

ORISSA HIGH COURT

Venkata Swamy

Vs

Superintendent

Original Jurisdiction Case No. 380 of 1955

(Narasimham, C.J. and Das, J.)

06.11.1956

JUDGMENT

Das, J.

1. This is an application under Article 226 of the Constitution of India against an order of dismissal of the petitioner, dated 27-11-54. The petitioner's case was that he was appointed on 7-9-54 as an extra-departmental branch post-master of Golabando in Berhampur Division by the opposite party on a monthly salary of Rs. 25/-. On 24-2-54 the Superintendent of Post Offices, Berhampur Division, issued a letter to the petitioner to the effect that it was reported that he was indulging in politics, especially pro-Andhra activities which are against the Government Servants' Conduct Rules, and he was asked to explain within five days from the receipt of the letter as to why drastic action should not be taken against him. The petitioner duly submitted his reply on 1-3-54 pleading absolute innocence. On 13-3-54 a warning was issued by the Superintendent of Post Offices, Berhampur Division, to the petitioner in the following terms :

"You should remain aloof from politics, especially pro-Andhra activities, which are against the Government Servants' Conduct Rules, else there is no other alternative but to remove you from the charge of the office."

Thereafter all of a sudden, the petitioner was ordered on 27-11-54 to make over charge of his office to one Sri Adikanda Patro, Head-master, Board Elementary School, the same afternoon. On 6-12-54, the petitioner received orders from the opposite party that his services as extra departmental branch post-master, Golabando, were dispensed with, with effect from 27-11-54 afternoon under Rule 2 (iii) of Schedule I-B of Posts and Telegraphs Manual, Vol. III. The petitioner, thereupon, preferred an appeal to the Director of Posts and Telegraphs, Cuttack, which was rejected on 17-1-1955. It is alleged that the opposite party No. 1 never made any enquiry regarding the alleged activities of the petitioner and that the notice given to the petitioner on 24-2-54 was too vague and baseless. Further, subsequent to 13-3-54, no fresh charges were made against the petitioner, nor was he called upon to explain his misconduct, if any, but his services were all of a sudden dispensed with without assigning any reason whatsoever. The removal of the

petitioner is thus arbitrary and without any proof, much less any material on record of which notice was given to the petitioner for his explanation. It is complained that at no stage any reasonable opportunity was given to the petitioner to explain his doubtful character or his unsatisfactory work for which his services are said to have been dispensed with. Thus, the mandatory provisions of Article 311 (2) of the Constitution of India are violated, and the petitioner is entitled to a writ of mandamus against the opposite party.

2. The opposite party filed a counter-affidavit to the above petition and averred that the petitioner was only a temporary part-time employee under the Government receiving no regular salary, but only an allowance per mensem and as such his services could be terminated at any time without notice or any other formalities which could attract Article 311(2) of the Constitution. The petitioner no doubt was employed as an extra-departmental agent from 7-9-25 to 27-11-54, but he does not come under Rule 3 of the Civil Services (Classification, Control and Appeal) Rules. Those services were clearly and definitely excluded from the operation of the said Rules. Thus, the extra-departmental agents along with certain other temporary employees of the department are wholly excluded from the operation of the Civil Services (Classification, Control and Appeal) Rules as specifically stated in para 4 of Chapter I of the Manual of Appointments and Allowances of Officers of the Posts and Telegraphs Department. With regard to the facts alleged in the petition, it was averred that on receiving reports that the petitioner was indulging in political activities conducive to communal disturbances, which are against the Government Servants' Conduct Rules, by which the petitioner is bound, and which prohibit the Government servants including part-time employees of the Government from taking part in political activities, the Superintendent of Post Offices, Berhampur, though it was not incumbent upon him, served the petitioner with notice to explain why drastic action should not be taken against him and also he was warned that he should keep himself aloof from such political activities which may bring about communal disturbances, failing which the petitioner would run the risk of being removed from the charge of his office. According to Memo No. Esb/110-16/32 dated 20th December, 1923 from the Secretary to the Government of India, Department of Industries and Labour, Posts and Telegraphs Branch, New Delhi to the Director General of Posts and Telegraphs full power of control over extra departmental agents employed in the Posts and Telegraphs department was conferred on the Director General, and under Annexure "B" to the said memo the petitioner was liable to be removed from service for unsatisfactory work or doubtful character. It was further stated that it was not necessary under the conditions of service of the petitioner as laid down by R. (2) (A) (iii) of the Posts and Telegraphs Manual, Vol. III to make any such enquiry or give any opportunity to the petitioner to submit his explanation or assign any reason for discharging him from service. The petitioner being only a temporary part time employee is not deemed to be holding a civil post for the purpose of Article 311 (2) of the Constitution, and that in any case, as a temporary extra-departmental agent, his services were liable to be terminated without observance of the formalities under Article 311 (2) of the Constitution.

