
(1962) 06 KAR CK 0010
In the Karnataka High Court
Case No : Regular Appeal No. 2 of 1957

Gangadhar Gurusiddappa

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 29-06-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 14, 311, 311 (2)

Citation : AIR 1963 Kar 193 : (1962) ILR (Kar) 527

Hon'ble Judges : N. Sreenivasa Rau, C.J; T.K. Tukol, J

Bench : Division Bench

Advocate : M. Krishna Swami, for the Appellant; R.S. Mahendra, for K. Nanjundiah, for the Respondent

Judgement

T.K. Tukol, J.—The appellant instituted Special Suit No. 16 of 1954 on 7-6-1954 in the Court of the Civil Judge, Senior Division, Hubli (District Dharwar), passed respectively on 17-1-1950, 8-1-1951 and 27-3-1951 by the District Transportation Superintendent, Hubli, were illegal and void and that he therefore still continued in the service of the Southern Railways entitling him to the salary and the other emoluments according to rules.

2. The facts relevant to the appeal are not in dispute and they may be briefly stated: The plaintiff who entered the services of the Madras and Southern Mahratta Railway was promoted to the post of Deputy Controller of Trains in 1945 and v/as substantively holding the same on the material date. On 15th January 1950 the plaintiff absented himself from duty. The District Transportation Superintendent, Hubli, wrote him a letter on the next day asking him to attend to duty immediately and intimating that he would be suspended from pay and duty if he absented himself on that day. The plaintiff also received a telephonic message from the same Officer on 17-1-1950 saying that he had been suspended from pay and duty as he had failed to present himself for work as required. He refused to accept a letter of the same date confirming the order of

suspension. Another letter sent to him by registered post on 18-1-1950 was returned to the Officer on 21-1-1950 with the postal endorsement of refusal.

A charge-sheet dated 11-2-1950 was served on the plaintiff calling upon him to show cause why he should not be removed from service or punished with any of the lesser penalties specified in Rule 1702 of the Railway Establishment Code and asking him to submit his explanation on or before 22-2-1950. The notice also intimated the plaintiff that in case he desired to be heard in person, he should express the same by substituting his explanation before the specified date. The plaintiff submitted his explanation dated 27-2-1950 stating that he had already Intimated on 14-1-1950 to the Chief Controller his inability to attend on 16-1-1950 and he could not have attended to his work subsequently in view of the order of suspension from 17-1-1950. He also stated that he was not in a fit condition to move out of bed and that the officer had no need to worry himself for an acknowledgment in writing of his order of suspension as his say had been communicated to him through the peon who had carried the letter to him.

He further stated that the Officer might take any action if he was in a position to do so. The District Transportation Superintendent, thereafter passed an order on 17-5-1950 reducing the plaintiff to the scale of a clerk in grade Rs. 80 -- 160 for a period of three years and the plaintiff was called upon to join his duties in that post at once. On 21-5-1950 the plaintiff sent two Medical certificates but these private certificates were rejected by the authorities. Some correspondence ensued between the plaintiff and the Railway authorities. On 10-8-1950 the plaintiff was served with a second charge-sheet calling upon him to show cause for his absence and for his failure to resume duty by 20th July, 1950, as required of him. The plaintiff offered his explanation by letter dated 19-8-1950 stating that he had already been punished for a default similar to the one which had been mentioned in the second charge-sheet, that he had appealed to the Financial Commissioner of Railways on 12-7-1950 and that if the officer continued that enquiry the judgment on the point which was still to be decided by the appellate authority would amount to contempt of that authority. The Chief Operating Superintendent considered his explanation to be unsatisfactory and submitted all the papers to the General Manager for necessary action. The latter called upon the plaintiff to join his duty on or before 1-12-1950. But as the plaintiff failed to comply with the direction, he was informed to meet the General Manager on 23-12-1950.

After the interview with the plaintiff, the General Manager modified the order of punishment by limiting the reduction in rank to a period of three months only and ordered the plaintiff to resume duty on 8-1-1951. The Chief Operating Superintendent communicated these orders to the plaintiff by letter dated 3-1-1951. The plaintiff addressed a letter dated 7-1-1951 to the District Transportation Superintendent (Traffic), Hubli, stating that as he had been paid only Rs. 160/- as his pay, it amounted to a compulsion on him to suffer the punishment imposed on 3-1-1951 for more than three months and that he

should therefore be paid the substantial pay of Rs. 380/- from 8-1-1951 and that his work might be watched by trying him in the higher capacity as the Deputy Controller of Trains in which he had been confirmed from 1-12-1948. The authorities were not prepared to accept the terms proposed by the plaintiff and the District Transportation Superintendent informed the plaintiff by letter dated 9th January 1951 that he was not authorised to go beyond the provisions of the letter already sent to him on 6-1-1951 and that he should unequivocally indicate whether it was his intention to report to duty in accordance with the orders already passed.

