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Court : Karnataka

Decided On : Dec-07-1960

Reported in : ILR1961KAR84; (1961)ILLJ479Kant

Judge : S.R. Das Gupta, C.J., ;A.R. Somnath Ayyar and ;B.M. Kalagate, JJ.

Acts : States Reorganization Act; Government of India Act, 1919 - Sections 96B, 96B(5), 240, 240(1), 240(2) and 240(3); Public Servants Inquiries Act, 1850; New South Wales Civil Service Act, 1884; Government of India Act, 1915 - Sections 240(1), 240(2), 240(3) and 240(4); Government of India (Amendment) Act, 1935 - Sections 241(2) and 243; Code of Civil Procedure (CPC), 1908 - Sections 60; Police Act; Constitution of India - Articles 124(4), 217(1), 226, 309, 310, 311(1), 311(2), 313 and 314

Appeal No. : W.P. No. 283 of 1959

Appellant : Malleshappa Hanamappa

Respondent : State of Mysore

Judgement :

S.R. Das Gupta, C.J.

1. The question, which has been referred to us for decision, shortly stated, arises as follows.

2. The petitioner was directly recruited as an upper division clerk. His first appointment was as junior assistant, Political Department. On 18 September 1943 he was transferred on deputation of the Rationing Department, which was a temporary department. In that department he rose up to the position of a Rationing Officer and was drawing a sum of Rs. 460. On 1 March, 1954 the Rationing Department which, as I said, was a temporary department, ceased to exist and the petitioner was thereupon reverted to his parent department. Instead of being reposted to the Political Department he was first posted to the Labour Department and then to the Public Works Department. The pay which was fixed on such reversion was Rs. 120. The petitioner's case is that when he went on deputation on 18 September, 1943 he was confirmed in the post of junior assistant on a pay of Rs. 120 in the grade pay of Rs. 100-5-120-170-10-220. The petitioner had all along been protesting against the said fixation of his pay on his reversion and before he could get any relief in that respect the States Reorganization Act was enacted and the petitioner came to be allotted to the Mysore State. The Mysore Government was thereafter intimated by the Bombay Government that the latter had fixed his pay from 1 June, 1954 at Rs. 225 in the scale of Rs. 210-15-300. On the basis of that order the Government of Mysore eventually fixed his pay as follows :-

'Date on which Amount of fixed pay fixed Rs. 1. On 1 June 1954 ..... 225.00 As fixed by the Government of Bombay under No. MHB 1057 of 20 April 1958.2. On 26 February 1955 ..... 240.00 3. On 26 February 1956 ..... 255.00 4. On 4 June 1957 ..... 270.00'

3. It is against that decision that the writ petition, being W.P. No. 283 of 1959 out of which the question referred to us arises, was filed by the petitioner.

4. The main contention of the petitioner in his said writ petition was that the portion of his service in the Rationing Department should be allowed to count for increments in his parent department during which the petitioner would have drawn pay in the time-scale applicable to the post he holds on reversion but for his deputation of the Rationing Department, i.e., his case should be so regulated as to restore the position which the petitioner would have occupied in his parent

department had he not been deputed. In support of that contention the petitioner relied on a circular of the Government of Bombay, being Circular No. 7573/33 dated 31 October 1950. The said circular reads as follows :-

'Government servants on deputation Fixation of pay on revision. Government of Bombay FINANCE DEPARTMENT CIRCULAR No. 7573/33 Bombay Castle, 31 October 1950 Circular of Government It has come to the notice of Government that Government servants when deputed to other departments or offices often draw pay in time-scales which are identical with the time-scales in their parent departments. The question, therefore, arises on their reversion to their parent department whether the service rendered in an identical time-scale in the department to which their services had been lent, should be allowed to count for increments in the parent department under note 4 below Bombay Civil Service Rule 41. Government is pleased to direct that all such cases should be regulated under Bombay Civil Service Rule 51 and that only that portion of the service in the foreign department or office should be allowed to count for increments in the parent department during which the person concerned would have drawn pay in the time-scale applicable to the post he holds on reversion, but for his deputation to another department or office, i.e., the case should be so regulated as to restore the position the person concerned would have occupied in his parent department had he not been deputed.

2. Government is also pleased to direct that in all cases in the past which have not been regulated in accordance with the principle enunciated above, the pay should be refixed in accordance with Para. 1 above with effect from the 1 December, 1950 provided the persons concerned have not acquired a vested right to their present pay by reason of their being confirmed in or appointed substantively to the post in question. No retrospective adjustments or recoveries should however be made. (By order of the Governor of Bombay) V. M. JOSHI, Deputy Secretary to Government.'

5. At the hearing of the said writ petition a question arose as to whether or not the claim made by the petitioner under the said circular rests on a justiciable right in respect of which relief is obtainable under the provisions of Art. 226 of the

Constitution. It is that question which has been referred to a Full Bench and we have to decide it. The said question reads as follows :-

'Whether the claim made by the petitioner under the Circular of the Government of Bombay (Circular No. 7573/33) dated 31 October, 1950, that his case should be so regulated as to restore to him the position he would have occupied in his parent department had he not been deputed to the Department of Civil Supplies, rests on a justiciable right in respect of which relief is obtainable under the provisions of Art. 226 of the Constitution.'

6. In order to determine this question what we have to ascertain is whether or not a Government servant can obtain relief for breach of his service conditions, under which he holds his office. In other words, whether breach of such service conditions is justiciable The decision on this question against depends mainly upon the view we take as to the effect of Art. 310 of the Constitution.

