JAMMU AND KASHMIR HIGH COURT

Sheik Ghulam Qadir

Vs.

State of J. and K

Writ Petn. No. 143 of 1968

(S.M. Fazl Ali C.J. and Jaswant Singh, J.)

02.05.1969

JUDGMENT

S.M. Fazl Ali, C.J.

1. This petition for an appropriate writ arises in the following circumstances.

2. According to the petitioners, two of them, namely petitioners 1 and 2 were gazetted employees and the others non-gazetted employees in the Department of Sericulture of the Government of Jammu and Kashmir. The petitioners further aver that the Sericulture Department is just like other Department of the Government consisting of gazetted and non-gazetted members of the staff and they were and are governed by the Jammu and Kashmir Civil Services Rules and Regulations in all matters and possess the facilities and the safeguards afforded to all Government servants of other departments. The petitioners further allege that they have always been treated as Government servants and their posts have been shown in the civil list and the budgets of the Departments concerned. In order, however, to stream-line the administration and to give it a commercial colour the Government on 3rd October 1963 constituted a Board called the Jammu and Kashmir Industries which was a State Government undertaking and which had a Memorandum and Articles of Association. After this undertaking came into existence, the then Sadar-i-Riyasat of Jammu and Kashmir (now Governor) issued instructions by which 21 industrial undertakings were entrusted to the Jammu and Kashmir Industries Ltd. The newly formed Jammu and Kashmir Industries was governed by a Board of Directors set up under the Memorandum of Association and was entrusted with several types of responsibilities like management, corporate organization, personnel and financial responsibilities and functions. The instructions further ordained that under the personnel responsibility of the Board the administration of the servants of the company was to be governed by the provisions of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules etc. from time to lime. After the issue of the aforesaid instructions on 3-10-63 the petitioners who were permanent employees of the Sericulture Department started working under the Board of J and K Industries on the same terms and conditions as applied to them before and they were treated to be as on deputation from the State Government to this Government undertaking.
Subsequently by a notification No. SRO 36 D/-11-2-66, note 6 was added to rule 52 of the

KCSR which provided that service in the companies owned by the Government should not be treated as foreign service for the purpose of grant of deputation allowance. It was further stipulated that those employees of the Industrial concerns who were entitled to pensionary benefits should be treated as employees of the J and K Industries and the pension of the employees of Sericulture Department entitled to pensionary benefits should be shared by the Government and the company under the rule of proportion but no deputation allowance would be admissible. A particular set of Government servants, however, who had been deputed to the Government undertaking would continue to receive deputation allowance. Lastly it was provided that in future individual cases for grant of deputation allowance were to be considered on their merits. We shall refer to the broad details of this notification a little later when we discuss the arguments advanced before us by the learned counsel for the parties.

3. In short the notification finally provided that henceforward the employees of the erstwhile Sericulture Department who were entitled to pensionary benefits should be treated as employees of the J and K Industries. It is this notification which has been assailed before us by the petitioners on various grounds. In the first place it was contended before us that the petitioners were only entrusted to the company that is to say they were directed to work under the company on the same terms and conditions which they had enjoyed as Government servants. Thus by asking the petitioners to work under the J and K Industries no change in their status, emoluments, conditions of service and other statutory safeguards was brought about and they continued to be just like Government servants of other departments. By virtue of the impugned notification, however, the Government by one stroke of pen sought to alter the entire status of the petitioners so as to terminate their service as Government servants and convert them into servants of the company. Such an act according to the petitioners clearly amounted to a termination of the service or reduction in rank of the petitioners and was therefore violative of Section 126 of the State Constitution (Art. 311 of the Constitution of India), inasmuch as such an action was resorted to without consent of the petitioners and operated to their serious prejudice. Secondly it was argued that the impugned notification sought to select the petitioners for hostile discrimination even as between Government employees situated in similar circumstances and therefore was hit by Article 16 of the Constitution of India. Another objection taken was that the notification amounted merely to an executive order and it could not overrule the statutory provisions contained in the J and K Civil Service Rules which have the authority of the Constitution itself, having been kept alive under the provisions of the State Constitution. Lastly it was submitted that the impugned notification is clearly hit by Article 207 of the KCSR inasmuch as the procedure laid down therein has not been followed in the present case before applying the impugned notification to the petitioners.

4. On the side of the respondents Mr. Chagla submitted three short points. In the first place he argued that by virtue of the formation of the limited company called the J and K Industries the Sericulture department was abolished and the service of the petitioners stood automatically terminated and therefore the question of attraction of Section 126 of the State Constitution did not arise. It was urged that since the petitioners were permanent employees they were absorbed in the Company on almost the same terms and conditions and therefore they should have no grievance on that account. Secondly it was submitted before us that the petitioners were guilty of laches for having surrendered to the jurisdiction of the company and having accepted employment under the company as far back as 1963 when the company was set up it was too late in the day to complain about the terms and conditions of their service about five years after they

had started working under the company. The learned counsel therefore submitted that on the ground of laches alone the petition was liable to be dismissed.

