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Regulation of conditions of services of the persons appointed to public services and posts

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Abstract

The object of compulsory retirement is to weed out the dead wood in order to maintain efficiency and initiative in the service and also to dispense with the services of those whose integrity is doubtful so as to preserve purity in the administration. Generally, whose integrity is doubtful so as to preserve purity in the administration? Generally Service Rules provide for compulsory retirement of a Government servant on his completing certain number of years or attaining the prescribed age. His service record is reviewed at that stage and a decision of service is taken whether he should be compulsorily retired or continued further in service. No charges or imputation is leveled against him, requiring from him an explanation.

Key words: administration, judgment, Parliament

Introduction

A country without an efficient civil service cannot progress in spite of the earnestness of the people at the helm of affairs in the country. Whatever democratic institutions exist, experience has shown that it is essential to protect the public services as far as possible from political or personal influence.1

Article 309 empowers Parliament and the State Legislatures to regulate the recruitment and the conditions of service of the persons appointed to public services and posts under the Union and the States, respectively. Until provision in that behalf is made by an appropriate legislature under Article 309, the President and the Governors may make rules for regulating the recruitment and conditions of service of persons appointed to such services and posts. The Constitution itself provides for the creation of the Public Service Commission for the Union and the States to assist in the recruitment of the Public services.

The mode of recruitment and the category from which the recruitment to a service should be made are all mattes which are exclusively with in the domain of the Executive. These are the matters of policy and the Court cannot sit in judgment over the wisdom of the executive in these matters.2

According to Article 309 it is clear that the law-making power of Legislature and the rule making power of the Executive must not contravene any provision of the Constitution such as, Articles 301,311 and 320. Such laws and rules are also subject to other provisions of the Constitution contained in Articles 14,15,16,19,98,146, 187,229,234,(1).

[1] . P.P.Subbaraya--- Constituent Assembly Debates, p.962.

[2] . State of A.P. v. Sadanandan, AIR 1989 SC 2060.

Doctrine of Pleasure: In England, the normal rule is that a civil servant of the Crown holds his office during the pleasure of the Crown. This means that his services can be terminated at any time by the Crown, without assigning any reason. Even if there is a contract of employment between the Crown, the Crown is not bound by it. In other words, if a civil servant is dismissed from service he cannot claim arrears of salary of damages for premature termination of his service. The doctrine of pleasure is based on the public policy.

Article 310 of the Indian Constitution incorporates the Common law doctrine of pleasure. It expressly provides that all persons who are members of the Defence Services or the Civil Services of the Union or of All – India Services hold office during the pleasure of the President. Similarly, members of the State Services hold office during the pleasure of the Governor. But this rule of English law has not been adopted in this Article. A civil servant in India could always sue the Crown for arrears of salary.3 The rule is qualified by the words "except" or "expressly provided by the Constitution.4 Thus Art. 310 itself places restrictions and limitations on the exercise of the pleasure under Art.310 is limited by Art.311(2). The services of permanent Government servant cannot be terminated except in accordance with the rules made under Art. 309, subject to the procedures in Art. 311(2) of the constitution and fundamental rights. The above doctrine of pleasure in invoked by the government in the public interest after a Government servant attains the age of 50 years or has completed 25 years of service. This is constitutionally permissible as compulsory termination of service under Fundamental Rules 56(b) does not amount to removal or dismissal by way of punishment. While the Government reserves its right under Fundamental Rules 56(b) to compulsory retire a Government servant even against his wish, there is a corresponding right of the Government servant under Fundamental Rules 56(c) to voluntarily retire from service by giving the Government three months' notice. There is no question of acceptance of the request for voluntary retirement by the Government when the Government servant exercises his right under Fundamental Rules 56(c).5 Similarly, under Art, 310 the Government has power to abolish a post. However, such an action whether executive or legislative, is always subject to judicial review. The question whether a person whose services are terminated as a result of the abolition of post should be rehabilitated by giving alternative employment is a matter of policy on which the Court has no voice6.

Restriction on Doctrine of Pleasure: The Constitution lays down the following limitations on the exercise of the doctrine of pleasure;

(1) The pleasure of the President or Governor is controlled by provisions of Article 311, so the field covered by the Article 311 is excluded from the operation of the doctrine of pleasure7. The pleasure must be exercised in accordance with the

[3] . State of Bihar v. Abdal Majid, AIR 1954 SC 245
[4] . Opening words of Article 310.
[5] . Dinesh Chandra v. State of Assam ,AIR 1978 SC 17.
[6] .K.Rajendran v. State of Tamil Nadu, AIR 1982 SC 1107.
[7] .Motiram v. North Eastern Frontier Railway, AIR 1964 SC 600 at p.609.

procedural safeguards provided by Article 311.

