CIVIL WRIT.

Before Khosla, J.

KRISHAN DAYAL AND OTHERS,—*Petitioners*

versus

THE GENERAL MANAGER, NORTHERN RAILWAY, BARODA HOUSE, NEW DELHI.—*Respondent.*

Civil Writ Application No. 121-D of 1954

1954

June. 17th

Indian Railway Establishment Code, Volume II, Rule 2046(2)(a)—Meaning of—Constitution of India—Article 311—Compulsory retirement—Whether removal from service—Indian Railway Establishment Code, Volume I, Rule 1727—Petition or memorial to the President—Whether only remedy.

Held, that Rule 2046(2)(a) of the Indian Railway Establishment Code, Volume II, gives the Railway Department the power to retire a ministerial servant at the age of 55 because the rule says that the ministerial servant "may be required to retire at the age of 55 years". This clearly means that the obligation of the Railway Department to retain the ministerial servant after the age of 55 is subject to a modification, in that the ministerial servant may be retired without complying with the provisions of Article 311 of the Constitution. The rule says that the servant "should ordinarily be retained in service." This clearly does not mean the same thing as "should invariably be retained." The word "ordinarily" weakens the force of the phrase and gives the Railway Authorities power to retire a ministerial servant after the age of 55 even though he is efficient.

Held, that the word "removal" as used in Article 311 of the Constitution has a narrow and technical sense. It is not synonymous with termination of service. The compulsory retirement cannot be said to be removal or dismissal because none of the incidents attaching to removal or dismissal obtain in the case of compulsory retirement. It is, therefore, not obligatory to comply with the provisions of Article 311 of the Constitution of India before a person is compulsorily retired.

Held, that the only remedy which the petitioners had in this case was to petition the President under Rule 1727 of the Indian Railway Establishment Code, Volume I, for the interpretation of Rule 2046(2)(a). A Railway servant, however, has the right to move the High Court under the provisions of Article 226 of the Constitution where he can show that he was removed or dismissed illegally.

Petition under Article 226 of the Constitution of India praying that Your Lordships may be pleased to issue directions, orders, or writs in the nature of Mandamus, or other writs restraining the Opposite Party from giving effect to the decision terminating the services of the employees.

N. C. CHATTERJEE, NARINJAN SINGH KEER and VIR SAIN SAWHNEY, for Petitioners.

C. K. DAPHTARY, Solicitor-General and R. S. NARULA, for Respondent.

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JUDGMENT

KHOSLA, J. This is a petition by seventy-one persons under Article 226 of the Constitution. The petitioners are all employees of the Northern Railway. Some of them are under 55 years of age and the rest are between the ages of 55 and 60. They belong to what is called the "ministerial service" and are aggrieved by a notice served upon them whereby they are to be retired before attaining the age of 60. Those who were under 55 were given the option of taking leave preparatory to retirement up to a maximum of twenty-eight months. They were informed that this leave would be granted to them provided it was due even if the leave period took them beyond the age of 55 years. Those who were over the age of 55 were served with a similar notice and they were informed that they would be allowed to avail of leave preparatory to retirement up to a maximum of twenty-eight months provided that it was due and admissible and provided the leave did not take them beyond the age of 60 years. The petitioners' case is that being members of the ministerial service they are entitled to be retained in service until the age of 60. Hence they pray for a writ of mandamus or other direction restraining the opposite party who in this case is the General Manager, Northern Railway, from giving effect to the decision which would have the effect of making the petitioners retire before attaining the age of 60.

On behalf of the petitioners reliance is placed on rule 2046 (2) (a) of the Indian Railway Establishment Code, Volume II, the relevant portion of which is in the following terms :—

> "2046 (2) (*a*).—A ministerial servant, who is not governed by sub-clause (*b*), may be required to retire at the age of 55 years, but should ordinarily be retained

in service, if he continues efficient up to the age of 60 years. He must not be retained after that age except in very special circumstances, which must be recorded in writing, and with the sanction of the competent authority. *

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(b) A ministerial servant—

(i) who has entered Government service on or after the 1st April 1938, or on the 31st March, 1938, did not hold a lien or a suspended lien on a permanent post on that date,

shall ordinarily be required to retire at the age of 55 years. He must not be retained after that age except on public grounds which must be recorded in writing, and with the sanction of the competent authority and he must not be retained after the age of 60 years except in very special circumstances.

