

(1985) 01 CAL CK 0017

In the Calcutta High Court

Case No : FMAT No's. 929-931 of 1984 and FMAT No. 970 of 1984

Gour Chandra Sarkar and Others

APPELLANT

Vs

State Electricity Board and Others

RESPONDENT

Date of Decision : 28-01-1985

Acts Referred:

Air Corporations Act, 1953 — Section 45(2)(b), 7, 8
Constitution of India, 1950 — Article 12, 14, 16, 21, 226
Electricity (Supply) Act, 1948 — Section 18A, 19

Citation : 89 CWN 474

Hon'ble Judges : P.K. Mukherjee, J; M.M. Dutt, J

Bench : Division Bench

Advocate : Somnath Chatterjee, P.K. Ray and Kalyan Das Gupta, Pravat Kr. Sengupta and Subrata Kr. Ghosh for the petitioner in CR 6920 W of 1983, Dipankar Ghosh and S. Gupta for the Petitioner in CR 6557 W of 1983, for the Appellant; Gopal Ch. Chakraborty, U. Chakraborty and S. Bhattacharjee for the petitioner in CR 1060 (w) of 1983, Dipankar Ghosh, Mohitosh Majumdar, Asoke Kr. Ganguly, Mukul Lahiri, Swapan Kr. Dutt and Asoke Basu, for the Appearing Parties

Final Decision : Allowed

Judgement

M.M. Dutt, J.—These Rules issued under Article 226 of the Constitution of India have been treated to be in our list for hearing and disposal as prayed for by the learned Advocates of the parties. All these Rules have been heard together as they raise a common question of law, namely, whether Regulation 34 of the West Bengal State Electricity Board employees Service Regulations, hereinafter referred to as "the Regulations", is invalid and void. Except the petitioner, Sri Gour Chandra Sarkar, in C. R. No. 6058 (w) of 1984, the other petitioners are the regular permanent employees of the West Bengal State Electricity Board, hereinafter referred to as "the Board". The petitioner, Gour Chandra; Sarkar, who was a non-gazetted permanent staff under the Electricity Development Directorate, Government of West Bengal was transferred on deputation to the West Bengal State Electricity Board. He is now the Deputy Secretary, Generation

and Transmission Wing of the Board The other petitioners also hold high and responsible positions in the Board. While the petitioners had been working in their respective posts, the Secretary of the Board issued orders, all dated March 22, 1984, terminating the services of the petitioners with immediate effect on payment of three months salary in lieu of three months" notice. The orders of termination issued to the petitioners being verbatim the same, we set out below one of such orders of termination that was issued to the said Gour Chandra Sarkar :

West Bengal State Electricity Board

48/1, Diamond Harbour Road, Calcutta-27.

Office Order no. NR/De. Secy/

Dated 22.3.1984

It is, hereby, ordered that the services of Sri Gour Chandra Sarkar, Dy. Secretary and posted as Deputy Secretary, Generation & Transmission Wing are terminated with immediate effect on payment of three months" salary in lieu of three months" notice.

This has the approval of the Chairman.

Sd/- S.N. Menon Secretary

2. There can be no doubt that the said order is an order of termination simpliciter and does not contain any stigma against the employee concerned or any reason for such termination. In the affidavit-in-opposition affirmed on behalf of the Board by Sri S. N. Menon, the. Secretary and filed in each of these Rules, there is a general statement in paragraph 3 of the affidavit, inter alia, that after the re-constitution of the Board with Shri A. Ghatak as the Chairman, a review was made on performances of the officers and employees of the Board. Further, it is stated that in the course of review of such performances, it has been ascertained in several cases that various irregularities have been committed and substantial losses have been occasioned to the Board in the manner in which some officers and employees holding important posts have discharged their duties, raising well justified suspicion about the propriety of the manner of performances in case of such officers and employees. After full, bona fide and dispassionate consideration of the matters and on the basis of records, the Board had decided with an open mind that it was not desirable to continue with the services of some such officers. The service regulations of the Board confers power on the Management to terminate the services of a permanent employee on three months" notice or on payment of three months" salary in lieu of such notice. It was honestly felt that in the interest of the Board and in public interest, it would not be proper and suitable that such officers employees should be continued in service. In the circumstances, without deciding on the question of guilt of such officers employees, in whom the Board lost its confidence and who were not found suitable, their conduct being not good and not satisfactory which will appear

from the records, and without imposing any punishment, the Board at the highest level, namely, through the Chairman and the Secretary exercised its powers bona fide under the said Regulation 34. It has been asserted inter alia by the deponent of the affidavit, who is the Secretary of the Board, that in the discharge of his duties and functions, he has acted absolutely bona fide and only in the interest of the Board, and that whatever decision and action he has taken has been approved by the Chairman. Further, it has been averred that the concerned petitioner is one of the officers in respect of whom an order for termination, of his service was issued in the circumstances aforesaid. In other paragraphs of the affidavits-in-opposition, some allegations have been made against the conduct of the petitioner concerned justifying the order of termination of his services. At this stage, it is not necessary to refer to these allegations made against each of the petitioner.

3. It is not in dispute that the impugned orders of termination of the services of the petitioners have been passed under Regulation 34. We may, however, refer to Regulation 33 dealing with termination of services of both permanent and temporary employees of the Board. Regulation 33 provides as follows :

33(1). Unless otherwise specified in the appointment order in any particular case, the services of a permanent employee of the Board may be terminated without notice -

(1) on his attaining the age of retirement or by reason of a declaration by the competent medical authority that he is unfit for further service," or

(ii) as a result of disciplinary action;

(iii) if he remains absent from duty, on leave or otherwise, for a continuous period exceeding 2 years.

