PART (III) Contd.-

CHAPTER A

SCOPE AND AMBIT OF LIMITATIONS OF
DOCTRINE OF PLEASURE
CHAPTER X

OVER the years, the High Courts and the Supreme Court of India have been called upon to adjudicate the validity or otherwise of dismissal or removal of public servants from the service by the Union or the State Governments in the light of safeguards provided by the Constitution of India.

In this chapter, we would proceed to examine as to what is the scope and ambit of various limitations on the doctrine of pleasure. How far these limitations, which are in reality the safeguards provided to the civil servants by the Constitution, have been recognized and respected by our courts in India. In other words, who are and who are not the persons entitled to these safeguards? Another fundamental question which remains to be answered and which has not yet been answered by the Courts (because it is not their domain) or by the nation is: whether these safeguards are still necessary in the present politico-socio-economic environment of the country, when to the common dismay of all,
the order of reversion as contravening Article 311(2). The High Court upheld the contention. On an appeal to a division bench, the order of the single bench was reversed and the writ petition was dismissed. The division bench held that a government servant officiating in a post had no right to hold that post and thus the reversion to his substantive post was not a reduction in rank within the meaning of Article 311(2). However, the division bench took no notice of the distinction made in some cases that a reversion for administrative reasons was not 'reduction in rank', but a reversion by way of punishment was. The appellant then filed an appeal to the Supreme Court of India. Speaking on behalf of the majority, Chief Justice S.R. Das made the following observations:

"Subject to exceptions contemplated by the opening words of Article 310(1) e.g., Articles 129, 148, 216 and 334, our Constitution has adopted by the said Article 310(1) the English Common Law Rule that public servant hold office during the pleasure of the President or the Governor as the case may be and it has by Article 311 imposed two qualifications for the exercise of that pleasure; in other words, the provisions of Article 311 operates as a proviso to Article 310(1)."

(A)

PERSONS ENTITLED TO PROTECTIONS

WITH regard to the interpretation of Article 311, two questions were posed by the Supreme Court in the above mentioned case. They were:

(1) Who are entitled to protections and

(ii) What is the ambit of protections laid down in Art. 311(2).
It was further held that where a government servant has entered into a contract of service, providing for fixed term, he is entitled to continue in service for the duration of the period specified in the contract and cannot be arbitrarily turned out of office before the expiry of the period at the sweet will and pleasure on the basis of the doctrine of pleasure.

Regarding the second question, it was held that "the words 'dismissed', 'removed', and 'reduced in rank' have acquired a special meaning at the time of the Constitution and it is only in those cases where the Government intends to inflict only one of these three forms of punishments that the government servant must be given reasonable opportunity of showing cause against the action proposed to be taken in regard to him. Therefore, if the termination of service is sought to be brought about otherwise than by way of punishment, then the government servant whose service is so terminated cannot claim the protection of Article 311(2)."

(a) Civil Servants having a right to the post.

Then the question was: when could the termination of a service be considered as a punishment? In answering this question, it was said that the test to be applied was whether the servant had the right to hold the post either under the terms of contract express or implied, or under the rules governing the conditions of his service.
A person appointed substantively to a permanent post normally acquired a right to hold the post until, under the rules, he attained the age of superannuation, or was compulsorily retired and in the absence of a contract, express or implied, or a service rule, he could be turned out of his post unless the post itself was abolished or other disqualifications and appropriate proceedings were taken under the service rules read with Article 311(2). Termination of service of such a servant so appointed must per se be a punishment for it operates as a forfeiture of the servant's right and brings about a premature end of his employment.

The same was true of a person appointed for a fixed term to a temporary post and of a servant holding a temporary post which had ripened into quasi-permanent service as defined in the rules. Except in the three cases, viz., permanent, quasi-permanent and a fixed term appointment, a government servant has no right to his post and the termination of his service did not amount to dismissal or removal by way of punishment.

The majority, therefore, came to the conclusion in Dingra's case that the appellant had no right to the officiating post, nor did the order of reversion entail forfeiture of his chances of promotion in future, nor did it affect his seniority in the substantive post. Thus he

could not complain that the requirements of Article 311(2) were not complied with.

Whether abolition of post is dismissal or removal within the meaning of Article 311(2), came up for consideration before the Supreme Court recently in N. Ramanatha Pillai v. State of Kerala. On behalf of the appellants the following contentions were raised: the right to the permanent tenure is created by rules or Acts and therefore executive decision cannot put an end to these rights. Since service rules create statutory rights to receive salary and pension till the age of superannuation, these statutory rights constitute property within the meaning of Articles. Thus it was argued that a premature termination of post violates Article 311(2), 14(1)(f) and 31(1) and also Article 14 and 16. It was further asserted that if the termination of employment without notice was bad, a termination without a valid rule was worse.

1. Bose J., in his dissenting judgment said:
"The test must always be whether evil consequences over and above those that would ensue from a 'contractual termination' are likely to follow and Article 311(2) cannot be confined to the penalties prescribed by the various rules or in other words the Article cannot be evaded by saying in a set of rules that a particular consequence is not a punishment or that a particular kind of action is not intended to operate as penalty."

It was further observed by His Lordship:
"The real hint does not lie in any of those things—the form of action or the procedure followed or what operated that same in the mind of a particular officer— but in the consequences that follow and in my judgment, the protections of Article 311 are not against harsh words but against hard blows."

Two questions posed by the Supreme Court were:

(i) Whether the Government had a right to abolish a post in the service? and

(ii) Whether the abolition of post is dismissal or removal so as to attract Article 311?

