

BOMBAY HIGH COURT

S. Vasudevan

Vs.

S.D. Mital

Misc. Petns. Nos.248, 254, 255 and 256 of 1960

(Tambe and Gokhale, JJ.)

18.01.1961

JUDGMENT

Tambe, J.

1. These four Petitions have been placed before us for hearing on being referred to by Mr. Justice K.K. Desai. These four petitions give rise to some common questions of law and can conveniently be disposed of by a common judgment. In the first two petitions, M.P. Nos.248 and 254 of 1960, constitutionality of the Essential Services Maintenance Ordinance, 1960, No.1 of 1960, promulgated by the President has been challenged, while in the other two petitions, M.P. Nos.255 and 256 of 1960, constitutionality of Rule 4(A) and rule 4(B) of the Central Civil Services (Conduct) Rules, 1955, has been challenged. The questions raised are of considerable importance.

2. Facts giving rise to these petitions may be briefly stated. In exercise of the powers conferred by clause (1) of Article 123 of the Constitution, the President of India promulgated an Ordinance called "Essential Services Maintenance Ordinance, 1960", hereinafter referred to as the Ordinance. It is in the following terms:-

"The Essential Services Maintenance Ordinance, 1960.

No.1 of 1960.

Promulgated by the President in the Eleventh Year of the Republic of India.

An Ordinance to provide for the maintenance of certain essential services and the normal life of the community.

Whereas Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

Now, therefore, in exercise of the powers conferred by clause (1) of Article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:-

1. (1) This Ordinance may be called the Essential Services Maintenance Ordinance, 1960.

(2) It extends to the whole of India: Provided that it shall not apply to the State of Jammu and Kashmir except to the extent to which the provisions of this Ordinance relate to the Union employees.

(3) It shall come into force at once.

2. (1) in this Ordinance-

(a) "Essential service" means-

(i) any postal, telegraph or telephone service;

(ii) any railway service or any other transport service for the carriage of passengers or goods by land, water or air;

(iii) any service connected with the operation, or maintenance of aerodromes, or with the operation, repair or maintenance of aircraft;

(iv) any service connected with the loading, unloading, movement or storage of goods in any port;

(v) any service connected with the clearance of goods or passengers through the customs or with the prevention of smuggling;

(vi) any service in any mint or security press;

(vii) any service in any defence establishment of the Government of India;

(viii) any service which the Central Government, being of opinion that strikes therein would prejudicially affect the maintenance of any public utility service or would result in the infliction of grave hardship on the community may, by notification in the Official Gazette declare to be an essential service for the purpose of this Ordinance:

(b) "Strike" means the cessation of work by a body of person employed in any essential service acting in combination or a concerted refusal or a refusal under a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment.

(2) Every notification issued under sub-clause (viii) of clause (a) of sub-section (1) shall be laid before each House of Parliament as soon as may be after it is made, and shall cease to operate at the expiration of forty days from the reassembly of Parliament unless before the expiration of that period a resolution approving the issue of the notification is passed by both Houses of Parliament.

EXPLANATION:- Where the Houses of Parliament are summoned to re-assemble on different dates, the period of forty days shall be reckoned from the later of those dates.

3. (1) If the Central Government is satisfied that in the public interest it is necessary or expedient so to do it may, by general or special order, prohibit strikes in any essential service specified in the order.

(2) An Order made under sub-section (1) shall be published in such manner as the Central Government considers best calculated to bring it to the notice of the persons affected by the Order.

(3) An Order made under sub-section (1) shall be in force for six months only, but the Central Government may, by a like Order,

(3) extend it for any period not exceeding six months if it is satisfied that in the public interest it is necessary or expedient so to do.

(4) Upon the issue of an Order under sub-section (1):

(a) no person employed in any essential service to which the Order relates shall go or remain on strike;

(b) any strike declared or commenced, whether before or after the issue of the Order, by persons employed in any such service shall be illegal.

(4) Any person who commences a strike which is illegal under this Ordinance or goes or remains on, or otherwise takes part in any such strike shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two hundred rupees, or with both.

(5) Any person who instigates, or incites ether persons to take part in, or otherwise acts in furtherance of, a strike which is illegal under this Ordinance shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

(6) Any person who knowingly expends or supplies any money in furtherance or support of a strike which is illegal under this Ordinance shall be punishable with imprisonment for a term which may extend to one year, or with, fine which may extend to one thousand rupees, or with both.

(7) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, any police Officer may arrest without warrant any person who is reasonably suspected of having committed any offence under this Ordinance.

(8) The provisions of this Ordinance and of any Order issued thereunder shall have effect notwithstanding anything inconsistent therewith, contained in the Industrial Disputes Act, 1947, or in any other law for the time being in force.

RAJENDRA PRASAD,

President.

G.R. Rajagopaul,

Secretary."

3. On 8-7-1960, in exercise of the powers conferred by sub-section (1) of Section 3 of the Ordinance, the Central Government on being satisfied that in the public interest it was necessary to make an order, made an order prohibiting strikes in the essential services enumerated in sub-section (1)(a)(i to vii) of Section 2 of the Ordinance.

4. Mr. S. Vasudevan, a citizen of India and petitioner in Misc. Petition No.248 of 1960 was at the material time working as a permanent Upper Division clerk of the Union of India in the office of the General Manager, Telephones Bombay District, at Bombay in the Pay and Billing Section. He was also the Secretary of the Bombay Telephones Branch of the All India (Posts and Telegraphs) Administrative Offices Employees' Association Class III and IV.

5. Mr. Oswald Pereira, a citizen of India and Petitioner in Misc. Petition No.254 of 1960 was at the material time working as a junior telegraphist at the Traffic Department of the Overseas Communications Service, Central Telegraph Office, Bombay 1. He was also an Honorary General Secretary of Overseas Communication Service, Staff Union, a registered Trade Union under the provisions of the Indian Trade Union Act, 1926.

6. Both the Petitioners joined the General Strike of the employees of the Union of India which commenced on 12-7-1960. The action taken against both of them by the authorities concerned is identical. We would therefore mention facts relating to the action taken against Mr. S. Vasudevan only.

By his order dated 18-7-1960, first respondent Mr. S.D. Mitel, Director of Telegraphs (General), Telephones, Bombay District, suspended Mr. Vasudevan from service on the ground that disciplinary proceedings were contemplated to be taken against him. On 21-7-1960, he was served with a charge-sheet. The charge framed against him was

"That the said Shri S. Vasudevan committed grave misconduct by participating in the illegal strike in contravention of the Essential Services Maintenance Ordinance, 1960."

The statement of allegations on the basis of which the aforesaid charge was framed against him was:

"Sri S. Vasudevan failed to report to duty as required of him on and from 12th July 1960. This was in contravention of the Essential Services Maintenance Ordinance, 1960, which has declared the strike by P. and T. officials as illegal."

On 20-7-1960 Mr. Vasudevan lodged this petition (Misc. Petition No.248 of 1960) and on or about 5-8-1960, Mr. Oswald Pereira lodged Misc. Petition No.254 of 1960 under Article 228 of the Constitution, wherein they pray that this Court be pleased to hold the order of suspension and the charge-sheet served on them as void, illegal and inoperative in law, issue a writ of mandamus directing the first respondent to withdraw the said order of suspension and the said charge-sheet and to reinstate them in their usual posts as if they had not been suspended, issue a writ of order quashing the said order of suspension and the charge-sheet and issue a writ of prohibition or other order in the nature of prohibition prohibiting the respondents and their servants and agents from proceeding further with the departmental proceedings on the basis of the said charge-sheet.

7. Mr. E.X. Joseph, a citizen of India and Petitioner in Misc. Petition No.255 of 1960, was at the material time working as an Upper Division clerk in the Indian Audit and Accounts Department at Bombay. He was elected as the Secretary of the Civil Accounts Association in June 1956 and was continuing as its Secretary at the material time. This Association was duly recognized by the Accountant General for the purpose of negotiations and correspondence with regard to conditions of service of the staff. It was affiliated to an All India Body called "The All India Non-Gazetted Audit and Accounts Association" which is a Federation of the various recognized local Associations of the Non-Gazetted staff of the Indian Audit and Accounts Department. The Petitioner was elected as the Secretary General of the said All India Body in or about May 1958 and was continuing to be its Secretary at the material time. The Government of India withdrew recognition of this All India Body in May 1959. The Petitioner, however, continued to be the Secretary-General of the All India Body even after withdrawal of its recognition.

