

PATNA HIGH COURT

Tarak Nath Ghosh

Vs

The Government of India

(S Misra and T Nath, JJ.)

31.03.1965

JUDGMENT

Misra, J.

1. This is an application under Articles 226 and 227 of the Constitution of India for the issue of an appropriate writ quashing the order of the Government of India, dated the 31st, July, 1964, annexure A to the petition, and, in the alternative, for directing the opposite party to disclose the charges against the petitioner available to the opposite party on the 31st July, 1964, and the nature of the departmental proceeding against him on the same date. The petitioner is a member of the Indian Police Service having been recruited as a result of a competitive examination held in the year 1956. His appointment was made on the 26th of January, 1957. His case is that he served in various capacities in Uttar Pradesh, West Bengal and Bihar, when he was posted as Deputy Inspector-General of Police, Southern Range, Ranchi, in this State substantively in June 1962. On the 23rd of July, 1964, however he received an order of transfer to Patna and was posted as Special Officer, Political, General and Transport Department (Transport Branch), Patna. While he was serving in that capacity, he received a communication from the Government of India, Ministry of Home Affairs, New Delhi, dated the 31st of July, 1964, placing him under suspension with immediate effect. On receipt of the communication, the petitioner requested the Government to supply him with a copy of any report which might have been submitted against him by any enquiring officer such as the Inspector-General of Police, which might have led to the order of suspension contained in the aforesaid letter. The petitioner's request was made by letter dated the 17th August, 1964. No reply was, however, received by the petitioner.

2. On the 24th of August, 1964, the petitioner addressed a petition to the Secretary to the Government of India, Ministry of Home Affairs, New Delhi, through the Chief Secretary to the Government of Bihar, stating that either the charges upon which the Government felt satisfied that the order of suspension should be passed and the nature of the departmental proceeding

started against him should be disclosed to him or the order of suspension should be withdrawn. An advance copy of this letter was sent to the Secretary to the Government of India, Ministry of Home Affairs, which was received there on the 26th August, 1964. The petitioner has stated that no reply was received so far to that petition as well. In the circumstances, the petitioner made an application for permission to proceed on leave available to him, but his prayer for leave was also refused. The petitioner was on transfer posted as Special Officer in the transport branch of the Political, General and Transport Department which has no concern with the police department and was staying at the Circuit House at Patna and in spite of that the order of suspension was continued against him. Accordingly, the petitioner finding himself without any remedy, and being aggrieved by the order of suspension, moved this Court for a writ in terms stated above.

3. The counter-affidavit filed on behalf of the Chief Secretary to the Government of Bihar is to the effect that certain facts had come to light in regard to the conduct of the petitioner in the discharge of his duties on the 6th of July, 1964, which were brought to the notice of the Central Government. It was on foot of that information that the Central Government passed the order of suspension on the 31st July, 1964. The reason why he was transferred to Patna in the Transport Department was that his continuance as the Deputy Inspector-General of Police, Southern Range, Ranchi, was considered as inexpedient and prejudicial to public interest on account of the activities of the petitioner. As to the allegation in the petition that the petitioner had no information about any departmental enquiry, it has been stated in paragraph 6 of the counter-affidavit that the petitioner was questioned by Sri S. P. Verma, Inspector-General of Police, Bihar, as early as the 8th of February, 1964, about his activities which gave an inkling to the petitioner that his conduct in the discharge of his duties was looked upon with suspicion by the Government. The departmental enquiry and investigation against the petitioner was still going on and that was the reason why charges were not framed against him.

