
(1961) 08 CAL CK 0023
In the Calcutta High Court
Case No : Suit No. 2288 of 1952

Jyotirmoyee Sharma

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 02-08-1961

Acts Referred:

Constitution of India, 1950 — Article 300, 311, 311(2)
Government of India Act, 1935 — Section 175(3), 240(3)

Citation : AIR 1962 Cal 349

Hon'ble Judges : P.C. Mallick, J

Bench : Single Bench

Advocate : B.N. Sen, S. Ray and Hansa Kumari Deb Burman, for the Appellant;
G.P. Kar and Aroon Mookerjee, for the Respondent

Judgement

P.C. Mallick, J.—This is a suit by a Government employee for a declaration that the order terminating her service is wrongful, illegal and void and that she is still entitled to the office. There is an alternative case made for damages for wrongful dismissal.

2. The plaintiff is an M.A. and Ph. D. of the Chicago University in Sociology. Her case is that she; was offered a permanent post of Anthropologist by the Government in the Department of Anthropology in the Indian Museum on June 7, 1949 which offer she accepted. Prior to this appointment she was working in the same department as a temporary Anthropologist which office she relinquished before accepting the new appointment. In the new post she was to be on probation for 2 years.

3. The plaintiff's service was terminated by a letter dated June 2, 1952 addressed to her by the Director Of Anthropology Sri. B. S. Guha. Prior to this she was charge-sheeted. She denied the charges and demanded a judicial enquiry.

4. The order terminating her service is challenged on the ground that it is in

contravention of the Constitution and of the Fundamental Rules. The order it is alleged is void, inoperative and of no effect. The order is further characterised as malicious, arbitrary and capricious, mala fide and illegal. In paragraph 15 of the plaint the case of wrongful dismissal is made and damages assessed at Rs. 5,34,804/- have been claimed.

5. The reliefs claimed are as follows:

(a) A declaration that the order of dismissal of the plaintiff by the defendant is wrongful, illegal void, inoperative and of no consequence whatsoever.

(b) A declaration that the plaintiff still remains entitled to hold the office of Anthropologist in the Department of Anthropology as mentioned in the foregoing plaint from which the plaintiff was removed by an illegal order of the defendant.

(c) Alternatively, a decree for Rs. 534804/- as mentioned and claimed in paragraph 15 of the foregoing plaint.

6. In the written statement it is pleaded that the plaintiff was a probationer and during the probationary period her services were terminated. It is denied that she was dismissed. All allegations made as to contravention of the Constitution and/or of the Fundamental Rules are denied. It is denied that the order terminating her service was void and/or unlawful and/or inoperative, malicious or arbitrary. It is denied that the plaintiff has any right to continue in the post of Anthropologist or to hold the same or that her removal from this office is wrongful. The claim for damages has been disputed. It is contended that the letter of appointment dated June 7, 1949, does not comply with the requirements of Section 175(3) of the Government of India Act, 1935 and that in consequence there was no valid and binding contract of service between the plaintiff and the Government.

7. To meet the above defence the plaint appears to have been amended pursuant to an order of the Court dated March 16, 1955. By this amendment, a new paragraph was added to the plaint being paragraph 3A, It is pleaded in that paragraph that the Union of India accepted and treated the plaintiff to be a government servant in lawful employment. A case of estoppel and ratification is made out in the said paragraph. Apparently, this new case was made to come within the observation of the Supreme Court in the case of Chattrbhuji Vithaldas.

8. In the additional written statement filed in answer to the new amendment, all allegations in the new paragraph of the plaint have been traversed. It is alleged that the contentions raised in the amended paragraph do not form a part of the notice u/s 80 of the Code of Civil Procedure. In the premises, the notice u/s 80 of the CPC is in any event insufficient and invalid.

9. On the pleadings the following Issues were raised:

1) Is there any valid and binding contract of service between the plaintiff and the defendant in view of the provisions of Section 175(3) of the Government of

India Act, 1935?

2) Did the plaintiff have the permanent post of Anthropology as mentioned in paragraph 3 of the plaint?

3) Did the plaintiff have any opportunity of defending herself? Was there any enquiry held therefor?

4) Was the principle of natural justice observed and followed as mentioned in paragraph 12 of the plaint ?

5) Is the plaintiff entitled to the declaration asked for?

6) Is the plaintiff entitled to any damage as mentioned in paragraph 15 of the plaint?

7) Has the plaintiff any cause of action?

8) Is the plaintiff entitled to any relief?

10. At the trial the plaintiff tendered her own evidence. The defendant did not tender the evidence of any witnesses. The document disclosed by the parties and embodied in the Brief of Documents have been marked as Ex. A, formal proof having been dispensed with by consent. A copy of the notification issued by the Public Service Commission inviting applications for the post has also been tendered in evidence and marked Ex. B, formal proof also in this case having been dispensed with.

11. The plaintiff's right to sue has been challenged on the ground that there is no valid and binding contract of service between the parties hereto. The contract is evidenced by the letter dated June 7, 1949 of the Director to the plaintiff containing the offer of service and the letter of acceptance of even date. Admittedly, the formalities prescribed by Section 175(3) of the Constitution of India have not been complied with. It is contended by Mr. Kar that there is no contract valid and binding in law and no suit can be maintained on the basis of such invalid contract. There are authorities of this Court in support of the argument advanced by Mr. Kar. In the Case of Ranjit Kumar Chakravarty Vs. State of West Bengal, , I have expressed a contrary view. I have held that such a contract of employment need not comply with the formalities prescribed by Section 175(3) of the Government of India Act and a suit on the basis of such a contract can well be maintained in law. I am informed that the view expressed by me has been approved by Datta J. in another suit. My attention has also been drawn to a Bench decision of the Patna High Court in the case of P.N. Sarkar Vs. State of Bihar and Others, in which Ramaswami C. J. adopted the same view that I had expressed. I told Mr. Kar that I am bound by my own judgment and there is no use further arguing the point before me. Should the matter go up in appeal Mr. Kar will have full liberty to argue the point before the Appeal Court. The other side will be entitled in that event to take all points in support of the maintainability of the suit including grounds made in paragraph 3A of the

amended plaint. On the grounds stated by me in my judgment reported in *Ranjit Kumar Chakravarty Vs. State of West Bengal*, I held that there is a valid contract of service in the instant case and the suit is not liable to be dismissed on the ground taken by Mr. Kar.