8. On 3-6-1960, the petitioner was served with a charge-sheet signed by the first respondent, Accountant General, Maharashtra. He was charged for having committed a deliberate breach of rule 4(B) of the Central Civil Service, (Conduct) Rules, 1955 (hereinafter referred to as the Rules) by continuing to be a member of the All India Association, and an inquiry into that charge was held on 8-7-1960. As a result of the inquiry the first respondent came to a tentative conclusion that the charge framed against him was clearly proved and that the penalty of removal from service be imposed on him. He therefore served a notice dated 11-7-1960 on the petitioner calling upon him to show cause why the proposed penalty should not be imposed on him. It appears that on the same date the first respondent also served another order on the petitioner suspending him from service with immediate effect. On 25-7-1960, the first respondent served the petitioner with another charge-sheet. The charge framed against him was:

"That the said Shri E.X. Joseph, U.D.C. (under suspension) has deliberately contravened the provisions of Rule 4(A) of the Central Civil Services (Conduct) Rules, 1955, in so far as he has participated actively in the various demonstrations organized in connection with the strike of the Central Government employees and took active part in the preparations made for the said strike".

The allegations of facts on which the charge was founded were:-

"Prior to the strike of Central Government employees, it was observed that Shri E.X. Joseph working in the office of the Accountant General, Maharashtra, Bombay, was organizing meetings of the non-Gazetted employees of the office of the Accountant General, Maharashtra, Bombay, and instigating the staff to participate in the strike by delivering inflammatory speeches and shouting violent slogans.

Shri Joseph was also seen placing placards at various places in the office, urging the staff to join

mass rallies organized in connection with the strike. Shri Joseph had also issued various circulars to the members of the staff exhorting them to participate in the strike."

This petition was lodged on or about 8-8-1960.

9. Mr. K.R.S. Nair, a citizen of India and Petitioner in Misc. Petition No.256 of 1960, was at the material time serving as a lower division clerk in the Income-tax Department at Bombay. He had also been elected at the material time as the Honorary General Secretary of the Union formed by the Ministerial officers working in the Income-tax Department, Bombay known as the Central Board of Revenue Ministerial Officers' Union, Bombay. According to the Petitioner, 90 per cent, of the Ministerial Officers are members of this Union and the Union is formed with the object of making representations to the Government on behalf of the employees and to carry on negotiations, with the Government for the purpose of securing better service conditions and to have collective bargaining with the Government. According to the petitioner, this Union has made certain demands for improvement in their pay scale and allowances. These demands were turned down by the Government sometime prior to 21-6-1960. Thereafter a secret ballot was taken and 90 per cent of the member, of the Union voted for the strike. On 25-6-1960, the Union had served a strike notice on the first respondent, Commissioner of Income-tax, Bombay. On 12-7-1960, the employees went on strike and the petitioner also struck work on that day. The strike was called off on 16-7-1960. By a memorandum dated 13-7-1960, the first respondent served the petitioner with the following charge-sheet:

"Charge 1. That the said Shri K.R.S. Nair, functioning as Lower Division clerk in I.T. Department Bombay, had failed to attend the office on July 12, 1960, and thereafter without previous permission of his superior officer, and thereby violated office discipline.

Charge II. That the said Shri K.R.S. Nair, in spite of specific warning of action under Rule 4(A) of the Central Civil Services (Conduct; Rules in case he abstained from attending office thereby participating in the strike called for from the mid-night of 11th July 1960, had so stayed away from his duties thereby deliberately contravening the provisions of the said Rules." The statement of allegations against the petitioner on which the charges were framed was as follows:

"Regarding charge 1. The said Shri K.R.S. Nair, functioning in this office as Lower Division clerk in I.T. Department, Bombay, willfully abstained from attending office on the 12th day of July 1960 and thereafter. Such abstention was without the prior permission of his superior officer and was against the express warning issued against such abstention. By so abstaining from work Shri K.R.S. Nair, has violated office discipline.

Regarding Charge II. As mentioned in the statement of allegations pertaining to the first charge, Shri K.R.S. Nair, was specifically warned that any contemplated abstention from attending to his duties on the 12th July 1960 and thereafter was a deliberate contravention of Rule 4(A) of the Central Civil Services (Conduct) Rules. In spite of such warning Shri K.R.S. Nair has stayed

away from duties thereby participating in the strike launched by Central Government employees of which notice was given by the C.B. R.M.O. Union. He thereby committed a breach of Rule 4(A) of the Central Civil Services (Conduct) Rules."

On 8-8-1960, the petitioner lodged this petition under Article 226 of the Constitution.

10. Reliefs asked for by Mr. Joseph and Mr. Nair are similar to those asked in Miscellaneous Petitions Nos.248 and 254 of 1960.

11. All these petitions have been argued together by Mr. Singhvi, learned Counsel for all the petitioners. The Ordinance is challenged on the ground, that the Ordinance issued was in excess of the powers conferred by Article 123(1) of the Constitution, inasmuch as the President has not mentioned that it was necessary for him to issue such an Ordinance, that the President having delegated essential legislative functions therein to the executive, it is liable to be struck down and that it is violative of the rights conferred on a citizen under Article 19(1)(c) and (g) and Article 23(1) of the Constitution; at any rate, the restrictions imposed on the exercise of those rights are in excess of the permissible limits. In the alternative, it is urged that the Ordinance having lapsed on 19-9-1960, no further action is competent and therefore the departmental inquiries started against the petitioners for contravention of the Ordinance be quashed.

12. Validity of Rule 4(A) of the Central Civil Services (Conduct) Rules is challenged on the ground of it being violative of the rights conferred by Article 19(1)(a), (b), (c) and (g) and validity of rule 4(B) is challenged on the ground of it being violative of the rights conferred by Article 19(1)(b) and (o) of the Constitution. It was also urged that the Indian Audit and Accounts Department as well as the Income-tax Department of the Union of India is Industry within the meaning of clause (j) of Section 2(ii) of the Industrial Disputes Act, 1947, Act XIV of 1947. The petitioners therefore are governed by the Industrial Disputes Act. Rules 4(A) and (B) being inconsistent with the provisions of the Industrial Disputes Act are bad in law.

13. Before we proceed to deal with the contentions raised by Mr. Singhvi as regards the constitutionality of the Ordinance as well as the Rules, it is necessary to deal with the preliminary objections raised by Mr. Porus Mehta, learned Counsel for the respondents. It is his contention that all the four petitioners are members of a civil service of the Union within the meaning of Article 310 of the Constitution; they held post during the pleasure of the President, they therefore have no right to challenge the constitutionality of the Ordinance issued by the President relating to the conditions of their service, or any of the Rules issued by the President in exercise of the powers conferred on him by the Proviso to Article 309 of the Constitution, save and except on the ground of infringement of the rights conferred on them by Article 311. Those rights according to Mr. Mehta are two-fold, that a civil servant will not be dismissed or removed from his service by an authority subordinate to that by which he was appointed and that no civil servant shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken against him. If these rights are not contravened then a civil servant has no right to challenge in a Court of Law any action

taken against him on the ground that it is violative of the rights conferred on him by other Articles of the Constitution. In other words, the contention of Mr. Mehta is that the issue as regards the constitutionality of the Ordinance relating to the conditions of service of a civil servant or the Rules framed by the President under the Proviso to Article 309 is not justiciable on any ground other than they being violative of the provisions of Article 311 of the Constitution. We find considerable difficulty in accepting the argument of Mr. Mehta.

14. Article 123 of the Constitution deals with Legislative powers of the President and confers on him the power of promulgating Ordinances during recess of Parliament, if he is satisfied that circumstances exist which render it necessary for him to take immediate action, an Ordinance so promulgated by the President has the same force and effect as an Act of Parliament. It is however necessary to lay the Ordinance before both Houses of Parliament when the Parliament is next summoned. It lapses at the expiration of six weeks from the re-assembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses. Clause (3) of Article 123 provides that if and so far as an Ordinance under this Article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void. Power conferred on the President under Article 123 thus is legislative in nature and subject to all the limitations which are imposed by the Constitution on the legislative competence of Parliament.

15. Article 309 confers power on an appropriate Legislature to enact laws to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. The Article in terms says that this power is to be exercised by the appropriate Legislature subject to the provisions of the Constitution. The power conferred on the President or the Governor under the Proviso to make rules relating to the aforesaid matters is only a transitional provision until appropriate legislature legislates on the subject. Any rules so made have the force of law. The rule-making power of the President under the Proviso thus is also legislative in nature and has to be exercised on the language of Article 309 of the Constitution subject to the provisions of the Constitution.

16. Article 13, which appears in Part III dealing with Fundamental Rights, provides that laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. It also further provides that the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention, be void. Sub-clause (a) of clause (3) of Article 13 provides that unless the context otherwise requires, "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. On the terms of this Article then both Ordinances issued under Article 123 as well as the Rules framed under the Proviso to Article 309 would, if they take away or abridge the fundamental rights conferred on a citizen under Part III of the Constitution, to the extent they infringe on these rights are void.

