
(1965) 09 CAL CK 0018
In the Calcutta High Court

Makhanlal Dey

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 28-09-1965

Acts Referred:

Constitution of India, 1950 — Article 154, 162, 164, 174, 176

Government of India Act, 1935 — Section 235

Police Act, 1861 — Section 7

Citation : 70 CWN 925 : (1967) 2 LLJ 782

Hon'ble Judges : S.K. Datta, J;A.C. Gupta, J

Bench : Division Bench

Judgement

S.K. Datta, J.—This appeal is by a dismissed Government servant, Makhanlal Dey, against the Union of India and raises questions regarding the construction of Articles 309, 310 and 311 of the Constitution.

2. The more relevant facts necessary for appreciating the controversies of law Involved In this appeal are given herein below In the next two paragraphs:

3. In 1937 the plaintiff, Makhanlal Dey, was employed as an estimator in the Military Engineering Service commonly known as M.E.S. He was thereafter promoted to the rank of a Superintendent and ultimately employed at the relevant time as a Sub-divisional Officer, commonly known as S.D.O. The plaintiff was accordingly admittedly at all material times a civilian in the Defence Service.

4. On 16 December 1919 a chargesheet was made over to him which contained inter alia charges of negligence In the course of his duties. On 23 November 1949 the Constitution of India came Into force. On 5 September 1951 the Chief Engineer, Eastern Command, dismissed the plaintiff. In 1952 the plaintiff filed an appeal. On 26 November 1953 the said appeal was rejected and the order of dismissal was confirmed. On 15 September 1954 the plaintiff filed a suit for declaration before a Subordinate Judge at Alipore, 24-Parganap, that the order of dismissal dated 5 September 1951 and the final order dated 28 November 1953 were bad In law and without Jurisdiction and that ht should be declared as still in

service. On 26 March 1959 the suit was decreed In favour of the plaintiff. On 26 April 1960 an appeal was preferred against the said judgment and decree. On 16 January Sri S.N. Bagchi the then Additional District Judge, First Court, Alipore, allowed the appeal and dismissed the suit. Thereafter, on 25 April 1980 this appeal was presented In this Court.

5. Sri Nalin Banerjee, learned advocate appearing for the appellant, submitted that on a proper construction of Articles 309, 310 and 311 of the Constitution It Is patent that Article 309 controls Arts, 310 and 311 of the Constitution. Therefore, the rules, more or less in terms of Clause (2) of Article 311 made by the Defence Department, which must have been made either by the President or under his direction or alternatively by the Central Legislature, will prevail over the pleasure of the President as provided In Article 310. Hence the breach of such rules of the Defence Department as in this case, makes the dismissal of the plaintiff wrongful.

6. In order to appreciate this contention it is necessary to make a survey of the provisions In the Constitution relating to services. Part XCV baginning with Article 308 and ending with Article 314 deals with services under the Union and the States. Article 308 deals with Interpretation of the expression "State." Article 309 deals with recruitment and conditions of service of parsons serving the Union or State. Article 310 deals with tenure of office of persons serving the Union or a State. Article 311 deals with dismissal, removal or redaction of persons employed In civil capacities under the Union or a State. Article 312 deals with "all-India services." Article 313 deals with transitional provisions. Article 314 deals with provisions for protection of existing officers of certain services. Article 309 provides inter alia that the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connexion with the affairs of the Union or of any State.

7. Article 309 further provides that it shall be competent for the President or such person as he may direct In the cane of services and posts in connexion with the affairs of the Union and for the Governor or Rajpramukh of a State or such person as he may direct In the case of services and posts in connexion with the affairs of the State to make rules regulating the recruitment and the conditions of service of persons appointed to such services and posts until provision in that behalf Is made by or under the Act of the appropriate legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

8. Article 309 commences with the words "subject to the provisions of this Constitution."

9. Therefore, the operative provisions of the article may be qualified or fettered by other articles or provisions of the Constitution.

10. Article 310 fetters the provisions of Article 309.

11. Article 310 does so because it provides inter alia that

(1) a member of a Defence Service,

(2) a member of a civil service of the Union or of an all-India service,

(3) every person who holds any post connected with defence or civil post under the Union,

holds the post or office during the pleasure of the President.

12. Article 310 again open a with the words " except as expressly provided by this Constitution."

13. Therefore, Article 310 in its turn may be qualified or fettered by other" articles or provisions of the Constitution.

14. Article 311 of the Constitution qualifies the provisions of Article 310 in certain respects.

15. Article 311 does so because It imposes two restrictions upon the " pleasure" of the President as provided in Article 310. The first restriction is that no civil servant shall be dismissed or removed by an authority subordinate to that by which he was appointed and secondly, no such civil servant shall be dismissed or removed until he has been given reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

16. Hence Article 309 does not control Articles 310 and 311 of the Constitution.

17. The interaction of Articles 309, 310 and 311 in the case of a member of civil service or persons holding post under the Union or State has been the subject-matter of discussion by the Supreme Court. In this connexion reference may be made to the case of Parshotam Lal Dhingra v. Union of India 1958?1 L.L.J. 544,

18. Article 311, however, leaves untouched or unaffected

(1) a member of a Defence Service, and

(2) a person who holds any post connected with defence.

19. Hence, Article 310 only governs the employees of the Defence Department in respect of tenure of office.

20. Therefore, it follows that there is no provision in the Constitution which affects the exercise of the pleasure of the President as to a member of a Defence Service or a person holding any post connected with defence.

21. The reason for not applying "Art. 311 to Defence member or to Defence Service or persona holding post with defence is not far to seek. The procedure prescribed in Article 311 is dilatory. In Defence Service such dilatoriness may be fatal. Again, In the case of Defence Service such a right may be fatal to the State, for a guilty officer may escape through the technicalities of Article 311 of

the Constitution.

22. Hence, our Constitution preserves the English rule that all servants hold service at the pleasure of the Crown with reference to the members of Defence Service or persons holding Post under the Defence Department.

23. The Defence Department had admittedly made rules on the lines of Clause (2) of Article 311 governing members of the Defence Department and/or the persons holding posts with the defence. The constitutional provisions of Article 311 cannot and do not qualify the provisions of Article 310 In respect of persons employed by the Defence Department. Hence, the rules made by the Defence Department which are not founded on constitutional provisions can be and are merely directory and cannot affect the constitutional right of the President embodied In 3. 310, and consequently the breach of such administrative rules does not result in any infringement of any legal right. Our Constitution preserves the law laid down In the case of Venkata Rao v. Secretary of State 64 I.A. 66 in regard to the employees of the Defence Department as to tenure of office. Hence, where there is a competition between the rules and the pleasure of the President, no Court can give effect to the rules and thereby assume jurisdiction in the sphere of the pleasure of the President.

