(1976) 07 MP CK 0001

Madhya Pradesh High Court

Case No: Miscellaneous Petition No. 610 of 1975

A.D. Tannirwar		APPELLANT
	Vs	
State of M.P. and another		RESPONDENT

Date of Decision: July 29, 1976

Acts Referred:

- Constitution of India, 1950 - Article 226, 309, 311, 311(2)

Citation: (1981) ILR (MP) 730

Hon'ble Judges: S.M.N. Raina, J; G.P. Singh, J

Bench: Division Bench

Advocate: Gulab Gupta, for the Appellant; S.L. Saxena, Government Advocate, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

G.P. Singh, J.

The main question arising for decision in this petition under Article 226 of the Constitution is whether an order terminating the service of a quasi-permanent civil servant which is void being in contravention of Article 311 of the Constitution can be validated by retrospectively amending the service rules and depriving the civil servant of his quasi-permanent status.

2. The petitioner, A.D. Tannirwar, was appointed as officiating Workshop Foreman in the Madhya Pradesh Education Class II Service in August 1964. By order, dated 22nd July 1966, the petitioner was transferred and appointed to officiate temporarily until further orders as Lecturer in Mechanical Engineering in M.P. Education Service Class II. The petitioner was posted as a Lecturer in the Government Secondary Technical School, Jabalpur, against a vacant post. By order, dated 20th October 1966, the petitioner''s services were terminated with immediate effect as no longer required. The petitioner, however, continued in service because the order, dated 20th October

1966, was kept in abeyance and was finally withdrawn on 23rd December 1966. In the order, dated 23rd December 1966, it was mentioned that the petitioner would have to compete along with other candidates for the post when it is advertised by the Public Service Commission. The posts of Lecturer including the petitioner''s post were advertised by the Public Service Commission in 1965. The petitioner applied for the post, but he did not appear before the Public Service Commission as his wife fell ill. It appears that no candidate was selected by the Public Service Commission for the post held by the petitioner in 1965 and the petitioner continued on the post. The post was again advertised by the Public Service Commission only in 1972. The petitioner applied for the post, but he was not called for interview because by that time he had become overage and ineligible for appointment. The petitioner''s services were terminated by order, dated 18th June 1975, with effect from 18th July 1975, that is, after expiry of one month from the date of the order. It will be seen that the petitioner had worked continuously for nearly 9 years on the post of Lecturer before his services were terminated. The petitioner filed this petition on 3rd July 1975 challenging the order of termination of his services. The main contention raised in the petition is that after continuous service of 5 years on the post of Lecturer, the petitioner had acquired the status of quasi permanent and his services could not be terminated by giving one month''s notice.

3. The service conditions of temporary and quasi-permanent employees are governed by the Madhya Pradesh Government Servants (Temporary and quasi-permanent Service) Rules, 1960. These Rules were drastically amended with retrospective effect during the pendency of this petition. To appreciate the points requiring decision in this petition, it is necessary to refer to the rules as they were first made and then to refer to the subsequent amendments. Rule 2 (b) of the Rules defined quasi-permanent service to mean "temporary service commenced from such date as may be specified in that behalf in the declaration issued under rule 3 consisting of periods of duty and leave (other than extraordinary leave) after that date". Specified post was defined by Rule 2 (c) to mean "a particular post, or the particular grade of posts within a cadre, in respect of which a Government servant is declared to be quasi-permanent under Rule 3." Rule 8 provided as to when a Government servant would be deemed to be in quasi-permanent service. This rule reads as follows:

3. A Government servant shall be deemed to be in quasi-permanent-permanent service--

(i) if he has been in temporary service continuously for more than three years; and

(ii) if the appointing authority being satisfied as to his suitability in respect of age, qualifications, work and character for employment in a quasi-permanent capacity, has issued a declaration to that effect, in accordance with such instructions as the Governor may issue from time to time.