17. Article 226 of the Constitution confers power on this Court to issue such writs or orders to any person or authority, including in appropriate cases any Government, throughout the territories in relation to which it exercises jurisdiction for enforcement of any of the rights conferred by Part III of the Constitution. Having regard to the provisions of Article 13 and Article 226 of the Constitution and having regard to the legislative nature of the power conferred on the President by Article 123 and the Proviso to Article 309, there is no manner of doubt that it is open to this Court to examine the constitutionality of the Ordinance issued or the Rules framed under the Proviso to Article 309, when action taken thereunder by any authority located within the territory over which this Court exercises jurisdiction is challenged by any person on the ground that his fundamental rights have been thereby violated. To hold otherwise, would lead to startling results of denying exercise of fundamental rights by a civil servant during the period of his service. The period of service of a civil servant would normally extend over 30 years. The number of civil servants in this country is a large one. It is difficult to assume that the Constitution-makers in enacting Article 310 of the Constitution intended the exercise of fundamental rights by a civil servant to be dependent on the will of the executive.

18. The field covered by Articles 123 and 309 under which the President or the Governor is empowered to promulgate Ordinances and make service rules is altogether a different field, and that is the exercise of legislative powers by the President or the Governor. The exercise of power under these Articles, therefore, would be subject to all limitations imposed by the Constitution on the exercise thereof and would be subject to a judicial review to the same extent as any enactment passed by any legislature.

19. It may be true that the President or the Governor, as the case may be, has over-riding power to terminate the services of a public servant even in disregard of service rules. The constitution-makers might have conferred this over-riding power on these high dignitaries presumably in the national interest and in expectation that the exercise thereof would not result in injustice to any citizen. The action taken in such a case is in exercise of their executive powers.

20. But that is altogether a different field. Here we are concerned with the exercise of legislative powers by the President.

21. Under the English Common Law as observed by Das C.J. in *Parshotam Lal Dhingra v. Union of India*¹,

"all servants of the Crown held office during the pleasure of the Crown and were liable to be dismissed at any time and without any reason being assigned for such dismissal. No action lay against the Crown in respect of such dismissal even though it were contrary to the express terms of the contract of employment for the theory was that the Crown could not fetter its future executive action by entering into a contract in matters which concerned the welfare of the State. A servant of the Crown could not at Common Law sue

the Crown even for the arrears of his salary and his claim could be only on the bounty of the Crown. The established notion was that the implied condition between the Crown and its servant was that the latter held office during the pleasure of the Crown, no matter whether it had been referred to when the engagement had been made or not and that public policy demanded this qualification."

Following the aforesaid rule of the English Common Law, it has been held by Their Lordships of the Privy Council in *Venkatrao v. Secy. of State*², that there was no right in a civil servant enforceable at action to hold his office in accordance with the service Rules and he could therefore be dismissed notwithstanding failure to observe the procedure prescribed by the rules. The case related to pre-Constitution period. This rule of English Law has not been adopted in its entirety in India as observed in *State of Bihar v. Abdul Majid*³

22. The doctrine that a public servant holds office during the pleasure of the President or Governor, as the case may be, is made subject to the express provisions of the Constitution.

23. Articles 124, 148, 218 and 324 of the Constitution expressly provide that the Supreme Court Judges, the Auditor-General, the High Court Judges and the Chief Election Commissioner shall not be removed from his office except by an order of the President passed after an address by each House of Parliament, supported by the requisite majority therein specified.

24. Article 311 also places restrictions on the exercise of the pleasure by the President or the Governor in the matter of termination of services of a civil servant and those restrictions are that a civil servant shall not be dismissed or removed by an authority subordinate to that by which he was appointed and that no such person as aforesaid, shall be dismissed, or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. Subject to the aforesaid limitations, the aforesaid rule of the English Common Law has been adopted in India.

25. Article 310 thus relates to the tenure of the office of a public servant to hold post under the Union or State and the exercise of the executive powers conferred on the President or the Governor under that Article is limited to that field.

¹1958 SCR 828 : AIR 1958 SC 36 ³1954 SCR 786 : AIR 1954 SC 245

²64 Ind App 55 : (AIR 1937 PC 31)

26. If the contention of Mr. Mehta is accepted, there is a possible danger of instances akin to one in *Janakiraman v. State of Andhra Pradesh*⁴, occurring more frequently and resulting in the denial of the exercise of the fundamental rights guaranteed to the citizens under Article 16 of the Constitution. In that case, services of an employee in the Andhra Government were terminated solely on the ground of his being a non-Andhra. When we posed this question to Mr. Mehta, he conceded that the exercise of the power conferred by Article 123 and the proviso to Article 309 is subject to the provisions of Article 16 of the Constitution. If that be so, we see no logical reason why exercise of this power should not be subject to the provision, of other Articles in Part

III of the Constitution. Non-acceptance of Mr. Mehta's contention is not likely to lead to untoward results.

27. The Articles which are likely to come into play in the matter of legislation relating to civil servants are Articles 14, 16 and 19 of the Constitution. Barring Article 14, which ensures equality before law, other Articles confer power on appropriate Legislatures to enact laws restricting exercise of the rights conferred by Articles 16 and 19 in public interest or in the interest of maintenance of public order etc. and for good reasons. No objection could be taken to the proper exercise of this power.

28. We would now proceed to examine the decisions to which we were referred by Mr. Mehta. Mr. Mehta particularly laid emphasis on two decisions : *Balakotaiah v. Union of India*⁵, and Special Civil Appln. No.1081 of 1956. (Bom) decided by a Division Bench of this Court, consisting of Chagla C.J. and Dixit J. on 4-7-1956.

29. The facts in Balakotaiah's case 1958 SCR 1052: AIR 1958 Supreme Court 232 were that the services of Balakotaiah, a railway servant, were terminated for reasons of national security under Rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1949, on the ground that he was engaged in subversive activities. By a petition under Article 226 of the Constitution, he challenged the validity of the order terminating his services. One of the grounds urged was that the Security Rules under which action was taken were in contravention of Article 14 and Article 19(1)(c) of the Constitution and therefore the order of termination passed thereunder was void. The contentions raised by the respondents i.e. the Union of India, were that the Rules in question were valid and the orders passed thereunder were not open to attack. The High Court, without deciding the question as regards the validity of Rule 3 of the Security Rules, held that the action taken by the respondents in terminating the services of Balakotaiah could be sustained under Rule 148(3) contained in the Railway Establishment Code, and in this view of the matter it did not decide the questions as regards the validity of the Security Rules. The matter went to the Supreme Court. Their Lordships of the Supreme Court did not agree with the view taken by the High Court and proceeded to decide the question as to the constitutionality of Rule 3 of the Security Rules. At page 1061 of (SCR): (at p.237 of AIR) it is observed:

"That renders it necessary to decide whether the Security Rules are unconstitutional, as contended by the appellants."

⁴ AIR 1959 And Prad 185

⁵ 1958 SCR 1052 : AIR 1958 SC 232

After discussing the question, their Lordships held that the Security Rules were not illegal as being repugnant to Article 14. Considering the question as regards contravention of Article 19(1)(c), Their Lordships observed at page 1064 (of SCR) : (at p.238 of AIR):

"The argument is that action has been taken against the appellants under the rules, because they are Communists and trade unionists, and the orders terminating their

services under Rule 3 amount, in substance, to a denial to them of the freedom to form associations, which is guaranteed under Article 19(1)(c). We have already observed that that is not the true scope of the charges. But apart from that, we do not see how any right of the appellants under Article 19(1)(c) has been infringed. The orders do not prevent them from continuing to be Communists or trade unionists. Their rights in that behalf remain after the impugned orders precisely what they were before. The real complaint of the appellants is that their services have been terminated; but that involves, apart from Article 311, no infringement of any of their Constitutional rights. The appellants have no doubt a fundamental right to form associations under Article 19(1)(c), but they have no fundamental right to be continued in employment by the State, and when their services are terminated by the State they cannot complain of the infringement of any of their Constitutional rights, when the question of violation of Article 311 arises. This contention of the appellants must also be rejected."

Mr. Mehta particularly laid stress on the observations of their Lordships from "But apart from that" and contended that these observations fully support his contention. Reading these observations in their context we are unable to accept the argument of Mr. Mehta that in making the observations Their Lordships have ruled that it is not open to a civil servant to question the validity of the Service Rules on the ground of infringement of his fundamental rights. On the other hand, from the observations appearing at page 1061 : (of SCR): (at p.237 of AIR), of the report reproduced above, it is clear that Their Lordships have examined the question and held that the Security Rules were not illegal as being repugnant to Article 14, or Article 19(1)(c) of the Constitution. All that is said by Their Lordships is that when the rules that govern the conditions of a civil servant do not contravene the provisions of the Constitution, the only ground on which a civil servant can complain, against the order of his dismissal is infringement of Article 311. He has no fundamental right to be continued in the employment by the State.

