

(1975) 09 BOM CK 0007
In the Bombay High Court
Case No : Sp. C. A. No. 1337 of 1974

Vishwanath Sadashiv Deshpande and others APPELLANT
Vs
Comptroller and Auditor-General of India, New Delhi and others RESPONDENT

Date of Decision : 25-09-1975

Acts Referred:

Constitution of India, 1950 — Article 309, 310, 311

Citation : (1975) MhLj 876

Hon'ble Judges : B. A. Masodkar, J;A. R. Shimpi, J

Bench : Division Bench

Advocate : K. H. Deshpande and Y. B. Fadnavis, for the Appellant; P. G. Palshikar, for the Respondent

Final Decision : Allowed

Judgement

B. A. Masodkar, J.—The present petition has been Bled by the petitioners who are holding civil posts under the Comptroller and Auditor-General of India, in the affairs of Union Government and are designated as "Auditors", which posts were formerly known as Upper Division Clerks. All the petitioners who are 14 in number, except Nos. 12 and 14, have been confirmed in the department. From Annexure-1, which is not in dispute, it appears that petitioner No. 1 was appointed in 1950, while petitioner No. 11 is treated to be in service from 1943. Their dates of confirmation, firstly, as Lower Division Clerks and thereafter as Auditors are also mentioned and are between 1945 to 1964 and 1953 to 1973. These facts are not is dispute.

2. These petitioners absented from duty on May 10, 1974 because of the call of general strike by the Central Government employees. The next day, i.e, 11th of May 1974, was Saturday and 12th the Sunday, both being holidays. Meanwhile the strike appears to have been called off and the petitioners resumed their duty on 13th. Initially all these three days, i.e. 10th to 12th, were treated as absent from duty. But it was not disputed before us on behalf of the respondents that

eventually pay on account of 11th and 12th was released and no pay or allowance was paid for May 10th, 1974. By communication of June 27, 1974, the office of the Director of Audit and Accounts P.&T., Nagpur (Annexure-6) notified that the unauthorised absence will "constitute break in service with all its consequences". Earlier on May 24, 1974 similar such communication was issued notifying that the participation in the strike of the Central Government Employees from 10-5-74 to 12-5-74 was being treated as unauthorised absence and the pay was being cut for these days from the pay bills for May, 1974. In the month of August, 1974, a memo was issued intimating those who have gone on strike that the pre-examination training given to them and their candidature for the Departmental Examination was being treated as provisional. That Memo is at Annexure-7 and is of August 9, 1974. The examination which is called "Revenue Audit Examination" for the year 1974 was to be held on August 26, 1974. The notice as per the Annexure-9 of August 20, 1974 was prepared and put up by the Deputy Director of Audit and Accounts /Admn. P. & T., Nagpur, from which the names of the petitioners were omitted. It may be mentioned that even before this notice the petitioners had given wires and asked for the opportunity to appear for the examination. Those telegrams of August 20 are not in dispute. As their names were omitted, the present petition appears to have been filed on August 22, 1974, in this Court. This Court on August 23, 1974 directed that the petitioners is permitted to appear for the Examination to be held on 26th. However, the results of the Examination were to be withheld till further orders by this Court. The petitioners accordingly have appeared for the said Examination.

3. Now the scheme regarding the holding of these examinations is evidenced by Annexure-2 which is Comptroller and Auditor General's circular regarding Departmental Revenue Audit Examination for Upper Division Clerks and appears to have been issued on July 25, 1971. It states that the training courses for the staff in the various branches in the Audit Departments in the offices mentioned therein, are required to be given to the Upper Division Clerks in the matters of audit of revenue receipts of major revenue-earning departments like the income tax, Central Excise, Wealth Tax, Gift Tax, Estate Duty etc. and several other aspects of the Union as well as State constitutional functions. It also notes that there had been a phenomenal growth of receipts in the Post and Telegraph, Railways etc. which are under audit of other branches of the Audit Department, and having regard to these factors it was considered necessary to conduct training courses for the staff in those branches of the Audit Department in the matter of audit of receipts of the Departments under their audit with a view to intensifying the scope of audit of receipts. The question which was under the consideration of the Comptroller and Auditor General was eventually decided and with the concurrence of the Ministry of Finance was approved with the extension of the scheme to the Upper Division Clerks in other branches of the Audit Department such as, Railways, P. & T., Defence, Commercial, Commerce, Works and Miscellaneous, should be intensified by providing for training courses and a Departmental Examination at the end of training to test the knowledge. It is also

provided that on passing of these examinations, the Upper Division Clerks would be allowed to draw two advance increments in their scales of salary. Then follows the details of the scheme providing for Syllabus for the training course and the Departmental Examination. Conditions of the eligibility to sit for the Examination are laid down in paragraph (3) of the Circular and it provides as follows: -

"(3) Upper Division Clerks including Selection Grade Upper Division Clerks who are permitted to appear for the examination should have rendered not less than 3 years of continuous service as Upper Division Clerks on the crucial date to be fixed by the Comptroller and Auditor General every year and attended the prescribed training courses required to be conducted by the various offices. S. A. S. Part I, passed clerks and S. A. S: Part IT passed clerks not promoted as S. A. S. Accountants are also eligible to sit for the Examination."