12. The first point to be considered is the position of the plaintiff at the date of appointment and at the date of termination of her service. She was appointed in a permanent post on June 7, 1949 but she should be on probation for two years. Two years expired on June 7, 1951. On the expiry of the period, neither she was expressly confirmed in her service nor her service terminated. What then was her position in service after June 7, 1951? Mr. Roy the learned counsel appearing for the plaintiff submitted that the probationary period having expired, after June 7, 1951, she was on a permanent cadre thereafter. All evidence on record points to this conclusion. Reliance has been placed on the advertisement issued by the Government inviting applications for the post, the letter of the Under-Secretary dated June 2, 1949, the offer of service made to her by the letter dated June 7, 1949 and the acceptance thereof by her as also on the plaintiff's oral testimony in Court. The plaintiff's evidence is that she applied for the post in response to the advertisement issued. She was interviewed by the Federal Public Service Commission in May 1949 at Delhi. After interview she was shown a letter signed by the Under-Secretary and she was told informally that she was appointed. Formal letter offering appointment came to her later on June 7 which she formally accepted. Ex. B is the advertisement issued by the Federal Public Service Commission for recruitment of one. Anthropologist in the Anthropological Survey of India (Central Service Class D. It contains certain "Informations for candidates." Paragraphs 6, 7 and 12 have been referred to in the course of the argument by the learned counsel. They read as follows:

(6) "The post is permanent and pensionable.

(7) Persons appointed will be on probation for a period of 2 years. The appointment can be terminated during the probationary period without reason being given.

12. Pay:-- 350-350-380-30-590-E.B.30-770-40-850. Higher initial pay up to a maximum of Rs. 440/- may be granted, as a special case, to a specially qualified and experienced candidate."

The letter of the Under Secretary to the Director of Anthropology regarding recruitment of the Anthropologist is in the following terms:

"I am directed to refer to the correspondence resting with this Ministry's endorsement No. F. 6/1/47-A.2. dated the 31st December, 1948, on the subject mentioned above and to say that the Governor-General has on the recommendation of the Federal Public Service Commission selected Dr. (Miss) Jyotirmoyee Sarma, M.A., Ph. D., for appointment to the permanent post of Anthropologist in the department of Anthropology on probation for two years. The scale of pay for this post is Rs. 250-350-380-30-590-

E.B.-30-770-40-850, but, Dr. (Miss) J. Sarma will receive an initial salary of Rs. 440/- p. m. which will be personal to her from the date of her permanent appointment.

2. I am to request that the post may now be offered to Miss Sarma and that arrangements may also be made by you at an early date for her examination by a medical board. She should be charged for her medical examination a fee of Rs. 16/- each, one quarter of which should be credited to the Govt. and the balance paid to the members of the Medical Board. The Board's report may kindly be furnished to the A. G. West Bengal in due course"

13. Pursuant to this an offer was made to the plaintiff by the letter dated June 7, 1949 written by one M. N. Chanda, for the Director. The letter reads as follows:

"I am directed to offer you a permanent post of Anthropologist in the Department of Anthropology in the scale of Rs. 350-350-380-880-30-590-E.B.--20-77-40-850 on an initial salary of Rs. 440/- p. m. which will be personal to you from the date of your permanent appointment. You will be on probation for 2 years.

I am to request that the undersigned may kindly be informed urgently if you are willing to accept the offer on the above terms and conditions."

14. The plaintiff's acceptance of the offer as evidenced by her letter of even date written to the Director which reads as follows:

"In reply to your Memo No. 2032, dated June 7, 1949, I am happy to accept the permanent post of an Anthropologist in the Department of Anthropology on the terms and conditions mentioned by you....."

15. On the same date plaintiff relinquished charge of the office of temporary Anthropologist and assumed charge of the new office. This is evidenced by defendant's document No. 2.

"Certificate of Transfer of Charge.

Certified that I have on the forenoon of this day relinquished charge of the office of temporary Anthropologist, Department of Anthropology.

Sd/- Jyotirmoyee Sarma. Signature of relieved Officer. Station--Calcutta
Designation: Anthropologist. Date--7th June 1949. Signature of relieving Officer.
Designation."

16. All these in the submission of Mr. S. Roy lead to the conclusion that the plaintiff was appointed as a permanent incumbent in the office though for a period of two years she would be on probation. During the probationary period of two years, her probation and service is liable to be terminated. But if the Government chooses not to terminate the probation and service within the probationary period of two years the plaintiff acquires the full status of a permanent officer on the expiry of the two years. There was no power reserved

to the Government to extend the probationary period. It cannot, therefore, be contended that! in the absence of actual confirmation she automatically continues to be a probationer till the date of actual confirmation or till the date of termination of her service. It is to be noticed that neither the letter of appointment nor any other document indicates that the appointment was subject to confirmation. The appointment in the Permanent office was absolutely unqualified.

17. Mr. Kar, learned counsel appearing for the defendant contended that even though the letter of appointment and other documents do not indicate that the office was "subject to confirmation", yet without an act of confirmation there cannot be a change from probationary to permanent status. That confirmation must necessarily be after the expiry of the probationary period. It follows that after the expiry of the probationary period and till the date of confirmation or termination of service, the plaintiff continues to occupy the status of a probationer. The point has been considered in a number of cases which may now be considered. In the case of R. Venkatapathy Vs. The Dy. Inspector-General of Police Western Range and Others, , a Division Bench of the Madras High Court gave its views on the point under consideration. The opinion is correctly summarised in the head note which reads as follows:

"Where the period of probation of a person appointed in the police department comes to an end he does not automatically become a full member of the service. It is one thing to say that the period of probation had come to an end; it is quite another thing to say his probation was found satisfactory, and he was admitted as a full member of the service. Before the latter could be done, there should be a finding by the concerned superior officer that this probation has been found to be satisfactory. Necessarily the determination of this question can only be taken up after the period of probation has come to an end. It is idle to contend that the superior officer has no right even to come to a conclusion whether the probation has been satisfactory and whether he is entitled to be admitted a full member of the service. In arriving at this conclusion anything which has happened subsequently to the expiry of the period of probation will also be relevant and can be taken into consideration."