30. Facts in Special Civil Appln. No.1061 of 1956 (Bom) were that the services of a temporary employee in Ordnance Factory at Ambarnath were terminated on payment of one month's wages in lieu of notice. He challenged the order of termination of his services on the ground that he was a workman in an industry within the meaning of the Industrial Disputes Act. The order of termination amounted to retrenchment within the meaning of that Act. The procedure prescribed in Section 25F of the Act was not followed and therefore the order was bad in law. The plea raised on behalf of the Superintendent, Ordnance Factory, respondent to the petition, was that whatever the Industrial Disputes Act may lay down, the President of the Union has an overriding power conferred upon him under Article 310(1) and by reason of that overriding power it was open to the Union to terminate the services of the petitioner without assigning any reason. The contention of the petitioner was rejected and that of the respondent was accepted. The learned Chief Justice who delivered the judgment of the Court has observed:

"But it is not open to the petitioner to challenge the order of retrenchment on that ground

because as the petitioner happens to be a civil servant Government has the power to terminate his service at pleasure under Article 310."

It is pertinent to note that the petitioner in that case had not challenged the legality or validity of any of the rules governing his service. The petitioner was also a temporary servant and it is only in this context that the aforesaid observations were made by the learned Chief Justice. The learned Advocate-General contended that the same principles would apply whether the servant is a temporary or a permanent servant and that the power conferred upon the President by Article 310 would be available to him even in the case of permanent civil servants. The learned Chief Justice was at pains to point out that he was not deciding such a larger and wider question. He observed:

"In our opinion, it is unnecessary to decide the much larger and wider question on this petition. We are dealing with a temporary servant and whatever observations we may make are only germane to the case of a Government servant who has been temporarily employed and whose services are liable to be terminated at a month's notice."

We are unable to read this decision as an authority supporting the contention of Mr. Mehta.

31. We will now proceed to consider other decisions referred to us by Mr. Mehta.

32. Facts in *Jagdish Dajiba v. Accountant General, State of Bombay*⁶, were that the services of the petitioner, a permanent Class III employee of the Union of India in the office of the Accountant General of Bombay, were terminated by an order of the President of India in the interest of national security. The order of the President was communicated to the petitioner by an officer of the Department. The order terminating his services was challenged by the petitioner inter alia on the ground that it was bad inasmuch as it rendered nugatory the right of appeal granted to him under the Service Rules, that the right - under Article 311(2) of the Constitution of showing cause against his dismissal - was denied to him; the President had no power to exercise his pleasure in breach of the Rules. It was held by a Division Bench of this Court that where the President exercises his pleasure under Article 310 of the Constitution of India, he is bound only by the express provision, of the Constitution such as Article 311 and not by any rules. Again, it has to be noted that the order impugned in this case was made by the President himself and what was challenged was the order itself and not any of the rules framed by the President in exercise of his legislative powers.

33. In *Sedumadhava Rao v. Collector of South Arcot*⁷, the petitioner was a Taluk Head Accountant in the Revenue Subordinate Service in South Arcot District. He was also the President of the Non-Gazetted Officers' Association. He was charged with contravention

⁶60 Bom LR 241 : (AIR 1958 Bom 283)

⁷AIR 1955 Mad 468

of Rule 6 of the Government Servants Conduct Rules. The petitioner admitted the truth of the

charge that while in Government service he sold tickets for a dramatic performance and helped to collect funds for his association of which he was the President, without having obtained requisite permission of the superior authority. The Collector punished the petitioner by ordering temporary reduction in rank for a period of three months. Validity of that order was challenged by the Petitioner on the ground that Rule 6 of the Madras Government Servants Conduct Rules was unconstitutional as it offended the fundamental right of the petitioner guaranteed by Article 19(1)(c) of the Constitution. After examining the provisions of the rule it was held that the said Rule 6 was not unconstitutional and the restrictions imposed by the rule were reasonable restrictions within the meaning of clause (4) of Article 19 of the Constitution. Thereafter the learned Judge deciding the case observed that there was also another bar in the way of the petitioner:

"The petitioner has no constitutional right to any appointment under the Government in the Revenue Subordinate service. Having accepted an appointment in that service, subject among other terms of his service, to the Government Servants Conduct Rules, and having had the benefit of that appointment all these years, the petitioner cannot be heard to contend, as incidental to the exercise of discretion in his favor under Article 226 of the Constitution, that the rule is unconstitutional."

It is on these observations that Mr. Mehta has placed reliance in support of his argument. Following this decision, similar view has been taken by the Kerala High Court in *V.C. Chacko v. T.C. State*⁸, and *Divakaran Nair v. State of Travencore Cochin*⁹,

34. We do not find anything in the above observations to hold that it is not within the competence of this Court to examine the vires of the rules. All that is said is that in exercise of their extraordinary powers under Article 226 of the Constitution, the learned Judges in their discretion did not think it proper to allow a contention of the nature that was raised before them to be raised. The exercise of the discretion would necessarily depend on the facts of each case.

35. We may at this stage reproduce the observations of Their Lordships of the Supreme Court in *Bashesar Nath v. I.T. Commissioner*¹⁰, at page 162;

"The rights conferred on citizens may be thus classified: (i) statutory rights; (ii) constitutional rights; and (iii) fundamental rights. One need not consider the statutory rights in this context but the constitutional rights are those created and conferred by the Constitution. They may or may not be waived by a citizen, as stated in the text books and the decisions of the Supreme Court of the United States of America above referred to. But when the rights conferred are put on a high pedestal and are given the status of fundamental rights, which though embodied in the Constitution itself are in express terms distinguished from the other constitutional rights (e.g. fundamental rights which are enshrined in Part III

of the Constitution and are enacted as immune from any legislation inconsistent with or derogatory thereto, and other constitutional rights which are enacted in other provisions for instance in Articles 265 and 286 and in Part XIII of the Constitution), they are absolutely inviolable save as expressly enacted in the Constitution and cannot be waived by a citizen."

It therefore follows that a citizen by accepting Government service is not estopped from challenging the validity of the Service Rules.

36. Facts in *K.P. Shankerlingam v. Union of India*¹¹, were that the plaintiff, a former railway servant whose services were terminated under Rule 3 of the Railway Services (Safeguarding of National Security) Rules 1949, instituted a suit challenging the validity of the order and for a declaration that he continued in service and for arrears of salary on that footing. It was contended on behalf of the defendant, the Union of India, that the tenure of employment of a Government servant is only during the pleasure of the President and that in respect of his dismissal from service he can have no justiciable cause of action unless there is express provision in the Constitution under which he is entitled to protection. In upholding the contention Mr. Justice K.K. Desai observed at page 10 (of Bom LR):

"In all the circumstances aforesaid with some hesitation and reluctance I have come to the conclusion that the contention raised on behalf of the defendants is correct and the plaintiff is not entitled to maintain this suit as regards the impugned order dated August 12, 1953."

Again, it has to be noted that the vires of the rules were not challenged in the case. What was said by the Plaintiff was that his dismissal being in contravention of the rules was bad. We have already made it clear that the power exercised by the President or Governor under Article 310 of the Constitution in terminating services of a civil servant, not involving infringement of Article 311, may not afford a cause of action to him for a suit for a declaration that he is entitled to hold his office in accordance with the Service Rules applicable to him. But that is altogether a different matter. The provisions of Article 310 of the Constitution do not come in the way of this Court in examining the legality or constitutionality of the Ordinance promulgated by the President under Article 123(1) of the Constitution or Rules framed by the President or Governor, as the case may be. under the proviso to Article 309 of the Constitution. The preliminary objection raised by Mr. Mehta has, therefore, to be rejected.

37. Turning to the first contention raised on behalf of the petitioners by Mr. Singhvi, it is his argument that the Ordinance promulgated by the President is in excess of the power conferred on

the President under Article 123 inasmuch as it is not mentioned by the President that it was necessary for him to promulgate such an Ordinance. The argument is founded on the language of clause (1) of Article 123. Clause (1) provides:

"If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances

¹¹62 Bom LR 1 : (AIR 1960 Bom 431)

appear to him to require."

