CIVIL MISCELLANEOUS

Before Mehar Singh and S. B. Capoor, JJ.

DR. *PARTAP SINGH*,—*Petitioner.*

versus

THE STATE OF PUNJAB,—*Respondent.*

Civil Writ Application No. 961 of 1961.

1962

April, 4th

Constitution of India (1950)—Articles 309, 313 and 372 (1)—Power to amend service rules—Whether vests in the Legislature—Governor of a State—Whether competent to make new rules and abrogate old rules—Punjab Civil Services Rules (1959)—Rules 1.6 and 3.26 (d)—Effect and applicability of—Public servant on leave preparatory to retirement—When cannot be permitted to retire on attaining the age of superannuation—Order passed under Rule 3.26 (d)—When takes effect—Power of suspension—Whether vests in the Government—Order of appointment, dismissal or suspension—Whether administrative—Constitution of India (1950)—Art. 311—Whether applies to order of suspension—Order of suspension—Whether effects severance of relationship of master and servant—Leave preparatory to retirement—Whether can be cancelled to recall the officer to duty while simultaneously suspending him—Constitution of India (1950)—Art. 14—Government proceeding with departmental enquiry instead of prosecution in Court—Whether discriminatory—Art. 23—Retention of government servant in service after the date of compulsory retirement or superannuation—Whether amounts to 'begar'—Evidence Act (I of 1872)—Ss. 145 and 155(3)—Tape-recorded statements—Whether reliable.

Held, that in view of the provisions of Articles 309, 313 and 372(1) of the Constitution there is power of amendment of the rules with regard to any public service or any post which continues after the commencement of the Constitution and that power can be exercised by the Governor until the Legislature makes an enactment on the subject. Power to completely abrogate the old rules is also given to the competent authority under Article 372(1). The Governor has made the new Rules of 1959 in exercise of

the power under Article 309 and the petitioner is bound by those rules as the 1941 Rules have been abrogated and have ceased to exist and there is no question of the petitioner having gained any vested right in the age of superannuation under the 1941 Rules.

Held, that service rules are only justicable so long as they remain in force and a public servant can only have the benefit of existing law applicable to him and not abrogated law as is the case with 1941 Rules. Where the public servant entered service on the express understanding, by the conditions of his service, that he is to be bound by the changed and altered rules, he cannot depend on rule 1.6 of the Punjab Civil Services Rules, 1959, Volume I and claim to be governed by the old rules. Rule 3.26(d) of the said Rules applies to him.

Held, that rule 3.26(d) applies to a Government servant who is on leave preparatory to retirement and he cannot be required or permitted to retire on attaining the age of superannuation if he is suspended before attaining that age on a charge of misconduct. It is not necessary that the charge of misconduct must be communicated to him with the suspension order; all that the rule requires is that at the time the suspension is made there must exist a 'charge of misconduct' against him. The word 'permitted' in rule 3.26 means that a Government servant against whom there is a charge of misconduct shall not be allowed to retire on the date of reaching the normal age of compulsory retirement or superannuation.

Held, that an order passed under Rule 3.26(d) takes effect from the day when it is served on the government servant concerned or it comes to his knowledge. If by that date he had retired, it will have no effect qua him.

Held, that the Government has (i) inherent power to suspend a Government servant on a charge of misconduct, (ii) power under section 14 of the Punjab General Clauses Act, 1898, which is in the same terms as section 16 of the General Clauses Act, 1897 to suspend a government servant appointed by it, and (iii) power to suspend under rule 4(v) of the Punjab Civil Services (Punishment and Appeal) Rules, 1952, in which case rules do not require that before such order is made explanation of the Government servant be obtained.

Held, that the power to appoint, dismiss or suspend an officer is the exercise not of a judicial power but of administrative power and the order of dismissal or suspension is neither judicial nor *quasi* judicial but is an administrative order. An order of suspension is neither an order of dismissal nor of removal and Article 311 of the Constitution is not attracted to such an order. The Government servant who is suspended is not entitled to an opportunity for explanation or charge-sheet before order of suspension is made.

Held, that the suspension of a Government servant in accordance with the rules does not amount to suspension of the contract of service and severance of the relationship of master and servant between the Government and him. After suspension he holds the office under the direction that he is not to attend to his duty until order is made in accordance with rule 3.26(d).

Held, that a Government servant retains his lien on his permanent post from which he proceeded on leave preparatory to retirement to the date of his retirement and on suspension that lien of his continues. His retirement is deferred under a specific rule and his lien on the post continues until a final decision is taken in regard to him. There is nothing wrong in the Government cancelling his leave preparatory to retirement and recalling him to duty while simultaneously suspending him.

Held, that the Government has the right to hold a departmental enquiry againt a Government servant as well as to prosecute him and it is the option of the Government to proceed with either the departmental enquiry first or with a criminal prosecution. Merely because the Government takes one or the other course does not mean that Article 14 of the Constitution is attracted and there is a case of discrimination based on arbitrary exercise of power. The Government has the power to proceed in both ways and there is nothing arbitrary in its first proceeding with the enquiry and then if sufficient evidence is available for prosecution to prosecute the Government servant. Nor can it be inferred that the Government acted *mala fide* in proceeding with the departmental enquiry instead of proceeding against him first before a Court.

Held, that when service is continued according to and under the service rules even after the date of compulsory retirement or superannuation, that is not *"begar"* or forced labour but service according to the conditions of service as provided in the rules applying to the Government servant and is not in violation of Article 23 of the Constitution.

Held, that it is not safe to rely on a tape-recorded statement without examining the person whose statement it purports to be. The statement recorded on tape can be tampered with and so cannot be taken as a reliable piece of evidence which can be depended upon.

Petition (apparently under Article 226 of the Constitution of India) praying that a writ of Certiorari or any other appropriate writ, direction or order be issued quashing the order of the respondent dated 3rd June, 1961, suspending the petitioner and revoking the leave preparatory to retirement and compelling the petitioner to serve the respondent after the petitioner has attained the age of superannuation, and the enquiry which is being held against the petitioner.

Petitioner: In Person.

S. M. SIKRI, ADVOCATE-GENERAL and M. S. PUNNU, DEPUTY ADVOCATE-GENERAL, for the Respondent.

ORDER

MEHAR SINGH, J.—This is a petition, though it does not say so, apparently under Article 226 of the Constitution by Dr. Partap Singh, petitioner, seeking writ, direction or order to quash the order of suspension made against him and also the order of revocation of his leave preparatory to retirement and the enquiry that is going to be held against him. The facts and the circumstances are these. Mehar Singh, J.

The petitioner joined Punjab Civil Medical Service in April, 1940. From June, 1941, to the end of 1945, he served in the War in a temporary rank in the Indian Medical Service. His rank in the Army was Leiutenant Colonel. In 1947 the

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

Punjab and North-West Frontier Province Civil Service Commission invited applications for selection of candidates in Class I of the Punjab Civil Medical Service. He made an application to be appointed to that service and on having been selected joined it on August 21, 1947. The partition of the country took place in the meanwhile on August 15, 1947. In the History of Services of Gazetted Officers, 6th Edition, at page 577, appears the history of the petitioner. This is the note in regard to his joining the new service on August 21, 1947,—

> "Treated "New Entrant" and allowed the benefits of War Service for the fixation of pay, seniority. He will forfeit all his previous service in the Civil Department as also the privileges and rights accruing from it including the benefits of War Service, if any, already allowed to him in his previous appointment in P.C.M.S., Class II (Gazetted)."

The petitioner thus for the first time joined this new service with effect from August 21, 1947, forfeiting all previous service with privileges and rights in the Punjab Civil Medical Service, Class II. After having been posted to other stations, from April 6, 1956, he came to be posted as Civil Surgeon at Jullundur. He avers that the Chief Minister came to bear malice towards him, the details in support of which will be referred to later at the proper place and on October 29, 1960, started an enquiry against him and he was further informed by the Director of Health Services' letter of December 6, 1960, that he had been transferred from Jullundur to Amritsar. Then he says that in view of the attitude of the Chief Minister he applied for leave preparatory to retirement, which was sanctioned by the Government with effect from December 18, 1960, and this was notified in the Punjab Gazette of January 27, 1961. In the Blitz of January 14, 1961, appeared an article under the caption "Punjab's Latest Scandal.....The Sewing Machine of Kairon Family". A copy of the article is Annexure E. In that article appeared

certain allegations against the Chief Minister and some members of his family, most of which allegations find repetition in the petition of the petitioner. On January 17, 1961, the petitioner received a letter, dated January 13, 1961, Annexure F, from the Jullundur District Inspector Vigilance enquiring from the petitioner whether he would come to Jullundur or would be available at some other address where his viewpoint in regard to the examination of a patient by him at private level, while posted at Jullundur, could be obtained. In February, 1961, the petitioner received letter of the Director of Health Services conveying to him remarks in the annual confidential file relating to the period April 1, 1959 to March 31, 1960. The remarks were—

> "Professionally he is reported to be somewhat above average, yet there have been persistent complaints about his avarice and lack of integrity."

The petitioner says that he gave reply to this letter by his letter, copy Annexure G, of June 29, 1961, in which nearly all the allegations in the petition and most of those that appeared in the Blitz find place. On February 13, 1961, the Vigilance Inspector interrogated the petitioner in regard to the one case already referred to above and seven other cases, which cases had been examined by the petitioner in private wards of the Jullundur Civil Hospital. In the Blitz issue of March 18, 1961, was published a letter, copy Annexure H, from the wife of the petitioner. In this letter though she said that the name of her husband was unjustifiably associated with the Chief Minister and his family, she proceeded to confirm practically all what had been previously published in the issue of the Blitz of January 13, 1961. The petitioner further avers that on March 20, 1961, certain tape-recorded talks between him and the Chief Minister and the Chief Minister's wife were played before a Press Conference and subsequently an attempt was made to raise the matter in the local Legislative Assembly. He then says that in

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

April, 1961, his wife sent a pamphlet with the title "Acts of Corruption by Shri Partap Singh Kairon and his family" to Members of Parliament and numerous other leading personalities in the country. On May 12, 1961, the petitioner wrote to the Director of Health Services that the Chief Minister was weighted against him and *mala fide* enquiries were being conducted against him.

On June 3, 1961, the Deputy Secretary in the Health Department addressed the letter, copy Annxure J, to the Director of Health Services in regard to the petitioner. The letter says—

> "I am directed to say that the investigations made by the Vigilance Department into certain complaints have revealed that while working as Civil Surgeon, Jullundur, Dr. Partap Singh had extracted illegal gratifications from a number of patients or their relatives by coercing them and had charged fees which were either not admissible to him or were in excess of the scale laid down in the Punjab Medical Manual. It has also come to light that he did not attend the patients until he had received illegal gratification. The evidence brought on record being sufficiently strong to warrant serious action against him, Government have decided that a departmental enquiry should be instituted against him under rule 7 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952.
>
> The Governor of the Punjab is, therefore, pleased to order that Dr. Partap Singh, ex-Civil Surgeon, Jullundur, should be placed under suspension with immediate effect. Since he is due to attain the age of superannuation on the 16th June. 1961, the Governor of Punjab is further pleased to order that Dr. Partap Singh shall be retained in service beyond this date till the completion of the inquiry referred to in para 1 above. This order

is being passed under rule 3.26(d) of the Punjab Civil Services Rules, Volume I, Part I.