3. Mr. Ramdas, learned counsel appearing on behalf of the petitioner, however, contended that the petitioner, was doubtless a Civil servant and as such the provisions of Article 311 (2) of the Constitution would apply to him; and accordingly his discharge without any enquiry and without any reasonable opportunity for submitting his explanation is against tile provisions contained in Article 311 (2), and as such it offends the constitutional provisions, and he is entitled to a writ.

4. Thus, the only question for consideration is whether the applicant is a member of a Civil

service of the Union of India and as such is entitled to the protection afforded under Clause (2) of Article 311. Before dealing with the history of the provisions under Article 311 (2) of the Constitution, I would like to refer to a decision of the Supreme Court, reported in *Dinabandhu Sahu v. Jadumoni Mangaraj*¹, wherein their Lordships at page 413 gave an indication that :

"with reference to the last findings, it is possible to urge with some force that extra-departmental agents and Presidents of Chowkidari Unions, are not, having regard to their functions, Government servants and that accordingly there was no contravention of Section 123 (8)."

For the first time the services were given the statutory protection under Section 96 (B) of the Government of India Act, 1919, recognizing the Rules and Regulations in force prior thereto. Section 96 (B) is in the following terms :

"Section 96 (B) (1) : Subject to the provisions of this Act and of the rules made thereunder, every person in the Civil Service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed.

If any such person appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a Governor's province, and on due application made to the superior does not receive the redress to which he may consider himself entitled, he may without prejudice to any other rights of redress, complain to the Governor of the Province in order to obtain justice, and the governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable.

2. The Secretary of State in Council may make rules for regulating the classification of the Civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to local Governments, or authorize the Indian Legislature or local Legislatures to make laws regulating the public services :

Provided that every person appointed before the commencement of the Government of India Act. 1919, by the Secretary of State in Council to the Civil Service of the Crown in India shall remain all his existing or accruing rights, or shall receive such compensation for the loss of any of them as the Secretary of the State in Council may consider just and equitable.

3. The right to pensions and the scale and conditions of pensions of all persons in the Civil Service of the Crown in India, appointed by the Secretary of State in Council, shall be regulated

in accordance with the rules in force at the time of the passing of the Government of India Act, 1919. Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the service appointed before the date thereof. Nothing in this section or in any rule there under shall prejudice the rights to which any person may or may have become entitled under the provisions in relation to pensions contained in the East India Annuity Funds Act, 1874.

4. For removal of doubts, it is hereby declared that all rules or other provisions in operation at the time of passing of the Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority, relating to the Civil Service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed, but any such rules or provisions may be revoked, varied, or added to by rules or laws made under this section.

