LETTERS PATENT APPEAL

Before Bhandari, C. J. and Mehar Singh, J.

GURDIP SINGH,—*Appellant.*

versus

THE STATE OF PUNJAB,—*Respondent.*

Letters Patent Appeal No. 79 of 1954.

1959

July, 14th,,

Constitution of India (1950)—Article 311—Government servant having no right to the post or the rank—Termination of services or reduction in rank of—Whether by way of penalty—Considerations and criteria to determine stated—Allegations of misconduct—Charge sheet given and inquiry held—Whether indicates that termination is founded on misconduct—Increment withheld and services terminated—Such termination, whether legal, if Article 311 not complied with.

Held, that in a case where a Government servant has no right to the post or the rank, and, when either his service is terminated or he is reduced in rank, the question that arises for consideration is, when is the misconduct, negligence, inefficiency or other disqualification on the part of the Government servant a *motive* operating on the mind of the Government in terminating his service or reducing him in rank, and when mis-conduct etc. is a *foundation* for the termination of his service? The only criterian for making out one from the other is that in the former case the action taken does not and in the latter case it does, in addition, visit the servant with penal consequences, such as forfeiture of his pay or allowance or the loss of his seniority in his substantive rank or stoppage or postponement of his future chances of promotion. If any one or more of the penal consequences accompany the termination of the service of the servant, then that is taken as an indication that although inform the Government has purported to exercise its right to terminate the employment or to reduce the servant to lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment or reduced him in rank as and by way of

penalty. Only one or more of the above penal consequences, in addition to termination of service is a consideration which indicates that the termination of the service is as and by way of penalty and no other consideration comes into play.

Held, that allegations or imputations of misconduct, etc. the giving of charge sheet, the subsequent enquiry about the charge sheet and the report of the Enquiry Officer, lead to no indication that the termination of service is founded upon misconduct. Where the Government has uncontrolled right of termination of service, all these steps are merely to inform the mind of the Government so as to help it in arriving at the reason or the motive for the termination of service. So long as the basis of the termination of service does not travel out of the field of motive or reason for termination, which the Government has right to do, it is not taken as penal consequence attracting Article 311 of the Constitution of India.

Held, that withholding of increment is a penalty provided under the service rules according to which the right to increment is a matter of course, but the competent authority is given power to withhold it if a Government servant's conduct has not been good or his work has not been satisfactory. The withholding of increment, even though provisionally, but connected with charges of misconduct levelled against a Government servant and coupled with the termination of his service is a clear case in which the misconduct does not only operate as motive but a foundation for the termination of his service. Such termination of service, though ostensibly according to the terms and conditions of his service, is accompanied by a penalty or punishment causing monetary loss to him and is illegal and ineffective because of non-compliance with Article 331(2) of the Constitution.

Pershotam Lal Dhingra v. *Union of India* (1), relied upon. *Union of India* v. *Jeewan Ram* (2), *and P. Balakotaiah* v. *Union of India and others* (3), referred to.

Letters Patent Appeal under Clause X of the Letters Patent of the Punjab High Court, Simla against the

(1) 1957 S.C.R. 828
(2) A.I.R. 1958 S.C. 905
(3) A.I.R. 1958 SC 232

Judgment Hon'ble Mr. Justice J. L. Kapur, dated the 18th August, 1954 passed in Civil Writ No. 70 of 1954.

H. L. SIBAL, for Appellant.

L. D. KAUSHAL, for Respondent.

JUDGMENT

MEHAR SINGH, J.—The appellant, Gurdip Singh, was appointed on September 22, 1950, officiating Agricultural Assistant, 'A' Class, and the order (Annexure R.A.) with regard to him is in these terms— Mehar Singh, J.