The judgment was delivered by Rajmanner C. J. It does not appear from the judgment whether under the Rules or by the letter of appointment power was reserved to the Government to extend the probationary period. It, however, appears from the judgment that in fact there was an extension of the probationary period. Incidentally it should be noted that to this Madras case notice to show cause was Why the "probation should not be determined" and not why the "service should not be determined." Mr. Kar naturally relies very strongly on this decision. In the case of Naresh Chandra Gangopadhyay Vs. Director of Fisheries, Government of West Bengal and Others, , a Division Bench, of this Court consisting of Chakravarti, C. J. and Lahiri, J. expressed their views on the point as under. At p. 101 Chakravarti, C. J., who delivered the judgment makes

the following observations:

"A great deal of controversy appears to have taken place before the learned Judge as to whether the appellant had continued to be a mere probationer in Government service or had become a confirmed member by reason of his having been retained in employment after the expiry of the probationary period. The learned Judge held that the appellant had continued to be a probationer and I find no good reason to dissent from that view. It is quite true that the probationary period was for two years only and that even after the expiry of that period, the appellant had not been discharged but kept on in service. At the same time, he had not been confirmed. It has also to be noticed that by the very terms of his appointment, he was to be confirmed only if he satisfied both of two conditions, one of which was satisfactory work during the probationary period and the other of which was the passing of a departmental examination. Admittedly, he did not pass a departmental examination during the probationary period and obviously his work was not considered satisfactory. It may have been wrong for Government not to hold a departmental examination within the probationary period and the appellant, if he was so minded, might have taken appropriate steps at the appropriate time for forcing Government to hold a timely examination. This point, however, which is somewhat in the appellant's favour, loses a great deal of its force, if one remembers that when the examination was ultimately held in 1951, the appellant failed to pass it. Be that as it may, whatever might have been the reason for Government not confirming him, the fact remains that he was not confirmed and if he was not confirmed he could not claim any status other than that of a probationer."

In this case the order of appointment specifically provided that the appointee would be confirmed in service on the satisfactory completion of the period of probation and passing of a departmental examination which may be prescribed during the period. It is contended by Mr. Roy that the case is, therefore, distinguishable from our case in which there is no such express condition. In the case of *State of Punjab Vs. S. Sukhbans Singh*, , the point which came up for consideration by a Division Bench of the Punjab High Court was whether the Government had power to extend the probationary period. The Court held that the Government had the power. The case was decided on a construction of the Rules prevailing in Punjab, The case of *Bipat Prasad v. State of Uttar Pradesh*, decided by a single Judge of Allahabad High Court and reported in AIR 1939 All 536 is that of a Sub-Deputy Inspector of Schools. He was "appointed substantively on two years" probation in the Deputy Inspectors of Schools Service." Long after the probationary period of two years had expired the State Government purported to extend the period of probation successively. The right to extend the probationary period was challenged. The Court held on the construction of the Rules that the Government had no power to extend the probationary period retrospectively and that the order extending the probationary period retrospectively was of no effect. In the case of *Purnanando Patra Vs. Collector of Central Excise, Calcutta and Another*, , decided by H. K.

Bose, J. the probationer was allowed to cross the probationary period before his services were finally terminated. H. K. Bose, J. expressed his opinion that after the expiry of the probationary period, the Government servant cannot be said to be a probationer any longer. The opinion, however, does not appear to be backed by reason and cannot be said to be well considered. In the case of Dr. Kanshi Ram Anand Vs. The State of U.P. and Another, , Mehrotra, J. expressed the opinion that after a probationer had completed the prescribed period of probation and had served the Government for more than one year after the expiry of that period it cannot be said that he was still on probation. This case also was decided on the interpretation of the Rules of service prevailing in Uttar Pradesh. On the construction of the Rules, the learned Judge recorded his opinion indicated above. There was an appeal against this decision of Mehrotra, J. which was heard by a Division Bench of the Allahabad High Court consisting of Mootham, C. J. and Raghur Dayal, J. The decision of the Court of Appeal is reported in State of U.P. and Another Vs. Dr. Kanshi Ram Anand, . The appeal was dismissed. The learned Chief Justice makes the following observations in Paragraph 7 of the judgment at P. 846 of the report:

"In the present case the Government did not confirm the respondent at the end of his period of probation. He admittedly was allowed to continue in Government service for three more years. In such circumstances it appears to me that there are only two possibilities: that respondent's further employment must be either permanent or temporary. I am disposed to think that the former view is the better, and that, if the Government does not exercise its right under R. 19 to dispense with a member of the service during or at the end of his period of probation, but retains him in its employment, it must be deemed to have confirmed him in his appointment. It is not however necessary for me to express a final opinion on this point for, whichever be the correct view, a second question arises."

The judgment indicates that the opinion of the learned Chief Justice was tentative rather than final. In the case of Bipat Prasad Sonekar Vs. The State of Uttar Pradesh and Others, , Tandon, J. expressed the same opinion. In the case of K. Ramchandra v. State of Mysore, heard by a Division Bench of the Mysore High Court and reported in AIR 1960 Mys 65, Chief Justice S. R. Das Gupta in delivering judgment expressed his opinion that after the expiry of the period of probation the Government servant ceases to be a probationer. At page 67 of the Report the learned Chief Justice makes the following observation:

"..... It would appear from the said order that the petitioner was appointed as Principal B. Ed. Training College, Gulbarga, That was his substantive appointment to a permanent post. The order no doubt also mentions that he will be on probation for one year. But it does not follow therefrom that even after the expiry of one year he will continue to be on probation or that the Government would be entitled to extend the period of probation. There is nothing in the said order to warrant the conclusion that period of probation will continue even after one year

and so long as the petitioner is not confirmed or that the Government would be entitled to extend the said period of probation at its own pleasure. It cannot therefore be said that the petitioner was on probation on the date he was discharged from service. I am, therefore, of the opinion, that the contention of Mr. Venkataranga Iyengar viz., that the continuance of the petitioner after the period of one year was that of a permanent employee should prevail."