It is the contention of Mr. Singhvi that in the Preamble of the Ordinance the President has not said that it was necessary for him to promulgate such an Ordinance. The Ordinance thus being in excess of the power conferred on him is illegal, inoperative and void. Reliance is placed by Mr. Singhvi on the observations of Meredith C.J. in *Ratan Roy v. State of Bihar*¹², at p.340. The observations no doubt support the contention of Mr. Singhvi but with respect to the learned Chief Justice we find it difficult to accept the contention of Mr. Singhvi. Omission to use the word 'such' in the Ordinance promulgated is not fatal to it. Article 123(1) empowers the President to promulgate an Ordinance when two conditions are fulfilled; (i) that both Houses of Parliament are not in session and (ii) the President is satisfied that circumstances exist which render it necessary for him to take immediate action. If these two conditions are fulfilled, the President is empowered to promulgate an Ordinance as the circumstance, appear to him to require. Now, on the terms of the Preamble of the Ordinance promulgated by the President it is clear that both these conditions were satisfied at the time of the promulgation of the Ordinance and he has in the Ordinance in terms stated that he was therefore promulgating the following Ordinance. The word "therefore" used in the Preamble amply establishes that the President was satisfied that it was necessary for him to promulgate such an Ordinance, that is, he thought it necessary to promulgate the Ordinance in the terms thereof. This contention of Mr. Singhvi, therefore, should be satisfied that it was necessary for him to promulgate such an Ordinance, that is, he thought it necessary to promulgate the Ordinance in the terms thereof. This contention of Mr. Singhvi, therefore, should fail. We may also point out that the aforesaid view of Meredith C.J. was not concurred in by Sarjoo Prosad J. When on difference of opinion the matter was placed before Sinha J., he did not accept the view taken by Meredith C.J. but agreed with that taken by Sarjoo Prosad J.

38. It is next contended by Mr. Singhvi that in enacting Section 3, the President has delegated essential legislative function of deciding circumstances when strikes in a given service should be prohibited without laying down any guiding principle therefor. It is not possible for us to accept this contention also. The question has been considered by Their Lordships of the Supreme Court in *Re Article 143, Constitution of India and Delhi Laws Act (1912) etc.* 1951 SCR 747 : AIR 1951 Supreme Court 332, *Rajnarain Singh v. Chairman. Patna Administration Committee*¹³, and *Harishanker Bagla v. The State of Madhya Pradesh*¹⁴, At page 888 (of SCR) : (at p.468 of AIR)

it was observed

"It was settled by the majority judgment in the Delhi Laws Act case, 1951 SCR 747 : AIR 1951 Supreme Court 332 that essential powers of legislation cannot be delegated. In other words, the legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct."

¹² AIR 1950 Patna 332

¹⁴1955(1) SCR 380 : AIR 1954 SC 465

¹³1955(1) SCR 290: AIR 1954 SC 569

In the light of this rule the present Ordinance will have to be examined.

39. The Ordinance has already been reproduced above. In our view, the President has laid down with sufficient definiteness the legislative policy and that policy is maintenance of certain essential services for the purpose of ensuring normal life of the community. The President is at pains to enumerate Essential Services in Section 2(1)(a) (i to viii.) It cannot be disputed that maintenance of these services is essential for ensuring normal life of the community. After having enumerated these services, the President has in Section 2(1)(a)(viii). empowered the Central Government to enlarge this list to a certain extent, but again it has to be noticed that it is not left at the sweet will of the executive to include any and every service under this category. It must be such a service that strike therein would prejudicially affect the maintenance of any public utility service or would result in the infliction of grave hardship on the community. A further safeguard is also provided by making it obligatory on the Central Government to place before each House of Parliament the notification issued under this clause. It has then been provided in sub-section (1) of Section 3 that if the Central Government is satisfied that in the public interest it is necessary or expedient so to do, it may, by general or special order, prohibit strikes in any essential service specified in the Order i.e. specified in Section 2(1)(a)(i) to (viii). When these provisions are read together, it is abundantly clear that the President has not delegated any essential legislative function to the Central Government. The Central Government has to act within the ambit of the legislative policy laid down in the Ordinance. The limits of delegated powers have been specifically stated in the Ordinance. In our judgment, therefore, the Ordinance is not bad on account of excessive delegation of legislative power to the Central Government. The contention raised on behalf of the petitioners by Mr. Singhvi, therefore, also must fail.

40. It is then contended that the Ordinance takes away the right conferred on a citizen by Article 19(1)(c) to form associations or unions and is therefore liable to be struck down. The argument is that the right to form associations or unions is conferred on citizens to enable them to join together for the purpose of bettering their conditions of life by method of collective bargaining. Collective bargaining can only be successful with the aid of the right to go on strike. The right to

go on strike therefore is included in the right to form association or unions. The question that falls for consideration is whether the right to go on strike is included in the right conferred by the Constitution on the citizens to form associations or unions. Now, the right of people to assemble together and agree to abide by a set of rules of procedure and thus organize themselves on some sort of permanent relationship in matters of common interest and common concern or strive for betterment of their condition by peaceful means and for lawful purpose is a well recognized right. It is common knowledge that voice of an individual has not the same effect as that of anything said together by a group of persons. Larger the number greater the effect. It is also well recognized that to achieve political progress, free criticism and free expression and exchange of views and thoughts without malice and in a peaceful manner is a valued contributory factor. If a man has to express there must be audience, if there has to be exchange of views people must meet together. It is these basic ideas which, in our opinion, form the basis of the three freedoms guaranteed to the citizens under Article 19(1)(a) to (c) of the Constitution. The right to go on strike, however, is different in character. It is not joint or collective expression of views but is joint or collective action. By its very nature it is fraught with possibilities of leading to violence. History has been telling us that in large number of cases where people have gone on strike there has been resort to violence. It can safely be assumed that the Constitution-maker,, were well aware of it at the time the Constitution was being enacted. It can also be safely assumed that the Constitution-makers were aware that the right of workers in industry to go on strike has been with certain limitations recognized in certain parts of the world. Our Constitution is an elaborate one. If the Constitution-makers had intended to confer on the citizens as a fundamental right the right to go on strike, they would have expressly said so. In these circumstances, the fact that the right to go on strike has not been expressly conferred on the citizens leads us to hold that the right to go on strike is not included in the right conferred on the citizens under Article 19(1)(c) to form associations or unions. We may at this stage mention that it has been observed in *Corpus Juris Secundum*, Volume 83, page 525, that the right to strike is a relative right which can be exercised with due regard to the rights of others. Neither the common law nor the 14th amendment to the Federal Constitution confers an absolute right to strike.

41. In this connection, Mr. Singhvi has referred us to three decisions: *Farrer v. Close*¹⁵, and *State of Bihar v. Deodar Jha*¹⁶,

42. The first case relates to the pre-Constitution period and has no relevance. The observations in the second case on which reliance is placed by Mr. Singhvi are in the judgment of Hennen J. at p.612 of the report. They are:

"I am, however, of opinion that strikes are not necessarily illegal."

We are unable to see how these observations are of any assistance to the petitioners. Where a strike is legal or illegal would depend on the provisions of law in force at a particular time. We are not concerned here with the question whether a strike in the abstract is legal or illegal. What

we are concerned with is whether the right to go on strike forms an integral part of the fundamental right conferred on the citizens by Article 19(1)(c) of the Constitution.

43. In the third case, no doubt in paragraph 14 of the judgment, it has been observed that the workers in an industry have a fundamental right to resort to strike when they are so pleased in order to express their grievances or to make certain demands. But it appears that those observations were made in view of the fact that the State of Bihar had not challenged that position. The question which was being considered in that case was not whether the right to resort to strike was a fundamental right within the meaning of Article 19(1)(c). What was being considered was whether the strike resorted to by the workers during the pendency of proceedings before a Tribunal was illegal and was in contravention of Section 23 of the Industrial Disputes Act. The observations relied upon, in our opinion, are obiter and do not carry the petitioners' case any further.

44. We would however proceed to consider whether the restrictions imposed by the Ordinance are within the limits prescribed by clause (4) of Article 19 of the Constitution. That clause empowers the State to make laws imposing, in the interests of public order or morality, reasonable restriction, on the exercise of the right conferred by Article 19(1)(c).

¹⁵ Criminal Revn. No.745 of 1949 D/-30-8-1949 (1869) 4 QBE) 602

¹⁶ AIR 1958 Patna 51

45. We have already held, and it is not in dispute that the Ordinance promulgated by the President is a law. The question that arises is whether the restrictions imposed are reasonable and are in the interests of public order.

46. The expression 'public order' has been explained by Their Lordships of the Supreme Court in *Romesh Thappar v. State of Madras*¹⁷,

"Now, 'public order' is an expression of wide connotation and signifies that state of tranquility which prevails among the member, of a political society as a result of the internal regulations enforced by the government which they have established."

47. In *Narendra Kumar v. Union of India*¹⁸, at p.436 Their Lordships of the Supreme Court have observed:

"In applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interests of the general public."

In the light of these principles, the facts of this case will have to be approached.

48. The Ordinance had been promulgated at the time when a general strike was threatened by Class III employees of the Union. It has been stated at the Bar that over 90 per cent of the members of the Union had opted to go on strike. The danger that had to be averted is stated in Misc. Petition No.248 of 1960 by the first respondent in the following terms:

"I say that the proposed strike by its nature and timing was likely to imperil the safety of the country and cause grave public hardship and enormous losses to the country. I further say that the proposed strike contemplated the stoppages of essential services in which the public interest was clearly paramount and in a highly organized community as ours, the paralysing effect of the proposed strike would have been unfavourable. The strike was calculated to disorganise the economic life and well-being of the community and to coerce the Government. The strike was an irresponsible and unwarranted act endangering the public order and public safety of the country and disturbing the economic life of Bombay in particular and the country in general."

