PATNA HIGH COURT

Kamta Charan Srivastava

Vs

Postmaster-General

Misc. Judicial Case No. 382 of 1954

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

05.05.1955

JUDGMENT

Das, C.J.

1. This is an application for the issue of a writ in respect of an order of discharge passed against the petitioner on 27-2-1953, which the petitioner says he received on 3-3-1953. The order of discharge is contained in Office Memorandum No.B-256, dated 27-2-1953, which memorandum is in these terms:

> "Sree Kanta Charan Srivastava, son of Sri Raghunath Sahaya, a resident of Mahalla Damuchak, P.O. and P.S. Muzaffarpur, and the temporary sub-postmaster, Bidhupur R.S. Sub-office, and Sri Jagdish Prasad Sinha of village Rajkhund, P.O. Garaul and P.S. Mahuwea and the then temporary clerk, Thanjharpur Sub-Office, were allowed to appear at the recruitment examination held on 30-7-50 in the Zilla School, Muzaffarpur, and Patna High School, Gardanibagh, respectively. As a result of the said examination they were selected by the Postmaster-General, Bihar Circle, Patna, and allotted to this division for appointment as clerks.

Their answer books and application forms were accordingly sent by the Postmaster-General, for record in this office. At the time of appointment their hand-writings were compared with those in their answer books in English subject and found to differ. This being a case of false personation, the matter was reported to the Postmaster-General, Bihar Circle, Patna, who ordered the case to be reported to the Police. From the police report it appears that these two officials did not actually sit at the examination and in their places two other persons sat for them. These two officials were placed under suspension with effect from the date noted against each:

1	Sri Kamta Charan Srivastava.	25-4-52.
2	Sri Jagdish Prasad	28-3-52.

	Sinha.	

Now, that the cases have been established against them, Sri Kamta Charan Srivastava and Sri Jagdish Prasad Sinha are informed that being undesirable their services are not required in this department. Under the R.5 of the Central Civil Services (Temporary Service) Rules, they are hereby given one month's notice of discharge from this department. This notice will take effect from the date on which it is received by Sri Kamta Charan Srivastava and Sri Jaglish Prasad Sinha and they will be treated as discharged from this department on the expiry of the period of one calendar month from that date.

Sd. B.B. Sen Gupta
Superintendent of Post Offices,
Muzaffarpur Division."

2. The petitioner alleges that in pursuance of a notification issued by the Postmaster-General of Bihar in 1950, Calling for applications to fill certain vacancies in the Postal Department, the petitioner sat at an examination held at Muzaffarpur on 30-7-1950. As a result of the examination the petitioner was selected for appointment as a postal clerk and allotted for service in the Tirhut Postal Division. He underwent training at a training centre and thereafter he was posted to the office of a temporary clerk at Sitamarhi. The petitioner further states that in accordance with a letter dated 13-3-1951, issued from the office of the Superintendent of Post Offices, Muzaffarpur, the hand-writing of the petitioner was tested with the answer-books which he had written at the examination held on 30-7-1950, and he was selected for training after his hand-writing had been compared with the hand-writing in the answer-books.
The petitioner completed his period of probation on 30-6-1951, and was later posted as a Sub-Postmaster at Pukki Sarai Post Office. On 15-4-1952, the Sub-Inspector in charge of the Muzaffarpur Town Police Station interrogated the petitioner about his answer-books at the competitive examination held on the 30-7-1950. This enquiry, it appears, was made in the course of an investigation into an offence alleged to have been committed by the petitioner under Section 419, Penal Code. The petitioner's case is that the local police submitted a final report in the case, holding that there was no sufficient evidence for a charge-sheet. While this investigation was proceeding, the petitioner received an order dated 25-4-1952, by which he was put under suspension with immediate effect. Then on 27-2-1953, the order of discharge was passed.

3. The main grounds on which the petitioner challenges the validity of the order of discharge dated 27-2-1953, are these (1) the petitioner was a permanent clerk and R.5 of the Central Civil Services (Temporary Service) Rules, 1949, did not apply to him, and the Superintendent of Post Offices, Muzaffarpur Division, had no authority to terminate the services of the petitioner on one month's notice under the said rule; (2) in any view, the Superintendent of Post Offices, Muzaffarpur, was not the authority competent to terminate the services of the petitioner; (3) the Central Civil Services (Temporary Service) Rules, 1949, were no longer in force and no order could be passed against the petitioner under those rules; (4) the order of discharge was passed 'mala fide' as a result of some personal grudge which the Inspector of Post Offices had against the petitioner, and the order is bad for non-compliance with R.55 of the Civil Services (Classification, Control and Appeal) Rules and Articles 311 and 320 of the Constitution of India; and (5) it was also argued before us that as a matter of fact the hand-writing of the petitioner had

been compared with the answer-books of the petitioner on a previous occasion and the petitioner was accepted for training after such comparison had been made; therefore, the reason for which the petitioner was discharged did not in fact exist.