Answer to first question was straight away given in the affirmative on the ground that "the creation or abolition of post is dictated by policy decision, exigencies of circumstances and administrative necessity. The creation, the continuance and the abolition of post are all decided by the Government in the interest of administration and general public."

Neither the Supreme Court nor the High Courts had an opportunity to provide an answer to the other (second) question. Council for the appellants relying on the observations of the Supreme Court in Moti Ram's case, that a person who substantively holds a permanent post has a right to continue in service, subject of course, to the rule of superannuation and the rule as to compulsory retirement and if for any other reason that right is invaded and he is asked to leave his service, the termination of his service must inevitably mean the great of his right to continue in service, said that the abolition of the post was in the nature of a penalty and hence amounted to removal. Rejecting the argument, Ray C.J., observed that with regard to abolition of post and consequential

1. An attempt was, however, made to base the answer of this question on the observations of Supreme Court in P.L. Shingre's case (AIR 1953 S.C. 36); Champak Lal's case (AIR 1964 S.C. 1594) and Moti Ram's Case (A.I.R. 1964 S.C. 600).

termination, no charges are framed nor any enquiry is held. Such a termination is not dismissal or removal within the meaning of Article 311 of the Constitution and as such there does not arise any question of opportunity of showing cause in the case of abolition of post. The abolition of post is not a personal penalty against the government servant. The abolition of post is an executive policy decision.

As a consequence of the said foresaid discussion it is submitted that the view expressed in Dhingra’s case, that all government servants whether permanent or temporary officiating or on probation, are covered by the provisions of Art. 311(2), is correct in so far as it holds that such termination does not involve any punishment and therefore is not ‘dismissal’ or ‘removal’ etc. But the observations that in the absence of a contract or a service rule providing for termination of service by notice, all government servant have a right to hold a permanent post till the age of superannuation, does not appear to be a correct view. This latter view overlooks the tenure at pleasure, laid down in Article 310. It is submitted that the majority has altogether ignored the implications of Article 310(2).

Thus in three cases, viz., permanent, quasi-permanent and a fixed term appointment, a government servant always has a right to, or lien upon, the post held by him.

1. Whether after abolition of post the government servant who was holding the post would or would not be offered any employment under the State would therefore be a matter of policy decision of the government, as the post does not confer any right on the servant—(AIR 1973 S.C. 2641(2649)) 2. A.I.R. 1958 S.C. 36.
In his case, the provisions of Article 311 are always applicable. They are excluded from the operation of pleasure. But if the post held by such a person is abolished, Article 311 will not be applicable.

(B)

PERSONS PARTLY ENTITLED TO PROTECTION

When the services of a civil servant, who has no right to the post, are terminated, the provisions of Art. 311(2) again are applicable, but only where the order of termination entails some penal consequences. But if the termination is without any penal consequences, Article 311(2) will not be applicable at all. It is in this sense, we say that these persons are partly at pleasure and partly not. We would proceed to discuss this category of persons in the succeeding paras of this Chapter.

(a) Civil servant having no right to the post.

The persons who have no right to the post are those holding temporary posts, holding permanent appointments on probation or officiating against permanent posts.

With regard to these persons Dr. Jain has observed:

"In none of the above situations, a government servant has a right to the post he is holding. The character of employment in each case is transitory, and the employment can be terminated at any time by giving a reasonable notice without assigning any reason; this does not per se amount to dismissal or removal and accordingly, Article 311 is not attracted".*

* Dr. M. P. Jain, Indian Constitutional Law, p. 700
(1) Temporary civil servants.

Incidents of temporary service vary from state to state and no precise definition of the expression 'temporary service' can be evolved so as to apply to all types of temporary employees. The impression that one gets from the expression 'temporary service' is that it is the negative or the reverse of permanent service.

It may be stated that the temporary employees and the probationers stand, to a great extent, on the same footing, as far as the application of the doctrine of pleasure, is concerned. Thus, in those cases, wherein a person is employed for a fixed period, either as a temporary employee or as a probationer (for instance, a person may be employed temporarily for a period of one year or a person may be appointed permanently, but on one years' probation and that period is subject to further and unlimited extension), there is no distinction between the two categories. However, the most important distinction between the two is that, in the case of a probationer, it can be provided in the rules that he will be confirmed automatically after the expiry of the period of probation or if the rules provide for the maximum period of the period, he will be automatically deemed to be confirmed after the expiry of the maximum period of probation, unless his services are not otherwise terminated earlier. But this is not so in the case of a person employed on temporary basis.

After a conspectus of whole case law on the subject the Supreme Court of India laid down the following

(1) The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

(2) The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

(3) If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

(4) An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.  

(5) If there is a full scale departmental enquiry envisaged by Article 311 i.e. an Enquiry Officer is appointed, a charge sheet submitted, explanation called for and considered, any order of termination of service made there-after will attract the operation of the said Article.

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2. Thus in Ram Gopal v. State of M.P., where the termination was made after holding an informal inquiry to ascertain whether the servant should be retained in service or not to attract Article 311 (3).
Regarding proposition (2) above, laid down by the Supreme Court some difficulty was bound to arise as each case of termination was to be examined on its own merits. A solution to this problem has been provided by the Supreme Court decision in State of Bihar v. Shiva Bhikshuk Mishra.\(^1\) The Supreme Court said that the argument that "so long as there are no express words of stigma attributed to the conduct of a Government Officer in the impugned order it cannot be held to have been made by way of punishment" is not tenable. Their Lordship further said as follows:

"The form of the order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct... It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the over-riding test will always be whether the misconduct is a mere motive or is the very foundation of the order."\(^1\)

We may also refer to a recent decision of the Supreme Court in Radan Mohan Prasad v. State of Bihar and others.\(^2\) In this case even a simple termination of a temporary government servant, though holding a permanent post for the last 17 years without any inquiry against him has been held to be violative of Art. 311 (2) and as such has been declared as illegal. It was held by the Supreme

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Court that where the services of a government servant holding permanent post were terminated in the background of Chief Minister's statement in the Assembly about his services being unsatisfactory and government intention to serve him show cause notice, though the order in the fact of it, did not indicate any stigma or penalty, yet the attendant circumstances made it amply clear that the order did carry with it a stigma of inefficiency and misconduct on the part of the government servant concerned.

