CHAPTER-IV

CONSTITUTIONAL SAFE-GUARDS

In the preceding Chapter, it has been noticed that the English Common Law rule regarding the holding of office by public servants during the Pleasure of the Crown has not been adopted in India in its entirety and with all its rigorous implications. The 'doctrine of pleasure' contained in Art 310 is subject to Art 311, but not to rules or Acts made under Art. 309; where the protection of Art. 311 does not apply, the service of a government servant can be terminated at anytime without holding an enquiry which may be prescribed by the Rules or Acts made under Art. 309.

The right of the Government to dismiss its employees arising out of the relationship between a master and servant is regulated by Art. 311, which by its wordings, while recognising such a right in the Government imposes certain restrictions and prescribes a procedure by which such dismissal can be effected. These restrictions are imposed only with a view to safeguard and protect the interests of the Government servants. They are:-

A) No removal or dismissal by an authority subordinate to the appointing authority - Art. 311 (1).

B) No removal or dismissal or reduction in rank, except after an inquiry affording reasonable opportunity of hearing in respect of those charges framed against him Art. 311 (2).
Applicability of Art. 311

The applicability of Art. 311 of the Constitution to the various categories of persons employed under the State was considered by the Supreme Court in the leading cases - State of Assam Vs Kanak Chandra ¹ and P.L. Dhingra Vs Union of India ². While in the ‘Kanak Chandra’s Case’ the tests for deciding whether a post or office under the State fell within the purview of Arts. 309, 310 and 311 were determined, in ‘P.L. Dhingra’s Case’, the applicability of Art. 311 to the various categories of the civil servants and their status under the Constitution were discussed in detail.

In the early stages of the working of the Indian Constitution, a view prevailed that only permanent civil servants could enjoy the protective umbrella provided by Art. 311. But in Dhingra’s case, ³ the Supreme Court for the first time held that the provisions of Art. 311 made no distinction between a permanent and temporary civil servant. Das, J was quite emphatic in holding that to confine the scope of Art. 311 to permanent civil servants only would invite many problems and it would be difficult to say that a permanent civil servant or a servant officiating in a permanent post does not hold the “post”. It is submitted that the interpretation of Art. 311 as suggested by the court is correct and to add qualifying word to Art. 311 would compel us to read in the provisions something which is not there.

1. AIR 1967 SC 884.
2. AIR 1958 SC 36.
3. Ibid.
Before a person can claim the constitutional protection afforded by Art. 311, the following conditions need to be satisfied:

a) that he must have a right to hold a post
b) that the post held must be a civil post, and
c) that it must be either under the Union or a State Government

The next question is . when can a civil servant claim the protection afforded by the Constitution? The answer is given in Articles 311 (1) and (2). Clause (1) is attracted when the civil servant is removed or dismissed from service while Clause (2) is applicable when he is reduced in rank. The test laid down by the Supreme Court for the applicability of Art 311 of the Constitution to a particular case is whether the action proposed to be taken is by way of punishment.

Now we come to the crucial point as to what action proposed to be taken against a government servant constitutes an action 'by way of punishment'. In this regard, the Superem Court has prescribed that either of the following conditions should be present for attracting the provisions of Art. 311.

i) the civil servant has a right to the post or the rank;
ii) the action visits him with evil consequences

The motive behind the action is not relevant but if the court comes to the conclusion that the misconduct was not a mere motive but the very foundation of the order, then in such a case the provisions of Art 311 would be attracted. Hence, if either of the above said two conditions is not satisfied, the provisions of Art. 311 will not be attracted,
even though the action taken may be due to some misconduct or inefficiency

Under the service rules a right to the post exists in 3 classes of cases:

a) Those holding substantive appointments to a permanent post;
b) Those in temporary appointment for a fixed period; and
c) Those in quasi-permanent service

In these 3 cases premature termination of service, otherwise than by way of superannuation or compulsory retirement, _per-se_ and without anything more amounts to removal and therefore Art. 311 is attracted.

These principles were laid down in _Motiram's case_ 4. This case had to deal with Rule 149 (3) of the Railway Code giving power to the Railway Administration to terminate the services even of permanent servants merely on giving notice for a specified period or on payment of salary in lieu thereof at any time during the service, even long before the age of retirement. The Supreme Court held that in the case of government servants who have a right to the post e.g. permanent servants, Art. 311 would be applicable even if the removal was not by way of punishment. Gajendragadkar, J., speaking for the majority observed:

"Termination of the services of a permanent servant otherwise than on the ground of superannuation or compulsory retirement, must

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4. Motiram Vs N.E.F. Railway, AIR 1964 SC 600
per-se amount to his removal.” So, in such a case even if the order terminating the service is really not by way of punishment, still Art 311 would be attracted. Rule 149 (3) of the Railway Code contravenes Art 311 and was struck down.