(2) The tenure of the Supreme Court Judges [Article 124], High Court Judges [Art.218], Auditor-General of India [Art.148(2)]. The Chief Election Commissioner [Art.324], and the Chairman and members of the Public Service Commission [Art.317] are not dependent on the pleasure of the President or the Governor, as the case may be. These posts are expressly excluded from the operation of the doctrine of pleasure.

(3) The doctrine of pleasure is subject to the Fundamental Rights8

Constitutional safeguards to Civil Servants and restrictions on the Doctrine of pleasure:

Article 311 provides the following safeguards to civil servants against any arbitrary dismissal from their posts:

(1) No person holding a civil post under the Union or the State shall be dismissed, or removed by authority subordinate to that by which he was appointed.[Art311(1)].

(2) No such person shall be "dismissed", "removed" or "reduced" in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

'Civil Post': Article 311 is applicable only to one class of public officers. i.e,. those who hold a 'civil post' under the Union or the States. Those safeguards are not available to defence personnel of even a civilian employee in defence service. They can be dismissed from service without assigning any reason9. The protection of Article 311 is not available to military personnel who are governed by the Army Act. The term 'civil post' is not defined in the Constitution, but having regard to Articles 310 and 311 it appears to have been used in contra-distinction of 'defence post'. The term 'civil post' means an appointment, or office or employment on the civil side of the administration.10 In State of U.P. v. A.N.Singh,11 the Supreme Court has held that a person holds a civil post if there exists a relationship of master and servant between the State and the person holding the post. The relationship is established if the State has right to select and appoint the holder of the post, right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A person employed in police holds a 'civil post.12.

1. **No removal by subordinate authority:** Article 311(1) says that a civil servant cannot be dismissed or removed by any authority subordinate to the authority by which he was appointed. This does not mean that the removal or dismissal must be by the same authority who made the appointment or by his direct superior. It is enough if the removing authority is of the same or co-

[8] .Union of India v. P.D.More, AIR 1962 SC 630; General Manager, S.Rly v. Rangachari, AIR 1962 SC 36.

[9] V.K.Nambudri v. Union of India, AIR 1961 Ker.155.

[10] Sher Singh v. State of M.P., AIR 1955 Nag,175.

[11] AIR 1965 SC 360; State of Assam v.Kanak Chandra, AIR 1967 SC 884.

[12] Jagannath Prasas v. State of U.P., AIR 1961 SC 1254.

ordinate rank as the appointing authority13.

2. **Reasonable opportunity to defend:** Article 311(2) lays down that a civil servant cannot be dismissed or removed or reduced in rank unless he has been given a reasonable opportunity to show cause against the action proposed to be taken against him. Originally, the opportunity to defend was given to a civil servant at two stages; (1) at the enquiry stage, and this is an accord with the rule of natural justice that no man should be condemned without hearing; and (2) at the punishment stage, when as a result of enquiry the charges have been proved and nay of the three punishment. i.e. dismissal, removal or reduction in rank were proposed to be taken against him. The Constitution (*42nd Amendment*) Act, 1976 has abolished the right of the Government servant to make representation at the second stage of the inquiry. This second opportunity was given to the Government servants under the rulings of the Courts which was given a constitutional sanction by the Constitution (15th Amendment) Act,1964. The newly added proviso to Art 311(2) by the (42nd Amendment) Act, 1976, has abolished the right of the Government servant to make representation at the second stage of the inquiry. This second opportunity was given to the Government servants under the rulings of the Courts which was given a constitutional sanction by the Constitution (15th Aendment) Act, 1964. The newly added proviso to Art. 311 (2) by the (42nd Amendment) Act, 1976 makes it clear that if after inquiry it is proposed to impose upon a person any of the three punishments, i.e., dismissal, removal or reduction in rank, they may be imposed on the basis of the evidence given during such enquiry and he shall not be entitled to make any representation. This means that the above mentioned punishments will be imposed on the basis of the evidence adduced during the time of inquiry of charges against the Government servant. If as a result of such inquiry the charges are proved the same evidence shall be the basis of imposing the three penalties on the Government servant.

The protection under Article 311(2) is available only where dismissal, removal or reduction in rank is proposed to be inflicted by way of punishment and not otherwise. 'Dismissal' and 'removal' are synonymous terms but in law they acquired technical meanings by long usage in Service Rules. There is, however, one distinction between the 'dismissal' and 'removal', that is, while in case of 'dismissal' a person is debarred from future employment, but in case of 'removal' he is not debarred from future employment.14

Termination of Service when amounts to punishment:

The protection of Art.311 is available only when 'the dismissal, removal or reduction in rank is by way of punishment'. The main question, therefore, is to determine as to when an order for termination of service or reduction in rank amounts to punishment. In Parshottam Lal Dhingra v. Union of India, 15 the Supreme Court

[13] Mahesh Prasad v. State of U.P., AIR 1950 SC 70; Purshottam Lal Dhingra v. Union of India, AIR 1968 SC 36.

