have the services terminated under Rule (3) but this is merely a statement of the effect of Rule (3)

and not any intimation of a decision by the authorities that the petitioner's services would be terminated. Reliance was also placed on paragraph 3

of the notice but this must be read along with paragraphs 4 and 5 and they clearly show that no action had been decided on.

Indeed when it is remembered that a proper notice under Rule 4(b) can only be after an inquiry is held and a punishment tentatively proposed, the

notice dated 27-2-1950 calling upon the petitioner to give his explanation for the charges can in no manner be regarded as falling under Rule 4(b).

In our opinion the present case falls directly within the principle laid down by the Privy Council in -- "High Commissioners for India v. I.M. Lall",

1948 F. C. R. 44 and the order dated 6-9-1950 must be held to be illegal.

8. Mr. K.V. Venkatasubramania Aiyar also argued that in case his construction of Rule 4 of Safeguarding of National Security Rules was not

accepted he would rely on Article 311(2) which re-enacts the provisions of Section 240(3) of the Government of India Act, 1935 and contend

that the Safeguarding of National Security Rules would be void as against Article 311(2). As we have held that Rule 4 of the Safeguarding of

National Security Rules does not differ from Section 240(3) or Article 311(2) on this point it is unnecessary to discuss this aspect any further.

9. A further point was taken by Mr. Nambiar that questions relating to the propriety of the notice and the legality of dismissal did not arise in this

case because under the rules applicable to railway establishment the services of the petitioner could be terminated on a month's notice; that under

the notice dated 6-9-1950 a month's pay in lieu of notice was given to him, that in substance it was a case of termination of services and not of

dismissal or removal and that accordingly Article 311 did not apply. He referred to Rule 148(3) and (4) of the Indian Railway Establishment Code

which run as follows:

(3) Other ((non-pensionable) railway servants. The service of other (non-pensionable) railway servants shall be liable to termination on notice on

either side for the periods shown below. Such notice is not however required in cases of summary dismissal or discharge under the provisions of

service agreements, retirement on attaining the age of superannuation and termination of service due to mental or physical incapacity:

(a) Probationary officers and officers on probation other than those in the medical department--3 months" notice;

(b) Officers on probation in the Medical department--one month's notice;

(c) Permanent Gazetted officers--6 months" notice;

(d) Permanent Non-Gazetted employees--1 month's notice;

(4) In lieu of the notice prescribed in this rule, it shall be permissible on the part of the Railway Administration to terminate the services of a railway

servant by paying him the pay for the period of notice.

It is common ground that the petitioner is a permanent non-gazetted employee falling within Clause (d) of Rule 3 and it is accordingly contended

that his services could be validly terminated under that rule and must be taken to have been in fact so terminated. Reliance was also placed on

Article 310 of the Constitution which generally enacts that civil posts under the Union or State are held on pleasure and it is argued that Rule 148 is

in accordance with Article 310 & is, therefore, valid. Mr. K.V. Venkatasubramania Aiyar contends in reply that Article 310 and Rule 148 must

both be read subject to the statutory rights declared in Article 311; that the respondent took action avowedly only under the Safeguarding of

National Security Rules, that the order is one of compulsory retirement under those rules and not a termination of service under Rule 148; and that

its validity must be judged by the provisions of Rule 4 and of Article 311.

10. Article 310 has a long history behind it. It has its origin in the rule well established in British Jurisprudence that all public offices are held at the

pleasure of the Crown. Two consequences result from this rule. The services of the civil servant can be terminated without assigning any reason

and even in the case of wrongful dismissal no action could be maintained at law for damages, the theory being that the King can do no wrong. In --

"Shenton v. Smith", 1895 A. C. 229, this rule was applied to an appointment made by the Government of Western Australia and it was held that

the office was held at pleasure and could be terminated at will and no action for damages would lie for wrongful dismissal. Lord Hobhouse in

delivering the judgment of the Judicial Committee observed that:

Neither principle nor authority has been adduced to show that in the employment and dismissal of public servants the colonial Government stands

on any different footing than the Home Government.

In -- "Dunn v. Reg", (1896) 1 Q. B. 116, it was held that even if there was a contract of employment for a period and it was terminated before the

period without cause, no action for damages will lie. The following observations of Lord Watson in -- "De Doshe v. Reg", see footnote in 1896 1

Q.B. 116 were quoted and followed:

In the second place I am of opinion that such a concluded contract if it had been made, must have been held to have imported into it the condition

that the Crown has the power to dismiss. Further I am of opinion that, if any authority representing the Crown were to exclude such a power by

express stipulation, that would be a violation of the public policy of the country and could not derogate from the power of the Crown.