Explanation.--In computing continuous service for the purposes of this sub-rule, any period of break in service during a vacation shall be counted as a period of actual service where, upon re-employment immediately after the vacation, the Government servant has been allowed to draw his full pay and allowances in respect of such period.

Rule 4 of the Rules dealt with the declaration referred to in Rule 3 and reads as follows:

4. (1) A declaration issued under Rule 3 shall specify the particular post or the particular grade or posts within a cadre, in respect of which it is issued and the date from which it takes effect.

(2) Where recruitment to a specified post is required to be made in consultation with the Public Service Commission, Madhya Pradesh, no such declaration shall be issued, except after consultation with the Commission.

By Notification, dated 11th January 1974, a very material amendment was made in Rule 3 and a new clause was inserted as clause (iii) which was as follows:

(iii) if he is declared quasi-permanent as a result of clauses (i) and (ii) or in the absence of such declaration if he has completed five years of continuous service.

Rule 4 of the Rules was also amended by adding two provisos in sub-rule (2). The provisos so added read as follows:

Provided that where according to any rules the appointments or promotions were required to be made in consultation with the Commission and where such consultation has been made, no further consultation with the Commission shall be necessary at the time of declaring the Government servant as quasi-permanent: provided further that where the appointments were to be made in consultation with the Commission, but appointments were made on ad-hoc basis without consulting the Commission, in such cases, before a Government servant is declared quasi-permanent, consultation with the Commission shall be necessary.

By notification, dated 22nd December 1975, certain amendments were made with retrospective effect from 11th January 1974. One of the important amendments made by this Notification is to omit clause (iii) from Rule 3 which was inserted by Notification, dated 11th January 1974. The second important change is insertion of new Rules 3-A and 3 AA. The amendments made by Notification, dated 22nd December 1975, are as follows:

(1) In rule 2, for clauses (b) and (c), the following clauses shall be and shall always be deemed to have been substituted with effect from the 11 January, 1974, namely:--

(b) Quasi-permanent Service'' means temporary service commenced from such date as may be specified in that behalf in the declaration issued under rule 3 or from the date from which the Government servant concerned is deemed to be in

quasi-permanent service under rule 3A and consisting of periods of duty and leave (other than extraordinary leave) after that date:

(c) ''Specified Post'' means particular post, or the particular grade or posts within a cadre in respect of which a Government servant is declared to be in quasi-permanent service under rule 3 or deemed to be in quasi-permanent service under rule 3A;

(2) In rule 3:--

(a) for clause (1), the following clause shall be and shall always be deemed to have been substituted with effect from the 11 January, 1974, namely :--

(1) if he has been in temporary service in the same service or post continuously for more than three years; and

(b) Clause (iii) shall be and shall always be deemed to have been omitted with effect from the 11 January, 1974;

(c) for the Explanation, the following Explanation shall be and shall always be deemed to have been substituted with effect from the 11 January, 1974, namely--

Explanation. In computing continuous temporary service for the purposes of this rule any period of break in service during a vacation shall be counted as a period of actual service where, upon re-employment immediately after the vacation the Government servant has been allowed to draw his pay and allowances in respect of such period.

(3) after rule 3, the following rules shall be and shall always be deemed to have been inserted with effect from the 11 January, 1974, namely:--

3-A. A Government servant in respect of whom a declaration under clause (ii) of rule 3 has not been issued but has been in temporary service continuously for five years in a service or post in respect of which such declaration could be made shall be deemed to be in quasi-permanent service unless for reasons to be recorded in writing the appointing authority otherwise orders.

3-AA For the purpose of rule 3 and 3 A, in the case of an appointment:--

(a) Where consultation with the Public Service Commission is not required, service which a Government servant has rendered prior to his temporary appointment according to the provisions of the recruitment rules or any instructions issued by the Governor from time to time, shall not be counted for reckoning the completed three years or five years of service, as the case may be;

(b) where consultation with the Public Service Commission is required, a service which a Government servant has rendered prior to his selection by the Public Service Commission shall not be counted for reckoning the completed three years or five years of service, as the case may be;

(4) in rule 4, for the second proviso, The following proviso shall be and shall always be deemed to have been substituted with effect from the 11th January, 1974, namely:--

PROVIDED, further that where an appointment requiring consultation with the Public Service Commission was made without such consultation in such case before a Government servant is declared to be in quasi permanent service consultation with the Public Service Commission shall be necessary.