[14] . Mohd Abdual Salim Khan v. Sarfaraz, AIR 1975 SC 1064.

[15] .AIR 1958 SC 36.

has laid down two tests to determine whether the termination is by way of punishment----

(1) whether the servant had a right to hold the post or the rank;

(2) whether he has been visited with evil consequences.

If a Government servant had a right to hold the post or rank either under the terms of any contract of service, or under any rule, governing the service, then the termination of his service or reduction in rank amounts to a punishment and he will be entitled to the protection of Art. 311.

Suspension is not punishment:

The suspension of a Government servant from service is neither dismissal or removal nor reduction in rank, therefore, if a Government servant is suspended he cannot claim the constitution guarantee of reasonable opportunity.16 Where an employee is suspended during the disciplinary inquiry but the dismissal order is set aside by the Court and a fresh inquiry is ordered against him on the same charge, it was held that the initial suspension continued till the final order of dismissal was passed and the employee was entitled to subsistence allowance only and not full wages.17 Likewise, where an employee was suspended after having been informed of the abolition of the department in which he was employed it was held that he was not entitled not only to arrears of pay and allowances before the date of suspension but also to pay and allowances for the period subsequent to suspension till abolition of post and other benefits such as gratuity permissible under the rule.18 Thus, where the services of a Government servant are terminated as a consequence of the abolition of the post held by him for bona fide reasons. Art. 311(2) need not be complied with the termination of services of the Government servant when post is abolished does not involve 'punishment' at all and, therefore, the protection of Article 311(2) is not available.

Compulsory retirement simpliciter is not punishment:

A premature retirement of a Government servant in 'public interest' does not cast a stigma on him and no element of punishment is involved in it and hence the protection of Art. 311 will not be available. The expression in the context of premature retirement has a well-settled meaning and refers to cases where the interest of public administration require the retirement of a Government servant who with the passage of years has prematurely, ceased to possess the standard of efficiency, competence and utility called fro by the Government service to which he belongs., The power to compulsorily retire a government servant is one of the face of the doctrine of pleasure incorporated in Art. 310 of the Constitution. The object of compulsory retirement is to weed out the dead wood in order to maintain efficiency and initiative in the service and also to dispense with the services of those whose integrity is doubtful so as to preserve purity in the administration. Generally, whose integrity is doubtful so as to preserve purity in the administration. Generally Service Rules provide for

[16] .Sukh Bansh Singh v. State of Punjab,AIR 1962 SC 1711.

[17] .Divisional Personnel Officer, Western Rly. v. Sunder Das, AIR 1981 SC 2177.

[18] . Kesho Nath Khurana v. Union of India, AIR 1982 SC 1176.

compulsory retirement of a Government servant on his completing certain number of years or attaining the prescribed age. His service record is reviewed at that stage and a decision of service is taken whether he should be compulsorily retired or continued further in service. No charges or imputation is leveled against him, requiring from him an explanation. While misconduct and inefficiency are factors that are taken into consideration where the order is one of dismissal or removal or of retirement. There is no such requirement is case of compulsory retirement. There is no need to hold an enquiry. Only the satisfaction of the authorities form the basis on which the order is passed. A Government servant who is compulsorily retired does not lose any part of the benefit that he has earned during service. Thus, compulsory retirement differ both from dismissal and removal as it involves no penal consequences and thus does not attract the provisions of Art. 311 of the Constitution. This is the statement of law which has been laid down in Shyam Lal v. State of U.P.19 governing compulsory retirement cases.

Guidelines for Compulsory Retirement Stated:

In State of Gujarat v. Umedbhai M. Patel,20 the Supreme Court has laid down following principles governing compulsory retirement.

1. When the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

2. Ordinarily the order of compulsory retirement is not to be treated as a punishment under Art. 311 of the Constitution.

3. For better administration, it is necessary to chop off dead wood but the order of compulsory retirement can be based after having due regard to entire service record of the officer.

4. Any adverse entries made in the confidential record shall be taken note of and be given due weight age in passing such order.

5. Even un communicated entries in the confidential record can also be taken into consideration.

6. The order of compulsory retirement shall not be passed as a short cut to avoid departmental inquiry when such course is more desirable.

7. If the officer is given promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

8. Compulsory retirement shall not be imposed as punitive measure.

In a significant judgment, Baikunth Nath v. Chief Medical Officer,21 the Supreme Court has held that the Government can compulsorily retire its employees without assigning any reason or following the principles of natural justice. The three Judge Bench of the Court laid down the following principles governing compulsory retirement-

(1) An order of compulsory retirement is not a punishment. It implies no stigma.