5. No rules or other provisions made or confirmed under this section shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person in the Civil Service of the Crown in India in such manner as may appear to him to be just and equitable, and any rules made by the Secretary of State in Council under Sub-section (2) of this section delegating the power of making rules may provide for dispensing with or relaxing the requirements of such rules to such extent and in such manner as may be prescribed : Provided that where any such rule or provision is applicable to the case of any person, the case shall not be dealt with in any manner less favorable to him than that provided by the rule or provision." It is under provisions of sub-section (2) to Section 96 (B) that the Civil Services (Classification, Control and Appeal) Rules were framed and came into force on 27th of May, 1930. Rule 55 of the said Civil Services (Classification, Control and Appeal) Rules reads as follows :

"Rule 55. Without prejudice to the provisions of the Public Servants Enquiries Act, 1850 no order of dismissal, removal or reduction shall be passed on a member of a Service other than an order based on facts which have led to his conviction in a Criminal Court or by a Court-Martial unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself.

The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required within a reasonable time, to put in a written statement of his defense and to state whether he desires to be heard in person. If he so desires or if the authority concerned so direct, an oral inquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof. This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions

of the rule may, in exceptional cases for special and sufficient reasons to be recorded in writing be waived, where there is a difficulty in observing exactly the requirements of the rule and these requirements of the rule and those requirements can be waived without injustice to the person charged." Then came the Government of India Act, 1935 which enacted in Section 240 with regard to the tenure of office of persons employed in civil capacities in India and virtually embodied R. 55 above-quoted in sub-section (3) thereto. Sub-section (3) of Section 240 runs as follows :

"No such person as aforesaid shall be dismissed 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." Clause (2) of Article 311 of the Constitution is word for word the same as sub-section (3) of Section 240 of the Government of India Act, 1935, except the words "or removed" after the words "shall be dismissed".

By virtue of the powers delegated by the Secretary of State under sub-section (2) of Section 96 (B) of the Government of India Act of 1919 to the Governor-General and the Governors of Provinces, various heads of departments under their delegated authorities framed rules and in the present cases the Director General of Posts and Telegraphs in India framed rules for his department on which the opposite party relies in the counter-affidavit referred to above. Now R. 3 of the Civil Services (Classification, Control and Appeal) Rules provides that these rules shall apply to every person in the whole time civil employment of a Government in India. Thus, it is obvious that the part-time employees - the petitioner being admittedly one such - were excluded from any protection from the very beginning ever since the Civil Services (Classification, Control and Appeal) Rules were framed under Section 96 (B) (2) of the Government of India Act, 1919. They cannot be said to have acquired any new or wider right under Section 240, sub-section (3) of the Government of India Act, 1935, which virtually embodied R. 55 as aforesaid nor can they be said to have acquired any higher right of protection under Article 311 (2) of the Constitution. They are doubtless governed by the departmental rules framed by the Director General of Posts and Telegraphs, as authorized by the Central Government.

5. Mr. Ramdas, learned counsel for the petitioner referred us to the earliest decision of the Judicial Committee of the Privy Council reported in *R.T. Rangachari v. Secy. of State*², and *R. Venkata Rao v. Secy. of State*³, These two cases were heard at the same time. In the case reported at p. 27 *R.T. Rangachari v. Secy. of State*(*supra*), their Lordships held that the stipulation or proviso as to dismissal in Section 96 is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time. This statutory safeguard should be observed with the utmost care and a deprivation of pension based upon a dismissal purporting to be made by an official, who is prohibited by statute from making it, rests upon an illegal and improper foundation, but in their Lordships' opinion although by virtue of Section 96 (B) a statutory right is created, it is not actionable. In the case reported at p. 31 *R. Venkata Rao v. Secy. of State*(*supra*), their Lordships clearly held that while on the clear facts of the case mistakes of a serious kind have been made and wrongs have been done which call for redress, their Lordships are unable as a matter of law to hold that redress is obtainable from the Courts. Now in this connection, I will refer to a decision of the Supreme Court reported in *State of Bihar v. Abdul Majid*⁴, That was a case by a Sub-Inspector of Police against the State of Bihar for declaration that the order of the Deputy