> "The folowing candidates are appointed officiating Agricultural Assistants, 'A' Class, in the scale of Rs. 100—10—200/10—300 till further orders, against vacant posts in the Entomological Section with effect from the date they report themselves for duty to the Entomologist, Ludhiana:—
>
> | *Sr. No.* | *Name* | *Remarks* |
> |---|---|---|
> | 2. | S. Gurdip Singh Josen. | *Vice* S. Harbans Singh Bhatti promoted to P.A.S., Class II." |

This order is signed for the Director of Agriculture. It was conveyed to the appellant by memorandum (Annexure R.B.) of September 25, 1950, and the appellant was asked to report to duty to the Entomologist, Government Agricultural College, Ludhiana, by October 15, 1950, failing which his appointment was to be considered as cancelled. He joined service on October 3, 1950, and was posted to Nagrota in Kangra District as incharge of Bee Farm.

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On March 27, 1953, at about 11-30, a.m., the Development Minister paid a surprise visit to the Nagrota Bee Farm. He found the oppellant absent from the Farm. While looking for the appellant, he came across other employees of the Bee Farm who made inconsistent statements not only about the appellant but also certain other matters concerning the Farm. Subsequently he came across the appellant and the appellant is also said to have made wrong statements to him. The Development Minister on April 6, 1953, wrote a long inspection note (Annexure R.C.) in which he pointed out all that was connected with the conduct of the appellant when he went to inspect the Bee Farm. In the end he noted—

> "All this clearly shows that S. Gurdip Singh is utterly unfit for the post he is holding and the sooner he is got rid of the better. I understand he is still a temporary hand and has not been confirmed. I think his services should be terminated at once. I believe Shri Sawhney, the former Director of Agriculture, also inspected this Farm a few months ago and was also not satisfied with the working of this Agricultural Assistant. First he should be transferred telegraphically and later his services be terminated."

Upon this the appellant was transferred from Nagrota to Ludhiana on April 14, 1953. Subsequently on May 1, 1953, he received a charge-sheet, (Annexure A-1), dated April 27, 1953, in which detailed facts are set out from the inspection note of the Development Minister and then briefly the charges against the appellant were, (1) that he made mis-statement before the Development

Minister, (2) that he was absent from duty, (3) that his control over the staff at the Farm was unsatisfactory, (4) that he had misused the Farm labour, (5) that he did not perform his duties in the Farm, (6) that he had made false statement before the Development Minister, and (7) that he wilfully allowed the Beldar to use Government property for his private use. The appellant gave reply to this charge-sheet within the time within which he was required to give an answer to it. Later the Deputy Director of Agriculture held an enquiry between August 22 and 24, 1953, when he took evidence of a number of witnesses during the enquiry. The appellant says that this Enquiry Officer exonerated him completely of the charges, but the return on behalf of the respondent, the State of Punjab, is that this is not quite correct as the Enquiry Officer did not completely exonerate the appellant but recommended that a lenient view of the case might be taken and the appellant be let off with a warning to improve. It is further stated in the return of the respondent that the report of the Enquiry Officer was not relied upon while passing orders terminating the appellant's service.

On October 29, 1953, the service of the appellant was terminated under the following order (Annexure D) of the Director of Agriculture:—

> "(1). As a result of the surprise visit of the Development Minister to the Government Bee Farm, at Nagrota, on 27th March, 1953, certain irregularities committed by S. Gurdip Singh Josen, Officiating Agricultural Inspector, 'A' Class, who was working as incharge of the Farm came to his notice. Consequently the services of S. Gurdip Singh

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Josen are terminated with immediate effect.

(2). The increment which fell due to S. Gurdip Singh Josen in the scale of Rs. 100—10—200/10—300 on 3rd October, 1953, and was provisionally withheld,—*vide* this office order, dated the 30th September, 1953; is finally withheld with permanent effiect."

The appellant then wrote to the Director of Agriculture requesting for supply of the tour note of the Development Minister, remarks of the Entomologist on the appellant's reply to the charge-sheet, the report of the Enquiry Officer, and the evidence recorded at the enquiry, and to that the reply (Annexure F), dated February 1, 1954, that he received was—

"With reference to his letter No. 3, dated the 6th January, 1954, S. Gurdip Singh is informed that he was appointed in this Department as Officiating Agricultural Inspector, 'A' Class, *till further orders* and his services were terminated on account of unsatisfactory work. Since it was finally decided not to hold any departmental enquiry, the question of supplying copies of the documents asked for does not arise.