5. Before entering into the merits of the arguments advanced by the parties it may be necessary to settle a slight controversy raised by the parties to the petition. While the petitioners have categorically asserted in their petition that they were permanent employees of the Sericulture Department, having been shown from year to year in the civil list and provision having been made for these posts in the departmental budget, this allegation has not been categorically denied by the State in its affidavits who has in a most dexterous fashion tried to deny this allegation and has given more or less an evasive answer. The State in its affidavit says that the petitioners are employees of the company, but does not say that before the company came to be established the petitioners were not permanent employees of the Sericulture Department of the Government. Furthermore the State has not produced the service records or the service books of the petitioners to show that they were not permanent employees of the Government. The manner in which they have denied the averment regarding the petitioners being permanent servants of the Government may be quoted as under :-

> "Averments made in para 1 of the petition are admitted to this extent that the petitioners are the citizens of India and the residents of Jammu and Kashmir State. It is denied that they are the officers of the Jammu and Kashmir Government Department. Regarding the members of the staff there are no names of the persons to whom it refers nor have their particulars been given and in the absence of these particulars no reply can be given. It is further submitted that the averment is not admitted."

6. It will be noticed from the averments quoted above that the Secretary to the Industries Department of Jammu and Kashmir who has given the affidavit has not chosen to deny categorically that the petitioners were ever permanent employees of the Government. Mr. Chagla also in the course of his arguments did not seriously contest the allegation of the petitioners that they were permanent employees of the Sericulture Department of the Government. What the secretary to the Department of Industries has said in his affidavit is that at the time when the affidavit was given, the petitioners were not officers of the Jammu and Kashmir Government Department. In other words the State has practically admitted impliedly that before the formation of the company the petitioners were permanent employees of the Government.

7. Mr. Chagla further submitted that the respondent 3 being the Managing Director of the Company no writ will lie against him. This position was, however, conceded by Mr. Asoka Sen appearing for the petitioners who confined his relief only against the first respondent which is the State of Jammu and Kashmir.

8. For these reasons we are constrained to hold that on the materials before us it has been proved beyond any shadow of doubt that the petitioners were permanent employees of the Government working in the Sericulture Department before the existence of the J. and K. Industries Ltd. Company.

9. We would now examine the contentions raised by the counsel for the petitioners. To begin with, there can be no doubt that the petitioners were permanent Government employees of the Sericulture Department and the names of the first two petitioners are mentioned in the civil list of

the years prior to 1962. For instance in the civil list of 1962 dated 1-1-62 at pages 174 and 178 Mr. Kaul petitioner No. 2 has been mentioned as having entered the service on 18-1-1999 (Bikrami) and promoted as Dy. Director on 19-3-61. The position of this petitioner prior to the formation of the company is shown on 19-3-1961. Similar is the entry with regard to petitioner I Ghulam Qadir who is shown on 1-6-62 as Offg. Dy. Director. In these circumstances therefore we have now to see if by virtue of the impugned notification the conditions of service of the petitioners were affected to their prejudice or whether or not the effect of the notification was to terminate their services and constitute them into an absolutely new entity. In this connection the first argument advanced by Mr. Sen was that there was nothing in the order of the then Sadar-i-Riyasat or in the Articles of Association or in the Memorandum of Association to authorize the Government to change the conditions of service of the petitioners, whose services were entrusted to the company. The order creating the J and K Industries to be governed by a Board of Directors is dated 3-10-63 and runs as follows :-

> "Sanction is accorded to the formation of company under the J and K Companies Act, 1997, for the running of the Industrial undertakings mentioned in the annexure of this order. The articles and memorandum of association of the said company as per annexture to this order are also approved and it is directed that these be registered under Jammu and Kashmir Companies Act, 1997".

10. It is true that there is nothing in this order which authorizes the Government to change the terms and conditions of service of the petitioners, nor does it empower the administration of the company to interfere with the conditions of service of the petitioners. Mr. Sen drew our attention to Article 89 of the Articles of Association which runs thus :-

> "Notwithstanding anything contained in any of these Articles the Sadar-i-Riyasat may from time to time issue such directives or instructions as he may think fit in regard to the company, and the Directors shall duly comply with and give effect to such directives or instructions."