4. Rule 6 of the Rules which continues without any change provides that "the service of a Government servant in quasi-permanent service shall be liable to termination --

(i) in the same circumstances and in the same manner as in the case of a Government servant in permanent service; or

(ii) when the appointing authority concerned has certified that a reduction has occurred in the number of posts available for Government servants not in permanent service.

5. The learned counsel for the petitioner contends that on 11th January 1974 when clause (iii) was inserted in Rule 3, the petitioner became in quasi-permanent service on the post of Lecturer because on that date he was continuously holding that post for more than 5 years and as the petitioner''s services were not terminated in accordance with Rule 6, the order of termination of his services, dated 18th June 1975, violated Article 311 of the Constitution. It is further contended that the rules made during the pendency of this petition could not be effective to take away the quasi-permanent status acquired by the petitioner and to validate the order of termination of his services which violated Article 311 of the Constitution.

6. The first question to be seen is whether the petitioner acquired a quasi permanent status by virtue of clause (iii) inserted in Rule 3 by Notification, dated 11th January 1974. The learned Government Advocate has contended before us that the petitioner at no stage became quasi-permanent because no declaration to that effect was issued under Rule 4. We are unable to accept this argument. The effect of addition of clause (iii) was that a Government servant could be deemed to be quasi-permanent (1) if he was declared quasi-permanent as a result of clauses (i) and (ii); or (2) in the absence of such declaration, if he completed five years of continuous service. No declaration was needed for making a Government servant quasi-permanent in case he completed five years of continuous service. A declaration referred to in Rule 4 related to the declaration required under clause (ii) of Rule 3. The declaration was, however, not necessary for attaining the status of quasi permanent after completing 5 years of continuous service. The conferral of that status in such cases was automatic by operation of clause (iii) of Rule 3. The acceptance of the argument of the learned Government Advocate that even in cases falling under clause (iii) a declaration under Rule 4 was necessary for acquisition of quasi permanent status will make that clause entirely nugatory. It is also argued by

the learned Government Advocate that in the absence of a declaration under Rule 4, there could not be any specified post to which the quasi-permanent status could attach which also showed that a declaration was necessary. In our opinion, this argument is also without any merit. It is true that a declaration under Rule 4 specifies the particular post or the particular grade or posts within a cadre in respect of which the status of quasi-permanent is acquired by a Government servant But in cases where no declaration is necessary and the conferral of quasi-permanent status is automatic by operation of clause (iii), the specified post on which the quasi-permanent status is acquired must be deemed to be that post on which the Government servant was working continuously for more than 5 years. In the instant case, it is not disputed that the post of Lecturer on which the petitioner was working was a permanent post and that he was continuously working on that post from 22nd July 1966. The petitioner, therefore, was in continuous service on that post for more than 5 years when clause (iii) was inserted in Rule 3 on 11th January 1974. The petitioner thus acquired a quasi-permanent status. We may here mention that the conclusion reached by us on the construction of clause (iii) of Rule 3 is in line with a Division Bench decision of this Court in Ramkishore Agarwal v. State of M.P. and another M.P. No. 101 of 1975, decided on 27th October 1975. (Indore Bench).