24. Hence, I reject the contention advanced on behalf of the plaintiff. Sri Banerjee, learned advocate for the dismissed employee, further submitted that in any event the pleasure of the President cannot be delegated and expressed by an officer of the Defence Department.

25. This point was not taken in the plaint or canvassed In the trial Court or in the lower appellate Court or made a ground in the grounds of appeal.

26. This point, however, depends on the undisputed documents before the Court and in particular, the letter of dismissal. Hence, In my view, in the ends of justice the plaintiff should be allowed to agitate this point for the first time In the second appeal.

27. In Baburam Upadhyaya case AIR 1961 S.C. 781 this question arose for consideration. Their lordships observed inter alia as follows:

The argument is that a power to terminate the service at pleasure under Article 310 is a part of the executive power of the State, that power under Article 154 can be exercised by the Governor directly or through officers subordinate to him, and that under Article 154(2)(b) the Parliament or the legislature of the State can confer the same power on any authority subordinate to the Governor, or, at any rate, can make a law prescribing that the Governor shall exercise the said pleasure through a particular officer...

Doubtless the Governor may have to exercise the said power, whenever an occasion arises, in the manner prescribed by the Constitution, but that in itself does not make it a part of the executive power of the State or enable him to delegate his power.

We have already discussed the contention of the learned Counsel that the Governor exercises his pleasure through officers specified u/s 7 of the Police Act and therefore, it is not possible to equate the Governor's pleasure with that of the specified officer's statutory power.

28. In this case the President did not express his pleasure, but an officer of the Defence Department did. Hence, this contention advanced on behalf of the plaintiff is well-founded. Hence, the dismissal of the plaintiff was wrongful.

29. Sri Roy, learned advocate for the Union of India, submitted that the pleasure of the President is not justiciable and accordingly cannot be the subject-matter of an enquiry by the Court.

30. There can be no doubt that the Courts are debarred from examining the pleasure of the President. The Court is not, in my opinion, however, debarred from examining whether in fact the pleasure has been exercised by the President or by someone who is duly authorized by the Constitution to act on his behalf.

31. In this case the President expressed no pleasure either way. An executive officer of the Union of India expressed his pleasure by dismissing the plaintiff. The pleasure of the executive officer does not enjoy the immunity which has been granted to the President. It has been held by the Supreme Court that the right to exercise the pleasure of the President cannot be delegated. Hence, in this case an executive officer has wrongfully prevented the plaintiff from exercising his duties as an officer of the Defence Department. His wrongful act is supported by the Union of India. Consequently, the dismissal of the plaintiff is wrongful. Hence, the plaintiff has a cause of action against the Union of India.

32. Sri Roy, further submitted that the Union of India has expressed the pleasure of the President who is the executive head of the State and consequently, no question of any right of action arises, for in the very nature of the employment it was precarious and it has been terminated by the written statement filed by the Union of India.

33. It will be noticed that what is required under Article 310 of the Constitution is the pleasure of the President and not the pleasure of the Union of India which is not identical with that of the President of India under the Constitution. Hence, in my view, this contention must be rejected.

34. In the result, the appeal is allowed with costs, the judgment of the lower appellate Court is set aside and in view of the passage of time, the judgment and decree of the trial Court is varied by substituting, in its place, a declaration that the purported orders of dismissal of the plaintiff dated 5 September 1951 and the final order dated 26 November 1953 were void and inoperative and the plaintiff remained in service at the date of the institution of the present suit.

A.C. Gupta, J.

35. The question arising for decision in this second appeal relates to the security

of tenure of a civilian employed In Defence Service.

36. Appellant Makhanlal Day, hereinafter referred to as Dey, was appointed as an estimator In the Military Engineering Service In May 1937 and was subsequently promoted to the grade of Superintendent, Class I. His appointment was made permanent In March 1950. In 1948 Dey was employed as Sub-divisional Officer In the office of Garrison Engineer, Calcutta, the hierarchy of official position In the said service, Day's Immediate superior was the Garrison Engineer who in his turn, was subordinate to the Superintending Engineer, more commonly known by the initials O.R.I.E. Over them all was the Chief Engineer, Ranohi, who was the head of the Eastern Command. On 26 August 1918 one Sri G.R. Gulati who was a surveyor In the office of C.R.I.E. addressed a letter on behalf of C.R.I.E. to Garrison Engineer, Calcutta, pointing out certain irregularities In some work done by Dey in March 1918 Sri Kakar was the O.R.I.E. at the time. On this letter (Ex. 1. A) a court of Inquiry was convened, composed of three members, which held It a sitting on 26 August 1918 when several witnesses Including Dey were examined. The findings of this Court of Inquiry (Ex. 8), published on 8 November 1918, contained nothing adverse against Dey. Sri Kakar who, as stated earlier, waa the O.R.I E, however expressed his disagreement with the said findings In a letter (Ex. A 16) written by him on 17 December 1948 to the Headquarter, Calcutta Sub-area. Sri Kakar was succeeded by Lieutenant-Colonel Goutam a as C.R.I.E., Calcutta, In May 1949 and Immediately thereafter a second court of inquiry was convened to go over the very same allegations investigated by the earlier court of Inquiry. The second court which eat for three days, on 1, 2 and 3 June 1919 expressed the opinion that the responsibility for the irregularities complained of could not be fixed on any particular Individual but it also noted that Sub-divisional Officer Day was careless and negligent In maintaining the ledger and records. The report of the second court of inquiry-(Ex. 7. A) was also disapproved, this time by Lieutenant-Colonel Goutama who was then the C.R.I.E, In a note dated 29 July 1919 (Ex. A. 15) to the Headquarter, Calcutta Sub-area, he criticized the proceedings of the second Court of Inquiry and expressed the view that the court should reassemble to conduct the proceedings in a more desirable way and that effort should be made to "dig out" relevant evidence and Information. On this note a third court of inquiry was convened. There is some dispute as to whether It was really the third or a reassembly of the second court of inquiry. There was a fresh order setting up this new Court, the second court of Inquiry bad concluded Its proceedings and delivered its opinion; further, the composition of the two courts was also different, one of the members constituting the second court having been replaced In the subsequent body. From all these, there cannot be any doubt that it was Indeed a third court of Inquiry. Proceedings before this Court opened on 18 August 1949 when the president of the court approached the C.R.I.E. for a discussion on certain matters and the C.K I.E. handed over a document enumerating the points which he desired to be further Investigated. The third court of Inquiry also duly submitted Its opinion (Ex, B. 6) which laid the blame on Day in regard to certain matters.