During the period of suspension Dr. Partap Singh will be entitled to such subsistence allowance as may be admissible to him under rule 7.2 *ibid* as amended from time to time."

A copy of this letter on the same day, with a covering letter of which the copy is Annexure I, was forwarded by the Director of Health Services to the address of the petitioner at Kanpur. The petitioner apparently had left his address at Kanpur while going on leave preparatory to retirement. The petitioner has produced at the hearing an envelope in which these letters were posted to him. The postal seals show that the letters were despatched on June 5, the envelope reached Kanpur on June 7, and on being redirected, it reached Delhi on June 16. But the petitioner says that he did not receive it until June 19, 1961.

In the meantime the respondent sensing that the petitioner might be avoiding service of the order of the Government on him published in the Extraordinary Gazette of June 10, 1961, these notifications in regard to the petitioner—

"No. 4788-IHBI-61/24935. The Governor of Punjab is pleased to place Dr. Partap Singh, Civil Surgeon, under suspension with effect from the 3rd June, 1961, and fix his headquarters at Chandigarh during the period of suspension.

No. 4788/IHBI-61/24940 : The Governor of Punjab is pleased to revoke with effect from 3rd June, 1961, the date from which Dr. Partap Singh, Civil Surgeon, has been placed under suspension, the leave preparatory to retirement sanctioned to him (*vide* Punjab Government notification No. 61-CH-3HBI-61/2385, dated the 18th January, 1961, read with notification (corrigendum) No. 871-3HBI-61/7301,

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

dated the 22nd February, 1961), and in pursuance of the provisions of Clause (d) of rule 3.26 of the Punjab Civil Services Rules, Volume I, Part I, is further pleased to order that he shall not be permitted to retire on his reaching the date of compulsory retirement but shall be retained in service until the inquiry into the charges against him is concluded and a final order passed thereon."

In paragraph 23 of the petition the petitioner says that "the Delhi papers of 15th June, 1961, published a news item about the petitioner, and mentioned a notification of the respondent in the Gazette Extraordinary in which specific mention of cancellation of leave was made, and the petitioner has obtained a true copy of this notification which is Annexure K." The petitioner avers that he has documentary evidence that the notification purporting to have been published on June 10, was in fact made and published on June 14, 1961. The Director of Health Services' letter, copy Annexure L, of July 3, 1961, forwarded to the petitioner statement of charges against him with a statement of allegations in regard to the charges. These are part of Annexure L.

An explanation of the petitioner to the charges or his defence to the same was called for. There are altogether seven charges with the letter Annexure L. The first charge relates to one Jaswant Kaur who was not examined in the hospital but was made to come to the residence of the petitioner where she was examined on payment of fee. There are three heads under the second charge, one relating to the death of three persons, injured in an accident, due to the negligence of the petitioner in the hospital, the second relating to excessive or extorsive charge made from one Darshan Singh and the third to having caused the death of one Santosh by carelessly handling her on the operation table. In the third charge there are about seventeen instances and the allegation in regard to each is that the petitioner, taking advantage of his position, unduly extorted money

from the persons named in the instances. The two heads under the fourth charge have reference to two instances out of the many under the third charge. The fifth charge relates to use of valuable medicines from the hospital store by him for himself and members of his family. The sixth charge concerns pilfering of some eight bed-head tickets relating to persons some of whose names appear in charge III and that with the object of the petitioner screening his conduct. The last charge relates to inhuman treatment to one Chanan Mal in forcing him to remove his wife from the private ward of the hospital when she had not been cured. This in brief is the substance of the seven charges. The statement of allegations with the charges gives detailed facts and material about each charge.

The petitioner seeks to have the order of the Government quashed, as explained, on these grounds, which are, however, stated below in somewhat different sequence than in which he has stated the same,—

"(i) That inasmuch as the petitioner entered the service of the Punjab Government in 1947, he was governed by the rules framed under section 241 of the Government of India Act, 1935.

(ii) That rule 3.26(d) of the Punjab Civil Services Rules, Volume I, Part I, which came into force in the year 1953, did not apply to the petitioner and the Punjab Government had no authority to take action against the petitioner under that rule.

(iii) That order under rule 3.26(d) can be passed in the first instance, and not by way of revising an order that had already been passed. The petitioner had already been permitted to retire at the end of leave and his retirement was automatic. This permission could not be revised or taken away under this rule.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

(iv) That rule 3.26(d) could not be availed of by the respondent upon the facts of the case.

(v) That inasmuch as no charge of misconduct had been framed against the petitioner before the order of suspension was made and before the order extending the period of his service under rule 3.26(d) was passed, the order was illegal.

(vi) That inasmuch as the order of suspension was served on the petitioner after the date of his superannuation and therefore of retirement, it was ineffective and void.

(vii) That the order of revocation of leave preparatory to retirement was not served on the petitioner at all and therefore, had no effect as against the petitioner.

(viii) That the order revoking leave was not authorised by any rule of law.

(ix) That the order allowing an officer leave preparatory to retirement could be revoked only when the officer was recalled to duty (*vide* rule 8.42 of the Punjab Civil Service Leave Rules) but not for the purpose of suspending him for enquiry upon a charge.

(x) That there being no rule which authorises the State Government to suspend an officer except by way of punishment under rule 14.10 of the Classification of Services, Conduct, Discipline and Punishment and Appeal Rules, the order of suspension was passed in contravention of the rules of justice as no opportunity was given to the petitioner to show cause against it.

(xi) That no order of suspension can be made against an officer who has been granted leave preparatory to retirement and is in enjoyment of the same.

(xii) That the said orders are *mala fide* exercise of the power, if any, vested in the respondent, on account of the personal ill will which the respondent Chief Minister bears against the petitioner.

(xiii) That the aforesaid orders are an abuse of power and are intended to feed the grudge of the Chief Minister against the petitioner."

The respondent to the petition is the State of Punjab in the Ministry of Health. In the return with the affidavit of the Secretary to Government in the particular Department so far as statements of fact in regard to petitioner's service career are concerned the same are mostly admitted, but otherwise there is a denial to the allegations made by the petitioner and also to the instances given by him to support his plea that on account of those instances the Chief Minister has been weighted against him. In regard to the specific grounds taken by the petitioner, and which grounds have been reproduced above, the return says that in so far as grounds (i) and (ii) are concerned, though the other facts stated in the same are admitted, but not that the amendments to the rules issued after the date of his entry into service are not applicable to him for that, it is stated, is not tenable inasmuch as any amendments made to the rules subsequent to the entry of any Government servant automatically apply to him. Reply to ground (iii) is that the contention in it has no force and that the Government was fully competent to pass an order under rule 3.26(d) and the petitioner's leave could be cancelled at any time. As to ground (iv) it is stated that the provisions of rule 3.26(d) are binding on the petitioner. Reply to grounds (vi) and (vii) is that the petitioner gave incorrect particulars to avoid service and the order regarding his suspension was published in the Punjab Government Gazette (Extraordinary), 1961, and efforts to serve the petitioner with the orders were made but the petitioner evaded the receipt thereof. So far as ground (x) is concerned the position taken is that

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

the order of suspension was lawfully passed in accordance with the rules on the subject and it was not at all necessary to give any show-cause notice to the petitioner before ordering his suspension. Reply to ground (xii) is that the orders against the petitioner were passed *bona fide* in the exercise of lawful powers vested in the Government and that the contention of the petitioner that the orders were passed on account of personal ill will of the Chief Minister against the petitioner is wrong and has been denied. In regard to the remaining grounds (v), (viii), (ix), (xi) and (xiii) the return says that the order passed in regard to the petitioner was perfectly in order and legal and it is further stated that any hositility of the Chief Minister in the matter is incorrect and is denied. In addition to the return by the respondent there are some affidavits filed on the side of the respondent of persons whose names appear mostly in the petition or who have been concerned or are said to have been concerned with facts referred to in the petition. Reference to those affidavits will be made at proper places.

The petitioner has personally argued his case and the respondent has been represented by the Advocate-General. There were the Civil Services Rules (Punjab), 1941 Edition, and there are the Punjab Civil Services Rules, made in 1953, present edition 1959, which will hereinafter be referred to as the 1941 Rules and 1959 Rules, respectively.

The first contention of the petitioner has been that he was in the Punjab Civil Medical Service before the partition in 1947 and at the time of the partition he opted to serve on this side of the Punjab. He, therefore, claims protection of the Indian (Provisional Constitution) Order, 1947, to safeguard his rights under the 1941 Rules. In this respect he has referred to *Hiranmoy Bhattacherjee and another* v. *State of Assam* (1). Reference has earlier been made to the history of petitioner's service in which it is clearly stated that he was treated as new entrant on August 21, 1947,

(1) A.I.R. 1954 Assam 224.

with forfeiture of previous service and privileges and rights accruing from it. So there is no substance in this claim of the petitioner for obviously he took up service and joined it after the date of the partition.

The second argument by the petitioner is that when he was recruited 1941 Rules, made under section 241 of the Government of India Act, 1935, applied to him, which is true, but he further says that those rules are still applicable to him, as, according to him 1959 rules do not and cannot apply to him. There is rule 1.6 (d) in the 1941 Rules and rule 1.6 in the 1959 Rules, Volume I which provides—

> "Nohting in these Rules shall operate to deprive any person of any right or privilege to which he is entitled by or under any law or by the terms of his agreement."

The petitioner contends that the rights acquired by him under the 1941 Rules cannot be taken away by the 1959 Rules for even rule 1.6 of the latter Rules preserves him those rights. The right claimed is what the petitioner describes as his absolute right to retire upon attaining the age of 55 years. Action has been taken and orders made against the petitioner pursuant to rule 3.26 (d) in Volume I, of the 1959 Rules. This clause does not exist in Rule 3.26 of 1941 Rules. The position of the petitioner is that no action could be taken in regard to or against him under clause (d) of Rule 3.26 of the 1959 Rules. Clause (a) of Rule 3.26, Volume I, in either set of rules provides that except as otherwise provided in other clauses of this very rule the date of compulsory retirement of a Government servant, other than a ministerial servant in the 1941 Rules and other than a Class IV Government Servant in the 1959 Rules, is the date on which he attains the age of 55 years. There is a provision that in exceptional circumstances on public grounds he may be retained after the age of compulsory retirement. Rule 5.27, Volume II, of 1941 Rules makes provision that

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

"a superannuation pension is granted to a Government servant in superior service entitled or compelled, by rule, to retire at a particular age. See rule 5.28 *infra*, and rule 3.26 of Volume I of these Rules," and rule 5.28 of this Volume provides that "a Government servant in superior service who has attained the age of 55 years may, at his option, retire on a superannuation pension." There has been reference by the petitioner to Rules 5.30 and 31, Volume II, of either set of Rules but these Rules only provide that as the superannuation age is approaching and before the expiry of the period of extension each Government servant's case should be taken up and that is for purposes of pension. It is on these Rules of 1941 that the petitioner relies to say that on attaining the age of 55 years he had an absolute right to retire from service and he could not be retained in service after his age of superannuation.

In 1959 Rules, Volume I, clause (d) of Rule 3.26 reads—

> "A Government servant under suspension on a charge of misconduct shall not be required or permitted to retire on his reaching the age of compulsory retirement but should be retained in service until the enquiry into the charge is concluded and a final order is passed thereon."

