

**(1964) 09 AHC CK 0020**

**In the Allahabad High Court**

**Case No : Civil Miscellaneous Writ No. 58 of 1962**

Dr. Prem Behari Lal Saxena

APPELLANT

Vs

State of Uttar Pradesh and Another

RESPONDENT

**Date of Decision : 02-09-1964**

**Acts Referred:**

Civil Services Regulations and Liberalised Pension Rules — Rule 436, 474  
Constitution of India, 1950 — Article 311(2)

**Citation : AIR 1965 All 406 : (1967) 1 LLJ 357**

**Hon'ble Judges : H.C.P. Tripathi, J**

**Bench : Single Bench**

**Advocate : K.C. Saxena and A.P. Pandey, for the Appellant; Standing Counsel, for the Respondent**

**Final Decision : Allowed**

## Judgement

Tripathi, J.—This writ petition is directed against an order No. II.F.86E/ST/1354, D/- 341-1961 passed by the Government of Uttar Pradesh abolishing the permanent ex-cadre post of the Anaesthetist at the U. H. M. Hospital Kanpur and thereby dispensing with the services of the petitioner who was the incumbent of that post.

2. The petitioner who is a Graduate in Medicine and Surgery was appointed a permanent Anaesthetist to the Medical College, Lucknow in January 1945. While employed there he applied for the post of an Anaesthetist at the State Hospitals at Kanpur and was appointed as such by the Government on terms and conditions mentioned in its order D/-March 31, 1951 (Annexure 2 to the petition) and the petitioner joined the post on the 10th of September, 1951. Subsequently he was confirmed in his post with effect from September 10, 1955.

3. In 1957 as the petitioner refused to go on transfer to Varanasi, he was suspended and then he filed a Writ Petition No. 415 of 1958 in this Court which was allowed and the order of suspension was quashed by Hon"ble Tandon J. on the ground that as the post held by the petitioner was an ex-cadre post, he was

not amenable to transfer to some other place from Kanpur. Accordingly, the petitioner was reinstated in his post of Anaesthetist at the U. H. M. Hospital at Kanpur under a Government order D/-May 27, 1959.

4. On 4th of March, 1960 the Additional Director of Medical and Health Services addressed a letter to the Civil Surgeon, Kanpur directing him to enquire from the petitioner "if he is prepared to accept the P. M. S. (I) cadre post of Anaesthetist (Temporary) at one of the hospitals in this State, in view of the fact that the post of Anaesthetist at Kanpur is superfluous now."

The petitioner, however, refused to accept the offer.

5. On 3rd of June, 1980 another letter was addressed by the Director of Medical and Health Services to the Civil Surgeon, Kanpur, asking him to enquire from the petitioner, "if he is prepared to accept the PMS I Cadre Post of Anaesthetist (Permanent) at any of the State Hospitals outside Kanpur...as the post of an Anaesthetist at Kanpur is considered to be superfluous now."

6. The petitioner again refused this offer and expressed his willingness to go outside Kanpur provided he was absorbed in PMS I in General Cadre.

7. On December 15, 1960, the Additional Director again wrote to the Civil Surgeon, Kanpur to enquire if the petitioner was "agreeable to his permanent absorption in the PMS I Cadre on the post of Anaesthetist, and his being posted initially to Kamalapat Memorial Hospital, Kanpur which is a transferable post." This offer too was not acceptable to the petitioner. Thereafter the impugned order was passed on 3rd of November, 1991 abolishing the post and dispensing with the services of the petitioner.

8. Learned Counsel for the petitioner has challenged the validity of the aforesaid order on several grounds. His contention is that an order of discharge resulting from the abolition of a permanent post is an order of removal within the meaning of Article 311 of the Constitution and as such the petitioner should have been given an opportunity to show cause before it was passed. Learned counsel has argued that as the impugned order involves loss of accrued benefits to the petitioner in the shape of earned leave and pension, it is punitive in character and as such is also hit by Article 311 of the Constitution. It has been argued that the impugned order being in contravention of statutory rules is unsustainable in law. Finally it has been contended that the post has been abolished not because it has proved itself superfluous but on extraneous considerations for getting rid of the services of the petitioner and the order is, therefore, mala fide and illegal.

9. On the other hand, learned Standing Counsel for the State has contended that the State Government has an inherent right to abolish a post which has proved superfluous, that Article 311 of the Constitution is wholly inapplicable to the facts of the present case and that the impugned order having been passed in accordance with the statutory rules cannot be interfered with in these proceedings.