Inspector General was void and for recovery of his arrears of salary. The Chief Secretary to the Government wrote to the Inspector General of Police that the order of dismissal was untenable and the appellant was to be reinstated at his instance. On appeal by the State of Bihar it was contended that the appellant's claim for arrears of salary could be made only under Rule 95 of the Service Code. Their Lordships held that the rule had no application to the case as the reinstatement of the appellant was not at the instance of any of the authorities mentioned therein and hence the enabling provision contained in it did not operate as a bar to the appellant's suit. Their Lordships while dealing with the origin and scope of the rules and the remedies of civil servants in India held that the rule of English Law that Civil servants are liable to dismissal without notice and there is no right of action for wrongful dismissal that is, they cannot claim damages for premature termination of their services has not been adopted in Section 240. Section 240 itself places restrictions and limitations on the exercise of that pleasure of His Majesty while holding office and those restrictions must be given effect to. They are imperative and mandatory. It follows therefore that whenever there is a breach of restrictions imposed by the statute, the matter is justiciable and the party aggrieved is entitled to suitable relief at the hands of the Court. Next I will refer to a decision of the Federal Court reported in *Afzalur Rahman v. Emperor*⁵, where Varadachariar, J., held that as early as in the Government of India Act, 1858, it was recognised that the power of making appointments to offices in India was divided and distributed amongst several authorities in India and existing usage and regulations relating thereto were continued, subject to the reservation of power to the Secretary of State in Council to make Regulations. In exercise of this power, rules and regulations have been framed from time to time, dividing the superior and the subordinate services into various classes and empowering different authorities to appoint and dismiss officers of the different classes. Section 96 (B) (2) of the Government of India Act, 1919 recognized the rules of this kind then in force and provided for the Secretary of State making rules in that behalf and also for delegation by him of the rule making power to the Governor General in Council or to a Local Government. As enactments both of the Indian Legislature and of Local Legislatures had sometimes provided for appointments to and dismissal from various offices, that system also was recognized in the same section of the Government of India Act, 1919. The provisions of Sections 241 and 240 (2) of the Constitution Act of 1935, should also be understood in the light of this longstanding practice. The same view was adopted by the Supreme Court in a case reported in *Shyamlal v. State of U.P.*⁶, Mr. Ramdas referred us to a decision reported in *Brojo Gopal Sarkar v. Commissioner of Police*⁷, To begin with, that was a case of a wholetime servant of the Calcutta Special Constabulary under the Calcutta Suburban Police Act (Bengal Act 2 of 1866), where the special police officer appointed under Section 12 of the Act was afforded the same protection as a member of the regular police force and thus had the protection under Article 311. Hence that case has no application whatever to the facts of the present case. Mr. Ramdas then referred us to two cases reported in *Kishanlal Laxmilal v. State of M.B.*⁸, and *Sher Singh Malban v. State of Madhya Pradesh*⁹, Those cases, however, are clearly distinguishable. Last of all he referred us to a case reported in *Lachmi and others v. Military Secretary to Governor of Bihar*¹⁰, wherein it was held that the true test in determining whether a person comes within Article 311 of the Constitution is not whether his salary or wages are paid from State funds; the true test is whether he is a member of a Civil service of a State or whether he holds a civil post under a State. The expression 'Civil post under a State' means that the post is under the control of the State, that is the State can abolish the post if it so desires, or the State can regulate the conditions subject to which the post is or will be held. The real test, therefore, is the immediate or ultimate control which is exercised by the State with regard to the post in question.

The petitioners in that case were working in the garden of the Raj Bhawan and as such were not Government servants. Hence, I do not see how those cases can be of any avail to Mr. Ramdas.