(2) In the case of a temporary employee, his service may be terminated by serving of -

(a) one month's notice on either side or on payment of a month's salary in lieu thereof; or

(b) notice on either side for the period specified in the appointment order or contract or on payment of salary in lieu thereof, as the case may be.

(c) The service of a temporary employee shall also be deemed to have been terminated automatically if the period of extraordinary leave without pay and or of unauthorised absence from duties exceed (s) a maximum period of 90 days.

Regulation 34 was initially a provision for resignation. But by an amendment made by the Board's resolution no. 27 dated July 27, 1968, Regulation 34 is now partly a provision for resignation and partly for termination of service of a permanent employee. Regulation 34 is set out below :

34. In case of a permanent employee, his services may be terminated by serving

three months" notice or on payment of salary for the corresponding period in lieu thereof.

(Second paragraph of Regulation 34 is omitted as it provides for resignation which is not relevant for our purpose).

4. Thus it appears that while Regulation 33(1) provides for the termination of service of a permanent employee under certain circumstances, namely, as a result of his attaining the age of retirement or being medically unfit or as a result of a disciplinary action or his remaining absent from duty for a continuous period exceeding 2 years, Regulation 34 is a provision for termination of the service of a permanent employee not on any ground whatsoever but by serving three months" notice or on payment of salary for three months in lieu of notice. Regulation 35 provides for retirement. Under Regulation 35, except as otherwise provided in the Regulations, the date of retirement of a Board's employee, other than a member of the clerical staff or an employee of a Class IV service is the date on which he attains the age of 58 years. He may, however, be retained in service beyond that date with the sanction of the Board on public grounds which should be recorded in writing.. He would not be retained after attaining the age of 60 years except in very special circumstances. Regulations 36 and 37 provide for the respective ages of retirement of a member of the clerical staff and an employee of a Class IV service of the Board as 55 years and 60 years respectively. Thus the services of a permanent employee of the Board can be terminated under Regulation 33(1) or by way of retirement after his attaining the age of 58 years or 60 years, as the case may be. That was the initial scheme of the Regulations. But as noticed earlier, by an amendment of the Regulation 34 by the Board's resolution no. 27 dated July 27, 1968, the services of a permanent employee of the Board can be terminated by serving three months" notice or on payment of salary for three months in lieu of notice.

5. The validity of Regulation 34 has been vehemently challenged by the petitioners. At this stage, it may be recorded that there is no dispute that the Board is an instrumentality or agency of the Government of West Bengal and, accordingly, if is comprehended within the expression "any other authority" under Article 12 of the Constitution of India. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , it has been observed by the Supreme Court that where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. Further, it has been observed that the rule inhibiting arbitrary action by Government must apply equally where such corporation is dealing with public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.

6. It has been urged by Mr. Dipankar Ghosh, learned Counsel appearing on

behalf of some of the writ petitioners that the impugned Regulation 34 has conferred on the Board completely uncanalised and unbridled power of termination of the services of a, permanent employee without laying down any guidelines for the exercise of such power and, as such, it is ultra vires Articles 14, 16 and 21 of the Constitution of India. In support of his contention, the learned Counsel has placed reliance on a decision of the Supreme Court in *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, . In that case, a Challenge was made to the validity of Rule 148(3) and Rule 149(3) of the Railway Establishment Code, Volume I. Under Rule 148(3), the service of other (non-pensionable) railway servants shall be liable to termination on notice on either side for certain specific period or salary for such period in lieu of notice. Rule 149(3) related to the termination of the service of other railway servants after giving them notice for the specified period, or paying them their salary for the said period in lieu of notice. The said rules were challenged on the ground that the termination of the services of a permanent railway servant, under the rules would be his removal from service in contravention of Article 311(2) of the Constitution. The validity of the said rules were also challenged on the ground that they contravened Article 14 of the Constitution; the first challenge in this regard was that no principle was laid down which should guide the decision of the authority in exercising its power under the said rules and the second challenge was that no other branch of public services either under the States or under the Union contained any rule which would correspond to the impugned rules. On these two grounds, the validity of the said rules were challenged as offending Article 14 of the Constitution.

7. Gajendra Gadkar J speaking for himself and for two other learned Judges of the Court held that rules 148(3) and 149(3) of the Railway Establishment Code which permitted the termination of a permanent railway servant's services in the manner provided by them, were invalid because the termination of the services which the said rules authorised was tantamount to removal of the railway servant from permanent service and in contravention of the constitutional safeguard provided by Article 311(2). So far as the challenge to the validity of the said rules under Article 14 was concerned, it was held that the said rules were violative of Article 14 of the Constitution inasmuch as they enabled an unequal or discriminatory treatment to be meted out to a permanent railway servant. No opinion was, however, expressed whether the said rules were also violative of Article 14 of the Constitution as no principle had been laid down for the guidance of the decision of the authority in exercising its power under the said rules. Subba Rao J delivered a separate judgment, but he agreed with the view expressed by Gajendra Gadkar J. Saha J delivered dissentient judgment upholding the validity of rule 148(3) and rule 149(3).