4. The petition has been contested by the opposite party and a counter-affidavit has been filed in which it has been stated that the petitioner was appointed to a temporary post, and in accordance with the terms of the temporary post, he was liable to be discharged under Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, on one month's notice. The allegations made by the petitioner that the order was 'mala fide', that the Superintendent of Post Offices had no authority to terminate the services of the petitioner, etc., were also challenged as incorrect.

5. The first point that falls for consideration is if the petitioner was appointed to a permanent post and if he was liable to be discharged on notice under Rule 5 of the Central Services (Temporary Service) Rules, 1949. Learned Counsel for the petitioner has drawn our attention to a publication called Rules for Recruitment to the services of Telegraphists, Telephone Operators, Clerks and Sorters, and he has contended that the petitioner, who was an outsider, was appointed in accordance with the rules in Part III of the said publication. Learned Counsel has drawn our attention to R.15 of the said rules which states:

> "On the occurrence of a vacancy an outside candidate will be appointed on probation and a departmental candidate on officiating basis for one year. Within two years of his appointment, he will be required to pass a departmental test that may be prescribed under the rules in force at the time. One of the subjects for the test will be a local Indian language and the candidate will have to be able to speak, write and read the local Indian Language, If he passes the test and he is found suitable in every respect, the candidate will be confirmed at the end of the period of probation or on his passing the test whichever is later.

If during the period of probation his work or conduct is not satisfactory, or if he fails to pass the test, an outside candidate will be liable to be removed from service without notice and a clerk recruited from among departmental candidates will be liable to revert to the appointment which he held before being appointed as a clerk". The argument of learned Counsel for the petitioner is that the petitioner was a probationer within the meaning of the aforesaid R.15 and he was liable to be removed from service without notice only if during the period of probation his work or conduct was not satisfactory or if he failed to pass a departmental test; as none of the aforesaid two contingencies had happened, the petitioner was not liable to be removed under Rule 15. He was appointed to a permanent post and was on probation; therefore, he was not liable to be discharged under Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949. In my opinion, this argument of learned Counsel for the petitioner is not worthy of acceptance. The very letter of appointment which the petitioner has filed shows that he was appointed to a temporary post. This letter is an annexture to the supplementary affidavit filed on behalf of the petitioner. The letter from the Postmaster-General, Bihar Circle, dated 4-1-1951, states that the petitioner had passed the competitive examination and his name had been brought on the list of approved candidates for appointment as clerk in Tirhut Division according to the requirements of the Department. In the last paragraph of this letter the Postmaster-General stated:

"It should also be noted that he will get the appointment letter from the office of the Superintendent of Post Offices, Tirhut Division, Muzaffarpur".

On 13-3-1951, the petitioner was selected for training by the Superintendent of Post Offices, Tirhut Division, and he was asked to report for training at the Head Office at Muzaffarpur. This letter also stated that the petitioner should appear in the office for a test in hand-writing before he was allowed to receive the training. There is an endorsement on the back of this letter which says that the candidate appeared for a test in handwriting. It is not clear who wrote this endorsement and whether the test was actually made or not. This is a matter, however, to which I shall advert subsequently. On 30-6-1951, the petitioner received his letter of appointment. This letter is in these terms:

"Shree Kamta Charan Shrivastava, an outside candidate who appeared at the last recruitment examination held on 30-7-50 and was allotted to this Division for clerical appointment having completed the practical training as envisaged in the PMG-Patna letter No.Staff R/329/50 Result, dated 23-1-51 as modified by letters of same Nos. dated 2-2-51 and 3-3-51 on 28-6-51 is hereby appointed as acting temporary Clerk, Sitamarhi, vice Sheoji Prasad Singh.

The candidate should join this appointment at once." The letter, therefore, shows clearly enough that the petitioner was appointed as a temporary clerk and not as a probationer to a permanent post. Under Rule 2(d) of the Central Civil Services (Temporary Service) Rules, 1949, "temporary service" means officiating and substantive service in a temporary post, and officiating service in a permanent post, under the Government of India. It is manifest from the letter of appointment given to the petitioner that he was appointed to officiate or act in a temporary post; therefore, he was a man in temporary service within the meaning of the Central Services (Temporary Service) Rules, 1949. Rule 5 of the said rules states 'inter alia' that the service of a temporary Government servant who is not in quasi-permanent service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority, or by the appointing authority to the Government servant. The period of such notice shall be one month, unless otherwise agreed to by the Government and by the Government servant. This rule clearly applies to the case of the petitioner and I am unable to accept the contention of learned Counsel for the petitioner that he was a clerk in permanent employ but on probation within the meaning of R.15 of Part III of the Rules for Recruitment to the Services of Telegraphists, Telephone Operators, Clerks and Sorters.