In an earlier case, (P.L. Dhingra’s case AIR 1958 SC 36) it was observed: “In every case the court has to apply 2 tests: (i) whether the servant has a right to the post (or) (ii) whether he has been visited with evil consequences.” This observation is too wide and has been modified in Motiram’s case.” Gajendragadkar, J., observes: “The first test alone is applicable to the case of permanent servants, while the second test is relevant in the case of temporary servants, probationers and the like.”

Substantive appointment

The next question is how to decide whether a government servant has right to a particular post. This aspect is to be examined with reference to the nature of the post and the capacity in which it is held. Broadly speaking, all posts are either permanent or temporary and they may be held in a substantive, quasi-permanent or temporary capacity. A government servant holding a permanent post in a substantive capacity acquires a lien over that post. Such a person will hold right over the post till he attains the age of superannuation or is compulsorily retired on his attaining the specified age, under F.R. 56 (j). A person holding

5. Supra Note 4, p.47.
a permanent post in a substantive capacity cannot, in the absence of
a contract, express or implied, be turned out unless the post itself is
abolished or it is in accordance with the rules governing superannuation/
compulsory retirement or he is guilty of misconduct, negligence or
inefficiency or other disqualifications and appropriate proceedings are
taken against him under the Service Rules read with Art. 311 (2).

Temporary or Officiating Service:

Rule 2 (d) of the Central Civil Services (Temporary Service)
Rules, 1965 defines 'temporary service' as meaning the service of a
temporary government servant in a temporary post or officiating service
in a permanent post, under the Govt. of India. According to its ordinary
connotation, the word 'officiating' is generally used when a servant held
one post permanently or substantively, or is appointed to a post in a
higher rank, but not permanently or substantively, while still retaining his
lien on his substantive post i.e., officiating in that post till his confirmation.
Such officiating appointment may be made when there is a temporary
vacancy in a higher post due to the death or retirement of the incumbent
or otherwise.

In contrast, the word 'temporarily' usually denotes a person
appointed in the civil service for the first time and the appointment is
not permanent but temporary i.e. for the time being, with no right to the
post. Temporary appointments are meant to meet urgent needs of the
Govt. and they are otherwise than the normal method of recruitment.
A person temporarily appointed shall not be regarded as probationer and shall be replaced as soon as possible by a member of the service or an approved candidate qualified to hold the post under the said rules. A temporary government servant acquires no right to the post. His service can be terminated at any time in terms of his employment, after giving him a stipulated or a reasonable notice, without casting any stigma and without following the procedure contained in Art 311 (2) since it cannot be said to be penal.⁶

The tenure of a temporary employee can be brought to an end both as a measure of the exercise of the contractual right of terminating the services by an innocuous order as well as by the punitive measure by dismissal or removal. The former is an order of discharge *simpliciter* and will not attract Art. 311 (2). In the later case, the temporary employee too is entitled to the protection afforded by Art. 311. Where an order of termination of service is passed by way of punishment and is *ex-facie* punitive in nature, such an order cannot be passed even in respect of a temporary employee, without a regular departmental inquiry.⁷ However, where the departmental enquiry did not proceed beyond the stage of submission of charge sheet and dropped thereafter, a simple order of termination of a temporary employee would not be punitive.⁸

The Supreme Court has ruled in a recent case ⁹ that if there are allegations of misconduct against an employee on probation and an

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inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of the enquiry, the order would be punitive in nature as the enquiry was held not with a view to assess the general suitability of the employee for the purpose in question, but to find out the truth of allegations of misconduct against that employee. In such a situation, the order would be founded on misconduct.

In Jagadish Mitter Vs Union of India 10 the services of the appellant, a temporary Second Division clerk in the General Post Office, were terminated by a notice of one month in terms of his contract. The order of termination contained as "having been found undesirable to be retained in Govt. service." The S.C. held, that the order expressly cast a stigma on the appellant and in that sense, must be held to be an order of dismissal and not a mere order of discharge. It was, therefore, bad as the appellant was removed from service without complying the provisions of Art. 311 (2).

Where the services of a temporary servant was terminated on the ground of unsuitability for the post held by him and it was not by way of any punishment and no stigma was attached to him, it was held that Art. 311 (2) was not violated.11

The Court can lift the veil of an innocuously worded order to find out whether the foundation of the order is misconduct. If it is so, then

10. AIR 1964 SC 419.
an enquiry according to Art. 311 (2) becomes inevitable. The Supreme Court has emphasized that the form of order is not decisive and whether an order is one of punishment or not is not a matter of substance which has to be decided on the basis of the entirety of circumstances preceding or attendant on the impugned order.