7. The learned Advocate-General appearing for the State contended before us that under Art. 310 Government servants hold their office at the pleasure of the President or of the Governor as the case may be. According to the learned Advocate-General, the said article does not merely mean that such service is terminable at the pleasure of the President or of the Governor, as the case may be, but the effect of the said article also is that everything relating to such service including the conditions thereof is at the pleasure of the President or of the Governor and consequently no breach of the said service conditions is justiciable. In other words, if the Government or the President, as the case may be, makes an order which is contrary to the said service conditions, the Government servant concerned cannot obtain any relief in respect thereof in a Court of law. The learned Advocate-General contended that the pleasure of the Governor or of the President, as the case may be, is not restricted merely to termination of the services of the Government servants but extends to everything relating to such service. That being so, it was further contended before us, the Acts of the appropriate legislature regulating the recruitment and conditions of persons appointed to public services and passed in connexion with the affairs of the Union or of any State under Art. 309 or the rules framed thereunder are all subject to this

doctrine of pleasure as enunciated in Art. 310.

8. In support of the above contention the learned Advocate-General relied mainly on a decision of the Privy Council in Venkata Rao v. Secretary of State . He also relied on a decision of the Federal Court in Punjab Province v. Tarachand [A.I.R. 1947 F.C. 23 : 1947 M.W.N. 575 : 1945 F.C.R. 89 F.C.]. a decision of the Bombay High Court in S. Framji v. Union of India [1959 - I L.L.J. 107]; and on four decisions of the Madras High Court in Devasahayam v. State of Madras [A.I.R. 1958 Mad. 53]; Sambandam v. R. T. Superintendent, Southern Railway [A.I.R. 1958 Mad 243 : 1958 M.W.N. 1]; Devasahayam v. Madras State : AIR1959 Mad1 and Sambandam v. R. T. Superintendent, Southern Railway [1959 - II L.L.J. 613].

9. The first question therefore which we have to decide in this reference is what is the extent and scope of pleasure as indicated in Art. 310. I shall deal with the decisions on which the learned Advocate-General relies later on. I shall first try to determine the said question with reference to the actual wording of the said article. Article 310 provides as follows :-

'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.'

10. It would appear from the wordings of the said article that 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.' Correspondingly every person, who is a member of the civil service of a State holds office during the pleasure of the Governor. The expression used in the said article is holds office during the pleasure of the President or, as the case may be, of the Governor. The expression used, namely, 'during the pleasure' to my mind clearly indicated that it is the tenure of office which is held at the pleasure of the President or of the Governor. In other words, the effect of the said article is that the said tenure of office can be terminated by the President or the Governor as the case may be at his pleasure. I am unable to hold on the language used in the said article that the pleasure of the President or of the Governor, as the case may be, relates to everything connected with such services. This view, which I am taking in this matter, finds clear support from the observations of their lordships of the Supreme Court made in State of Bihar v. Abdul Majid [1954 - II L.L.J. 678] and also from the observations of their lordships of the Federal Court in Punjab Province v. Tarachand [A.I.R. 1947 F.C. 23 : 1947 M.W.N. 575 : 1945 F.C.R. 89 F.C.] (supra). Mr. Justice Mehrotra of the Allahabad High Court in the decision in Lachman Prasad v. Superintendent, G. H. & S. Factory : AIR1958 All345 also took the same view. I will refer to those cases hereafter. Before doing that I shall deal with the cases relied on by the learned Advocate-General.

11. The learned Advocate-General, as I said before, in support of his contention mainly relied on a decision of the Privy Council in Venkata Rao v. Secretary of State . It should be noted that the other decisions on which the learned Advocate-General also relied, rested on the view they took as to the effect of the said decision of the Privy Council. I shall have therefore to examine closely the said decision of the Privy Council in Venkata Rao v. Secretary of State (supra) in order to determine the true effect, thereof. In that case the plaintiff, who was the appellant before their lordships of the Judicial Committee, had brought an action claiming damages for wrongful dismissal from Government service and the question which arose for their lordships' decision was whether or not such a suit for damages was maintainable. That question had to be determined with reference

to S. 96B of the Government of India Act, 1919, which inter alia provided as follows :

'2. (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.

* * * (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 the State in Council under Sub-section (2) of this section delegating the power 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 favourable to him than that provided by the rule or provision.'

12. Amongst the rules framed under the above section was rule XIV which reads as follows :

'Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, in all cases in which the dismissal, removal or reduction of any officer is ordered, the order shall, except when it is based on facts or conclusions established at a judicial trial, or when the officer concerned had absconded with the accusation hanging over him, be preceded by a properly recorded departmental enquiry. At such an enquiry a definite charge in writing shall be framed in respect of each offence and explained to the accused, the evidence in support of it, and any evidence which he may adduce in his defence shall be recorded in his presence and his defence shall be taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded on each charge.'

13. The final decisions of the High Court was that requirements of rule XIV were not satisfied in that case. But the said Court decided the question of law against the appellant and dismissed the suit; the question of law being that the suit was not maintainable as the petitioner was liable to be dismissed at pleasure. Before their Lordships of the Judicial Committee the appellant contended that the statute gives him a right enforceable by action to hold his office in accordance with the rules and that he could only be dismissed as provided by the rules in accordance with the procedure prescribed thereby. In dealing with that contention their lordships of the Judicial Committee referred to two earlier decisions of the Board; the first being in Shelton v. Smith [1895 A.C. 229] and the second in Gould v. Stuart [1896 A.C. 575]. In the first case their lordships of the Judicial Committee held that servant of the Crown held their office during the pleasure of the Crown; not by virtue of any special prerogative of the Crown but because such are the terms of their engagement, as is well understood throughout the public service and if any public servant considers that he has been dismissed unjustly, his remedy is not by a law suit, but by an appeal of an official or political kind. In the second case the Board consisting of three members, two of whom had sat in the earlier case, held that the Government servant concerned held office under certain conditions expressly enacted in the body of the New South Wales Civil Service Act, 1884, and that these express provisions of the statute were 'inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure.' After referring to the said two cases their lordships of the Judicial Committee took the view that S. 96B in express terms states that office is held during pleasure and 'there is therefore no need for the implication of this term and no room for its exclusion.' Their lordships therefore held that the rules did not fetter the pleasure of the Crown during which the appellant held his office. Their lordships then observed, and it was on those observations that the learned Advocate-General relied in support of his contention, as follows :-

'The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far-reaching to commend itself for acceptance. The rules are manifold in number and most minute in particularity and are all capable of change.'