Candidates are allowed 4 chances to successfully complete the said Examination. Para. (4) lays down the "Incentive to candidates passing the Examination", and it provides that those who pass the Examination will be allowed" two advance increments in the Upper Division Clerk or Selection Grade Clerk Scale; taking effect from the last day of the Examination and the next increment will accrue on the usual date of increment. Selection of candidates is provided by paragraph (5), where the principle of seniority has to be followed. By paragraph (6), training courses are provided and it is indicated that such courses for a period not exceeding 6 weeks with 1 to 1 1/2 hours of lecture or training on each working day so as to cover the syllabus are to be provided for. In the same paragraph it is provided that candidates who offer to appear for Examination may be required to apply in the prescribed form. The training courses are to be arranged immediately after the selection of the candidate; para. 4 deals with availability of books for the candidates, while para. 5 for the syllabus etc. with which we are not really concerned. It is not disputed before us on behalf of the respondents that all the petitioners under this scheme were given training as provided for by paragraph (6). It is apparent, therefore, that all the petitioners were treated as fit for training during the period preceding the eventual deletion of their names from the list of candidates for the 1974 Examination. That they have submitted their applications is also not in dispute.

4. This deletion of names from the list produced at Annexure-9, is thus the subject-matter of challenge of the present petition,

5. In the return filed on behalf of the first three respondents, i. e. the Department, it has been submitted that the examination is not a competitive examination nor the passing of this examination is a condition of permanency of auditors in the Government service. However, on passing this examination an auditor would be allowed to draw two advance increments in his time scale. Apart from this incentive, the auditor passing the examination does not get any benefit or preferment in the matter of employment. No employee has any right or claim to be selected for being imparted training in Revenue Audit and/or thereafter to appear in the Revenue Audit Examination. As to the reason why the

names were deleted, the return states (in para 2) :

".... Though the date of the Examination was fixed as 26-8-74, before that date a section of the Central Government employees declared an indefinite strike from 10-5-1974. The strike was illegal; The Government servants have no right to go on strike as they would be violating rule 7 of the Central Civil Services (Conduct) Rules. The petitioners participated in the strike and thereby violated the provision of Central Civil Services (Conduct) Rules and also committed an offence under the Defence of India Rules- The period during which the employees were on strike was treated as unauthorised absence involving break in service. An adverse entry in the confidential reports of the employees who participated in the strike by remaining unauthorisedly absent was also made. The adverse entry was made to the effect that the employees by participating in the strike were guilty of gross indiscipline and a sense of irresponsibility. As suitability and good conduct are basic and inherent conditions for being allowed to appear in the examination, it was decided by the respondent No. 1 viz., the Comptroller and Auditor General of India that employees in whose confidential reports the above mentioned adverse entry had been made were not suitable for being permitted to appear in the Departmental Examinations."

* * * * *

" It is submitted that Revenue Audit Examination is held under the administrative orders issued by the Comptroller and Auditor General of India and it is within his powers to determine and lay down the conditions of eligibility and reject the admission of candidates considered unsuitable."

As to the breaks in service, because of unauthorised absence on May 10, 1974, the return refers to the Central Civil Services (Conduct) Rules, 1964 and Central Civil Service (Classification, Control and Appeal) Rules, 1965. It makes a specific reference to F. R. 17 and Rule 7 of Conduct Rules. It relies on Rule 27 of the Central Civil Services (Pension) Rules, 1972 involving interruption in service.

6. On behalf of the Union of India, separate return is filed and reliance is placed on F. R. 17 to indicate that that would result in break in service; so also reliance is placed on rule 27 of the Central Civil Services (Pension) Rules, 1972. In paragraph 5 of the said return it is averred:

"5. It is further to be understood that the break-in service caused by the unauthorised absence does not render the employee becoming out of service in any circumstances. The employee concerned is allowed to remain in service without any fresh employment order. The "treatment given to the unauthorised absence can be of various types, but in the case of condonation by grant of leave, unless the employee concerned moves the local departmental authority for commuting absence without leave into extraordinary leave, nothing can be done suo motu on the part of the competent authority."