8. Das Gupta J took the view that the said rules did not contravene Article 311(2) of the Constitution. As to whether the said rules violated the provision of Article 14 of the Constitution it was found that the said rules did not lay down any principle or policy for guiding the exercise of discretion by the authority who

would terminate the service in the matter of selection or classification, and that arbitrary and uncontrolled power is left in the authority to select at its will any person against whom action would be taken. Further, it was observed that the said rules enabled the authority concerned to discriminate between two railway servants to both of whom the rules equally applied by taking action in one case and not taking it in the other. Accordingly, it was held by Das Gupta J that in the absence of any guiding principle in the exercise of the discretion by the authority the said rules had, therefore, to be struck down as contravening the requirements of Article 14 of the Constitution. Thus it appears that Das Gupta J came to the same conclusion as the majority but on a different ground.

9. Mr. Ghosh has also placed reliance upon a decision of a learned single Judge of the Bombay High Court in *S. S. Muley v. J. R. D. Tata and others*, 1979 (2) S. L. R. 438. In that case, Regulation 48(a) of the Air India Employee Service Regulations was also challenged under Articles 14 and 16 of the Constitution. Regulation 48(a) is somewhat similar to Regulation 34 with which we are concerned. Regulation 48(a) provided for the termination of the services of a permanent employee without assigning any reason by giving him 30 days' notice in writing or pay in lieu of notice.

Learned single Judge of the Bombay High Court held that in the absence of any guidelines, the provisions of clause (a) of Regulation 48 were patently arbitrary and discriminatory and, therefore, violative of the provisions of Articles 14 and 16 of the Constitution.

Muley's case was, however, overruled by a Division Bench of the Bombay High Court in *Monohar P. Kharkhar v. Reghuraj*, 1981 II L.L.J. 459 holding, inter alia, that Regulation 48(a) of the All India Employees Service Regulation did not contravene Article 14 or Article 16 of the Constitution in any manner.

10. In *Maneka Gandhi v. Union of India*, 1978 S.C.C. 248, it has been observed by the Supreme Court that now the law is well settled that when a statute vests unguided and unrestricted power in an authority to affect the rights of a person without laying down any policy or principle which is to guide the authority in exercise of this power, it would be affected by the vice of discretion since it would leave it open to the authority to discriminate between person and things similarly situated. In *Khakhar's* case (supra) this principle has been taken notice of. It has been observed that it is difficult to conceive of any authority, equated with "State" under Article 12 of the Constitution and bound by the constitutional guarantee in Part III of the Constitution, being authorised to terminate the services of its employees without reason or do any act arbitrarily.

The validity of Regulation 48(a) had been upheld on the ground that if Regulation 48(a) is read along with functions as indicated in section 7 of the Air Corporation Act for the efficient carrying out of which employees are appointed in terms of section 8 of the said Act, and the object for achieving which the Regulations are framed u/s 45(2) (b) of the said Act, it would at once be clear that the powers

cannot be said to be so uncanalised and unguided. In other words, the Bombay High Court was of the view that sufficient guidelines have been laid down in the provisions of the said Act and, as such, the Regulation 48(a) would not be struck down as offending Article 14 of the Constitution.

11. So far as Regulation 34 is concerned, it authorises the termination of service of a permanent employee of the Board on three months' notice or on payment of salary in lieu of notice. Regulation 34 does, not require any reason to be given by the authority concerned. There is no other Regulation which lays down any guidelines or principle for the termination of the services of a permanent employee of the Board. It is, accordingly, submitted on behalf of the petitioners on the authority of the judgment of Das Gupta J in Moti Ram Dekka's case (supra) that as Regulation 34 has conferred on the Board an unguided and uncanalised power of termination of the services of the permanent employees of the Board, it should be struck down as violative of Article 14 of the Constitution of India.

12. On the other hand, it is submitted by Mr. Somnath Chatterjee, learned Counsel appearing on behalf of the Board that the view of Das Gupta J in Moti Ram Dekka's case (supra) has not been shared by any of the other learned Judges of the Court and, therefore, that view should not be taken to be the view of the Supreme Court. Counsel submits that it is not correct to say that no guidelines have been laid down for the exercise of the powers under Regulation 34. Our attention has been drawn to section 18A and section 19 of the Electricity Supply Act, 1948. It is contended that sufficient guidelines have been laid down by the legislature in the provisions of sections 18A and 19 of the Act. Further, it is contended by the learned Counsel that in any event, even assuming that no guidelines have been laid down in regard to the exercise of power under Regulation 34, that cannot be a ground for condemning the same. Counsel submits that Regulation 34 confers the power on the Board or its Chairman or Secretary who are very responsible officers not expected to act unreasonably and arbitrarily. According to the learned Counsel when such power is vested in high ranking officials, it is not likely that such officials would be acting whimsically or capriciously in terminating the services of the permanent employees of the Board.

13. We are unable to accept the contention of the learned Counsel for the Board that sections 16A and 19 lay down the guidelines for the exercise of the power under Regulation 34. Neither the provisions of those two sections, nor any other provisions of the Electricity Supply Act provide for the termination of the services of the permanent employees of the Board and, therefore, question of laying down the guidelines for the exercise of power of termination does not arise. Indeed, in our opinion, no such guideline has been laid down by the provisions of sections 18A and 19 of the said Act. The contention of the Board in this regard is rejected.