14. The learned Advocate-General relied strongly on the above observations and contended before us that their lordship clearly held that any rule that may be framed would not fetter the pleasure of the Governor or the President. He therefore contended that all rules framed by the Governor regulating the service conditions of the servant concerned in a State is subject to the said pleasure and a breach of the said rules is not justiciable. No doubt, the learned Advocate-General contended, the rules are all solemn assurances but they cannot form the basis for an action in a court of law.

15. I am unable to accept the said contention of the learned Advocate-General as to the true effect of the said Privy Council decision. I am unable to hold that in making the said observation their lordships of the Judicial Committee meant to lay down any such broad proposition that no rule regulating service conditions is justiciable. It should be noted that the case with which their lordships of the Privy Council were concerned was one of dismissal. Their lordships were considering the rules which fettered the pleasure of dismissal and were not concerned with other rules regulating service conditions. What, in my opinion, their lordships held was that the provision is S. 96B that the office is held during the pleasure cannot be controlled or fettered by any rule. Their lordships nowhere laid down in the said decision that the pleasure in question relates not only to the tenure of office but also to every condition of service. The case being one of dismissal, their lordships had no occasion to decide the last question and in fact their lordships did not decide it. In my opinion, what in effect their lordships decided in the said case was that there cannot be any term, be it in the contract or rules, which will take away the right of dismissal which rests on the pleasure of the Crown. If, therefore, it is interpreted that 'pleasure' relates only to dismissal, such a view would not in any way be inconsistent with the said decision.

16. The learned Advocate-General in support of his contention also relied on the subsequent observations of their lordships which are as follows :-

'Counsel for the appellant nevertheless contended with most logical consistency that on the appellant's contention an action would lie for any breach of any of these rules, as for example, of the rules as to leave and pensions and very many

other matters. Inconvenience is not a final consideration in a matter of construction but it is at least worthy of consideration and it can hardly be doubted that the suggested procedure of control by the courts over Government in the most detailed work of managing its services would cause not merely inconvenience but confusion.'

17. These observations, according to the learned Advocate-General, show that their lordships were clearly of the view that no action for breach of any of the rules would lie. In my opinion, it is not possible to accept that contention. It appears that although their lordships mentioned, in dealing with the said contention of the counsel for the appellant, that inconvenience is not a final consideration in a matter of construction but is at least worthy of consideration, their lordships did not finally negative the said argument but proceeded immediately thereafter to refer to other consideration which, according to their lordships, were of 'utmost weight' and irresistibly led to the conclusion that no such right of action as is contended for by the appellant exists. Their lordships observed as follows :-

'There is another consideration which seems to their lordships to be of the utmost weight. Section 96B and the rules make careful provision for redress of grievances by administrative process and it is to be observed that Sub-section (5) in conclusion re-affirms the supreme authority of the Secretary of State in Council over the civil service. These considerations have irresistibly led their lordships to the conclusion that no such right of action as is contended for by the appellant exists.'

18. In the present case, no rule could be pointed out which makes a provision for redress of the petitioner's grievance in question, nor is there any rule which corresponds to Sub-section (5) of S. 96B. I have, on a careful consideration come to the conclusion that the said Privy Council decision is no authority for the proposition which is urged before us, viz., that the pleasure of the President or of the Governor, as the case may be, not only relates to dismissal but also to everything connected with the service of a Government servant.

19. The learned Advocate-General then relied on the Federal Court decision in Punjab Province v. Tara Chand [A.I.R. 1947 F.C. 23 : 1947 M.W.N. 575 : 1945

F.C.R. 89 F.C.] (supra). This was again a cases of dismissal. The question which arose in that case was whether or not a Government servant, who has been dismissed, can claim arrears of pay. The High Court allowed his claim for arrears of pay only in respect of such period of service as fell within three years immediately preceding the institution of the suit. Against that decision the Province of Punjab preferred this appeal to the Federal Court. Their lordships dismissed the said appeal. The learned Advocate-General in citing this case mainly relied on a passage from the judgment of Zafrulla Khan J., one of the learned Judges who decided the said case, which is as follows :-

'It is useful to recall that while Sub-secs. (1) and (2) of S. 240 reproduce the provisions of S. 96B, Government of India Act, 1915, Sub-section (3) enacts in the form of a statutory provision that which theretofore had been only a matter of statutory rule. Sub-section (4) is new. We are of the view that Parliament enshrined these provisions in the body of the Act deliberately in order to provide public servants with safeguards the contravention of which should give them a right of action for appropriate relief. The distinction between the consequences flowing from the contravention of a statutory rule, such as the provision corresponding to S. 240(3) then was and the contravention of a statutory provision itself, such as the provision corresponding to S. 240(2) contained in S. 96B, Government of India Act, 1915, is well brought out in the judgments of the Judicial Committee in 64 I.A. 55 and 64 I.A. 40. In the last case their lordships observed : '..... It is manifest that the stipulation or proviso as to dismissal 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. It is plainly necessary that this statutory safeguard should be observed with the utmost care and that 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'.'