(ii) Probationers.

With regard to the discharge of a probationer during the period of probation, the law as laid down by the Supreme Court has been stated above. Where the rules lay down a maximum period of probation, the law as settled down by the Supreme Court is that the employee is considered

1. Barwell and Mar, quoted with approval, the observations made by Remfrey J., in Wechsler v. Johnston and Hoffman, (Cochrane v. Suit No.455 of 1928, unreported) and have characterized the principles applicable to a probationer as analogous to those regarding goods sent 'on approval'. The person, as taking over goods, is regarded as having made an irrevocable offer to sell them and so cannot require a return of them, before the time stipulated. The prospective buyer, during the period mentioned, is a bailee of the goods, with an option to buy. Thus, according to the authors, in one case, the goods and, in the other, the services are taken 'on trial' (by the prospective buyer or employer), usually for a specified time, otherwise for a reasonable time. Hence, whenever a person is appointed as a 'probationer' or taken on a higher post 'on probation', a period of testing is prescribed or, if not prescribed, it is for a reasonable duration. Usually, terms of service agreement or service rules contemplate a specific period of probation. (See M. Barwell and S. J. Mar, I The Law Relating to Service in India: The Law of Master and Servant (1952) p.66.
a permanent servant after the expiry of maximum period of probation prescribed under the rules, even in the absence of a specific order of confirmation. However, where the service rules do not prescribe the maximum period of probation or where there are no rules at all in existence, the position is far from being clear. In such cases, the judicial view appears to be that the employee continues to be a probationer until there is an affirmative order of his confirmation by the competent authority. The Supreme Court in a recent latest case of Kedar Nath v. State of Punjab, observed as under:

The law on the point is now well settled. Where a person is appointed as a probationer in any post and a period of probation is specified, it does not follow that at the end of the said specified period of probation he obtains confirmation automatically even if no order is passed in that behalf. Unless the terms of appointment clearly indicate... or there is a specific service rule to the effect, the expiration of the probationary period does not necessarily lead to confirmation.

In other words, it is always open to the competent authority to extend the period of probation from time to time according to the circumstances, where there are no rules framed in this regard on the basis of a fundamental rule and in view of the law laid down by the Supreme Court in Kedar Nath v. State of Punjab that a probationer

3. Ibid at p.576.
remains a probationer always, till he is confirmed actually or discharged from service. In such cases, certainly an employee will be subject to a great hardship, probably without any fault on his part. This hardship becomes more hard when the employee is allowed to continue on substantive post after the expiry of period of probation, but without any order either extending his term of probation or confirming him and is also allowed to receive his increments in that capacity, then all of a sudden he is removed merely on the ground that he was a probationer.

Thus ordinarily, the general rule applicable to a probationer should be that in no case the initial period of probation should be extendable. It would, it is submitted, accord well with the modern trends and our social needs, if it is laid down that after the expiry of a reasonable time, which in no case should be more than three years, a probationer must be deemed to have been confirmed in his post automatically. (iii) Civil Servants retired compulsorily.

After a considerable vissitude in the judicial opinion, the view to which the Courts have now veered round is that when a government servant is compulsorily retired or the termination of service is made as a result of change in the age of superannuation, he too, has no right to the post and therefore, the provisions of Article 311 are not applicable to him. But if the compulsory retire-

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1 See Hobley v. I.R. 1771 (P&H) 311
ment or the termination as a result of a change in the age of superannuation entails any penal consequences, the Article 311(2) will be applicable. In other words these persons are at par with temporary civil servants or persons appointed on probation etc.

The Supreme Court in Shyam Lal v. State of U.P. 1 laid down two tests to be applied for ascertaining whether a termination of service by way of compulsory retirement amounted to removal or dismissal, so as to attract the provisions of Article 311 of the Constitution. The first is whether the action is by way of punishment and to find out whether it was necessary that a charge or imputation against the officer is made the condition of the exercise of the power; the second is whether by compulsory retirement the officer is losing the benefit he had already earned. In the present case, a charge sheet having been drawn up against the officer, an enquiry was held and passed. However, the order of compulsory retirement was order of compulsory retirement was not based on the result of the enquiry. Supreme Court observed that, since the order of compulsory retirement is not passed on the result of the enquiry, the enquiry may be to help the government to make up its mind as to whether it was in the public interest to dispense with his service without it was in the public any imputation in the charge-sheet. As his termination was not made subject to the exercise of the power, it did not mean any punishment to the officer.

In the case of U.P. v. Nanam Mohan, the order of retirement was in the following terms:

"I am directed to say that the Governor has been pleased to order in the public interest under Article 465A and note (1) thereof of the Civil Services Regulations, the compulsory retirement with effect from September 1, 1960 of Sri Nanam Mohan Nagar, Director State Museum Lucknow, who completed 42 years of age on July 1, 1960 and 28 years and 3 months of qualifying service on 31st May, 1960 as he has outlived his utility."