The plaintiff replied by letter dated 9-1-1951 that he was prepared to join duty at any time for any post on his former pay of Rs. 380/- per month. Owing to the plaintiff's failure to comply with the orders, the General Manager issued a communication to the plaintiff on 22-3-1951 stating that as he had not carried out the orders and had no inclination as disclosed by his subsequent letters to carry out the orders, his services were terminated with effect from 27-3-1951 and that he would be given a month's pay in lieu of notice in accordance with the terms and conditions of his service. Thereafter, the plaintiff sent certain representations for reconsideration and then filed the present suit after giving a notice to the Union of India on 10-2-1954 u/s 80 of the Code of Civil Procedure.

3. The defendant filed his written statement as Ext. XI and denied the various allegations contained in the plaint. It was contended that the plaintiff had wilfully absented himself on the 15th and 16th January 1950 after sending notice of undertaking a fasting satyagraha, that his plea of sudden illness was not true, that the order of suspension was passed pending Departmental enquiry as the plaintiff wilfully absented himself from duty, that it was the Chief Operating Superintendent who ordered on 8-2-1950 the issue of a charge-sheet to the plaintiff for his unauthorised absence from duty and refusal to accept letters sent to him by the District Transportation Superintendent and that the order of reduction had been passed as the Chief Operating Superintendent and the General Manager had not been satisfied with the explanation offered by the plaintiff; the plaintiff's justification of his absence by subsequent production of medical certificates which were not acceptable to the District Medical Officer was unsatisfactory and it was only after further opportunities were given to the plaintiff that the General Manager confirmed the order of reduction in rank, limiting the period of such reduction only to three months. As the plaintiff did not join his duties even after 8-1-1951, the General Manager terminated his services by a notice dated 27-3-1951 after giving him one month's pay in lieu of notice according to the terms and conditions of his service. The plaintiff filed his rejoinder justifying his conduct

3a. At the trial the learned Civil Judge considered the documentary and the oral evidence placed before him and came to the conclusion that the order of suspension was legal, that the order of reduction had been passed after giving reasonable opportunity to the plaintiff, that the order finally terminating the

services of the plaintiff was in pursuance of the terms and conditions of his service and that the plaintiff was not entitled to any of the reliefs prayed for by him. He accordingly dismissed the suit with costs by a judgment dated 30th June 1956. In the appeal preferred by the plaintiff, he challenged all the findings of the trial Court and prayed for a judgment in his favour in terms of his prayer in the plaint.

4. Mr. M. Krishnaswamy, the learned Advocate appearing for the appellant, conceded that the order of suspension passed against the plaintiff pending the Departmental enquiry was legal. He, however, challenged the legality of the order of reduction in rank on the ground that reasonable opportunity had not been given to his client as required by Article 311 of the Constitution and that the order of termination of plaintiff's services by communication dated 22-3-1951 without affording any reasonable opportunity was illegal as it was in clear contravention of the provisions of the said Article. He also submitted that the order of termination amounted to an order of dismissal as its contents indicated that it was on account of some stigma or misconduct that the General Manager had removed him from service. At this stage it is necessary to note that the competency of the Officer who passed the orders of reduction in rank and of termination of the plaintiff's service has not been disputed.

5. Before entering into the merits of these contentions, it is essential to refer to the nature of the plaintiff's service firstly under the Madras and Southern Mahratta Railway Company and thereafter under the Union Government. Ex. 55 is a copy of the agreement executed by the plaintiff in favour of the Madras and Southern Mahratta Rail-Way Company on 22-7-1938 defining the conditions and terms of his service under the Company. Conditions 4 and 8 of this agreement which are relevant for the purpose of the suit read as follows;

"(4) That the first period of three months of my engagement shall be on probation, thereafter my engagement shall be from month to month terminable by one month's notice in writing ore either side.

(8) The authority which is competent to appoint me in the appointment I hold, has the right to discharge me on giving one month's notice and also the right to dismiss me summarily for any reason which may to him appear sufficient, as to Which his decision shall be final and binding on me."

6. The plaintiff was examined at Ex. 124. He admitted in paragraph 12 of his cross-examination that when his services were terminated, he was as non-pension able non-gazette officer amongst Class III of the Railway Servants. He also admitted in paragraph 11 of cross-examination that when the Company was taken over by the Government of India from 1-1-1946, the General Manager issued a Circular regarding the re-employment and that for signed an agreement on 11-6-1945 accepting the terms of re-employment on the terms and conditions mentioned in the Circular. It is common ground that the terms and conditions under which be had entered into the service of the Southern Mahratta Railway

Company were engrafted into his service conditions under the Government of India. It would, therefore, be evident that the contractual obligations as evidenced by the agreement referred to earlier will govern the relationship of the plaintiff and the defendant.

7. The first point for consideration is as regards the legality of the order reducing the plaintiff from the post of a Deputy Controller of Trains to that of a Head Clerk on the maximum pay of Rs. 160/- per month. This order has been attacked on the ground that it was in contravention of Article 311 of the Constitution, as the order was passed without giving reasonable opportunity to the plaintiff. Article 311(2) of the Constitution provides that no person holding a civil post under the Union or the State shall be dismissed, removed or reduced in rank until he has been given reasonable opportunity of showing cause against the action proposed to be taken against him. This Article has been the subject-matter of numerous decisions and the learned Advocate for the appellant has placed reliance on the latest decision of the Supreme Court in the State of M.P. v. Chintaman Sadashiva AIR 1961 SC 1623. Their Lordships briefly indicated what "Reasonable opportunity" means at a Departmental Enquiry:

"A proper opportunity must be afforded to him at the stage of the enquiry after the charge is supplied to him as well as at the second stage when punishment is about to be imposed on him. If the first enquiry was materially defective and denied the public servant an opportunity to prove his case it is impossible to hold that a reasonable opportunity guaranteed to a public servant by Article 311(2) had been afforded to him."