These averments in the affidavit of the first respondent have not been controverted by the Petitioners. It is to avert this danger that the Ordinance was promulgated. It is therefore not possible to hold that it has not been issued in the interests of public order.

49. It is argued by Mr. Singhvi that sub-section (1) of Section 3 of the Ordinance provides that if the Central Government is satisfied that in the public interest it is necessary or

¹⁷1950 SCR 594 at p.598 : (AIR 1950 SC 124 at p.127)

¹⁸ AIR 1960 SC 430

expedient so to do, it may, by general or special order, prohibit strikes in any essential service specified in the Order and this shows that the Ordinance is promulgated in the public interest and not in the interests of public order. The use of the words 'public interest' in sub-section (1) of Section 3 does not, in our opinion, lead to that conclusion. 'Public interest' would include maintenance of public order. The words 'public interest' used in sub-section (1) of Section 3 have to be read in the context of other provisions of the Ordinance and when so read there is no doubt that the restrictions imposed are in the interests of public order.

50. The preamble of the Ordinance in terms says that it has been promulgated to provide for maintenance of certain essential services and the normal life of the community. The restrictions imposed are on the members of the specified essential services only for an initial period of six months. The restrictions are in the form of declaring strike in certain essential services illegal, and making it a penal offence as against any person who commences illegal strike or goes or remains on, or otherwise takes part in any such strike punishable with imprisonment for a term which may extend to six months, or with fine which may extend to two hundred rupees, or with both, as against any person who instigates, or incites other persons to take part in or otherwise acts in furtherance of a strike which is illegal, punishable with imprisonment for a term which

may extend to one year, or with fine which may extend to one thousand rupees or with both, and against any person who knowingly expends or supplies money in furtherance or support of a strike which is illegal under the Ordinance, punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

51. It is the argument of Mr. Singhvi that the aforesaid restrictions imposed are not reasonable. In the first instance, he contends, that, in effect, the Ordinance totally prohibits strikes in certain departments; total prohibition is not restriction. The contention has been answered by Their Lordships of the Supreme Court in Narendra's case, AIR 1960 Supreme Court 430. At page 436 of the Report, it has been observed:

"There can be no doubt therefore that they intended the word 'restriction' to include cases of 'prohibition' also".

52. It is next contended by Mr. Singhvi that the sentences provided are too heavy. In our opinion, they are not heavy having regard to the enormity of the threatened danger. It has to be borne in mind that the objective that was sought to be achieved by the Ordinance was to provide for maintenance of essential service and the normal life of the community, and to achieve that objective it was necessary that persons in the essential services who were threatening to jeopardise the maintenance of essential services and thereby dislocate and disorganize the normal life of the community were deterred from doing so.

53. It is then said that power has been given to arrest persons even in suspicion. Section 7 of the Ordinance empowers a police officer to arrest without warrant any person who is suspected of having committed any offence under the Ordinance. It leaves the door open for innocent citizens being harassed. The argument advanced omits to notice the word 'reasonably' used in Section 7. Conferment of power on a police officer to arrest persons who are reasonably suspected of having committed certain offences is not new to the Criminal law. Section 54 Criminal Procedure Code confers such power on a police officer in certain cases, and it cannot be said that such power has been, stray cases apart, abused by the police officers.

54. It is next contended that provisions of the Industrial Disputes Act 1947 (Central) were sufficient to meet the situation and it was not at all necessary to promulgate such Ordinance. This argument has no foundation in the facts averred in these two petitions. It has not been said in the petitions that the activities carried by these two departments is an industry within the meaning of the Industrial Disputes Act. Further, it is apparent from the provisions of Section 8 of the Ordinance that the provisions of the Industrial Disputes Act, 1947, were not considered to be adequate to cope with the situation.

55. In our judgment, having regard to the danger to be averted the restrictions imposed by the Ordinance promulgated by the President were reasonable restrictions imposed in the interests of

public order. Provisions of clause (4) of Article 19 therefore have not been contravened.

56. It is then contended that the Ordinance infringed the rights conferred on the petitioners by Article 19(1)(g) to carry on occupation, they have chosen. It is the argument of Mr. Singhvi that the petitioners are carrying on occupation of Government service; the right conferred by Article 19(1)(g) to carry on occupation includes the right not to carry on the occupation; by going on strike the petitioners have chosen not to carry on their occupation; the Ordinance prevent, the petitioners from exercising their right not to carry on their occupation and it is in this way that it contravenes Article 19(1)(g) of the Constitution. Reference is made to two decisions reported in AIR 1959 Supreme Court 149 and *Indian M. and M. Corporation v. Industrial Tribunal*²⁰,

57. The argument, in our opinion, is fallacious. It is true that the right to carry on occupation includes the right not to carry on occupation and that is what is said in these two decisions. But here the petitioners have not chosen not to carry on their occupation, on the other hand, they want to remain in the occupation, viz., they want to remain in Government service, take their pay and yet not work and that is not choosing not to carry on the occupation. It is open to the petitioners to resign from Government service if they so desire. The Ordinance does not prohibit them from doing so. This contention has therefore no force and has to be rejected.

58. It is next contended that the Ordinance makes the petitioners work against their will at the threat of penal consequences and that amounts to a form of forced labour which clause (1) of Article 23 of the Constitution prohibits. The Ordinance thus being in contravention of the provisions of clause (1) of Article 23 of the Constitution is bad in law. This contention is also without any force. It omits to notice the force of the word "similar" occurring in the clause. That clause prohibits (i) traffic in human beings (ii) begar and (iii) other similar forms of forced labour. It would be seen that every form of forced labour is not prohibited by the clause. In fact, clause (2) of Article 28 permits the State to impose on the citizens compulsory service for public purposes. What is prohibited by the first clause is imposing on the citizens forced labour which is similar in form to begar. It is true that begar is not defined but it is a well understood term which means making a person work against his will and without paying any remuneration

²⁰ AIR 1953 Mad 98

therefor. Molesworth at page 580 gives the meaning of begar as "Labour or service exacted by a Government or a person in power without giving remuneration for it." In Wilsons Glossary the meaning of the word is given as "Forced labour, one pressed to carry burden for individuals or to public; under old system when pressed for public service, no pay was given." In our opinion, therefore, to bring the case within the mischief which clause (1) of Article 23 provides against, it must be established that a person is forced to work against his will and without payment. Such is not the case here. Even assuming that the threat of penal consequences provided in the Ordinance would have the effect of making the petitioners work against their will, it is beyond doubt that it was not intended to make them work without any payment; on the other hand, they would be getting their full remuneration for the work they would be doing.

59. Mr. Singhvi also referred us to the decision reported in *Bailey v. State of Alabama*²¹, which has been cited with approval by Wills at page 511 in 'Wills on Constitution law'. This decision is distinguishable on facts. The facts in that case were that Alonzo Bailey entered into a written contract to perform labour or service for the Reverside Company and thereby obtained a sum of 15 dollars from the said company. Afterwards he refused to perform the labour or service. The contention raised by Bailey was that refusal or failure on his part to perform service or to refund the money obtained from the company under the contract without cause does not make out a prima facie case of his intent to injure or defraud the Reverside Company. This contention was not accepted. It was, on the basis of a certain statute in force in the State of Alabama, held that Bailey was guilty of the offence and was made to pay a fine of 30 dollars and costs. Constitutionality of the statute was questioned before the Supreme Court of America on the ground that it offends against 13th Amendment and the statute framed thereunder. The 13th Amendment provides:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United State, or any place subject to their jurisdiction.

Section 2: Congress shall have power to enforce this article by appropriate legislation."

60. Pursuant to the authority thus conferred by Section 2 of the 13th Amendment, a legislation was passed which provided that the holding of any person to service or labour under the system known as peonage is abolished and forthwith prohibited in the territory of New Mexico, or in any other territory or State of the United States and further declared that all acts, laws, etc. shall be null and void. It was held that the essence of the word 'peonage' is compulsory service in payment of a debt. The law of Alabama on the strength of which Bailey was convicted recognized peonage. The law being in conflict with the legislation made pursuant to the authority conferred by Section 2 of the 13th Amendment was null and void. We are not here concerned with any case of peonage. This decision, therefore, has no relevance to the question which we have to consider. For reasons stated above, in our opinion, this contention raised by Mr. Singhvi also fails.

61. Lastly it is contended by Mr. Singhvi that the Ordinance, which is a temporary legislation, having lapsed, no further action for its breach was competent and the departmental enquiry proceedings pending against the petitioners are therefore liable to

²¹(1910) 55 Law Ed 191

be quashed. Reliance is placed on the following observations in Craies on Statutes at page 377 (5th Edition):

"As a general rule, and unless it contains some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it, and it ceases to have any further effect. Therefore, an offence committed against a temporary Act must be

prosecuted and punished before that Act expires and as soon as the Act expires any proceedings which are being taken against the persons will ipso facto terminate."