In Shesh Narain Awasthy Vs State of U.P., the service of a temporary constable in the U.P. Police was terminated apparently by an innocuous order. On scrutiny, however, the court found that his service was terminated on account of his alleged participation in the activities on an unrecognised Police Karam Chari Parishad. The termination order, therefore, was held to be bad as having been passed without following the procedure prescribed by Art.311 (2).

Ad hoc or stop gap appointment

An ad hoc appointment is made due to the exigency of a particular situation without considering the respective merits of all those who are eligible. It is a stop gap arrangement. It is fortuitous and does not confer any right to continue even on the temporary post. Such an appointment can be made when there is administrative necessity or emergency calling for additional hands for performing administrative task of a given post lying either vacant or created to meet the given temporary necessity or emergency.

An ad hoc appointee has no right to the post and his services can be terminated at any time. But where the services of such an appointee are terminated on the ground that after his appointment different qualifications have been prescribed for the post, the termination would be bad when other persons similarly situated have been retained.\textsuperscript{15}

In \textit{Rattan Lal Vs State of Haryana},\textsuperscript{16} the Supreme Court has strongly deprecated the policy of the State Govt. carried on over a number of years of appointing teachers on \textit{ad hoc} basis every year and terminating their services each year during the summer vacations thereby depriving them of their wages for those periods. There cannot be denial of salary to persons having already worked on stop gap arrangement. In a given case\textsuperscript{17} permission to open new classes and recognition of additional subject was granted by parishad and a qualified teacher on appointment to that post worked on stop gap arrangement, but post not being sanctioned by Director of Education, held salary cannot be denied to the teacher, as per U.P. Intermediate Education Act, 1921, Sec 16(E).

\textbf{Absorbtion of ad hoc employee into regular appointment}

In \textit{Baseruddin M. Madari Vs State of Karnataka},\textsuperscript{18} the petitioners were appointed in the University as teachers on ad hoc basis. They continued to work for 3 years with some break. It was

\begin{itemize}
\item\textsuperscript{15} Kitab Singh Vs State of Haryana, 1985 (1) SLR 438.
\item\textsuperscript{16} AIR 1987 SC 478.
\item\textsuperscript{17} Sri Bans Narain Pandey and others vs Secretary, Madhyamik Shiksha Parishad Allahabad, 2000 (3) SLR 310 (All).
\item\textsuperscript{18} 2000 (8) SLR 361.
\end{itemize}
held that their services cannot be terminated and they should be absorbed in regular vacancies.

Removal of a temporary servant on the ground of 'unsuitability'.

If attaches a stigma?

Where a servant is discharged, not on the ground that he was unfit but because he was found unsuitable a finding to this effect would seriously impair the possibility of any future employment. It is an order wherein there is an indication of stigma.\(^\text{19}\) On the ground of general unsuitability, it is open to the authorities to terminate the services of a temporary employee by means of simple order of termination without attaching any stigma on him.\(^\text{20}\) But where stigma is attached like allegation of misuse of power, the order becomes punitive and if Art. 311 is not followed, also illegal.\(^\text{21}\) Termination of a probationer for unsatisfactory work does not attach any stigma.

Punish or Discharge - Choice of the Government

Since the Govt. has an absolute right to terminate the services of temporary or officiating servants at any time, this right may be exercised even if the termination is sought on account of some misbehaviour on the part of the servant. Although it is desirable that in such cases the delinquent may be subjected to regular departmental

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proceedings, since a resort to the short cut of termination of services through the exercise of the contractual powers may, many a time, lead to miscarriage of justice resulting in undeserved hardship in some cases and escaping of the delinquents unpunished in others, the position in law remains that the Govt. has an absolute choice in the matter. It may invoke the powers conferred by the terms of contract or the service rules or may choose to punish the servant.

Enquiry dropped- termination - effect of :

In a Bombay case 22 an inquiry initiated against a temporary employee was dropped and his services were terminated soon thereafter on the ground that his services were no longer required. No reasons were assigned for the termination. In the circumstances, it was held that the termination cannot necessarily be said to be by way of punishment.

Where the appointment is made on a purely temporary basis, the incumbent will not become a permanent employee simply because the post is made permanent.

Holding of Inquiry

The Government is fully competent to hold an enquiry to ascertain whether the servant is suitable to be continued in the post to which he has been appointed in an officiating or temporary capacity. Such a

Preliminary enquiry may even be held ex parte for it is merely for the satisfaction of the Government though usually for the sake of fairness, explanation is taken from the government servant even at such enquiry. Such an enquiry must not be confused with the regular departmental proceedings which are held for the purpose of inflicting on the employee any of the three major punishments mentioned in Art 311 of the Constitution. While the former type of enquiry is outside the scope of Art. 311 (2), the latter must comply with its requirements.