Here ended one chapter of the story.

37. The second chapter began with the framing of a chargesheet (Ex. E) against Day on 1C December 1949 accusing him of gross negligence of duty. This chargesheet is based on the Irregularities complained of in the letter, dated 28 August 1948 (Ex. 1. A), written by surveyor Sri G.R. Gulati on behalf of the then C.R.I.E. to which reference has already been made and which led to the setting up of the aforesaid three courts of Inquiry. This was followed by two other chargesheets. The second chargesheet (Ex. B. 1) is dated 15 September 1950 and is based on certain Irregularities found by Lieutenant-Colonel Goutama on 12 May 1950 when he visited Kanohrapara subdivision where Day was posted as Sub-divisional Officer. The genesis of the second chargesheet thus relates to a point of time subsequent to the framing of the first chargesheet. Chargesheet 3 is dated 28 October 1950 (Ex. B. 2); it charges Day with neglect of duty and Inefficiency in regard to certain constructions at Ellenborough Maldan Camp in Calcutta in 1949. Some discrepancies in payment of bills in respect of the said work were pointed out by a technical examiner which caused a departmental enquiry. In that enquiry held on 31 January 1950 several witnesses including Day had been examined. It was a general fact-finding enquiry in which no one figured as accused. It appears from the proceedings of the said enquiry that on the findings recorded, recommendation was made for severe disciplinary action against Day and two other officers. Chargesheet 3 is founded on the proceedings of the aforesaid departmental enquiry held on 31 January 1950.

38. I think it would be convenient here to refer to the rules under which the aforesaid courts of Inquiry were convened and the charge sheet against Day was issued. Admittedly Day was a civilian employed in Defence Services and that he was paid from the Defence Services Estimates. There is also no dispute that at the relevant time such an employee was governed regarding disciplinary matters by a body of rules decreed as Army Instructions 212 of 1919. Rule 6 of the aforesaid rules is as follows:

Service of a chargesheet.—No order of dismissal, removal or reduction shall be passed on a Government servant unless he has been informed in writing of the grounds on which it is proposed to take action, and he has been afforded an adequate opportunity for defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the persons charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case.

He will be required within a reasonable time to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so directs, an oral enquiry shall be held. At that enquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and for such witnesses called as he may

wish, provided that the officer conducting the enquiry may, for special and sufficient reasons to be recorded In writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the grounds thereof.

In case a board of Inquiry la held to Investigate Into an Incident and no formal charges have been framed against any one at this stage, a Government servant Involved In the incident against whom disciplinary action is contemplated should subsequently, on the basis of the findings of that board of Inquiry, be served with a chargesheet and asked to put In a written statement In his defence within a reasonable time. He should also be furnished with a copy of the proceedings of the board of Inquiry and asked whether he wishes farther to examine or cross-examine any witness. If he expresses a desire to do so, the officer conducting the enquiry should arrange to summon the witness concerned provided that the officer may, for special and sufficient reasons to be recorded or writing, refuse to call a witness.

Note 1.?This rule shall not apply were the person concerned has absconded, or where It Is for other reasons Impracticable to communicate with him.

Note 2.?All or any of the provisions of the rule may, In exceptional cases, for special and sufficient reasons to be recorded In writing, be served, where there la a difficulty In observing exactly the requirements of the rule and these requirements could be waived without Injustice to the parsons concerned.

39. Now, to resume the narrative from the point It was left off, Day was "asked to put in a statement of his defence In regard to the accusations made against him In the said chargesheets. He was not however asked la regard to any of these chargesheets as to whether he desired to be heard in person. Hiving received the first chargesheet dated 16 December 1919 Day asked for copies of the findings and opinions of the three courts of Inquiry Including a copy of the document containing the various points on which the G.R.I.E Lieutenant-Colonel Gjutama desired further" investigation by the third court of inquiry. In reply to his requisition Day succeeded la getting a copy of only a part of the proceeding a of the first court of Inquiry and nothing else. As regards the third chargesheet dated 28 October 1950 Day wrote to" the authority asking for a copy of the technical examiner's observations and also facilities for verifying the original bills and other documents In order to enable him to prepare his defence. This request also was not acceded to in the absence of the materials asked for by him from the authorities, Day prepared his statements in defence as best as he could in the circumstances and submitted them under protest. Thereafter by a notice dated 25 May 1951 (Ex. 3) Day WAS asked to show cause why he should not be dismissed from service as an "accumalated punishment" for all his offences. In reply to this notice Day by letters addressed to the authorities reiterated demand for copies of the necessary papers and also claimed a personal hearing explain the evidence against him. These requests were also turned down the authorities however agreed to let him have an inspection only of soms of the dojam sat 3.

Ultimately Dey was dismissed from service by an order dated 5 September 1951 passed by the Chief Engineer, Eastern Command, for gross neglect of duty on the basis of the chargesheets 1 and 3. The relevant portion of the said order reads as follows:

I, the undersigned, do hereby dismissM.L. Day ...from M.E.S. Service...having been found guilty of continued gross neglect of duty?vide chargesheet a dated 16 December 1949 and 28 October 1950.

40. Thereafter Day preferred a departmental appeal which also was rejected by the appellate authority on 28 November 1953.

41. On 15 September 1951 Day instituted the present suit praying for a declaration that the order of dismissal passed against the plaintiff on 5 September 1951 and the final order on 25 November 1953 affirming la appeal the said order of dismissal were Illegal and ultra vires and not binding on the plaintiff and a farther declaration that the plaintiff was still in service. The order of dismissal was attacked by the plaintiff as Illegal and without Jurisdiction on two grounds; first, on the ground that the Bald order was mala fide being inspired by Sri S.R. Kakar and managed through his friends Sri J.R. Gulati and Lieqtenant-Colonel Goutama because the plaintiff had refused to depose falsely In favour of Sri Kakar in a criminal proceeding. The second ground was that the plaintiff was not given any opportunity to defend himself by reason of the withholding of material and Important papers by the authorities concerned. The trial Court found against the plaintiff on the issue as to whether the order of dismissal was vitiated by bias or malice but held that the plaintiff did not get reasonable opportunity of defending himself, not bale? sap piled with material and Important papers necessary to enable him to make out a proper defence against the accusations made In the charge-sheets as also against the notice to show cause against the proposed penalty. On this finding the trial Court came to the conclusion that the order of dismissal was in contravention/ of the rules of natural justice and the provisions of Clauses 6 and 8 of the Army Instructions 212 of 1949. The trial Court was also of the opinion that the order of dismissal was repugnant to Rule 15 of the rules framed under Article 309 of the Constitution which had come Into force replacing the Army Instructions after the plaintiff had preferred the departmental appeal. On these findings the trial Court decreed the suit with costs.

