Debesh Chandra Das Vs Union of India (UOI)

Court: Calcutta High Court

Date of Decision: May 19, 1967

Acts Referred: Administrative Service (Cadre) Rules, 1954 â€" Rule 3, 4(1), 6
All India Services (Discipline and Appeal) Rules, 1955 â€" Rule 3
All India Services Act, 1951 â€" Section 3, 3(1), 4
Civil Procedure Code, 1908 (CPC) â€" Section 80
Civil Services (Classification, Control and Appeal) Rules â€" Rule 33(2), 37, 42, 44(D)
Companies Act, 1956 â€" Section 237(B)
Constitution of India, 1950 â€" Article 226, 309, 311, 312, 320
Government of India Act, 1915 â€" Section 96B

Citation: (1968) 2 ILR (Cal) 445

Hon'ble Judges: A.N. Ray, J

Bench: Single Bench

Advocate: N.C. Chakraborty and N.C. Sen Gupta, for the Appellant;S.V. Gupte, Solicitor-General and S.K. Datta and S.S. Javali, for the Respondent

Final Decision: Dismissed

Judgement

A.N. Ray, J.
The Petitioner obtained this Rule for an order that a writ in the nature of mandamus do issue commanding the Respondents to

act and proceed in accordance with law, to recall, cancel and withdraw the orders dated June 20, 1966 and September 7, 1966, and to forbear

from giving effect to the orders. The Petitioner also obtained a Rule in the nature of certiorari commanding the Respondents to certify and transmit

to this Court all records and proceedings relating to the issue of the impugned orders to render conscionable justice by quashing or setting aside the

impugned orders.

2. The Petitioner entered the Indian Civil Service in the year 1934 and the services of the Petitioner were allotted to what has been described as

the Assam cadre of the Indian Civil Service. The Petitioner was allotted to the State of Assam. The Petitioner held the post of Under-Secretary to

the Government of Assam during the years 1938 to 1940. In the year 1940 the Petitioner''s services were placed at the disposal of the

Government of India. The Petitioner was an Under-Secretary in the Home Department. In the year 1943 the Petitioner became the Deputy

Secretary to the Government of India in the Home Department. In the year 1947 the services of the Petitioner were requisitioned by the

Government of Assam. The Petitioner was released by the Government of India. The Petitioner became Development Commissioner and

thereafter Additional Chief Secretary and Chief Secretary to the Government of Assam.

3. In the year 1951 the Petitioner was again drafted into the services of the Government of India, and during the years 1951 to 1954 the Petitioner

served as Secretary, Union Public Service Commission. During the years 1955 to 1961 the Petitioner became Joint Secretary to the Government

of India in the Ministry of Transport and Communication. During those years the Petitioner led several deputations abroad. Between the month of

February 1961 and the month of July 1964 the Petitioner worked as Managing Director of the Central Warehousing Corporation in the Ministry of

Food, Government of India.

4. On July 29, 1964, the Petitioner was appointed Secretary in the Ministry of Social Welfare. The Petitioner alleges that the then Commerce

Minister Shri Manubhai Shah set up a committee under the chairmanship of the Petitioner though the Petitioner was not serving in the said Ministry

and Shri Manubhai Shah eulogised the Petitioner''s work as "wonderful and excellent". The Petitioner, alleges that he took up the Department of

Social Security and the Petitioner in addition to his duties of Secretary attended International Social and Security Conference and the Petitioner''s

work was appreciated by Mr. Wildmann, Secretary-General of the International Organization, who said that under the Petitioner''s chairmanship

the conference represented a step forward on the difficult road of social security development.

5. The Petitioner alleges that in spite of the Petitioner''s record of service the Petitioner received a letter dated June 20, 1966, from the Cabinet

Secretary where it was stated that it had been decided that the Petitioner should be asked either to revert to the Petitioner''s parent State or to

proceed on leave preparatory to retirement or to accept some post lower than that of Secretary to the Government. The Petitioner thereafter had

an interview with the Cabinet Secretary on June 23, 1966. The Petitioner made a written representation to the Cabinet Secretary. In that written

representation the Petitioner stated that, if it was decided not to retain the Petitioner''s service as Secretary, the Petitioner would request the

Government to consider the human element of the fact that having served all his life away from his home province he had not the opportunity to

build a house and had just started constructing a house in Calcutta and would take eight months to so construct and, therefore, he would be

grateful if he was allowed time to serve in that capacity for that period.