7. The next question to be considered in this case is whether the order, dated 18th June 1975, terminating the petitioner''s services was valid when it was made. We have already referred to Rule 6 which provides in what cases the service of a Government servant in quasi-permanent service can be terminated. Generally speaking, the service of a quasi-permanent Government servant can be terminated only in the same circumstances and in the same manner as in the case of a Government servant in permanent service. This general rule is subject to one exception that the service of a quasi-permanent Government servant can also be terminated when the appointing authority concerned has certified that a reduction has occurred in the number of posts available for Government servants not in permanent service. It is not disputed that the petitioner''s services have not been terminated in accordance with Rule 6, The petitioner''s services were terminated on the erroneous assumption that he was a temporary Government servant not in quasi permanent service and was governed by Rule 12 under which the Government can terminate the service of a temporary Government servant by a month''s notice. In Parshotam Lal Dhingra Vs. Union of India (UOI), , the Supreme Court held that when the service of a Government servant holding a post temporarily ripens into a quasi-permanent service, he acquires a right to the post although his appointment was initially temporary and the termination of his employment otherwise than in accordance with Rule 6 will deprive him of his right to that post which he acquired under the rule and will prima facie be a punishment and regarded as a dismissal or removal from service so as to attract the application of Article 311 of the Constitution. It is, therefore, clear that the order, dated 18th June 1975, terminating the petitioner''s service was invalid on the date when it was made because it

contravened Article 311 of the Constitution

8. The further question to be examined is whether the amendments made during the pendency of the petition in the Rules have validated the order of termination. We have already quoted the amendments that were made on 22nd December 1975. The most important amendment with which we are directly concerned in this case is that clause (iii), which was inserted in Rule 3 by Notification, dated 11th January 1974, has been retrospectively omitted with effect from the same date. Rule 3-A, which has now been inserted with effect from 11th January 1974 does no doubt confer quasi-permanent status without an express declaration on a Government servant who is in temporary service continuously for 5 years, but in view of Rule 3-AA, service which a Government servant has rendered prior to his selection by the Public Service Commission cannot be counted for reckoning the period of five years where consultation with the Public Service Commission is required for appointment to the post. As the petitioner was not selected by the Public Service Commission, the temporary service did not qualify for reckoning under Rule 3-AA so as to confer upon him a quasi-permanent status under Rule 3-A. As these amendments were inserted retrospectively with effect from 11th January 1974, the effect of the amendments is to take away the quasi-permanent status which the petitioner had acquired under clause (iii) of Rule 3 and to make the order of termination of his service valid. The important point, therefore, that arises for consideration is whether amendments in the rules can be retrospectively made as to take away the quasi-permanent status of a Government servant which has already been acquired and to validate an order of termination of service which is invalid and void being in contravention of Article 311 of the Constitution.

9. The power of the Governor to make rules is derived under the proviso to Article 309 of the Constitution. The Governor can make rules regulating the recruitment and the conditions of service of persons appointed to services and posts in connection with the affairs of the State until provision in that behalf is made by or under an Act of the State Legislature. It is settled law that once appointed to a post, a Government servant acquires a status and his rights and obligations are governed by rules framed under Article 309 which may be unilaterally altered by the Government: Roshan Lal Tandon Vs. Union of India (UOI), . It is also settled law that the Governor under Article 309 can make retrospective rules: B.S. Vadera Vs. Union of India (UOI) and Others, and Raj Kumar Vs. Union of India (UOI) and Others, . The power to make rules is, however, subject to the provisions of the Constitution and, therefore, the rules made cannot be in breach of Article 311 of the Constitution. The scope and ambit of Article 311 were examined by the Supreme Court in Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., . It was held in that case that where the service of a permanent civil servant is terminated otherwise than by operation of the rule of superannuation or the rule of compulsory retirement, the termination amounts to removal under Article 311(2) of the Constitution even though the termination is brought about by service rules. The