18. Supreme Court has not delivered any opinion on the point. Judicial opinion as stated above is divided. On the one hand, there is the weighty view of Chief Justice Rajamannar that after the expiry of the probationary period, if the probationer is allowed to continue in service there is no automatic confirmation making the probationer permanent but on the other hand there is an automatic extension of the probationary period. On the other hand we have the equally weighty opinion of Chief Justice S. R. Das Gupta of Mysore to the effect that there is in such circumstances no automatic extension of the period of probation but automatic confirmation in the permanent office instead. The opinions of both the learned Chief Justices are entitled to high respect. In the facts of the instant case, however, I am inclined to accept the views of Chief Justice S. R. Das Gupta in preference to the views of Chief Justice Rajamannar. The period of 2 years provided for in the instant case was intended to enable the Government to find out within two years whether the plaintiff was suitable for the job. Two years was thought to be a sufficient period within which the Government was to make up its mind and terminate the probation and along with it her service. If the Government chooses not to terminate the probation and service within the prescribed period, the appointee in the permanent post must be deemed to be suitable and stood confirmed in his office. Mr. Kar strenuously argued that the Government had the right to determine the suitability after taking into account the last date of probationary service. If the probationer committed a lapse on the last date of probation though during the entirety of the probation the probationer proved to be worthy of the office; then reasonably the Government should be given a reasonable time thereafter to determine the suitability of the probationer for the permanent post Till such decision is taken, the status of the employee cannot be anything other than that of a probationer. The fallacy of this argument is that suitability of a candidate for the office is not determined by a single act, If one act committed on the last date of probation is an instance of unsuitability of the candidate for the office, the offending officer can nevertheless be dealt with and suitable disciplinary action can be taken against him even after the confirmation. Mr. Kar's argument does not sound very convincing. On the other hand, in the absence of any rule or agreement reserving the Government's right to extend the probationary period how can the Government extend the probationary period by an unilateral act? I cannot find any reason for this. The plaintiff was appointed in a permanent post. She was to remain on probation in that permanent post for a period of two years only in terms of the Government order and the letter of appointment. Probation and service not having been terminated within the prescribed period, the plaintiff in my judgment became a

permanent incumbent to the office after the expiry of two years.

19. In the instant case probationary period expired on June 7, 1951. Shortly before that on May 21, 1951, the Director appears to have sent a confidential report of her work finding a number of faults in her behaviour and conduct. The said report is set out in extenso as under:

"Extract from the Confidential Report on the work of the (Miss) J. Sarma, Anthropologist, for the year 1950.

Her impossible demand for a separate bath-room for her while camping in the Abor Hills, her want of co-ordination with work of the party in general and her failure to get on with other members made her unpopular. Although a very good Abor woman, Oyal Mego was procured through the efforts of the Political Officer specially for her at considerable cost, her services were very little utilised by Dr. Sarma, inspite of my repeated instructions that she should see more of Abor women and the life they lead by visiting their homes with Oyal and by establishing report and cordial feelings with the tribal people. Throughout my stay with the field party in the Abor Hills that year I noticed no improvement and I felt that unless she could overcome her apathy and show genuine interest in Abor life, no researches of importance and accuracy were likely to result from her visit. On my return to Calcutta in March I felt it my duty, therefore, to warn her that she must change her attitude and make the best of her Abor trip. When the party returned to Head Quarters, I was, however, informed by the leader of the party that instead of collecting the data herself she used to send her interpreter Oyal with a questionnaire to the Abor homes to get materials and in every way failed to adapt herself to the surroundings. This was a great disappointment to me as not only did I get her appointed in the Department but still entertained hopes of her ultimately developing into a good Anthropologist inspite of her failures in the past.

Her attitude towards her colleagues, temperamental incompatibility to get on with them also showed little improvement. Complaints continued to come about her superior attitude and rudeness of manners even from our Foreign Fellow Dr. Lidio Cipriani. In the discussion's in our seminar meetings she made no contribution and kept herself generally aloof from the activities of the Department. What is more regrettable, by her attitude and conduct she did not give that co-operation and support in enforcing discipline in the Department and even went to the extent of writing a very discourteous letter to me. She was shown all consideration and given every chance but unless she can show a very marked improvement in her work and radical change, in her attitude towards her senior officers and courtesy and tolerance towards the junior members she is not likely to fulfil the purpose for which she has been appointed in the Department."

20. Mr. B. N. Sen, learned junior counsel for the plaintiff, bitterly complained that each one of these facts stated in the said confidential report is false and malicious and in the perspective of subsequent events he can now say that the

motive of the Director was to get rid of the plaintiff somehow so that his own wife may be appointed in her place. A copy of the confidential report was given to the plaintiff. The plaintiff was apt to think that the object of sending a copy of the confidential report was to invite answers to the allegations made in the confidential report. She, therefore, gave her answer to the allegations in a letter dated May 27, 1951, addressed to the Minister of Education, New Delhi. In her answer she denied the allegations and gave reasons in proof of its falsity. She asked for an enquiry to determine the truth of the allegations in the confidential report. This letter was sent according to the official practice through the departmental head viz. the Director himself. In early June for urgent domestic reason the plaintiff asked for casual leave for four days from 4th to 7th June, 1951. She in fact took 2 days" leave There are a number of letters relating to this matter. The Director refused to sanction two days" casual leave and took the plaintiff to task for not obtaining previous permission. This led the plaintiff to address another letter to the Hon"-ble Minister on June 24, 1951 by way of appeal against- the warning and praying that the 2 days" casual leave may be sanctioned. On 17th July a show cause notice signed by the Director was served on the plaintiff. The said letter is important and is set out hereunder:--

"I have been instructed by the Government of India to inform you that it is proposed to terminate your services as Anthropologist in this Department on the following grounds:--

(i) Failure to discharge your duties as a member of the staff, e.g., reluctance to give lectures as instructed and to participate in seminars; indifference towards research and publications.