This reply purports to have been given on behalf of the Director of Agriculture.

On April 5, 1954, the appellant filed a writ petition under Article 226 of the Constitution challenging the legality of the termination of his service on the ground of contravention of Article 311 of the Constitution.

In the return on behalf of the respondent the facts are not disputed but the position taken is that "before terminating his (appellant's) services it was (it is submitted erroneously) considered necessary by the Director of Agriculture to give him an opportunity of showing cause against the action proposed to be taken against him, under Rule 7(1) of the Punjab Civil Services (Punishment and Appeal) Rules, 1952. Accordingly, on being instructed, the Entomologist, Punjab, Ludhiana, under whom the petitioner was working, charge-sheeted the petitioner for the irregularities pointed out in the Tour Note of the Development Minister and asked him to render his explanation within a fortnight. The petitioner was also asked that in case he desired to be heard in person or he wished to produce any witness, he should clearly indicate against each allegation the names of witnesses to be produced. " With regard to the result of the enquiry the return goes on to say— "It is denied that the petitioner was completely exonerated by the Enquiry Officer. It was, however, recommended by him that a lenient view of the case might be taken and the petitioner be let off with a warning to improve. The report of the Enquiry Officer was, however, not relied upon while passing orders terminated his services." In regard to the termination of the service of the petitioner it is stated— "it is admitted that the services of the petitioner were terminated with immediate effect by an order, dated the 28th October, 1953, and that this order was forwarded to the petitioner for compliance by an endorsement, dated the 4th November, 1953. The Government was advised and it is submitted rightly that the services of the petitioner could be terminated without complying with the provisions of Article 311 of the Constitution of India. It is submitted that the provisions of Article 311 of the Constitution do not apply to

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the petitioner as he was appointed officiating temporary Agricultural Assistant (A Class) till further orders." So in short the position taken on behalf of the respondent has been that Article 311 has no application to the case of the termination of the service of the appellant.

The learned Single Judge dismissed the petition of the appellant on August 18, 1954, holding that the case of the appellant was covered by the rule laid down in *Satish Chandra Anand* v. *The Union of India* (1), in which their Lordships held that termination of service by notice under one of the clauses of service contract is not dismissal or removal from service within Article 311. The learned Single Judge was of the opinion that the basis of that case holds even in the case of temporary post terminable according to the rules and the protection of Article 311 is not attracted in such a case.

On September 21, 1954, the appellant appealed against the order of the learned Single Judge dismissing his petition. This case has been pending for some considerable time and in the interval the question whether, and if so in what circumstances, Article 311 is attracted in the case of the termination of service of a temporary or officiating Government servant or a probationer, has come for consideration by their Lordships of the Supreme Court in *Parshotam Lal Dhingra* v. *Union of India* (2). The learned Chief Justice after an exhaustive and thorough review of the whole position with regard to the protection afforded under Article 311 to a Government servant, in so far as the law with regard to a case like the present

(1) 1953 S.C.R. 655
(2) 1957 S.C.R. 828

is concerned observes thus, starting from page 861 of the report—

> "Any and every termination of service is not a dismissal, removal or reduction in rank. A termination of service brought about by the exercise of a contractual right is not *per se* dismissal or removal, as has been held by this Court in *Satish Chander Anand* v. *The Union of India* (1). Likewise the termination of service by compulsory retirement in terms of a specific rule regulating the conditions of service is not tantamount to the infliction of a punishment and does not attract Article 311(2), as has also been held by this Court in *Shyam Lal* v. *The State of Uttar Pradesh* (2). In either of the two above-mentioned cases the termination of the service did not carry with it the penal consequences of loss of pay, or allowances under rule 52 of the Fundamental Rules. It is true that the misconduct, negligence, inefficiency or other disqualification may be motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service the motive operating on the mind of the Government is, as Chagla, C. J.; has said in *Shrinivas Ganesh* v. *Union of India* (3), wholly irrelevant. In short, if the termination of service is founded on the

(1) 1953 S.C.R. 655
(2) (1955) 1 S.C.R. 26
(3) I.L.R. 58 Bom. 673

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right flowing from contract or the service rules then, *prima facie*, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with.