20. The learned Advocate-General relied on these observations in support of his proposition that statutory rules are not justiciable although the position would be different if they are incorporated as part of the statute itself. At this stage it should be mentioned that the provisions of Sub-section (3) of S. 240, which inter alia

provides that no person 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, were not incorporated in S. 96B of the said Act but had been only matters of statutory rules. What their lordships of the Privy Council held in Venkata Rao v. Secretary of State [(supra) was that those rules cannot override the express terms of S. 96B viz., that the office is held during pleasure. Their lordships of the Federal Court, in making the said observations on which the learned Advocate-General relied, were only stating that the Parliament in enacting the rules in the body of the Government of India Act, 1935, deliberately enshrined those provisions, which were originally in the form of rules under the Government of India Act, 1915, in the body of this Act in order to make them available to the public servants, the contravention of which should give them a right of action for appropriate relief. I am unable to hold that in making the said observations their lordships meant to say that no statutory rule, whether it relates to dismissal or otherwise, is justiciable. I am also unable to hold, as contended by the learned Advocate-General, that the further implication of these observations is that the President, as the case may be, not only relates to dismissal but also to everything relating to such service. I should once again mention that the decision of the Privy Council in Venkata Rao v. Secretary of State (supra) as also the observations of their lordships of the Federal Court on which the learned Advocate-General relied, do not relate to anything other than the question of dismissal. It is difficult, in my opinion, to read in those observations any such proposition that the pleasure of the Crown relates not only to termination but also to everything concerning the service of Government servants. On the other hand, Zafrulla Khan J., in his judgment in the said case, observed as follows :

'It may be conceded that in the absence of express limitation a public servant in India holds office during His Majesty's pleasure. This has been recognized and given statutory effect in Sub-section (1) of S. 240, Government Act. It has, however, been made subject to the express provisions of the Constitution Act some of which are set out in the remaining sub-sections of S. 240. These provisions operate as limitations upon the applicability of the doctrine of tenure during His Majesty's pleasure. It seems to us very doubtful whether the doctrine itself imports anything more than the period of tenure of office of a servant of the

Crown is liable to be terminated at His Majesty's pleasure and that in the absence of any express provision binding upon the Crown guaranteeing to a public servant a tenure terminable on other conditions a public servant may be dismissed from office at will.'

21. These observations, to my mind, completely negative the view which the learned Advocate-General urged before us, viz., that the said decision of the Federal Court is an authority for the proposition that the doctrine of pleasure is not limited merely to tenure of office but extends to every thing including conditions of service relating to such service. On the other hand, this decision in my opinion and in particular the observations to which I have just now referred, support the contrary view, viz., that the said doctrine of pleasure does not mean anything more than that the period of tenure of office of a servant of the State or the Union is liable to be terminated at the pleasure of the Governor or the President.

22. I now come to the Madras decisions on which the learned Advocate-General also relied. They are Devasahayam v. State of Madras [A.I.R. 1958 Mad. 53] (supra); Sambandam v. R. T. Superintendent, Southern Railway [A.I.R. 1958 Mad. 243 : 1958 M.W.N. 1] (supra); Sambandam v. R. T. Superintendent, Southern Railway [1959 - II L.L.J. 613] (supra) and Devasahayam v. Madras State : AIR1959 Mad1 (supra). I shall take up those decisions one by one. In the case of Devasahayam v. State of Madras [A.I.R. 1958 Mad. 53] (supra) Rajagopala Ayyangar, J., in dealing with this question, viz., whether the infraction of other rules of service could give rise to an action or could be redressed by Courts, held as follows :

'Even if the matter had to be decided, without reference to the history of the provisions and the decisions at various stages but only on the terms of the Constitution itself, the question has in my judgment to be answered the same way. Article 310 lays down in emphatic terms that the tenure of civil servants is 'at pleasure' though subject to the opening words of Clause (1) 'except as expressly provided by this Constitution' which might possibly be a reference to provisions like Arts. 124(4) and 217(1), proviso (b), as to which there is some doubt and of course to Art. 311(1) and (2) and also Art. 314. On the language of the article of the

Constitution, the argument scarcely seems open that the 'pleasure' is qualified or conditioned by the observance of the rules framed under Art. 309 or other similar provisions or continued under Art. 313. If I am right so far, the violation or infraction of a statutory rule would give rise to a cause of action for being agitated in Courts only if the nature of the infringement brought it within the jurisdiction of the Courts or their competency to afford relief.'

23. His lordship in that case was no doubt concerned with the question as to whether any variation in the order of seniority to the prejudice of an officer in civil service does give rise to a right the violation of which could be removed by invoking the jurisdiction of the Court under Art. 226. But the observations, to which I have just now referred, it must be admitted, are of general character and they embody the view contrary to the view I have taken so far. It should however be mentioned that his lordship in making the said observation proceeded on the assumption that pleasure relates to all matters of service conditions and not restricted to dismissal only. His lordship did not enter into any discussion at all and did not state clearly in his said judgment as to what the ambit of that pleasure is. It seems to me that that question as to how far the doctrine of pleasure extends and whether it goes beyond dismissal were not specifically raised and in any event not argued before his lordship in the manner in which they have been raised and argued before us. It should also be mentioned that his lordship made no reference in his judgment to Abdul Majid case [1954 - II L.L.J. 678] (supra) to which I shall refer hereafter and in which there is, in my opinion, a clear observation of Mahajan, C.J., to the effect that the doctrine of pleasure concerns itself with tenure of office of a civil servant. For these reasons I am unable to agree with the view expressed by his lordship in the said case on this point.