(ii) Improper conduct and behaviour in general e.g., wilful discourtesy towards colleagues and subordinate staff.

(iii) Aid and abetment to peon Jogendra Misra of the Department against office discipline e.g., providing him with stationery and typing facilities for his petitions against the Director.

(iv) Absence from duty without leave on June 4th and 5th, 1951 and leaving station without permission.

(v) Applying for an appointment elsewhere without obtaining the permission of the Head of Department.

You are asked to show cause within a fortnight of the receipt of this letter why your services should not be terminated."

21. A comparison of the allegations made in the confidential report of May 21, 1951 and those contained in the above show cause notice will indicate that all the charges are new except charge, No. (ii) viz. "Improper conduct and behaviour in general e.g. wilful discourtesy towards colleagues and subordinate staff." Allegation of dereliction of duty as alleged in charge No. (i) aiding and abetting Jogendra Misra by providing with stationery and typing machines as

alleged in charge No. (iii), obtaining casual leave for two days, June 4 and 5 and leaving Station without permission and also applying for other appointment without permission of the Head of Department are all new charges and they are no-where to be found in the confidential report. By a letter dated July 27, 1951, the plaintiff asked for particulars of the allegations, and requested that the charges be made more definite. She expressly refers to R. 55 of the Fundamental Rules and was apt to think that the show cause notice initiated an inquiry under Rule 55 of the Fundamental Rules. She denied the letters generally. She made enquiries of the two appeals filed by her on the 27th May and 24th June to the Appellate Authority viz., the Hon"ble Minister. On July 31, 1951, the plaintiff addressed another letter through the Director on the subject of the show cause notice. The letter concludes with the following paragraph:--

"May I therefore pray that as the matter is a grave and serious one on my part your Honour would be pleased to make an enquiry into the matter by any Superior authority to the Director of this Department and after being satisfied as to the truth of my statements be pleased to set aside all the charges and allegations made against me and confirm me in the service."

22. On August 31, 1951 and again on September 30, 1951, the plaintiff made enquiries of the Hon"ble Minister about the appeals preferred by her in the 4 letters noticed previously. The language of the inquiry more or less is identical and is in the following terms:--

""I have the honour to submit that the above-quoted appeals are pending with your Honour. They involve the vital questions of my confirmation of service, increment of pay, efficiency, conduct, dismissal, deduction from pay, privilege of leave, and of leaving station, etc."

23. On October 1, 1951 the Director furnished particulars of the charges contained in the show cause notice dated July 17, 1951. Particulars of dereliction of duty given are:--

(a) Failure to give lectures to the trainees as directed. The lectures were to commence on 5th March, 1951. The plaintiff is alleged to have avoided it first on the plea of ill health and then on the plea that it was not a part of her duty.

(b) Non-participation in seminar works held from May 18, 1950 to August 13, 1951. The period is partly within two years of probationary period and partly outside.

(c) Indifference towards research and publication. The first instance under this head refers to incidents from December 1948 to February, 1949 i.e., prior to her appointment to the office which was dated June 7, 1949. It is to be noted that, neither of these omissions figured in the confidential report of the Director though many of the acts complained of were very near to the date of the report. The second paragraph refers to the failure to take interest in the Abor Woman Oyal Mego. This indeed is to be found in the confidential report. The last

paragraph refers to a mistake in the publication "Village Organisation of the Kanikars" which the plaintiff was asked to correct on July 9, 1951, that is, after the date of termination of the probation. The only other publication consists of data collected by the Abhor woman. Under the heading of "improper behaviour and discourtesy to colleagues", several examples have been given. Of these, A, B, C and D refer to a period prior to her appointment to the post in June 1949; the other refer to the period of probation in the present service. The last two charges are of a personal character. Exception is taken to the language of the letter written to the Director on March 29, 1951 and also to her failure to recognise the Director during office hours.

24. The allegation of aiding and abetting Jogindra Misra consists in the Director's suspicion that stationery was supplied and typing facilities given by the plaintiff in addressing a memorial to the Hon'ble Minister for reinstatement in service. Mr. B. N. Sen, learned counsel, stated in court that the order of dismissal of Jogindra Misra passed by the Director was set aside, as a result of this memorial. Regarding the other two allegations, namely, casual leave for two days on 4th and 5th June, 1950 and applying for appointment elsewhere, details given are such that need not be noticed. The last two paragraphs are important and are set out here-under:

"In view of the facts mentioned above, it is proposed to terminate your employment as Anthropologist, Department of Anthropology, a post you are holding on probation--under Rule 55-B of the Civil Service Classification, Control and Appeal Rules. I have accordingly been instructed by the Government of India to apprise you of the above grounds and to ask you to show cause, within a fortnight of the receipt of this letter, why your employment should not be terminated. You are also instructed to submit your reply through me and not direct to the Government of India. No advance copy of the reply sent directly to the Government of India will be entertained.

This also disposes of your letters dated the 27th of May 1951, the 27th of June 1951, the 4th day of July 1951, the 10th of July 1951, the 31st day of July 1951 and the 31st August 1951, addressed to the Hon'ble Minister for Education, Government of India."

On October 5, 1951, the plaintiff addressed another letter to the Minister relating to the allegations made in the Director's letter dated October 1, 1951. The charges made in the letter have been characterised as after-thought. The letter concludes as under:

"At para 3 of the letter of the Director under reference he writes that his letter disposes of my appeals dated 27-7-51, 24-6-51 and 31-7-51. It appears therefore that all the appeals I have made have been withheld by the Director without informing me about the reasons for his doing so against the Rules.

The Director in his letter under reference holds my post to be still on probation. But according to the terms of my appointment the probationary period for me

has ended on June 7, 1951.

In the above circumstances I beg to pray that your honour may be pleased to call for all ray appeals that appear to have been withheld illegally so far, and also to order for holding a judicial enquiry into all the allegations against me and to offer sufficient scope and opportunity to defend me and my honour and prestige in the matter before your honour comes to any final decisions."