6. On July 23, 1966, the Petitioner addressed a letter to the Prime Minister of India. In that letter the Petitioner stated that the Petitioner''s work as

Secretary in the Ministry of Social Security was good and the Petitioner gave several instances which would speak of the Petitioner''s character of

work. The Petitioner stated that the Petitioner justified his appointment with complete adequacy, energy and initiative and that the Petitioner should

be allowed to continue in the service of the country. The Petitioner asked for a personal interview with the Prime Minister.

7. On September 7, 1966, the Cabinet Secretary wrote to the Petitioner that the Petitioner had submitted a representation to the Prime Minister

that the Petitioner had also been granted an interview by the Prime Minister on August 31, 1966. The Cabinet Secretary communicated that he

was directed to inform the Petitioner that after the oral and written representation in the matter, the Government had decided that the Petitioner''s

services might be placed at the disposal of the Petitioner''s parent State, namely Assam. The letter concluded by stating that if, however, the

Petitioner would like to proceed on leave preparatory to retirement, the Petitioner would be pleased to inform the Government.

8. The Petitioner alleges that the pay of the post of a Secretary to the Government of India is Rs. 4,000 per month, while the topmost post in the

Assam cadre has a salary of Rs. 3,000 per month. The Petitioner, therefore, alleges that if the Petitioner reverts to the State of Assam, the

Petitioner will suffer a financial loss of Rs. 1,000.

9. The Petitioner alleges that the Petitioner has a right to hold a post of Secretary in which the Petitioner was serving at the date of the order for a

further period of three years and, therefore, the reversion to the State of Assam would not only entail reduction in rank but would result in the loss

of pay and future prospect of advancement.

10. The Petitioner alleges that the alternative order of being asked to go on leave preparatory to retirement is penal in character and that the

Petitioner under Rule 56 of the Fundamental Rules is entitled as a member of the Indian Civil Service to remain in service for 35 years and that he

cannot be required to retire before the expiration of the period.

11. The Petitioner alleges that no charge of unsuitability or inefficiency has been formulated against the Petitioner and no charge under the Civil

Service Conduct Rules has been made against the Petitioner. The Petitioner alleges that the Petitioner carried out the directions of the Minister Shri

A.K. Sen. The further allegations of the Petitioner are that a few days after Shri A.K. Sen left the Ministry, Sm. M. Chandrasekhar told the

Petitioner that he was a party to the insult to which she was subjected by Shri Sen and now that Shri Sen was away she would see that the

Petitioner was removed from the Ministry of Social Security. The Petitioner in para. 34 of the petition alleges that the impugned order must have

been made at the instance of Sm. M. Chandrasekhar and not on the basis of a bona fide assessment of the Petitioner''s merit in work or for the

purpose of bona fide administrative requirements of the Government of India.

12. The Petitioner submits that the letter dated June 20, 1966, leaves no manner of doubt that the real reason in the impugned order requiring the

Petitioner to reverts to Assam is the covert insinuation contained in the letter, namely, that the Petitioner is not fully capable of meeting the new

challenge and that he should make room for another person. The Petitioner alleges that the statement in the letter dated June 20, 1966, that the

cases of officers occupying top level administrative posts had been examined was made behind the back of the Petitioner and results of the alleged

unilateral examination are not binding on the Petitioner. Therefore, the Petitioner alleges that the provisions of Article 311 of the Constitution and of

the Civil Service Conduct Rules have been violated and the Union Public Service Commission has not been consulted before making the order.

The Petitioner also challenges the order dated June 20, 1966, by which the Petitioner was asked to accept a post lower in rank than that of the

Secretary to the Government of India and the Petitioner impeaches that order as in excess of jurisdiction and mala fide in character. In para. 37 of

the instance of Sm. M. Chandrasekhar who had a personal grudge against the Petitioner during the time of the previous Minister because the

Petitioner carried out certain directions of the Minister superseding the orders of the Deputy Minister.