* * * * *

The petitioners all entered service before the 1st of April, 1938. Therefore, their case is covered by sub-rule (2) (a) quoted above. Mr. Chatterjee who argued the case on behalf of the petitioners contended that under this rule the Railway Department had no option but to retain ministerial servants until they attained the age of 60 unless they were found inefficient. He contended that the meaning of the phrase "should ordinarily be retained in service, if he continues efficient" means that a ministerial servant can be retired at the age of 55 only if there is a finding that he is inefficient. The onus, therefore, lies on the employer, and if there is no specific finding of inefficiency the ministerial servant must be allowed to continue in service until the age of 60. From

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these premises it was contended that the petitioners were being "removed" from service when they were called upon to proceed on leave preparatory to retirement and that this removal could not be effected without having recourse to the provisions of Article 311 of the Constitution.

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The first question to determine, therefore, is whether the compulsory retirement of a ministerial servant before he attains the age of 60 can be said to be removal from service within the meaning of Article 311 of the Constitution. Now, it is quite clear that if a Government servant is inefficient he can be removed on that ground at any time during his service but before steps can be taken to remove him the formalities required by the Government Servants Conduct Rules and Article 311 of the Constitution must be complied with. For instance, a Government servant who is 30 or 35 years of age cannot be summarily removed on the ground of inefficiency but he can be removed after an enquiry and after being given a 'show cause' notice. The rule quoted above gives the Railway Department the power to retire a ministerial servant at the age of 55 because the rule says that the ministerial servant "may be required to retire at the age of 55 years". This clearly means that the obligation of the Railway Department to retain the ministerial servant after the age of 55 is subject to a modification, in that the ministerial servant may be retired without complying with the provisions of Article 311 of the Constitution. The rule says that the servant "should *ordinarily* be retained in service." This clearly does not mean the same thing as "should invariably be retained". It seems to me that the word 'ordinarily' weakens the force of the phrase and gives the Railway Authorities power to retire a ministerial servant after the age of 55 even though he is efficient.

The dictionary meaning of 'ordinarily' as given in the Shorter Oxford English Dictionary is '(1) in conformity with rule; as a matter of regular occurrence; (2) in most cases; usually, commonly; (3) to the usual extent; (4) as is normal or usual". In common parlance 'ordinarily' means in a large majority of cases. The expression is never used in reference to a case to which there are no exceptions. The expression 'ordinarily' has been interpreted in a number of English cases. For instance; "ordinarily kept for a domestic purpose" in reference to an animal to kill which was an offence was interpreted to mean "that the class of animal killed is usually so kept, but it is not necessary to prove that the particular animal in question was so kept" (*Nye* v. *Niblett*, (1). Similarly, "ordinarily resident" has been interpreted to mean "residence in a place with some degree of continuity and apart from accidental or temporary absences" (*Levene* v. *Inland Revenue Commisisoners* (2), cited in Stroud's Judicial Dictionary, Third Edition). It, therefore, seems to me that the import of 'ordinarily' in rule 2046 is that the Railway Authorities were given the right to retire a ministerial servant at the age of 55, and if he is so compulsorily retired he can have no grievance, for he has no right to continue in service after the age of 55. He will be retained in most cases provided he is efficient but he cannot claim to be retained as a matter of right. Otherwise his case will be no different to the case of a man who has served only for two or three years and is in fact not efficient, and it cannot be argued that this rule makes no distinction between a ministerial servant who has served for a short period and one who has attained the age of 55.

(1) (1918) 1 K. B. 23.
(2) 1928 A.C, 217.

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The word 'removal' as used in Article 311 of the Constitution has a narrow and technical sense It is not synonymous with termination of service. For instance, a Government servant who is employed on a contract for a fixed term will be removed from service after the expiry of his term His removal does not bring his case within the mischief of Article 311. A person may be employed temporarily on condition that he will be liable to be removed on being given a month's notice, or the post to which he is employed may be retrenched and in such a case the termination of his service will not be considered removal from service. This question was considered at some length by the learned Judges of the Supreme Court in *Shyam Lal* v. *The State of Uttar Pradesh* (1). The learned Judges were dealing with the case of an officer who was compulsorily retired after twenty-five years' service under the provisions of Article 465-A of the Civil Service Regulations. Das, J., observed (pages 488, 489)—

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

(1) 1954 S.C A. 476.