14. It is true that the authority that will exercise the power of termination of the services of the permanent employees may be the Board or its high ranking

officials. But that would be no ground for vesting them with such wide and unrestricted power of termination. It is difficult to rule out the possibility of a high ranking official to act capriciously or even mala fide. It is, therefore, not at all safe to confer such power on anybody without any restriction or any guideline for the exercise of the power invading the very valuable right of the permanent employees to continue in service. We are in agreement with the view expressed by Sawant J of the Bombay High Court in Muley's case (supra) to the effect that as long as power has to be exercised through a human agency, which is subject to all the frailties, whatever the position it occupies, it is not only dangerous but irrational to entrust it with such arbitrary and absolute power. There is, therefore, no substance in the contention of the board that as the power, under Regulation 34 has been vested in me Board or its Chairman or Secretary holding high positions of responsibility, Regulation 34 is not liable to be condemned on the ground that no guideline for the exercise of such power has been laid down.

15. There has been much controversy between the parties as to whether in Moti Ram Deka's case (supra), it was only Das Gupta J who held that as rules. 148(3) and 149 (3) of the Railway Establishment Code have conferred on the authority arbitrary and uncontrolled power of termination without laying down any guiding principle in the exercise of the discretion by the authority, the said rules offended against Article 14 of the Constitution and, therefore, should be struck down, or the said view was shared by other learned Judges of the Supreme Court in that case. We have already noticed the submission made on behalf of the Board that the view expressed by Das Gupta J should not be regarded as the view of the Supreme Court. It appears to us and, indeed, it has been already stated earlier that Das Gupta J alone took the said view, but in our opinion, nothing turns out on that. It is a pure question of law whether, when the provision of a statute or a rule or regulation framed under a statute confers arbitrary and uncontrolled power on an authority without laying down the guidelines for the exercise of such power, such provision or rule or regulation should be struck down as contravening the provision of Article 14 of the Constitution. At this stage, it may be pointed out that we have started the discussion on the point with the observation of the Supreme Court in Maneka Gandhi's case (supra) that when a statute vests ungurded and unrestricted, power in an authority to affect the rights of a person without laying down any policy or principle which is to guide the authority in exercise of this power, it would, be adjusted by the vice of discrimination since it would, leave it open to the authority to discriminate between persons and things similarly situated. This principle of law has been, stated by the Supreme Court in that decision as well settled. Article 14 strikes at arbitrariness in executive or administrative actions as it is founded on the concept of equity, in such actions, if any authority is vested with arbitrary power affecting the right of another, it cuts at the root of equality. As Article 14 guarantees equality before the law and equal protection of the laws, it is not conceivable that an authority should be vested with arbitrary and uncontrolled power. Any provision of a statute, rule or regulation conferring such power on an

authority must obviously be held against the spirit and concept of the equality clause in Article 14 of the Constitution. Regulation 34 has undoubtedly conferred such unguided and uncontrolled power of termination of services of the permanent employees of the Board by the mere service of three months' notice or salary in lieu of such notice. Regulation 34, in our opinion, suffers from the vice of arbitrariness and discrimination and should be struck down as contravening Article 14 of the Constitution.

16. In this connection, we may notice another contention of the learned Counsel for the petitioners that Regulation 34 is discriminatory, because the employees in the same class are being treated unequally; it discriminates between the Board's employees and other public servants who are similarly situated. Under Regulation 31(2) (a), the services of a temporary employee of the Board can be terminated by the service of one month's notice on either side or on payment of one month's salary in lieu, thereof. It is the contention of the petitioners that there is much difference between a permanent and a temporary employee of the Board. The permanent employee is entitled to be in service till he attains the age of superannuation or is dismissed from service by way of punishment in accordance with law. A permanent employee has greater security of service than a temporary employee. No objection can be taken if the services of a temporary employee of the Board are terminated by one month's notice or on payment of a month's salary in lieu of such notice because of the temporary nature of his service. The termination of the services of the permanent employee in the manner as provided in Regulation 34 is opposed to the concept of permanence of employment. It is urged by the learned Counsel for the petitioners that Regulation 34 has placed the employees of the Board on par with the temporary employees of the Board. In other words it is submitted by the learned Counsel, unequal have been treated equally without any conceivable reason therefore.

17. In our opinion, there is much substance in the above contention of the petitioners. Regulation 34 purports to treat the permanent employees of the Board on the same footing as temporary employees can be treated so far as termination of service is concerned. Besides such unequal treatment, Regulation 34 may be said to be affected by the vice of discrimination. The authority concerned may terminate the service of one permanent employee, under Regulation 34 and direct starting of disciplinary proceedings against another employee under the same circumstances. Again, the authority may proceed against one permanent, employee under Regulation 34 and may not take any action whatsoever against another permanent employee under the same circumstances. Thus from the above point of view also Regulation 34 is discriminatory in nature and offends against Articles 14 and 16 of the Constitution.

18. The next question that calls for our consideration is whether termination of the service of a permanent employee under Regulation 34 would mean dismissal or removal from service by way of punishment. The question arises because a

permanent employee under the Board has the right to continue in service till he attains the age of superannuation or retirement. The question also arose before the Supreme Court in Moti Ram Deka's case (supra). It has been observed by Gajendra Gadkar J, who delivered the judgment of the majority that a person who substantively holds a permanent post has a right to continue in service, subject of course, to the rule of superannuation and rule as to compulsory retirement. Further, it has been observed that if for any other reason that right is invaded and he is asked to leave his service, the termination of the 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. The said observation undoubtedly supports the contention made on behalf of the petitioners that the termination of the service under Regulation 34 should be regarded as dismissal or removal from service by way of penalty.