[19] .AIR 1954 SC 369; see also Allahabad Bank Officer's Assn. v. Allahabad Bank (1996) 4 SCC 504.

[20] . AIR 2001 SC 1109.

[21] . (1992) 2 SCC 299.

(2) The order has to be passed by the Government on forming opening that it is in the public interest to retire a government servant. The order is passed on the subjective satisfaction of the Government.

(3) Principles of natural justice have no place in the context of an order of compulsory retirement. However, Courts will interfere if the order is passed mala fide or there is no evidence or if it is arbitrary.

(4) The Government (or the Review Committee) shall have to consider the entire record of service before taking a decision in the matter particularly during the later years' record and performance.

(5) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it un communicated adverse remarks were taken into consideration. The circumstances by itself cannot be a basis for interference.

Article 311 applies to both temporary and permanent servants:

The Constitutional guarantee of reasonable opportunity is available to both permanent and temporary servants. In Parshottam Lal Dhingra v. Union of India,22 the Supreme Court held that "Article 310 in terms, makes no distinction between permanent and temporary members of the service or between persons holding temporary or permanent post in the matter of their tenue being dependent upon the pleasure of President or the Governor, so does Article 311 in our view, make no distinction between the two classes, both of which are, therefore within its protection and the decisions holding the contrary view cannot be supported as correct."

Reasonable opportunity:

According to Art. 311(2), a civil servant cannot be dismissed or reduced in rank until he has been given reasonable opportunity of showing cause against the action proposed to be taken in regard to him. What does the expression *'reasonable opportunity' mean? In Khem Chand v Union of India23* the appellant who was in Government service was served with a charge-sheet and an enquiry was held on the basis of the report of the enquiry officer and he was served with an order of dismissal the next day. The appellant challenged the validity of the order of dismissal on the ground that he had not been supplied with a copy of the Enquiry Officer's Report and no opportunity was given to him against the action proposed to be taken in regard to him a required by Article 311. The Court held that even though an enquiry was held on the basis of which the enquiry officer had reported that the charges were proved and recommended the punishment of dismissal the authority competent to pass an order of punishment was bound to give a further opportunity to the Government servant to show cause why the particular punishment of dismissal should not be inflicted on him. It was at this stage where the punishment authority had accepted the report of the enquiry officer and proposed to inflict a particular punishment that the further opportunity became due. Since no further opportunity

[22] . AIR 1958 SC 36; Union of India v.P.K.More, AIR 1962 SC 360; See also State of Bihar v. S.B.Mishra, AIR 1971 SC 1011; Union of India v. P.S.Bhatt, AIR 1981 SC 957.

[23] .AIR 1958 SC 300.

had been given to the appellant it was held that the order of dismissal was unconstitutional being in violation of Article 311(2), the Supreme Court held that the 'reasonable opportunity' envisaged by Art. 311 includes:

(1) an opportunity to deny his guilt and establish his innocence which can be only done if he is told what the charges against him are and the allegation on which such charges are based;

(2) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and also.

(3) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do so if the competent authority, after the enquiry is over and after applying his mind to the gravity of the charges, tentatively proposes, to inflict one of the three major punishments and communicates the same to the Government servant.

This provision which was brought in the Constitution by 15th Amendment in 1964 consequent to the Supreme Court judgment in Khem Chand v.Union of india24 was deleted by the 42nd Amendment of Constitution in 1976. Now, it is not necessary to give inquiry at the second stage of proposed action to be taken.

Exceptions to Art.311(2) and Exclusion of Natural Justice:

The protection of Article 311(2) for giving, 'reasonable opportunity' is not available in the following circumstances:

(1) where a person is dismissed are reduced in rank on the ground of misconduct which has led to conviction or criminal charges;

(2) where it is impracticable to give the civil servant an opportunity to defend himself but the authority taking action against him shall record the reasons for such action.

(3) Where in the interest of the security of State, it is not expedient to give such an opportunity to the civil servant. [Art. 311.Proviso]

However, it was held that a government servant is not wholly without any remedy under the Service Rules made under Article 309. Thus, where the second proviso to Article 311 (2) applies, though there is no prior opportunity to a government servant to defend himself against the charges made against him, he has still two remedies available to him:

(i) departmental appeal under relevant service rules to show that the charges against him are not true;

(ii) remedy of judicial review, where the Court will examine whether the penalty imposed on the aggrieved person is arbitrary or grossly excessive or was not warranted by the facts and circumstance of the case.

This would be a sufficient compliance with the requirement of natural justice.

[24] AIR 1958 SC 300.