This clause was not in this rule in the 1941 Rules. If 1941 Rules alone apply to the petitioner and not the 1959 Rules made under Article 309 of the Constitution, it is apparent that action against the petitioner could not possibly be taken under clause (d) of Rule 3.26, Volume I, of 1959 Rules.

The petitioner urges that Article 309 of the Constitution is prospective and not retrospective in the sense that it applies to Government servants who were recruited previous to the Constitution but have continued in service after the Constitution. In other words, what he says is that the provisions of Article 309 do not apply to a Government servant appointed before the Constitution

though continuing in service after it. In support of this he points out that this Article relates to persons appointed to public services and posts in connection with the affairs of any State and he was appointed in connection with the affairs of Punjab Province in accordance with section 241 of the Government of India Act, 1935. This of course is meaningless because there are no provinces after the Constitution and as he has continued in service his appointment has been continued in connection with the affairs of the State, otherwise he would have ceased to be in service immediately as the provinces came to an end. It is clear from Article 313 that until other provision is made, all laws in force immediately before the Constitution and applicable to any public service or any post continue but only with regard to any public service or any post which continues to exist after the commencement of the Constitution. So that any service that has continued after the Constitution has continued under the provisions of the Constitution and in the case of a State in connection with the affairs of that state. The argument is obviously without substance. Then he says that the word 'appointed' in this Article means appointed after the Constitution and not before it. In this respect he refers to Article 312 in which the same word has been used and in the context in that Article he points out that it can only possibly mean person appointed after the Constitution when Parliament provides for the creation of an All-India Service. That is so, but the meaning of this word in this Article cannot be any other as the creation of such service comes about after the Constitution. The petitioner further refers to Articles 310 and 311 in which the word used is 'holds' and section 241(2) of the Government of India Act, 1935, in which the word used is 'serving', and contends that if the intention was to bring in those who were appointed before the Constitution within the scope of Article 309, the word used would have been 'holds' or 'serving' as used in those provisions. That any of these two words has not been used in Article 309 and the word 'appointed' has been used does not lead to the conclusion that the meaning of the word 'appointed' in Article

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

309 is as given to it by the petitioner. Acceptance of this argument would mean addition of words 'after the Constitution' after the word 'appointed' in this Article, and there is no justification for any such addition. When asked whether the result of this approach was not that 1941 Rules in so far as he was concerned were immutable and could not be changed by any authority, he has said that of course the same can be changed by the Legislature and not by the Executive Authority. This is not correct because under Article 313 the old rules continue in force applying to any public service which continues to exist after the Constitution until other provision is made. Other provision can be made according to the proviso to Article 309 by the Governor of a State regarding the recruitment and conditions of service of persons appointed to public services and posts until provision in that behalf is made by and under an Act of an appropriate Legislature under this Article. Again Article 372(1) of the Constitution provides that all laws in force immediately before the Constitution shall continue to be in force until altered or repealed or amended by a competent Legislature or other competent authority. The words 'other competent authority' in respect of such power having regard to proviso to Article 309 is the Governor of the State. So not Legislature alone but until the Legislature acts in this behalf, the Governor has the power of making 'other provision' within the scope of Article 313 and of alteration or repeal or amendment under Article 372(1). This argument by the petitioner is, therefore, not sound that the 1941 Rules can only be changed by the Legislature. It is evident that the same can be changed and abrogated by the Governor until the Legislature makes an enactment in this behalf. If the meaning given to the word 'appointed' in Article 309 is as contended by the peitioner, even the Legislature cannot change the 1941 Rules. This is not correct.

Another argument of the petitioner is that in section 276 of the Government of India Act, 1935, while continuing the old Rules under that Act it was specifically provided "that the same shall be

deemed to be rules made under the appropriate provisions of this Act", and such words are not to be found in Article 313, which is somewhat similar provision. He, therefore, urges that while under section 276 of the Government of India Act, 1935, the old rules were deemed to have been made under the provisions of that Act, and, therefore, could be altered and amended, and as the old rules are not deemed to have been made under the Constitution because of the omission as referred to in Article 313, so 1941 Rules cannot be amended. In this respect he relies upon *D. S. Grewal* v. *The State of Punjab* (2), that the object of the words as referred to in section 276 of the Government of India Act, 1935, is to enable the competent authority to add to, alter, vary and amend the Rules and says that the omission of those words implies absence of such power. From this he infers that as there is no power to amend the old rules so any rules that may be made under Article 309 must be prospective in the sense that they only apply to persons recruited and appointed after the Constitution and not to those, who were recruited or appointed before the Constitution. In the first place, amendment of the old rules can be made under Article 372(1) and secondly, in view of the provisions in paragraph 26 of the Adaptation of Laws Order, 1950, which paragraph provides—

> "Where any rule, order or other instrument was in force under any provision of the Government of India Act, 1935, or under any Act amending or supplementing that Act, immediately before the appointed day, and such provision is re-enacted with or without modifications in the Constitution, the said rule, order or instrument shall, so far as applicable, remain in force with the necessary modifications as from the appointed day as if it were a rule, order or instrument of the appropriate kind duly made by the appropriate authority under the

(2) A.I.R. 1959 S.C. 512.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

said provision of the Constitution, and may be varied or revoked accordingly,

power of amendment is given on the basis that the same have been duly made by the appropriate authority under the provisions of the Constitution. When this provision is taken into consideration Grewal's case rather speaks against the contention of the petitioner. Thus there is power of amendment of the rules and that power can be exercised by the Governor until the Legislature makes an enactment on the subject. The 1959 Rules, though largely following the pattern of the 1941 Rules, are a new set of rules made under Article 309. Article 313 has continued the old rules only 'until other provision is made', and now that other provision has been made by the competent authority by making 1959 Rules. Power to completely abrogate the old rules is also given to the competent authority under Article 372(1). It has been held by their Lordships in *Thaivalappil Kunjuvaru Vareed* v. *The State of Travancore-Cochin* (3), that the continuance of laws contemplated by Article 372(1) is subject to the other provisions of the Constitution; and the continuance is only until altered or repealed or amended by a competent Legislature. It has already been pointed out that the same is the power under this provision with 'other competent authority'. So that 1941 Rules could only continue 'until other provision is made' according to Article 313 and the same is the effect under Article 372(1).

So the Governor has the power both to amend and abrogate old rules and to make new rules under Article 309 subject to any legislative enactment by the Legislature. The Governor has made the new Rules of 1959 and the old Rules of 1941 have been completely abrogated.

When the petitioner joined service in addition to the 1941 Rules he came to be governed by the

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(3) A.I.R. 1956 S.C. 142,

Punjab Civil Medical Service, Class I (Recruitment and Conditions of Service) Rules, 1940. Rule 17 of these rules provides—

> "In all matters not expressly provided in these rules, the members of the service shall be governed by such rules as may have been or may hereafter be framed by Government and by the provisions of the Government of India Act, 1935."

So all this argument on the side of the petitioner is apparently meaningless because under this rule he entered service accepting that rules in his case could be altered and when altered he would be governed by the altered or new rules. This is an express condition of his service and he cannot escape the effect of it. It is further provided in Rule 1.8, Volume I, in both sets of rules that the power of interpreting, changing and relaxing the rules is vested in the Finance Department. So the rules are made subject to this power. A similar argument that rules subsequently introduced after the appointment of a Government servant were no part of his contract of service with the Government was rejected by P. B. Mukharji, J., in *Anil Nath De* v. *Collector of Central Excise,* (4) in which the learned Judge observed—"I am unable to agree with this contention. The service in this case means that the Government servant accepts as part of his conditions of service these rules as they from time to time are made and modified." This finds support from *Smith* v. *Galloway* (5), *Page* v. *Liverpool Victoria Friendly Society* (6), and on appeal 712 and *University of Ceylon* v. *Fernando* (7). Thus the petitioner is bound by the 1959 Rules and as those rules have been made under Article 309 and as 1941 Rules were to continue only 'until other provision is made' within the meaning of Article 313 and until abrogated within the scope of Article 372(1), so the 1941 Rules have ceased to exist and have been abrogated.

In continuation of this aspect of his argument the petitioner has further contended that the

(4) A.I.R. 1958 Cal. 407.
(5) 1898) 1 Q. B. 71.
(6) (1927) 43 T.L.R. 375.
(7) (1960) 1 All. E.R. 631 at page 639,

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

Governor has no power to amend or abrogate 1941 Rules to his disadvantage for, he says, service rules like the 1941 Rules are law having been made pursuant to statutory power or power given under the Constitution as has been held in *Banarsi Dass* v. *State of Uttar Pradesh* (8), *Kamta Charan Srivastava* v. *Postmaster-General, Bihar* (9), *Baishnab Charan Das* v. *State of Orissa* (10) and *State of Uttar Pradesh* v. *Babu Ram Upadhya* (11), and a vested right unless taken away by express enactment or necessary implication is not taken away by mere implication. In this last respect the petitioner refers to *Baldev Singh* v. *The Government of Patiala and East Punjab States' Union* (12), and *wallwork* v. *Fielding* (13). The vested right upon which the petitioner is laying emphasis is his, what he considers, unquestioned right to retire at the age of 55 years according to 1941 Rules. No doubt service rules or regulations made pursuant to statutory power or power given in the Constitution, so long as the same do not conflict with the provisions of the Constitution, are law, but in so far as such rules as have been continued under Article 313 are concerned the same have been continued subject to the provisions of that Article and Article 372(1). Once other provision is made in this behalf the old rules and in this case 1941 Rules, just cease to exist by the operation of Articles 313 and 372(1). It needs no emphasising that the existence of such law is conditional on other provision having been made under Article 313 and abrogation or amendment under Article 372(1). So that once the 1941 Rules have been abrogated and have thus ceased to exist there is no question of the petitioner having gained any vested right in the age of superannuation as he claims. The petitioner has referred to *Keshavan Madhava Menon* v. *State of Bombay* (14) and *Anup Singh* v. *The State* (15), but neither of these two cases is

(8) A.I.R. 1954 All. 813,
(9) A.I.R. 1955 Patna 381,
(10) A.I.R. 1957 Orrisa 70.
(11) A.I.R. 1961 S.C. 751.
(12) A.I.R. 1954 Pepsu 98.
(13) (1922) 2 K.B. 66,
(14) A.I.R. 1951 S.C, 128,
(15) A,I.R. 1953 Pepsu 24.

D. Sir
v.
The State of Punjab
Mehar Singh, J.

helpful to him for in the first case the only question was whether proceedings launched under section 18(1) of the Press (Emergency Powers) Act, 1931 could or could not continue after the Constitution and in the second the learned Judges found a certain service rule inconsistent with a guarantee given under Article 16 of the Pepsu Covenant. The effect of repeal is given in section 6 of the General Clauses Act, 1897, and unless that provision, or an analogous provision, can be said to apply to the abrogated 1941 Rules, this argument on behalf of the petitioner is utterly without basis. Consequently to support this position the petitioner has referred to paragraph 27 of the Adaptation of Laws Order, 1950. The paragraph reads—

> "27. Nothing in this order shall affect the previous operation of, or anything duly done or suffered under, any existing law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law, or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law."