question in that case related to the validity of Rules 148 and 149 of the Railway Establishment Code, 1959, which provided that the service of railway servants shall be liable to termination on notice by either side. The rules were held to be violative of Article 311(2). Moti Ram''s case was followed in Gurdev Singh Sidhu Vs. State of Punjab and Another, , where the Supreme Court considered a question relating to the validity of a rule of compulsory retirement of a permanent Government servant at the end of 10 years of his service. It was held in that case that a permanent Government servant has a right to continue in service subject to two exceptions. The first exception is in relation to the rule of superannuation provided the age of superannuation has been reasonably fixed. The second exception is in regard to the rule of compulsory retirement which provides for a reasonably long period of qualified service after which alone compulsory retirement can be ordered. In all other cases, a permanent Government servant can be removed from service only for good cause after an opportunity is given to him to meet the charge on which he is to be removed. It was, therefore, held that the rule empowering the State to compulsorily retire a Government servant at the end of 10 years of his service contravened Article 311 as it did not provide for a reasonably long period of qualified service. It will thus be seen that in case of permanent Government servants Article 311 does not merely guarantee that they shall not be punished by dismissal, removal or reduction in rank without an opportunity of meeting the charge, but also that they will have a reasonably long tenure of service during which their services will not be terminated except for good cause. A permanent Government servant acquires a right to the post held by him and it is for this reason that a reasonably long tenure of service is made available to him under Article 311. It is an application of the same principle that it was held in The State of Mysore Vs. H. Papanna Gowda and Another etc., that a law made by the State Legislature of Mysore under which a Government servant in a college ceased to be Government servant and became servant of a University was violative of Article 311. A rule which is not a rule of superannuation or a rule of compulsory retirement after a reasonably long period of service but which provides for the termination of the service of a permanent Government servant will be violative of Article 311.

10. The principles laid down by the Supreme Court in relation to permanent Government servants in Moti Ram''s case and Gurdev Singh''s case also apply to a Government servant who has acquired a quasi permanent status. This follows from the ruling in P.L. Dhingra''s case where a quasi-permanent Government servant is placed in the same category for availability of protection under Article 311 in which a permanent Government servant is placed. According to P.L. Dhingra''s case, a quasi-permanent Government servant also acquires a right to the post. As already seen, the service of a quasi-permanent Government servant can be terminated in the same circumstances and in the same manner as in the case of a Government servant in permanent service with this difference that his services can also be terminated when the appointing authority concerned has certified that a reduction

has occurred in the number of posts available for such Government servants. Subject to the said condition, a quasi-permanent Government servant acquires a right of security of tenure like a permanent Government servant and any premature termination of his services, as in the case of a permanent Government servant, per se contravenes Article 311 of the Constitution. The following passage from the judgment in P.L. Dhingra''s case is relevant on this point:

Thus when the service of a Government servant holding a post temporarily ripens into a quasi permanent service 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 Article 311.

[N.B. Rule 6 of the M.P. Government Servants (Temporary and Quasi Permanent) Rules, 1960 is the same as Rule 6 of the Central Civil Service (Temporary Service) Rules, 1949.]

The implication of the ruling in P.L. Dhingra''s case is that except when the appointing authority concerned has certified that a reduction has occurred in the number of posts available for Government servants not in permanent service, a quasi permanent Government servant enjoys the same security of tenure as a permanent Government servant. Like a permanent Government servant, a quasi permanent Government servant also has a right to the post. A rule which takes away the security of tenure available to a quasi permanent Government servant under Article 311 of the Constitution will be invalid on the same principle on which the rules relating to permanent Government servants were held invalid in Moti Ram''s case and Gurdev Singh''s case. As a result of the above discussion, it is clear that it is not open to the Government to make a rule that the service of a quasi-permanent Government servant will be liable to termination at any time after notice. Such a rule would contravene the provisions of Article 311 of the Constitution on the principle laid down in Moti Ram''s case. If no rule can be made under Article 309 enabling the Government to terminate the service of a quasi-permanent Government servant at its will and pleasure, it reasonably follows that the same thing cannot be done by depriving the Government servant of his quasi permanent status. A rule which takes away the quasi permanent status of a Government servant which he has already acquired will also infringe Article 311 of the Constitution, for in effect such a rule will deprive the Government servant of the right to the post and security of tenure acquired by him under that Article.