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But the mere fact that the servant has no title to the part or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or

the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty. The use of the expression "terminate" or "discharge" is not conclusive. In spite of the use of such innocuous expressions, the court has to apply the two tests mentioned above, namely, (1) Whether the servant had a right to the post or the rank, or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to ? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be "regarded as a reduction in rank and if the requirements of the rules and Article 311, which give protection to Government servant have not been complied with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant."

In a case like the present where a Government servant has no right to the post or the rank, the

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question, when either his service is terminated or he is reduced in rank, that arises for consideration is when is the misconduct, negligence, inefficiency or other disqualification on the part of the Government servant a motive operating on the mind of the Government in terminating his service or reducing him in rank and when misconduct, negligence, inefficiency or other disqualification is a foundation for the termination of his service ? The only criterion provided by the learned Chief Justice for marking out one from the other is that in the former case the action taken does not and in the latter case it does in addition visit the servant with penal consequences and those consequences enumerated in the judgment are— "if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion,....." If any one or more of these penal consequences accompany the termination of the service of the servant, then that is taken as an indication that although in form the Government has purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment or reduced him in rank as and by way of penalty. It is clear that only one or more of the penal consequences, as referred to above, in addition to termination of the service is a consideration which indicates that the termination of the service is as and by way of penalty, and no other consideration comes into play. In other words, mere allegations or imputations against a servant whose service can be terminated by the Government either under the contract or the service rules as of right is not a consideration which indicates the termination to be as and by way of

penalty. This is how I look at *Parshotam Lal Dhingra's case* (1), in so far as it applies to a case like the present and this is how a Division Bench of this Court in Letters Patent Appeal No. 72 of 1958, decided on October 28, 1958, has read and understood that decision. An actual example of such penal consequences accompanying the termination of service is the case of *Union of India* v. *Jeewan Ram* (2). In that case the plaintiff was a permanent booking-clerk in the service of the Railway but, according to the conditions of his service, his service was liable to termination on one month's notice on either side. Certain imputation against the integrity of the plaintiff was made and the substance of the charge was that he tried to force a certain person, wanting to purchase tickets from him, to pay bribe to him. A charge-sheet was given to the plaintiff to explain his position within the time stated which he did. After that an order was passed against him stating that he would be given one month's pay in lieu of notice or removal from service with effect from a certain date and on the reverse of the order it was stated that he will be given a subsistence grant at the rate of one-half of his pay for the period that he remained under suspension. The plaintiff having succeeded, the appeal was taken to the Supreme Court by the Union of India and the argument was that under the rules applicable to the service of the plaintiff, his service was terminable on one month's notice, which was duly given, and he having no right to the post, the reason which motivated the authorities to dispense with his service was irrelevant. Their Lordships found that not only was the plaintiff, in addition to the termination of his service, deprived of half of his pay during the period of suspension, but he was also deprived of certain other privileges. On this it was held that this was

(1) 1957 S.C.R. 828
(2) A.I.R. 1958 S.C. 905

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a case in which the misconduct imputed to the plaintiff was the foundation for the termination of his service and not merely the motive.