By letter of January 9, 1952, the Director was informed by the then Education Secretary, Dr. Humayun Kabir that the Public Service Commission had decided to terminate the service of the plaintiff. It enclosed a report of the public Service Commission dated January .2, 1952. The plaintiff was informed of this Government decision by a letter dated January 11, 1952 and addressed by the Director to the plaintiff. A copy of the report of the Public Service Commission is annexed to this letter. The report is set out hereunder:

"1. The Union Public Service Commission observe that on the conclusion of her probationary period the work and conduct of Dr. (Miss. J. Sarma, Anthropologist, was not considered satisfactory and the following charges were framed against her:--

(i) Failure to discharge her duties as a member of the staff e.g., reluctance to give lectures as instructed and to participate in seminars; indifference towards research and publications.

(ii) Improper conduct and behaviour in general e.g., wilful discourtesy towards colleagues and subordinate staff.

(iii) Aid and abetment to peon Jogendra Misra of the Department against office discipline (e.g., providing him with stationery and typing facilities for his petitions against the Director.

(iv) Absence from duty without leave on June 4th and 5th, 1951 and leaving station without permission.

(v) Applying for an appointment elsewhere without obtaining the permission of the Head ot Department.

The specific instances on which the charges were based were also communicated to Miss Sharma and she was asked to explain why her services should not be terminated.

(3) In her explanation dated 5th October, 1951, Miss Sarma has referred to certain previous representations made by her. The Commission have carefully perused all the records of the case including her previous representations. In their opinion her work during the period of probation has been thoroughly unsatisfactory and she has no reply to the charges drawn up against her beyond a categorical statement that they are false and malicious. The Commission also observe that her behaviour towards her colleagues and subordinates has not been satisfactory. She apparently did not take her duties seriously and the

Commission would hold that all the charges against her are well founded and proved. The Commission find that Miss Sarma has not justified her selection in any way and they have no hesitation in advising that her services should be terminated."

25. The case is being fought on the ground of law. The challenge is that there is a breach of Article 311(2) of the Constitution and the order of dismissal is illegal. I am not called upon to record my view as to the propriety of the conduct of the Director or the plaintiff as evidenced by this correspondence. Learned counsel appearing for the parties displayed commendable restraint and all matters except such as are relevant for the determination of the point of law are kept out of bound. Such facts as disclosed in the documents in record and relevant for the purpose may now be stated:

(a) Show cause notice served on 17th July and supplemented by the letter dated October 1, 1951 is after the probationary period had expired. Probationary period expired on June 7, 1951.

(b) Many of the grounds taken in the charge sheet are not to be found in the confidential report. For the purpose of the points of law, this fact is not to be considered as reducing the weight of the charges or supporting the case of the plaintiff that the charges continued in the letter dated 17th July were made as an after thought. The question has to be considered from this point of view that whether they are charges proper or adequate relevant for termination of probation or are proper and adequate charges for taking disciplinary measures against a Government employee on a charge of misfeasance or non-feasance.

(c) In the show cause notice the plaintiff was directed to show cause not against termination of probation but termination of service. The word "dismissal" has not been used. This show cause notice does not purport to be a show cause notice under Rule 53-B of the Fundamental Rules though it appears that the Director purported to give the subsequent notice dated October 1, 1951 in exercise of the power under Rule 55-B of the Fundamental Rules.

(d) The plaintiff took the show cause notices as a notice initialing an enquiry under Rule 55 of the Fundamental Rules. She said so expressly in her letter dated May 27, 1951 and demanded definite charges to be framed as required by Rule 55 of the Fundamental Rules. Having regard to the nature of the charges and timing of the letter being after the probationary period, the plaintiff, in my judgment, was justified in so thinking.

(e) She all along asked for an enquiry by an officer other than the Director and this has been denied to her. Having regard to the seriousness of the charges and the conduct of the Director, who clearly inspired them, the plaintiff, in my judgment, was justified in asking for an enquiry by somebody other than the Director.

(f) There has been a denial of natural justice in this case in not directing an

enquiry by an officer other than the Director and, in my judgment, full opportunity should have been given to the plaintiff to answer the charges.

(g) The charges made against her and found to have been proved by the Public Service Commission relate to acts anterior to her appointment to the post of permanent Anthra-pologist during the probationary period and after the probationary period.

(h) The charges levelled against the plaintiff are acts in the nature of misfeasance and non-feasance and, in my judgment, are penal in character. Each one of them warranted disciplinary action. In the opinion of the Public Service Commission, "all the charges are well-founded and proved." It puts a stigma on her competence and thus affects her future career. According to the plaintiff's evidence which I accept, this stood in her way in getting a job to which she is entitled by her ability and qualifications. The termination of service on the grounds alleged amounts, in my judgment, to punishment. It really amounts to dismissal, even though it is described as termination of service.

26. I now come to the most important question to be decided in this Case, namely--Was the order of termination of service lawful? The answer depends on the question--Was the plaintiff entitled to the protection of Article 311(2) of the Constitution? It is conceded that the procedure laid down in Article 311(2) of the Constitution for the protection of civil servants has not been followed in the instant case. It follows that if in law the instant case comes within Article 311(2) of the Constitution, the offending order must be held to be illegal. If not, the plaintiff must fail.

27. IT is now settled law that Article 311(2) of the Constitution is attracted whenever the service of a civil servant in the permanent cadre is terminated before the period of his service. In the instant case, I have held that the plaintiff, on the date of the order terminating her service, was a permanent member of the Service. It follows that the order terminating her service must be held to be unlawful, as it amounts to a violation of Article 311(2) of the Constitution. Mr. Kar conceded that if in fact the plaintiff was a permanent member of the Civil Service, then the offending order must be held to be unlawful.

28. Though I have found that the plaintiff was, at the date of the offending order, a permanent civil servant, there are weighty authorities which indicate that her status in service continued to be probationary even after the expiry of the probationary period. The authority I have in mind is the judgment of Rajamannar, C. J. noticed before. Assuming that I am wrong in my view that at the material date the plaintiff was a permanent member of the Civil Service and that her status continued to be that of a probationer even after the expiry of the probationary period, what would be the position in law? In law, a probationer has no right to service and the probation can be terminated at the will of the Government. Having regard to this fact, can it be contended that the provisions of Article 311(2) of the Constitution are attracted in the instant case?