It was submitted by Mr. Sen that while this Article authorizes the Sadar-i-Riyasat to issue directions regarding the finances, conduct of business and affairs of the company, it does not give the Sadar-i-Riyasat any authority to interfere with or alter the conditions of service of the employees of the Sericulture Department whose services were placed at the disposal of the company. In our opinion the contention raised by the learned counsel for the petitioners is sound and must prevail. Article 89 (Supra) does not contain any power which is given to the Sadar-i-Riyasat to alter the conditions of service of the petitioners who were entrusted to the company. Nevertheless the Sadar-i-Riyasat being the fountain of all powers had a constitutional right to make rules or to amend the Jammu and Kashmir Civil Service Rules or to alter the service conditions of the petitioners unilaterally without their consent. In exercising such a power it was not necessary that the Sadar-i-Riyasat should have been authorized by the company or by the Articles of Association. Furthermore in issuing SRO, 36 dated 11-2-66 we do not think that the Sadar-i-Riyasat purported to act under any provision of the Articles of Association, but he acted under the general rule-making powers given to him under Section 124 of the State Constitution. To what extent these rules are valid is of course a different matter. Mr. Sen further drew our

attention to Article 73 (5) of the Articles of Association which runs as under :-

> "Without prejudice to the general powers conferred by the last preceding Articles, and the other powers conferred by these Articles, the Directors shall exercise the following powers with the sanction of the Sadar-i-Riyasat, that is to say, powers: to appoint and promote and at their discretion, remove, retire or suspend such managers, secretaries, officers, clerks, agents or servants, for permanent, temporary or special services as they may, from time to time, think fit and to determine their powers and duties and fix their salaries or emoluments and to require security in such instances and to such amount as they think fit provided that no appointment the maximum pay of which is ₹ 2000 or more per mensem shall be made without the prior approval of the Sadar-i-Riaysat."

11. It was submitted that under this sub-clause of Article 73 the Directors with the sanction of the Sadar-i-Rayasat had been given specific powers regarding appointment, promotion, etc., of the servants of the company, but even this clause does not empower the company to alter the conditions of service of the petitioners. Even if this be so, the observations made with respect to Article 89 equally apply to this Article also. The question for determination in the present case is not the incompetency of the company to alter the conditions of service of the petitioners, but it relates to the competency of the Government to change the conditions of service of Government servants by violating their statutory and constitutional safeguards. The argument advanced by Mr. Sen on this score is therefore, rejected.

12. Another important contention raised by Mr. Sen which requires serious consideration is the application of legal principles laid down in *Nokes v. Doncaster Amalgamated Collieries*[1], In this case Viscount Simon who spoke for the House of Lords observed as follows :-

> "..... after weighing the reasoning in those judgments and the arguments presented at the bar of this House, I have come to the conclusion that contracts of personal service are not automatically transferred by an order under Section 154.
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[1](1940) AC 1014 at page 1018 : (1940) 3 All ER 549 at page 553

The truth is that many contracts are not capable of being dealt with by the method said to be involved in the language of Section 154. For example, what would become of a contract which remunerates a manager with a share of the profits of a constituent undertaking, or a contract with a medical man to attend the servants of a company at a fixed total fee? Such contracts cannot be dealt with simply by substituting a new employer for the old for the nature of the contract necessarily depends upon the old employer continuing to be a contracting party, and any change of employer gives the contract an entirely new meaning.". The ratio decidendi in this case was that where a servant entered into a written contract with the company his service could not be transferred to another company by the owner unilaterally without the consent of the servant. What happened in that case was that the appellant had entered into a written contract of service with a company and served as a coal miner. On June 4, 1937 an order was made under Section 54 of the Companies Act transferring to the respondent company the property, rights, and

liability of the colliery company which stood dissolved under Section 153 of the Act. The appellant appeared to have absented himself without sufficient cause and the respondent company having sustained a loss brought an action under the Employers and Workmen Act Their Lordships held that a transfer of the assets and liabilities of the Company by itself would not operate as a transfer of the service contracts entered into by the employees of the previous company which were not capable of being transferred.

13. In the present case if what was done in 1940 AC 1014 : 1940-3 All ER 549 (supra) was sought to be done by the J. and K. Industries Company by virtue of the impugned notification, then the case would have been directly in point. We, however, do not think that the services of the petitioners were transferred to the company without any reservations. What happened was that the services of the petitioners were entrusted with the company, to start with on the same terms and conditions and subsequently it was the Government itself and not the company which altered the conditions of service the status and other benefits enjoyed by the petitioners to their prejudice and without their consent. The sole question for determination is as to whether the Government was competent to do this. In these circumstances therefore while the principles enunciated in the Nokes' case, 1940 AC 1014 : 1940-3 All ER 549 (supra) may be a valuable guide to us in determining the validity of the action of the Government it would not be on all fours with the facts of the present case; it may be necessary to reproduce the entire note 6 in order to understand its legal implications.