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In the present case the learned counsel for the appellant has contended that the termination of the service of the appellant was accompanied by penal consequences, (a) because imputations of misconduct in the shape of allegations of negligence, inefficiency and untruthfulness were made against the appellant, a charge-sheet given to him with regard to the same, an enquiry was held, and the report of the Enquiry Officer was actually made on the same, which means that not only was misconduct alleged against the appellant, but all stages to establish it as a fact were carried through, and this is clear indication that the misconduct alleged against the appellant was the foundation of the termination of his service and not merely its motive, and (b) because in addition to termination of his service a penal consequence also attended the termination because the annual increment which had become under the rules the due of the appellant was permanently withheld thus depriving him of the amount of the increment for the period between the date it became due and the date of the termination of the appellant's service. It has already been pointed out that the first is no ground that leads to the indication that the termination is founded upon misconduct, negligence, inefficiency or other disqualification. The giving of the charge-sheet to the appellant, the subsequent enquiry about the charge-sheet, and the report of the Enquiry Officer, though following the same path as in the case of a permanent servant, were intended in a case like the present, where the Government has uncontrolled right of termination of service, merely to inform the mind of the Government so as to help it in arriving at the reason or

the motive for the termination of service. Therefore, the first reason given by the learned counsel for the appellant to show that the termination of the service of the appellant in this case is accompanied by penal consequences cannot be accepted. The learned counsel has pointed out that not only reference to the alleged misconduct of the appellant has been made in the charge-sheet but that in a subsequent communication by the Government to the appellant (Annexure F) it has clearly been stated that the service of the appellant has been terminated on account of unsatisfactory work. The learned counsel says here is a clear case from the start to the end of an imputation of misconduct and that imputation being the basis of the termination of the service of the appellant. This is true but it is not enough that it should be the basis for so long as that basis does not travel out of the field of motive or reason for termination of service, which the Government has right to do so, it is not taken as a penal consequence attracting Article 311. The learned counsel for the appellant stresses that such imputations mar the future of the appellant and almost make it impossible for him to gain further employment. Such a consequence, however, unless entailed under the rules as a penal consequence, is no consequence that is a matter of consideration in this respect and this is how I understand *Parshotam Lal Dhingra's case* (1) and this is how the learned Judges in the Division Bench in Letters Patent Appeal No. 72 of 1958 have done so. The first ground urged on behalf of the appellant does not, therefore, prevail.

There is substance in the second ground. The order (Annexure D) terminating the service of the appellant shows that increment was due to him on October 3, 1953. It was provisionally withheld on September 30, 1953, and it was finally withheld,

(1) 1957 S.C.R. 828

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with permanent effect; by the same order by which the service of the appellant was terminated. Rule 4.7 in the Punjab Civil Services Rules, Volume I, Part I, says—

> "47. An increment shall ordinarily be drawn as a matter of course, unless it is withheld. An increment may be withheld from a Government servant by a competent authority if his conduct has not been good or his work has not been satisfactory. In ordering the withholding of an increment, the withholding authority shall state the period for which it is withheld. and whether the postponement shall have the effect of postponing future increments."

In the Punjab Civil Services (Punishment and Appeal) Rules, 1952, printed as appendix 24 in the Punjab Civil Services Rules. Volume I, Part II, rule No. 4 refers to penalties, which may, for good and sufficient reason, be imposed upon members of the services to whom these rules are applicable, and the second penalty is— "Withholding of increments or promotion, including stoppage at an efficiency bar, if any." It is immediately clear that the withholding of increment is a penalty provided under the service rules and according to rule 4.7 the right to increment is as a matter of course, but the competent authority is given power to withhold increment if a Government servant's conduct has not been good or his work has not been satisfactory. In other words, increment becomes due and accrues as a matter of course, but the competent authority may, for the reasons stated, withhold it. In the case of the appellant the order says that the increment which fell due on October 3, 1953, was first provisionally withheld on September 30, 1953; and later on October 29; 1953,