19. It is, however, contended by Mr. Chatterjee for the Board that as compulsory retirement is not removal or dismissal and is quite valid, Regulation 34 should not be struck down on the ground that termination of service under Regulation 34 is dismissal from service by way of punishment. A similar contention was made in Moti Ram Deka's case (supra), but that was overruled following an earlier decision of the Supreme Court in Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI), . In the case of a compulsory retirement a long period of qualified service is generally prescribed. In Gurdev Singh Sidhu Vs. State of Punjab and Another, , it has been observed by the Supreme Court that if a permanent public servant is compulsorily retired under the Rules which prescribe the normal age of superannuation and provide for a reasonably long period of qualified service after which alone compulsory retirement can be ordered, that may not amount to dismissal or removal under Article 311(2) of the Constitution. Further, it has been observed that where while reserving the power to the State to compulsorily retire a permanent public servant, a rule is framed prescribing a proper age of superannuation, and another rule is added giving the power to the State to compulsorily retire a permanent public servant at the end of 10 years of his service, that cannot be treated as falling, outside Article 311(2); the termination of the service of a permanent public servant under such a rule, though called compulsory retirement, is in substance removal under Article 311(2). In view of the above Supreme Court decision, we do not think that there is any substance in the contention made on behalf of the Board that the termination of service under Regulation 34 should not be considered as dismissal or removal from service by way of punishment.

20. In Moti Ram Deka's case, according to the majority view, the termination of service of permanent railway employees under rules 148(3) and 149(3) of the Railway Establishment Code was removal from service by way of punishment and as the said rules did not provide for any enquiry, they contravened the provision of Article 311(2) of the Constitution. In the instant cases, it is urged on behalf of the petitioners that apart from the fact that Regulation 34 is ultra vires Article 14, it should also be struck down as ultra vires the provision of Article 311(2) of

the Constitution. But the question is whether Article 311(2) is applicable to the instant Cases. In *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, , it has been held by the Supreme Court that merely because a juristic entity may be an "authority" and therefore "State" within the meaning of Article 12, it may not be elevated to the position of "State" for the purpose of Articles 309, 310 and 311 which find a place in Part XIV of the Constitution. But in an earlier decision of the Supreme Court in *Managing Director, Uttar Pradesh Warehousing Corporation and Another Vs. Vijay Narayan Vajpayee*, , O. Chinnappa Reddy J while delivering a concurring judgment observed :

In growing realization of the importance of employment in the public sector, Parliament and the Legislatures of the States have declared persons in the service of local authorities, Government companies and Statutory Corporations as public servants and extended to them by express enactment the protection usually extended to civil servants from suits and prosecution. It is, therefore, but right that the independence and integrity of those employed in the public sector should be secured as much as the independence and integrity of civil servants.

21. It follows from the above observation that O. Chinnappa Reddy J was of the view that there should be no distinction between public sector employees and civil servants in regard to the security of service. But it has not been laid down in clear terms that those who are employed in the public sector will also get the benefit of the provision of Article 311 of the Constitution. In a recent decision of the Supreme Court in *A.L. Kalra Vs. Project and Equipment Corporation of India Ltd.*, , Desai J in delivering the judgment of the Court quoted in extenso the observation of O. Chinnappa Reddy J in *U. P. Warehousing Corporation's* case (supra) including that set out above and observed :

Therefore,-the distinction sought to be drawn between protection of Part XIV of the Constitution and Part III has no significance.

22. It may, however, be pointed out that in *Kalra's* case (supra), the facts were such that the application of any of the provisions of Part XIV of the Constitution including Article 311 was not necessary. In this case also, the Supreme Court has not laid down any specific principle of law to the effect that like the civil servants, public sector employees are also governed by the provisions of Part XIV of the Constitution.

If is true that in both the decisions of the Supreme Court some general observations against the distinction between civil servants and employees in the public sector have been made, but so long as no definite and positive principle of law doing away with such distinction and directing application of the protection of Part IV of the Constitution including Article 311 thereof is not laid down, it is difficult to apply the provision of Article 311(2) of the Constitution in the instant cases and hold that Regulation 34 contravenes Article 311 (2) of the Constitution and is invalid. Moreover, in *Ajay Hasia's* case (supra) it has been positively held that an authority under Article 12 is not a "State" for the purpose of Part XIV of

the Constitution.

23. It has, however, been held by us that an order of termination of the services of a permanent employee of the Board is in the nature of a penalty and amounts to removal or dismissal from service, as held by the Supreme Court in Moti Ram Deka's case (supra) in respect of termination of service under rules 148(3) and 149(3) of the Railway Establishment Code, Regulation 62 of the Regulations specifies the different punishments that may be imposed including the punishment of dismissal from service on the employees of the Board found to be guilty of any act of misconduct or of any breach of discipline, and Regulation 63, inter alia, provides for the holding of an enquiry into the charges leveled against the delinquent employee after affording him all reasonable opportunity to attend the enquiry, explain his conduct, defend himself, cross-examine witnesses if he so chooses and adduce evidence on his own behalf if he so likes. It is not in dispute that no enquiry was held in accordance with Regulation 63 before the impugned orders of termination were issued to the petitioners under Regulation 34. As the impugned orders of termination under Regulation 34 are in the nature of penalties and amount to dismissal from service, the same cannot be allowed to be sustained as, admittedly, the procedure laid down in Regulation 63 has not been complied with.