13. In para. 38 of the petition the Petitioner alleges that the orders dated June 20, 1966 and September 7, 1966, are in violation of the provisions

contained in Articles 311 and 320 of the Constitution, that the orders are in violation of principle of natural justice, that the Respondents acted on

extraneous consideration and that the orders are bad.

14. The Petitioner alleges that part of the cause of action for making the application arose within the jurisdiction of this Court inasmuch as the order

dated September 7, 1966, was received by the Petitioner at Calcutta within the jurisdiction of this Court on September 10, 1966, and the notice

demanding justice had been issued by the Petitioner''s Solicitors from their office within the jurisdiction of this Court.

15. There is an affidavit-in-opposition affirmed by Dattatraya Sridhar Joshi. In that affidavit it is alleged that the Petitioner qualified himself from the

Indian Civil Service in the year 1933 and was allotted to the then province of Assam and that the Petitioner joined the Assam cadre of the Indian

Civil Service. It is alleged that the Petitioner was called on deputation to the Government of India in the year 1951 and the Petitioner discharged his

duties in various capacities in the Government of India since then. The deponent denies that the Petitioner was confirmed in his appointment as

Secretary to the Ministry of Social Security. The deponent alleges that the performance of the Petitioner did not come to the standard, expected of

a Secretary to the Government of India and further that it is a prerogative of the Government to decide in what manner the services of a particular

employee would be utilised and to judge whether a particular employee continues to perform his duties well.

16. The deponents alleges that para. 7 of pt. II of the scheme for staffing senior administrative posts of and above the rank of the Deputy Secretary

under the Government of India, published under the Ministry of Home Affairs resolution No. F. 34(3)EO/57 dated October 17, 1967, in the

Gazette of India dated October 17, 1967, provides that the officers who are borrowed for appointments to the posts or equivalent to Joint

Secretary will similarly revert on the expiry of five years and it is also provided in the said Rule that in exceptional circumstances, however, where

the public interest so demands the tenure of an individual officer in the same posts or in other posts or class of posts may be extended or curtailed

with the concurrence of the lending authority. The deponent alleges that the Petitioner was appointed to the post of Joint Secretary of the

Government of India in the month of January 1955 and the Petitioner has held the post of Joint Secretary or posts equivalent to that of Joint

Secretary and Secretary for more than five years. It is denied in the affidavit-in-opposition that the Petitioner has a right to serve the Government of

India for a period of about three years more.

17. The deponent alleges that the Petitioner was appointed to the post of Secretary with effect from the forenoon of July 30, 1964, and the

appointment was notified as ''until further orders''. By letter dated March 6, 1965, the Petitioner was informed that the appointment was continued

with the approval of the Appointments Committee of the Cabinet. It is alleged that the appointment being ''until further orders'' is a clearly

officiating or temporary one and the Petitioner has no right to hold the post of a Secretary to the Government of India in a substantive capacity and

there was no substantive appointment of the Petitioner to the post of a Joint Secretary or a Secretary to the Government of India. It is alleged that

the Petitioner holds a lien on a substantive post in the Assam cadre and as will appear from expl. 4 to Rule 3 of the All India Service (Discipline &

Appeals) Rules, 1955, the reversion to a lower post of a member who is officiating in a higher post after trial in the higher post or for administrative

reasons does not amount to a reduction in rank within the meaning of the said Rule or otherwise. It is denied that there is any punishment or

reduction in rank. It is alleged that the reversion of the Petitioner to his parent cadre, even though it may involve a financial loss, can neither be

considered as punishment nor as reduction in rank. It is alleged that the Petitioner does not belong to the Central cadre and his reversion to his

parent cadre on which he holds lien does not amount to reduction in rank by reason of the allegation that he would suffer loss in his pay.

18. It is denied that it was necessary to give the Petitioner any reason for the order reverting the Petitioner to his parent cadre. It is also denied that

any question of affording reasonable opportunity to show cause arose. It is alleged that the Petitioner was only being asked to revert to his

substantive post on reversion from a higher post in which he was officiating and the application of the Civil Service Conduct Rules or the provisions

of Article 311 of the Constitution does not arise.