As for the allegation contained in paragraph 9 of the petition, the instructions issued by the Government of Bihar contained in annexure B to the petition would be of no advantage to the petitioner inasmuch as he was a member of the Indian Police Service under the control of the Secretary of State for India, which control after the 15th August, 1947, came to be vested in the Central Government. As for the order of suspension itself, it was alleged that it was an interim suspension pending departmental enquiry and investigation of the petitioner's case. The order of suspension was passed by the President of India, the appointing authority of the members of the Indian Police Service, while the petitioner's leave application was pending consideration before the State Government. Leave was, however, granted to him for short periods. The stand of the petitioner that he could not be placed under suspension before a proceeding was actually started against him was also controverted as incorrect inasmuch as the present suspension was an interim measure and not by way of punishment. The counter-affidavit filed on behalf of the

Government of India, opposite party No. 1, and the Deputy Secretary to the Government of India. Ministry of Home Affairs, opposite party No. 2, contains, in substance, the same facts as find place in the counter-affidavit on behalf of the Chief Secretary, Government of Bihar

4. Mr. S. C. Ghose appearing in support of the petition has urged that the order of suspension against the petitioner is illegal, whether it is to be considered as an interim measure or one as a punishment, as the conditions of service of the petitioner are governed by Civil Services (Classification, Control and Appeal) Rules in so far as they apply to the members of the All India Services. Notification No 2038-A. R., dated Simla, the 19th June, 1930, containing the resolution by the Secretary of State for India in Council refers to penalties under paragraph 49, thus:

"49. The following penalties may, for good and sufficient reason and as hereinafter provided, be imposed upon members of the services comprised in any of the Clauses (i) to (5) specified in Rule 14, namely:

X X X X X X

(v) Suspension.

X X X X X X"

As for the railway servants, Rule 1706 (A Guide to Discipline and Appeal Rules) referring to the conditions on which he may be suspended, provides:

"X X X X X X

1706. (1) A railway servant may be placed under suspension-

(a) where a disciplinary proceeding against him is contemplated or is pending; or

(b) where a case against him in respect of any criminal offence is under investigation or trial.

X X X X X X"

The same applies to the Central Civil Services
wherein under Rule 12 it is provided:

"12. Suspension. (1) The Appointing Authority to which it is subordinate or any other authority empowered by the President in that behalf may place a Government servant under suspension-

(a) where a disciplinary proceeding against him is contemplated or is pending, or

(b) where a case against him in respect of any criminal offence is under investigation or trial.

X X X X X X"

As for the All India Services, Rule 7 runs as
follows:--

"7 Suspension during disciplinary proceedings. (1) if having regard to the nature or the charges and the circumstances in any case, the Government which initiates any disciplinary proceedings is satisfied that it is necessary or desirable to place under suspension the member of the Service against whom such proceedings are started that Government may--

(a) if the member of the Service is serving under it pass an order placing him under suspension,
or

(b) if the member of the Service is serving under another Government, request that Government to place him under suspension, pending the conclusion of the inquiry and the passing of the final order in the case:

X X X X X X"

Mr. Ghose has urged that the position in respect of the Central Services in general and the Railway Service is that the order of suspension can be passed where a disciplinary proceeding against the officer is contemplated or is pending. In the case of a member of the All India Services, however, reference is only made to a situation in which a suspension may be ordered which is that "the Government which initiates any disciplinary proceeding" may do so and it does not refer to a contemplated proceeding. In the present case no proceeding has been started so far against the petitioner, so that even if any proceeding were contemplated against him that will be sufficient to sustain the order of suspension which, in the case of a member of the All India Services, can be passed when disciplinary proceedings have already been initiated. He has urged that this distinction has been thought necessary and a more stringent safeguard provided in the case of a member of the All India Services, so that he may not be victimised and lowered on flimsy grounds by an order of suspension Inasmuch as such a position would be derogatory to a person occupying a high office as a member of the All India Services.

5. Mr. Ghose urged that on the 28th August, 1964, the petitioner requested the Government to supply him with a copy of the charges; but no reply was given. In the year 1930, no doubt, when the Civil Services (Classification, Control and Appeal) Rules were framed, suspension was a major punishment but in 1955 this was changed. Act 61 of 1951 was passed in that year as an All India Services Act. It was passed empowering the Government of India to make rules and regulations governing the conditions of service of a member of the All India Services in terms of Article 309 of the Constitution of India. Section 4 of that Act continued the old rules but in 1955 the All India Services (Discipline and Appeal) Rules were passed. The other Services of the Central Government, however, were governed by the Central Civil Services (Classification, Control, and Appeal) Rules. In 1957, however, those rules were replaced by a fresh set of rules. The Hand Book of Rules and Regulations for the All India Services (1962 edition) at page 261, under Rule 7 contains the provision in regard to suspension of a member of All India Services to which the petitioner belongs.