Then again in para. 6 it is stated:

"That although by "break-in-service" all the past services are forfeited, but as the employee does not become out of service, he is allowed the same rate of pay even after the break, as was being drawn by him before the period of the break."

It is further stated:

"However, the break being a period when no duty was performed and the absence being unauthorised, the period is not counted for incremental purposes and it also affects certain other benefits like leave, Travel Concession, Children Education Allowance, Grant of Quasi-permanency, eligibility for Departmental Promotion Examination where one of the prescribed conditions of the eligibility is that the employee concerned should have put in a specified minimum amount of continuous service immediately before a prescribed date. In the present case since the continuity in service gets broken because of the period of unauthorised absence which causes a break, the employee ceases to be eligible for the corresponding facilities till he completes the specified minimum period of continuous service after the period of break."

Further in paragraph 8 it is stated as:

"8. The break-in-service is the direct result of the unauthorised absence vide proviso (1) to F. R. 17 and this F. R. 17 is to be read with Article 420 of the Civil Services Regulations and Rule 27 of the Central Civil Services (Pension) Rules, 1972."

Thus for the Union the eligibility of the petitioners is being denied because there has been unauthorised absence on 10th May 1974 which resulted in break-in-service involving forfeiture of all the past service for the purpose of counting it under the scheme mentioned hereinabove. For the purpose of the Department, apart from the break-in-service, the suitability of the candidate involving his conduct as evidenced by the confidential record wherein the entry has been made recording that he had gone on strike and further that he had violated Rule 7, is also being relied upon.

7. It may also be stated at the outset before we turn to the respective submissions that it is not in dispute that before the petitioners' names were deleted from the list, they were not given any show cause notice nor were they heard in that regard. Even before us no order has been produced showing that any decision was taken with regard to these petitioners by the Comptroller and Auditor-General or and that there is any record thereof made by that authority by passing a speaking order. We will indicate hereinafter that the submission of the learned counsel appearing for the Union of India is that making of such an order is not necessary and the omission from the list is good enough and that he mainly relies on the statements that are contained in the return.

8. It is contended for the petitioners that there is no foundation in any rules, either the Central Civil Services (Conduct) Rules (hereinafter called the Conduct Rules) or the Disciplinary Rules that are framed or those are referable to the

provisions of Article 309 of the Constitution indicating that there could be a break in service by simple unauthorised absence. He submits that in the matter of civil service, action regarding break-in-service can only be founded on the prescribed rules and in all other cases the action will be unauthorised. It is contended that concept of break-in-service, as is understood by the respondents and as is stated in the returns, involves serious civil consequences, in that the past service of the civil servant has to be treated as if not rendered, and not available for the purpose of counting and further that he is to be deprived of the continuity of the service for the purpose of calculation of the same under the scheme by which he can further the chances in the matters of employment. It is submitted that the scheme formulated by the Comptroller and Auditor General is for the benefit not only of the Department but also of the civil servant. It confers certain privileges and clothes the selected employee for training who successfully passes the examination with a right to receive certain benefit. There are also obligations imposed, in that such an employee who is covered by the scheme has to undergo training in the prescribed syllabi by attending the courses and lectures as indicated and is required to appear for the examination. By taking the training and appearing for the examination, it is submitted that he furthers his chances in the matter of his services and it cannot therefore be said that the scheme does not confer any right on the employee.

9. Mr. Deshpande appearing for the petitioners further submits that it is well settled by the catena of decisions of the Supreme Court that before the civil servant is meted out with any evil consequences in the matters of his employment and appointment, there is a duty to act fairly and judiciously and that denying the right of examination and consequent chance of getting two advance increments in the salary are the civil consequences and unless the orders are made in keeping with the principles of natural justice and fairly, he submits that the decision omitting the names of the petitioners is contrary to law and as such invalid. He relied on the following decisions of the Supreme Court:-

Jai Shanker Vs. State of Rajasthan, , State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, , Union of India (UOI) Vs. K.P. Joseph and Others, , State of Punjab Vs. K.R. Erry and Sobhag Rai Mehta, , Shri Raghunandan Panda Vs. State of Orissa and Others, and The Government of Mysore and Others Vs. J.V. Bhat and Others, .