8. In the present case, there cannot be any doubt that the order of reduction in rank is illegal, as the recognised procedure of giving an opportunity once after the framing of the charge and then after the findings are recorded on supplying a copy of such findings together with a notice to show cause against the proposed punishment was not followed by the Officer passing the order. The charge-sheet served on the plaintiff is at Ex. 85, dated 11-2-1950. The first paragraph mentions the items of charges and paragraphs 2 to 4 read as follows:

"(2) You are hereby called upon to show why you should not be removed from service or punished with any of the lesser penalties specified in Rule 1702 of the S. R. E. Code Vol. I.

(3) Your reply should be submitted on or before 22-2-1950.

(4) In the event of your desiring to be heard in person you may express your desire whilst submitting your reply before the specified date. Failure to submit your reply before the specified date above will result in disposing your case Ex parte."

The plaintiff submitted his written explanation at Ex. 166 in which he stated that he had absented himself from duty as he had been compelled to stay at home due to the order of suspension dated 17-1-1950 and that he had not stayed

away without permission as he had communicated to the Chief Controller by letter dated 14-1-1950 to arrange for his reliever. He also stated that he was not in a fit condition to move from bed and that though he had not acknowledged the letters he had never disputed the receipt of the memo dated 17-1-1950 communicating to him the order of suspension. On receipt of this explanation, the District Transportation Superintendent issued a communication (Ex. T.115) dated 17th May 1950 stating that the explanation offered by the plaintiff was considered to be most unsatisfactory, that it was a matter of regret that a senior subordinate like him should be found to be so irresponsible as to stay away from duty without permission and to refuse to accept the letter sent to him and that therefore he had been reduced to the office of a Clerk on a maximum salary of Rs. 160/-.

Some correspondence ensued between the plaintiff and the Railway authorities and the plaintiff had even an interview with the General Manager on 23-12-1950. It appears from Ex. 161 which is a letter addressed by the Chief Operating Superintendent on 26-12-1950 to the General Manager, that the plaintiff submitted a letter through him to the General Manager on 23-12-1950, probably after the interview on that - day, and expressed his regret and promised not to give occasion for complaint in future. Unfortunately that letter of regret has not been produced by the defendant. Taking all these factors into consideration, the General Manager informed the Chief Operating Superintendent by letter Ex. 162 dated 29th December 1950 that in the circumstances explained, he accepted the recommendation that the original order of reduction for a period of three years be superseded and that the reversion as Clerk on Rs. 160/- per month was to be operative for a period of three months subject to the condition that if he worked satisfactorily during that period he would be restored to his original grade as Deputy Controller with no loss of seniority.

Mr. Mahendra the learned Advocate for the respondent conceded that no formal enquiry was held after the service of the charge-sheet and that a copy of the findings recorded by the Enquiring Officer was not supplied to the plaintiff. He, however, contended that in the very nature of things the plaintiff had no explanation and that it was not necessary in the circumstances of the case either to supply a copy of the findings or to serve a second notice regarding the proposed punishment.

9. We do not think that there is any substance in the contention that no further enquiry was necessary as the plaintiff had not denied the charge that he had stayed away from duty and that the reduction in rank was only temporary and not permanent. It may be noted that the plaintiff had issued a communication to the Chief Controller on 14-1-1950 (Ex. 63) stating that he was Starting a Satyagraha on the 15th instant and that arrangements for relief may kindly be made. It is in evidence that the plaintiff went on a Fasting Satyagraha for a period of one week in his own house which was given publicity in the local paper and that he also communicated that fact to the Chief Operating Superintendent

on 26-1-1950 (Ex. 64) drawing his attention to the fact that he "completed my Fasting Satyagraha after a week's scheduled period on 23rd instant." In his reply to the charge-sheet (Ex. 166 dated 27-2-1950) the plaintiff had not expressly referred to his absence being due to Satyagraha but had subsequently produced in May two Medical Certificates from private Doctors which were not accepted by the District Medical Officer.

The explanation and the correspondence in connection with the charge-sheet disclose that an enquiry should have been held by giving an opportunity to the plaintiff and that specific finding should have been recorded on each of the charges. Since it is conceded that no copy of the findings was supplied to the plaintiff and no second notice to show cause against the proposed punishment was issued, it is unnecessary to go into the facts of this part of the case. In support of his contention, Mr. Mahendra the learned Advocate for the respondent, submitted that as the reduction in rank was only temporary, the provisions of Article 311(2) of the Constitution were not attracted to the facts of this case. There is nothing in the wording of Article 311(2) that the protection guaranteed thereunder was to be extended only in case the proposed reduction in rank was permanent. The clause is unqualified and is not modified by any words to support the distinction now made by the learned Advocate.