19. The deponent denies that the Respondent No. 3 had a personal grudge. It is denied that the Respondent No. 3 made complaints about the

Petitioner to the then Minister Shri Sen. It is denied that the Government acted mala fide or that the Government acted on extraneous

considerations.

20. There is an affidavit-in-reply affirmed by the Petitioner. In the affidavit-in-reply the Petitioner alleged that the Petitioner"s appointment as

Secretary was confirmed and that the Petitioner"s tenure is for a period of five years from the date of appointment in the month of July 1964 and,

therefore, the Petitioner is entitled to remain as Secretary upto the year 1969. The Petitioner alleges that a Secretary is kept on probation for a

period of six months and then he is confirmed and that the Petitioner was so confirmed. In the affidavit-in-reply the Petitioner alleges that expl. 4 to

Rule 3 of the All India Service (Discipline & Appeals) Rules, 1955, has no relevance. The Petitioner further alleges that the Petitioner"s work as

Secretary was outstanding and that the decision of the Government of India based on administrative reasons shows the mala fide and arbitrary

nature of the impugned orders.

21. Counsel on behalf of the Petitioner contended that the return furnished by Dattatraya Sridhar Joshi, Cabinet Secretary, by his affidavit affirmed

on January 3, 1967, is insufficient, because in his verification he alleges that statements made in paras. 4 to 11, 13 to 17(a), 18, 21 to 23, 25 and

26 are true to his information from records, but he has not identified and particularised those records. It is said that Rules 14 and 34 of the Rules in

regard to applications under Article 226 of the Constitution require the sources of information and particulars of records to be given. In my opinion

the verification gives the sources of information and also mentions what statements are based on record.

22. The main contentions of the Petitioner are three-fold. First, that the Petitioner has a right to the post of Secretary to the Government of India in

the Ministry of Social Welfare, secondly, that the reversion to the State of Assam is a reduction in rank, and thirdly, that the orders were made

mala fide. In order to appreciate the contentions of the Petitioner it is necessary to refer to certain rules on which reliance was placed. Counsel for

the Petitioner placed reliance on Fundamental Rules 9(19), 9(30), 9(30)(a), 9(22), 13 and 14. Fundamental Rules are rules made by the Secretary

of State in Council u/s 96B of the Government of India Act as it stood on May 27, 1930, and subsequently amended from time to time by the

Governor-General in Council in exercise of the powers conferred on him by Rules 33(2), 37, 42 and 44(D) of the Civil Services Classified

(Control & Appeal) Rules in respect of the personnel under his rule-making control. These Fundamental Rules are the rules applicable to members

of Services as contemplated under Article 309 of the Constitution.

23. Fundamental Rule 9(1) states that a Government servant officiates in a post when he performs the duties of a post on which another person

holds a lien. A local Government may, if it thinks fit, appoint Government servant to officiate in a vacant post on which no other Government

servant holds a lien. Fundamental Rule 9(30) states that a temporary post means a post carrying a definite rate of pay sanctioned for a limited time.

Fundamental Rule 9(30)(a) states that a tenure post means a permanent post which an individual Government servant may not hold for more than a

limited period. Fundamental Rule 9(22) states that a permanent post means ""a post carrying a definite rate of pay sanctioned without limit of time.

Fundamental Rule 9(13) states that lien means the title of a Government servant to hold substantively, either immediately or on the termination of a

period or periods of absence, a permanent post including tenure post to which he has been appointed substantively.

24. Counsel for the Petitioner contends relying on the Fundamental Rules that in the present case the Respondent cannot allege that the Petitioner

was officiating inasmuch as the Government has not stated who has a lien on the post that the Petitioner occupied and is alleged to have officiated.

In other words, it is said on behalf of the Petitioner that the Government of India without alleging that any person has a lien on the post of Secretary

in the Ministry of Social Welfare, Government of India, cannot contend that the Petitioner was officiating in that post. Secondly, it is contended that

the post of a Secretary in the Ministry of Social Welfare and Security was a new appointment inasmuch as the department was entirely new and

the Petitioner became its first Secretary and, therefore, the Petitioner could not be officiating in that post. Thirdly, it is said that the Petitioner could

not be described to be occupying a temporary post, because there is no evidence given by the Respondent that the post has been given for a

limited time. Fourthly, it is said that the definition in the Fundamental Rules of tenure post is that a Government servant can hold the tenure post for

a limited time, and in the present case it will also come within the definition of permanent post in the Fundamental Rules, because the post of

Secretary is sanctioned without limit of time. Finally, it is said that the Petitioner in the present case was confirmed as Secretary and, therefore, the

Petitioner''s appointment became permanent.