10. As against this, Mr. Palshikar appearing for the respondents and Union of India contended that, firstly, the petitioners have no legal right to seek enforcement of a mere circular providing for a scheme for examinations. His approach is that these are merely administrative instructions and no right has been conferred upon the civil servants and, therefore, the petition is unentertainable. From this it is contended that in true character the scheme has been framed for administrative efficiency and is in the nature of privilege conferred on the employees always at a discretion of the employer. It is submitted strenuously that by very nature of things, such concessions are

privileges and are liable to be withdrawn and such withdrawals cannot be justiciable. Although he conceded that no speaking order has been produced in support of the decision to omit the names of the petitioners from the list of candidates permitting to take the examination, he submits that the statements made in the return disclose good grounds and the Court should be satisfied that in fact the petitioners had participated in the strike on 10th of May 1974 and thus had acted in breach of Rule 7 of Conduct Rules. There had been consequently the decision taken to treat the absence on that day as resulting in break-in service. It reflected in the confidential record. Persons whose record has been considered by the authority to be adverse would not be suitable. The basic concept of the scheme is to promote the administrative efficiency of suitable candidates so that the working of the Department runs on smooth lines. There being no right and the scheme being more or less in the nature of concession, it is urged that, not permitting the petitioners to take the examination would not subject them to any civil consequence nor to penalty. The principles, therefore, of natural justice, fairness or judiciousness in the matter of reaching those results are not at all available to the petitioners. He contends that there is implicit evidence in the framing of Central Civil Services (Conduct) Rules, 1964 along with Central Civil Services (Classification, Control and Appeal) Rules, 1965 read with Central Civil Services (Pension) Rules, 1972, hereinafter called, Conduct Rules, Control Rules and Pension Rules respectively, to show that absence of duty because of strike would tantamount to break in service and the past service would not be available to the employee for being counted as his continuous service so as to be able to appear for the examination. He emphasizes the scheme itself and particularly paragraph 3 which we have extracted above to make a submission that that paragraph shows that eligibility is a matter to be determined by the selection authority. Several administrative considerations may weigh with the authority and break in service by reason of the unauthorised absence should be treated as a sound and existing ground permitting omission of the names of the petitioners from the list of examinees. As to the decisions of the Supreme Court the learned counsel submits that there being no civil consequences, no question of any opportunity of being heard arises in such matters.

11. Now these respective submissions and the admitted positions indicate to us that what has weighed primarily with the authorities, i. e. the respondents, while denying the opportunity of the examination to all these petitioners is the concept of "break in service" which is referable to the absence from duty by each of the petitioners on May 10, 1974. Undoubtedly, each of the petitioners did join the strike in contravention of Rule 7 of the Conduct Rules that provides a prohibition against the Government servant in the following terms:-

"7. Demonstrations and strikes.-No Government Servant shall-

(i) engage himself or participate in any demonstration which is prejudicial to the interests of the sovereignty and integrity of India, the security of the State,

friendly relations with foreign States, Public order, decency or morality, or which involves contempt of Court, defamation or incitement to an offence, or.....

(ii) resort to or in any way abet any form of strike or coercion or physical duress in connection with any matter pertaining to his service or the service of any other Government servant."

11. Undoubtedly these are salutary provisions made in the interest of public services. However from itself nothing further than what is stated follows. Having provided for such a prohibition these Conduct Rules by themselves do not indicate what would be the consequence if one acts in breach of it. Though clearly a negative injunction operating against Government servant is so stated, result thereof is not indicated. Government servant acting in breach would obviously expose himself to penalty and that field providing for punitive consequences is left out to be dealt with by the Control Rules. It appears implicit in this that upon breach of this inhibition to resort to strike Government servant will have to be suitably dealt with under those Rules and no automatic result is attached to the breaking of this provision. Only because a Government servant resorts to strike it is nowhere provided, nor was any prescription brought to our notice, that from that moment he ceases to hold office or that his service comes to an end by operation of any rule or law. The matter obviously is left to be dealt with appropriately by the authorities under the Control Rules. The subject of Control Rules is to provide, firstly, for the classification of several categories of civil services and, secondly, enabling the authorities for taking disciplinary action against the civil servant. With this view, the Rules provide how a suspension can be brought about of a civil servant and how penalties could be imposed and disciplinary action can be initiated against those who are holding a civil post for misconduct. The terra "misconduct" is wide enough to include breach of Conduct Rules including the one providing for prohibition against strike. By Rule 11, in Part V, of Control Rules, for good and sufficient reasons, stated penalties which are classified as minor and major can be imposed on a Government servant. The major penalties include inter alia the penalty of compulsory retirement, removal from service and dismissal from service. The Rules subject the decision to impose the penalties to review by the appellate authorities.