The learned trial Judge has observed in paragraph 16 of his judgment that

".....the expression "reduced in rank" in Article 311(2) of the Constitution has reference to a permanent reduction or degradation of status." We are unable to find support for such a proposition either in Article 311(2) of the Constitution or in any of the reported cases on the subject. Reliance was placed on a decision of the Madhya Bharat High Court in *Prem Biharilal v. State of Madhya Bharat*, AIR 1954 Madh-B 49 in which the scope of Articles 310 and 311 has been explained. What was decided in that case was that an order of Suspension during an enquiry by the Anti-Corruption Department with regard to certain complaints of corruption against an officer would not amount to reduction in rank and that therefore there was no need to give opportunity under Article 311(2) to show cause against a suspension. Our attention was specifically drawn to the following passage to support the argument that the reduction in rank contemplated by Article 311(2) was permanent reduction. After discussing that suspension of a Government servant does not amount to reduction in rank with reference to certain decided cases, their Lordships went on to observe as follows:

"In all these cases the decision of the Nagpur High Court in AIR 1949 118 (Nagpur) has been dissented from and it has been held that there is a difference between "reduction in rank" and "suspension"; that suspension is a temporary deprivation of one's office or position; that by reason of suspension the person suspended does not lose his office nor does he suffer any degradation. He ceases to exercise the powers and to discharge the duties of the office for the time being. His rank remains the same and his pay does not suffer any reduction. He cannot draw his salary during the period of suspension. His powers, functions

and privileges remain in abeyance but he continues to be subject to the same discipline and penalties and to the same authorities", and that reduction in rank in Article 311 has reference to a permanent reduction or degradation of status.....".

With due respect, while we are in agreement with the elucidation of the implications of an order of suspension, we are unable to agree that reduction in rank contemplated by Article 311 has reference only to a permanent reduction or degradation of status. These observations relate to an order of suspension and the Court was not called upon to decide the nature of punishment by way of reduction in rank in order to attract the provisions of Article 311(2). Our attention was also drawn to a decision of the Punjab High Court in *Gurdip Singh S. Surain Singh Vs. State of Punjab*, in which their Lordships considered when termination of service amounts to a penalty requiring compliance with the provisions of Article 311(2) of the Constitution. It has no relevancy to an enquiry where the final order passed is one of reduction in rank. We are satisfied that in the present case the order of reduction in rank is bad in law and the plaintiff will, be entitled to the declarations sought for. It is unnecessary in this appeal to consider the consequences of this declaration since the plaintiff has not prayed for any of the incidental reliefs by way of a claim for arrears of salary or subsistence allowance during the relevant period.

10. The most important question is as regards the validity of the order of termination of plaintiff's services. Mr. Krishnaswamy for the appellant attacked the order on two grounds. Firstly, he submitted that having found the plaintiff guilty of disobedience of the orders of his superior Officers, it was not open to the Railway authorities to get rid of the plaintiff by recourse to a notice without holding a departmental enquiry. Secondly, he submitted that as the present order of termination of service amounts to an order of dismissal, it is required to be set aside as there is admittedly no compliance with the provisions of Article 311 of the Constitution.

11. Before examining the merits of these two contentions, it is necessary to refer to the circumstances and the actual wording of the notice terminating the services of the plaintiff in order to determine whether the termination amounts to a dismissal. It is not disputed that the plaintiff did not join his duties after he received the order of reduction in rank dated 17th May 1950. The plaintiff was asked by the District Transportation Superintendent by Ex. 97 dated 3rd July 1950 to resume his duties as Sub Head of the Train section of his Office on Rs. 160/- per month and that if he failed to resume his duty by 20th July 1950, the question of retaining him in service would have to be considered. The plaintiff's failure to attend his duties resulted in the issue of a second charge-sheet (Ext. 87 dated 10-8-1950) to show cause why he absented himself without sufficient cause during the period subsequent to 20th July 1950 and failed to obey the orders issued to him in that behalf. He was also called upon to show cause why he should not be removed from service or punished with any of the lesser

penalties specified in Rule 1702 of the State Railway Code, Vol. I. He was directed to submit his explanation on or before 20th August 1950.

The plaintiff submitted his explanation (Ex. 70) dated 19-8-1950 stating that he had already been punished for a default similar to the one which the Officer was going to enquire into and that he had appealed to the Financial Commissioner of Railway on 12-7-1950. He further stated that his defence in appeal was more or less the same and that under the circumstances the enquiry might however be shelved until his appeal was decided. He also intimated that if the enquiry was continued, they would be committing contempt of the appellate authority. The plaintiff also addressed a communication to the General Manager at Ex. 71, on 21-11-1950, stating that payment of salary of a clerk to him from 27-10-1950 onwards was irregular although he had not worked in that capacity and that the irregularity might be rectified by treating the three-months' period as punishment in order to avoid double reduction of salary.