This paragraph pertains to 'existing law' which expression has been defined in paragraph 2(1)(e) of this Order to mean "an existing Central law, existing Provincial Law or existing State Law". The 1941 Rules were made under section 241 of the Government of India Act, 1935, by the Punjab Provincial Government. An existing Provincial Law, an existing State law, or an Act of Parliament of the United Kingdom or any Order-in-Council, rule or other instrument made under such an Act have been excluded from the definition of 'existing Central law'. The definition of 'existing State law' relates to law that was in force in an Indian State and this has no bearing in the present case. The expression 'existing Provincial law' means—"(i) Any Provincial Act or Ordinance or Regulation made by the Governor of a Province under the Government of India Act, 1935, or (ii) Any rule, by-law, regulation, order, notification or other instrument made under any Provincial Act,

The State of Punjab

Tehar Singh, J.

Ordinance or Regulation,—"The first part of this definition does not apply to 1941 Rules because the same are neither Provincial Act nor any Ordinance nor Regulation made by the Governor of a Province under the Government of India Act, 1935. The second part of this definition does not apply to those rules because the same are not made under any Provincial Act, Ordinance or Regulation. So this paragraph 27 does not apply to the present case but the paragraph which applies is paragraph 26 which has already been reproduced above. The 1941 Rules made under section 241 of the Government of India Act, 1935 were subject to alteration as held by the Privy Council in *Venkatta Rao* v. *Secretary of State* (16) and service rules made under the Constitution are similarly subject to change at any time. So no vested right in the age of superannuation was created in the petitioner by 1941 Rules. It has already been shown that the petitioner took service subject to the express condition that the rules relating to his conditions of service were liable to change and alteration. So the petitioner acquired no vested right of which he could take advantage. In *Madho Singh,* v. *Emperor* (17), the learned Judges have pointed out, with reference to the Defence of India Rules, that such rules do not come within the scope of section 6 of the General Clauses Act, 1897, and the provisions of that section do not extend to the same. Similar is the position in regard to 1941 Rules in this case. This argument of the petitioner cannot be accepted as well. Rule 1.6, Volume I, of both sets of rules has already been reproduced. One of the contentions of the petitioner is that service rules in regard to the conditions of service of a Government servant are justicable as held in *Lachhman Prasad, Ram Prasad* v. *Superintendent, Government Harness and Saddlery Factory, Kanpur* (18), *Malleshappa Hanamappa Bellary* v. *State of Mysore* (19), and *Gurdip Singh* v. *Union of India* (20), and that rule

(16) A.I.R. 1937 P.C. 31,
(17) A.I.R. 1944 Patna 217.
(18) A.I.R. 1958 All. 345.
(19) A.I.R. 1961 Mysore 88.
(20) A.I.R. 1962 Punj. 8.

1.6 expressly provides that nothing in 1959 Rules shall operate to deprive him of any right or privilege to which he is entitled by or under any law. He says that he is entitled to superannuation at 55 years under the 1941 Rules and that right is protected by this rule. Firstly, as held in *Gurdip Singh* v. *Union of India* (20), rules are only justicable so long as they remain in force, secondly, he can only have benefit of existing law applicable to him and not abrogated law as is the case with the 1941 Rules, and lastly, it has already been found above that 1941 Rules have been abrogated and the petitioner by the conditions of his service entered service on the express understanding that he is to be bound by the changed and altered rules. So this rule 1.6 does not advance his case.

The outcome of this is that 1959 Rules apply to the petitioner and rule 3.26(d) of Volume I applies to him.

The third main argument of the petitioner has been that even if that rule applies to him, it could only have been applied in the first instance and not after he had gone on leave preparatory to retirement. What he seems to be saying is that the rule could have been applied to him before he went on leave preparatory to retirement but once he proceeded on leave, the rule cannot operate against him. The rule has already been reproduced and there is nothing in it that gives the least support to this argument. On the contrary the rule clearly says that a Government servant in the position of the petitioner shall not be 'permitted to retire on his reaching the date of his compulsory retirement', and this obviously means that this rule can be applied at any time before the date of compulsory retirement. So that this argument is untenable. In this connection the petitioner says that there is distinction between the age of superannuation and that of compulsory retirement, basing this on observation of their Lordship of the Supreme Court at page 895 in *State of Bombay* v. *Saubaghchand M. Doshi* (21), but this is of no

(21) A.I.R. 1957 S.C. 892.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

avail to him because both in 1941 and 1959 Rules at places the expressions 'compulsory retirement' and 'superannuation' are used as synonyms, and as an instance reference may be made to rule 3.26(a), in both sets of rules, where the attainment of the age of 55 years is described as the date of compulsory retirement. To other reasons advanced by the petitioner for the non-application of rule 3.26(d) to him are (a) that no charge-sheet was given to him with the order of suspension as required by this rule, and (b) that this rule only deals with Government servants required to retire as in rule 3.26(c)(i), Volume I, and rule 5.32(b), Volume II, of 1959 Rules, and permitted to retire as in rule 5.32(a), Volume II, of 1959 Rules. In regard to the first of these two arguments rule 3.26(d) refers to "a Government servant under suspension on a charge of misconduct shall not be required or permitted to retire .....", and it nowhere says that the charge of misconduct has to be communicated to the Government servant with the suspension order. All that it means is that at the time the suspension is made there is to exist 'a charge of misconduct' against the Government servant, and if this condition is fulfilled, the requirements of the rule are satisfied. We called upon the learned Advocate-General to satisfy us that before the order of suspension of the petitioner there were charges of misconduct against the petitioner with the respondent which went to form the basis of the order of suspension. The learned Advocate-General produced the administrative file and therein we found that on June 2, 1961, before the order of suspension was made, there was a complete charge-sheet embodying the seven charges which was subsequently given to the petitioner for explanation and which is going to be the basis of the enquiry. No doubt the words 'the charge' with the words 'the enquiry into the charge' refer to the words 'a charge' appearing earlier in this rule of which the probable effect is that the enquiry that is to be held under this rule after suspension of the Government servant will have to be enquiry into such charge or charges as existed when the suspension was made and which were the basis of the order

of suspension. However, in the present case we find that the very charge-sheet that is on the record of this case existed on the administrative file on June 2, 1961. As the rule does not require communication of such charges before the order of suspension is made so the terms of the rule in the present case in this respect have been fully complied with. In this case it is not necessary to go into the scope of the words 'required to retire', but what needs consideration in connection with the second aspect of the argument of the petitioner is the words 'permitted to retire'. Rule 5.32(a), Volume II, 1959 Rules, deals with retiring pension to a Government servant permitted to retire after completing qualifying superior service for 25 years. The petitioner contends that the words 'permitted to retire' are used only with the limited meanings as are given to these words in this rule, but there is nothing to justify that these words have been used in rule 3.26(d) with the same restricted meanings, which restricted meanings are not inherent in these words but so far as rule 5.32(a), Volume II, is concerned these words attained the limited meaning from the context of the rule in which they have been used. There is no such limitation in rule 3.26(d). The ordinary meaning of the word 'permitted' has to be taken and that apparently means that a Government servant against whom there is a charge of misconduct shall not be allowed to retire on the date of reaching the normal age of compulsory retirement or superannuation. The petitioner has not succeeded in showing that in terms rule 3.26 (d), Volume I, of 1959 Rules has not been complied with.

The petitioner further urges that the order suspending him from June 3, 1961, and revoking his leave preparatory to retirement from that date cannot have effect so far as he is concerned because by the time he was served with the orders and came to know of the same he had retired. If this is in fact so, the position taken by the petitioner is of course unassailable. It has already been stated that the letter of the Secretary to the Director of Health Services in regard to the orders

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

made against the petitioner on June 3, was forwarded by the Director of Health Services to the petitioner on June 5. The cover of the letter produced by the petitioner shows that it reached Kanpur on June 7. Kanpur was the address left with his office when he proceeded on leave preparatory to retirement. The petitioner was not there. The letter was redirected to Delhi and that probably must be because the petitioner had moved from Kanpur to Delhi. The cover further showed that the letter reached Delhi on June 16. In spite of this the petitioner says that he did not receive it until June 19, 1961. In the meantime, as also already pointed out, a notification publishing the orders in regard to the petitioner was issued in the Gazette Extraordinary of June 10, 1961. The petitioner has stated in his petition that there was material with him that in fact no such publication took place on that date and that the orders were made as also published in the Gazette on June 14, 1961, but at the hearing he has not been able to say a word in support of this allegation in the petition. In the return the respondent has explained that the petitioner was evading service and, therefore, as the time was short, the orders were published in the Gazette Extraordinary of June 10, 1961, so as to enable the petitioner to know of the same. In paragraph 23 of the petition the petitioner says that news about a notification by the respondent in the Gazette Extraordinary cancelling his leave preparatory to retirement appeared in Delhi papers of June 15, 1961. He obviously, so it appears from this statement, knew through the press of the order made against him in this respect. When asked at the hearing about this statement he has come forward to give an explanation on the spur of the moment that it was not he who read the news in the Delhi papers on that day, but was subsequently informed of the appearance of the news on that day. If this was so, the petitioner who has taken every care to give details in the petition would not have missed this. In the History of Services of Gazetted Officers, 6th Edition, at page 577, in the history of the petitioner his date of birth is given as June 16, 1906. Rule 2.5, Volume I, of 1959 Rules

provides that "when a Government servant is required to retire, revert or cease to be on leave on attaining a specified age, the day on which he attains that age is reckoned as a non-working day, and the Government servant must retire, revert, or cease to be on leave (as the case may be) with effect from and including that day". In the same volume rule 2.15 says that "day means a calendar day, beginning and ending at midnight;..." The petitioner contends that having regard to these rules and the date of his birth he retired on the midnight of June 14 and 15, 1961, as his retirement takes effect from June 15, 1961.

He then refers to the letter, copy Annexure J, and points out that it is stated in this that the petitioner was due to attain the age of superannuation on June 16, 1961 and so order about his retention in service beyond that date till completion of the enquiry was made. In the return on behalf of the respondent also in paragraph 34 it is stated that the petitioner was due to retire on the forenoon of June 16, 1961. The petitioner thus takes the position that although he retired on and with effect from June 15, the order of his retention in service under rule 3.26(d) was made operative from beyond June 16, and consequently after he had actually retired. However, in the notification what is stated is that the petitioner was not to be permitted to retire on his reaching the date of compulsory retirement but was going to be retained in service until enquiry into the charges against him was concluded and final order passed thereon. So in the letter of which the copy is Annexure J and in the return on behalf of the respondent though mistaken view has been taken about the date of the retirement of the petitioner and if the matter stood there, this was to the advantage of the petitioner but the notification as it appears in the Gazette is only to the effect that the petitioner was to be retained in service on his reaching the date of compulsory retirement till the result of the enquiry. It is the notification that would govern the case and not any mistaken notion as represented in the return or in a letter by the Secretary to the Government

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

to the Director of Health Services. So the orders in regard to the petitioner under rule 3.26(d) were made not after his retirement but before his retirement and operative also not after the date of his retirement but on his reaching that date. According to the petitioner he received the copy of the orders on June 19, 1961, but in the ordinary course he should have received the same on June 7, 1961, at the address which he left behind when he went on leave preparatory to retirement. Then he admits in his petition that he had knowledge of the same on June 15, 1961, the day he was retiring. In any case notification in the Gazette Extraordinary is a public notice to him and that notification was published on June 10, 1961, some days before the date of his compulsory retirement. One other grievance of the petitioner is that while in other cases such orders are conveyed or served to the person concerned in the normal way but in his case resort has been had to publication in the Gazette which he considers is somewhat discriminatory treatment and not indicative of action in good faith. In the return it has been stated that the petitioner was evading service and it is further clear from the cover produced by the petitioner that he was not at the address that he had left behind. Such orders are normally published in Government Gazette and in the circumstances of the case there is nothing extraordinary in this having been done. So there is no substance in these approaches by the petitioner.