The Supreme Court held that the order clearly attached a stigma and any person who read the order would immediately consider that there was something wrong with his or his capacity to work and this attracts provisions of Article 311 of the Constitution.

However, where there were no express words in the order itself, which would throw any stigma, the Court refused to look into the background resulting in the passing of such order. Thus in L.N. Saksena v. State of M.P., the Supreme Court laid down that, where the order retiring the government servant contained a stigma, the order was liable


to be set aside, but refused to extend this ruling to
cases, where there were no express words to that effect
in the order itself. The Supreme Court observed as
follows:

"But where there are no express words in the
order it self which would throw any stigma on
the government servant we cannot delve into
Secretariat files to discover whether some
kind of stigma can be inferred on such research." 1

After considering the various aspects, the Court
concluded:

"What the appellant wants us to hold is that
the mere fact that a government servant is
compulsorily retired before he reaches the
age of superannuation is in itself, a stigma.
But this is against the consistent view of
the court that, if the order of compulsory
retirement before the age of superannuation
contains no words of stigma, it cannot be
held to be a removal requiring action under
Article 311." 2

It may be mentioned that in cases of 'removal'
'dismissal' or 'reduction in rank' of government employees
a test has been laid down by the Supreme Court, as stated
earlier, to the effect that the form of order is not con-
clusive of its true nature and it might merely be a cloak
or camouflage for an order founded on misconduct. In other
words, the entirety of the circumstances, preceding or
attendant on the impugned order must be examined in order
to see whether such an order entails any penal consequences


2. Ibid.

See also Ram Prasad v. State of Punjab A.L.R. 1966 S.C. 1607 and Moti Ram lata v. General Manager N.E.P.Railway-
or not. But this principle does not appear to have been made applicable in cases of compulsory retirement. It is submitted that a similar test as laid down by the Supreme Court in cases of termination of services and reduction in rank, should be made applicable in cases of compulsory retirement, as well.

In J.N. Sinha's case which has a curious history, the High Court was concerned with the situation where an order retiring a government servant compulsorily, was evidently an arbitrary one. The petitioner was serving as Director (Selection Grade) in Survey of India Department. An order was passed retiring him compulsorily under F.R. 56 (j) as amended. It was stated in the order that the President of India was of the opinion that it was in the

1. See State of Bihar v. Shiva Bhikshuk - AIR 1971 S.C. 1011 (1014) where it was observed that no such rigid principle has ever been laid down by the S.C. that one should only look to the order and if it does not contain any imputation of misconduct or words attaching stigma to the reputation of a govt. servant it must be held to have been made in the ordinary course of administrative routine and the Court is debared from looking at all the attendant circumstances to discover whether the order had been made by way of punishment (at p. 1014)


2a. This case (J.N. Sinha v. Union of India) was first decided by the High Court of Delhi - see (1970 S.L.R. 313). Then an appeal was filed by the Union of India and the decision of High Court was reversed (see Union of India v. J.N. Sinha A.I.R. 1971 S.C. 460). Against the decision of Supreme Court a review application was filed in the Supreme Court by Mr. Sinha which was accepted and case was remanded back to the High Court. High Court then gave the decision (see (1970) S.L.R. 746)

3. Amended in May, 1962 (17th May) Firstly a memorandum was issued by the Court of India on 30.11.1962 raising the age from 56 to 58. Then on 21.7.1963, F.R. 56 was amended by the Sixth Amendment and the memorandum was incorporated with some modifications.
officer. It may also be that, in certain key post, public interest may require that a person of undoubted ability and integrity should be there. There is no denying the fact that, in all organizations, there is a good deal of dead-wood. It is in the public interest to chop off the same.

Against this decision a review application was filed on the ground that the High Court did not consider other pleas raised by the Petitioner in the High Court and decided the case on the short point that the petitioner was not accorded an opportunity to show cause. The review application was accepted by the Supreme Court and the case was remanded to the High Court for decision on other pleas.

Referring to the contentions of the petitioner that the impugned order did not state the reasons which impelled the appropriate authority to take the view that the retirement of the petitioner was in the public interest and that no reasonable man could have come to the conclusion that it was in the public interest to retire the petitioner compulsorily, the High Court said that the right conferred on the government is an absolute one, but that right can be exercised only subject to the conditions mentioned in Rule 56(j) of Fundamental Rules of 1922, one of which is that the concerned authority must be of the opinion that it is in the public interest to do so.

1. On 29.8.1970
2. On 15.11.1970
With regard to the other contention of the petitioner that the order of compulsory retirement was an arbitrary one, the High Court said when such a contention is raised, the Court has to examine the material placed before it and decide whether the decision to retire the servant compulsory was arbitrary or not. On facts the Court found that the order of compulsory retirement was wholly arbitrary and quashed the impugned order.¹

(iv) **Termination of service by a change in the age of superannuation.**

We would now proceed to some decisions relating to termination of service as a result of change in the age of superannuation.

The first reported case on the point is Bishnu Narain v. State of U.P.² In this case when the appellant joined service, the age of retirement as laid down in the service rules was 55 years. Later on the age was raised to 58 years. But after sometime, it was again brought down to 55 years⁴ and hence the appellant had to retire. He challenged his retirement on the ground that it was violative of Article 311(2). The Supreme Court held that a termination of service of a government servant as a result of change in the age of superannuation did not attract Article 311(2) of the Constitution.