It is therefore incorrect to say that once the formal departmental proceedings are initiated, it is not open to the authority concerned to drop them and to take the alternative course of discharging the temporary servant in terms of contract or the relevant statutory rules. In A.G. Benjamin Vs Union of India, a notice was sent to the appellant, a temporary employee in the Central Tractor Organisation to show cause why disciplinary action should not be taken against him. An Enquiry Officer was also appointed, but before the enquiry could be completed, the Chairman recommended that the services of the appellant be terminated by way of discharge simpliciter under Rule - 5 of the Temporary Services Rule, 1949, by stating in his note to the Secretary: "The departmental proceedings will take a much longer time and we are not sure whether after going through all the formalities we will be able to deal with the accused in the way he deserves." The order of termination simpliciter finally made in this case was upheld by the Supreme Court.

23. 1967 (SC) SLR 185.
Temporary employment for a fixed period

The service of a person appointed to a post for a fixed term cannot, in the absence of a contract or a service rule permitting its premature termination, be terminated before the expiry of the stipulated period unless he has been guilty of some misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under Art. 311 (2). The premature termination of the service of a servant so appointed will prima facie be a dismissal or removal from service by way of punishment and so would fall within the purview of Art. 311 (2).

Art. 311 and part-time appointment:

In Venkataswamy Vs Superintendent, Post Offices 24, a Division Bench of the Orissa High Court has held that ever since 1919, part-time employees have been excluded from any protection, and they never had any right under the 1935 Act or under the Constitution, but following the Supreme Court decision in Motiram's Case 25, the Punjab and Haryana High Court has held in Gurdarshan Singh Grewal Vs State of Punjab 26, that a part-time permanent employee is also entitled to the protection of Art. 311, and quashed the order of termination of service of the part-time employee passed without following the procedure laid down by Art. 311.

24. AIR 1957 Ori 112.
25. Supra Note 4, p48.
Quasi Permanent Service

This class of servants is recognised by the Service Rules.\textsuperscript{27} They are, of course, a particular class of temporary servants. Their position with regard to the provisions of Art. 311 of the Constitution was considered by the S.C. in P.L. Dhingra’s case:\textsuperscript{28}

"Thus when the service of a government servant holding a post temporarily ripens into a quasi-permanent as defined in the 1949 Temporary Service Rules, he acquires a right to the post although his appointment was initially temporary and, therefore, the termination of his employment otherwise than in accordance with rule 6 of those Rules will deprive him of his right to that post which he acquired under the rules and will, prima facie, be a punishment and regarded as a dismissal or removal from service so as to attract the application of Art. 311."

The true scope and effect of these rules was considered by the S.C. in the case of K. S. Srinivasan Vs Union of India.\textsuperscript{29} According to the service rules, a person appointed to a post temporarily assumes quasi-permanent status when he has been in continuous service for more than 3 years, and has been certified by the appointing authority as fit for employment in a quasi-permanent capacity.

It is to be noted that the issue of declaration as contemplated in Rule 3 of the said Service Rules, is a \textit{sine quo non} of 'quasi-

\begin{itemize}
  \item \textsuperscript{27} Central Civil Services (Temp. Service) Rules, 1949
  \item \textsuperscript{28} Supra Note 2, p.45.
  \item \textsuperscript{29} AIR 1958 SC 419.
\end{itemize}
permanent service.' A government servant does not acquire a quasi-permanent status unless and until a declaration is issued in his favour. In **P.M. Pandit Vs Union of India** 30 it was held that a mere continued service for more than 3 years without further declaration contemplated by Rule 3 (ii) was not sufficient to confer quasi-permanent status on the servant, and motive for termination of service under Rule-5 was irrelevant.

A quasi-permanent post can be terminated in the same manner as the employment of a permanent government servant, or, when a reduction occurs in the number of posts for such employees. If, therefore, a quasi-permanent servant’s services are terminated otherwise than in accordance with Rule 7 (i) (ii), of the above referred 1949 Rules, he is deprived of his right to that post and it will *prima facie* be a punishment and be regarded as dismissal or removal from service so as to attract Art. 311.

Once a government servant is declared to be quasi-permanent, it is not open to the Govt. to relegate him to temporary status by cancelling their earlier order. The reason is that such a step would have the effect of forfeiture of the benefit already earned by him, in regard to his right to hold the post, leave, gratuity etc which could be done by complying with the provisions of Art. 311 (2) of the Constitution only.