In the fourth place, the petitioner contends that order of his suspension is *ultra vires* or beyond the powers for the rules provide no power in the Government to suspend a Government servant in contemplation of or pending an enquiry. He first refers to rules 7.5 and 7.6, Volume I, 1959 Rules, to point out that those rules refer to suspension when a Government servant is being proceeded against on a criminal charge or the like or is under arrest for a debt. He then refers to rule 4(v) of the Punjab Civil Services (Punishment and Appeal) Rules, 1952, appearing as Appendix 24 of Volume I of the 1959 Rules, and points out that in this rule suspension is a penalty. He says that

there is no other rule in the 1959 Rules under which there is power of suspension in contemplation of or pending enquiry. He is not being proceeded against on a criminal charge against him nor was he under arrest for a debt. In regard to suspension as penalty he says that it could not be inflicted without calling an explanation from him for otherwise the action would be contrary to rules of natural justice. The learned Advocate-General has taken the position that the Government has (i) inherent or implied power to suspend a Government servant on a charge of misconduct—(ii) power under section 16 of the General Clauses Act, 1897, (Section 14 of the Punjab General Clauses Act, 1898) to suspend a Government servant appointed by it, and (iii) power to suspend under rule 4(v) of the Punjab Civil Services (Punishment and Appeal) Rules, 1952, in which case rules do not require that before such order is made explanation of the Government servant be obtained because in regard to penalties (iii), (vi) and (vii) of this rule such is the requirement under Article 311 and in the case of penalties (i), (ii) and (iv) such requirement is provided in rule 8 of these very rules but the rules omit for any such opportunity in regard to penalty (v) which is the penalty of suspension. That there is inherent power in the Government to suspend a Government servant on a charge of misconduct has been held in *Gurudeva Narayan Srivastava* v. *State of Bihar* (22), *Abid Mohammad Khan* v. *The State* (23), and *Nrisingha Murari Chakravarty* v. *District Magistrate and Collector, Hooghly* (24). The petitioner refers to *The Management Hotel Imperial, New Delhi* v. *Hotel Workers' Union* (25) and points out that there is no implied power of suspension, but that was a case concerning an industrial dispute and not concerning a Government servant. The second ground urged by the learned Advocate-General is simply unimpeachable because it is supported by a decision

(22) A.I.R. 1955 Patna 131.
(23) A.I.R. 1958 M. P. 44.
(24) (1961) 65 Cal. W.N. 129.
(25) A.I.R. 1959 S.C. 1342.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

of their Lordships in *Pradyat Kumar Bose* v. *The Hon'ble the Chief Justice of Calcutta High Court* (26), in which their Lordships observed at page 291—

> "This results from Section 16, General Clauses Act which by virtue of Article 367(1) of the Constitution applies to the construction of the word 'appointment' in Article 229(1). Section 16(1), General Clauses Act clearly provides that the power of 'appointment' includes the power 'to suspend or dismiss'."

Section 14 of the Punjab General Clauses Act, 1898, is in the same terms as section 16 of the General Clauses Act, 1897. The authority that has the power to appoint has, therefore, the power to suspend in view of this provision. There is no answer to this on the side of the petitioner. There is force in the third ground taken by the learned Advocate-General because in regard to six of the seven penalties referred to in rule 4 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952, there is provision for giving an opportunity to a Government servant to make representation about the infliction of those penalties as has already been pointed out but there is no such provision in regard to the one penalty that is suspension. But this would appear not to apply to this case because if in the present case suspension was a penalty, it would come to an end with the respondent reaching the age of superannuation. However, on the first two grounds this argument on behalf of the petitioner is discarded.

The petitioner also urges that the order suspending him is a quasi-judicial order and says that he finds support for this from *Ramchandra Maheshwari* v. *The State of Bhopal* (27), and *Barnard* v. *National Dock Labour Board* (28), but these two cases do not support him. In the first

(26) A.I.R. 1956 S.C. 285,
(27) A.I.R. 1954 Bhopal 25.
(28) (1953) 2 Q.B. 18.

case the head-note appears to be wrong and the learned Judge has not held that order of suspension is a quasi-judicial order and in the second case what the Court of Appeal held was that disciplinary function which is quasi-judicial function, could not be delegated and the person to whom delegation of such function was made could not suspend the workman. This case does not say that order of suspension was a quasi-judicial order. Of course quasi-judicial disciplinary function cannot be delegated and the case decides nothing more. It is now settled by their Lordships in *Pradyat Kumar Bose* v. *The Hon'ble the Chief Justice of Calcutta High Court* (26), that power to appoint and dismiss an officer is the exercise not of a judicial power but of administrative power and following upon this it has been held in *Haragovinda Sarma* v. *S. C. Kagti* (29), and *Bhagwant Saran Srivastava* v. *Collector and District Magistrate, Jaunpur* (30), that an order of dismissal is neither judicial nor quasi-judicial. If follows that such an order is an administrative order. Now, their Lordships have further held in *Pradyat Kumar Bose* v. *The Hon'ble the Chief Justice of Calcutta High Court* (26) that having regard to section 16 of General Clauses Act, 1897, power of appointment in Article 299(1) includes the power to suspend or dismiss, and as pointed out, same is the position having regard to section 14 of the Punjab General Clauses Act, 1898. If power to appoint or dismiss is administrative power it follows that power to suspend a Government servant is also an administrative power. That being so the petitioner was not entitled to an opportunity of explanation for the order of suspension. This finds support from the Division Bench decision of this Court in *Kapur Singh* v. *Union of India* (31) at page 71. The petitioner also refers to *Provincial Government, Central Provinces and Berar* v. *Shamshul Hussain Siraj Hussain* (32), *Kidar Nath Agarwal* v. *The State of Ajmer* (33) *and Narayan Prasad Rewany* v.

(29) A.I.R. 1960 Assam 141.
(30) A.I.R. 1961 All. 284.
(31) I.L.R. 1956 Punjab 236=A.I.R. 1956 Punj. 58.
(32) A.I.R. 1949 Nag. 118.
(33) A.I.R. 1954 Ajmer 22.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

State of Orissa (34), and contends that suspension amounts to reduction in rank, but this is obviously not correct for if that was so Article 311 would be attracted to the case of suspension and it is not. It has been held by their Lordships in *Mohammad Ghouse* v. *The State of Andhra* (35), that an order of suspension is neither order of dismissal nor of removal and Article 311 of the Constitution is not attracted to such an order. So this approach is not helpful to the petitioner either. The petitioner further takes the position that there was no power to suspend him without first framing charges against him. This aspect of the matter has already been touched upon in reference to similar argument connected with the application of rule 3.26(d) to this case. The petitioner refers to *Mehar Chand Mehta* v. *The City Board, Shahjahanpur* (36) in support of this position. But that was a case decided by the learned Judge under section 69-A of the U.P. Municipalities Act, 1916, and the learned Judge held that "a suspension under section 69-A(1) is permissible only pending completion of the enquiry. There must therefore, be an enquiry started before a person can be suspended. The enquiry contemplated by section 69-A is initiated by the framing of the charges." The section actually requires in terms the framing of charges before suspension and the decision of the learned Judge proceeded on interpretation of the section in this particular local statute. This case is not helpful to the petitioner, and he has not been able to show that under the law he was to be given an opportunity for explanation or charge-sheet before order of his suspension was made.

The petitioner then contends that the letter, copy Annexure J, shows that the order of suspension was made on June 3, 1961, and it did not reach him till June 19, whereas it was published in the Gazette on June 10, 1961. He says in the nature of things the order of suspension made suspending him from June 3, could not possibly be operative

(34) A.I.R. 1957 Orissa 51.
(35) A.I.R. 1957 S.C. 246.
(36) A.I.R. 1959 All. 230.

from that date as it could not reach him on the very day. He presses that in such circumstances the obvious effect of the order was to operate retrospectively and as held in *Hemanta Kumar Bhattacharjee* v. *S. N. Mukherjee* (37), *Narayan Prasad Rewany* v. *State of Orissa* (34), and *Abid Mohammad Khan* v. *The State* (23), an order of suspension operating retrospectively cannot be a valid order, which is correct, but as has been pointed out in second of these three cases such an order is not absolutely void but is operative from the date the Government servant is actually relieved of his duties and placed under suspension. In the present case it will in any case operate from June 10, 1961, on which date the notification in the Gazette appeared and on which date the petitioner must be presumed to have had knowledge of the order. So on this account there is no flaw in the order of suspension. The petitioner says that the order of his suspension and retention in service under rule 3.26(d) has not been made on public ground and, therefore, is not a valid order. He has probably in mind not rule 3.26(d) but rule 3.26(a) because this later clause of this rule says that ordinarily the compulsory date of retirement of a Government servant is when he attains the age of 55 years and he must not be retained in service after that age, except in exceptional circumstances with the sanction of competent authority on public grounds. In the first place, the suspension of the petitioner and his retention in service is not under clause (a) but clause (d) of this rule. And secondly, the case of *Nripendra Nath Bagchi* v. *Chief Secretary, Government of West Bengal* (38) cannot help him because in that case while the rule comparable to clause (a) of rule 3.26 was there but rule comparable to clause (d) of rule 3.26 was not there. So the learned Judge had to consider whether retention in service was on public grounds. He expressly points out that there was no rule applicable to that case comparable to rule 3.26(d). So that this contention is also without substance.