24. Mr. Chatterjee, however, submits that as the impugned orders do not contain any stigma against the petitioners and, further, the petitioners not having been found to be guilty of any misconduct or breach of discipline, the impugned orders should not be considered as in the nature of punishments amounting to dismissal from service. We are unable to accept the contention. The petitioners, except Sri Gour Chandra Sarkar, who are all permanent employees of the Board holding responsible posts have acquired a right to remain in service of the Board till retirement. Their services can be terminated before such retirement by way of punishments by orders of dismissal after holding an enquiry in accordance with Regulation 63. The termination of the service of a permanent employee, under Regulation 34 is an invasion of the right of the employee to hold the post and continue in the service of the Board till retirement and, therefore, should be regarded as in the nature of a penalty. The said right of a permanent employee cannot be allowed to be interfered with at the sweet will of the authority concerned by an order of termination under Regulation 34 without disclosing any reason to the employee concerned merely because the order of termination does not contain any stigma. To uphold this contention would mean doing away with the security of services of permanent employees of the Board which is indisputably a "State" within the meaning of Article 12 of the Constitution and rendering nugatory the provisions of Regulations 35 and 36 inter alia dealing with retirement. Such a contention can be made in the case of termination of service of temporary employees, for they do not have the same security of service as the permanent employees, and they cannot claim, to have any right to continue in service. The contention of the Board is, accordingly, rejected.

25. Thus, even without the aid of Article 311(2) of the Constitution, the result is virtually the same. In view of our finding that an order of termination of the services of a permanent employee of the Board under Regulation 34 should be considered as penal in nature and would be tantamount to dismissal from service, any such order passed without following the procedure laid down in Regulation 63 would be invalid. We have, however, already held that Regulation 63 contravenes the provision of Article 14 of the Constitution and, as such, it is invalid and void.

26. On the assumption that Regulation 34 is valid, another attack of the petitioners to the impugned orders of termination is that the Secretary of the Board had no authority to terminate the services of the petitioners under Regulation 34. The impugned orders of termination are stated to have been issued with the approval of the Chairman of the Board. Regulation 34 does not provide as to the authority who would exercise the power of termination. By Office Order No. 2881 dated April 21, 1979, the Board framed certain rules for delegation of powers. Both parties have placed reliance upon these rules contained in the book entitled, "Delegation of Powers, Part I". Section III of the book contains delegation of powers. Under Serial No. 1 of section III, the Chairman is the appointing authority of all class I employees of the Board. In the remarks column against Serial no. 1, it is stated as follows :

Appointment order of Heads of departments will be signed by the Chairman.

Other appointment orders by orders of and on behalf of the Chairman will be signed by the Secretary to the Board.

Appointment in Class-I posts shall be made with the recommendation of Selection Committee-I.

27. Under Serial no. 15, it is provided that the appointing authority, with the approval of the Chairman has the power to terminate service by giving notice or by paying salary in place of notice period.

28. It appears from Serial no. 1 that except the appointment orders of Heads of departments of the Board, the appointment orders of other class I employees of the Board will be signed by the Secretary by the orders of and on behalf of the Chairman of the Board. It is submitted by Mr. P. K. Roy, learned Counsel supplementing the arguments of Mr. Chatterjee that when the Secretary has been authorised to sign the appointment orders of Class I employees other than the Heads of departments, he should be regarded as the "appointing authority" for the purpose of Serial no. 15. Further, it is submitted that the Secretary having terminated the services of the petitioners, who are all Class I employees, with the approval of the Chairman, the orders of termination are quite legal and valid. We are unable to accept the contention. It is true that under Serial No. 1, the Secretary will sign the appointment orders of certain class I employees by the orders of and on behalf of the Chairman, but that power, in our opinion, will not give the Secretary the status of the "appointing authority". In spite of the

delegation to the Secretary of the power of signing the appointment orders on behalf of and by the orders of the Chairman, the Chairman is the "appointing authority" for the purpose of termination of services of the Class I employees as provided in Serial No. 15. The fact that the Secretary has to sign the appointment orders "by the orders of and on behalf of the Chairman" negatives the contention that he is the "appointing authority", for the purpose of termination of service of class I employees of the Board.

29. Counsel for the Board, however, submits that if the Chairman was the appointing authority, in that case, under Serial No. 15, the power of termination would have been to the "appointing authority" or to "the Chairman" and not to the "Appointing Authority" with the approval of the Chairman" which indicates that the Chairman is not the appointing authority. It has been already found that so far as Class I employees of the Board are concerned, the appointing authority is the Chairman as per Serial no. 1. Therefore, although under Serial no. 15, the delegation is to the "Appointing Authority with the approval of the Chairman", that will not make the Secretary the appointing authority. It may be that in respect of certain categories of employees other than Class I employees of the Board, officers subordinate to the Chairman are the appointing authorities and, so, under Serial no. 15, the delegation has been made in such a manner as to cover all cases including the case where the Secretary or any other officer subordinate to the Chairman is the appointing authority. But where the Chairman in himself the appointing authority, the question of approval does not arise. The contention of the Board is, accordingly, overruled. At this stage, it may be stated that it is the contention of the petitioners that their appointing authority is the Board and not even the Chairman. We do not think we are called upon to decide the question as, by virtue of the delegation of power, the Chairman is the appointing authority even for the purpose of termination of services of the petitioners as held by us.