Mr. Singhvi also referred us to certain observations made in the following decisions reported in *Ali Ahmad v. Collector of Bombay*²², *Keshavan Madhava Menon v. State of Bombay*²³, *S. Krishnan v. State of Madras*²⁴, *State of Punjab v. Mohar Singh*²⁵, and *Gopi Chand v. Delhi Administration*²⁶,

62. It is not in dispute that the Ordinance is a temporary legislation and has lapsed on 19th September 1960. Sub-clause (a) of clause (2) of Article 123 provides that

"An Ordinance promulgated under this articleshall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the re-assembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses upon the passing of the second of those resolutions."

The Explanation provides

"Where the Houses of Parliament are summoned to re-assemble on different date, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause."

The House of People was summoned to reassemble on 1-8-1960 and the Council of States was summoned to reassemble on 8-8-1960. No resolution was passed by the Parliament before the expiration of the aforesaid period of six weeks disapproving the Ordinance. Under the provisions of sub-clause (a) of clause (2) of Article 123 the Ordinance therefore lapses on the expiration of six week, from 8-8-1960 that is on 19-9-1980.

63. The aforesaid observations at the first sight appear to support the contention of Mr. Singhvi but on a closer scrutiny of the authorities to which we were referred, in our opinion, they have no application to the facts of the present case.

64. In Menon's case, 1951 SCR 228: AIR 1951 Supreme Court 128 Das J. who delivered the judgment of the majority at page 235 (of SCR) : (at p.130 of AIR) of the Report, observed:

"It is well known that on the expiry of a temporary statute no further proceedings can be taken under it, unless the statute itself saved pending proceedings. If,

²²1949-51 Bom LR 589, at p.599: (AIR 1950 Bom 33)

²⁴1951 SCR 621 at p.628: (AIR 1951 SC 301)

²³1951 SCR 228 at p.235: (AIR 1951 SC 128 at p.130)

²⁵1955 (1) SCR 893 at p.897 : (AIR 1955 SC 84)

²⁶ AIR 1959 SC 609 at p.615

therefore, an offence has been committed under a temporary statute and the proceedings were initiated but the offender had not been prosecuted and punished before the expiry of the statute, then, in the absence of any saving clause, the pending prosecution could not be prosecuted with after the expiry of the statute by efflux of time."

In Krishnan's case, 1951 SCR 621 : AIR 1951 Supreme Court 301 Patanjali Sastri J. who delivered the judgment of the majority, after referring to the aforesaid observations in Craies stated the rule thus at page 628 (of SCR) : (at p.304 of AIR):

"The general rule in regard to a temporary statute is that, in the absence of special provision to the contrary proceedings which are being taken against a person under it will ipso facto terminate as soon as the statute expires."

It is thus abundantly clear that the proceedings which terminate on the expiration of a temporary statute are proceedings taken under the statute that had expired, the nature of the proceedings, being prosecution for an offence alleged to have been committed under the temporary statute. Now, in the instant case, proceedings which have been taken against the petitioners and which are still pending are proceedings in a departmental enquiry. These proceedings cannot therefore be said to be proceedings either under the Ordinance or prosecution for the offence under the Ordinance.

65. We have already reproduced the charges framed against the petitioners, the gist of those charges is grave misconduct on the part of the petitioners by participating in the illegal strike. Action taken against the petitioners thus is not under the Ordinance. Had it been intended to take action against the petitioners under the Ordinance, they would have been prosecuted under Section 4 of the Ordinance. The charges framed against the petitioners are not for commission of any offence under the Ordinance, the departmental enquiry cannot terminate in imposing any sentence of imprisonment or fine on the petitioners. In our view, therefore, the lapsing of the Ordinance on 19-9-1960 has not the effect of ipso facto terminating the proceedings in the departmental enquiry started against the petitioners. These proceedings therefore are not liable to be quashed.

66. For reasons stated above, in our opinion, Miscellaneous Petitions Nos.248 and 254 of 1960 are liable to be dismissed.

67. and this brings us to the other two Petitions. Miscellaneous Petitions Nos.255 and 256 of 1960 wherein the validity of Rules 4(A) and 4(R) of the Central Civil Services (Conduct) Rules, 1955 has been challenged. Before we proceed to deal with this question it would be convenient to deal with a common question raised by both the petitioners.

68. It is contended by both the petitioners that they are workmen in an industry within the meaning of Section 2(j) of the Industrial Disputes Act, they are governed by the provisions of that Act, the Central Civil Services (Conduct) Rules have no application to their cases, and the

departmental proceedings taken against them under Rule 4(A) or 4(B) for violating the Rules are therefore liable to be quashed. Reliance is placed on two decisions of Their Lordships of the Supreme Court in Hospital case, *State of Bombay v.*

*Hospital Mazdoor Sabha*²⁷, and the Corporation case, *Corporation of the City of Nagpur v. Its employees*²⁸ and in particular on the observations of Their Lordships in paragraph 20 of the report where the workers in the Tax Department of the Nagpur Corporation have been held to be workmen in an Industry. It is the argument of Mr. Singhvi that the work carried on in the two departments, viz., the Indian Audit and Accounts Department and the Income-tax Department to which these two petitioners belong, is not a regal function of the State, that work can as well be done by private agency if the Government chose to appoint such an agency, the workers in these two departments are therefore workmen within the meaning of the Industrial Disputes Act. The question as to which activity can be termed as an industry within the meaning of the Act has been considered at length by another Division Bench of this Court of which one of us (Tambe, J.) was a party *Tulsiram Sadanamal v. Commissioner of Labour*²⁹, On consideration of various decisions, including the aforesaid two decisions of Their Lordships of the Supreme Court, the rule deducible has been summarized as follows:

"The important test for deciding whether any business, trade, or a calling of an employer,, service, employment avocation or occupation of an employee constitutes an industry within the meaning of the Act is not only the character of the activities indicated by the works included in the definition but their form and organization in relation to the employed labour force as an active and creative agent for achieving the fruits of the activity. It should be an activity which is predominantly carried on by employment of organized labour force for the production or distribution of goods or for rendering of material services to the community at large or a part of such community."

In each case, therefore, it has to be seen (i) whether the activity is predominantly carried on by employment of organized labor force and (ii) whether such activity is carried on either (a) for the production or distribution of goods, or (b) for rendering material service to the community at large or to a part of such community. It has not been stated in these petitions in what manner the activities carried on by these two departments are carried on for either of the aforesaid two objects. We find it difficult to hold that the employees in these two departments are engaged either for production or distribution of goods or for rendering any material service as such to the community at large or part of such community. In the Hospital case, 62 Bom LR 553 : AIR 1960 Supreme Court 610, the activity carried on in the Hospitals was of rendering material service to the community at large; in the Corporation case also the departments which have been held to be an industry have been held to be rendering material services to the citizens of Nagpur. It has been held that the workers in the Tax Department have been substantially doing the work of those Departments. The aforesaid two decision, on which reliance is placed by Mr. Singhvi, therefore, are hardly of any assistance to the petitioners. This contention of Mr. Singhvi, therefore, fails.

69. The Services Rules are framed by the President in exercise of the powers conferred on him by the Proviso to Article 309 and clause (5) of Article 148 of the Constitution. Rules 4(A) and 4(B) have been subsequently introduced in these rules in the year 1957. Rule 4(A) provides:

²⁷62 Bom LR 553: AIR 1960 SC 610

²⁹ Special Civil Appln No.135 of 1060, D/-5-12-1960 (Bom)

²⁸ AIR 1960 Supreme Court 675

"No Government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service."

It is contended that rule 4(A) is violative of the rights conferred by Article 19(1)(a), (b), (c) and (g) of the Constitution. Mr. Singhvi, in the first instance, urged that the expressions 'strike' and 'demonstration' are not defined; the expression 'demonstration' is very wide; in the absence of any definition, the executive authorities might include ordinary gestures such as putting on a cap of a particular variety or a badge or distribution of leaflets advocating the cause of public servants as demonstration and punish that government servant therefor. It is true that these two expressions are not defined. But, in our view, the meaning of 'strike' is well understood. In the passage relied on by Mr. Singhvi in (1869) 4 QBD 602 at p.612 this definition has been given as "A strike is properly defined as a simultaneous cessation of work on the part of workmen", and it is in this sense that this expression is, generally understood. The expression "demonstration", no doubt, is wide one but it has also an ascertained meaning. In the Webster's Dictionary at page, 459, primary meaning of word 'demonstrate' is given as, "to make evident, to show or prove to be certain, to prove beyond the possibility of doubt". The meaning of the word 'demonstration' used in connection with a party or group is given as "A public exhibition by a party, sect, or society or its numbers, principles etc. as by a parade or mass meeting." In Oxford English Dictionary Vol.III 'demonstration' is defined as

"A public manifestation, by a number of persons, of interest in some public question, or sympathy with some political or other cause; usually taking the form of a procession and mass-meeting."