In Batahari Jena v. State of Orissa,³ before May,

¹ (1970) S.L.R. 848
² A.I.R. 1965 S.C. 1157
³ A.I.R. 1971 S.C. 1510
1963, an Orissa government servant under services Rules, had to retire on attaining the age of 55 years, whether he had completed 30 years' qualifying service or not. In May, 1963, by notification, the age of superannuation was raised from 55 to 58, though the government reserved to itself a right to ask any employee to retire at the age of 55. It was held by the Supreme Court that the Regulation was not violative of Article 311. It was observed that the order of retirement at 55 years did not cast any aspersions or stigma on the government servant which would attract Article 311.

A similar view has been taken by a full bench decision in Lingaraj Patnaik v. District Judge Cuttak. Under Rule 71(b) Orissa Service Code, a particular ministerial servant may be required by Government to retire at the age of 55 years. After 55 years, the Government has a right to terminate the service and the servant has no right to continue, in the service, there being no right to continue. It was held that there is neither dismissal nor removal of the servant when the option to retire is

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1. Under paragraph 3 of the notification, Government had a right to require any government servant to retire at the age of 55 years without assigning any reason. The fact that by the notification of 5th February, 1964 certain guidelines were indicated to the Heads of the Departments in considering whether a government servant should continue in service beyond the age of 55 years, one of the facts for consideration being lack of integrity, did not imply that any officer whose continuance in service was not advised, lacked in integrity.

exercised. Article 311(2) of the Constitution has, therefore, no application to a case of termination of service under Rule 71(b).

On the basis of the above discussion, the following propositions emerge: First, in ascertaining whether the order of compulsory retirement is one of punishment or not (without going into the facts and attendant circumstances leading to the order), it has to be ascertained whether in the order there is any element of charge or stigma or any imputation of misbehaviour or incapacity against the officer concerned; secondly, an order for compulsory retirement on the completion of 25 years of service or an order of compulsory retirement made in the public interest to dispense with further service, will not amount to an order of dismissal or removal, as there is no element of punishment; thirdly, an order in the nature of punishment or penalty on the ground that there is possibility of loss of future prospects, namely the officer will not get an enhanced pension. In the following two cases, however, compulsory retirement will attract the provisions of Article 311(2). Where the order of compulsory retirement involves loss of benefits already earned and when the order of compulsory retirement is arbitrary one.
(C)

PERSONS NOT ENTITLED TO PROTECTIONS

Under this head, we would deal two different classes of persons. There are persons who are not entitled to protections but at the same time they are also excluded from the operation of doctrine of pleasure. On the other hand, there are persons who are neither entitled to protections nor they are excluded from the operation of doctrine of pleasure. Under the first category, falls only those persons governed by specific Constitutional provisions (dealt with under sub head(a) below). Under the second category falls the following:

Civil Servants not validly appointed; Defence Personnel;
Civil Servants convicted on a criminal charge;
Civil servants in whose case holding of inquiry not possible;
Civil Servants in whose case security of state involves; (dealt with under sub heads(b) to (f) below)

(a) Servants governed by specific Constitutional Provisions

A category of persons which is altogether excluded from the purview of Articles 310 and 311, are specified in some of the provisions of the Constitution itself. Article 310(1) begins with the non-obstante clause. The non-obstante clause of the Article, refers inter alia to Articles 124, 145, 217, 218 and 324 which respectively provide that the Judges of Supreme Court, the Comptroller and Auditor General of India, the High Court Judges and the Election Commissioner shall not be removed from their offices, except in the manner laid down
in those Article. The holders of these offices hold their posts, not at the pleasure of the President, but during good behaviour. They are exempted from the rule that the servants hold their offices, during the pleasure of the President or of the Governor. These officers cannot be removed, except by an order of the President, made on an address by each House of Parliament, passed by the specified majority and "on the ground of proved misbehaviour or incapacity".

(b) Civil Servants not Validly Appointed.

It is noteworthy that Article 311 of the Constitution is not applicable to invalid or irregular appointments. In other words, if it is found that the appointment of a particular person was not validly made, that person is removable at pleasure.

The point came up for consideration before the Calcutta High Court, in Ram Nagina v. Governor General in Council. 1 Sinha J., held that, if it is established that the appointment of a particular person was not validly made, that person is removable at the pleasure of the appointing authority. In his case, Article 311 cannot be made applicable.

Then the question was considered by a division bench of Madhya Pradesh High Court in Abdul Hafeez v. M.P. Government. 2 The petitioner was first appointed to officiate

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1. 54 C.L.J. 275 See also Union of India v. Ram Nagina 89 C.L.J. 942.
as Ootroi Superintendent in 1960. He was then in 1961, confirmed on this post. He continued to hold the post of Ootroi Superintendent on a permanent basis, when, in 1963, one Anwarul Haque, a Head clerk in the Municipal Council, submitted a representation to the Government against the appointment of the petitioner as Ootroi Superintendent, contending that the petitioner's appointment by the President of the Municipal Board was illegal and that he was entitled to be appointed to the post. When this representation was taken up for consideration, correspondence was exchanged between the Government and the Municipal Council, the Government taking the stand that the post of Ootroi Superintendent was a post, falling within the term "an Assessment or Revenue Officer" used in section 55(1) of the Bhopal State Municipal Act, 1555 and, as such, the prior approval of the Government to the appointment of the petitioner to that post was necessary and, as no such approval was obtained, the petitioner's appointment as Ootroi Superintendent was illegal and, further, that Anwarul Haque was qualified for being appointed as Ootroi Superintendent. Accordingly, the petitioner was reverted and Anwarul Haque was appointed as Ootroi Superintendent in his place.

