

(1959) 08 CAL CK 0011
In the Calcutta High Court
Case No : Civil Revn. Case No. 1702 of 1958

Purnanando Patra

APPELLANT

Vs

Collector of Central Excise, Calcutta and Another

RESPONDENT

Date of Decision : 13-08-1959

Acts Referred:

Central Civil Services (Temporary Service) Rules, 1949 — Rule 2, 3, 5
Constitution of India, 1950 — Article 310, 311, 311(2)

Citation : AIR 1960 Cal 314

Hon'ble Judges : H.K. Bose, J

Bench : Single Bench

Advocate : Priti Bhusan Burman and D.N. Mukherji, for the Appellant; Prafulla Kumar Roy and Debi Prosad Pal, for the Respondent

Judgement

H.K. Bose, J.—This is an application under Article 226 of the Constitution for an appropriate Writ for cancellation of an order dated the 25th February 1958 terminating the employment of the petitioner as an Inspector of Central Excise and for directing the opposite parties to forbear from giving effect to that order.

2. On 30th July 1946 the petitioner was appointed as a temporary Inspector in the Central Excise Collectorate, Calcutta, having its jurisdiction over West Bengal and Orissa. On 1st May 1951 the petitioner was allowed to cross the probationary stage in the prescribed time scale of pay with effect from 1st January 1950 and the petitioner was warned that if the petitioner failed to pass the departmental examination for Inspectors within the next permissible chances his increment in the time scale of pay would be stopped until further orders, and he would be liable to be discharged or reverted as the case might be. The prescribed time scale of pay at the time was Rs. 80-Prob-100-5-120 E.B.-8-200-10/2-220. The petitioner appeared for the first time in the departmental examination in May 1953 but he passed only in three out of the five papers and on account of this failure of the petitioner to pass the departmental examination completely, the petitioner's increment in the time

scale of pay was stopped with effect from 1st August 1953. The petitioner was thereafter called upon to appear in the two papers in which he had failed, at the departmental examination which was to be held at Calcutta on 13th May 1954, while he was at Banamalipur in Puri district, having been transferred there on 9th May 1954. The petitioner received intimation about the examination on 12th May 1954 and he at once made arrangements for coming down to Calcutta but in spite of his efforts he missed the examination in paper No. I and appeared only in Paper II. On 3rd May 1955 the petitioner received an order under Rule 6 of the Central Excise Departmental Examination Rules 1049 discharging the petitioner from service with effect from the date of service of the Order. On 10th May 1955 the Order was served on the petitioner and he was relieved from Government service on the same date.

3. The petitioner thereupon sent several representations to the Central board of Revenue on 12th May 1955, 4th July 1955 and 12th September 1955. On 7th October 1955 the petitioner was reappointed as a temporary Lower Division Cleric. The petitioner made repeated representations against this order and after some correspondence the petitioner was informed on 7th January 1956 that the petitioner had been removed from his service as Inspector for failure to pass the departmental examination and he was appointed as a Lower Division Clerk as a special case on compassionate grounds. On 28th June 1956 the petitioner moved this Court under Article 226 of the Constitution and Sinha, J. issued a rule on the opposite parties to show cause why the order dated 3rd May 1955 should not be cancelled or quashed. On 7th January 1957 during the pendency of the Rule the order of discharge dated the 3rd May 1955 was cancelled and the petitioner was reinstated in service in the grade of Inspector of Central Excise, with effect from the date of his discharge, and was posted to Kalimpong division. The petitioner joined his post at Kalimpong on 31st January 1957. Sometime thereafter he was transferred to Kurseong. The petitioner after his reinstatement made several representations for payment of his arrears of salary but no reply was received to such representations. The petitioner however was given another chance after his reinstatement to pass the departmental examination in Papers I and II held on 6th July 1957 and 8th July 1957 in which the petitioner appeared but he failed in both the papers. Before appearing in the examinations the petitioner by his letter dated the 27th May 1957 asked for supply of some books from the department of Central Excise Collectorate and the books were supplied to him on 3rd June 1957. After his failure in the July examination the petitioner was asked to be in readiness for the Departmental examination to be held in November 1957 but as ultimately the Central Board of Revenue did not condescend to give the petitioner any further permission to appear in the examination the petitioner's services were terminated by an order dated the 25th February 1958 with effect from 6th April 1958 in accordance with R. 5 of the Central Civil Services (Temporary Service) Rules 1949 upon one month's notice being given to the petitioner. The said order dated the 25th February 1958 may be set out hereunder :