> "Service in the companies set up under Companies Act and wholly owned by Government should not be treated as foreign service for the purpose of grant of deputation allowance. So far as J. and K. Industries are concerned there was a large number of employees from the Industrial concerns who were not entitled to pensionary benefits and these should now be treated as the employees of J. and K. Industries Ltd. Some few employees of erstwhile Sericulture Department who were entitled to pensionary benefits should also likewise be treated as employees of J. and K. Industries and their pension shared by the Government and the Company under rule of proportion. In these circumstances no deputation allowance shall be permissible. There are, however, some Government servants who have been sent on deputation to these companies who will continue to be governed by the terms of deputation already sanctioned.

In future individual cases of grant of deputation allowance may, however, be examined in their own merit in accordance with the broad principles laid down as under :-

> (i) A deputation or duty allowance may be considered where the circumstances of the posting of the person concerned suggests considerable personal inconvenience or additional expenditure, e.g., having to work at an out of the way place where he normally would not have been required to work, or
> (ii) Where a person has to be selected very carefully for a particular post in view of the nature of its responsibilities and duties and some recognition of the fart in the form of a suitable allowance would be merited.
> (iii) It should be accepted as a general rule that all deputationists must be considered for

promotion in their parent Organization should a vacancy occur. In such event if they are suitable they should be given the promotion and the Corporation should either be required to give them the additional pay or to return the official to their parent organization.

(iv) There should be no objection to a deputationist receiving promotion while on deputation. Such promotion however, shall not confer any rights in the matter of compensation or emoluments on return to the parent organization."

Serious exception has been taken to the first part of note 6 which seeks to treat the petitioners as employees of the J. and K. Industries from the date of the said notification. It would appear that there is some amount of inconsistency between the first and the second part of note 6 itself. While the first part clearly mentions that service in the companies set up under the Companies Act and wholly owned by the Government (which includes the present company) should not be treated as foreign service for the purpose of grant of deputation allowance, yet the second part says that employees of erstwhile Sericulture Department who were entitled to pensionary benefits should be treated as employees of the J. and K. Industries. Thus while for the purpose of deputation allowance the servants of the company would not be deemed to be in foreign service but would be Government servants, in other respects. they would be deemed to be employees of the company and not of the Government. No rational basis for this classification appears to have been made out either in the amended rule incorporated in note 6 or in the affidavits filed by the State.

14. The matter does not stop here. It is provided that the employees of the erstwhile Sericulture Department who were entitled to pensionary benefits should also likewise be treated as employees of the J. and K. Industries. This part of the rule applies to the petitioners and changes their status from that of Government servants to servants of a limited company. The petitioners by virtue of this change appear to have been deprived of the following important safe-guards, privileges and emoluments.

(a) By being treated as employees of the company they have lost the safeguards granted to Government servants under Section 126 of the State Constitution because they ceased to be in the service of the State by force of this rule.

(b) They will not be entitled to the revised dearness allowance from November 1967 like other Government servants but were to get the same only from January 1968.

(c) The petitioners would be deprived of the revised grades of Government servants following the recommendation of the Pay Commission implemented on 27-2-1968 and subsequent revision of grades if any.

(d) By being treated as servants of the company the moment the company is liquidated their services would stand terminated.

15. These are the disadvantages and handicaps from which the petitioners have suffered by virtue of the impugned notification.

16. We have now to see as to what is the effect of the Government order. It is true that it is open to the Government to change the conditions of service of the petitioners from time to time

unilaterally and without their consent, as held by the Supreme Court in *Roshan Lal v. Union of India*[2], where their Lordships observed as follows :-

> "The emoluments of the Government servant and his term of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee."

17. It is, however, one thing to alter the conditions of service of a Government servant from time to time and quite a different thing to terminate his services altogether or to convert the nature of his service from one form to another resulting in a complete transformation of the character of the service.

18. In the instant case if the petitioners are to be treated as employees of the company the character and nature of their service is completely changed and they would cease to enjoy the immunity and protection given to them by Section 126 of the State Constitution; and if a Government servant who is entitled to protection under Section 126 is suddenly deprived of this protection without any notice then such an action cannot but be held to be either as a termination of his service or a reduction in rank. Secondly as pointed out above, a Government servant has certain advantages over a private servant. Government service is a statutory contract and is governed by statutory rules and constitutional safeguards and therefore there is a sense of security both in the character and in the tenure of service. It is not a matter of insignificance that a person who enjoys this security loses it by one stroke of pen, and this is what has happened to the petitioners in the present case. The petitioners have ceased to be Government servants and have become private servants of the company overnight, with the result that prior to the passing of the Government order their service could not have been terminated without giving notice to them under Section 126 of the State Constitution but after the passing of the order they could be dismissed at a moment's notice without complying with the provisions of Section 126. Apart from this basic loss, the petitioners have also suffered financial loss in emoluments inasmuch as they would no longer enjoy the grades which are revised from time to time either due to