12. After careful scrutiny it becomes obvious that the Conduct Rules and the Control Rules are complementary to each other and evolve an integrated scheme of firstly laying down the do's and don'ts as far as civil servants are concerned and by separately providing for the authorities and the procedure as to how the civil servants can be subjected to penalties specifically stated by the Rules. Forfeiture of past service or introducing break in the tenure of the Government servant is not a penalty anywhere contemplated. If for the breach of Conduct Rules any such imposition would have been thought of there is no reason as not to mention the same. Looking to the composite scheme of these Rules the rule-making authority has in its wisdom provided that Government servant should be available as such to suffer penalty imposed after following the procedure

prescribed. If automatic break having effect of effacing the services rendered would have been thought of as resultant of breach of Rule 7 supra, serious complications would arise. One such being the person holding civil post by his unilateral act with impunity, would cease to be a Government servant the moment he acts in breach of that rule and thereafter not available to be dealt with by appropriate authority. Can it be said that such a consequence is contemplated? The matter has to be viewed from overall perspective. Of necessity it appears that the things are left to the field of Control Rules. We would indicate that this is all very much compatible with the concept of civil service and principles underlying service jurisprudence.

13. Subject of Pension Rules is quite distinct and different from these two Rules and those cannot be mixed while considering the matters while the civil servant is actually serving his tenure. The Pension Rules would come into effect when the civil servant ceases to hold the post or is not in the service and his entitlement upon such cessation has to be worked out. For that purpose if there be an interruption in the service, Pension Rules and particularly Rule 27 upon which reliance has been placed, indicates how that interruption has to be treated and how even that can be regularised by competent sanction. It states that an interruption in the service of a Government servant entails forfeiture of his past service, except in the following cases:

- (a) authorised leave of absence;
- (b) unauthorised absence in continuation of authorised leave of absence so long as the post of absentee is not filled substantively;
- (c) suspension, where it is immediately followed by reinstatement, whether in the same or a different post, or where the Government servant dies or is permitted to retire or is retired on attaining the age of compulsory retirement while under suspension;
- (d) transfer to non-qualifying service in an establishment under the control of the Government if such transfer has been ordered by a competent authority in the public interest; and
- (e) joining time while on transfer from one post to another.

By sub-rule (2) thereof, the pension sanctioning authority is enabled by an order to commute retrospectively the periods of absence without leave as extraordinary leave. All these contemplate an existing interruption in service. Object of Rule 27 is not to provide for interruption but to lay down its result for computing periods or tenure for entitlement and computation of the pension benefit. This Rule therefore cannot assist to find out as to when tenure having begun can be said to have been broken or interrupted.

14. As far as the Conduct and Control Rules are concerned, no rule was cited before us which will indicates that there would be automatic break in service or forfeiture of the past service upon happening of any particular event. In fact for

the Union it was conceded that there is no such specific rule either in the Conduct Rules or in the Control Rules introducing element of automatic "break-in-service" resulting in forfeiture of the past services rendered. Having provided for a prohibition so as to prevent Government servant from a resorting to strike, the matter is still left to be dealt with by the Control Rules whereunder punishments for good and sufficient reasons following the procedure can be imposed. Those Rules too do not provide for any such penalty of forfeiture of the past service rendered by the civil servant in a civil post.

15. That leaves us to consider whether such an implication follows from F. R. 17 on which both in the returns and at the time of the arguments the learned counsel appearing for the Union of India laid much stress. Before we extract the Rule itself, we may observe that it was contended that it is implicit in the scheme of F. R. 17, read with Rule 11, that a civil servant is obliged to serve the State or Union for twenty four hours. His wilful absence from that duty would automatically result in putting an end to the service itself resulting in "break-in-service" or tenure. It has been urged that the Rule should be so interpreted as indicating that every wilful absence from duty by a civil servant would efface his past service and he would only enter upon a fresh tenure, the old having come to an end.

16. Prima facie these appeared to us startling propositions based on mere implications of the rules referred. For founding forfeiture of such a kind, even under common law of master and servant, we would expect some term in contract or provision in law governing that relationship. By itself wilful absence from duty may be the outcome of several reasons and circumstances. Without providing for such a consequence it should be difficult to countenance such a submission, more so, in the case of a civil servant.

17. However, we proceed to extract the relevant parts of the Fundamental Rule relied upon :-

"F. R. 17. (1) Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties. Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence."

(Emphasis added)

Our attention was drawn to F. R. 11 as creating an obligation, in that Government servant would be deemed to be a whole-time Government servant. As against this, for the petitioners, reliance was placed on F. R. 56 to submit that till the civil servant attains the age of fifty-eight years, there is no break in service contemplated by these rules and every break in this tenure must result in the cessation of the service either amounting to dismissal or removal.