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

And again—

"On compulsory retirement he will be entitled to the pension etc., that he has actually earned. There is no diminution of the accrued benefit. It is said that compulsory retirement, like dismissal or removal, deprives the officer of the chance of serving and getting his pay till he attains the age of superannuation and thereafter to get an enhanced pension and that is certainly a punishment. It is that in that wide sense the officer may consider himself punished but there is a clear distinction between the loss of benefit already earned and the loss of prospect of earning something more. In the first case it is a present and certain loss and

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is certainly a punishment but the loss of future prospect is too uncertain, for the officer may die or be otherwise incapacitated from serving a day longer and cannot, therefore, be regarded in the eye of the law as a punishment. The more important thing is to see whether by compulsory retirement the officer loses the benefit he has earned as he does by dismissal or removal. The answer is clearly in the negative. The second element for determining whether a termination of service amounts to dismissal or removal is, therefore, also absent in the case of termination of service brought about by compulsory retirement."

I have taken the liberty to quote at some length the judgment of Das, J., because his observations apply with full force to the case before me although the petitioners are ministerial servants and Shyam Lal was a non-ministerial servant. The petitioners' case comes under rule 2046 of the Indian Railway Establishment Code whereas Shyam Lal's case came under Article 465-A of the Civil Services Regulations but the principle which governed both cases is identical, namely the principle of compulsory retirement. In the one case Government has been given the right to retire a servant after twenty-five years' service and in the other case they have been given the power to retire a ministerial servant on his attaining the age of 55. In both cases the servant may be retained in service either because it is in the public interest to do so or because he is efficient, but in neither case can it be said that compulsory retirement is removal or dismissal because none of the incidents attaching to dismissal

or removal obtain in the case of compulsory retirement In the case of the petitioners before me there is no element of punishment and they have not been deprived of any rights.

A more direct authority is *Raghunath Narain Mathur* v. *Union of India* (1). This was a case of a Railway servant who was compulsorily retired before attaining the age of 60. The argument advanced before a Division Bench of the Allahabad High Court was the same as advanced before me and the learned Judges observed—

> "We are unable to accept this argument as correct. The Railway authorities have an unfettered option, in our opinion, to retire a person at the age of 55, though, normally speaking, they are expected to continue persons in employment, unless they are inefficient, until they reach the age of 60. But it is solely for them to decide whether a man shall be retained or not after the age of 55. The word 'ordinarily' does not take away their rights to retire him and it cannot be ignored."

The learned Solicitor-General contended that this petition was liable to be dismissed on a preliminary ground, namely that the petitioners have not availed of the right given to them under the rules of submitting a petition or memorial to the President. Under rule 1727 of the Indian Railway Establishment Code, Volume I, the Railway servant has a right to submit a petition or memorial to the President. The power to interpret these rules has been reserved to the President, and therefore, the petitioners cannot move this Court unless they have, in the first instance, petitioned

(1) A.I.R, 1953 All. 352.

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the President. Even after such a petition has been submitted and rejected the petitioners would not be entitled to come to Court because the President has the power to interpret these rules and the rejection of the petition would mean that rule 2046 was interpreted in a way whereby compulsory retirement was not taken to be synonymous with removal or dismissal. There is force in this argument and it seems to me that the only remedy which the petitioners had was to petition the President although I must not be taken to mean that in the case of an ordinary dismissal a Railway servant cannot move the High Court under the provisions of Article 226 of the Constitution where he can show that he was removed or dismissed illegally. In the present case I am clearly of the view that the compulsory retirement of the petitioners does not amount to removal or dismissal. There was, therefore, no question of holding an enquiry regarding their efficiency and of giving them an opportunity to show cause as required by Article 311 of the Constitution. This petition is, therefore, not competent and I dismiss it with costs.