42. The defendant, Union of India, preferred an appeal from the decision of the trial Court. The Court of appeal below came to the following findings on the principal questions involved In the appeal:

(a) Under Article 310 of the Constitution the plaintiff was liable to be dismissed at the pleasure of the President; the protection of Article 311 was not available to the plaintiff who was a civilian in Defence Service. The President or the Governor under the Constitution means the executive head of the Union or the State as the case may be or their lawful delegate. The Chief Engineer of the Eastern

Command in dismissing the plaintiff acted as the lawful delegate of the President.

(b) Plaintiff's tenure of service being at the pleasure of the President, the Army Instructions governing disciplinary matters are not justiciable. No action can be maintained on breach of these rules.

(c) The pleasure of the President is not subject to any rules of natural justice except those embodied in Article 311 which is not available to the plaintiff and as such it is of no consequence if the enquiry preceding the dismissal of the plaintiff was conducted in disregard of the principles of natural justice. Also, neither the President nor his delegated authority in dismissing a civilian in Defence Service acts as a tribunal and therefore no question of violation of the rules of natural Justice can arise in this case.

(d) Rules framed under Article 309 which came into force when the departmental appeal preferred by plaintiff was pending, replacing the Army Instructions which were in operation when the enquiry against the plaintiff and his dismissal took place, cannot be considered in deciding the legality of the order of dismissal. In any event even the rules framed under Article 309 cannot control Article 310 and are not enforceable in a Court of law.

43. The Court of appeal below on the findings summarized above allowed the appeal and dismissed the suit with costs to the Union of India. From this decision the plaintiff has come up in second appeal to this Court.

44. It was not disputed in any of the Courts below, nor before us, that in the enquiry preceding the dismissal of the plaintiff the directions contained in the Army Instructions concerning disciplinary matters were disregarded. It was also not disputed that the authorities by refusing to supply copies of necessary documents asked for by the plaintiff precluded him from making an effective defence. Also, the finding recorded by the trial Court that apart from the violation of the Army Instructions, the procedure followed in dismissing the plaintiff was in disregard of the principles of natural justice, was not questioned by the Court of appeal below nor challenged before us by Sri P. K. Roy, learned advocate for the respondent. Indeed it can hardly be denied that the enquiry was conducted in a manner which paid little regard to the elementary rules of justice and fairplay. Besides being denied copies of the relevant documents, the plaintiff was not given a personal hearing. Rule 6 of the Army Instructions requires that while asking a Government servant, upon whom a charge-sheet has been served, to put in a written statement of his defence, it is to be ascertained whether he desires to be heard in person. Apart from Rule 6, this is also a requirement of natural justice in the circumstances of this case. It may be argued that the plaintiff should have himself demanded a personal hearing without waiting to be asked by the authorities; It appears that the plaintiff did ask for a hearing to enable him to explain the evidence against him at the second stage when he was asked to show cause against the penalty proposed. This request was also refused. In view of the fact that it was not ascertained from him by the authorities at the first

stage as to whether he desired to be heard In person, one can think of no valid reason why this request was turned down. Thus the enquiry resulting In the dismissal of the plaintiff was conducted In clear violation of the principles of natural Justice. As there Is no dispute that this was the position, I need not elaborate further on this point and will proceed on that footing.

45. The question therefore la whether non-compliance with the directions In the said instructions or disregarding the rules of natural justice renders the order of dismissal passed on the plaintiff invalid or void. If the plaintiff's dismissal was really an expression of the pleasure of the President, then It would be of no consequence whether these rules or Instructions were followed or disregarded. Under Article 310 persons serving the Union or a State hold office during the pleasure of the President or the Governor as the case may be. The only fetter on this pleasure Is embodied In Article 311. The protection afforded by Article 311 is however by its very terms restricted to members of a civil service of the Union or an all-India service or a civil service of a State or who hold civil post under the Union or a State. It IB well-settled that the protection of Article 311 does not extend to civilians employed In the Defence Services. But It remains to be seen whether the plaintiff's dismissal was la fact an expression of the pleasure of the President. I have quoted the order of dismissal above. This doss not show that the dismissal was at the pleasure of the President. The Court of appeal below thought that the Chief Engineer of the Eastern Command who passed the order dismissing the plaintiff did so as a lawful delegate of the President. There is nothing In the order of dismissal to indicate that the dismissing authority was acting as a dele-fate of the President and exercising his power to dismiss at pleasure. There is also no other material on record to suggest that such was the case. Union one assumes that every case of dismissal of a Government servant is an expression of the pleasure of the President or the Governor as the case may be and, further, that the dismissing authorities In all such cases function as delegates of the President or the Governor, I find no behalf for the finding recorded by the Court of appeal below on this point. And there is absolutely no warrant for any such assumption.

46. Clause (1) of Article 53 of the Constitution provides:

The executive power of the Union shall be vested In the President and shall be exercised by him either directly or through officers subordinate to him In accordance with this Constitution.

47. Presumably it is this provision which was at the back of the assumption made by the Court of appeal below that the Chief Engineer, Eastern Command, was acting as a delegate of the President in dismissing the plaintiff. The President Is the executive head of the Government of India. But the learned Judge apparently overlooked that It is the executive power and no other that can be exercised through officers subordinate to the President and that too in accordance with the Constitution.

48. In this context it is relevant to refer to Clause (1) of Article 77 which says:

All executive action of the Government of India shall be expressed to be taken in the name of the President.