30. We may also notice another contention of the Board that even assuming that the Chairman is the appointing authority and not the Secretary, the latter having issued the impugned orders of termination with the approval of the Chairman, the impugned orders should be regarded as passed by the Chairman himself. Under Serial no. 15, it is only, the appointing authority who has been delegated with the power of termination of service. It is true that such termination has to be made with the approval of the Chairman and, in the instant cases, the Chairman is stated to have granted his approval. But merely because such approval has been granted by the Chairman will not, in our opinion, render the impugned orders as that passed by the Chairman. As the Chairman is the appointing authority, he has to act himself and apply his mind without being influenced by the opinion or recommendation of anybody. The decision to terminate must be the decision of the Chairman. In the instant cases, it is the decision of the Secretary which is stated to have been approved by the Chairman. The impugned orders of termination having, therefore, been passed or issued by the Secretary who is not the appointing authority, they are illegal,

inoperative and void. So, on the assumption that Regulation 34 is valid, the Secretary had no authority to terminate the services of the petitioners.

31. The petitioner, Gour Chandra Sarkar in C. R. 6058 (w) of 1984 has an additional ground of attack to the impugned order terminating his services. It is not in dispute before us that he is a permanent employee of the Electricity Development Directorate of the Government of West Bengal on deputation to the Board. It appears from the memo dated April 20, 1955 of the Chief Electrical Engineer, Government of West Bengal that pursuant to the Government decision that the Electricity Development Directorate would cease to function with the setting up of the Board with effect from May 1, 1955, Gour Chandra Sarkar who was then holding the post of L. D. Clerk was directed to be transferred to the Board on and from the said date on his own pay and allowances. Further, it was directed that on transfer, he would be treated as on deputation to foreign service under the general terms and conditions. The petitioner gave his consent to work on deputation and, thereafter, he was transferred on deputation to the Board.

32. The contention of Mr. Ghosh for the petitioner is that as the petitioner, Gour Chandra Sarkar, is a Government servant, his services can be terminated only by the Government and not by the Board under Regulation 34. On the other hand, it is submitted by Mr. P. K. Roy for the Board that although the petitioner has been transferred on deputation to the Board, he is an employee of the Board and Regulation 34 is applicable to him.

33. At this stage, it will be pertinent to refer to the terms and conditions of transfer of the employees of the Electricity Development Directorate of the Government of West Bengal to the Board which will appear from the letter dated (May 12, 1960 of Sri H. Das, Asst. Secretary to the Government of West Bengal to the Accountant General, West Bengal, a copy of which is annexure "A" to the affidavit-in-reply of the petitioner affirmed by him on June 26, 1984. In the letter (Annexure A), a reference has been made to the order of the Governor under which the employees of the Electricity Development Directorate whose services have been placed at the disposal of the Board would be governed by certain terms and conditions as specified in the said letter. Clause (a) of these terms and conditions provide, inter alia, that for these employees posts will be retained under the Development Department of the Government of West Bengal as "Shadow posts" till such time as the incumbents retire from Service, and the Board shall pay contributions for pension under the relevant rules of the West Bengal Service Rules, Part-I. Thereafter, class (b) provides as follows:

None of those persons shall be removed or dismissed from service or reduced from substantive rank without the orders of the State Government. They may, however, be otherwise punished by the Board subject to an appeal to Govt.

34. The terms referred to above show that the Government has retained control over the transferred employees, as it has over its other employees. Such retention of control has been possible because the Government has not totally

and finally severed the relationship of master and servants between it and the transferred employees. In other words, the employees, who have been transferred to the Board from the Electricity Development Directorate including the petitioner, Gour Chandra Sarkar, are still the employees of the Government. If by virtue of the transfer they became the employees of the Board, in that case, the Government could not retain any control over them. Our attention has, however, been drawn on behalf of the Board to Regulation 2(i) which provides as follows :

2(i). These Regulations shall apply to all employees of the Board (except those borne on the work-charged establishment), whether transferred from the Electricity Development Directorate of the Government of West Bengal on the date of formation of the Board or recruited by the Board, in so far as they are not inconsistent with the provisions of the Factories Act, 1948 as applied to certain classes of employees of the Board :

Provided that persons, who immediately before their transfer held hen on or were appointed on probation to permanent posts under the Electricity Development Directorate shall retain their pensionary status under the Government of West Bengal, the Board paying in respect of these employees contributions for pension at rates determined by the State Government and the Board and that none of these persons shall be removed or dismissed from service or be granted extension of service except with the previous approval of the Government.

35. In view of Regulation 2(i), it is submitted on behalf of the Board that the petitioner, Gour Chandra Sarkar, is an employee of the Board and that, in any event, Regulation 34 will apply to him. Regulation 2(i) provides for the applicability of the Regulations even to the persons who have been transferred to the Board from the Electricity Development Directorate of the Government of West Bengal. We are only concerned with the question whether the services of the petitioner can be terminated by the Board under Regulation 34. The terms and conditions of the transfer notice before as well as Regulation 2(i) prohibit the removal, dismissal or reduction from the substantive rank of the transferred employees by the Board without the orders of the State Government. This shows that the deputationists or the transferred employees cannot be regarded as the employees of the Board. It is, however submitted on behalf of the Board that it may be that without the order of the State Government the Board cannot remove, dismiss or reduce from the substantive rank any such deputationists, but there being no restriction on termination of their services under Regulation 34, the Board will always be entitled to terminate the services of such deputationists. We are unable to accept the contention. Even assuming that Regulation 34 is legal arid valid, it was not there in its present form at the time these persons including the petitioner, Gour Chandra Sarkar, were transferred on deputation to the Board. It was only on July 27, 1968 that by an amendment of Regulation 34, the provision for termination of services of the permanent

employees was incorporated. The transferred employees are bound by the terms and conditions subject to which the transfers were made with their consent. The Board cannot, in our opinion, unilaterally treat them as its employees and apply the provision of Regulation 34. It is not the Board's case that the petitioner, Gour Chandra Sarkar, has been absorbed in the Board's service and, so, he cannot be treated as its employee. The petitioner still remains the employee of the State Government.