**Probation**

Government servants have to undergo a period of probation before they are confirmed. The word ‘Probation’ is defined generally as

meaning a proceeding to ascertain the truth to determine character of qualification. The term is also employed to indicate a period during which the competency of an officer or employee may be determined. There can be no doubt that 'probation' connotes a period on trial and a probationer is a person who has been appointed on trial. Therefore, a probationer, being on trial, does not have any right to the post held by him.

If the appointee is not found suitable either during the period of probation or on completion thereof he need not be retained in service and his services may be terminated by notice. An officer can be placed on probation even in case of temporary appointment. It is not correct to say that when an officer is put on probation it must be to a substantive post. A person holding a temporary post on probation does not get a right to hold the post after the expiry of the period of probation because the post is temporary and can be abolished at any time. The simpliciter termination of the service of a probationer does not attract Art. 311 (2).

**Period of Probation**

The period of probation is prescribed by the rules relating to the conditions of service. Most service rules provide the initial period of probation. Some also provide for extension of the period of probation.

Rule-3 of the I.A.S. (Probation) Rules, 1954, prescribes a period of 2 years and one year for probation for every person recruited under the Regulations mentioned in sub-rules (1) and (2) respectively, sub-rule

(3) empowers the Central Government to extend the period of probation which shall not ordinarily exceed 4 years.

Similarly, Rule-3 of the Indian Police Service Rules, 1954, also provides for a period of probation of 2 years and 1 year for persons recruited under Regulations mentioned in sub-rules (1) and (2) respectively. Sub-rule (3) empowers the Central Government to extend the probation without mentioning any limitation.

It is open to the Govt. to prescribe a period of probation shorter than that mentioned in the rules. In R.L. Gupta Vs Union of India, the Supreme Court has deprecated the practice of keeping officers for long periods on probation. The period spent on leave does not count for probation. In certain cases the service other than the post in which a person in probation also counts for probation.

Termination of Probation - not a Punishment

Termination of probation on ground of not having passed the tests or not having acquired the prescribed special qualification or not having satisfied the appointing authority is not a punishment. It is only in furtherance of the right reserved under the rules.

An order discharging a public servant even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other

34. (1988) 2 SCC 250.
disqualification may appropriately be regarded as one by way of punishment, but an order discharging a probationer following upon an enquiry to ascertain whether he should be confirmed is not of that nature.\textsuperscript{36} The words 'unsuitable' or 'unfit' or 'unsatisfactory work and conduct' for the job do not cast any stigma. In such cases termination of the service of a probationer without a formal hearing is not regarded as bad.\textsuperscript{37}

The law relating to protection to probationers was considered by the S.C. in \textit{State of Punjab Vs Sukh Raj Bahadur}.\textsuperscript{38} In this case, a probationer in the service of Punjab Govt. completed his period of probation. A charge-sheet was then served upon him and his explanation was taken. Thereafter his services were terminated. The legality of the order terminating his service was questioned as the safeguards of Art. 311 had not been observed. It was held, reversing the decision of the Punjab High Court, that the probationer can claim the benefit of Art. 311 only if the termination of services is by way of punishment. Here such enquiry as was held was only for considering whether or not the probationer should be confirmed and not to visit him with a punishment. So Art. 311 (2) was not attracted and the order of termination of services was held valid.

If the performance of a probation is found unsatisfactory his services can be terminated on expiry of probation period.\textsuperscript{39} One of the

\begin{itemize}
  \item \textsuperscript{36} ONGC Vs Mohd. Sikandar Ali, AIR 1980, SC 1242.
  \item \textsuperscript{37} 1969 (1) SCJ 51.
  \item \textsuperscript{38} AIR 1968 SC 1089.
  \item \textsuperscript{39} Ram Pravesh Singh Vs State of Bihar, 2001 (88) FLR 864 (Pat).
\end{itemize}
judicially evolved tests to determine in substance an order of termination of a probationer's appointment is to see whether prior to the termination there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct (c) which culminated in a finding of guilt. If all the 3 factors are present, the termination has been held to be punitive irrespective of the form of the termination order. Conversely, if any of the 3 factors are missing, the termination has been upheld. 40

Discharge during Probation:

It is well settled that a government servant who is on probation can be discharged and such discharge would not amount to dismissal or removal within the meaning of Art 311 (2) and would not attract the provision of that Article where the services of a probationer are terminated in accordance with the rules and not by way of punishment.