18. The Fundamental Rules lay down the general conditions of service as well provide for the matters regarding dismissal, removal, suspension, retirement and other ancillary and collateral subject. Every rule, therefore, will have to be understood and interpreted for the purpose for which it has been framed. Fundamental Rule 17 itself is the part of "General Conditions of Service" and by its terms it enables an officer to draw the salary and allowances attached to his post. It fixes the date when he becomes entitled to that pay and allowances and also the terminus when he will cease to be so entitled. It clarifies that such entitlement to pay and allowances will not be available to the officer who is absent from duty without authority. The proviso appended to sub-rule (1) of F. R. 17, to our mind, throws light on the very intention of the framers of the Rule. The subject of the Rule is, therefore, only to indicate the entitlement of an officer to pay and allowances attached to: the post during the tenure. The proviso not only excepts but explains the position that an officer absenting himself from duty without any authority would lose the entitlement for that period to such pay and allowances. Reading sub-rule (1) together with the proviso, it is therefore clear that it does not provide for any consequences of forfeiture of past service resulting in "break" in tenure. In fact tenure and its treatment is not the subject of this rule. It is not doubted nor was disputed that the concept of break in service postulates that on the day the break is reached, the tenure of the civil servant is put an end to or otherwise stands determined and after the break he would enter upon the fresh duration of service in his own post. This would entail obviously that services rendered till the day of such break would not be available to be treated as continuous after the day of break. It is difficult to read such a drastic consequence in the terms of F. R. 17. In fact we would for ourselves think that break in service involves forfeiture of the past service and should be expressly provided for. Tenure in a civil post by its very nature being a matter of continuity, its determining consequences should be spelt out clearly by the rules themselves and we would be slow in inferring by implication such a sequel of forfeiture of past service which would by itself determine the status of a civil servant and wipe out all his rights as well his obligations. Just like Pension Rules make provision regarding the matters of interruption of service, we do not find in "General Conditions of Service" under the Fundamental Rules any rule dealing with a "break in service" flowing from sheer fact that a civil servant has wilfully absented alone or in a consorted attempt with others without authority on any particular day. Suffice it to observe that the civil service with the State is a matter of status as well that of tenure. Once by appointment the post is held two consequences follow. Firstly there is entitlement of pecuniary benefit attached to the post and secondly fixity of terms provided for is assured to civil servant. F. R. 17 operates on the first while F. R. 56 on the other. The confirmed civil servant is entitled clearly to serve his full tenure fixed by the Fundamental Rules like F. R. 56 and his entitlement because of continuous service cannot be lightly determined. That tenure can be put an end to only by recourse to the permissible modes of determination of services, which may take the shape of termination, removal, dismissal, retirement or resignation. To these five modes

the natural calamity of death may be added. Concept of interruption of service provided for by Pension Rule does not affect tenure as such but. provides for how the periods are to be considered. "Break-in-service" being based on the consequence that involves either something like resignation or dismissal, leading unto surrender or forfeiture of past service rendered, cannot fit in, in contemplation of tenure attached to the post. Conceptually such results militate against basic concept of service jurisprudence. By introducing tenure attached to post, a time dimension holds the post and service rendered by the incumbent having relation to his entitlement or benefits having a quid pro quo of rendering good and honest personal services. By rendition of such service certain benefits accumulate and tenure to the credit of civil servant. Result of forfeiture would efface all that is so earned. In law to achieve such a state when the matters are of tenure as well of status express terms would of necessity must be available. Without there being any such provision and looking to the basis foundation and formulations underlying these concepts, no forfeiture of past service can be implied involving determination of tenure along with all loss of accumulated benefits as well obvious release from all obligations.

19. The nature of civil service being such that it is a tenure and a status, our Constitution thought it fit to put it under the protective umbrella, as is available in Article 311 of the Constitution enabling States to make Rules under Articles 309 and 310 for specified purposes. No rule however would be valid if it runs counter to what is provided for by Article 311. If we were to assume that there is any implication that the service rendered by a civil servant in a civil post would stand automatically determined, in that he will cease to be the civil servant by a contingency of wilful absence, it is clearly that we may be inferring quite contrary to the constitutional contemplation with regard to the protections afforded to the civil servants, for we would, by accepting imposition of "break-in-service", as canvassed for involving forfeiture of past service, be sanctioning a process of determination of service for cause and as such a dismissal from the tenure already undergone and served, such a drastic consequence surely cannot be merely implied. If "break" introduces determination of past service for cause of a given civil servant and "re-employment" afresh, can the first result be less penal than what is contemplated by "dismissal" of a civil servant? Even as a major penalty Government servant can be subjected to removal not affecting his chance to re-appointment. For meting out that punishment protection of Article 311 would be available and punishment imposed contrary to it would be void. We fail to see how the same result can be reached by changing mere label though the content and effect is the same. The matter is not being put on par with "resignation" or its resultant consequences but on forfeiture involving consequences of termination, effacement and of re-entry. The first two elements having result of punitive determination of services cannot but be reached except following the procedure prescribed for imposing penalty nor can be meted out contrary to Article 311 of the Constitution.