"Sri Purnananda Patra. a temporary Inspector of Central Excise is hereby

informed that his services are no longer required in this Collectorate. Under R. 5 of the Central Civil Services (Temporary Service) Rules he is accordingly hereby given one month's notice of termination of his service. This notice will take effect from the date on which it is served on Sri Patra and his services will accordingly stand terminated at the expiry of the period of one calendar month from that date.

Sd/- R. N. Misra Collector of Central Excise, Calcutta. 24-2-1958."

4. The first contention raised by Mr. Burman, the learned Advocate for the petitioner, is that the petitioner having been appointed on 30-7-1946, the Central Civil Services (Temporary Service) Rules which came into force in 1949 cannot have any retrospective application to his case. But it has been pointed out in previous decisions of this Court, that u/s 241(2) of the Government of India Act 1935 the Government had the power to frame rules so as to affect services of persons in the employment of the Government--no matter whether such service commenced before the coming into force of the Government of India Act 1935 or after it came into operation. The Central Civil Services (Temporary Service) Rules 1949 were framed under this rule-making power, and the petitioner's employment being a continuing one and it having continued after the framing of the Rules, the Rules operated prospectively in the case of petitioner's service. In my view there is no substance in this contention of the petitioner. In fact in the case of K.S. Srinivasan Vs. Union of India (UOI), (2nd column top) no such point was even attempted to be raised and it was conceded that these Rules were the relevant Rules which governed the conditions of the service of the appellant who was appointed on 1-5-1946.

5. The next point that has been argued by Mr. Burman is that the petitioner being in the service of the Government from 30-7-1946 to 25-2-1948 the petitioner must be deemed to be in the quasi-permanent service of the Government and hence Rule 5 of the Central Services (Temporary Service) Rules 1949 has no application to his case.

6. Now the expression "Quasi-permanent service" has been defined in Rule 2t,b) of the Central Civil Services (Temporary Service) Rules 1949 as follows:

" "Quasi-permanent service" means temporary service commencing from the date on which a declaration issued under Rule 3 takes effect and consisting of periods of duty and leave (other than extraordinary leave) after that date".

7. So according to this definition a declaration as contemplated in Rule 3 is essential before a service can be regarded as quasi-permanent service.

8. Rule 3 as appearing in the Government publications (Except the Gazette of India) reads as follows:

"A Government servant shall be deemed to be in quasi-permanent service:

(i) if he has been in continuous Government service for more than three years,

and (ii) if the appointing authority being satisfied as to his suitability in respect of age, qualifications, work and character for employment in a quasi-permanent capacity, has issued a declaration to that effect in accordance with such instructions as the Governor-General may issue from time to time".

9. It will also be convenient at this stage to set out the relevant portions of Rule 5 and Rule 6 on which reliance has been placed by the learned Advocate for the petitioner:

"Rule 5 (a)--The service of a temporary Government servant who is not in quasi-permanent service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant.

(b) The period of such notice shall be one month, unless otherwise agreed to by the Government and by the Government servant.

Rule 6 -- The service of a Government servant in quasi-permanent service shall be liable to termination:

(i) in the same circumstances and in the same manner as a Government servant in permanent service, or

(ii) * * *

10. The argument of Mr. Burman is that the conjunction "and" appearing in the Government publications between Rule 3(i) and Rule 3(ii) is a misprint as the Gazette of India publication shows that the word "and" is not there, and consequently a Government servant who is in continuous Government service for more than three years shall be deemed to be in quasi-permanent service and as under Rule 6(i) the services of such an employee can be terminated only in the manner in which services of permanent Government servant can be terminated, such a servant is entitled to the protection and benefits of the provisions of Article 311(2) of the Constitution. As the petitioner is in Government service for about 12 years he must be deemed to be in quasi-permanent service and so his services cannot be terminated under Rule 5 but only under Rule 6(i) and as that has not been done, and no opportunity as required under Article 311(2) has been given to him to show cause against the action proposed to be taken against him, the order dated 25-2-1958 is invalid and inoperative.