in the same order which terminated the service of the appellant, it was finally withheld with permanent effect. The learned counsel for the appellant contends that on the date of the order terminating the service of the appellant increment had become due and had accrued to the appellant and he was entitled to the amount of the increment to the date of the termination of his service from October 3, 1953. He has been deprived of the amount of the increment between October 3 and 29, 1953; thus causing loss to him in his pay, and the case of the appellant is exactly parallel to the case of *Union of India* v. *Jeewan Ram* (1). The reply of the learned Deputy Advocate-General is that the increment having been provisionally withheld before the date on which it fell due and finally withheld with the termination of the service of the appellant, it never became due to him or accrued to him, and there has been no loss to him in his pay because he points out that in *P. Balakotaiah* v. *Union of India and others* (2), their Lordships have observed, that "if the order would result in loss of benefits already earned and accrued, that would also be punishment." The position urged by the learned Deputy Advocate-General is that in this case the benefit of the increment has not been earned and has not accrued to the appelland for the reason that before it was due to the appellant it was provisionally withheld and then with the termination of the service of the appellant it was finally withheld with permanent effect. It is apparent that an increment is either withheld or it is not withheld. The effect of its provisional withholding in a case like this has really no meaning other than that the final order withholding it was suspended until the competent authority made up its mind finally. So the provisional withholding of the increment of the appellant has no effect

(1) A.I.R. 1958 S.C. 905
(2) A.I.R. 1958 S.C. at p. 238

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upon the rights of the appellant to the increment. Apart from this, the order provisionally withholding the increment of the appellant was immediately connected with the charges against him and arises out of the same, it was not something independent and apart from them. In the end the irregularities which led to the termination of the service of the appellant were also the ground for withholding the increment of the appellant, thus, while terminating his service, at the same time depriving him of his pay due to him because of the increment to which he became entitled from October 3, 1953, to the date of the termination of his service. So that this is a clear case in which the misconduct of the appellant has not only operated as a motive but a foundation by reason of depriving the appellant of his pay earned as increment between October 3 and 29, 1953, for the termination of his service, ostensibly according to the terms of his service. The termination of his service ostensibly according to the terms and conditions of his service has in the appellant's case been accompanied by a penalty or punishment causing a monetary loss to him. This is a case apparently within the dicta of their Lordships in *Parshotam Lal Dhingra's* (1), and *Jeewan Ram's cases* (2). The order terminating the service of the appellant is, therefore, illegal and ineffective, because of non-compliance with the provisions of Article 311(2) of the Constitution. The appeal of the appellant succeeds and it is held that the order terminating the service of the appellant is illegal and ineffective and the result is that the appellant continues in service.

In the result, the appeal of the appellant is accepted and his petition succeeds with the effect as

(1) 1957 S.C.R. 828
(2) A.I.R. 1958 S.C. 905

stated just above. In the circumstances of the case there is no order as to costs.

BHANDARI, C. J.—I agree.

K. S. K.

APPELLATE CRIMINAL

Before G. D. Khosla and Tek Chand, JJ.

THE STATE,—*Appellant.*

versus

KULDIP SINGH AND OTHERS,—*Respondents.*

Criminal Appeal No. 699 of 1958.

1959

July, 15th

Administration of Evacuee Property Act (XXXI of 1950)—Section 38—Requirements of—Code of Criminal Procedure (Act V of 1898)—Section 403—Order of acquittal passed on the ground that the sanction of the Deputy Commissioner was not on the record—Whether bars second prosecution when it is found that the sanction had in fact been accorded before the first prosecution was started.

Held, that Section 38 of the Administration of Evacuee Property Act, 1950, merely requires that the Government must give sanction before a prosecution can be started. It does not even say that the sanction must be in writing and it certainly does not say that the piece of paper upon which the sanction is recorded must be placed before the Court or placed on the record of the case to which it relates. That being so, it is the giving of the sanction which gives the power to the Court to hear the case. In this case sanction was given on 12th June, 1957. The Magistrate, therefore, had jurisdiction to hear the case. In this view of the matter the Magistrate could pass an order of acquittal or of conviction. He passed an order of acquittal and that order stands because it has not been set aside. It is wholly immaterial upon what grounds the order of acquittal was based. Section 403 of the Criminal Procedure Code does not say that the order of acquittal must be made on merits before it operates as a bar to a