(37) A.I.R. 1954 Cal. 340.
(38) A.I.R. 1961 Cal. 1.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

On the question of suspension the further argument of the petitioner is that his suspension means suspension of contract of his service so that relation of master and servant between the Government and him has gone with the result that the Government has no longer any control over him. He also says that when the service contract period ended with his reaching the date of retirement, his suspended contract of service also came to an end. The first case to which he makes reference to support this argument is *Queen-Empress* v. *Durga* (39), but this was a case of the suspension of a police constable who was charged under section 29 of Act No. 5 of 1861 (Police Act) and convicted but he was acquitted because the learned Judge was of the opinion that that section contemplates that the person to be charged with an offence under that section must have been, at the time of his having done the act in respect of which the charge is preferred, a police constable within the meaning of that statute, and the learned Judge then observed that by section 8 of that Act, read in conjunction with the form to be found in the schedule attached to that Act, it was clear that once a police officer had been suspended, it was his duty to hand over to his superior officer the certificate under which he was appointed a member of the police force; so that the effect of the statute was that a police officer who had been suspended, from the mere circumstances of that suspension ceased to be a police officer, because it is ordered by the Act that when he is suspended his certificate, hitherto in operation, shall cease to have effect, and shall be immediately surrendered to his superior officer. Suspension of a police constable under the provisions of that particular Act had the effect that the certificate upon the authority of which the police constable remained a police constable ceased to have operation and had to be surrendered, so that when the police constable had not the certificate, he was no longer a police constable. No such situation arises because of the suspension of the petitioner and on facts the case has no bearing whatsoever on the

(39) (1888) 10 All. 459.

case of the petitioner. The petitioner then refers to *The Management Hotel Imperial, New Delhi* v. *Hotel Workers' Union* (25), and the cases referred to therein, in which their Lordships have held that "the power to suspend, in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant, and that such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the so-called period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the suspension has the effect of temporarily suspending the relation of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay. These principles of the ordinary law of master and servant are well settled .....". This, however, was a case of an industrial dispute and not that of suspension of a Government servant. In this connection the petitioner has referred to *L. C. Agarwal* v. *Municipal Board, Hapur* (40) in which Mootham, C.J., observes at page 582—"Suspension is ordinarily of two kinds, namely suspension as a punishment and suspension pending enquiry. We are concerned here only with the suspension pending enquiry. That suspension may however, also be of two kinds, for a distinction must be drawn between suspending an employee from service and suspending him from performing the duties of his post or office. If there is a contract of service in the strict sense, the first kind of suspension involves the suspension of the contract, while the second involves only a suspension of the employee from the performance of his duties on

(40) A.I.R. 1961 All. 580,

D. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

the basis that the contract is subsisting." The petitioner seems to think that his is a case of suspension from service and that is why he made reference to these cases. This is apparently not the correct position and cannot be the correct position in view of rule 3.26(d), Volume I, of 1959 Rules, and the orders made in regard to the petitioner under that rule and published in the Gazette of June 10, 1961. The rule specifically says that a Government servant under suspension on a charge of misconduct is not to be permitted to retire on reaching the date of compulsory retirement but should be retained in service until enquiry into the charges is completed and a final order is passed thereon. Thus the rule in so many words retains such a Government servant in service and this is exactly the case in regard to the petitioner. In the words of the rule exactly the same statement appears in the orders about the petitioner that appeared in the Extraordinary Gazette of June 10, 1961. It is, therefore, not true that the petitioner has been suspended from service, the correct position being that he is being retained in service in accordance with the rules already referred to. His case is, therefore, that of suspension from office. No doubt on the particular date he was not actually occupying the office because he was on leave preparatory to retirement but then there was his right to that office and the order suspending him clearly refers to him as Civil Surgeon. So in the case of the petitioner the suspension is not from service and these two cases do not further the argument by the petitioner. In the case of the suspension of a Government servant in accordance with the rules, as is the case of the petitioner, it does not amount to suspension of the contract and severance of the relationship of master and servant between the Government and him. In *Hemanta Kumar Bhattacharjee* v. *Union of India* (41), the learned Judge observes that "if a person is merely suspended, he still continues to be in service, but is in a state as it were, of suspended animation." And

(41) A.I.R. 1958 Cal. 239.

in *Divisional Superintendent, Northern Railway, Delhi Division* v. *Mukand Lal* (42), it has been held that suspension is something less than termination of service and, therefore, a connection, however tenuous, continues between the master and servant. In *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (43), Cotton, L.J., observes— "When a man is suspended from the office he holds it is merely a direction, that so long as he holds the office and until he is legally dismissed he must not do anything in the discharge of the duties of the office,....." This explains clearly what exactly is the legal position in regard to a person who is suspended holding an office. The petitioner has been suspended from the office of Civil Surgeon and the suspension is a direction that he holds the office until necessary steps are taken in regard to him in accordance with rule 3.26(d), Volume I, of 1959 Rules. Consequently the petitioner's is not a case of suspension from service and his connection with the Government as employer has not ceased and further he holds the office under the direction that he is not to attend to his duty until order is made in accordance with rule 3.26(d). In this connection the petitioner has referred to rules 7.2(2), Volume I, and rule 4.21(c), Volume II, of 1959 Rules. Rule 7.2, Volume I, relates to allowance during period of suspension and the new sub-rule (2), which has been substituted from November 4, 1959, provides that "no payment under sub-rule (1) shall be made unless the Government servant furnishes a certificate that he is not engaged in any other employment, business, profession or vocation." The advantage that the petitioner seeks to derive from this rule is that during the period of suspension the Government servant can have himself engaged in other employment, business, profession or vocation and when that happens he is not entitled to suspension allowance. Since because of suspension the Government servant is stopped from attending to his duty, so the Government has tolerated his engagement somewhere else during the period of

(42) A.I.R. 1957 Punj. 130.

(43) (1888) 39 Ch. D. 339 at page 362.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

suspension in certain circumstances but that does not mean that because of this rule his relationship during suspension is completely severed with the Government service and before the date of compulsory retirement he is not amenable to disciplinary action by the Government where it is called for. Rule 4.21(c), Volume II, as it existed before November 25, 1959, provided that "an interruption in the service of a Government servant entails forfeiture of his past service, except in the following cases:— (c) Suspension immediately followed by reinstatement, which need not be to the same post", and this clause (c) to this rule has been substituted by this—"Suspension where it is immediately followed by reinstatement whether to the same or a different office, or where the officer dies or is permitted to retire or is retired while under suspension." The petitioner contends that the meaning of this rule is that ordinarily suspension means interruption in the service of a Government servant entailing forfeiture of his past service, but there are exceptions to that and one of them is that made in clause (c). He, therefore, considers that because of his suspension there has been interruption in his service; there is no such thing, for by the very words of the rule under which he has been suspended he is to continue in service. The question of forfeiture or otherwise of service arises in connection with the period of suspension after the suspension has come to an end when a proper order is made against the Government servant either dismissing him or awarding him lesser penalty or reinstating him. The effect of such orders is dealt within rules 4.17 to 4.22. None of these rules, and not even particularly rule 4.21(c), leads to the conclusion that the order of suspension in the case of the petitioner amounts to what practically the petitioner contends is the termination of his service.

The fifth aspect of the position urged by the petitioner is that he having gone on leave preparatory to retirement, on the expiry of that leave his retirement was to be automatic, and there was no power to cancel that leave and recall him for

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

the purpose of suspension. He says that leave preparatory to retirement is entirely on a different footing than any other kind of leave. To some extent this is bound to be so having regard to this particular kind of leave, but if the contention of the petitioner is to prevail it means that he retired practically on the date on which he proceeded on such leave. This, however, would appear to be not a consistent position for that date is not the date of superannuation or compulsory retirement of the petitioner and the later date is at the expiry of that leave subject to extension of service according to rule 3.26(d), Volume I, of 1955 Rules. The petitioner refers to certain rules to support this position taken by him. Rule 8.43(2), Volume I, provides that a Government servant on leave preparatory to retirement shall be precluded from withdrawing his request for permission to retire and from returning to duty, save with the consent of the authority empowered to appoint him. Rule 8.21 of this Volume deals with leave beyond the date of compulsory retirement and it makes provision for such leave when leave preparatory to retirement applied for is refused. Note 10 of this rule says—"Compulsory recall from leave preparatory to retirement should be deemed to be a constructive refusal of the balance of leave unenjoyed for the purpose of this rule." This would mean that under this rule the Government servant so recalled would be entitled to such remaining leave under this rule subject to its conditions. Rule 8.41-A provides for a contingency when a Government servant having proceeded on leave preparatory to retirement, before the date of compulsory retirement, is required for employment during such leave and it says that that is to be with his consent. There was no such rule at first in the 1941 Rules but it was added by the correction slip of April 1, 1949. At that time it made distinction between a Government servant required for further service in his parent Department or office, when power was taken to cancel the leave and recall him to duty, and when he was to be re-employed in a post other than in his parent Department or office, then his return was made optional. This rule in the 1959 Rules makes his

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

recall in both cases with his agreement. When he comes back the leave cancelled is treated as leave refused under rule 8.21. Rule 8.42 makes provision for recall from leave and it deals with two positions, (i) when recall is optional and (ii) when it is compulsory, the difference being in regard to certain privileges admissible in the second case but not in the first case. Sub-rule (b) of this rule provides for travelling allowance to such a Government servant when he is recalled. These are rules from Volume I of 1959 Rules. In Volume II of the same rules, rules 7.26(a) and 7.27(a) make provision with regard to a Government servant obtaining employment after retirement and in certain cases permission is necessary but not when such permission has already been obtained during leave preparatory to retirement. So these rules show that during leave preparatory to retirement a Government sevant can be permitted to obtain re-employment somewhere else. Rule 9.14(2) makes provision that orders for payment of pension should be made not later than the date of retirement but are not to be issued more than a month in advance of such date. Rule 13.29 enables a subscriber to the Provident Fund to withdraw the amount during leave preparatory to retirement. These rules show that there is difference between the incidents of leave preparatory to retirement as compared to any other kind of leave but in the nature of things that was bound to be. So while leave preparatory to retirement has to be on different basis in some respects, it does not cease to be leave. And it is leave which is subject to the general provisions relating to leave such as the provision of rule 8.15, Volume I, of 1959 Rules, that leave cannot be claimed as of right and when the exigencies of public service so require, discretion to refuse or revoke leave of any description is reserved to the authority empowered to grant it. All leave including leave preparatory to retirement, is apparently subject to this rule. Although rule 8.41-A deals with recall of a Government servant who has proceeded on leave preparatory to retirement, to duty with his consent, but the power of recall in regard to all leave is to be found in rule 8.42 and leave pre-

paratory to retirement is not excepted from this rule. The petitioner contends that as in regard to a Government servant proceeding on leave preparatory to retirement there is special provision in rule 8.41-A for recall so the general provision in rule 8.42 cannot be applied to him and in his case there cannot be recall without his agreement. But it is clear from note 10 to rule 8.21 that there can be compulsory recall from leave preparatory to retirement in which case the balance of the unenjoyed leave is treated as leave refused under that rule. The petitioner refers to *Ram Adhar Singh* v. *State of Bihar* (44), *Brajinandan Prasad* v. *State of Bihar* (45), *and Atindra Nath Mukherjee* v. *G. F. Gillot* (46), and points out that notes to rules as decisions of the Government interpreting the rules have no force in law in so far as such interpretations are not warranted by the construction of the rules. He, therefore, contends that note 10 to rule 8.21 should not be taken into consideration. But the position of the notes in 1959 Rules is somewhat different than notes subsequently added to the rules as instances of decisions taken by the executive authorities under the rules. In paragraph 6 of the Preface to the First Edition of 1959 Rules it is stated that "the opportunity has also been taken to include important orders relating to interpretation of rule, in the form of "Notes" or "illustrations" below the relevant rule." So that in the case of 1959 Rules notes have appeared as part of the rules as illustrations as much as illustrations appearing sometimes as part of a statutory provision. The petitioner then refers to rule 2.75, Volume III, of 1959 Rules and says that while under suspension he is not entitled to travelling allowance, but because he is not entitled to such an allowance on account of suspension, he cannot say that cancellation of leave preparatory to retirement cannot be made because no travelling allowance is available to him. He then says that he had no joining time but the order in regard to him provides Chandigarh to be his headquarters and obviously he could only be expected to return there within reasonable time.