24. The decision in Sambandam v. R. T. Superintendent, Southern Railway [A.I.R. 1958 Mad. 243 : 1958 M.W.N. 1] (supra) so far as it relates to this point, rests on the view it took as to the effect of the Privy Council decision in Venkata Rao v. Secretary of State (supra). Rajagopalan, J., who decided the said case, also proceeded on the assumption that the tenure of office as well as other conditions of service are determined at the pleasure of the Executive and Art. 309 cannot by itself constitute a limitation on the power of the Executive in the exercise of its

pleasure as it does not fall within the scope of the saving clause in Art. 310(1) 'except as expressly provided by the Constitution.' As in the other case, there is no discussion on the point as to the true scope or ambit of the doctrine of pleasure. His lordship also founded his decision on this point on the observations of the Judicial Committee made in Venkata Rao v. Secretary of State (supra) that the rules constitute a solemn assurance and they do not bring into existence rights and obligations enforceable in Court. As I said before, their lordships of the Privy Council were concerned with a case of dismissal and all that their lordships held was that the pleasure of the Crown to terminate the services of its servants could not be fettered by any rules. It is in that context that the observations, on which Rajagopalan, J., relied, have to be understood. I am unable to reconcile myself with the view that their lordships meant to say that the doctrine of pleasure extends beyond dismissal and relates to all matters connected with the service of such servants including their service conditions. That question was not before their lordships and their lordships had no occasion to consider the same and did not pronounce any opinion thereon. Unlike the case in Devasahayam v. State of Madras [A.I.R. 1958 Mad. 53] (supra) there is no doubt reference in this case to the decision of the Supreme Court in Abdul Majid case [1954 - II L.L.J. 678] (supra). But it should be noted that the observations of Mahajan, C.J., made on this point were not referred to by his lordship in his judgment. In those observations Chief Justice Mahajan as I said before made it quite clear that the doctrine of pleasure concerns itself only to the tenure of office. Rajagopalan, J., however, observed that what was held in Abdul Majid case (supra) was that the rule of English law that a civil servant cannot maintain a suit against the State or against the Crown for recovery of arrears of salary does not prevail in this country. With all respect, I am unable to agree with his lordship that is all that was held in the said Abdul Majid case (supra). I find that there is a clear pronouncement by his lordship Mahajan, C.J., on the question as to how far the doctrine of pleasure extends. His lordship Mahajan, C.J., in Paras. 11, 12 and 13 of the judgment observed as follows :-

'(11) It was suggested that the true view to take is that when the statute says that the office is to be held at pleasure, it means 'at pleasure', and no rules or regulations can alter or modify that; nor can S. 60, Civil Procedure Code, enacted

by a subordinate legislature be used to construe an Act of a superior legislature. It was further suggested that some meaning must be given to the words 'holds office during His Majesty's pleasure' as these words cannot be ignored and that they bear the meaning given to them by the Privy Council in .

(12) In our judgment, these suggestions are based on a misconception of the scope of this expression. The expression concerns itself with the tenure of officer of the civil servant and it is not implicit in it that a civil servant serves the Crown ex gratia, or that his salary is in the nature of a bounty. It has again no relation or connexion with the question whether an action can be filed to recover arrears of salary against the Crown. The origin of the two rules is different and they operate on two different fields.

(13) The rule that a civil servant holds office at the pleasure of the Crown has its origin in the Latin phrase durante beno placito (during pleasure), meaning that the tenure of office of a civil servant except where it is otherwise provided by statute, can be terminated at any time without cause assigned. The true scope and effect of this expression is that even if a special contract has been made with the civil servant the Crown is not bound thereby. In other words, civil servants are liable to dismissal without notice and there is no right of action for wrongful dismissal, that is, that they cannot claim damages for premature termination of their services.'

25. The view expressed in these observations accords with what Zafrulla Khan, J., had observed in Punjab Province v. Tarachand [A.I.R. 1947 F.C. 23 : 1947 M.W.N. 575 : 1945 F.C.R. 89 F.C.] (supra) to which I have already referred. Rajagopalan, J., while dealing with this case, did not refer or consider the observations made by Chief Justice Mahajan, to which I have referred. I am therefore unable to accept the view taken in the said decision of the Madras High Court in Sambandam v. R. T. Superintendent, Southern Railway [A.I.R. 1958 Mad. 243] (supra).

26. The other two decisions of the Madras High Court, on which the learned Advocate-General relied [viz., Sambandam v. R. T. Superintendent, Southern Railway - 1959 - II L.L.J. 613 (supra) and Devashayam v. Madras State - : AIR1959 Mad1 (supra)] are also of little assistance to him. The decision in Sambandam v. R. T. Superintendent, Southern Railway [1959 - II L.L.J. 613]

(supra) was a decision on appeal against the judgment of Rajagopalan, J., in Sambandam v. R. T. Superintendent, Southern Railway (supra) to which I have already referred. In deciding this appeal their lordships of the Madras High Court did not refer to Abdul Majid case [1954 - II L.L.J. 678] (supra). Their lordships did not also refer to the observations of Rajagopalan, J., about pleasure. The ratio decidendi of this decision was that even if there was a reduction in rank by way of seniority, it was not as and by way of punishment, for there was no order expressly reducing the rank of the servant personally. In the other case reported in Devasahayam v. Madras State : AIR1959 Mad1 (supra) all that was decided was that reduction in rank does not amount to punishment and that was the only question dealt with in that case. That was a simple case, to use the words of their lordships, in which the applicant, who had obtained benefit in the way of seniority by the relaxation of rules, had been deprived of that benefit by a subsequent cancellation of such relaxation. Thus in that case there was not even any violation of any existing rule of seniority.

27. I now come to the decision of the Bombay High Court in S. Framji v. Union of India [1959 - I L.L.J. 107] (supra). The learned Advocate-General also relied on this decision as supporting this contention. Chagla, C.J., who delivered the judgment in that case, did no doubt mention that there are two views on the expression 'holding office during the pleasure of the President.' One view is that it only deals with the tenure of office and all that it provides is that the President can dismiss any civil servant at pleasure. The other view which, according to his lordship, has been taken in England and is a possible view, is that when a Government servant holds office at the pleasure of the King or the President, it connotes not merely that his services are terminable at the pleasure of the King or the President, but further that the service under Government is not a creature of contract and cannot be regulated by terms of a contract, that the relationship between a Government servant and the Government is not contractual and that no term of service can be made justiciable, nor can a Government servant assert any right relating to his service in a Court of law. But his lordship did not decide the question as to which of the said two views is correct, but left it open. His lordship proceeded on the view that even assuming that it is open to the Union or the President to enter into a contract with the servants or any of them, there was in

fact no contract between the President and the plaintiff in that case, as would appear from the following observations made by his lordship :-

'Without deciding the broader question with regard to the implications of the doctrine of a civil servant holding office during the pleasure of the President, we must confine ourselves in this appeal to the rather narrow question as to whether the Railway Code constitutes a contract between the civil servant and Union Government.'