49. In the present case the dismissal order passed against the appellant is not in the name of the President. The order was passed by the Chief Engineer, Eastern Command, and signed by him. Thus the order does not even purport to be in the exercise of the pleasure of the President under Article 310. Apart from that, it is now settled that the power given to the President and the Governor under Article 310 to dismiss at pleasure persons serving the Union or the State, as the case may be, is not an executive power. In *State of Uttar Pradesh and Ors. v. Baburam Upadhyaya* AIR 1981 S.C. 751 (vide supra) the Supreme Court by a majority repelled an argument based on Article 154 which vests the executive power of the State in the Governor. In terms similar to Article 53, that the power to terminate the service at pleasure under Article 310 is part of the executive power of the State and that as power under Article 164 can be exercised by the Governor directly or through officers subordinate to him, the said power to dismiss at pleasure can be similarly exercised through subordinates. Subba Rao, J., delivering the judgment of the majority, observed as follows at p. 760 of the report:

The first question is whether the power of the Governor under Article 310 to terminate the services of a Government servant at pleasure is part of the executive power of the State under Article 154 of the Constitution. Article 154 speaks of the executive power of the State vesting in the Governor; it does not deal with the constitutional powers of the Governor which do not form part of the executive power of the State. Article 162 says that, subject to the provisions of the Constitution the executive power of the State shall extend to matters with respect to which the legislature of the State has power to make laws; If the legislature of the State has no power to make a law affecting the tenure at pleasure of the Governor, the said power must necessarily fall outside the scope of the executive power of the State. As we will presently show, the legislature has no such power and, therefore, it cannot be a part of the executive power of the State. That apart, if the said power is part of the executive power in its general sense, Article 162 imposes another limitation on that power, namely, that the said executive power is subject to the provisions of the Constitution and, therefore, subject to Article 310 of the Constitution, in either view, Article 310 falls outside the scope of Article 154 of the Constitution. That power may be analogous to that conferred on the Governor under Articles 174, 175 and 176. Doubtless the Governor may have to exercise the said power, whenever an occasion arises, in the manner prescribed by the Constitution, but that in itself does not make it a part of the executive power of the State or enable him to delegate his power.

50. His lordship then proceeded to show that the legislature of the State has no power to enact a law affecting the pleasure of the Governor under Art.; 310.

Referring then to the scope of Article 310 of the Constitution to remove a misapprehension that if the view expressed In the passage quoted above were accepted it would lead to an anomalous situation, his lordship said as follows:

A law made by the appropriate legislature or the rules made by the President or the Governor, as the case may be, under the said article may confer a power upon an appropriate authority to remove a public servant from service; but the conferment of such a power does not amount to a delegation of the Governor's pleasure. Whatever the said authority does is by virtue of express power conferred on it by a statute or rules made by competent authorities and not by virtue of any delegation by the Governor of his power. There cannot be conflict between the exercise of the Governor's pleasure under Article 310 and that of an authority under a statute, for the statutory power would be always subject to the overriding pleasure of the Governor.

51. Article 73 which prescribes the extent of the executive power of the Union corresponds to Article 162 which defines the executive power of the State. Clause (1)(a) of Article 73 makes the executive power of the Union coextensive with the legislative power of the Parliament. Baburam Upadhyaya case A.I.R 1961 S.C. 751 (vide supra) thus clearly establishes that the power to dismiss a public servant at pleasure is outside the scope of Article 73 as well as Article 154 and, therefore, cannot be delegated by either the President or the Governor to a subordinate officer but can be exercised by them alone, in the manner prescribed by the Constitution. The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, was referred to in a later decision of the Supreme Court, Moti Ram Deka v. Northeast Frontier Railway 1964?II L-L.J. 467. Gajendragadkar, J. (as his lordship then was), who spoke for the majority In Moti Ram case (vide supra), observed at p. 491 of the report that the decision in Baburam case AIR 1961 S.C. 761 (vide supra) that the power to dismiss at pleasure cannot be delegated was not

Intended to lay down that a law cannot be made under Article 309 or a rule cannot be framed under the proviso to the said article proceeding the procedure by which, and the authority by whom, the said pleasure can be exercised.

In the Instant case, however, there was no enactment or rule vesting the Chief Engineer, Eastern Command, with the power under Article 310 to dismiss at pleasure. Clearly, therefore, the dismissal order In the present case could not have been made In exercise of the pleasure of the President and, as I have already pointed out, on the face of the order It does not even purport to be. I hold that the Court of appeal below was is error in thinking that the Chief Engineer of the Eastern Command in dismissing the plaintiff acted as the lawful delegate of the President.

52. The next question is whether the Army Instructions governing disciplinary proceedings in respect of civilians In the Defence Services, which were In operation when the enquiry against the appellant was being conducted, are

Justiciable, in other words, whether an action is maintainable for enforcement of these rules. The learned Judge of the Court of appeal below found that these Instructions had been framed u/s 235 of the Government of India Act, 1935, but held that they were not justiciable on the ground that they could not control the pleasure of the President under Article 310. The learned Judge also held that rules under Article 309 regulating the procedure in disciplinary actions against civilians paid from the Defence Services estimates which replaced the aforesaid instructions when the administrative appeal of the present appellant was pending, were not retrospective in operation and as such did not apply; the learned Judge went on further to hold that assuming these rules were retrospective, no action would till be maintainable upon violation of the rules as these rules also could not control or affect the pleasure under Article 310. I have already held that the dismissal of the appellant cannot be attributed to the pleasure under Article 310 and these findings can therefore be got rid of on this short ground. But I feel it necessary to examine a little more fully the question as to the justiciability of the aforesaid instructions and the rules.

53. According to the learned Judge the instructions were statutory, being framed u/s 235 of the Government of India Act, 1935; but he held on the authority of Venkata Rao v. Secretary of State for India 64 I.A. 55 (vida supra) that In spite of their statutory origin these Instructions were no better than merely administrative directions and no action could be founded on them. In that case the appellant Venkata Rao, an employee in the Government Press, Madras, who was dismissed from service on the allegation of being involved In a leakage of Information in respect of certain examination papers brought a suit for damages for wrongful dismissal against the Secretary of State for India In Council on the ground that the dismissal was In violation of Rule XIV of the Civil Services Classification Rules made u/s 96B of the Government of India Act, 1915, as amended by Act of 1919, which was then In force. The opening words of Section 96B of the Government of India Act lays down that

subject to the provisions of this Act and of rules made thereunder every person In the civil service of the Crown In India holds office during His Majesty's pleasure

and the said Rule XIV prescribes the procedure to be followed in a departmental enquiry that must precede Imposition of any major punishment on an officer of the Government. Clause (5) of Section 96B provides, inter alia, that no rules framed under the section

shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person In the Civil Service of the Crown In India In such manner as may appear to him to be Just and equitable...

In the appeal before the Judicial Committee appellant Venkata Rao had been dismissed from service by his Immediate superior, the Superintendent of the Government Press, and not by the Secretary of State; this fact would appear

from the judgment of the Madras High Court, in ILR 57 Mad. 857 from which the appeal to the Privy Council was preferred. The Judicial Committee found that there was no enquiry as prescribed under rule XIV before appellant Venkata Rao was dismissed from service, but their lordships held that the rules conferred no actionable right on the Government servants and they could not insist that they were dismissible only as provided by the rules and in accordance with the procedure prescribed thereby because the rules could not clog the Crown's right to dismiss at pleasure. Having held that, their lordships went on to say that Section 96B and the rules provide for "redress of grievances by administrative process" and constitute only a solemn assurance

that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action.