6. The learned Advocate General appearing on behalf of the opposite party on the contrary contended that the petitioner is not entitled to the protection under Article 311 (2) he being a temporary part-time employee. The conditions of his service are different from those of whole-time services. He referred us to R. 284, in Vol. IV of the Posts and Telegraphs Manual dealing with appointment of extra-departmental agents. Rule 284 is in the following terms :

"Whenever possible branch offices should be placed in charge of extra-departmental agents such as school-masters station-masters, shop-keepers, landowners and pensioned servants of Government who have sources of income apart from their allowances for postal work. School-masters, station-masters and others who are paid servants should not, however, be appointed as extra-departmental branch post-masters without the previous consent of their superior officers or employers as the case may be. A police officer who is not a pensioner may not be employed as an extra departmental agent without the previous sanction of the Director-General."

Further, under the rules framed by the Director-General the extra-departmental agents are not entitled to any pension. Under Rule 4 of the Provident Fund Rules, they are not entitled to open any provident funds account. In the Manual of appointments and allowances of officers of the Indian Posts and Telegraphs Department (3rd Edn), instructions regarding fixation of monthly allowances, appointment of extra-departmental agents and branch post-master, provision of office or residential accommodation at the cost of the department, where really necessary, have been enumerated. According to these instructions, the monthly allowance of an extra-departmental agent is to be fixed at the discretion of the head of the circle concerned. Separate monthly contingent allowances for extra-departmental post-masters are sanctioned, but in fixing the monthly allowance the head of a circle takes into account the amount required for contingency in each case. These extra-departmental agents can go on leave only after putting either their own nominee, agent or servant in charge of the office. Besides, R. 4 of Chapter I of the Manual of appointments etc. excludes certain members of the staff wholly from the operation of the Civil Services (Classification, Control and Appeal) Rules and the extra-departmental agents are shown in clause (vi) thereto. Further, Rule 2(iii) of Schedule I-B to the posts and Telegraphs Manual contemplates infliction of penalties for any good and sufficient reasons. No enquiry or opportunity for removal has been envisaged under that rule.

Thus, from the very nature of their employment and the conditions of service, it is clear that an extra-departmental branch post-master cannot be held to be a Government servant, and much less holding a Civil post under the Union Government within the meaning of Article 311(2) of the Constitution. The departmental authorities, it is abundantly clear, have complied with the departmental rules referred to above and have accordingly discharged the petitioner from service. The rules had given the authorities full powers of control over these services and they could be removed for unsatisfactory work or doubtful character. I am, therefore, clearly of opinion that the applicant is not a Government servant and much less a civil servant for purposes of the Constitution, and under the rules he is not entitled to the protection envisaged in Article 311 of the Constitution. Accordingly, I do not see how the petitioner in this case can claim any relief under Article 311(2) of the Constitution. In the result this petition is dismissed with costs.

Hearing fee Rs. 100/-.

Narasimham, C. J.

7. I agree.

8. The main question for consideration is whether an Extra-Departmental Branch Post Master is "a member of a Civil Service" or "holds a civil post" within the meaning of Article 311 of the Constitution so as to claim the safeguards provided in that Article before he could be removed from his post. Having regard to the nature of his functions I am satisfied that he is merely an agent and is not either a member of a Civil Service" or "the holder of a Civil Post". In all statutory notifications he has been described only as an Extra-Departmental Agent. Thus, when the Secretary of State made the Civil Services (Classification, Control and Appeal) Rules in 1930, in exercise of the powers conferred by Section 96B(2) of the Government of India Act 1919, he expressly excluded part-time Government servants from the scope of those rules and conferred power on the Governor-General in Council to make rules on their behalf. In exercise of this power the Governor-General, in Memo No. Esb. 110-16/32 dated 20-12-1932 from the Government of India in the Department of Industries and Labour (Posts and Telegraphs Branch), to the Director-General of Posts and Telegraphs conferred on the Director-General "full power of control over Extra-Departmental Agents employed in the Posts and Telegraphs Department, in respect of such employment." The Director-General of Posts and Telegraphs also, in exercise of this power provided for the appointment and conditions of service of these Extra-Departmental Agents See Schedule No. I-B to the Posts and Telegraphs Manual, Vol. III and Rule 284 of Vol. IV. Under that Rule it was directed that no person should be appointed as an Extra-Departmental Agent unless he had an independent source of income apart from his allowance for doing such postal work. He is not entitled to any pension, nor is he entitled to contribute to any provident fund. A monthly allowance is paid to him, out of which he has to defray the expenses connected with his post office including the expenses of accommodation. He is allowed to go on leave after putting his own nominee, agent or servant, in charge of the post office. This privilege is, I think, decisive on the question at issue in the present application. It is inconceivable that any regular Government servant would be permitted to hand over charge of his office to his own nominee, agent or servant and go on leave. I am therefore of the view that these Extra-Departmental Branch Postmasters are mere agents of Government in respect of their postal work, and the terms and conditions of the agency are regulated by the relevant provisions of the Posts and Telegraphs Manual which are in the nature of terms of conduct of the agency. It is true that these agents may also be "public officers" within the meaning of Section 2 (17) of the Civil Procedure Code, or "public servants" within the meaning of Section 21 of the Indian Penal Code. But this is due to the express provisions in the said two Statutes defining those expressions. They can be of no help in construing Article 311 of the Constitution.