In my opinion, the contention advanced on behalf of the petitioner by the learned Counsel is one of substance. When similar provisions on the question of suspension in regard to the Central Services, the Railway Services and the All India Services are compared, as I have mentioned above, the difference of terminology stands out as prominent beyond doubt. If the intention were to subject a member of the All India Services to the liability for suspension on the mere ground that a proceeding was contemplated against him, there was no reason why the same should not have been done in clear terms as in other cases.

As a matter of fact, detailed provisions have been made in Sub-rules (2) and (3) of this rule as to

the other circumstances in which suspension may be ordered. Sub-rule (2) states that a member of the Service who is detained in official custody whether on a criminal charge or otherwise, for a period longer than forty-eight hours, shall be deemed to have been suspended by the Government concerned under this rule. Sub-rule (3), which was amended by MHA Notification No. 7/7/60-AIS(II), dated the 17th April, 1961, provides further that a member of the Service in respect of, or against, whom an investigation, inquiry or trial relating to a criminal charge is pending may, at the discretion of the Government under which he is serving, be placed under suspension until the termination of all proceedings relating to that charge, if the charge is connected with his position as a Government servant or is likely to embarrass him in the discharge of his duties or involves moral turpitude.

In my opinion, therefore, the detailed provision in Rule 7, under all the three sub-rules, exhausted the circumstance in which a member of the All India Services may be put under suspension by the appointing authority. Since the language of Sub-rule (1) distinctly states that "the Government which initiates any disciplinary proceedings is satisfied that it is necessary or desirable to place under suspension the member of the Service against whom such proceedings are started that Government may ... pass an order placing him under suspension".

I am inclined also to accept the reason for such distinction in the case of a member of the All India Services to the effect that such a safeguard was necessary on account of the high position in rank of public service in the country which the All India Services occupied. To allow a member of that Service to be placed under suspension without the formal proceeding being started may cause humiliation to an officer of such high rank without any justification whatsoever Mr. B C. Ghose has drawn my attention in this connection to the following cases :

AIR 1938 Cal 759 Secy. of State v. Surendra Nath Goswami; 1914-15 All ER 984 Hanley v. Pease and Partners Ltd; 1922 All ER 298 Wallwork v. Fielding.

6. Mr. Lalnarain Sinha, Government advocate, who appears for the opposite party, has urged, in the first place, that the power of the Central Government to suspend a member of the All India Service is not merely subject to Rule 7 of the All India Services (Discipline and Appeal) Rules, 1957, but the power of the President under the Constitution of India is much wider than the restriction contained in Rule 7. He has formulated the following propositions in support of his argument :

(1) The tenure of service of a civil servant is at the pleasure of the President in terms of Article 310 of the Constitution;

(2) The tenure at the pleasure of the President cannot be altered by Article 309 or the rules made

thereunder;

(3) The tenure at the pleasure of the President cannot be altered or affected by any legislation of Parliament, because the powers of legislation are derived from Article 245 read with the Lists, and Article 245 itself is subject to Article 310.

(4) The President is now himself in the position of the appointing authority;

(5) The power of dismissal includes the power of appointment;

(6) The power of interim suspension is a part of disciplinary action and the power of the Government of India to suspend a member of the All India Services is derived both from its position as the appointing authority in view of the Constitution and the previous Constitution Act as also from the general law of master and servant. Hence, Rule 7 of the All India Services (Discipline and Appeal) Rules, 1957 should be read as meaning the stage when the authorities have applied their minds and should not be taken literally to mean the formal initiation of a proceeding against the member of the service upon whom the order of suspension has been passed.