10. The question whether the State Government can abolish a permanent civil post under it without giving an opportunity to the incumbent to show cause is not free from difficulty. Fundamental Rules, Vol. II, Part I, Chap. II, Rule 9 (22) reads :

"Permanent post means a post carrying a definite rate of pay sanctioned without limit of time." Sub-clause (13) of the aforesaid rule defines:

"Lien means the title of a Government servant to hold substantively, either immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post, to which he has been appointed substantively."

11. In view of this definition of permanent post given in the rules, I am of opinion that it will not be reasonable to hold that the State Government can abolish a permanent post without affording an opportunity to its incumbent to show cause against such abolition. To hold otherwise will result in obliterating the marked distinction between permanent and temporary posts. It is true that the employer enjoys an inherent right to abolish a post even of a permanent character, but, in my opinion, he can do so only after giving notice to the incumbent whose removal follows automatically after such abolition.

12. In the case of *P. L. Dhingra v. Union of India*, A I R 1938 S C 36. Hon"ble Chief Justice S. R. Das was pleased to observe :

"The appointment of a Government servant to a permanent post may be substantive or on probation or on an officiating basis. A substantive appointment to a permanent post in public service confers normally on the servant so appointed a substantive right to the post and he becomes entitled to hold a "lien" on the post. This "lien" is defined in Fundamental Rules Section III, Chap. II, Rule 9 (13) as the title of a Government servant to hold substantively a permanent post, including a tenure post, to which he has been appointed substantively. The Government cannot terminate his service unless it is entitled to do so (1) by virtue of a special term of the contract of employment, e.g., by giving the requisite notice provided by the contract or (2) by the rules governing the conditions of his service, e.g., on attainment of the age of superannuation prescribed by the rules, or on the fulfillment of the conditions for compulsory retirement or, subject to certain safeguards, on the abolition of the post or on being found guilty, after a proper enquiry on notice to him, of misconduct, negligence, inefficiency or any other disqualification."

13. In my opinion, the aforesaid observation of the Hon"ble the Chief Justice is an authority for the proposition that the services of a Government servant can be terminated on the abolition of the post subject to certain safeguards. It must, therefore, be held that one of those safeguards is that he should be given an opportunity to show cause before the contemplated abolition becomes a fact.

14. In the case of *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways*,

Maligaon, Pandu, etc., which was a case arising out of termination of services of a railway employee in accordance with Rule 148 (3) of the Railway Establishment Code, while discussing the definition of a permanent post as given in those rules, Hon"ble Chief Justice Gajendragadkar was pleased to observe :

"It is thus clear that as a result of the relevant definitions, a permanent post carried a definite rate of pay without a limit of time, and a servant who substantively holds a permanent post has a title to hold the post to which he is substantively appointed, and that, in terms, means that a permanent servant has a right to hold the post until, of course, he reaches the age of superannuation, or until he is compulsorily retired under the relevant rule." ..... "A person who substantively holds a permanent post has a right to continue in service, subject, of course, to the rule of superannuation and the rule as to compulsory retirement. If for any other reason that right is invaded and he is asked to leave his service, the termination of his service must inevitably mean the defeat of his right to continue in service and as such, it is in the nature of a penalty and amounts to removal. In other words, termination of the services of a permanent servant otherwise than on the ground of superannuation or compulsory retirement, must, per se amount to his removal....."

It may be noted here that the definition of a permanent post as given in relevant railway fundamental rules is exactly the same as in Sub-rule (22) of Rule 9 of the Fundamental Rules which are applicable to the present case. No doubt, while making these observations his Lordship was dealing with a case in which the post in question had not been abolished but all the same much light can be had from them in arriving at a correct conclusion in the present case. In the aforesaid case it was further held that "Article 311 has to be read as a proviso to Article 310, and so, there can be no doubt that the pleasure contemplated by Article 310(1) must be exercised subject to the limitations prescribed by Article 311."

15. In the light of these observations, I am of opinion that the State Government does not enjoy an unfettered discretion to abolish a permanent post, and if they do so without giving an opportunity to the incumbent to show cause the order is hit by Article 311(2) of the Constitution inasmuch as it results in an automatic removal of the incumbent of the post.

16. In the present case no opportunity was given to the petitioner to show cause against the abolition of the post. Therefore, the impugned order cannot be sustained in law.