6. It has been contended before us that the rules called the Central Civil Services (Temporary Service) Rules, 1949, no longer exist. These rules were made under sub-section (2) of Section 241 of the Government of India Act, 1935. The argument before us is that by the Constitution Act, which came into force on 26-1-1950, the Government of India Act, 1935, was repealed and all rules made thereunder also came to an end. This argument is, in my opinion, incorrect. Article 313 of the Constitution states 'inter alia' that until other provision is made in this behalf under the Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of the Constitution, shall continue in force so far as consistent with the

provisions of the Constitution. Article 372 of the Constitution states 'inter alia' that notwithstanding the repeal by the Constitution of the enactment referred to in Article 395 but subject to the other provisions of the Constitution, all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. The expression "law in force" is explained in Explanation I of the section. Learned Counsel for the petitioner has contended before us that the Central Civil Services (Temporary Service) Rules, 1949, were not "laws in force" within the meaning of Article 313 or Article 372 of the Constitution, and learned Counsel has relied on a decision of the Supreme Court in - *'Edward Mills Co., Ltd., Beawar v. State of Ajmer*[1]*',* I do not think that the decision on which learned Counsel for the petitioner relies is of any help to him. In that decision it is pointed out that there is no material difference between "an existing law" and "a law in force". Article 366(10) defines what is meant by an existing law; it means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of the Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation. It is clear that the Central Civil Services (Temporary Service) Rules, 1949, come within that definition and it is also manifest that those rules are "laws in force" within the meaning of Articles 313 and 372 of the Constitution. The contention of learned Counsel for the petitioner that for an order to be a "law in force", the order must be a legislative and not an executive order, is answered by the circumstance that the Central Civil Services (Temporary Service) Rules, 1949, are statutory rules made by the Governor-General under the power conferred by statutes, namely, sub-section (2) of Section 241 of the Government of India Act, 1935. It cannot, therefore, be said that the rules were the result of a mere executive order. When we asked learned Counsel for the petitioner if other statutory rules, such as the Civil Services (Classification, Control and Appeal) Rules, had also ceased to be operative, learned Counsel said that those rules had also ceased to operate. There are, however, several Supreme Court decisions, including the decisions in - *'Satish Chandra v. Union of India*[2]*',* and - *'Venkataraman v. Union of India*[3]*',* where it has been held that the Civil Services (Classification, Control and Appeal) Rules are still in force. In 'AIR 1954 SC 375', his Lordship Mukherjea J., said that the Civil Services (Classification, Control and Appeal) Rules, made under Section 96-B(2) of the Government of India Act, 1919, are in force even now, so far as they are consistent with the Constitution. In my opinion, the position is the same with regard to the Central Civil Services (Temporary Service) Rules, 1949. The contention of learned Counsel for the petitioner that those rules have ceased to be operative must, I think, be overruled.

7. It has been argued before us, that the Superintendent of Post Offices, Muzaffarpur,
was not the appointing authority of the petitioner; it is argued that the appointing authority was the Postmaster-General, and none but the Postmaster-General could dismiss the petitioner. A reference has been made to Clause (1) of Article 311 of the Constitution, which states 'inter alia' that no person who holds a civil post under the Union of a State shall be dismissed or removed by an authority subordinate to that by which he was appointed. The contention of the petitioner is that the Postmaster-General alone was competent to dismiss the petitioner. This contention also appears to me to be without substance. I have referred to the letters which resulted in the appointment of the petitioner. It is true that the Postmaster-General brought the name of the petitioner on the list of approved candidates for appointment as clerks in Tirhut Division, but the Postmaster-General himself said that the appointment letter would issue from the office of the Superintendent of Post Offices, Tirhut Division. The Superintendent of Post offices, Tirhut Division, actually appointed the petitioner and issued the appointment letter. It is, therefore, clear

that the appointing authority of the petitioner was the Superintendent of Post Offices, Tirhut Division, and not the Postmaster-General; therefore, there has been no violation of clause (1) of Article 311 of the Constitution.