11. Reliance is placed on the decision of the Supreme Court in the case of Parshotam Lal Dhingra Vs. Union of India (UOI), where after laying down the proposition that a person appointed substantively to a permanent post and a person appointed to a temporary post for a fixed term of years, in Government service, have a right to their post and are entitled to the benefit of the provisions of Article 311(2) when their services are sought to be terminated for misconduct, negligence, inefficiency or other disqualifications, S. R. Das C. J. proceeded to observe as follows: (page 48)

"Further, take the case of a person who having been appointed temporarily to a post has been in continuous service for more than three years or has been certified by the appointing authority as fit for employment in a quasi-permanent capacity, such person under Rule 3 of the 1949 Temporary Service Rules, is to be deemed in quasi-permanent service which under Rule 6 of those Rules can be terminated (i) in the circumstances and in the manner in which the employment of a Government servant in a permanent service can be terminated or (ii) when the appointing authority certifies that a reduction has occurred in the number of posts available for Government servant not in permanent service. Thus when the service of a Government servant holding a post temporarily ripens into a quasi-permanent service as defined in the 1949 Temporary Service Rules, he acquires a right to the post although his appointment was initially temporary and therefore the termination of his employment otherwise than in accordance with Rule 6 of those Rules will deprive him of his right to that post which he acquired under the rules and will prima facie be a punishment and regarded as a dismissal or removal from service so as to attract the application of Article 311. Except in the three cases just mentioned a Government servant has no right to his post and the termination of service of a Government servant does not except in those cases amount to a dismissal or removal by way of punishment".

12. It is clear from the above observations of the learned Chief Justice of India that it was the Rule 3 of the Central Civil Services (Temporary Service) Rules, 1949 as published in the Gazette of India, without the conjunction "and", which had been placed before the Supreme Court, and the learned Chief Justice was construing such rule. According to such construction the petitioner before me who has put in a continuous service for a period of about twelve years is to be deemed to be in quasi-permanent service and so Rule 5 has no application to his case and the order dated 25-2-1958 which purports to terminate the employment of the petitioner in terms of Rule 5 is bad.

13. It may be pointed out however that in the latter case before the Supreme Court reported in AIR 1958 SC 418 to which I have already referred, in an earlier part of this judgment, Rule 3 with the conjunction "and" was placed for consideration before the Supreme Court and S.K. Das J. has set out this Rule in his judgment at page 424 (2nd column bottom). Now if the conjunction "and" was in fact in Rule 3 as framed by the Rule-making authority, then the petitioner cannot be regarded as being in quasi-permanent service by reason of his merely putting in a continuous service of more than three years. There has to be further a declaration, as contemplated in Rule 3(ii) in order to convert the service of the petitioner into a quasi-permanent service.

14. Mr. Roy on behalf of the respondents has however argued that whether the disputed conjunction "and" is there in Rule 3 or not, is immaterial, inasmuch as the definition of the expression "quasi-permanent service" as given in Rule 2 (b) clinches the matter in issue. According to Mr. Roy, this definition makes it clear that a declaration as contemplated in Rule 3(ii) is an essential ingredient of a

quasi-permanent service or status. In other words according to Mr. "Roy, before the petitioner can be deemed to be in quasi-permanent service it is incumbent on him to show, not only that he has been in continuous Government service for more than three years but also that the appointing authority has issued a declaration as contemplated in Rule 3(ii).