17. There are other reasons also why the impugned order cannot be allowed to stand. Rule 436 of Civil Service Regulations and Liberalised Pension Rules which is applicable in this case reads :

"436. Reasonable notice should be given to an officer in permanent employ before his services are dispensed with on the abolition of his office. If, in any case, notice of at least three months is not given, and the officer has not been provided with other employment on the date on which his services are dispensed

with, then, with the sanction of the authority competent to dispense with the officer's services, a gratuity not exceeding his emoluments for the period by which the notice actually given to him falls short of three months, may be paid to him, in addition to the pension to which he may be entitled under Articles 474 to 481; but the pension shall not be payable for the period in respect of which he receives a gratuity in lieu of notice."

This rule, in my opinion, contemplates that when a post is abolished then on the date on which the services of the incumbent are dispensed with, he] should be provided with other similar employment, if reasonably possible.

18. In the present case the impugned order abolishing the post was passed about a year after the last offer of the Government and on that date the petitioner was not offered any alternative employment. It is true that earlier the Government had repeatedly made offers to the petitioner to employ him on similar posts but it is also true that in none of its communications it was definitely indicated that the post was going to be abolished. In my opinion, if the petitioner had come to know that the post which he was holding was to be abolished, in all probability, he would have accepted one of these offers of similar employment which were made to him by the State Government.

19. On the 15th of November, 1963, the Civil Surgeon, Kanpur asked the petitioner to hand over charge in consequence of the impugned order. The petitioner says that he had earned leave of about four months at his credit. He applied on 16th October, 1961 for one month's earned leave from 1st December, 1961 to 31st December, 1961. His application was forwarded to the Government, but the Government was of the view that as his services had been dispensed with, the question of giving leave does not arise. In the counter-affidavit it has been asserted that "no Government servant is entitled as a matter of right to claim even the leave that has been earned by him, as would be evident from Fundamental Rule 67 as incorporated in F. H. B. Vols. II to IV, and as such the reply that was sent by the Government that no question of leave arose since the post had been abolished was quite within its jurisdiction." It will be noticed that the petitioner's allegation that on the date of his application he had already earned four months' leave has not been denied.

20. It is true that Rule 67 provides that "leave cannot be claimed as of right. When the exigencies of the public service so require, discretion to refuse or revoke leave of any description is reserved to the authority empowered to grant it." In the instant case, however, conditions which are requisite for refusal or revocation of the leave under the aforesaid rule were not present and, therefore, there was no justification for the State Government to have refused to grant leave to the petitioner which he had already earned on account of the duration of his service.

21. In his supplementary affidavit the petitioner has asserted that having been appointed to a substantive and permanent post, he became entitled to pension

under Article 361 of the Civil Service Regulations and that under Rule 474 and 474 (1) he became entitled to certain amount as pension. In the counter-affidavit it has been asserted that ""the petitioner's claim to the pension could be considered only under Article 426 of the Civil Service Regulations and to such a claim of pension, Rule 474 and 474 (1) have no application and no question of granting a pension arises."

22. Learned counsel for the petitioner has argued that this affirmation in the counter-affidavit clearly indicates that as a result of the impugned order, the Petitioner has not only been deprived of his post and is earned leave but also of his pension to which he is entitled under Rule 381 of the Civil Service Regulations. Learned Standing Counsel has, however, stated that the petitioner will be given the pension to which he might have been entitled under the relevant Rules.

23. Under Rule 426 of the Civil Service Regulations an officer who is selected for discharge owing to the abolition of his permanent post, unless he is appointed to another post, has the option of taking any compensation, pension or gratuity to which he may be entitled for the service he has rendered. That pension or gratuity is to be calculated in accordance with Rule 474 and 474 (1) (a). Therefore, the allegation in the counter-affidavit that the aforesaid rules did not apply in the case of the petitioner and that "no question of granting a pension arose" appear to be based on misapprehension of legal position.

24. Under the impugned order a gratuity equivalent to three months' salary was paid to the petitioner as contemplated by Rule 436 in lieu of notice. But this gratuity is not to be confused with the gratuity to which he is entitled on his not being provided with a similar post under II. 426 of the Civil Service Regulations. The contention of the respondents, therefore, that no question of pension in his case arises is devoid of force.

25. The petition is allowed. The order of the State Government dated 3rd of November, 1961 abolishing the post and discharging the petitioner from service is quashed. In the circumstances of the case, however, there will be no order as to costs.