8. I now proceed to a consideration of the last two points urged on behalf of the petitioner, namely, if the order passed against the petitioner was 'mala fide' and if he was entitled to a regular proceeding under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules or to a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, under clause (2) of Article 311 of the Constitution. I may state at once that R.55 of the Civil Services (Classification, Control and Appeal) Rules does not appear to be applicable, to the petitioner. The rules which may be said to apply to the petitioner in disciplinary matters are the rules in volume III of the Posts and Telegraphs Manual, called Rules relating to Appointments, Penalties and Appeals of Subordinate Staff. Those rules also prescribe a proceeding etc., more or less on the same lines as R.55 of the Civil Services (Classification, Control and Appeal) Rules. Rule 3 of the said Rules states the penalties which may for good and sufficient reason be imposed upon members of the subordinate services; the penalties include suspension, removal and dismissal. Rule 6 of the said rules states, inter alia, that without prejudice to the provisions of R.55 of the Civil Services (Classification, Control and Appeal) Rules, no order imposing a penalty specified in R.4, other than an order of suspension or an order superseding him for promotion to a higher post on the ground of his unfitness for that post, or an order based on facts which have led to his conviction in a criminal court, shall be passed against a member of the subordinate service unless the officer concerned has been given an adequate opportunity of making a representation that he may desire to make, and such representation, if any, has been taken into consideration before the order is passed. There is a proviso to the rule which states that the requirements of the sub-rule may, for sufficient reasons to be recorded in writing, be waived where there is difficulty in observing them, and they can be waived without injustice to the officer concerned. It is admitted that in the case before us no formal proceeding was drawn up against the petitioner; he did not, therefore, have an opportunity of making any representation, nor did he have an opportunity of showing cause against the action proposed to be taken against him under clause (2) of Article 311 of the Constitution. The question, therefore, is if the order terminating the services of the petitioner on a month's notice, is bad on the ground that no formal proceeding was drawn up against the petitioner, and the petitioner was not given an opportunity of showing cause against the action proposed to be taken against him. This is an important point and requires very careful consideration.

9. The determination of the question depends on whether the services of the petitioner were terminated by way of penalty as a disciplinary measure or his services were terminated on one month's notice in accordance with the terms of his contract of service on the ground that the authority concerned did not require his services. This point is not entirely free from difficulty, and I think we have to look to the substance of the matter. Learned Counsel for the petitioner has very seriously contended before us that the reasons given for the termination of the petitioner's services attach a stigma to the petitioner, and the petitioner has not been able to get any new job by reason of what is stated as the grounds for the termination of the petitioner's services. The argument of learned Counsel for the petitioner is that in effect the order passed is by way of penalty and the petitioner has been denied an opportunity of vindicating his honour by disproving the charges brought against him and also of showing cause against the action proposed to be taken against him. These are serious contentions and merit careful consideration. On behalf of

the Department it has been contended with equal seriousness that whatever may be the grounds mentioned in the order terminating the services of the petitioner, the order in effect and substance is that the services of the petitioner are no longer required and he has been discharged after a month's notice, in accordance with the terms of the contract of his service, and no disciplinary action by way of penalty for any misdemeanour committed in the course of his service has been taken against the petitioner.

10. I have already quoted the order by which the services of the petitioner were terminated. Before considering the true nature and effect of the order it is necessary to dispose of two preliminary points. Learned Counsel for the petitioner has contended before us that the handwriting of the petitioner was actually compared by two Superintendents of Post Offices and found to tally with the writing in the answer-books. We have no materials on which we can say that the handwriting was actually compared and found to tally with that of the answer books. The only document which has been brought to our notice is the endorsement made on the letter from the Superintendent of Post Offices, dated 13-3-1951. I had referred to that endorsement in an earlier part of my judgment. The endorsement merely states that the candidate appeared for a test in handwriting. In the absence of any materials, it is impossible for us to decide if the petitioner was really guilty of false impersonation or not. Moreover, we are not hearing an appeal from the order of the postal authorities and I do not think that it is open to us to investigate the facts for ourselves, such an investigation being impossible in the absence of relevant materials. It has been contended also on behalf of the petitioner that the order was 'mala fide' and was the result of a grudge which the Inspector of Post Offices had against the petitioner. There is no evidence of any such grudge, and I am unable to hold that the order is 'mala fide' in that sense.

11. I have already quoted the order in 'extenso'. In the first part of the order there is a recital of preliminary facts leading up to the case of false impersonation which was reported to the police. The order then states:

> "From the Police report it appears that these two officials did not actually sit at the examination and in their places two other persons sat for them."

This is a definite charge against the petitioner, a charge which was not, however, proved in any court of law. Then the order goes on to say that as the case, that is, the charge of false impersonation, is proved against the petitioner, his services are no longer required in the department and he is discharged after one month's notice. In my opinion, in its true scope and effect the order is an order of discharge or removal by way of penalty. It is now well settled that Article 311 of the Constitution makes no distinction between permanent and temporary holders of civil posts under the State. Clause (2) of Article 311 of the Constitution says:

> "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."