[2] AIR 1967 SC 1889 at p. 1894

rise in prices or on the recommendation of the Pay Commission. The mere fact that their present emoluments have not undergone any change and that they would be entitled to the same pensionary benefits can hardly compensate the loss which the petitioners have suffered by virtue of the impugned order. In this connection we might notice an argument which was put forward by Mr. Chagla that the Sericulture Department was abolished with the formation of the J. and K. Industries into a limited company. In this connection Mr. Chagla quoted Article 207 of the KCSR which runs thus:-

> "If an officer is selected for discharge owing to the abolition of his permanent post he shall, unless he is appointed to another post the conditions of which are deemed to be at least equal to those of his own, have the option.
> (a) of taking any compensation, pension or gratuity to which he may be entitled for the service he has rendered; or
> (b) of accepting another appointment on such pay as may be offered and continuing to count his previous service for pension."

This argument runs against the proposition adumbrated by Mr. Chagla because there is no allegation in the reply of the State or in any of the annexures filed by it that before transferring the service of the petitioners to the company or before passing the impugned notification the petitioners were notified of their being discharged from service and given an option either to take compensation or to opt to be appointed under the company. Indeed if the procedure laid down in Article 207 of the KCSR would have been followed the petitioners would have had no grievance. This procedure was, however not followed and this is an additional reason which invalidates the impugned order. Note 6 is at the most a supplementary rule and it cannot override a specific and substantive provision contained in Article 207 of the KCSR. It follows therefore that if the petitioners' services are terminated and they are transferred to some other company, then such action is contrary to the provisions of Article 207 which has not only a statutory force, but is also backed by the authority of the Constitution inasmuch as the rules framed have been saved by the Constitution. Thus we are in agreement with the argument of the learned counsel for the petitioners that the impugned notification contained in note 6 is clearly violative of Section 126 of the State Constitution and is also hit by Article 207 of the KCSR quoted above. On this ground alone the aforesaid notification so far as it affects the petitioners is entitled to be struck down as being invalid.

19. We might now refer to some authorities in support of the view that we have taken in the present case.

20. In the celebrated case of *Parshotam Lal Dingra v. Union of India*[3], it was clearly pointed out that where a Government servant has a right to a post or to a rank under the terms of employment or the rules governing the conditions of service, then termination of such service or of reduction to a lower post attracts at once Article 311 of the Constitution of India. In other words this case clearly lays down that whenever the service of a permanent Government servant is terminated or his rank is reduced, it is hit by Article 311 of the Constitution of India which corresponds to Section 126 of

[3] AIR 1958 SC 36

the State Constitution, and no such termination or reduction in rank can take place without giving a reasonable opportunity to the concerned employee to show cause regarding the action proposed to be taken against him.

21. In *Kidar Nath v. State of U.P*[4]. the same view is expressed.

22. In a later case of the Supreme Court in *Moti Ram Deka v. General Manager N. E. Frontier Rly*[5]., it was clearly pointed out that the termination of the services of a permanent civil servant otherwise than by operation of superannuation, retirement etc. amounted to removal within the meaning of Article 311 of the Constitution of India. In this connection their Lordships observed as follows:-

> "The question which arises for our decision in the present appeals is: if the service of a permanent civil servant is terminated otherwise than by operation of the rule of superannuation, or the rule of compulsory retirement does such termination amount to removal under Article 311 (2) or not? It is on this aspect of the question that the

controversy between the parties arises before us..... A person who substantively holds a permanent post has a right to continue in service, subject of course, to the rule of superannuation and the rule as to compulsory retirement. If, for any other reason, that right is invalid and he is asked to leave his service, and termination of his service must inevitably mean the defeat of his right to continue in service and as such it is in the nature of a penalty and amounts to removal. In other words, termination of the service of a permanent servant otherwise than on the ground of superannuation or compulsory retirement must per se amount to his removal and so, if by R. 148 (3) or R. 149 (3) such a termination is brought about, the Rule clearly contravenes Article 311(2) and must be held to be invalid."

23. The aforesaid decisions of the Supreme Court clearly show that any rule which amounts to a termination of the service of a permanent Government servant without complying with the requirements of Article 311(2) of the Constitution of India (S. 126 of the State Constitution) is invalid. This decision, in our opinion, applies with full force to the facts of the present case where the first Part of note 6 seeks to terminate the services of the petitioners as Government servants without at all complying with the requirements of Section 126 of the State Constitution.