7. Before I take up the broader question of the construction put up on Articles 309 and 310 vis-a-vis Articles 245 and 248 of the Constitution, it would be convenient to deal with the argument as to the stage when the order of suspension can be passed upon an officer of the All India Service, i.e., whether the order of suspension can be justified when the authorities have applied their minds to the facts which would incriminate the officer concerned in matters relevant for inflicting punishment upon him in terms of rule.

Mr. Lalnarain Sinha has urged that the expression "initiates any disciplinary proceedings" should refer to the stage when the authorities have applied their minds to the initiation of the proceedings. Properly analysed, this would mean that as soon as the authorities are in possession of the facts which might justify any disciplinary proceedings against the officer, he would be equally liable to an order of suspension. I am, however, unable to accede to this contention for the simple reason that if this view were taken of the meaning of these words in Rule 7 (1), there would be hardly any distinction between a contemplated proceeding as provided for in the case of a member of the Central Services or the Railway Service and that in Rule 7. It would also have the effect of eliminating the safeguard in the case of the members of All India Services to which I have already adverted. I am unable, therefore, to accept this contention raised on behalf of the opposite party by the learned Government Advocate.

8. The next question for consideration is a wider one as to whether the tenure of office of the member of All India Services, which in terms of Article 310 of the Constitution, (sic) is not

trammelled by rules and regulations which are framed by the Government under Articles 309 in pursuance of which the All India Services (Discipline and Appeal) Rules have been promulgated and in pursuance of which the All India Services Act, 1951, itself was put on the statute book. In this connection, it will be necessary to set out these two Articles :--

"309. Subject to the provisions of this Constitution, Acts of the appropriate Legislature may 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;

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act.

310. (1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an All India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

It is true, no doubt, that if these two Articles are read in isolation from each other and Article 310 given a literal interpretation so as to override Article 309, the contention urged on behalf of the opposite party by the learned Government Advocate may be accepted. Article 310 itself lays down that every member of a defence service or of a civil service of the Union etc., holds office during the pleasure of the President, but this is subject to what is expressly provided by the Constitution. Article 309 empowers that appropriate legislature may 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 Acts which are passed and rules which are framed in accordance with the provisions of Article 309 must, therefore, be held to be consistent with Article 310. If Article 310 refers to the exemption contained in a provision of the Constitution, and Article 309 is a part of the Constitution, it must be held that the Acts passed or rules framed under Article 309 are also by implication expected to form part of the exception.

As a matter of fact, it is difficult to conceive that a person belonging to the All India Services would be without any safeguard of any rules and regulations, at least on a theoretical basis, which are framed under Article 309, and they would hold their tenure at the pleasure of the President in the sense that they do not enjoy any guarantee in regard to their conditions of service, in which case they would be in a more helpless position than even a person who is serving a corporation or other statutory body. It is difficult to accede to this argument. The expression, therefore, "the pleasure of the President" or "the Governor" in case of all India Services of a member of the public service under any State would mean that no such person employed can necessarily insist upon continuation in the office if the President or the Governor would not like to retain such a person in Government employment. If, however, such a contingency arises and any one is affected in the conditions of service or if his services are terminated against law, he should be entitled to claim any other relief but not necessarily reinstatement in the office he was occupying before. The position even in English law on this point has been thus summarised by Hood Phillips in his Constitutional Law (2nd edition) at page 481 :

"As regards civil servants, including colonial and consular officers, etc., the trend of judicial decisions and dicta is that on grounds of public policy (not incapacity of the Crown) there is an implied term that they are dismissible at pleasure, even if they were appointed for a fixed period, that other terms of the contract as to conditions of service are not intended to be legally enforceable; that no action on the contract lies against a superior Crown servant, nor, apparently, for breach of warranty of authority, and that the Civil servant cannot recover arrears of salary. On the other hand, different conditions of service may be binding in special cases by statute. There are dicta by Lord Atkin and Denning to the effect that an express promise to employ for a definite period determinable 'for cause' overrides an implied term that the Crown servant is dismissible at pleasure. Contracts for personal services are not in general specifically enforceable, and a fortiori they could not be specifically enforced against the Crown, but there is reason in fairness or logic why the Crown should not pay compensation if it falls to keep an express promise, nor why payment for services rendered should not be recoverable on a quantum meruit, though the common law seems to make no provision for this"