The plaintiff was informed by Ex. 78 dated 10th December 1950 to see the General Manager on 23rd December 1950. It was thereafter, as noted already, that the period of reduction in rank was reduced to three months and the plaintiff was called upon to join his duties. It therefore appears that after the interview and expression of regret by the plaintiff, the authorities seem to have dropped the proceedings under the second charge-sheet and asked the plaintiff to join duties. Instead of joining his duties, the plaintiff addressed another letter Ex. 109 dated 7-1-1951 to the District Transportation Superintendent, Hubli, referring to the order of reduction in rank and stating that he should be paid a salary of Rs. 380/- per month from 1-1-1951 and that his work should be watched by trying him in a higher capacity than that of a Deputy Controller. He enquired whether he could resume his duty on 18-1-1951 on the conditions proposed by him. But the District Transportation Superintendent replied on 9-1-1951 by Ex. 110 that he was not authorised to go beyond the provisions of the letter of the Chief Operating Superintendent which had already (been forwarded to him and that the plaintiff should inform whether he was prepared to report to duty in accordance with the orders of the 3rd instant.

The plaintiff replied on 9-1-1951 (Ex. 111) that he was prepared to attend his duties at any time for any post on his former salary of Rs. 380/- per month. It is under these circumstances and at this juncture that the order of termination of his service at Ex. 50 came to be issued on 22-3-1951. We reproduce the text of the letter:

"No. R. 3403/COMML.

General Manager's Office, Madras. 22nd March 1951. To

Mr. G. G. Jamakhandi,

Railway Quarters, Hubli. Through COPS. You were advised by the D.T.S.T/ Hubli vide his letter ESA 10493, of 6-1-1951, that you should report for duty on

Monday, the 8th January 1951. You have not carried out his order and it appears from your subsequent letters that you have no inclination to carry out the orders.

2. Your services are therefore terminated with effect from the expiry of 27th March 1951.

3. You will be given a month's pay in lieu of notice in accordance with the terms and the conditions of your services.

Sd/- Kamalakar Rao for General Manager."

12. So the position as it stood on 22nd March 1951 is that the General Manager and the other officers seem to have taken a sympathetic attitude towards the plaintiff whose conduct all the while was more provocative than conciliatory, dropped the second enquiry, called upon him to join his duties, gave him sufficient opportunities till the 22nd March 1951 and then issued a notice terminating his service on the ground that it appeared from his letters that he had no inclination to carry out the orders. It is not disputed that the plaintiff was given a month's salary in lieu of notice as mentioned in Ex. 50.

13. The first part of the contention of the learned Advocate for the appellant is that when the authorities found that the plaintiff had disobeyed their orders of joining his duties in a clerical post, they should have framed a charge and held a departmental enquiry. In this connection reference may be made to Rule 148(3) of the Indian Railway Establishment Code, which lays down that

"(3) Other (non-pension able) Railway Servants. The service of other (non-pension able) railway servants shall be liable to termination on notice on either side for the periods shown below....."

Clause (d) of this Sub-rule provides that one month's notice was sufficient in the case of permanent non-gazette employees. Sub-rule (4) provides that

"in lieu of the notice prescribed in this rule, it shall be permissible on the part of the Railway Administration to terminate the service of a railway servant by paying him the pay for the period of notice."

The other relevant Rules are 1708 and 1709. The former enumerates the circumstances under which a Railway servant shall be liable to be removed from service, viz., inefficiency, committing any offence for which he may be dismissed under Rule 1706, repeated minor offences, absenting himself or overstaying sanctioned leave, without sufficient cause and incivility to the public.

Rule 1709 prescribes the procedure for removal. It would thus be evident that the Indian Railway Establishment Code which governs the services of the plaintiff, provided for termination of service or for dismissal from service on any of the grounds mentioned in Rule 1708. It is pertinent to note that the terms and conditions of his service as extracted from the agreement executed by the plaintiff in June 1945 clothe the Railway Authorities with power to terminate the services of the plaintiff with one month's notice. The question therefore would be

whether it was obligatory on the part of the Railway Authorities to resort to a departmental enquiry on any of the charges mentioned in Rule 1708 or whether they were at liberty to resort to the provisions of Rule 148(3) enabling them to terminate the services of an employee on one month's notice. In our opinion there is nothing in Article 311 of the Constitution which takes away the power of a competent authority to terminate the services of an employee according to the terms and conditions of an agreement of service executed by him, unless such terms and conditions are repugnant either to that provision or any of the provisions in the law of Contract.

In the present case the agreement to terminate the service by one month's notice was a term of the contract; the same clause of the agreement gave liberty to the plaintiff, if he wanted to resign from his service on giving a notice of one month to the defendant.

14. The merits of the contention advanced by the learned Advocate for the appellant may be examined in the light of the decisions relied upon by him. Our attention was first drawn to a decision of the Calcutta High Court in *Prasadi and Another Vs. Works Manager (M) Lillooah and Others*, in which their Lordships laid down that--

"Under Rule 148(3)(d), Indian Railway Establishment Code the Railway Administration are entitled to terminate the tenure of service of any permanent non-gazette employee, if they choose to do so, by merely giving a month's notice or a month's pay in lieu of notice and so may an employee belonging to that class relinquish his employment upon giving a similar notice. In case of a termination of service under the Rule by the Railway Administration, no question of any penalty or punishment is involved."