28. His lordship refused to look upon the rules contained in the Railway Establishment Code as a contract between the parties. In the present case, it is not necessary for us to go into the question whether or not the relationship between the Government and its servant is a contractual relationship. This decision, therefore, is, in my opinion, of no avail to the learned Advocate-General for his present contention. Before I leave this case, I should mentioned that we could not find any English authority - and we asked for such an authority several times from the learned Advocate-General and he could not produce any - in support of the observation made by Chagla, C.J., that the view taken in England is that when a Government servant holds office at the pleasure of the King or the President, it connotes not merely that his services are terminable at the pleasure of the King or the President but further that no term of service can be made justiciable, not can a Government servant assert any right relating to his service in a Court of law. It should also be noted that although Chagla, C.J., in his judgment referred to Abdul Majid case [1954 - II L.L.J. 678] (supra), his lordship did not refer to the observations of Mahajan, C.J., made in that case to which I have already referred. What Chagla, C.J., held with reference to this case is that all that the Supreme Court in Abdul Majid case [1954 - II L.L.J. 678] (supra) laid down was that the English common law rule regarding the holding of office by public servants only during the pleasure of the Crown has not been adopted by us in its entirety and with all its rigorous implications. Chief Justice Chagla further held :

'subject to the exception of Art. 311 and the exception enunciated by Abdul Majid case [1954 - II L.L.J. 678] (supra) with regard to the recovery of arrears of salary, it is not suggested, with respect, by the Supreme Court in its judgment that the

doctrine of a Government servant holding office during the King's pleasure has been in any way further limited or cut down.'

29. With all respect to the learned Chief Justice, I am unable to agree that that is all that the Supreme Court decided in Abdul Majid case [1954 - II L.L.J. 678] (supra). His lordship has not taken note of the clear observations of Chief Justice Mahajan made in his judgment, to which I have already referred. In the result, therefore, I hold that this decision of the Bombay High Court does not in any way establish the learned Advocate-General's point.

30. These are the cases on which the learned Advocate-General relied in support of his contention. As against these cases there are the decisions of the Supreme Court in State of Bihar v. Abdul Majid (supra) and the decision of the Federal Court in Punjab Province v. Tarachand [A.I.R. 1947 F.C. 23 : 1947 M.W.N. 575 : 1945 F.C.R. 89 F.C.] (supra) and the observations made by Mahajan, C.J., and Zafrulla Khan, J., respectively in the said cases. Mr. Venkataranga Ayyangar also relied on the decision of the Allahabad High Court in Lachman Prasad v. Superintendent, G. H. & S. Factory : AIR1958 All345 (supra). I have already set out in this judgment the observations of Mahajan, C.J., and of Zafrulla Khan, J., made in Abdul Majid case [1954 - II L.L.J. 678] (supra) and in Venkata Rao v. Secretary of State (supra) respectively. The Allahabad decision in Lachman Prasad v. Superintendent, G. H. & S. Factory : AIR1958 All345 (supra) is clearly on this point and fully supports the contention of Mr. Venkataranga Ayyangar. The main contention, which was urged in that case on behalf of the petitioner, was that fixation of pay was not made in accordance with the provisions of the rules framed by the Government-General in the year 1947 and amended in the year 1949. The stand taken up on behalf of the respondent was that the fixation of pay has been done in accordance with the rules as amended and various notifications issued in accordance with the rules. It was further contended on behalf of the respondent that the power of fixation exercised by the respondent was nothing but exercise of pleasure by the President under Art. 310 of the Constitution, the pleasure of the President being only subject to the limitation embodied in Art. 311. Apart from Art. 311, it was further urged on behalf of the respondent, the pleasure of the president was absolute and it cannot be interfered with by the Courts under Art. 226. This is also the contention of the

learned Advocate-General before us in this case. In dealing with this contention Mehrotra, J., after referring to the provisions of Arts. 309, 310 and 311, observed as follows :-

'It is argued that the pleasure of the President is only subject to Art. 311 and any violation of the guarantee given under Art. 311 is only actionable. The pleasure of the President cannot be fettered in any other manner. Any rules framed under Art. 309 regulating recruitment and condition of service of person appointed to public services cannot be regarded as express provisions of the Constitution so as to fetter the exercise of pleasure by the President. Reliance was placed on the following observation in the case of Jagannath Prasad v. State of Uttar Pradesh : AIR1954 All629 .'

31. His lordship then set out the relevant observations made in that case and held as follows :

'The short answer to this question is that fixation of scale of pay and grades cannot be said to be an exercise of the pleasure to terminate the services. All that Art. 310 deals (?) with is that every civil servant holds his post during the pleasure of the President. In the exercise of that pleasure it may be open to the President to terminate the services of all the employees but the fixation of scales cannot be considered as an exercise of the pleasure under Art. 310 of the Constitution.

* * * The expression 'at present' in Art. 310 concerns itself with the tenure of office of the civil servant and does not relate to the conditions of service.'

32. I shall have to refer to this judgment once again when I deal with the next question, viz., whether the rules framed under Art. 309 have statutory force and these rules, in so far as they regulate the conditions of service and do not affect the pleasure of the president or of the Governor to terminate the service under Art. 310, cannot be regarded as anything but statutory rules, a breach of which will be enforceable in proper cases by means of a writ. So far as the present question is concerned, viz., what is the ambit of pleasure, this decision, in my opinion, is a clear authority in support of the view that I have taken. I am also in entire agreement with the view expressed therein. It should be noted that the learned

Judge also referred to the observations of Mahajan, C.J., in support of his view on this point.