Feeling aggrieved, the petitioner filed a writ petition in the High Court. The High Court observed as follows:

"...our conclusion is that the petitioner's initial appointment to the post of Ootroi Superintendent by the President of the Municipal Board was illegal and he had no right to that post; that the standing Committee had no right to the power u/s 56(6) of the M.P. Municipal Act, 1961, to determine the legal legality of his appointment and to revert him to his substantive rank on finding that his initial appointment was illegal and that the petitioner's reduction did not in any way constitute an act of punishment on him."

1. A.I.R. 1965 M.P. 48 at p. 52
The Supreme Court also had the opportunity to consider the matter in State of Punjab v. Jagdip Singh. Though the case related to the confirmation and deconfirmation of some employees, the observations made are relevant here: the Supreme Court held:

"Where a government servant has no right to a post or to a particular status, though an authority under the government acting beyond its competence had purported to give that person a status which it was not entitled to give, he will not in law be deemed to have been validly appointed to the post or given the particular status."

The Assam High Court in Masyan Das v. Deputy Commissioner of Jarrong Tazpur followed the Supreme Court decision and held that if a person is found to have been appointed in government service by an authority who had no power or jurisdiction to make such an appointment, the person so appointed cannot be said to have held a post under the government. If his services are terminated, Art. 311 will not be applicable on account of the simple reason that his intial appointment was without any jurisdiction and without any valid authority.

2. Some persons who were officiating as Tehsildars in the old state of Pepsu were confirmed as Tehsildars by the orders of the Financial Commissioner dated 23.10.1956. On that date, no permanent posts were available for confirmation but the next day i.e. 24th Oct, 1956, the Rajpremukh sanctioned the creation of supernumerary posts to provide liens for the Tehsildars who had been confirmed. A few days later the State merged with the Punjab. Subsequently, Audit raised an objection regarding the validity of the confirmation and the Punjab Government passed an order deconfirming these Tehsildars. The validity of this order was upheld by the Supreme Court on the ground that the order of confirmation passed by the Financial Commissioner was invalid and that there was in law or order of confirmation at all.

3. A.I.R. 1970 Assam 57
(c) Defence Personnel and civilians working in defence services.

On the defence side, the provision includes not only commissioned officers, non-commissioned officers and men of the defence forces but also corresponding grades of civil officials whose work lies within the sphere of defence and who are paid from the defence estimates. These persons are not at all entitled to protections of Article 311(2)(a) (2).

In Union of India v. Ram Chand, Kapur J. observed:

"The law in regard to defence services has remained the same. At no time in the Constitutional history of India has any similar protection against arbitrary dismissal, removal or reduction in rank been provided in regard to these services. On the other hand they continued to hold office during the pleasure of the Crown and now they hold office during the pleasure of the President."

A similar view was taken by the Bombay High Court in Chandrabhan v. Union of India.

Regarding civilians working in the defence services also, the view expressed by the High Courts, is that such a person cannot claim to be holding a civil post and thus, the protection of Article 311 is not available to such him. The Supreme Court, in Kailash Chandra v. General Manager, too declined to pass any order for quashing an order of dismissal of a civilian in defence services. The view was again reaffirmed in Lekh Raj v. Union of India, and further held that such a person was not even entitled to invoke principles of natural justice under general law of master and servant.

2. A.I.R. 1955 Punj. 166 (M.B.)
4. A.I.R. 1966 S.C. 82; See also Sham Lal v. Director Military Forces-AIR 1968 Punj.312; & Inder Sain v. Union of India-
(4) Civil servants convicted on criminal charge.

Proviso (a) to Art. 311(2) runs as follows:

"provided that this clause shall not apply-
(a) where a person is dismissed or removed or
reduced in rank on the ground of conduct
which has led to his conviction on a crimi-
nal charge;"

Under this provision, such persons are entirely at
the pleasure of the Governor or of the President, as the case
may be. This makes an officer, convicted of a criminal charge,
liable to dismissal, without any further proceeding or hear-
ing. Thus, it would not have been possible, but for the present
proviso, to dismiss an employee on the ground of his conviction
on a criminal charge, without holding a disciplinary proceed-
ing on the same charge. The instant proviso, it is not
necessary for the Government to wait till the disposal of
appeal or revision presented against the conviction. However, if the conviction is, later on, set aside on appeal,
the order of dismissal ceases to have effect. In such cir-
cumstances, an employee is entitled to be reinstated forth-
with and to recover arrears of salary from the date of dis-
missal till he is properly dismissed in compliance with Arti-
cle 311(2).

No distinction is made between crimes involving
moral turpitude and other crimes, or offences punishable by

3. Thanji v. Union of India AIR 1965 Punj. 193. See also
   Tarini v. Chief Supdt., AIR 1965 Cal. 75.
fine or imprisonment. Thus, conviction for drunkeness would attract the operation of this proviso. 1

The word 'charge' in the proviso means some proved offence. A person, who is convicted for contempt of court, comes within the purview of this clause, even though no formal charge is framed in such cases. 2

A question may arise as to whether only the post-appointment conviction is included or whether the pre-appointment conviction can also be taken into consideration for the application of the proviso. The Assam High Court held that both 'pre' and 'post' appointment convictions are included. 3 But, it is submitted that this does not appear to be a reasonable view. Where the conviction is pre appointment, the government must wait for some time further to give the employee an opportunity to explain the circumstances in which such conviction took place. 4

The question came up for consideration very recently before the full bench of Punjab and Haryana High Court in On Parkash v. The Director of Postal Services, Amabla. 5 The petitioner, who was originally a temporary packer in the postal department w.e.f. July, 1948, was appointed as a

5. AIR 1973 P and H page 1 (F.B.)
able (b) if so, whether to dismiss him or to remove him from service... and (c) if the said conduct of the official is not such which renders his further retention in service undesir-able, whether the minor punishment, if any, should be inflicted on him... 