(44) A.I.R. 1954 Pat. 187.
(45) A.I.R. 1955 Pat. 353.
(46) 59 C.W.N. 835.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

He refers to rule 8.41-A, Volume I, of 1959 Rules, to point out that recall to duty is for the purpose of reappointment but not for the purpose of suspension. He forgets that suspension in his case has been made under the power of suspension in the Government as already referred to and pursuant to rule 3.26(d), Volume I, 1959 Rules. If this argument was accepted that power and that rule would be rendered nugatory. The learned Advocate-General has referred to rules 8.19, 8.20(a) and 8.23, Volume I, of 1959 Rules, to further show that in the nature of things leave preparatory to retirement has to be treated on somewhat different basis than ordinary leave but that of course does not lead to the inference urged by the petitioner that such leave cannot be cancelled or there cannot be recall from such leave. The petitioner also says that if there is power to recall after the Government servant has gone on leave preparatory to retirement, the power is for recall to duty and not to suspend. The learned Advocate-General refers to rules 8.45 and 8.46, Volume I, of 1959 Rules, to point out that a Government servant on return from leave has to report his return to Government but is not entitled, as a matter of course, to resume the post which he held before going on leave and the position is that he must report return to duty and await orders. That of course means await orders for posting and the like. In the case of recall of the petitioner under rule 8.46 he returns to duty and awaits orders when simultaneously with the order of recall he is suspended awaiting any enquiry. So that in view of these rules there is nothing exceptional in the order cancelling the leave preparatory to retirement of the petitioner and recalling him for the purposes of enquiry while suspending him at the same time when he was recalled. The petitioner seems to think, relying on *Jai Ram* v. *Union of India* (47); that the time after his retirement cannot be treated as part of service, but this case does not decide so as what is decided in the case is that where the service of a Government servant has ceased because of the retirement, he

(47) A. I. R. 1954 S.C. 584.

cannot be held to continue in his service, though at the time he is on post retirement leave granted to him under special circumstances. The leave was granted to the Government servant after the date of compulsory retirement because leave preparatory to retirement had been refused and a rule comparable to rule 8.21, Volume I, of 1959 Rules, was applied to the case. In the case of the petitioner, as already pointed out, he has continued in service under express rule 3.26(d). There is thus no force in any of these contentions by the petitioner. The learned Advocate-General refers to rule 3.13(e), Part I, of 1959 Rules, which says that a Government servant holding substantively a permanent post retains a lien on that post while under suspension. The petitioner retained his lien on his permanent post from which he proceeded on leave preparatory to retirement to the date of his retirement and on suspension that lien of his continues. His retirement has been deferred under a specific rule and his lien on the post continues until a final decision is taken in regard to him. Even in the case of a Government servant, who has been refused leave preparatory to retirement but is granted similar leave after reaching the date of compulsory retirement and according to rule 8.21, he retains lien on the post till he actually retires. If the petitioner has retained lien on the post from which he proceeded on leave, which as shown is the correct position, he cannot say that he cannot be suspended from that post and his leave preparatory to retirement cannot be cancelled so as to recall him to duty while simultaneously suspending him.

Sixthly, the petitioner contends that by the orders passed in regard to him as in the notification, copy Annexure K, there has been violation of Articles 13, 14, 19 and 23 of the Constitution. Articles 13 and 19 are brought into argument in this manner. The petitioner says that on attaining the age of 55 years he was to become a free man on retirement with restoration of full freedom to exercise all his fundamental rights under Article 19 and by retention of him in service beyond that date under rule 3.26(d) all such rights are curtailed so that the rule is bad as conflicting with

The State Singh v. The State of Punjab

Mehar Singh, J.

fundamental rights and thus void under Article 13. It appears that the argument proceeds on an assumption that the petitioner had an absolute right to retirement on a particular date, but it has been shown that he has no such right and the Government has the power to continue him in service in the circumstances as given in rule 3.26(d), which rule has been applied to him. It has further been shown that the petitioner entered service with the express condition of his service that he was to be governed by the rules of service made from time to time and he thereby voluntarily accepted all limitations upon himself and he cannot get away from those limitations while remaining in service. It was one of the conditions of his service to have the limitations and as he accepted it so he cannot now be heard to say that those limitations have come to an end contrary to the conditions of service accepted by him. No doubt he entered service before the date of the enforcement of the Constitution, but he continued after that date and thus accepted the same conditions of service even thereafter. So this is without substance. In regard to Article 14 the contention is that almost all the charges against the petitioner are charges of a criminal nature which can be enquired into and tried by an ordinary criminal Court. The respondent instead of prosecuting the petitioner has arbitrarily chosen to proceed against him departmentally. This has operated to his prejudice inasmuch as he has not the liberty to do what he likes after the date of retirement or seek any employment as he was intending to do. Besides he has not the same opportunity of defence in a departmental enquiry as he would have before a criminal Court. He says that this arbitrary decision of the respondent is discriminatory for the respondent has the option in two similar cases to proceed by way of departmental enquiry in one case and criminal prosecution in another case. In this respect the petitioner refers to a number of cases. The first case is *Nripendra Nath Bagchi* v. *Chief Secretary, Government of West Bengal* (38), but in this case the learned Judge did not form the opinion in the manner in which the argument has been urged by the petitioner. Of the

other cases, in *State of Bihar* v. *Shila-bala Devi* (48), the question was of discriminatory legislation which enabled same or similar class of cases to be assigned to different authorities, in *Niemla Textile Finishing Mills Limited* v. *The 2nd Punjab Tribunal* (49), the question for consideration was the power of the Government to refer an industrial dispute to one of the three tribunals referred to in the Industrial Disputes Act, 1947, and what was held was that the power was valid because each dispute arose in different circumstances and the Government had to consider which course to pursue in each case, in *Kapur Singh* v. *Union of India* (50), the question was whether the enquiry was to be under the Public Service (Enquiries) Act of 1850 or under rule 55 of the Service Rules, in *Jyoti Pershad* v. *Union Territory of Delhi* (51), the question was of unguided discretion whereunder discriminatory treatment could be accorded to persons or things similarly situate, and in *State of Orissa* v. *Dhirendranath* (52), the question was of two sets of rules applying to persons similarly situate and there was no guidance with the result that there was arbitrary and unguided power to select for the purposes of enquiry either one or the other set of rules. Not one of these cases on facts is relevant to the present case. The learned Advocate-General contends that it is not true that the Government has the alternative of either proceeding against a Government servant by way of departmental enquiry or prosecuting him on a criminal charge. He says that the Government has the right to hold a departmental enquiry against a Government servant as well as to prosecute him. This position taken by him finds support from *Venkataraman* v. *Union of India* (53), and *Delhi Cloth and General Mills, Limited* v. *Kushal Bhan* (54). In fact in the first of these two cases the Government proceeded by way of a departmental enquiry to start with and after the

(48) A.I.R. 1952 S.C. 329,
(49) A.I.R. 1957 S.C. 329,
(50) A.I.R. 1960 S.C. 493,
(51) A.I.R. 1961 S.C. 1603,
(52) A.I.R. 1961 S.C. 1715.
(53) A.I.R. 1954 S.C. 375,
(54) A.I.R. 1960 S.C. 806.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

conclusion of that enquiry proceeded to prosecute the Government servant. The learned Advocate-General has also referred to *Karuppa Udayar* v. *The State of Madras* (55), *Abid Mohammed Khan* v. *The State*, and *Venkataraman* v. *The State* (56), that it is the option of the Government to proceed with either the departmental enquiry first or with a criminal prosecution. It is, therefore, clear that because the Government takes one or the other course it does not mean that Article 14 of the Constitution is attracted and there is a case of discrimination based on arbitrary exercise of power. The Government has the power to proceed in both ways and there is nothing arbitrary in its first proceeding with the enquiry and then if sufficient evidence is available for prosecution to prosecute the Government servant. So there is no violation of Article 14. In this connection the petitioner has further said that the respondent has acted *mala fide* in not proceeding against him first before a Court but it is not quite clear how that inference is available when the Government can proceed against the petitioner both by an enquiry and by prosecution and it first starts with an enquiry.

The only other Article that remains for consideration is Article 23. The contention of the petitioner is that his retention in service after the date of compulsory retirement or superannuation is 'begar' or forced labour which is prohibited by that Article. He refers to two cases to support his contention. The first case is *Nripendra Nath Bagchi* v. *Chief Secretary, Government of West Bengal* (38), in which an argument based on this Article is discussed by the learned Judge at page 9. The learned Judge says that "this question has to be judged with reference to the service conditions of the petitioner contained in West Bengal Service Rules." The learned Judge then considers the rules and does not find that there was contravention of Article 23. In that case no rule comparable to rule 3.26(d) existed in the West Bengal

(55) A.I.R. 1956 Mad. 460.
(56) A.I.R. 1958 S.C. 107.

Service Rules. In the present case the 1959 Rules applicable to the petitioner specifically provide in rule 3.26(d), Volume I, for retention in service in the circumstances mentioned in the rule. When service is continued according to and under the service rules even after the date of compulsory retirement or superannuation, that is not *"begar"* or forced labour but service according to the conditions of service as provided in the rules applying to the Government servant. The second case is *Suraj Narain* v. *State of Madhya Pradesh* (57). But in that case a teacher was asked to work and then was not paid and it was in these peculiar circumstances that the learned Judges said that this kind of thing is prohibited in Article 23, but these are not the facts in so far as the petitioner is concerned. The petitioner has been retained in service and placed under suspension and the order says that he is entitled to subsistence allowance according to the rules. The further argument of the petitioner is that subsistence allowance admissible to him under rule 7.2, Volume I, of 1959 Rules, is not an allowance which can be enforced as a right but the rule starts with "A Government servant under suspension shall be entitled to the following payments.....". Apart from the imperative language of the rule, an order has already been made that the petitioner will draw subsistence allowance according to this rule. So there is no case of *"begar"* or forced labour so far as the petitioner is concerned.

The last argument by the petitioner is that the action taken against him and the orders made against him have been taken and made *mala fide* on account of the malevolence of the Chief Minister, Sardar Partap Singh Kairon, against him. The petitioner narrates the incidents from which he says that his inference is available. Before, however, detailed reference is made to those incidents there is the question of admissibility in evidence of tape-recorded statements. The petitioner has filed original tapes on which the recordings are to be found and also transcriptions

(57) A.I.R. 1960 M.P. 303,

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

of the conversations. Now, it has been held by Bhandari C.J., in *Rup Chand* v. *Mahabir Parshad* (58), that a statement recorded on a tape-recorder is admissible in evidence but without subscribing to this opinion, it may be stated straightaway that this mechanical process of obtaining statements is fraught with possibilities of such tampering as to render a statement or conversation something quite contrary to what might have been stated by the speaker originally or in the first instance. After a statement or a conversation has been recorded, the tape can be replayed and in most tape-recorders by reverse playing the recording is cleared or wiped off. This means that words or sentences can be tampered with. After tampering the tampered tape can be replayed on another tape-recorder and the second tape will produce recorded statement or conversation which will appear to be natural in continuity but which has in fact been so tampered with that it has lost its value as a correct representation of statement or conversation. If reliance is placed upon no more than record of a statement or conversation on the tape, it cannot be said to be basically reliable evidence. The only way to ensure the veracity of such statement or conversation is to examine the person whose statement or conversation has been tape-recorded, to put the recording to him, and then to let him say what he has to say about the same. Without this to proceed to rely upon such piece of evidence is to tread on extremely unreliable ground. This is a writ petition and it not being a suit there has been no question of examining witnesses and consequently those whose statements or conversations are said to have been recorded on the tapes filed in Court have not been examined with regard to the same. If confronted with such statements or conversations they might well have turned round and proved the falsity of whole or part of such statements or conversations. So without going into the question of admissibility of such evidence, the recordings, without examination of the persons whose statements or conversations have been recorded, cannot

(58) 1956 P.L.R. 441.

be taken as reliable piece of evidence which can be depended upon.