24. The aforesaid case of the Supreme Court was noticed in a recent Full Bench case of the Court in *Abdul Khalik v. State of J. and K*[6], where it was held that a permanent post could not be abolished without complying with the requirements of Section 126 of the State Constitution. In this case their Lordships of the Full Bench held as follows:-

'Moreover it seems to us that so far as a permanent servant is concerned, the moment his service is terminated except by way of compulsory retirement under a valid rule or by operation of the rule of superannuation, the termination would amount per se to removal from service. The question of his

[4] AIR 1967 All 197
[5] AIR 1964 SC 600
[6] AIR 1965 Jam and Kash 15 (FB)

conduct does not come into the picture at all. In fact the language of Section 126 of the State Constitution which is the same as in Article 311 of the Constitution of India, does not refer to any conduct of the employee concerned. All that Section 126 of the State Constitution says is that the employee must be given a reasonable opportunity to show cause against any action proposed to be taken against him. Even if the service of a permanent servant is terminated on the abolition of a post, it is certainly an action, and a very serious action which has been taken against the servant and hence the provisions of Section 126 of the State Constitution are clearly invoked. Here, in fact, lies the essential difference between the status of a temporary servant and that of a permanent servant. In the case of the former, Section 126 of the State Constitution or Article 311 of the Constitution of India would not be attracted, unless his termination is by way of punishment or penalty and in the case of the latter, however the very removal per se would amount to punishment provided the termination is not by way of retirement or by operation of the rule of superannuation.... .... In the present democratic set

> up, it is necessary for the State to ensure the safety and security of its servants and that is why the servants have been guaranteed protection by the Constitution. If it is held that the Government or the authority concerned has an absolute right to abolish the post without complying with the procedure laid down in Article 311 of the Indian Constitution or Section 126 of the State Constitution, it will be giving the Government or the authority concerned very wide and uncanalised powers which are capable of being misused at one time or the other. The right of a permanent servant to hold the post is a very valuable right and any forfeiture or extinction of this right must in the very nature of things attract the protection afforded to the servants under Section 126 of the State Constitution." (See page 21 of the Reports).

25. One of us was a party to the aforesaid decision and spoke for the court in the case. It is manifest from a consideration of the aforesaid authorities that the right of a permanent servant being a very valuable right and being safeguarded by a constitutional provision, the appointing authority cannot put an end to this right by stultifying and bypassing the constitutional provisions and thus striking a death-blow to the safety and security of service which a permanent Government servant possesses.

26. To the same effect is the decision in *Divisional Personnel Officer, Southern Rly., Mysore v. Raghavendrachar*[7], where their Lordships of the Supreme Court held as follows:-

> "One test for determining whether the termination of service was by way of punishment or otherwise is to ascertain whether under the service Rules but for such termination the servant has the right to hold the post."

Even if it be assumed for the sake of argument that the transfer of the petitioners to the company does not amount to termination of their service or removal from service there can be no doubt that in view of the radical changes brought about by the

[7] AIR 1966 SC 1529

impugned notification in the terms or conditions of service, the rank and position, the emoluments and the privileges enjoyed by the petitioners, to the detriment and to the prejudice of the petitioners, is tantamount at least to their reduction in rank within the meaning of Section 126 of the State Constitution. In these circumstances therefore the impugned notification is invalid as being hit by Section 126 of the State Constitution.

We are fortified in our view by a decision of the Supreme Court in *Shitla Sahai v. N. E. Rly., Gorakhpur*[8], where their Lordships observed as follows:-

> "If a civil servant has a right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank."

27. The law in America also appears to be the same. In Vol. LVI of the Corpus Juris Secundum certain valuable principles are laid down which afford valuable guidelines for us to determine the issues in this case. At page 412 (Art. 31) it has been observed that in the absence of a statute to the contrary, an employment for an indefinite term may be terminated at the will of either party,

regardless of the length of service. It is further observed that this rule is followed notwithstanding the fact that the contract of employment provides for payment at a daily, weekly, monthly or yearly rate.
Similarly at page 414 (Art. 31) the following observations appear:-

> "As a general rule employment contracts which in some form purport to provide for permanent employment..... are terminable at will by either party where they are not supported by any consideration other than the obligation of service to be performed on the one hand and wages or salary to be paid on the other."

Another pertinent observation is to be found at page 421 which appears to be directly in point. This observation is as follows:-

> "Where the master disposes of his business to another without notifying the servant of the change and the latter continues his services thereafter, the master is liable for the servant's wages as long as he remains without notice, and knowledge by the employee of the negotiations which resulted in the disposal of the business will not release the employer from such liability.
> x x x
> x x
> "The mere forming of a corporation by an employer and the use of the corporate name in the business for which he has hired the servant do not terminate the employment, where there is otherwise no change in the manner of conducting the business and the employer continues to be the real owner." (See Article 34).

28. The effect of this observation is that by the mere fact that the Sericulture Department was constituted into a corporate body would not ipso facto put an end to the service of the employee nor would the real owner be absolved from his responsibilities. Note 6 in the instant case, however, seeks to change the owner and
[8] AIR 1966 SC 1197 at p. 1199
takes away the rights which are vested in the employee and thus it clearly amounts to termination of his service or for that matter an unlawful termination on that account.