What happened in that case is that the appellants who had been employed in the Eastern Railway were subjected to a disciplinary proceeding for misconduct as they were found gambling in the Blacksmith's shop of the Railway and called upon to show cause why they should not be removed from service. A Committee of Enquiry held an enquiry and submitted its report to the Works Manager to consider the report along with the explanation submitted by the appellants and provisionally concluded that they should be removed from service. He therefore issued two separate notices requiring the appellants to show cause why the penalty of removal from service should not be inflicted on them. On receiving the notices the appellants asked for copies of the proceedings before the Committee of Enquiry but the Authorities declined to supply the copies. The appellants protested against the refusal of the Administration to supply them with copies of the proceedings and submitted that the Rule relied upon by the Administration in support of their refusal could not possibly stand in the way of complying with their request. The appellants were then informed that they were being removed from service, by notice the relevant portion of which read as follows:

"As your services are no longer required by the Administration, you are hereby

removed from service by my order in terms of the agreement and conditions of service and you are hereby given one month's pay in lieu of notice with effect from 18-2-1953 as provided for therein. Your services will accordingly be terminated on the forenoon of 18-2-1953."

Mr. Krishnaswamy emphasised the identity in the wording of the notice in that case and the one before us, and earnestly submitted that on the strength of that decision, his client was entitled to succeed. It may be noted that the stand taken by the Railway Administration in paragraph 10 of their counter-affidavit in the reported case was not that they had in fact proceeded Under Rule 148(3) but that their action was justified in view of the charge-sheets served on the appellants and the departmental enquiry held in the matter. Their Lordships also noted that even at the end of the counter-affidavit the Railway Administration had asserted that the appellants had been given a second opportunity to show cause. On the facts of that case, their Lordships came to the conclusion that the order of termination of service was in a departmental enquiry on a charge of misconduct and that it was not open to the Railway Administration to invoke the aid of Rule 148(3) in the Court of Appeal for the first time.

The right of the Railway Administration, either to terminate the services under Rule 148(3) or by initiating disciplinary proceeding according to their discretion was recognised by their Lordships in the following terms:

"I am also prepared to hold that if the Railway Authorities initiate a proceeding against an employee in exercise of their disciplinary jurisdiction, they would not there by debar themselves absolutely from abandoning such proceedings and proceeding under other powers that they may have under the Rules and Regulations, if the circumstances so require. Whether or not it would be proper to do so in a particular case, must depend on the facts of that case. But the real question before us in this case is what the Railway Authorities had, in fact, done and I have already shown that they had done nothing else than proceed up to the last under the Disciplinary Rules."

During the course of the judgment, their Lordships referred to a decision of the Patna High Court in Bhagwandas Vs. Senior Superintendent, Way and Works, Eastern Rly., which was sought to be relied upon by the learned Advocate for the respondent. In that case the delinquent Officer had absented himself from duty and the Railway Authorities initiated a Departmental proceeding but could not continue with the same owing to the continued absence and non-co-operation of the employee. Under those circumstances, a notice was issued in more or less the same terms as quoted above. Their Lordships held that the most important point to be decided in such cases is as to whether the Administration had proceeded by way of punishment or otherwise. They also held that where the services of a railway servant are being terminated not by way of penalty but in pursuance of the terms of an agreement of service, no question of the application of Section 240(2) of the Government of India Act, 1935, would arise. It would be therefore clear from these decisions that where the contract of

service and Rules governing the conditions of service arm the competent authority with the two powers mentioned above, it would be open to them either to terminate the services in accordance with the terms of the contract or to proceed by holding a departmental enquiry on any of the grounds permitted by the Rules. The Calcutta decision therefore is not only inapplicable to the facts of this case but confirms the stand taken up by the defendant, viz., that the termination was in pursuance of the terms of the contract.

Our attention was drawn to another decision of the same High Court in *Fakir Chandra Chiki Vs. S. Chakravarti and Others*, where the validity of Rule 148(3) and Rule 1702 of the Railway Establishment Code fell to be considered. In that case the petitioner who was a servant of the East Indian Railway and had been confirmed in the post of an Assistant Foreman, was taken over by the Government of India. He proceeded on sick leave and the Workshop Medical Officer declared him physically unfit as in his opinion he was not likely to be physically fit enough to resume his work on the expiry of his leave. The petitioner protested and applied to the Authorities stating that he could not be discharged summarily without being granted an opportunity of being heard in respect of his unfitness. There was neither any intimation given to him nor any formal notice, that he had been discharged from service for physical unfitness. It was under those circumstances their Lordships came to the conclusion that there was nothing in the service agreement which provided that a report by the Medical Officer declaring the employee to be medically unfit would operate as a notice of discharge or a summary dismissal, and that, the proper course in the circumstances of that case was to pass an order in compliance with the provisions of Article 311 of the Constitution. It may be noted that the facts of this case are entirely different and as was held by the Supreme Court in *Satish Chandra Anand Vs. The Union of India (UOI)*, , the termination of Services under the terms of the contract agreed upon by the parties would not attract the provisions of Article 311 of the Constitution.