This decision was followed in -- "In the matter of the petitions of Right of Charles

Lawrence Hales", (1918) 34 T.L.R. 314, where there was again

a special agreement and this decision was affirmed on appeal in -- "Hales v. Reg", (1918) 34 T. L. R. 589.

In -- "Denning v. Secretary of State for India in Council", (1920) 37 T. L. R. 138, the plaintiff was employed by the Secretary of State for India

on a contract for a period of five years. There was a premature termination of the services and there was no misconduct. It was held that the

plaintiff could not maintain an action for damages. In --"Gould v. Stuart", (1896) A. C. 575, the Judicial Committee, while affirming the general

rule that Crown servant could be dismissed at pleasure, held that where there was a statute prescribing terms of services and mode of dismissal

that would govern the rights of the parties. The law is thus summed up in Halsbury's Laws of England, Vol. VI, page 608 para 782, ""Except

where it is otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown and all

in general, are subject to the dismissal at any time without cause assigned; nor will an action for wrongful dismissal be entertained even though a

special contract be proved.

In India, these rules had been applied to offices held under the Government of India. Mr. Ilbert states the law in the following terms: (Vide Ilbert's

Government of India, 1916 Edn.): ""The tenure of persons serving under the Government of India or under a local Government is presumably

tenure during the pleasure of the Crown.

This principle has been affirmed in all the statutes relating to the Government of India. Section 96-B(1) of the Act of 1919 runs as follows :

Subject to the provisions of this Act and of Rules made thereunder, every person in the civil service of the Crown in India holds office during His

Majesty's pleasure and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service

may be dismissed by any authority subordinate to that by which he was appointed and the Secretary of State in Council may, (except so far as he

may provide by rules to the contrary) reinstate any person in that service who has been dismissed.

Section 240(1) of the Government of India Act, 1935 is in these terms:

Except as expressly provided by this Act, every person who is a member of civil

service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure!

11. This provision is even more emphatic than Section 96-B(1) of the 1919 Act because the qualifying words "And of rules made there under occurring in Section 96-B(1) on which it was possible to contend that the power of dismissal at pleasure could be controlled by the rules, have been omitted. Article 310(1) of the Constitution re-enacts this principle with verbal alterations not affecting the substance of the matter. It is as follows:

Except as expressly provided by this Constitution, every person who is a member of the defence service or of a civil service of the Union or of an all India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor or, as the case may be, the Rajpramukh of the State.

Thus the rule that civil posts under the Government are held at pleasure is part of the law of this country and it involves the consequence that there can be termination of service at will. Article 310 provides that this rule is subject to the exceptions "expressly provided by this Constitution". Such exceptions are provided in Article 310(2) which provides for compensation being paid when a contract for a period is terminated for no misconduct of the civil servant, in Article 311(1) which enacts that a person cannot be dismissed by an authority subordinate to that by which he is appointed, and in Article 311(2) which prescribes that a particular procedure should be followed before a person is dismissed or removed from service.

Subject to these statutory restrictions the general rule embodied in Article 310(1) that all offices under the Government are held at pleasure will govern the rights of the parties. "In -- "Venkatarao v. Secretary of State", ILR (1937) Mad 532 the facts were that a civil servant was dismissed without there having been a proper enquiry in accordance with the rules framed u/s 96-B of the 1919 Act. He filed a suit for damages for wrongful dismissal. It was Held by the Judicial Committee that as the office was held at pleasure the breach of the rules would not confer a right of action on

the civil servant for damages for wrongful dismissal. The decision in -- "Shenton v. Smith", (1895) AC 229 was followed. In--"Rangachari v.

Secretary of State for India", ILR (1937) Mad .517 a police officer was dismissed by an authority subordinate to one which appointed him and it

was held that the order of dismissal was illegal as being in contravention of the statutory provision enacted in proviso to Section 96-B.

In -- "High Commissioner for India v. I.M. Lair, 1948 F. C. R. 44 already referred to it was held that the dismissal was illegal and inoperative

because it contravened the statutory prescription laid down in Section 240(3) of the Government of India Act, 1935,

12. It will follow from the above that the Government has a right to terminate the services of a civil servant at will and the only restrictions on this

power are those expressly enacted in the Constitution. There is accordingly considerable force in the argument of the respondent that he has a right

to terminate the services of the employee under Rule 148 of the Indian Railway Establishment Code and that there is nothing in the Constitution

which restricts such a right.