In Union of India and another Vs V.K. Singh 41 where, a probationer, an I.A.S Officer, was alleged to have committed grave acts of misconduct during a training programme and was discharged from service under Rule 11 (2) of the Indian Administrative Service (Probation) Rules, 1954. It was stated, however, that as the probationer had a wife and a child an order of dismissal should not be passed, but instead he should be discharged under Rule 12 on the ground that he was unsuitable for being a member of the service and was found lacking in qualities of mind and character needed for the service. It was apparently for that

reason that the order of discharge was made. The probationer filed a writ petition requesting for reinstatement on the ground that there was violation of Art. 311 (2) of the Constitution of India and Rule-8 of the All India Services (Discipline and Appeal) Rules 1969 in-as-much as, the appropriate procedure was not followed before passing the impugned order.

One of the points to be considered was whether the same material on which a probationer is found guilty of conduct unbecoming a member of the service can alternatively be utilised for determining whether the probationer was unsuitable for being a member of the service or was found lacking in qualities of mind and character needed for the service. After a conscious and deliberate application of mind it recommended that instead of passing an order of dismal, be treated as one for discharge under Rule 12.

The discharge of a probationer before the expiry of the extended period of probation is legal. It is not necessary that the notice salary should be paid before the discharge, it can be paid subsequently.\(^{42}\) Where the probationer is allowed to continue beyond the maximum probationary period he stands confirmed and cannot be discharged from service or reverted to his original post.\(^{43}\)

The power of termination of probationer can be exercised not only on the expiry of the period of probation but also during the period of probation. It may be that the competent authority watching the

42. U.O.I. Vs Arun Kumar Roy (1986) 1 SCC 675.
performance of the probationer even for a short period may come to the conclusion that the behaviour of the probationer is such that he cannot be continued in service.\textsuperscript{44}

A probationer’s services can be terminated only if he was not in the service of the Govt. prior to such direct recruitment. But when he held a substantive lower post before appointment to a higher post, his services cannot be terminated by the exercise of the power to discharge him from service. The only course open for the authority concerned, on formation of opinion that he is unsuitable for the higher post, is to revert him to the lower post.\textsuperscript{45} If the order of reversion shows that it considered the probationer to have committed serious irregularities which made him unfit for confirmation, the reversion will carry stigma as well as reduction in rank and would attract Art. 311 (2).

**Termination of a probationer by way of Punishment**

An order of discharge, if it is passed by way of punishment for misconduct, or if it casts a stigma on the probationer, will amount to an order of removal or dismissal and will be illegal if it is not in conformity with Art. 311 (2) of the Constitution.

The case-law concerning termination of service of a probationer has been in a state of confusion as each case is based on its own peculiar facts. The Supreme Court in *Chandra Prakash Shah Vs*

\textsuperscript{44} V. Thiagarajan Vs Chief Security Officer, 1986 (1) SLJ 206 (CAT).
\textsuperscript{45} Punjab & Haryana High Court Vs State of Haryana, AIR 1975 SC 613.
State of Uttar Pradesh 5; has extensively reviewed the previous case-laws and sought to rationalise the same on the basis of the concept of "motive" and "foundation". The court has stated that an order dismissing a probationer though innocuously worded may be punitive in character. The form of the order is not conclusive and the court can go behind the order to find out the real foundation of the order. Where misconduct on the part of the employee was the "foundation" for the order, it is to be regarded as punitive in nature. But where it is only the motive for passing the order of termination, then it is not to be regarded as punitive.

In the instant case, a probationer constable's services were terminated by a simple notice. The court ruled that the order was punitive in nature. There were allegations of indiscipline and misbehaviour against him; a preliminary enquiry was held and on the basis of that enquiry, his services were terminated. As the procedure under Art. 311 (2) had not been followed, the order of termination was set aside.

A) FIRST SAFE-GUARD

No removal or dismissal by an authority subordinate to the appointing authority [Art. 311 (1)]. This clause provides that the civil servants of the Union or a State, cannot be removed or dismissed by any authority subordinate to the appointing authority. The underlying idea behind Clause (1) of Art 311 is to ensure a certain amount of security of tenure. It has been held that the government servant is

entitled to the judgment of the authority by which he was appointed or some superior authority to that authority. That, he should not be dismissed or removed by a subordinate authority in whose judgment he may not have the same faith. Thus, the civil servant cannot be deprived of this valuable guarantee for no fault at his.\textsuperscript{47}

In State of Bihar Vs Abdul Majid \textsuperscript{48}, it was held that a Sub-Inspector of Police appointed by the Inspector-General could not be dismissed by the Deputy Inspector-General.

The Govt. can confer powers on an officer other than the appointing authority to dismiss a government servant provided he is not subordinate in rank to the appointing authority. This means that a person appointed by the Secretary cannot be dismissed by the Deputy Secretary. A person appointed by the Central Govt. can be dismissed by it but not by the State Govt. A rule authorising a Junior Officer to dismiss employees appointed by a senior authority is invalid as contravening Art 311 (1).