9. I may also make it clear that this point was the subject matter of consideration in the case of *Punjab Province v. Tarachand*, 1947 FCR 89 : (AIR 1947 FC 23) in which the observation on a

similar question in regard to a member of the public service in Canada, who also holds his office at the pleasure of the Crown, was commented upon by Lord Atkin. The following observation of the learned Judge quoted in the above case is also relevant in this connection :

The petition of right is founded on averments that there was a contract between the suppliant and the Crown and that the contract had been broken. Both Courts in Canada have decided that by reason of the statutory abolition of the office Mr. Railyly was not entitled to any remedy, but apparently on different grounds. Maclean J. concluded that the relation between the holder of a public office and the Crown was not contractual. There never had been a contract, and the foundation of the petition failed. Orde J.'s judgment in the Supreme Court seems to admit that the relation might be at any rate partly contractual but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure if, there could have been no breach." *Reilly v. The King* 1934 AC 176. The judgment contains reference to the following passage in *Attorney-General v. De Keyser's Royal Hotel* 1920 AC 508;

"Those powers which the executive exercises without parliamentary authority are comprised under the comprehensive term of the prerogative, where, however. Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative ?"

Lord Atkinson went on to observe :

"I further concur with him in his analysis of the provisions of the Acts passed in 1803, 1804, 1819, dealing with the public service. I agree that in all this legislation there is not a trace of a suggestion that the Crown was left free to ignore these statutory provisions, and by its unfettered prerogative do the very things the statute empowered the Crown to do, but free from the conditions and restrictions imposed by the statutes.

It is quite obvious that it would be useless and meaningless for the legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might therefore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word 'merged' is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three

estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent; that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thence forth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however, unrestricted the Royal Prerogative may theretofore, have been."

Mr. B. C. Ghose has also drawn our attention further to the decision in the case of *T. Cajee v. U. Jormanik Siem* (1961) 1 SCR 750 at p. 768 : (AIR 1961 SC 276 at p. 283). That decision, however, does not bear on the question of the validity of the Civil Services (Classification, Control and Appeal) Rules in so far as suspension of a public servant governed by these ruler, is concerned. There is an observation, however, in that judgment which has been relied upon in support of an incidental argument that the petitioner would be entitled to his full salary during the period of interim suspension. The passage runs thus :

"In the circumstances therefore though an order of interim suspension could be made against the respondent while inquiry into his conduct with a view to his ultimate removal is going on, his remuneration according to the terms and conditions communicated to him cannot be withheld unless there is some statute or rules framed thereunder which would justify the withholding of the whole or part of the remuneration. So far therefore, as there is no statute or rule thereunder the remuneration cannot be withheld from the respondent even though an order of interim suspension, in the sense he is not to do the work of his office, may be made against him. The order of interim suspension therefore passed in this case on July 7, 1959, would be valid subject of course to the respondent being paid the full remuneration unless the District Council can legitimately withhold the whole or part of it under some statute or rules framed thereunder, there being undoubtedly no express contracts to that effect in this case."

It is unnecessary to deal with this matter in view of the order I propose to pass in this case

10. There is a further reference to the case of *State of Uttar Pradesh v. Babu Ram Upadhyia* (1961) 2 SCR 679 : (AIR 1961 SC 761). Mr. Lalnarain Sinha has relied upon this case in support of his contention that the Civil Services (Classification, Control and Appeal) Rules framed under Article 309 of the Constitution cannot prevail over the order of the President under Article 310 of the Constitution. In my opinion, the decision in this case although it appears to lay down a proposition contrary to what was held by the Federal Court in 1947 FCR 89: (AIR 1947 FC 23), (referred to above) which was concerned with the interpretation of Section 240 of the Government of India Act, 1935, which is parallel to the provisions of Articles 310 and 311, all

the same Subba Rao, J. summarised the position as follows :