33. Having carefully considered the contentions of the learned advocates for the respective parties and the decisions on which they relied, I have come to the conclusion that the expression 'during pleasure' in Art. 310 relates only to tenure of office of the civil servant and does not relate to the other conditions of service. That being my view on this point, it becomes unnecessary for me to decide the next contention urged before us by Mr. Venkataranga Ayyangar, viz., that even if the doctrine of pleasure as mentioned in Art. 310 extends to all conditions of service, even then it would be fettered by, and be subject to, any law or rules that may be enacted or framed under Art. 309 of the Constitution, inasmuch as such law or rule would amount to an express provision of the Constitution and thus coming within the exception as contemplated in Art. 310.

34. I shall now proceed to consider the next question which arises for our decision, viz., if the other conditions of service of a Government servant, i.e., other than those relating to termination framed under Art. 309 are not affected by the pleasure of the President or of the Governor, are those conditions of service justiciable and will breach of any one of them be enforceable by means of a writ. This question is by no means free from difficulty. Logically it may be contended that all rules framed under Art. 309 have statutory force, a breach whereof can be enforced under Art. 226 of the Constitution. That was also the view which was taken by Mehrotta, J., in the Allahabad decision, to which I have referred. His lordship observed as follows :-

'It is sufficient to point out that the rules framed under S. 241 of the Government of India Act deal with the conditions of service; they have therefore a statutory force. These rules in so far as they regulate the conditions of service and do not affect the pleasure of the President or the Government to terminate the services of his employees under Art. 310 of Constitution, they cannot be regarded anything but statutory rules, a breach of which will be enforceable in proper cases by means of a writ.

* * * As I have already indicated, the rules which have the effect of putting a limitation on the pleasure of the President may be regarded as mere instructions but the rules which have the effect of regulating the conditions of service and do not deal with the exercise of the pleasure of the President under Art. 310 of the Constitution cannot be regarded as mere instructions to the officers.'

35. Mr. Venkataranga Ayyangar strongly relied on the above observations and also contended before us that any violation of any of the rules framed under Art. 309 of the Constitution other than those relating to termination of service will be enforceable in proper cases. As I said before, there is much force in this contention. But would it be correct to hold that every rule framed under Art. 309 has got a statutory force I find myself unable to subscribe to such an extreme view. There may be rules even though purported to have been framed under Art. 309 of the Constitution which in effect are nothing but administrative instructions. Can it be said that even those rules give rise to a cause of action and are enforceable in a Court of law It should be noted that what Art. 309 provides is that the appropriate legislature and the President or the Governor, as the case may be, can respectively regulate the conditions of service by enactment or by rules. It has therefore to be seen whether any particular rule, though framed under the said article, is a rule relating to the condition of service before it can have a statutory force. A rule therefore, even though purported to have been framed under the said article, which is really in the nature of administrative direction and does not relate to condition of service of a Government servant, can by no means be said to be enforceable. In my view, therefore, it is only those rules, which relate to conditions of service as contemplated in Art. 309 and which create a right in the Government servant, which would be enforceable. Whether or not any particular rule relates to a condition of service and creates a right is a matter to be decided in each case. The same view seems to have been taken by the Calcutta High Court in Suryakumar Chatterjee v. S. N. Banerjee [58 C.W.N. 656]. Sinha, J., held in that case that the Court will enforce statutory rules and not administrative orders. In the case of Province of Bombay v. Modhukar : AIR1952 Bom37 , it was held that so far as the special provisions of S. 243 of the Government of India Act, 1935, and the statutory force given by them to the rules made under the Police Act regarding conditions of service are concerned, a breach of those rules would give rise to a

cause of action. It should be noted that it was conceded in the said case that a breach of a vital rule, e.g., a rule relating to dismissal or reduction from service, framed under the Police Act and relating to conditions of service of police officers referred to in S. 243, Government of India Act, 1935, gives rise to a cause of action. In my opinion, therefore, the question boils down to this, viz., whether or not rule in question is a rule which relates to conditions of service as contemplated in Art. 309 and creates a right. If it is, then whether it would be enforceable in a Court of law. They are vital rules, to which the Constitution has given statutory force, and a breach of those rules would give rise to a cause of action. Rules, which are in the nature of administrative orders or directions and do not relate to conditions service, create no right in the servant, even though such rules purport to have been framed under Art. 309 of the Constitution. Before concluding this point, I should refer to a decision of the Supreme Court in State of Madhya Pradesh v. Mandawar [1954 - II L.L.J. 673]. In that case the question, which arose for their lordships' decision, related to the grant of dearness allowance. Their lordships in dealing with that question, held as follows :-

'Mandamus can be granted only when there is in the applicant a right to compel the performance of some duty cast on the opponent. Rule 44 of the Fundamental Rules confers no right on the Government servants to the grant of dearness allowance; it imposes no duty on the State to grant it. It merely confers a power on the State to grant compassionate allowance its own discretion. No mandamus can therefore, issue to compel the exercise of such a power.'

36. Their lordships further observed as follows :-

'The claim now put forward is to compel the Government to grant dearness allowance at a particular rate, and under rule 44 of the Fundamental Rules, such a claim is a matter of grace and not a matter of right. In England, no petition of right will lie in respect of such a claim. The position is thus stated in Halsbury's Laws of England, Vol. IX, p. 688, note (s) :-

'It is erroneous to suppose that a petition of right will lie for matters which are of grace and not of right' [De Bode (Baron) v. R. - (1848) 13 Q B. 364 at p. 387(C)].' That is also the law in this country where an action is a substitute for a petition of

right.'