This requirement is not a restriction on the pleasure of the President or the Governor, for he may always dismiss a servant whether appointed by him or by some one subordinate to him. In effect, it constitutes a restriction on subordinate appointing authorities. In their case, the power of dismissal is to be exercised by authorities of the same rank as the appointing authorities.

\textsuperscript{47} Supra Note 2, p.46.
\textsuperscript{48} AIR 1954 SC 245.
This protection applies only when penalties of dismissal or removal from service is imposed and not when any penalties other than these are imposed. It does not apply even to the penalty of reduction in rank which is a major penalty. Art 311 (1) will not apply when a person is discharged in terms of condition of service or of contract unless it amounts to dismissal or removal from service.49

Appointing Authority

‘Appointing authority’ means the actual authority who appointed the government servant and not the authority competent to appoint under the rules.50 When a person is appointed by an authority superior to the authority who is entitled, under the Departmental Rules, he can be dismissed only by that authority and not the authority who had, in fact, ordered his appointment, empowered by the Rules. The appointing authority referred to in Art. 311 (1) means the authority who appointed the government servant to the post from which he has been dismissed or removed. He may be an authority other than the authority who made the initial order of appointment of the servant concerned.51

Again, where the power to make appointment is vested by a statutory provision in one authority, to be exercised on the advice of another officer, it is the former officer who is to be regarded as the appointing authority. The Govt. can confer powers on an officer other

than the appointing authority to dismiss a government servant provided he is not subordinate in rank to the appointing authority.\textsuperscript{52}

**Subordinate Authority**

The term 'Subordinate' refers to subordination in rank and not in respect of powers or duties. Art. 311 (1) thus, prohibits removal or dismissal of a civil servant by an authority subordinate in rank to the appointing authority. In *Suraj Narain Anand Vs North-West Frontier Province* \textsuperscript{53}, a case decided by the Federal Court under the Govt. of India Act, 1935, the petitioner, who was appointed as a sub-inspector in the police force of the N.W.F.P. by the Inspector - General of Police, was dismissed by the DIG of Police. It was held that D.I.G. was not competent to dismiss the petitioner and that rejection, of the appeal of the petitioner by the I.G. of Police was not equivalent to a dismissal from office by the Inspector-General himself.

In *State of Madhya Pradesh Vs Shardul Singh* \textsuperscript{54}, a departmental enquiry was initiated against a sub-inspector of police by the S.P. After holding an enquiry, he sent his report to the I.G. of Police who ultimately dismissed the sub-inspector from service. The order of dismissal was challenged on the ground of its being inconsistent with Art. 311 (1). It was argued that the enquiry held by the S.P. infringed the mandate of Art. 311 (1) as the sub-inspector was appointed by the I.G. of Police. The Supreme Court ruled that Art. 311 (1) "does not in

\textsuperscript{52} Jai Jai Ram Vs U.P. State Road Transport Corp. AIR 1996 SC 2289.
\textsuperscript{53} AIR 1942 FC 3.
\textsuperscript{54} (1970) 1 SCC 108.
terms require that the authority empowered under that provision to dismiss or remove an official should itself initiate or conduct the enquiry proceeding. The dismissal or removal of the officer, or even that enquiry should be done at his instance.” The only right guaranteed to a civil servant under Art. 311 (1) is that he shall not be dismissed or removed by an authority subordinate to that by which he was appointed.

The power of dismissal cannot be delegated to a subordinate authority. The appointment of an official to inquire into the charges and to report does not however, amount to delegation of powers. Where the order of dismissal is passed by the authority duly competent, its mere communication by the lower authority does not contravene Art. 311 (1).

**Removal or Dismissal by Authority equal in rank or Superior to appointing authority**

Art 311 (1) prohibits dismissal or removal by an authority subordinate to the appointing authority. It, however does not mean that the dismissal or removal must be by the very same authority who made the appointment or by his direct superior. It is enough that the removing authority is of the same rank or grade as the appointing authority. By necessary implication, the removing authority may be higher in rank to the appointing authority. But use of such power by the superior authority is not desirable normally, as it may affect adversely the right of appeal of the servant.56

55. Mahesh Prasad Vs State of U.P., AIR 1955 SC 70
56. S.N. Singh Vs State, AIR, 1956 Manipur 35.
In A.K. Sen Vs Union of India 57 where a security guard in the Central Industrial Security Force who was appointed by the Assistant Inspector General, was dismissed by the Commandant, the order was upheld as the two authorities were of the same rank.