15. The proposition that the right of an employer to terminate the services of an employee either under the terms of the contract and the Rules regulating the service conditions or by holding a departmental enquiry as provided by such rules, where both the powers are vested in him, (sic) finds support from the other decisions relied upon by Mr. Mahendra, the learned Advocate for the respondent. In *Priya Gupta Vs. General Manager, North Eastern Railway, Gorakhpur*, it was held that in a case where a Railway Servant had entered into a contract of service, his services were liable to be terminated not only under the terms of the agreement but also under Rule 148 of the Railway Establishment Code. It may be incidentally observed that Rule 148 was held to be valid and not hit by the provisions of Article 14 of the Constitution as the provisions therein were applicable to all railway servants who formed a well-defined class. Their Lordships went further and observed that even where there was no service agreement entered into by a Railway servant under Rule 143, the Railway Authorities were still competent to terminate his services under Rule 148(3) of

the Railway Establishment Code. The petitioner in that case was the General Secretary of the Assam Railway Labourers Association and had absented himself due to some work of the Trade Union on certain dates. His services were terminated by the issue of a notice with immediate effect with one month's pay in lieu of notice.

The order of termination was challenged on the ground that it was in contravention of Article 311 of the Constitution and that in the absence of an agreement of service the provisions of Rule 148 of the Railway Establishment Code could not have been invoked. Both these contentions were repelled and their Lordships came to the conclusion that the instant case fell within Rule 148 or the R. E. Code and was not hit by the provisions of Article 14 of the Constitution. It was also held that the termination of service did not attract the provisions of Article 311 as it did not amount to dismissal or removal within the meaning of that Article. The decision of the Bombay High Court in *Waman Balkrishna Bokare Vs. The Collector, Central Excise, Nagpur*, reiterated the view and confirmed that even where an employee is first dismissed and then reinstated after the order of dismissal had been set aside, it was open to the employer to terminate his services by resort to a term in the contract of service and that the right of an employer to enforce such a term in the contract was in no way taken away by his prior action of dismissal for misconduct.

In *Kishan Prasad Vs. The Union of India*, the Calcutta High Court had also to consider the power of the Government under Rules 1707 and 1709 of the R. E. Code dealing with disciplinary action and the necessity of complying with the provisions of Section 240 of the Government of India Act, 1935, where there was a special contract with the employee. The appellant who was a permanent employee of the railway and was served with a charge-sheet for misconduct, submitted his explanation pleading not guilty. Instead of proceeding with the departmental enquiry, the Additional Superintendent removed him from service after giving him one month's notice. It was held that the mere fact that a charge-sheet had been served did not show that the action was taken to exercise of disciplinary powers since the action finally taken was consistent with its being one taken in enforcement of the contractual right as well. It was observed that since none of the other steps contemplated in Rule 1709 had been taken, the Railway Authorities could not be said to have acted in exercise of the disciplinary powers in ordering the removal of the appellant. The conclusion of their Lordships was that on the facts of the case they were convinced that the Railway Authorities had proceeded under Rule 148(3) and not under Rule 1709 of the Railway Establishment Code and that the provisions of Section 240 of the Government of India Act did not come into operation. In view of this legal position we reject the contention advanced for the appellant.

16. Mr. Krishnaswamy further submitted that even if it was held that the Railway Authorities were competent to take action under Rule 148 of the Railway Establishment Code, yet the terms of the notice issued in the present case

indicated that the termination was by way of punishment and that the termination of service was therefore in contravention of Article 311 of the Constitution. Our attention was drawn to a decision of this High Court in *N. S. Nagaraja Rao v. State of Mysore* AIR 1958 Mys 23 in which the services of a Conductor of the Bangalore Transport Company had been terminated by the issue of a notice on the ground that the Conductor absented himself habitually. It was held that under the circumstances of that case, the termination amounted to a dismissal and that the petitioner should have been given an opportunity of answering the allegations on the basis of which the termination had been brought about. Their Lordships unequivocally recognised that the question as to whether or not a particular termination would amount to a dismissal would depend upon the facts of each case.

In the instant case the termination was under the back-ground that the plaintiff had no inclination to obey the orders of the superior authorities and that his services were therefore terminated with effect from the expiry of 27th March 1951 and that he was given one month's pay in lieu of notice. The striking feature in this case is that want of inclination to join services was not the basis for the termination of the service in the sense, that no departmental enquiry was held and no finding attaching any stigma of misconduct or incapacity to the petitioner was recorded. The plaintiff admitted during the course of his cross-examination that he had received the pay for the period of notice and also the amounts due to him towards the Provident Fund and Gratuity. In other words, the termination of services has not resulted in the forfeiture of the benefits already earned by him in the form of General Provident Fund and Gratuity.

As was laid down by the Supreme Court in *Dalip Singh Vs. The State of Punjab*, , there are two tests which have to be applied in ascertaining whether a termination of service amounts to removal or dismissal so as to attract the provisions of Article 311 of the Constitution. In the words of their Lordships:

"The first is whether the action is by way of punishment and to find that out the Court said that it was necessary that a charge or imputation against the officer is made the condition of the exercise of the power; the second is whether by compulsory retirement the officer is losing the Benefit he has already earned as he does by dismissal or removal."

As observed by their Lordships, misconduct and inefficiency or the like are normally factors that form the basis where the order is one of dismissal or removal, and where, the termination does not amount to dismissal, such imputation of misconduct or inefficiency merely forms the back-ground for the satisfaction of the authorities who take the action of terminating the services. The other essential requirement is the loss of benefits already earned by the employee.