11. The amendments introduced in the rules by Notification, dated 22nd December 1975, omitted clause (iii) from Rule 3 retrospectively from 11th January 1974. The effect of this retrospective amendment is the same as if clause (iii) was never inserted in Rule 3. The Government servants, who in the meantime acquired quasi

permanent status under clause (iii), are deprived of that status by retrospective omission of clause (iii) from 11th January 1974. The amendment in so far as it deprives the Government servants who had acquired quasi permanent status under clause (iii) of Rule 3 before 22nd December 1975 of that status infringes Article 311 of the Constitution and cannot be held to be valid. The proper way to give effect to the amendments introduced by Notification, dated 22nd December 1975, would be to hold that the amendments would not apply to those Government servants who had acquired quasi-permanent status before 22nd December 1975 by operation of clause (iii) inserted in Rule 3 by Notification, dated 11th January 1974. These amendments, therefore, could not be applied to the petitioner so as to deprive him of his quasi-permanent status.

12. In The State of Mysore Vs. Padmanabhacharya etc., , a Government servant was retired at the age of 55 years, although the age of superannuation applicable to him was 58 years. A rule was then made under Article 309 of the Constitution that the Government servants, who had been retired at the age of 55 years shall be deemed to have been validly retired. It was held that the rule violated Article 311 of the Constitution. The retirement of the Government servant in this case at the age of 55 years contravened Article 311 and was, therefore, invalid and void. This invalidity could not be cured by making a rule declaring the retirement to be valid. In the instant case, the petitioner''s termination of service by order, dated 18th June 1975, contravened Article 311. The invalidity in that order cannot be cured by making retrospective amendments in the Rules taking away the quasi- permanent status of the petitioner.

13. The learned Government Advocate has relied upon the case of Raj Kumar v. Union of India. In that case, the service of a temporary Government servant was terminated forthwith and it was directed that he shall be paid a sum equivalent to the amount of pay and allowances for a period of one month in lieu of the period of notice. This order was invalid because the relevant rule required that one month''s salary and allowances in lieu of notice be paid immediately before the termination of the service. This rule was retrospectively amended not making it obligatory to pay one month''s salary and allowances in lieu of the period of notice immediately before the termination of the service. The result of the amendment was that the order of termination of service, which was invalid when it was made, was validated. The amendment was held to be valid on the ground that under Article 309 of the Constitution it is open to the President or the Governor, as the case may be to make a retrospective rule. It will be seen that the temporary Government servant in that case had not acquired the status of a quasi-permanent Government servant and had no right to the post. The termination of his service in breach of the relevant rule did not offend Article 311 of the Constitution. The retrospective rule made under Article 309, therefore, did not infringe the security of tenure available under Article 311 and did not validate an order which was invalid for violation of that Article. This case, therefore, is not applicable to the instant case and does not help the

Government. The learned Government Advocate also relied upon the case of N. Lakshmana Rao and Others Vs. State of Karnataka and Others, . In this case, by rules made under Article 309 of the Constitution, the age of superannuation was reduced from 58 years to 55 years. It was held by the Supreme Court that when the rule only deals with the age of superannuation and the Government servant had to retire because of the reduction in the age of superannuation, it cannot be said that the termination of the service amounts to removal within the meaning of Article 311. It will be seen that the retirement under the amended rule took effect only after the coming into force of the rule. A Government servant, who had attained the age of 55 years before the coming into force of the rule was to be continued in service for a few months after the coming into force of the rule and no Government servant was retired from a date prior to the date of the coming into force of the rule. In the circumstances, there was no question of infringement of Article 311 of the Constitution. This case is also of no assistance to the Government.

14. For the reasons given above, it must be held that the petitioner continues to be a quasi-permanent Government servant and the order of termination of his service passed on 18th June 1975 is invalid and void being in contravention of Article 311 of the Constitution. The petition is allowed. The order, dated 18th June, 1975, terminating the service of the petitioner is quashed. There shall be no order as to costs of this petition. The security amount deposited by the petitioner shall be refunded to him.