"The discussion yields the following results : (1) in India every person who is a member of a public service described in Article 310 of the Constitution holds office during the pleasure of the President or the Governor, as the case may be, subject to the express provisions therein. (2). The power to dismiss a public servant at pleasure is outside the scope of Article 154 and therefore, cannot be delegated by the Governor to a subordinate officer, and can be exercised by him only in the manner prescribed by the Constitution (3) This tenure is subject to the limitations or qualifications mentioned in Article 311 of the Constitution. (4) The Parliament or the Legislatures of States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Article 310, as qualified by Article 311 (5) The Parliament or the Legislatures of States can make a law regulating the conditions of a service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Article 310 of the Constitution read with Article 311 thereof. (6) The Parliament and Legislatures also can make a law laying down and regulating the scope and content of the doctrine of 'reasonable opportunity' embodied in Article 311 of the Constitution; but the said law would be subject to judicial review. (7) If a statute could be made by Legislatures within the foregoing permissible limits, the rules made by an authority in exercise of the power conferred there under would likewise be efficacious within the said limits"

Further light is thrown on this matter in the decision of the Supreme Court in the case of *Moti Ram Delia v. General Manager. N. E. Frontier Rly* AIR 1964 SC 600, in which it has been held, referring to a previous decision of the Supreme Court in the case of *State of Bihar v. Abdul Majid*, AIR 1954 SC 245 that the rule of English Law *durante bene placito* (during pleasure) has not been fully adopted either by Section 240 of the Government of India Act, 1935 or by Article 310 (1) *Gajendragadakar. J* (as he then was) at p. 609 observed this:

"To the extent to which that rule has been modified by the relevant provisions of Section 240 of the Government of India Act, 1935, or Article 311 the Government servants are entitled to relief like any other person under the ordinary law and that relief must be regulated by the Code of Civil Procedure. It is mainly on the basis of this principle that this Court refused to apply the doctrine against *Abdul Majid* that a civil servant cannot maintain a suit against a State or against the Crown for the recovery of arrears of salary due to him. Thus, the extreme contention based on the doctrine of pleasure enshrined in Article 310 (1) cannot be sustained."

With regard to the scope of Article 309 vis-avis Article 311, he observed :

"Once the scope of Article 311 (1) and (2) is duly determined, it must be held that no rule framed

under Article 309 can trespass on the rights guaranteed by Article 311. This position is of basic importance and must be borne in mind in dealing with the controversy in the present appeals."

The validity of the rules framed under Article 309, therefore. If they are not inconsistent with and do not curtail the privilege under Article 311, cannot be challenged on the ground of the overriding power vested in the President, because members of the All India Services hold their office at the pleasure of the President. The decision in the case of R.P. Kapur v. Union of India AIR 1964 SC 787 is a case in which the primary question for consideration was the amount payable to the public servant during the interim suspension, and it has been held that where there is a provision in a statute or rule laying down the amount payable to the public servant during his interim suspension such statute or rule will govern the position. Where there is no such provision, the public servant must be entitled to his full emoluments during the period of his suspension. Such suspension must be distinguished from suspension as a punishment which is a different matter altogether depending upon the rules in that behalf. In view of the proposed order on this application, the decision of this case also need not be considered with regard to the prayer of the petitioner for payment of emoluments to him during the period of his suspension.

11. The position, therefore, in substance, remains unaltered whether Article 310 is held to be consistent with Article 309 as well or it is held to be independent of Article 309. Nor is it necessary for me to deal with the decision in the case of State of Madras v. K.M. Rajagopalan, AIR 1955 SC 817 and the case of AIR 1964 SC 787, holding that the President or the Governor, as the case may be, is now in the position of the appointing authority and, further, that the power of dismissal is included in the power of appointment, because these propositions are well settled and have not been brought into debate by Mr. B. C. Ghose for the petitioner. In my opinion, therefore the argument of Mr. Lalnarain Sinha that the Civil Services (Classification, Control and Appeal) Rules are subject to Article 310 of the Constitution in the sense that they do not contain the entire provision in regard to the penalty and procedure etc., in disciplinary matters of the members of the Civil Services etc., cannot be accepted. The rules are valid and in consonance with the provisions of the Constitution and since Rule 7, as I have already stated, has not been complied with in this case, the order of suspension against the petitioner cannot be upheld as valid.