That was a case of compulsory retirement of an Inspector General of Police whose services had been terminated for administrative, reasons as provided by

the Rules. The order was attacked on the ground that it was unconstitutional and illegal as it violated the protection guaranteed under Article 311 of the Constitution. It was while repelling these contentions that their Lordships laid down the tests mentioned above for ascertaining as to whether an order of termination by way of compulsory retirement amounted to punishment or not. In an earlier decision in *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, their Lordships clearly indicated that every termination of service does not amount to dismissal or removal and that Article 311 did not apply to all cases of termination of services. That was also a case of compulsory retirement. In elucidating the proposition, their Lordships laid down that dismissal generally implies that the

"Officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do"

and that

"the action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the Officer." In such circumstances the grounds involve the levelling of some imputation or charge against the Officer.

Their Lordships came to the conclusion that in that case there was some imputation against the appellant but that on the facts, the letter compulsorily retiring the Officer had made it perfectly clear that the Government was not holding any formal enquiry as required by the Civil Service Rules and that whatever enquiry had been made, had been made to help the Government to make up its mind as to whether it was in public interest to dispense with the services of the Officer. The charge of inefficiency or misconduct did not form the basis of termination of service by compulsory retirement. The learned Advocate for the appellant drew our attention to the decision in *A.R.S. Choudhury Vs. The Union of India (UOI) and Others*, as supporting his proposition. In that case the petitioner had been appointed as a temporary Brakesman and had been promoted to the rank of a Guard. A formal charge-sheet was served upon him that he had booked six packages containing stolen articles and that he had left the headquarters without obtaining permission. On facts, their Lordships found that the Departmental enquiry held against that railway servant had violated the Rules at every stage. It was on that ground that the proceedings culminating in the order of dismissal were held to be invalid. The facts of that case are patently distinct from the facts in the present case and the appellant cannot derive any assistance from that decision.

The decision in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, lays down that if the Government has by contract, express or implied, or Minder the Rules, the right to terminate the employment at any time, then such termination in the manner provided by the contract or the Rules is prima facie and per se not a punishment and does not attract the provisions of Article 311. The reason for the

view is that the termination carries with it "no evil consequences" and does not therefore attract Article 311 of the Constitution. Their Lordships further observed that if termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it would amount to a punishment and the requirements of Article 311 of the Constitution are to be complied with. The decisions in *Hartwell Prescott Singh Vs. The Uttar Pradesh Government and Others*, and *The State of Bombay Vs. Saubhagchand M. Doshi*, do not lay down any new proposition.

In *The Union of India (UOI) and Others Vs. Askaran*, the plaintiff who was an Accountant in the Railway had been removed from service by an order of the Chief Auditor after service of a notice and offer of one month's salary in lieu of notice as provided by Rule 148 (3) and (4) of the Railway Establishment Code. The order was attacked on the ground that it amounted to a termination of service inasmuch as the notice mentioned that the services of the plaintiff had been terminated under Rule 1708 of the Establishment Code. In the appeal their Lordships held that the mention of Rule 1708 was a mistake as the authority passing the order never contemplated taking proceedings under Chapter XVII which dealt with the "conduct and discipline". The facts of this case have not much bearing on the points at issue and need not be discussed any further.

The decision in *Nageshwar Prasad and Others Vs. State of Bihar and Others*, is also not pertinent. The latest decision of the Calcutta High Court in *Promode Ranjan Roy Vs. Chairman, Life Insurance Corporation of India and Others*, supports the respondent. The petitioner who was an employee of the Life Insurance Corporation had accepted certain terms and conditions of service containing a provision empowering the Corporation to terminate the appointment of the petitioner if the results achieved by him were not satisfactory. The Divisional Manager issued a letter by which the petitioner's services were terminated with immediate effect on account of poor work and he was offered salary for the current month and one month's salary in lieu of notice. The petitioner accepted the payment and subsequently challenged the order of termination on the ground that he had not been given an opportunity of showing cause against the action taken against him. *Sinha, J.* held that the conditions of service themselves contained a term empowering the Corporation to terminate the petitioner's services if the results were not satisfactory and that the order of termination was therefore good in law. His Lordship further held that the petitioner was estopped from challenging the order of termination as he had accepted two months' pay offered to him. It is unnecessary to consider the latter proposition since there is no plea of estoppel raised by the respondent in his written statement in the present case.

17. After a careful consideration of the decisions cited by the two Advocates, it appears to us that the services of the appellant had been terminated in pursuance of the terms of contract of his service, that the mention of his disinclination to obey the orders of his superior Officers was merely the

background indicating the circumstances under which the decision to terminate the services had been taken and that the order of termination does not amount to punishment as it neither attaches a stigma to the conduct of the appellant nor has it resulted in the forfeiture of any of the benefits earned by him prior to the date of termination. We, therefore, uphold the conclusion of the learned trial Judge on this point.

18. In view of the conclusions reached by us, the appeal has to be partially allowed and the appellant is entitled to a declaration that the order of reduction in rank is illegal. That portion of the trial Court's order is accordingly set aside. The order dismissing the suit in respect of the other reliefs is confirmed. In view of the partial success of the plaintiff, the parties are directed to bear their respective costs throughout.