29. The Supreme Court has expressed its view and laid down the law on the point in three cases which have to be considered now. In the case of Parashottamlal Dingra v. Union of India, decided by the Constitution Bench of the Supreme Court and reported in Parshotam Lal Dingra Vs. Union of India (UOI), . Das, C. J. deals with the case of probationers and officiating Government servants and makes the following observation in paragraph 27 of his judgment at p. 49 :

"It does not, however, follow that, except in the three cases . mentioned above, in all other cases, termination of service of a Government servant who has no right to his post e.g., where he was appointed to a post, temporary, or permanent, either on probation or on an officiating basis and had not acquired a quasi permanent status, the termination cannot, in any circumstance, be a dismissal or removal from service by way of punishment. Cases may arise where the Government may find a servant unsuitable for the post on account of misconduct, negligence, inefficiency or other disqualification. If such a servant was appointed to a post, permanent or temporary, either on probation or on an officiating basis, then the very transitory character of the employment implies that the employment was terminable at any time on reasonable notice given by the Government. Again if the servant was appointed to a post, permanent or temporary, on the express condition or term that the employment would be terminable on say a month's notice as in the case of Satish Chandra Anand Vs. The Union of India (UOI), then the Government might at any time serve the requisite notice. In both cases the Government may proceed to take action against the servant in exercise of its powers under the terms of the contract of employment, express or implied, or under the rules regulating the conditions of service, if any be applicable, and ordinarily in such a situation the Government will take this course. But the Government may take the view that a simple termination of service is not enough and that the conduct of the servant has been such that he deserves a punishment entailing penal consequences. In such a case the Government may choose to proceed against the servant on the basis of his misconduct, negligence inefficiency or the like and inflict on him the punishment of dismissal, removal or reduction carrying with it the penal consequences. In such a case the servant will be entitled to the protection of Article 311(2)."

In the case of State of Bihar v. Gopi Kishore Prasad, heard and decided by another Constitution Bench of the Supreme Court and reported in The State of Bihar Vs. Gopi Kishore Prasad, this point was further considered. At P. 691 of the report Sinha, C. J., who delivered judgment, refers with approval to the judgment of Das, C. J. in Dingra's case. The law as laid down in the two above cases is that even if the service of the probationer is dispensed with on the ground of mis-conduct, negligence, inefficiency or the like, the termination of service is by way of punishment because it puts a stigma on his competence and thus affect his future career. The facts in the Bihar case are that Govt. servant was in the Bihar Subordinate Civil Service on probation. A show cause notice was

served on him wherein a number of charges were framed against him. The Government passed an order of discharge on the basis of its own confidential reports. No enquiry as contemplated by Article 311(2) was held and no opportunity was given to the Government servant to show cause. The order of discharge was set aside on the ground that it was by way of punishment. Mr. Roy appearing for the plaintiff submitted that the above decision covers the instant case. I have held that the offending order terminating service is by way of punishment, because it puts a stigma on the plaintiff's competence and was likely to affect and in fact did affect her career. The submission of Mr. Roy must, therefore, be accepted.

30. Mr. G. P. Kar, learned counsel for the respondent has cited subsequent judgment of the Supreme Court in the case of *The State of Orissa and Another Vs. Ram Narayan Das*, which, according to Mr. Kar, is more on the point, inasmuch as the decision expressly considers the effect of Rule 55B of the Fundamental Rules. According to Mr. Kar, neither Pingra's case nor Gopi Kishore's case considered the effect of Rule 55B of the Fundamental Rules. Hence this Orissa case is the authority to be followed in the instant case where the Government purported to act under Rule 55B. No doubt Rule 55B along with other Rules regulating the service conditions of Government officers in Orissa was considered in the above Orissa case heard by the Supreme Court. But that fact cannot make this case the only authority on the point and only authority to be applied in the case of termination of service of a probationer. Shah, J. who delivered judgment of the court, cites Dingra's case and Gopi Kishore's case. Far from dissenting from the above two decisions, the learned Judge quotes with approval portions of the judgment from the two cases and takes pains to point out that the proposition laid down by Sinha, C. J. in Gopi Kishore's case is not inconsistent with their judgment. On the facts of the case and on construction of the various Orissa Rules as also Rule 55B of the Fundamental Rules, their Lordships came to the conclusion that it was merely a case of termination of probation and not of dismissal. It was not by way of punishment and it was held that by the order no stigma was cast on the officer and his future career was in no way affected.

31. It is to be noticed that in the cited case the notice was to this effect: Why he should not be discharged from service for gross neglect of duty and unsatisfactory work. The order of discharge, however, records that the ground of discharge was for unsatisfactory work and not "gross neglect of duty." The Supreme Court, therefore, held that discharge of a probationer on the ground of unsatisfactory work cannot be by way of punishment; it does not affect the future career of the Government servant and the discharge leaves no evil consequence or stigma on the discharged Government officer. On this finding the order of discharge was upheld and the order of the Orissa High Court was set aside. It was pointed out by Shah, J. that because of this fact the decision of Sinha, C. J. in *The State of Bihar Vs. Gopi Kishore Prasad*, would not be of any use to the petitioner.

32. The above case cited by Mr. Kar is distinguishable from the instant case. In the instant case, the plaintiff's service was terminated on the ground that the plaintiff was proved to have been guilty of various acts of misfeasance and non-feasance. I have held that the offending order was by way of punishment and did affect the plaintiff's future career. The case, is akin to and is very much similar to *The State of Bihar Vs. Gopi Kishore Prasad*, and the rule in *Gopi Kishore's* case, rather than the rule in *The State of Orissa and Another Vs. Ram Narayan Das*, should be applied to the facts of the instant case.

33. For reasons stated above, it must be held that the offending order terminating the plaintiff's service is bad in law and I make a declaration accordingly.