20. As we compare the schemes of Conduct Rules as well that of Control Rules

and the Pension Rules in the light of service jurisprudence, we feel that the only subject of F. R. 17 is to provide for entitlement to pay and allowances of a public servant while he is on duty, the only exception being that if he is absent from duty without authority then he will not be entitled to pay and allowances. There is no further implication possible to be worked out from the terms of F. R. 17 much less that of forfeiture of past service rendered by the civil servant.

21. The result of this finding is that the authorities were not right in treating that the absence on 10th of May 1974 which was in breach of Rule 7 of Conduct Rules automatically resulted in break-in-service in the case of every petitioner and thus resulting in forfeiture of their past services. As we have indicated and in fact quoted from the return, the main ground on which their eligibility for appearing at the examination has been decided is that their past service cannot be counted because that is the effect of break in service resulting from their participation on May 10, 1974 in the strike. If therefore there would not be any break-in-service brought about automatically under any of the Rules, such a ground was clearly not available to any of the respondents. We have, therefore, no hesitation in holding that the respondents have acted while denying the opportunity for appearing in the examination to these petitioners on a ground which has no legal sanction or foundation and in fact which under the Rules to which we have made a reference is non-existent one.

22. That takes us to the other aspects of the matter which were urged at the Bar in that it was contended that the petitioners have, no legal right and further that the scheme was merely a privilege capable of being withdrawn and as such unenforceable.

23. Having taken the view as we have on the first crucial point, really our answers to these submissions would be more or less academic, for it is enough for the purpose of the present petition to state that a decision which affects the matters of the petitioners' employment with the Union of India based on a ground for which there is no lawful sanction and as such non-existent, would entitle us to set aside the same.

24. The scheme indicated by the Circular produced at Annexure-2 undoubtedly is a scheme for providing intensified training and further providing for departmental examinations so as to achieve better efficiency in the matters of audit under the Comptroller and Auditor General. This is the motivation behind the scheme. However, it is absolutely clear that the substance of the scheme is that Upper Division Clerks should be provided for training for a period of six weeks on the subjects stated in the Syllabus and that if they have held the post continuously for a period of three years they should be permitted to appear for examinations as in case of success making them entitled to get two advance increments in their pay and salary. We read therefore in the scheme certain basic conditions permitting advancement in the matter of pay and salary as well bettering the efficiency in the discharge of duties attached to these posts. These are valuable adjuncts having practical and material orientations. It is not a mere matter of

chance or choice. Given opportunity, of training leading unto success increments in salary are assured. Everyone entitled under the scheme will have to be afforded equal opportunity in these regards. If there be any scope for selection in such matter and use of discretion that cannot be arbitrary, capricious or unguided. Withholding this facility in the garb of using discretion may in a given case affect the very matters of equality of opportunity and may also prove punitive. In fact if everything is equal and the person concerned has been holding the post for a period of three years choice or preference is regulated by the seniority and nothing more. The conditions of eligibility laid down in paragraph 3 and the selection of candidate in paragraph 5 of the Circular do not permit introduction of further or any other criterion. The conditions of eligibility which we have quoted above firstly indicate that the persons who are permitted to appear for examination should have rendered continuous service for a period of not less than three years as Upper Division Clerk on the crucial date and secondly should have attended the prescribed training courses. We may indicate that the emphasis for the respondents was being laid on the word "permitted" in above paragraph and it was urged that it is the logical implication that "permitted" would mean, only such candidates being permitted who are thought suitable. We are not inclined to infer any such subjective criteria in that phase and what that indicates is that normally if the persons are eligible in terms of paragraph in that they have attended the prescribed training course having been Chosen on the basis of seniority and that on the crucial date have at their credit three years" continuous service, they are treated as eligible for the examination. Even a person who may having adverse remarks in the confidential record may not be out of the test of this eligibility mentioned in paragraph 3 and paragraph 5, because obviously this is not a scheme for promotion but providing for efficiency and incentive to the Government servants in the matter of their work and duty. Surely, therefore, the remarks in the confidential record of a given employee will not be a condition of eligibility with regard to these matters. Even such an employee would be expected to be efficient and to know his job better and even be permitted, provided he undergoes the training and takes the test to get better emoluments in the same post. That cannot be denied to him on any other extraneous considerations. Though the words therefore are used in the manner in which they are being emphasized that the persons are permitted to appear, it appears to us that that has no nexus to the eligibility as such. The only condition under the scheme appear to be of continuous period of service and the training mentioned in paragraph 3 and seniority indicated by paragraph 5. Subject to these conditions, we do not find any other condition permitting the authorities to withhold this benefit under this efficiency-followed-by-incentive scheme in the matter of employment.