There is nothing in the Constitution which debars the Govt. from conferring powers on an officer other than the appointing authority to dismiss a government servant, provided he is not subordinate in rank to the appointing authority.58

B) SECOND SAFEGUARD:

No dismissal, Removal or Reduction in rank except after inquiry [Art. 311 (2)]. In the enquiry he must be:

a) informed of the charges against him, and

b) given a reasonable opportunity of being heard.

Clause (2) of Art 311 secures the second safeguard to the civil servants of the Union or a State. It provides: "No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which has been informed of the charges against him, and given reasonable opportunity of being heard in respect of those charges." The safeguard contained in Art 311 (2) is the reasonable opportunity of being heard in cases of (a) dismissal from, (b) removal from service, and (c) reduction in rank.

57. (1985) 1 SCC 641.
A person who loses his right of hearing by his own default cannot allege denial of opportunity. No hearing, if rectified at appellate stage, would be fair procedure unless prejudice is shown. The legal position would, therefore, be that since the object and the principles of natural justice is to ensure a fair hearing and a fair deal to the party whose rights are going to be affected, every case has to be examined on its own facts, keeping in view the nature of the inquiry, to determine whether prejudice has been caused to the person affected. Distinction has to be drawn between (a) No notice (b) No hearing, and (c) No adequate hearing. In the case of no notice, the violation would be fundamental and fatal. That itself is prejudice, none further need to be shown. No hearing, if rectified at appellate stage would be a fair procedure unless prejudice is shown. No adequate hearing would require, prejudice having been caused to be shown.  

Persons entitled to invoke Art 311 can be dismissed or removed or reduced in rank only after an enquiry. The enquiry should provide the delinquent employee with: (i) Notice of Charges against him. (This usually precedes the enquiry) (ii) a reasonable opportunity of being heard in respect of those charges.

The reasonable opportunity was required to be given in two stages
i) an opportunity to contest the charges levelled against him; and
ii) an opportunity to contest the findings against him and the punishment proposed to be imposed upon him.

59. D.P. Mahajan Vs Punjab National Bank and Others ASLJ 2004 (3) Delhi 281, (Del, HC)
The opportunity to show cause against the proposed punishment is not required to be given now as the result of the 42nd Amendment Act, 1977, w.e.f. 3.1.1977. If the disciplinary authority had itself held the inquiry no further notice need be given after recording findings against the delinquent. But if the disciplinary authority had appointed an inquiry authority the report of the inquiry must be given to the delinquent and he should be given opportunity to have his say on the inquiry report. A denial of the inquiry officers report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the delinquent employee to prove his innocence and is breach of the principles of natural justice.69

The safeguard provided in Art. 311 (2) extends to all civil posts irrespective of the fact whether they are permanent or temporary, whether they are officiating or on probation or whether they are appointed on contract basis. If the tenure of office of a civil servant is sought to be put an end to or he is reverted to a lower post as a measure of penalty irrespective of the form of the order and irrespective of the status of the civil servant, Art. 311 (2) is attracted.

If it is established that termination of service or reduction in rank is brought about as a measure of penalty, unless the provision of Art 311 (2) has been complied with, the order would be a nullity. But in cases where the order of termination does not indicate that it is made as a measure of penalty, the question whether in reality it amounts to penalty and therefore, attracts Art 311 (2) is a matter for investigation

60. Managing Director, ECIL Vs Kaunakar (1993), 4 SCC 727.
in each case and the question depends on (i) the rights of the civil servants, and (ii) the facts and circumstances of the case. While in the case of a civil servant who has a right to hold the post or rank, any order of termination or reversion to a lower post per se attracts Art 311 (2). In the case of persons who have no right to hold the post, it has to be proved that the order is in reality a punishment and not one passed in exercise of powers under the rules or contract of employment.

The protection of Art. 311 (2) extends to the following actions also if taken by way of punishment.

i) Compulsory retirement:

ii) Termination of service of a temporary government servant

iii) Discharge of a probationer, and

iv) Reversion from an officiating higher post to the substantive post.

In the cases (i) to (iii) if the action is by way of punishment, it amounts to dismissal or removal and in case (iv) it amounts to reduction in rank.

Such action will be deemed to be by way of punishment when

a) it is taken for a misconduct and the misconduct is not merely the motive but the basis of the action, (or)

b) it entails penal consequences and the government servant loses some accrued benefit on account of the action, or

c) a stigma is cast on the government servant.

The protection of Art. 311 (2) is not available in respect of the following actions against government servants:
i) Termination of service in accordance with the contract or service rules;

ii) Compulsory retirement in accordance with the service rules;

iii) Reversion simpliciter;

iv) Discharge of a probationer found unfit or unsuitable for the post;

v) Imposition of minor penalties;

vi) Termination of service on abolition of the post;

vii) Preliminary inquiry held to determine whether a formal departmental inquiry should be held or not.