(iii) an order imposing a punishment on a government servant simply because of his conviction on a criminal charge without reference to the conduct which led to the conviction cannot be sustained. 1

It may, thus, be stated that the proviso does not mean automatic dismissal or removal of the government servant after conviction, but the employer has to consider all the circumstances of the case and then to take a final decision.

Where a government servant is alleged to have committed an offence which is punishable under the criminal law, there is nothing in the Constitution or in any law to oblige the State to file a criminal case. The State may start departmental proceedings straight away. 2 It is always at the option of the government to proceed either under the criminal law or under the departmental rules or even to proceed under both simultaneously. 3 Where both the proceedings have started simultaneously, it is not at all obligatory on part of the department to stay the action being taken, till the disposal of the criminal trial. However, it would be desirable to await the decision of the Court, so that the defence of the employee in the criminal case may not be

4. Delhi Cloth Mills' case.
prejudiced by anything, taking place in the departmental proceedings. Similarly, it is also possible to prosecute a government servant on a criminal charge, after he has been dismissed by departmental action, on the same charge.

Another important question arises as to whether the government can proceed against a civil servant, who has been acquitted in a criminal case, departmentally on the same charge. It has been held by the Supreme Court in State of A.P. v. Rama Rao, that such proceedings, after acquittal by the criminal court are not barred by Article 20(2) of the Constitution of India. These two proceedings are entirely different in nature and scope.

(e) Discharge of Civil Servants where holding of enquiry not reasonably possible.

Under proviso (b) of Article 311(2), no opportunity is to be given to show cause, if the appointing authority records, in writing, a reason to the effect that it is not reasonably practicable to do so. But the trend of judicial decisions too has limited the scope of this proviso. We have already discussed this in Chapter IX of this work, dealing with the Reasonable Opportunity.

Summarizing, it may be assumed that the proviso applies in the following circumstances:

1. Delhi Cloth Mill's case.
(i) the authority must be competent to remove the delinquent official and it must apply its mind to his case. (Thus, where somebody simply carries out the orders and the dismissal etc. follow outright, the validity of the order cannot be sustained.)

(ii) the authority competent to remove etc. must record, in writing, its reasons for denying the opportunity.

(iii) the power must be exercised bona fide.

In such cases, an absolute pleasure is not exerciseable. There are certain limitations imposed on it.

(f) Discharge of Civil Servants where the security of State is involved.

Proviso (c) of Article 311(2) lays down that, where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold an inquiry, the inquiry may be dispensed with. Before the Constitution (Fifteenth Amendment) Act, 1963, the words used at the end of this proviso were "to give that person such an opportunity." These have now been substituted by the words "to hold such an inquiry." In other words, before the amendment, proviso (c) was considered to be a total exception to the requirements of clause (2) of Article 311 and it was held that proviso (c) empowered the President or the Governor to dispense with the giving of an opportunity to the delinquent to defend himself

3. For a detailed discussion see Chapter XV of this work.
4. For a detailed discussion see Chapter XV of this work.
as well as to dispense with the giving of a show cause notice to him.

After the amendment, the proviso (c) however, merely speaks of holding inquiry.

Basu has expressed the view that, after the amendment, in a case where proviso (c) is applied, a reasonable opportunity of making representation in regard to the penalty proposed, must be afforded to the delinquent official, even though there would be no inquiry stage. In other words, according to him, an opportunity of making a representation is to be afforded, though there would be no inquiry stage. It might be possible that, under certain circumstances, the authority may change its mind, after reading the representation of the delinquent officer, and might take a contrary view, which may be favorable to the delinquent officer. Take the simple case of an official, who is removed on the ground of writing a letter, prejudicial to the national interests, to the Chinese Embassy, without giving him the usual opportunity, in the interest of sub-secu- larity of the State. On his making a representation subsequently, it was disclosed by him that the letter was written under the directions of some person in authority. Under such circumstances, it may be possible that the authority which had passed the orders for the removal of the delinquent, may change its mind, after going through the representation of the delinquent.


It is now well established that, under the proviso, the satisfaction need not be the personal satisfaction of the President or of the Governor. It will be enough that the power is exercised in compliance with Article 166 of the Constitution, because the power to take disciplinary action against a government servant is the executive power of the Union or of the State, as the case may be. On the other hand, though the factum of satisfaction need not be recited in the order, but, if the order is challenged on the ground of absence of such satisfaction, it is incumbent upon the authority to establish that the requisite satisfaction had been made before issuing the order. It would also follow that, as in other cases of exercise of subjective satisfaction, the charge of malafide may be levelled against an order under this proviso. Where the rules have been made under Article 309, the procedure prescribed by those Rules must be observed.

1. Delivering a judgment on 23rd August, 1974, the Chief Justice of Supreme Court, Mr. A. V. Ray, while disposing two appeals filed by Ishar Chand Angral and Chander Singh against the State of Punjab had held that to say that the President must be satisfied personally was 'not correct statement of law and is against the established and uniform view of this court as embodied in several decisions .... (delivered) from 1955 upto 1971'.