9. In ILR 22 Pat 349 : (AIR 1943 FC 18), the Federal Court pointed out that in understanding the provisions of Sections 240 and 241 of the Government of India Act, 1935, the longstanding practice dealing with the classification of the various services and the conferment of power on different authorities to regulate the conditions of service of the various classes of services should be looked into. In AIR 1954 SC 369, the circumstances under which Section 240 of the Government of India Act, 1935 was inserted have been described, and it was pointed out that sub-section (3) of Section 240 "gave Statutory protection to the rights conferred by R. 55 of the

Civil Services (Classification, Control and Appeal) Rules but which, prior to this Act of 1935 had been held by the Privy Council in the last two cited cases, to be ineffective against the Crown's plenary powers of dismissal." Article 311 (2) of the Constitution is substantially the same as Section 240 (3) of the Government of India Act. The aforesaid observations of the Supreme Court would therefore apply with full force. There is thus authority for the view that Article 311 (2) of the Constitution and Section 240 (3) of the Government of India Act merely gave Statutory protection to the rights conferred by R. 55 of the Civil Services (Classification, Control and Appeal) Rules to Government servants. But R. 3 of the said Classification Rules expressly excluded part-time employees from the scope of those rules. It seems, therefore, a fair inference that these part-time Extra-Departmental Agents of the Posts and Telegraphs Department were never entitled to the safeguards of either R. 55 of the Classification Rules or of Section 240 (3) of the Government of India Act or of Article 311 (2) of the Constitution.

10. It is true that receipt of remuneration or absence of remuneration is not a decisive test in considering whether a particular employee is entitled to the protection of Article 311 (2). The two cases referred to by Mr. Ramdas, on behalf of the petitioner, namely, AIR 1955 Nagpur 175 and AIR 1955 Calcutta 556 related to employees who were working in an honorary capacity. Nevertheless, they were held to be holders of Civil posts for the purpose of Article 311 (2) mainly because the Statutes under which they were appointed expressly conferred upon them the same "protection" as was conferred on regular Government servants. Our attention has not been drawn to any provision, either in the Post Offices Act, 1898, or the Statutory rules made thereunder, by which those Extra-Departmental postal agents were given the same protection as was given to regular members of the Postal Services. Hence, the aforesaid decisions will not be of any help.

Petition dismissed.

Cases Referred.

¹ AIR 1954 SC 411

² AIR 1937 PC 27

³ AIR 1937 PC 31

⁴ AIR 1954 SC 245

⁵ ILR 22 Pat 349 : (AIR 1943 FC 18)

⁶ AIR 1954 SC 369

⁷ AIR 1955 Cal 556

⁸ AIR 1956 Mad Bha 100

⁹ AIR 1955 Nag 175

¹⁰ AIR 1956 Pat 398