13. The question still remains whether this is a case of termination of service under Rule 148 of the Indian Railway Establishment Code. The

contention of the learned advocate for the petitioner is that the order dated 6-9-1950 is one passed only under the Safeguarding of National

Security Rules and its validity must accordingly be determined with reference to those rules. We think that this contention is well founded. The

notice dated 27-2-1950 is expressly issued under Rule 2 of the Safeguarding of National Security Rules, 1949. It purports to follow the procedure

prescribed in Rule 4. Four charges are framed against the petitioner. He is asked to submit his explanation and he is told that his representations

would be referred to a committee of advisers set up by the Government of India for this purpose. The order dated 6-9-1950 also expressly recites

that the services are terminated under Rule 3 of the Railway Services Safeguarding of National Security Rules. In the counter affidavit filed by the

General Manager it is again expressly stated that action against the petitioner had been taken under the Railway Services Safeguarding of National

Security Rules, that the procedure prescribed by the rules had been properly followed, and that the rules have not become void under the

Constitution. It is not pleaded anywhere that any action was taken under Rule 148 of the Indian Railway Establishment Code. If action was

intended to be taken under that rule then there was no need to frame charges, call for explanation and send it for consideration by a special

committee. Even the service agreement of the petitioner has not been produced before us.

14. It appears to us to be amply clear from the record that the respondent did only what he purported to do under the notice and that was to take

action against the petitioner under the Security Rules. Reliance was also placed by Mr. Nambiar on the fact that a month's salary was paid to the

petitioner) but under rule 7 of the Safeguarding of National Security Rules, it is provided that compensation should be paid when final orders are

passed under Rule 3. The payment is, therefore, a solatium offered under the above rules under which the petitioner has been removed from

service. Mr. Nambiar relied on the following observations occurring in -- "Nagpur Electric Co. v. Anand Vishnu", AIR 1944 Nag 66, ""The

termination of the contract in due course, according to its terms is neither discharge, dismissal or release nor leaving employment.

We agree that when the services of an employee are terminated he cannot be held to have been dismissed. But whether in fact it was a case of

termination of services or dismissal is a question of fact and that must be determined on a consideration of the circumstances of the case.

15. We are of opinion that the order dated 6-9-1950 is not one terminating services but one of compulsory retirement falling within r. 3 of the

Safeguarding of National Security Rules and as the procedure prescribed in Rule 4 has not been followed, it is illegal and inoperative.

16. Mr. Nambiar finally contended that this application is not maintainable as the petitioner can enforce his rights in a regular suit and that where

there is another remedy open no relief should be granted in a writ of certiorari. It is true that this Court will not ordinarily interfere with an order

where there is another adequate remedy available to the party. This, however, is a rule of discretion for the guidance of the Court and not a

limitation on its powers. As observed by Das J. in -- Rashid Ahmed Vs. The Municipal Board, Kairana, the ""existence of an adequate legal

remedy is a thing to be taken into consideration in the matter of granting writs"". In the -- "King v. Postmaster General; Ex parte Carmichael",

(1928) 1 K.B. 291 Avory J. dealing with this very contention observed as follows:

But even if that remedy is open to her, it is undoubtedly good law that if the application for a certiorari is made by a party aggrieved, then it ought

to be granted "ex debito justitiae" and the court has not the general discretion which it would have when the application is made by one of the

public who is not personally concerned. That was decided long ago in the case of -- "Reg v. Surrey Justices", (1870) 5 Q B 466 and on that

principle, even though she has a remedy by appeal in this case, I am prepared to agree that the certiorari should go. seeing that the application is

being made by the applicant as the party aggrieved.

17. The law is thus stated in Halsbury's Laws of England, Vol. 9, page 873 para 1481:

Although the writ is not of course it will nevertheless be granted "ex debito justitiae" to quash proceedings which the Court has power to quash,

where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party

and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief, and this is the case even

though certiorari is taken away by statute and although there is an alternative remedy.

18. As the question involved is one of right procedure to be followed in exercise of the powers conferred under the Safeguarding of National

Security Rules and as the rights of the petitioner have been clearly infringed, this is a fit case in which the writ must issue. The order dated 6-9-

1950 is accordingly set aside. The petitioner will be entitled to his costs, advocate's fee Rs. 100.