There is no reason to assume that the expression 'demonstration' has been used in any other sense, or has been given any extended meaning in the rule.

70. Dealing with the first two cases, we have held that the right to go on strike is not included in the fundamental rights guaranteed to the citizens under Article 19(1)(c) and (g) of the Constitution, and prohibiting strikes does not contravene Article 19(1)(c) and (g). The same reasons would equally apply to the rejection of the contention that prohibiting strikes contravenes Article 19(1)(a) and (b). In our opinion, therefore, rule 4(A) so far as it prohibits government servants from resorting to any form of strike does not violate the fundamental rights conferred on the citizens by Article 19(1)(a), (b), (c) or (g) of the Constitution, and so far as it prohibits them from participating in any demonstration, it does not violate the fundamental rights conferred on citizens under Article 19(1)(a), (c), or (g) of the Constitution. It is true that rule 4(A) so far as it goes to prohibit government servants from participating in any demonstration contravenes the

provision, of Article 19(1)(b) of the Constitution.

71. We would now proceed to consider whether the restrictions imposed by rule 4(A) are in the interest of public order and public interest and within the permissible limits of clauses (3), (4) and (6) of Article 19 of the Constitution. It has to be noticed that the restrictions imposed are not absolute. They prohibit government servants from participating in any demonstration or resorting to any form of strike in connection with any matter pertaining to their conditions of service only. Strike and demonstration are not the only means through which government servants could ventilate their grievances or bring their grievances to the notice of the Government. It is open to the government servants to make representations to the Government. The relationship between the government servants and the Government is different in nature than that of an ordinary employer and employee. Personal interest is the primary factor that weighs with an ordinary employer and much more so in the case of an employer in an industry. Actions of the Government are not actuated by any personal motive as such. The Government carries on its administration in the interest of public. Furthermore, under the present circumstances the persons who run the Government are chosen representatives of the people. It cannot be disputed that for the maintenance of public order the affairs of the Government are conducted smoothly and without interruption. A Government cannot run smoothly unless discipline amongst and efficiency of the Government servants is maintained. If Government servants are permitted to participate in demonstrations and resort to strikes it is bound to disturb the smooth working of the Government, which in its turn may, in certain circumstances result in denial of exercise by large number of citizens of the freedom guaranteed to them under Article 19(1)(d) and (g) of the Constitution. Apart from it may, in certain cases, even disturb public tranquility. For reasons stated above, in our judgment, the challenge to the constitutionality of rule 4(A) should fail.

72. Rule 4(B) provides:-

"No Government servant shall join or continue to be a member of any service Association of Government servants:

- (a) which has not, within a period of six months from its formation, obtained the recognition of the Government under the rules prescribed in that behalf, or
- (b) recognition in respect of which has been refused or withdrawn by the Government under the said rules."

73. It is urged by Mr. Singhvi that this rule infringes the rights conferred on the petitioners by Article 19(1)(b) and (c) of assembling peaceably and without arms and of forming associations or unions. In our opinion, this contention is well founded. The rule in terms, makes membership of an unrecognised association or membership of an association of which recognition has been withdrawn, a disciplinary offence. That being the position, there cannot be any doubt that it is violative of the right conferred by Article 19(1)(c) of the Constitution to form associations or unions. Even though the rule in terms does not prohibit government servants from forming associations or unions, by making membership of unrecognised associations a disciplinary

offence, it has in substance done so and in considering infringement of fundamental rights it is the substance of the impugned Act or rule that matters and not the term. It is however the contention of Mr. Mehta who appear for the respondents that the restrictions imposed are reasonable restrictions and it is open to the Government to impose reasonable restrictions under clauses (3) and (4) of Article 19 of the Constitution. It is true that the rights conferred on the citizens under Article 19(1)(b) and (c) are not absolute rights and it is open to the State to make laws imposing in the interest of public order or morality reasonable restrictions on the exercise of the rights conferred by sub-clauses (b) and (c) of Article 19(1). It has therefore to be considered whether the restrictions imposed by this rule are reasonable and are in the interests of public order. We have already referred to the decision of Their Lordships of the Supreme Court in Romesh Thoppar's case, 1950 SCR 594 : AIR 1950 Supreme Court 124 where Their Lordships have observed that public order is an expression of wide connotation and signifies that state of tranquility which prevails among the members of a political society as a result of the internal regulations enforced by the Government which they have established. In a recent decision in the *Supdt., Central Prison, Fatehgarh v. Dr. Ram Manohar Lohia*³⁰, after considering clause (2) of Article 19, Their Lordship, have observed that "public order is synonymous with public peace, safety and tranquility". We fail to understand how a government servant, by merely being a member of a Service Association which is not recognised by the Govt. or whose recognition has been withdrawn by it, would endanger public peace, safety and tranquility.

74. Mr. Mehta urges that Rule 4(B) should be read along with the Central Civil Services (Recognition of Service Associations) Rules, 1959, and when so read, it becomes abundantly clear that the purpose of the rule is to prevent government servants from being members of associations of which outsiders are members or from being members of associations which are helped by the funds of outsiders. If that was so, that objective could easily have been achieved by making membership of the association in which outsiders are members or which are helped by the funds of outsiders a disciplinary offence. What has however been done is making the membership of an unrecognized association a disciplinary offence. Granting of recognition is exclusively in the discretion of the Government, so also cancellation or withdrawal of its recognition. Rule 7 of 1959 Rules provides that if in the opinion of the Government, a Service Association recognized under these rules has failed to comply with the conditions set out; in Rule 4, Rule 5 or Rule 6, the Government may withdraw the recognition accorded to such association. It is true that two of the conditions in the said rule provide that recognition will not be granted if the Association admits outsiders to be members of that Association, or if the Association takes funds from outsiders, but there are many other conditions also. Recognition could be withdrawn on uncertain grounds. To illustrate, clause (1) of Rule 5 is in following terms:

"Communication, addressed by the Service Association or by any office bearer on its behalf to the Government or a Government authority shall not contain any disrespectful or improper language."

The decision as to whether the language used in such a communication is disrespectful or improper or not depends solely on the opinion of the individual officer concerned and is bound to vary from officer to officer. The possibility of the power being arbitrarily exercised cannot be excluded. There is no right of appeal against refusal to grant recognition or withdrawal of recognition. The fundamental right of government servants to form associations or unions has thus been made subject to the arbitrary discretion of the executive Government. There appears to be hardly any necessity for imposing such restrictions in the interest of public peace, safety and tranquillity. It is indeed true that there is a presumption in favour of the constitutionality of a legislation, but the rule on the face of it infringes the fundamental right conferred on the citizen, by Article 19(1)(c) of the Constitution. The burden therefore lies on the respondents to satisfy that the restrictions imposed are reasonable and place necessary material therefor before us.

75. In *Saghir Ahmad v. State of U.P.*³¹, Their Lordships

³⁰ AIR 1960 SC 633 at p.639

³¹ AIR 1954 SC 728

observed:

"But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19(1)(g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the Article. If the respondents do not place any material before the Court to establish that the legislation comes within the permissible limits of clause (6), it is surely not for the appellant to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community."

These observations would equally apply to the present cases. The respondents have not placed any material before us to establish that Rule 4(B) comes within the permissible limits of clause (3) or clause (4) of Article 19 of the Constitution. No doubt, Government servants stand on a footing different from ordinary citizens and it is necessary to impose on them necessary restrictions for maintenance of discipline amongst them and their efficiency and that is essential in the interest of public order. Even then, it is difficult to assume that allowing government servants to become members of Service Associations which are not recognized by the Government would by itself be prejudicial to maintenance of discipline amongst them or their efficiency. For reasons stated above, Rule 4(B), as it stands, is liable to be struck down on the ground that it contravenes the provisions of Article 19(1)(c) of the Constitution. The view taken by us finds support in *Ramakrishnaiah v. President District Board, Nellore*³²,

76. In result, Miscellaneous Petitions Nos.248, 254 and 258 of 1960 are liable to be dismissed. Rule issued in those cases is therefore discharged.

77. Miscellaneous Petition No.255 of 1960 is partly allowed. The charge framed against Shri E.X. Joseph, Petitioner in that case, on 11-7-1960 for deliberate breach of rule 4(B) is quashed

and so also the order of the first respondent of date 9-7-1960 on enquiry in respect of the said charge is quashed. The enquiry started against him for breach of rule 4(A) shall however proceed.

78. In the circumstances, we make no order as to costs.

Order accordingly.

³² AIR 1952 Mad 253