Their lordships had no doubt that this assurance "will be ever borne in mind by the Governments concerned" and their lordships found no reason to alter their opinion in spite of the fact that

there happen to have arisen for their lordships' consideration two cases where there has been a serious and complete failure to adhere to important and indeed fundamental rules.

The other case referred to by their lordships is also reported in L.R., 64 I.A. 40, R.T. Rangachari v. Secretary of State for India in Council, in which the legality of an order removing a sub-inspector of police from office in disregard of the relevant rules came to be considered. With respect, one could understand if the rules which tended to operate as a along on the Crown's pleasure were held to be ultra vires, but it is difficult to follow how these statutory rules could be described as administrative directions. One also fails to see why it should be necessary to construe a statute or the rules made under it as an expression of the good intentions of the executive government.

54. Sri Boy for the respondent, Union of India, argued that the decision of the Privy Council in Venkata Rao case 611. A. 65 (vide supra) has been approved by the Supreme Court in more than one case and is binding on us, Venkata Rao case 64 LA. 56 (vide supra) has been referred to in several decisions of the Supreme Court, S.A. Venkataraman Vs. The Union of India (UOI) and Another, , Parshotam Lal Dingra v. Union of India 1958 1 L.L.J. 544 (vide supra), Khemchand v. Union of India and Ors. 1959 1 L.L.J. 167 to name a few, but in none of them Venkata Rao case 641.A. 55 (vide supra) has been approved in the sense that it was held that the said case had been correctly decided. All that the Supreme Court did in the aforesaid decisions was to state the gist of the reasoning in Venkata Rao case 64 I.A. 65 (vide supra); this was pointed out in the judgment of the majority in State of Uttar Pradesh v. Baburam Upadhyaya A.I.B. 1961 S.C. 761 (vide supra). Not only that, in Baburam Upadhyaya case A.I.K. 1961 S.C. 751 (vide supra) the Supreme Court clearly records its disapproval of the manner of construction of statutory rules adopted in Venkata

Rao case 641. A. 55 (vide-supra) as would appear from the following observations at pp. 761 and 763 of the report:

The statutory rules cannot be described as, or equated with, administrative directions ... In our view, subject to the overriding power of the President or the Governor under Article 310, as qualified by the provisions of Article 311, the rules governing disciplinary proceedings cannot be treated as administrative directions, but shall have the same effect as the provisions of the statute whereunder they are made, In so far as they are not inconsistent with the provisions thereof.

The decision of the Judicial Committee In Venkata Rao case 641. A. 55 (vide supra) as an authority for the proposition that all statutory rules regulating disciplinary proceedings against Government servants are administrative directions, must therefore be held to be no longer good law In our country. Besides, that decision, based on the provisions of the Government of India Act, can hardly be regarded as a direct authority on the question for decision In the present case which depends on an interpretation of the relevant articles of the Constitution, The propriety of the order of dismissal passes on the appellant before us cannot be decided on any theory analogous to the sovereign right of the British Crown to dismiss at pleasure. The pleasure of the President, to which the appellant's dismissal from service is sought to be attributed, Is embodied In Article 310 of the Constitution and qualified by Article 311 which, however, is not attracted In the case of the appellant who is a civilian In Defence Service. The mode of expression of this pleasure which is an Important point for ascertaining whether or not In a particular case dismissal of a civil servant Is attributable to the pleasure under Article 310 has also to be gathered from the provisions of the Constitution. It may be asked why In Venkata Rao case 64 I.A. 55 (vide supra) the order of dismissal passed on him by his Immediate superior and not even by the Secretary of State, was taken as a manifestation of the pleasure of the Crown. It IB not necessary for our purpose to trace the Intricacies of the British constitutional laws to find an answer to this question. I have found that the order of the appellant before us was not made In exercise of the pleasure under Article 310. I hold that the Army Instructions laying down the procedure to be followed In disciplinary actions would be enforceable In a Court of law provided the Court of appeal below was right In think tug that these Instructions had been framed u/s 235 of the Government of India Act, 1935.

55. The trouble, however, Is that one does not find any basis for the view that these Instructions were framed u/s 235 of the Government of India Act, 1935. In fact, in spite of our beat efforts we have not been able to trade the origin of those instructions ; even the learned advocate for the Union of India has failed to throw any light on this subject. Several years ago, another Division Bench of this Court launching upon a similar enquiry met with the same result as we have ; this Is what Chakravartti, C.J., had to say In Atindra Nath Mukherjee v. G.F. Gillot and Ors. 1956?1 L.L. J. 17 at 21:

The only basis of the Army Instructions mentioned In the affidavits was a resolution of the Government of India In the Military Department, being Resolution No. 2228 published on 22 December 1917, but In exercise of what authority that resolution was passed and whether It was law or an executive decision could not be stated by any one.

We have also not been able to go beyond the said resolution of 1917. This being the position, I do not think It la possible to treat the Army Instructions as statutory rules. If the Instructions are really administrative directions, the question will be, whether they are still enforceable by suit. The answer Is obviously In the negative. But these Instructions governing disciplinary proceedings, relevant provisions of which I have quoted earlier, embody certain fundamental rules of natural Justice which have been admittedly disregarded In the enquiry preceding the dismissal of the appellant. This leads to the next question whether the order of dismissal passed In the case can be challenged on that ground as void or Invalid, though the Army Instructions may not be Justiciable as such.

56. The short answer given by the Court of appeal below is that natural justice has no room for play In a case where the President or his delegated authority dismissed a civilian in Defence Service at his pleasure, that the President or the authority exercising the delegated power of the President under Article 310 of the Constitution is neither a quasi-Judicial tribunal, nor an administrative tribunal nor a Judicial tribunal so as to attract the principles of natural Justice. The learned Judge referred In this connexion to certain observations of Lord Goddard, C.J., in *Ex parte Fry* (1954) 2 All E.R. 118. This was a case where an order passed on a member of the fire brigade by an authority in exercise of his disciplinary powers was sought to be quashed by an order of certiorari. Lord Goddard. In refusing the application observed, consistent with the view expressed by him In an earlier decision, *R. v. Metropolitan Police Commissioner, Exp, Parker* (1953) 2 All E.R. 717 as follows;

It seems to me Impossible to say, where a chief officer of a force which Is governed by discipline, as la a fire brigade, is exercising disciplinary authority over a member of the force that he Is acting either, judicially or quasi-Judicially. It seems to me that he is no more acting Judicially or quasi-judicially than a school master who is exercising disciplinary powers over the pupils.