37. This case, in my opinion, impliedly supports the view that if the claim of a Government servant does not rest on mere discretion, as for example, pleasure, or is not a matter of grace but rests on a rule or law which has got a statutory force and creates a right in him, then the same would be enforceable. In such a case, a duty is cast on the State to abide by the said rule and the Court will see that the said statutory duty is performed by the Government.

38. In the result, therefore, I have come to the conclusion that rules which relate to conditions of service and create rights and are not mere administrative orders, would be enforceable. Having come to this conclusion, I shall now proceed to examine the last question involved in this petition, viz., whether or not Ex. D, which is the foundation of petitioner's claim before us, is based on any rule which has got statutory force.

39. Before I deal with this point, I shall refer to one decision of this High Court in Kamalamma v. State of Mysore [1960 Mys. L.J. 522]. That was a decision of myself and of Hombe Gowda, J. The learned Advocate-General placed some reliance on this decision in support of his contention, viz., that the doctrine of pleasure extends to all service conditions. The said decision, in my opinion, does not lay down any such proposition. What was held by us, following the two Madras decisions already referred to in this judgment, was that the reduction in rank consequent upon the refixation of the seniority of a civil servant does not per se amount to reduction in rank within Art. 311(2) of the Constitution of India and the affected servant cannot contend that his reduction in rank is by way of punishment. The question, which arises for our consideration in this reference, did not arise in that case. Besides, we held as a fact that the respondent 3 in that case, who belonged to a backward community and who was treated as senior to the petitioner therein, was, as per the rules of recruitment in force at the relevant period, entitled to be appointed as lecturer in preference to the petitioner. In other words, we held as a fact that she was justly treated as senior to the petitioner in that case. I do not think that the view taken by us in the said case in any way militates against the view which I have taken in this reference.

40. I now come to the question as to whether or not Ex. D is based on any justiciable rule. Mr. Venkataranga Ayyangar referred us to rule 71 of the Bombay Civil Services Rules framed by the Governor of Bombay under Clause (b) of Sub-section (2) of S. 241 of the Government of India Act, 1935, to regulate the conditions of service of persons serving in connexion with the affairs of the Province and contended before us that the notification in question follows the said rule. He referred us to instruction 2 appearing at the foot of the said rule. Rule 71 and instruction 2 thereof read as follows :-

'When a temporary post is created which will probably be filled by a person who is already a Government servant, its pay should be fixed by a competent authority with due regard to -

(a) the character and responsibility of the work to be performed;

(b) the existing pay of Government servants of a status sufficient to warrant their selection for the post

* * * Instruction 2. - The following principles should be observed in fixing pay of temporary posts :- (i) A Government servant placed on 'special duty' or 'on deputation' should have the pay of his temporary post fixed at what his pay would been from time to time in the regular line had he not been so deputed.'

41. Mr. Venkataranga Ayyangar contended before us that the notification in question is based on this rule and on this instruction. I am wholly unable to accept that contention. In my opinion, rule 71 has nothing to do with the notification in question. What that rule provides is that when a temporary post is created and is filled up by a person who is already a Government servant, his pay should be fixed in accordance with the principle laid down therein. In this case, no question of fixing the pay of the temporary post (i.e., the post occupied by the petitioner in the Department of Civil Supplies) arises, and Ex. D does not relate to that question. This rule, therefore, does not support Mr. Venkataranga Ayyangar's contention, nor does rule 9(56) to which also Mr. Venkataranga Ayyangar referred, help him in his present contention. He could not refer us to any other rule on which he said notification can be said to have been based.

42. Left at this stage, Mr. Venkataranga Ayyangar would have failed in his present contention. But the learned Assistant Advocate-General, in order to assist the Court himself, pointed out rule 50(b) which governs the present notification and on which it is based. We are thankful to the learned Assistant Advocate-General for the assistance he has given to the Court in this respect. Rule 50(b) inter alia provides that service in a post, other than a post carrying less pay referred to in Clause (a) of rule 22 whether in a substantive or officiating capacity, service on deputation and leave other than extraordinary leave counts for increments in the time-scale applicable to the post on which the Government servant holds a lien as well as in time-scale applicable to the post or posts, if any, on which he would hold a lien had his lien not been suspended. It is clear and that position was not seriously disputed before us that the circular in question only reiterates what is stated in rule 50(b) and is based on the said rule. That rule, in my opinion, relates to condition of service and creates a right in favour of the petitioner and is justiciable.

43. After this Full Bench case was heard and while the judgment in this case was under consideration a Division Bench of this Court in R.A. No. 128 of 1957 decided the same question which was pending in this Full Bench case for decision. The learned Advocate-General brought to our notice this fact, viz., that such a decision has been given. Thereafter we sent for that judgment and perused the same. Their lordships of the Division Bench in that case have taken a view contrary to the view which I have taken in this judgment. I have examined the judgment delivered in that case very carefully. In support of that judgment their lordships of the Division Bench relied on the cases which I have dealt with in this judgment and the cases which have followed them. It is not necessary to re-state my views already expressed by me either as to the true effect or the correctness of the said decisions.

44. In my opinion, the decision of the Division Bench on this point is wrong and the same, as a result of our decision in this case, stands overruled.

45. In the result, therefore, the answer to the question referred to us will be as follows :-

The claim made by the petitioner under the Circular of the Government of Bombay (Circular No. 7573/33) dated 31 October, 1950, that his case should be so regulated as to restore to him the position he would have occupied in his parent department had he not been deputed to the Department of Civil Supplies, rests on a justiciable right in respect of which relief is obtainable under the provisions of Art. 226 of the Constitution.

46. With this answer to the question referred to us, the case is sent back to the Division Bench for final decision thereon. Costs of this reference will be costs in the petition. Advocate's fee certified at Rs. 250 (two hundred and fifty).

Somnath Ayyar, J.

47. I agree.

Kalagate, J.

48. I agree.

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