12. The application is, therefore, allowed and the order of the suspension passed against him is quashed.

Tarkeshwar Nath, J.

13. I concur in the order that this application should be allowed and the order of suspension dated 31-7-1964 passed against the petitioner should be quashed as it is not valid. I further agree with

the reasons assigned by my learned brother for coming to that conclusion, but I am not in agreement with him regarding the interpretation of the words "except as expressly provided by this Constitution" occurring in Article 310 (1) of the Constitution of India. It is not necessary for me to recount the facts of this case which have been set out in extenso in the judgment of my learned brother. I would, however, make a few observations which I consider necessary in the circumstances of this case.

14. Learned Government Advocate had urged that the provisions of Article 310 of the Constitution of India were subject to the provisions of Article 311 but not to those of Article 309, and on the other hand, Article 309 was subject to the provisions of Article 310. He submitted that the petitioner could hold office only during the pleasure of the President and the President had a right to suspend the petitioner even without complying with the provisions of Rule 7 (already quoted by my learned brother) which provide for the suspension of a member of All India Services during disciplinary proceedings. These opening words "except as expressly provided by this Constitution" have been interpreted by the Supreme Court in two cases. Subba Rao, J. observed as follows in (1961) 2 SCR 679 : (AIR 1961 SC 751) "But Article 309 opens out with a restrictive clause, namely, 'subject to the provisions of this Constitution', and if there is no restrictive clause in Article 310, there cannot be any difficulty in holding that Article 309 is subject to 'the tenure at pleasure' under Article 310. In that event, any law made by the Legislature could not affect the overriding power of the President or the Governor, as the case may be, in putting an end to the tenure at their pleasure. Would the opening words of the clause in Article 310, namely, 'Except as expressly provided by this Constitution', make any difference in the matter of interpretation ? It should be noticed that the phraseology of the said clause in Article 310 is different from that in Article 309. If there is a specific provision in some part of the Constitution giving to a Government servant, a tenure different from that provided for in Article 310 that Government Servant is excluded from the operation of Article 310. The said words refer, inter alia, to Articles 124, 148, 218 and 324 which provide that the Judges of the High Courts and the Chief Election Commissioner shall not be removed from their offices except in the manner laid down in those Articles."

Gajendragadkar, J. (as he then was) had an occasion to consider the scope of Article 310 as well in AIR 1964 SC 600 and his Lordship observed as follows :

"Article 310 deals with the tenure of office of persons serving the Union or a State, and provides that such office is held during the pleasure of the President if the post is under the Union, or during the pleasure of the Governor if the post is under a State. The doctrine of pleasure is thus embodied by Article 310 (1) ... it is significant that Article 310 (1) begins with a clause 'except as expressly provided by this Constitution'. In other words, if there are any other provisions in the

Constitution which impinge upon it, the provisions of Article 310 (1) must be read subject to them. The exceptions thus contemplated may be illustrated by reference to Articles 124, 118, 218 and 324. Another exception is also provided by Article 311. In other words. Article 311 has to be read as a proviso to Article 310, and so, there can be no doubt that the pleasure contemplated by Article 310 (1) must be exercised subject to the limitations prescribed by Article 311."

15. Article 309 provides that appropriate Legislature may 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. This article further provides for the enactment of rules and regulations relating to the recruitment and the conditions of service of Government servants. Central and State. The rule-making power under this article is subject to the other provisions of the Constitution, Service rules made under this article cannot be valid, if they contravene the provisions of Article 311 (1) and (2). Article 310 (1) does not refer to any exception which might be laid down by any statute to the general rule relating to the tenure of service at pleasure of the President contained in that article The restriction on the application of the general rule embodied in Article 310 (1) is confined to the provisions contained in the Constitution itself. The position thus is that the provisions of Article 310 (1) are subject only to the exceptions provided by the Constitution itself. I am, therefore, of the view that the Acts passed and the rules framed under Article 309 cannot be deemed to be in the category of an exception provided by the Constitution and I am not in agreement with my learned brother with the observation made by him to the contrary.