15. In my view the contention of Mr. Roy is correct. It appears to me that Rule 2(b) and Rule 3 should be read together, and Rule 3 is a further amplification and clarification of the definition Clause 2(b). Even if the conjunction "and" is not there in Rule 3 the definition clause indicates that a declaration as contemplated in Rule 3 is the sine qua non of a "quasi-permanent service". There is nothing repugnant in Rule 3 which excludes the operation of the definition clause. The first Supreme Court judgment in Parshotam Lal Dhingra Vs. Union of India (UOI), , did not lay due stress on the definition clause 2(b), and construed Rule 3 in an isolated manner. The later case of "Srinivasan" considered the definition clause--Rule 2(b) together with Rule 3 which had the conjunction "and" between Sub-rules (i) and (ii) of this Rule, and held that declaration is essential for a quasi-permanent service.

16. In my view this later decision has put the correct interpretation on Rule 3 and the interpretation will be the same whether the conjunction "and" is there or not.

17. So the petitioner not being in quasi-permanent service his services were validly terminated by giving notice under Rule 5. It has been held by the Supreme Court in the case of Hartwell Prescott Singh Vs. The Uttar Pradesh Government and Others, that termination of employment according to the conditions of service contained in the service rules does not amount to dismissal or removal from service so as to attract Article 311 of the Constitution. It is clear that in the present case the petitioner's services were terminated by giving one month's notice under Rule 5 because he failed to pass the departmental examination and was found to be unsuitable for the post. It is not a case of removal or dismissal from service.

18. It was further contended by Mr. Burman that the petitioner is to be regarded as a Probationer if he is found not to be in quasi-permanent service, and the termination of his service on the ground of inefficiency is a punishment and amounts to removal or dismissal of service and as he was not given the opportunity envisaged in Article 311(2) of the Constitution the order of termination of service is invalid- But the Supreme Court has pointed out in the case of Parshotam Lal Dhingra Vs. Union of India (UOI), that a probationer has no right to the post and termination of the service of a probationer is not prima facie and per se a punishment and does not attract the provisions of Article 311. But if the Government takes the view that a simple termination of service is not enough and the conduct of the probationer 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). There is however nothing in this case to indicate that the opposite parties have proceeded to inflict any of the punishments contemplated in Article 311. Rule 13 Explanation VIII (b) of the Central Civil Service (Classification, Control and Appeal) Rules 1957 makes it clear that termination in accordance with Rule 5 of the Central Civil Services (Temporary Services) Rules 1949 is not a penalty. Moreover the petitioner had already been allowed to cross the probationary stage before his services were finally terminated by the order dated 28-2-1958. So he was not a probationer when his services were terminated. So this contention of Mr. Burman has no force.

19. The next point urged by Mr. Burman is that under Rule 55B of the Civil Services (Classification, Control and Appeal) Rules 1930 the petitioner should have been apprised of the grounds of the proposal for termination of his employment and opportunity should have been given to him to show cause before passing any order terminating his employment. But no case is made in the petition that the petitioner was a probationer at the time his employment was terminated and no ground is taken in the petition that Rule 55B applies to his case. If a specific ground had been taken or any such specific case had been made, the opposite parties might have stated facts in their affidavit in opposition to controvert the allegations. The case made in the petition is as I have already pointed out that the petitioner was allowed to cross the probationary stage by an order dated 1-5-1951 with effect from 1-1-1950. This contention of Mr. Burman is therefore rejected.

20. It has been suggested in the petition that the order terminating the employment is a mala fide one but this point has not been seriously pressed at the hearing. I am however unable to come to the conclusion that the order was prompted by any improper motive or bad faith.

21. The petitioner had several chances to pass the departmental examination as appears from paragraph 9 of the affidavit in opposition, but he did not deliberately avail himself of these chances; and in the chances that he did avail of before the first Order of discharge was served on him on 10-5-1955, he failed to pass in all the papers. It is true that in respect of the examination held in May 1954 he was not given sufficient notice of the examination but after he had moved the High Court under Article 226 on 28-6-1956 the authorities apparently felt the reasonableness of the petitioner's complaint with regard to the May examination and so proceeded to reinstate him with effect from the date of discharge. Thereafter further chance was given to him to sit for the papers in which he had failed, but the petitioner failed to come out successful.

22. In my view no ground has been made out for interference under Article 220. The Rule is accordingly discharged. But there will be no order as to costs.