57. The matter was taken to the Court of appeal which affirmed the order dismissing the application, but what the learned Judge overlooked la that the Court of appeal baaed Its decision only on the ground that In the facts of the case the disciplinary remedy of certiorari had been rightly refused; the Court of appeal preferred not to express any opinion on the point as to whether in such cases the disciplinary authority has to act judicially or not. Moreover, as shall presently show, the view a expressed by Lord Goddard in the two cases referred to above, have ceased to be good law even In England.

58. I have held that the order of dismissal In the Instant case was not passed in exercise of the pleasure under Article 310, and that the Chief Engineer, Eastern Command, could not in law and did not In fact function as a delegate of the President in dismissing the plaintiff, I have also found that the Army Instructions as such do not confer any actionable light. This being the position, the question that arises is, whether It was necessary to observe the rules of natural justice in the enquiry on the findings of which the appellant before us was dismissed. Was the authority that held the enquiry under a legal compulsion to adopt a judicial process so as to attract the principles of natural justice ? Clearly, there is no statute that required the authority to proceed judicially or quasi-judicially. In deciding when an authority IB required to act judicially, a passage in the judgment of Atkin L.J. In *flea;, v. "Electricity Commissioners (1924) 1 K.B. 17J* has been frequently referred to and universally accepted as authoritative. Stating the circumstances under which writs pf prohibition and certiorari can be Issued, Atkin, L.J., observed:

The operation of the writs has extended to control the proceedings of bodies which do not claim to be and would not be recognized as Courts of Justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act In excess of their legal authority, they are subject to the controlling jurisdiction of the King"s Bench Division exercised In these writs.

59. These much-quoted lines however eat themselves to conflicting interpretation. Lord Hewart, C.J., In *Rex v. Church Assembly Legislative Committee (1928) 1 K.B. 411* understood Lord Atkin to mean that before a body can be said to be bound to observe the principles of natural justice, two ingredients must be present: it should have legal authority to determine questions affecting the rights of subjects, and

here must be superadded to that characteristic the further characteristic that the body has the duty to adt judicially.

According to Lord Hewart, C.J., the duty to act judicially Is a separate and independent requirement which must be present before a body can be expected to observe the rules of natural justice. The view of Lord Hewart, C.J., WBB followed in a number of cases both In England and in this country as being a correct exposition of what Lord Atkin had meant, notable among them is the decision of the Privy Council in *Nakkuda Ali v. M. F. de S. Jayaratne 1861 A.C. 66*, In the year 1983 the House of Lords in *Ridge v. Baldwin 1963) 2 All E.B. 66* on an exhaustive review of the decided cases in England bearing on the application of the principles of natural Justice found that leaving aside war-time legislation which excluded the principles of natural aside as one of India saoriaces that war conditions required, until recently the decisions were uniform in holding that when an authority has the power to determine and decide the rights of an individual, it has a duty to act judicially.

60. Whether It was a case of removal from office, or pulling down a house, or even deprivation of membership of a professional or social body, the Courts held that the authority empowered to take action should follow " the Implied condition prescribed by the principles of eternal justice" Ex parte Ramshay-(1852) 18 Q.B. 173 (180), that

although there are no positive words In a statute requiring that the party be heard, yet the justice of the common law will supply the omission of the legislature " Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S. 180(194)

and that the rule *audi alteram partem*

is not confined to the conduct of strictly legal tribunals but is applicable to every tribunal or body of persons "Invested with authority to adjudicate upon matters Involving civil consequences to Individuals" Wood v. Wood (1874) L.R. 9 Exch. 190 (196).

As pointed out by Lord Reid In Ridge v. Baldwin (1963) 2 All E.R. 66 (vide supra) the judicial element is Inferred from the nature of the power; the duty to act judicially is not a separate and Independent Ingredient. According to Lord Hail, Lord Atkin In the passage quoted above was only reiterating the position established through the years, and the gloss put on It by Lord Hewart was not approved. Lord Reid remarked that

If Lord Hewart, C.J., meant that It is never enough that a body simply has to determine what the rights of an Individual should be, but there must always be something more to impose on It a duty to act judicially before It can be found to observe the principles of natural justice, then that appears to me impossible to reconcile with the earlier authorities.

After the decision of the House of Lords In Ridge v. Baldwin (1963) 2 All E.R. 66 (vide supra), the line of cases beginning with R. v. Church Assembly Legislative Committee and including Nakkuda Ali v. M. F. de S. Jayaratne and R. v. Metropolitan Police Commissioner, Ex. Parker, so far as they take a contrary view on this point, must be considered as no longer good law. It cannot be and now, as Lord Goddard, C.J., did In Ex parte Fry (vide supra), that an authority exercising its disciplinary powers has no duty to proceed judicially or quasi-judicially. The House of Lords has taken away the case from the hand of Lord Goddard's schoolmaster.

61. The established position seems to be that whenever any body of persons or authority determines questions affecting the rights of subjects, being legally competent to do so, It has a duty to proceed judicially In the sense that It must observe certain fundamental rules of justice and fairplay, provided, of course, there is no statutory provision which excludes the judicial approach. The body or authority need not necessarily be a court or a judicial tribunal in the strict sense of the term. Again, legal competence In this context does not necessarily imply statutory authority. An administrative body acting within its

bounds has undoubted legal authority for what it does, and such body, when It has to determine questions affecting the rights of subjects, must proceed judicially. Often an executive or administrative authority has to determine on evidence disputes arising out of claims made by opposing parties, and even where there are no two contesting parties before it, that authority has quite often to decide between a proposal made by the authority itself and an opposition offered by the subject concerned ?in all cases the authority has to adopt the judicial approach and observe the principles of natural justice. This does not mean, how-ever, that an administrative body must proceed judicially even when It has to take a decision purely upon considerations of policy or expediency, affecting the rights of the subjects only remotely and indirectly. But there again, If at any stage in the course of reaching its administrative decision, the authority has to decide on evidence between proposals and objections, It has a duty to act judicially at that stage. The position in this regard has been explained as follows In *R. v. Manchester Legal Aid Committee Ex parte R.A. Brand & Co., Ltd.* (1952) 2 Q.B. 413 431:

The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be Impossible and Indeed, inadvisable to attempt to define exhaustively. Where the decision is that of a Court, then, unless, as in the case for Instance, of justices granting excise licences, it "is acting In a purely ministerial capacity, it is clearly under a duty to act judicially. When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus, if, In order to arrive at the decision, the body concerned had to consider proposals and objections and consider evidence, then there Is the duty to act judicially in the course of that Inquiry. That as It seems to us, la the true basis of the decision In *Errington v. Minister of Health* (1935) 1 K.B. 249. While the Minister's decision to confirm the clearance order was an administrative act for the purpose of which he was entitled and bound to take Into consideration questions of policy, before arriving at the decision, he had to consider the objections of the property-owners and the views of the local authority. In other words, at one stage of the proceedings leading up to his decision there was something In the nature of a Us before him, and at that stage there was a duty to act judicially, as, for instance, not to hear one side behind the back of the other.