[His Lordship then discussed the allegations on the matter of *mala fides* and continued:]

Reference has already been made in some detail to an article that appeared in the Blitz of January 14, 1961, a subsequent confirmation in the same paper of the allegations appearing earlier in a letter by the wife of the petitioner, and the allegation of the petitioner that his wife circulated a pamphlet making allegations against the Chief Minister. Anything that the petitioner or any member of his family did to create circumstances themselves from which an inference is sought to be drawn that thereby the Chief Minister has become hostile to the petitioner cannot be available to the petitioner because if that was so any Government servant anticipating an enquiry against himself will start of making allegations in this manner, founded or unfounded, just to escape an enquiry.

One complaint of the petitioner at the hearing has been that in the return on behalf of the respondent though there have been denials in regard to the allegations made by him but those denials are contrary to the accepted principles relating to pleadings because the same are general denials and not specific denials. He has probably in mind Order 8, rule 5 of the Code of Civil Procedure which provides that "every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability." Now the Secretary in Ministry of Health could only enter a denial in a general manner but in regard to each allegation the denial is specific to this extent that version of each incident referred to by the petitioner is denied. Of course every sentence is not stated as having been denied. But I should consider that in the circumstances if an incident is denied that is good denial. However,

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

there are affidavits of persons referred to in the petition of the petitioner or connected with the incidents referred to in the petition in which specific denials have been made and versions counter to the versions given by the petitioner are stated. This grievance is of no substance.

The petitioner has then taken the position that there are circumstances from which only one inference is available that the action taken and orders made against him are *mala fide*. He refers to these circumstances—

(a) that there are series of coincidences which are indicative of the action having been taken against him *mala fide* and the coincidences are—On October 24, 1960, decision of the Supreme Court in the Punjab State appeal in the Karnal Murder case, and on October 29, 1960, first enquiry ordered against him, and on November 22, 1960, reversion of his brother-in-law,

(b) that according to rule 8.19, Volume I, of 1959, Rules, an officer who is to be dismissed, removed or compulsorily retired is not to be granted leave and as the petitioner was granted leave so the charges against him were found to be without substance but afterwards were resuscitated,

(c) that adverse remarks were conveyed to him ten months after the period to which the remarks related,

(d) that at the time the Vigilance Inspector had talk with him, he did not put to him all the cases that are now mentioned in the charges, and

(e) that there were departmental instructions according to which charges should have been given to the petitioner within fifteen days from the decision to start the formal proceedings whereas the same were not despatched to him till about a month after that.

The coincidences referred to above have already been considered and their effect taken cumulatively is no different. Most of the incidents seem to fit in with the dates suitable to the petitioner and, therefore, the same have been used, as stated in the return, to create prejudice in this case. No doubt according to rule 8.19 a Government servant is not to be granted leave if he is to be dismissed, removed, or compulsorily retired but this rule anticipates a decision like this before the question of granting leave arises. In the case of the petitioner the matter remained pending and before his leave was sanctioned no decision had yet been taken by the Government. So this delay on the part of the respondent is not an indication of bad faith. The adverse remarks were conveyed after ten months and the petitioner made a representation in reply to the same but this does not by itself speak of any such intention as imputed to the respondent by the petitioner. Any omissions by the Vigilance Inspector have no bearing so far as the merits of this case are concerned. It is true that the departmental instructions were not strictly complied with. For such failure the inference is not necessarily that the action taken against the petitioner is *mala fide*.

The petitioner further points out that charges framed against him are also framed *mala fide* because:

(i) the same are not borne out from the statement of allegations,

(ii) the dates of commission of acts of omission or commission have not been given and the petitioner cannot defend himself, and

(iii) in the statement of allegations it is not stated who was the person who made the allegations.

In this petition merits of the charges cannot be considered and not one of these grounds is indicative that the framing of the charges is *mala fide*.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

The petitioner then says that the notification in the Gazette Extraordinary of June 10, 1961, is *mala fide*, because—

(i) order that the petitioner was to have his headquarters at Chandigarh was not conveyed to him,

(ii) while others have been or are informed by letter of such orders, in his case information has been conveyed by notification, and

(iii) the Director of Health Services in his letter to him showed him on leave though the order of suspension was made earlier and the leave had been cancelled.

Not one of these considerations makes the notification as having been made *mala fide*.

The petitioner has contended on the basis of the arguments above that because of the action against him having been taken *mala fide* the result will be that the enquiry against him will have to be dropped and the respondent will be left to proceed against him in an ordinary criminal Court. He has not been able to refer to any direct case which supports the position like this. He, however, refers to five cases from which he seems to think that he draws support for this contention. The first case is *The King* v. *Sussex Justices, ex parte McCarthy* (59), a well known case, in which a clerk of the justices having prejudice against a party to litigation retired with the justices when they considered the case though he took no part in the deliberations. The conviction was quashed because it was found that the clerk was prejudiced against the person convicted. Reference is made to oft-quoted observation of Lord Hewart, C.J.,—"But while that is so a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly be seen to be done", and the petitioner says that in his case all indications are that

(59) (1924) 1 K.B. 256.

justice is not being done. In the second case, *C. S. Sharma* v. *State of Uttar Pradesh* (60), the learned Judge held that bias is relevant not only in the punishing authority but also in the enquiring officer even where the enquiring officer is a different person from the punishing authority. The first of these two cases has no bearing on facts and in so far as the general statement of law is concerned, while it is unexceptional but the stage has not arisen. There is so far no enquiry. When it will be held then a question like this can be considered. Similar is the position in regard to what has been held in the second of the above two cases. This approach is premature. Of the Supreme Court cases, *British India Corporation Limited* v. *The Industrial Tribunal, Punjab* (61), is a case in which a writ petition had been dismissed *in limine* in this Court but their Lordships directed its hearing because allegations of *mala fide* had been made in the petition. It is not clear how this is helpful to the petitioner. The second case is reported in the same volume at page 397, *Pannalal Binjraj and others v. Union of India and others* (62), but that case related to transfer of income-tax cases under a special provision and what was held in that case was that in case of abuse of power, the order passed *mala fide* can be struck down. It has to be established that an order has been passed *mala fide* before the ratio in this case can apply. The last case is *Lahore Electric Supply Company, Limited* v. *Province of Punjab* (63). But in that case what the learned Judges found was that the order was not made *bona fide* but for some collateral object. The learned Advocate-General points out that in all cases of this type it is only when the Court finds that an order has been made for a collateral object that it comes to the conclusion that it has been made *mala fide* and strikes it down. In the present case there is nothing to show that the orders made against the petitioner have been made for any collateral purpose than the purpose which is stated in the orders themselves. So these cases are not of assistance to the petitioner.

(60) 1961 All. 45.
(61) 1957 S.C. 354.
(62) 1957 S.C. 397.
(63) A.I.R. 1943 Lah. 41.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

The learned Advocate-General first contends that this Court cannot go into the *mala fide* or otherwise of the orders made against the petitioner by the Governor. He says that no allegation of *mala fide* can be made against the Governor and in this respect relies upon *Australian Communist Party* v. *The Commonwealth* (64), in which following the earlier case of *Duncan* v. *Theodore* (65), the learned Judges observe—"If the opinion is to be that of the Governor-General, it cannot, in my opinion, be examined at all, for it is not open to impute *mala fides* with respect to an act of the King by himself or his representatives." In the present case, however, there is no allegation of *mala fides* aganist the Governor. The allegation of *mala fides* is against the Chief Minister. But then the learned Advocate-General refers to Article 163(3) of the Constitution and says that the question any, and if so what, advice is tendered by a Minister to the Governor, cannot be enquired into in any Court. Proceeding on this he says that the orders having been made by the Governor it cannot be found out who gave advice to the Governor and what that advice was in connection with those orders. So he contends that the allegation of *mala fides* in this case is entirely irrelevant. It appears that this is an extreme argument and there may be a case in which allegation of *mala fides* is actually established and it will then have to be decided whether this Court can or cannot interfere in such circumstances. This, however, does not obtain in the present case because it has already been pointed out that the allegations in regard to *mala fides* made by the petitioner are disputed questions of fact. The second argument is that if orders made in regard to the petitioner are otherwise legal, the fact that the same have been passed because of ill-will or malevolence of executive authority will not vitiate or render the same illegal. In this respect he refers to Jurisprudence by Salmond, 11th Edition, page 417, Article 139, in which the learned author says—"As a general rule no act otherwise lawful becomes unlawful because done with a bad motive; and conversely no act otherwise unlawful is excused or justified because of the motives of the

(64) 83 C.L.R. 1 at page 257.
(65) 23 C.L.R. 510 at page 544.

doer, however, good". This appears to be an opinion in relation to civil injuries or torts, and it is a matter of very considerable doubt whether this statement of law can be applied in the manner in which the learned Advocate-General wishes to do in this case. The last argument of the learned Advocate-General is that an order of suspension is an administrative order. It has already been so held and the cases supporting this view have also been cited. The learned Advocate-General refers to *Franklin* v. *Minister of Town and Country Planning* (66), and these observations of Lord Thankerton at pages 102 and 103—"In my opinion, no judicial, or quasi-judicial, duty was imposed on the respondent, and any reference to judicial duty, or bias, is irrelevant in the present case. * *

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I am of the opinion that no judicial duty is laid on the respondent in discharge of these statutory duties, and that the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report. * * * *

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In such a case the only ground of challenge must be either that the respondent did not in fact consider the report and the objections, of which there is here no evidence, or that his mind was so foreclosed that he gave no genuine consideration to them, which is the case made by the appellants. * * *

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I could wish that the use of the word "bias" should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his

(66) 1948 A.C. 87.

Dr. Partap Singh
v.
The State of Punjab

Mehar Singh, J.

adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute." On these observations he contends that the orders passed in regard to the petitioner being administrative, no question of bias arises in regard to them for the authority passing such orders was not a judicial or quasi-judicial authority or acting in any of those capacities. There is substance in this contention of the learned Advocate-General. At this stage it is not possible to give an opinion whether the charges in the charge-sheet served on the petitioner are with or without substance. They have still to be enquired into. If the position taken by the petitioner was accepted, even if there was substance in the charges, the orders against him will still have to be quashed, with the result that there will be no enquiry into charges and consequently into his conduct as a public servant. The petitioner has said that all the possible officers who are likely to be appointed enquiry officers are under the Chief Minister and so both the enquiry officer and the punishing authority will be weighted against him but that is an argument based on assumption. Nor until an enquiry officer has been appointed and not until it is clearly known who is the punishing authority and not untill the petitioner is able to make any such allegations when any one or more of such authorities is or are known can this question ever arise for consideration. It appears that this is premature. Apart from this, it has already been stated that the allegatoins by the petitioner are disputed and on such disputed matters of fact it is not possible to find, in the circumstances, of this case, that the petitioner has succeeded in showing that the orders in regard to him and the action taken againts him have been made and taken *mala fide*.

The consequence is that the petitioner fails on all the ground urged by him and the petition is dismissed, but in the matter of costs some controversial matters have been raised during the hearing, and so the parties are left to their own costs.

Capoor, J.

S. B. CAPOOR, J.—I agree.

B.R.T.