16. The next question relevant for consideration in this case is as to in what manner the pleasure of the President had to be exercised An answer to this is available on reference to the decision in AIR 1964 SC 600 (already referred on another point), Gajendragadkar, J. observed as follows :

"Article 309 provides that subject to the provisions of the Constitution, Acts of the appropriate Legislature may 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 This clearly means that the appropriate Legislature may pass Acts in respect of the terms and conditions of service of persons appointed to public services and posts, but that must be subject to the provisions of the Constitution which inevitably brings in Article 310 (1) The proviso to Article 309 makes it clear that It would be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such persons as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and prescribing the conditions of service of persons respectively appointed to services and posts under the Union or the State. The pleasure of the President or the Governor mentioned in Article 310 (1) can thus be exercised by

such person as the President or the Governor may respectively direct in that behalf, and the pleasure thus exercised has to be exercised in accordance with the rules made in that behalf. These rules, and indeed the exercise of the powers conferred on the delegate must be subject to Article 310 and so. Article 309 cannot impair or effect the pleasure of the President or the Governor therein specified. There is thus no doubt that Article 309 has to be read subject to Articles 310 and 311, and Article 310 has to be read subject to Article 311."

At p. 619 of the same decision, his Lordship considered the correctness of the view taken by Nayudu, J. of the Assam High Court who delivered the minority judgment in the case of *Shyam Behari Tewari v. Union of India*, AIR 1963 Assam 94 (KB) and pointed out the true significance of the observations made by Subba Rao J. in (1961) 2 SCR 679 : (AIR 1961 SC 751). His Lordship observed as follows:

"What the said judgment has held is that while Article 310 provides for a tenure at pleasure of the President or the Governor, Article 309 enables the legislature or the executive, as the case may be to make any law or rule in regard, inter alia, to conditions of service without impinging upon the overriding power recognised under Article 310. In other words, in exercising the power conferred by Article 309 the extent of the pleasure recognised by Article 310 cannot be affected, or impaired. In fact, while stating the conclusions in the form of propositions, the said judgment has observed that the Parliament or the Legislature can make a law regulating the conditions of service without affecting the powers of the President or the Governor under Article 310 read with Article 91. It has also been stated at the same place that the power to dismiss a public servant at pleasure is outside the scope of Article 154 and, therefore, cannot be delegated by the Governor to a subordinate Officer and can be exercised by him only in the manner prescribed by the Constitution. In the context, it would be clear that this latter observation is not intended to lay down that a law cannot be made under Article 309 or a Rule cannot be framed under the proviso to the said Article prescribing the procedure by which, and the authority by whom, the said pleasure can be exercised. This observation which is mentioned and proposition number (2) must be read along with the subsequent propositions specified as (3), (4), (5) and (6). The only point made is that whatever is done under Article 309 must be subject to the pleasure prescribed by Article 310. Nayudu J. was, therefore, in error in holding that the majority decision of this Court in the case of *Babu Ram Upadhyaya*, 1961-2 SCR 679 : AIR 1961 SC 761 supported his broad and unqualified conclusion that Rule 149 (3) was invalid for the sole reason that the power to terminate the services has been delegated to the Railways Administration."

The position thus is that the pleasure of the President has to be exercised according to the procedure laid down by the rules framed under Article 309 of the Constitution of India. Rule 7 had the following heading "Suspension during disciplinary proceedings". This rule envisages that

if there was a disciplinary proceeding, it was open to the Government to suspend a member of all India service on being satisfied that it was either necessary or desirable to adopt that course. The order of suspension (Annexure A) indicates that disciplinary proceedings against the petitioner were only in contemplation but had not been actually initiated. The position thus is that there has been a violation of the provisions of rule 7 and the suspension even before initiating a disciplinary proceeding is premature and the said order cannot be allowed to stand. It must, therefore, be quashed in the present case.