* * * If, on the other hand an administrative body In arriving at its decision at no stage has before It any form of Us and throughout has to consider the Question from the point of view of policy and expediency, It cannot be said that it is under a duty at any stage to act judicially.

62. In *Province of Bombay v. Kusaldas Advani* (1950) Section C.R. 621, our Supreme Court examined the distinction between a judicial or quasi-judicial decision and a decision which of an administrative or ministerial nature. There are passages in some of the judgments delivered in that case which suggest that

an authority in making a decision is required to proceed judicially only when the law under which the authority in along itself requires a judicial approach. I think, however, that on a proper reading of all these judgments, to the majority of them the views expressed by Lord Reid in *Ridge v. Baldwin* (1963) 2 All E.E. 68 (vide supra) on the application of the principles of natural justice would appear to be complementary and not in conflict. Besides, in a recent decision of the Supreme Court, *Associated Cement Companies, Ltd. v. P. N. Sharma* 1965 1 L.L.J. 433 Gajendragadkar, C. J, referred to the decision in *Ridge v. Baldwin* (1963) 2 All E.R. 66 (vide supra) in some detail and observed as follows on the effect of that decision:

It would thus be seen that the area where the principles of natural Justice have to be followed and judicial approach has to be adopted has become wider and consequently, the horizon of the writ jurisdiction has been extended in a corresponding measure.

63. The Supreme Court has thus endorsed in unambiguous terms the views expressed by Lord Reid, which must, therefore, be accepted as the law in this country as well. It appears from the cases reviewed in *Ridge v. Baldwin* (1963) 2 All E.R. 66 (vide supra) that the doctrine that an authority has no duty to proceed judicially unless there is a statutory compulsion in that regard, is of a comparatively recent origin and opposed to the view uniformly expressed by the English Courts from the earliest times. With *Ridge v. Baldwin* (1963) 2 All. E.R. 66 (vide supra), this new doctrine which had been slowly rearing its head, was scotched, killed and buried in the country of its origin; I do not see why we should let its ghost trouble us any longer in this country.

64. Bearing in mind the scope and extent of the application of the principles of natural justice, was the authority that held the enquiry against the appellant under a duty to observe these principles? Did the enquiry affect any legal right of the appellant? The answer is undoubtedly in the affirmative. The relation between the Government and its employees is different from the ordinary master-and-servant relationship. The position of the Government servants in this regard has been summarized by S.R. Das, C. J., in *Parshotam Lai Dhingra v. Union of India* 1958 1 L.L.J. 544 (vide supra) as follows at p. 552:

In the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service or the post is abolished and his service cannot be terminated except by way of punishment for misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after due notice to him. An appointment to a temporary post for a certain specified period also gives the servant as appointed a right to hold the post for the entire period of his tenure and his tenure cannot be put an end to during that period unless he is, by way of punishment, dismissed or removed from service.

65. I think that this position is now established as a rule of law subject, of course, to Article 310 of the Constitution. The appellant who held a permanent post in the Military Engineering Service had normally a right to continue in that post till superannuation. Thus, on the result of the enquiry which was held by the authority in the exercise of its disciplinary powers depended the future career of the appellant. Clearly, therefore, the authority holding the enquiry had a duty to proceed judicially and follow the rules of natural justice and admittedly it did not. The dismissal of the appellant based on the result of such an enquiry must therefore be set aside as void. Sri Boy at one stage of his arguments said that making it obligatory on the enquiry authority to observe the rules of natural justice means Introducing through backdoor the protection of Article 311 to which the appellant was admittedly not entitled. I do not think this argument is sound. It is not correct to think that apart from Article 311 one has no right to complain even if the most elementary principles of justice are disregarded. The special Importance of Article 311 lies In this that it serves as a check on the power of the President or the Governor under Article 310 to dismiss at pleasure, which is otherwise supreme. One who does not come within the categories of parsons to whom Article 311 has been made applicable, has no protection if the President or the Governor la pleased to dismiss him in exercise of the power under Article 310. Article 311 is not in the Constitution just to keep a class of persona out of the scope of application of the fundamental rules of justice recognized in that article.

66. The only question that remains for consideration is whether the rules framed under Article 309 which Include, inter alia, provisions relating to disciplinary matters concerning civilians in the Defence Services which were brought Into operation when the departmental appeal preferred by the present appellant had been pending, have any application in the facts of the instant case, These rules are in similar terms as Army Instructions No. 212 of 1949 and contain provisions giving the said members of the Defence Services adequate opportunity of defending themselves In disciplinary proceedings; these rules are justiciable as such apart from any consideration of the principles of natural justice. On behalf of the appellant attempt was made to show that these rules are retrospective, but as they came into force after the enquiry was over, it seems that they can hardly make any difference in this case even If their retrospective character la assumed. It is to be noted, however, that Rule 31 of these rules framed under Article 309 provides, inter alia, that an appeal pending at the time when these rules came into force shall be deemed to be an appeal under these rules. No argument was advanced before us on the scope and effect, of this provision. Clearly the appellate authority under these rules has a duty to proceed judicially it does not appeal, however, from the records of the case how this quasi-judicial tribunal proceeded In disposing of the appeal. As there was no argument at the bar on this aspect of the matter, I would prefer not to express any opinion on the applicability and effect of these rules on this case. But since I have held that the original order of dismissal was void, the order of the appellate authority affirming

the dismissal must also be treated as a nullity.

67. In the result, this appeal must succeed. The judgment and decree of the Court of appeal below should be set aside and those of the trial Court restored but, I think, with a slight modification. The trial Court granted, inter alia, a declaration that the plaintiff was still in service. But more than six years have passed since the judgment of the trial Court was rendered and one does not know whether the plaintiff has in the meantime attained the age of superannuation or whether there is any other circumstance which would disentitle the plaintiff from getting a similar declaration to-day. To avoid any possible misunderstanding, I think, the declaration that the plaintiff is still in service should be modified and the plaintiff declared to have been in service at the date of the institution of the suit. The other declaration granted by the trial Court that the original order of dismissal and the appellate order affirming it are void, shall be retained.

68. The appeal is allowed with costs against the respondent, Union of India, the judgment and decree of the Court of appeal below are set aside and those of the trial Court restored with the modification indicated above.