36. The next contention that has been advanced on behalf of the Board in regard to Gour Chandra Sarkar is that assuming that he is not the employee of the Board, the Board is always entitled to terminate his service under the Board as has been done by the impugned order so that he reverts back to the services of the State Government. It is difficult to accept this contention. If the Board does not require the services of the petitioner, it is always at liberty to ask the Government to recall the petitioner back to the service of the Government. In case the Government recalls the petitioner, the Board will release him from its service. But it is difficult to accept the contention that the Board can terminate the services of the petitioner under Regulation 34 which applies only to the permanent employees of the Board. The petitioner not being an employee of the Board, Regulation 34 cannot be utilised for the termination of the services of the petitioner. Thus, even assuming that Regulation 34 is valid, yet it is not applicable to the petitioner, Gour Chandra Sarkar. The contention of the Board to the contrary is overruled.

37. Mr. P. K. Sen Gupta, learned Counsel appearing on behalf of Sri Nirmal Kumar Roy, the petitioner in C. R. 5920 (w) of 1983, while adopting the arguments of Mr. Dipankar Ghosh, submits that Regulations 34 and 35 are contradictory and cannot stand together. We do not think we are called upon to adjudicate on this point, particularly in view of our finding that Regulation 34 contravenes Article 14 of the Constitution, and is, accordingly, invalid.

38. Mr. Gopal Chakraborty, learned Counsel appearing on behalf of Sri Saktipada Ganguly, another petitioner also adopts the arguments of Mr. Dipankar Ghosh. He has, however, urged an additional point concerning his client. It is submitted by the learned Counsel that as the petitioner, Saktipada Ganguly was appointed in 1957 before the Regulations were framed by the Board, the Regulations are not applicable to him. We are not impressed with this argument. It may be that the petitioner was appointed before the Regulations were framed, but that does not mean that he will not be governed by any of the Regulations. We do not also think we are called upon to decide this point as we have already held that the impugned Regulation 34 is invalid as it offends against Article 14 of the Constitution.

39. It is vehemently urged by Mr. Ghosh that really the services of the petitioners have been terminated for the alleged misconduct in the guise of "termination simpliciter", under Regulation 34. Mr. Ghosh and the other learned Counsel have taken us through the affidavits-in-opposition where certain allegations have been

made against the petitioners. It is the contention of the learned Counsel for the petitioners that the impugned orders of termination are founded on the misconduct of the petitioners and, as such, the impugned orders should be struck down as, admittedly, no enquiry was held and no opportunity was given to the petitioners to defend themselves against the alleged misconduct. In support of his contention much reliance has been placed by Mr. Ghosh on the decision of the Supreme Court in Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, . In this connection, it may be pointed out that it has been already held by us on the authority of Moti Ram Deka's case (supra) that an order of termination passed under Regulation 34 is in the nature of a punishment and is tantamount to dismissal. We do not, therefore, think it necessary to examine the allegations made in the affidavits-in-opposition to see whether the impugned orders are really founded on misconduct or not. No other point has been urged on behalf of the parties.

40. For the reasons aforesaid, it is declared that Regulation 34 contravenes Article 14 of the Constitution and it is struck down as invalid. The impugned orders of termination of the services of the petitioners are quashed as inoperative and void. Let writs in the nature of Certiorari issue in this regard. Let writs in the nature of Mandamus also issue directing the respondents and each of them not to give any effect to the impugned orders of termination and to re-instate the petitioners in all the Rules, excepting Shri Satyabrata Gupta and Shri Nirmal Kumar Roy, with effect from the respective dates of termination of their services, in their respective posts which were held by them at the time the impugned orders of termination were issued, within four weeks from date.

41. We are told that Sri Satyabrata Gupta, petitioner in C. R. 6557 (w) of 1983, has retired on December 31, 1984 and Sri Nirmal Kumar Roy, petitioner in C. R. No. 6920 (w) of 1983, has retired on December 1, 1984. There is, therefore, no question of re-instatement of these two petitioners. The respondents are, however, directed to pay them their salaries and allowances for the period from the date of termination of their services, that is to say, from May 29, 1983 up to the respective dates of "their retirement, that would be admissible to them in case the impugned orders of termination had not been passed.

42. So far as the remaining writ petitioners are concerned, in view of the interim order dated 17th May, 1984, the respondents shall, within four weeks from date, pay them their arrears of salary and allowance with effect from the respective dates of termination of their services up to the date of their re-instatement subject to adjustment of any payment, if already made.

43. All the writ petitions are allowed and the Rules Nisi are made absolute. No order need be made in the appeals preferred against the interim orders which shall be deemed to have been disposed of.

There will, however, be no order for costs.

Paritosh Kumar Mukherjee, J.

I agree.