There are certain provisos to this clause which I need not consider as they do not apply in the present case. If the order terminating the services of the petitioner is in effect an order of removal by way of penalty on the ground of the charge of false impersonation at the examination held on

30-7-1950, then it is clear that the authority concerned has failed to comply with clause (2) of Article 311 of the Constitution. He has also failed to draw up a proceeding and give the petitioner an opportunity of making a representation in accordance with the rules relating to appointments, penalties and appeals of the subordinate staff in the postal department. This, in my view, is a fatal defect, and invalidates the order.

12. I may refer in this connection to the decision in - *'Shyamlal v. State of Uttar Pradesh[4]',* That was a case of an Officiating Superintending Engineer who was compulsorily retired under Article 465A of the Civil Service Regulations. The question was if such compulsory retirement was removal or dismissal within the meaning of Article 311 of the Constitution. It was pointed out that removal like dismissal no doubt brings about a termination of service, but every termination of service does not amount to dismissal or removal. His Lordship Das J., who delivered the judgment of the Court, referred to the decision of AIR 1953 SC 250 and pointed out that the word "removal" in clause (2) of Article 311 of the Constitution is used in the same sense in which the word is used in the relevant rules of the Civil Services (Classification, Control and Appeal) Rules. His Lordship then laid down the test of the distinction between removal within the meaning of clause (2) of Article 311 of the Constitution and removal which merely amounts to termination of service in accordance with the terms of the contract of service. His Lordship observed:

> "The answer to the question will depend whether the nature and incidents of the action resulting in dismissal or removal are to be found in the action of
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> compulsory retirement. There can be no doubt that removal - I am using the term synonymously with dismissal-generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer. There is no such element of charge or imputation in the case of compulsory retirement.

The two requirements for compulsory retirement are that the officer has completed twenty five years' service and that it is in the public interest to dispense with his further services. It is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be the real cause for taking the action but what is important to note is that the directions in the last sentence in Note 1 to Article 465A make it abundantly clear that an imputation or charge is not in terms made a condition for the exercise of the power. In other words, a compulsory retirement has no stigma or implication of misbehaviour or incapacity."

13. In the case before us the termination of the services of the petitioner is definitely, and in express terms, based on the charge of false impersonation, which charge, according to the postal authorities, has been proved. It is obvious, therefore, that the postal authorities acted against the

petitioner by way of penalty for misconduct or misbehaviour. It should be manifest that before the authority concerned was satisfied that the charge had been proved, the petitioner should have been given an opportunity of disproving the charge; furthermore, the petitioner should have been given an opportunity of showing cause against the action proposed to be taken against him.
It is true that the petitioner was not dismissed forthwith, but a month's notice was given to him and the order purported to say that his services were terminated in accordance with R.5 of the Central Civil Services (Temporary Service) Rules, 1949. But, as I have already observed, we are to look to the substance, and not merely to the form of the order. In substance the order is an order of removal on a definite charge alleged against the petitioner, but without giving the petitioner an opportunity of meeting the charge or of showing cause against the action proposed to be taken against him. Therefore the order is bad and must be quashed.

14. I would accordingly allow the application and make the rule and writ absolute by quashing the order of removal passed against the petitioner dated 27-2-1953.

15. The petitioner has also asked for an order that he is entitled to his full salary from 26-4-1952, the date on which he was placed under suspension. I do not think that we shall be justified in passing such an order in the present case. All that we are quashing is the order dated 27-2-1953, terminating the services of the petitioner on the charge of false impersonation. It would be open to the authority concerned to continue the order of suspension and draw up necessary proceedings to give the petitioner an opportunity of making a representation to disprove the charge brought against him
and also to give him an opportunity of showing cause against the action proposed to be taken against him; in the alternative, it is also open to the authority concerned to terminate the services of the petitioner on one month's notice under Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, provided such termination is made in accordance with the contract of his service and is not made by way of penalty for misconduct or misbehavior. If the intention is to penalise the petitioner for misconduct or misbehavior then a reasonable opportunity must be given to the petitioner to show that he is not guilty of misconduct or misbehavior and also of showing cause against the action proposed to be taken against him.

16. In the circumstances of the case, there will be no order for costs.

Imam, J.

17. I agree.

Application allowed.

Cases Referred.

[1] AIR 1955 SC 25
[2] AIR 1953 SC 250
[3] AIR 1954 SC 375
[4] AIR 1954 SC 369