With these observations, the court thus over-ruled the judgment delivered in Sardari Lal v. Union of India (A.I.R. 1971 S.C. 1547) in which it was held that "where the President or the Governor as the case may be, if satisfied makes an order under Art. 311(2) proviso (c) .... the satisfaction of the President or Governor is his personal satisfaction. (See the Times of India, August 27, 1974)

NECESSITY OF SAFEGUARDS TO CIVIL SERVANTS

In the modern law the question whether a public servant is entitled to safeguards should hardly be raised, as all systems of law (as would be seen later) agree that some protections to the public servant against the arbitrary action of the employer are necessary. The core of debate in the modern law is confined to the question whether the protections to the public servants should be sufficed under the fundamental law of the land or whether it would be sufficient to provide protections to him under the ordinary law of the land, which may include the creation of certain special agencies for the purpose. The Constitutional provisions granting security of tenure to the civil servant. Under the Swedish and Norwegian Constitutions, no public servant can be removed except with his own consent. In other countries, the government servant is guaranteed security of tenure under the ordinary laws.

Even in countries where the traditional view of public office was that it was the gift of government, experience showed that that system had two defects, viz., favouritism and inefficiency. It was ultimately realized that the worst effects of favouritism could be offset only by tacitly accepting the principle of security of tenure and recruitment on merit.

Thus most of the countries have attempted to standardize and formalize methods of security of tenure. Pressure to do so came from two sources, viz., the public
official themselves and enlightened political and academic opinion. Almost all the European countries now lay down an elaborate disciplinary procedure for the dismissal of permanent servants.

Of these, it was Prussia which had developed a highly trained and homogeneous body of public officials from as early as 1794 and it was an essential element in creating a strong state. The German State followed this tradition. At present, in Germany, most elaborate system is to be found, where there is a hierarchy of disciplinary courts with full-time prosecutor. At each stage the accused officer is given the right to know what evidence there is against him, to examine it and to rebut or refuse it. It is noteworthy feature of the German system that the penalty to be imposed is not decided by the official superior or by any higher authority but by disciplinary courts. In other countries the case against the official is prepared by the Establishment officer as in Britain or Switzerland or by the immediate officer as in France, Italy and Belgium. In France the head of the department is authorised to inflict a heavier penalty than that proposed by the Disciplinary Commission. In certain countries like Italy the Minister is bound not to inflict a heavier penalty than that proposed by the Disciplinary Commission.

The position of government servants in U.S.A. bears a resemblance in certain respects to our own system. Thus

1. France, Germany, Austria, Belgium, Switzerland, Sweden, Norway, Italy and England.
where a statute or rule provides that an employee may be discharged only after notice the provisions are enforced by the Courts and should be strictly complied with. The requirement of notice of discharge is, in some states, accompanied with a requirement of reasons for discharge and an opportunity to show cause against it. In such cases omission to grant a hearing to the employee would render the discharge invalid.

Even in U.S.S.R. any person aggrieved by an order passed against him has a special remedy by approaching the procurator's department. This is a special system in the U.S.S.R., under which it is possible to get redress through the intervention of a special organisation of officials called the Procurators. The procedure generally provides for protection of an employee and redress can be obtained against the person who arbitrarily recommended dismissal. The court has also the power to order reinstatement.

From the above survey, it is crystal clear that some protections either under the fundamental or ordinary law have been provided practically in all the civilized governments. There can be no exception. It may still be debatable whether in the modern socialist and welfare India these safeguards should be guaranteed by the Constitution or it would be sufficient to provide them under ordinary law of the land. In their wisdom and in the socio-economic background of the country at that time, our founding fathers opted for the Constitutional guarantees to the public servant and Article 311 was constituted
as a sort of Magna Carta of the public servant. It is true that the working of Article 311 and its interpretation by our courts have irked our politician and the builders of the modern India as they feel that Article 311 is an obstruction to the administrative efficiency and it is felt that India can ill-afford these constitutional luxuries. If India is to convert itself into a socialist state with some speed, it is argued, we must have a speedy procedure for getting rid of the inefficiency and corrupt public servant.

There is no denying the fact that a public servant who has no security of tenure can work with efficiency and dignity and therefore there is yet another school of thought which wants to further strengthen the protection to the public servant and prefer to use the word 'right' instead of word 'protection' on the ground that protection would come in only against the exercise of arbitrary pleasure, by way of prerogatives or otherwise, which do not exist in the Constitution. This school prefers the word 'right' on the ground that Article 310 containing the doctrine of pleasure also record only the relationship of master and servant. Even in the absence of such a constitutional provision the existence of the ordinary law of master and servant would have applied for governing the relationship between the two. Anyhow one need not enter into a controversy over this as it hardly matters whether we call it protection or right, as long as we understand the actual scope of the relevant constitutional provisions.
Thus in spite of the fact that in the present
decoenvironment, when to the common belief of
court, our civil service has fallen from the high pedestal of
rectitude, the remedy does not lie in throwing away these
safeguards from the Constitution. Rather there is great
need for their strict application and compliance by the
Courts. It has been suggested in this work that the task
of 'holding enquiry' should be entrusted to some independent
body like the State Lokayuktas instead of departmental head
concerned. Otherwise, the standard of civil service would
be lowered and the inefficiency will prevail at all levels
of services. The dreams of building a socialist India may
be also be hindered. These protections have all along been
regarded as of sufficient importance to be incorporated in
the Constitution itself. In this regards, remarks made by
Dr. Ambedkar, Chairman of the Constituent Assembly, are
worth quoting:

"There can hardly be any doubt that one of the most
important aspects of the public services is 'permanence in
office'. This is so closely associated with the 'security
of service', that it is difficult to think of the one without
at once associating with the other. Continuity of personnel
is of great importance. Constant change in the services is
costly in money and more costly in effectiveness. Civil ser-
vants must be given such security of tenure as will give
them confidence to deal forthrightly with their 'masters'."1