29. The conclusion deducible from the first para of the observations at page 421 (quoted above) is that where there is a change of masters a consequent change in the conditions of the service of an employee cannot be made without notice to or without the consent of the employee concerned. Note 6, as indicated above, seeks to bring about a radical change in the terms and conditions of the service of the petitioners without notice to them and without obtaining their consent. For these reasons the only inference that can be drawn is that on the date of the impugned order, by altering the character of the petitioners from Government employees to employees of the company, their services were terminated and this could not be done without resorting to the procedure laid down in Section 126 of the State Constitution as also in Article 207 of the KCSR.

30. Mr. Sen drew our attention to the fact that the impugned notification contained in note 6 apart

from violating Article 207 of the KCSR is also inconsistent with Rules 16, 16-A, 18, 37, 37-A and 37-B and a host of other rules. In view of our clear finding that note 6 is violative of Section 126 of the State Constitution and therefore invalid, it is not necessary for us to examine this particular argument raised by the learned counsel for the petitioners. We might, however, mention the fact that what is struck down as invalid and as amounting to terminating the service of the petitioners is only the following part of note 6:-

> "Some few employees of erstwhile Sericulture Department who were entitled to pensionary benefits should also likewise be treated as employees of J. and K. Industries and their pension shared by the Government and the Company under rule of proportion."

31. Before closing this part of the case, it may be necessary for us to examine the validity of the argument put forward by Mr. Chagla. Mr. Chagla submitted that since the department of Sericulture itself was abolished and the petitioners were in the service of the Company, the abolition of their posts has not resulted in any prejudice to the petitioners. This argument fails to consider the amount of mischief that has been caused by the objectionable part of note 6 as pointed out above. The argument further ignores the fact that if the intention of the Government was to abolish the services of the petitioners and absorb them elsewhere, then it was incumbent on the Government to have adopted the procedure laid down in Article 207 of the KCSR by giving option to the petitioners either to take compensation or to be absorbed in the service of the company on the terms and conditions mentioned in note 6. No such procedure was adopted, but by one stroke of pen the posts of the petitioners were abolished. Furthermore, such an action on the part of the Government violates Section 126 of the State Constitution as pointed out above, since Mr. Chagla himself admitted that by virtue of note 6 the posts held by the petitioners stood abolished.

32. Another important ground on which the impugned notification was attacked by the learned counsel for the petitioners was that it was violative of Article 16 of the Constitution of India, as only one set of Government servants namely those belonging to the Sericulture Department were selected for hostile discrimination by being treated as servants of the company, whereas the Government servants of other departments did not suffer from these handicap. Secondly it was pointed out that the distinction sought to be drawn by note 6 between an employee entitled to pensionary benefits and non-pensionary benefits was neither reasonable nor rational so as to afford a basis for classification. Thirdly it was urged that although Government servants from 21 departments were transferred to various companies, it were the employees of the Sericulture Department alone who were to be treated as employees of the company, and would cease to be Government servants. Lastly it was urged that the distinction regarding payment of deputation allowance even between Government servants transferred to the company was purely discriminatory.

33. As regards the first argument it does not appeal to us. The Department of Sericulture was undoubtedly a commercial activity of the Government and had been run on commercial lines. If the Government desired to streamline this department by putting it in charge of a Board of Directors by constituting a corporate body like the J. and K. Industries, then the employees belonging to the Sericulture Department formed a class by themselves and the classification was both reasonable and rational in relation to the object which was sought to be achieved by the act

of the Government. It is not alleged that there was any discrimination inter se between the employees of the Sericulture Department. For these reasons therefore Article 16 was not violated so far as this part of the case is concerned.

34. As regards the distinction between employees entitled to pensionary benefits and those not entitled to pensionary benefits there does not appear to be any discrimination. Since the petitioners' right to get pensionary benefits was left untouched they could possibly have no grievance against the order of the Government granting pensionary benefits to others.

35. Thirdly as regards the grievance made on the score of deputation allowance, we think this has some force. We pointed out in the very beginning that note 6 is itself inconsistent on this point. While the first part of note 6 clearly says that service in the companies set up under the Companies Act should not be treated as foreign service for the purpose of grant of deputation allowance, yet it seeks to discriminate between two employees both of whom are equally circumstanced. If the general rule is that for the purpose of deputation, service in the companies would not be treated as foreign service, so as to earn deputation allowance, then anybody transferred to the companies should not get any deputation allowance, there appears to be no rational basis for the provision that while some employees belonging to the Sericulture Department who are transferred to the company would not get deputation allowance, other employees of the same company who were getting it from before would continue to get deputation allowance. In other words a premium was sought to be placed on the employees of the Sericulture Department because they were transferred to the company some time after other employees who were getting deputation allowance. The rule does not give any guidelines to indicate why this discrimination has been made. We are, therefore, in agreement with the counsel for the petitioners that the part of the rule which relates to the grant of deputation allowance is discriminatory and must be struck down as being hit by Article 16 of the Constitution of India.