25. All this being plain and there being no condition in the scheme itself indicating any authority in favour of the respondents to withhold this benefit, only because there are some adverse remarks because of unauthorised absence from duty, we feel that the decision to omit the names of these petitioners who

were selected and trained for the prescribed period and who were continuously in service for the stated period could not have been reached by the respondents. From this follows the corollary that the scheme being of general benefit, its advantage and opportunity thereunder cannot be denied to public servant if he satisfies the eligibility under it such an action denying or withholding the benefit of the scheme which furthers the betterment in the matters of efficiency as well incentive in the pay and allowances that may have the effect on his future chances in the employment are surely matters of evil consequences to such servant. If any action, whether administrative, executive or quasi-judicial affects a civil servant so as to deprive him of the opportunity which is a part of the matter of his employment, we have no hesitation in holding that this Court will be entitled to review such a decision and grant appropriate relief to aggrieved party. It is not as if the scheme has been excepted from a particular class of civil servants. Out of the class of persons who are entitled to the benefit of the scheme certain persons are being excepted and, we have indicated above, on the grounds for which there is no legal sanction and which appears to be non-existent even under the scheme and relevant rules. The submission, therefore, that the petition is not entertainable, in our view, has no force.

26. On the very nature of the scheme and the benefits flowing thereunder, it is self-evident that its denial would be of a consequence in the matters of service to a civil servant. It has not been disputed before us that before this decision to omit the names of the petitioners from the list of examinees was taken, they were not given any opportunity of being heard. Even the grounds on which that decision was taken were not communicated to them and even before us no speaking order has been produced. In fact reliance has been placed on the averments made in the returns. We are therefore left to guess as to the existence of any such speaking order. The matter of training and the matter of examination being of consequence as it furthers the entitlement of the civil servant in getting two advance increments, we feel, the same could not have been denied except by following the minimum principles of fairness in this regard, in that the petitioners were entitled to know on what ground they were being denied this opportunity. Even if it be a privilege no other approach in this regard would be available. Though eventually permission to allow or to disallow appearance at the examination after the completion of the training may be termed as an administrative act, it is clearly fraught with the result that the person affected by negative decision loses an opportunity to further his prospects in the matters of employment. Unless therefore that decision is taken in keeping with the principles of natural justice, the same cannot be sanctioned. Before withdrawing the permission or refusing it minimum expected is that the person affected is communicated the grounds on which such action is proposed and his explanation sought and further that an order indicating the reason eventually made by the competent authority. These requirements that flow from the principle and necessary to act fairly while visiting someone with consequences that matter to him cannot be relaxed and should not be departed from.

Admittedly in this case all this has not been done. The decisions upon which reliance was placed for the petitioners indicates general principles that are attracted in such matters. Having come to the conclusions above it does not appear necessary to make reference to those authorities.

27. We have, therefore, no hesitation in holding that the omission of the petitioners' names from the list at Annexure-9 affected them adversely in the matters of their employment and is vitiated because of failure to follow the principles of fairness and justice. We have already found that the ground disclosed by the returns that there was in fact "break-in-service" is not based on any legal sanction and as such is not available and further that the other grounds disclosed in the returns are not the grounds on the basis of which trainees having undergone the studies could be denied the opportunity of taking the test.

28. In the result the omission of the petitioners' names from the list at Annexure-9 is illegal and the same is quashed. It is adjudged that the petitioners who were continuously in service for more than three years and had undergone admittedly the training prescribed under the examination scheme were entitled to appear for the examinations called "Revenue Audit Examination." They have already taken their examination and therefore we direct the respondents Nos. 1 to 3 to declare their result and if they have passed afford them the benefit of the scheme produced at Annexure-2. Petition is thus allowed. However, we do not make any orders as to costs.