34. The next question to be considered is whether the plaintiff can get damages for wrongful dismissal. Mr. Kar has contended that the only relief to which a Government servant illegally dismissed in breach of Section 240(3) of the Government of India Act is entitled to is a declaration that the order was wrongful and that he was still a Government servant. In the case of *Suraj Narayan v. North-West Frontier Province* 1941 FCR 37: (AIR 1942 FC 3), the Federal Court held that the plaintiff was not entitled to recover damages for wrongful dismissal. Subsequently in the case of AIR 1945 47 (Federal Court), the Federal Court after making a declaration that the dismissal was wrongful, remitted the case to the High Court with this direction that "the High Court do take such action in regard to any application duly made by or on behalf of Mr. I. M. Lall for leave to amend to claim damages as the High Court shall deem right; On further appeal to the Privy Council by its judgment reported in AIR 1948 121 (Privy Council), the Judicial Committee set aside the above direction. Lord Thankerton, who delivered the judgment of the Board, quoted, with approval the observation of Lord Blackburn in the Scottish case reported in *Mulvenna v. The Admiralty* (1926) SC 842 as laying down the law correctly. It was held that pay could not be recovered by action against the Crown, but by only petition, memorial or remonstrance. The view expressed by Lord Thankerton in AIR 1948 121 (Privy Council), has been dissented from by the Supreme Court in the case of *The State of Bihar Vs. Abdul Majid*, : (1954) IILLJ678SC. Mahajan C. J. cited with approval the decision of the Federal Court in *Punjab Province v. Tarachand*, AIR 1947 FC 23. It was held in *Tarachand Pundit's* case as well as in *The State of Bihar Vs. Abdul Majid*, that the rule of English law that a civil servant cannot maintain a suit against the State or the Crown for the recovery of arrears of salary does not prevail in India. The proposition is denied that a civil servant serves the Government "ex gratia" and that the salary is in the nature of a bounty. It is pointed out that Section 240 of the Government of India Act, 1935 itself places restrictions and limitations on the exercise of the Government's pleasure in dismissing a civil servant. These restrictions and limitations are imperative and mandatory. To the extent the rule that the Government servants hold office during pleasure has been de-parked from by the statute, the Government servants are entitled to relief, like any other

person under the ordinary law and that relief therefore must be regulated by the Code of Civil Procedure." The law now has been laid down by the Supreme Court that the "bounty theory" and the "pleasure theory" do not stand in the way of the Government servant from suing the Government in the ordinary court. It has been held that the Government servant is entitled to recover arrears of salary by a suit in a Civil Court.

35. There is no authoritative decision of the Supreme Court laying down that a Gov-ernment servant can sue for damages for wrongful dismissal. If the relation between the Government servant and the Government is contractual, and the Government servant is entitled to the remuneration for service rendered, there is no reason why the Government servant will not be entitled to get damages for wrongful dismissal just like an ordinary servant against his master. The observations of P. B. Mukharji, J. in the case of Anil Nath De Vs. Collector of Central Excise, Calcutta and Another, is to the effect that the relationship between the Gov-ernment and its servants is contractual and the Fundamental Rules become part of the contract of service. On this basis clearly an action for damages for wrongful dismissal lies against the Government. The other view is that the suit to recover damages for wrongful dismissal in breach of Section 240(3) of the Government of India Act is an action in tort. Even then an action in tort lies against the Gov-ernment in respect to all acts of Government except those in exercise of the sovereign power of the State. I do not think that the employment of the plaintiff as an Anthropologist in the Anthropological Department of the Union Government can be said to be an act in exercise of the sovereign power of the State, in my judgment a civil servant wrongly dismissed in breach of Section 240(3) of the Government of India Act or Article 311(2) of the Constitution is entitled to maintain an action for damages for wrongful dismissal.

36. The damages a servant is entitled to get from his master for wrongful dismissal is the loss suffered by reason of such dismissal. Mayne in his Treatise on Damages 11th Edition at page 293 lays down the rule as under:

"The measure of damages is the loss incurred. Prima facie this is the loss of wages which would have been earned had the employment continued according to contract, together with the value of the other advantages Under the contract such, for example, as the benefit of quarters rent-free, maintenance, or otherwise. But, in estimating the loss, due allowance must be made for the emoluments of any other employment obtained before the trial or of any employment likely to be obtained before the contract would have expired. If is the servants duty to minimise the damages, and, for this purpose to seek and accept suitable employment. But he is not expected to accept an engagement in a lower status, though it may be reasonable for him, in the State of the labour market, to accept a lower salary; and this will be taken into consideration in the calculation of the damages."

It is argued by Mr. Roy that the same rule will apply in the case of Government

servants wrongfully dismissed. According to the evidence tendered by the plaintiff that after wrongful termination she made attempt to get a suitable job but could not get any till September, 1955 when she obtained a Research Fellowship at the National Institute of Science in India. She was given a stipend at the rate of Rs. 400/-per month. Sometime after on December 1, 1956 the plaintiff was appointed a Reader in Sociology by the Utkal University at a salary of RS. 540/- per month. Calculating damages on the basis laid down by Mayne above Mr. Roy submitted that the claim of the plaintiff would come up to little over Rs. 30,000/-. She would not claim anything for the period after her appointment at the Utkal University.

37. When the case came up for hearing there was a talk of settlement and the plaintiff Was agreeable to accept Rs. 10,000/- by way of settlement. The settlement however fell through because the Government was only agreeable to make payment on "ex-gratia" basis and the plain-tiff was not willing to settle without having a declaration that the termination of service was wrongful. Mr. Roy, pointed out in opening toe case that without having such a declaration she would have difficulty in getting a post un-der the Government in future. She was willing to accept the amount indicated above, if the Government submits to a decree declaring the termination of service to be wrongful. Now, that the plaintiff is getting the declaration, the plaintiff is willing to accept the sum of Rs. 20,000/- in full settlement of her claim if the Government does not prefer an appeal. There will be a decree for Rs. 30,000/-, but if pay-ment is made by the Government and the Government does not prefer an appeal, the plaintiff is willing to accept Rs. 20,000/- in full satisfaction of the decree. There will be a decree for Rs. 30,000/-, as indicated above and a declaration. Certified for two counsel. The decretal amount will carry interest at the rate of 4 per cent per annum. The amount of the decree will be payable within three months and if not paid the decree would be executable after a period of three months. The plaintiff is also entitled to the costs of this suit. Certified for two counsel.