36. Thus as a result of our findings on the above points the first part of the entire note 6 which is as follows:-

> "Service in the companies set up under Companies Act and wholly owned by Government should not be treated as foreign service for the purpose of grant of deputation allowance. So far as Jammu and Kashmir Industries are concerned, there were a large number of employees from the Industrial concerns who were not entitled to pensionary benefits and those should now be treated as the employees of the J. and K. Industries Ltd. Some few employees of erstwhile Sericulture Department who were entitled to pensionary benefits should also likewise be treated as employees of J. and K. Industries and their pension shared by the Government and the company under rule of proportion. In these cases no deputation allowance shall be permissible. There are however, some Government servants who have been sent on deputation to these companies who will continue to be governed by the terms of deputation already sanctioned"

is struck down as invalid being violative of Article 16 of the Constitution of India, Section 126 of the State Constitution and Article 207 of the KCSR.

37. It was, however, faintly suggested by Mr. Chagla that note 6 was only in the nature of an explanation. This argument was, however, given up by Mr. Chagla when it was pointed out to him that even the State in its affidavits alleged that note 6 amounted to a full-fledged statutory rule made by the Governor under his rule-making power.

38. The last argument raised by Mr. Chagla to meet the contention of Mr. Sen was that the petition should be dismissed on the ground of laches. It was pointed out that although the company was formed as far back as 1963 the petitioners had submitted to the jurisdiction of the company, carried on their work and never raised any objection to their transfer from the Sericulture Department to the Company. This argument appears to be based on some misconception. In the first place when the company came into existence by order of the Sadar-i-Riyasat on 10-8-63 and the petitioners services were transferred to the company there was no order by the Sadar-i-Riyasat altering, changing or effacing the service conditions of the petitioners. On the other hand the order stated that the services of the petitioners were entrusted to the company a term which implied that the petitioners were to continue in service on the same terms and conditions as before. It is also not disputed that before the passing of the impugned notification this was the position. In these circumstances there was no question of, nor any occasion for the petitioners to protest or to make any grievance against the Government order. The petitioners felt aggrieved for the first time when the impugned notification in the form of note 6 was passed on 11-2-1966 which completely transformed their status and actually put an end to the nature and character of their service. As soon as this rule was passed, the first representation was made to the Government as far back as 17-10-66 (Annexure A to the petition). The Government does not appear to have passed any order on this representation which was followed by other representations without any result. When the petitioners were, however, convinced that they would not get any justice from the Government, they approached this court for an appropriate writ. In these circumstances the delay in filing the petition has been satisfactorily explained by the petitioners and we are not in a position to reject the petition on this ground alone.

39. Thus the conclusions that emerge from the findings given by us may be summarized as follows:

(1) That the petitioners have been proved to be permanent and confirmed Government servants holding substantive posts prior to their transfer to the company in the year 1963.
(2) That the impugned notification (SRO 36 dated 11-2-66) amounts to termination of the service of the petitioners or their removal from service and has been passed without complying with the mandatory requirements of the provisions of Section 126 of the State Constitution and is therefore invalid on this account.
(3) Even if the aforesaid notification does not amount to termination of the service of the petitioners or their removal from service it doubtless results in a material reduction of the rank held by the petitioners prior to their transfer to the company and attracts Section 126 of the State Constitution and is therefore invalid on this ground also.
(4) That the aforesaid notification is invalid as being inconsistent with the provisions of Article 207 of the KCSR as the procedure laid down in this Article has not been observed.
(5) That the first part of note 6 which provides for deputation allowance being granted to

one set of employees of the company and not to the petitioners is clearly discriminatory and is therefore invalid, being violative of Articles 14 and 16 of the Constitution of India.

(6) That the second part of note 6 of the KCSR which prescribes conditions and lays down the guiding principles for giving deputation allowance to employees of the company on the merits of each case is perfectly valid and is not hit by Articles 14 and 16 of the Constitution of India.

(7) That the petitioners have given a reasonable explanation for the delay, if any, in filing this petition and hence the petition is clearly maintainable. For the reasons given above, we allow this writ petition and hold that note 6 to the extent indicated above is invalid and ultra vires and destitute of any legal effect. We therefore grant a writ of Mandamus directing the respondent to place the petitioners in the same position in which they were before the notification SRO 36 dated 11-2-66 was passed as regards their service conditions etc. The petitioners will be entitled to costs of ₹ 300/- to be paid by the first respondent. Since it is conceded by Mr. Sen that no relief is sought against other respondents against whom no writ lies, the petition is dismissed as against respondents 2 and 3.

Jaswant Singh, J.

40. I agree.

Petition allowed.