25. In aid of the Petitioner''s contention reliance was placed on the letters dated July 29, 1964, July 31, 1964 and March 6, 1965, which are

annexures to the affidavit-in-opposition. In the letter dated July 29, 1964, signed by the Secretary, Appointments Committee of the Cabinet, it is

stated that the Petitioner is to be Secretary for six months in the first instance. In the letter dated July 31, 1964, there is a notification that the

President is pleased to appoint Shri Das as Secretary, Department of Social Security, with effect from the forenoon of July 30, 1964, and until

further orders. In the letter dated March 6, 1965, signed by the Secretary, Appointments Committee of the Cabinet, it is stated that the

Appointments Committee of the Cabinet have approved the proposal to continue Shri D.C. Das, I.C.S., as Secretary, Department of Social

Security. On these three letters counsel on behalf of the Petitioner contends first that the appointment was approved for a period of six months and

it was immediately followed by memorandum that the appointment was until further orders and the memorandum dated March 6, 1965, shows that

the period of six months expired, and, therefore, the Petitioner was confirmed after probation. The words ''have approved'' in the letter dated

March 6, 1965, are construed by counsel for the Petitioner to have the meaning confirmed after probation.

26. Counsel for the Petitioner referred to the Maxwell Committee Report published in the year 1937 and relied on paras. 61, 64, 65, 67 and 69.

The Maxwell Committee Report came into existence in the wake of the Government of India Act, 1935. The 1935 Act provided the maximum

number of Ministers that acted as guide regarding the number of departments that would be needed in the ministerial fields and formed the basis of

the proposal in that Report. In paras. 61, 64, 65, 67 and 69 at pp. 23 to 26 of the Report it appears that the proposal was that there should be

definite tenures to be followed by periods away from the secretariat in the case of grades of Under-Secretary and Deputy Secretary. With regard

to Secretaries it was stated in the Report that the position of the Secretary was the administrative head of his department and he was the principal

officer on questions which would fall within his departmental province. It was examined in the Report that the issue laid between a system of fixed

tenures, with or without the possibility of extension, and a system of appointments held permanently subject to the ordinary superannuation limit

with effective provision for earlier retirement for those who ceased to discharge the duties of the post adequately. In para. 69 of the Maxwell

Committee Report it is stated that the system best calculated to conserve the advantages of the tenure system while gaining some of the advantages

of permanency is one for the appointment of Secretaries for 5 years with eligibility for reappointment. The Maxwell Committee Report states that

appointment for secretaryship will be for the full terms of 5 years. Counsel for the Petitioner relied on the Maxwell Committee Report in support of

two contentions. First, that the tenure of secretaryship is 5 years and secondly, that a person who had been appointed a Secretary was eligible for

reappointment.

27. The other document on which counsel for the Petitioner relied is the resolution No. F. 34(3)-E.O./57 of the Government of India, Ministry of

Home Affairs, bearing date October 17, 1957, and published in the Gazette of India on October 26, 1957. In pt. II of the said resolution which is

described as a Scheme Tenure Deputation is dealt with by two paras. Nos. 6 and 7. Paragraph 6(i) is as follows:

6. (i) The suitability of officers for appointment on tenure deputation shall be decided on the advice of Central Establishment Board.

Paragraph 7 is as follows:

7. (i) Officers who are borrowed for appointment to posts of or equivalent to Deputy Secretary will ordinarily revert to the parent State cadre or

service on the expiry of four years and officers who are borrowed for appointments to post of or equivalent to Joint Secretary and Secretary will

similarly revert on the expiry of a period of five years.

(ii) In exceptional circumstances, however, where the public interest so demands the tenure of an individual officer in the same post or any other

post or class of post may be extended or curtailed with the concurrence of the lending authority.

Counsel for the Petitioner contended that the period of tenure showed that the officer who had been borrowed for the post of Deputy Secretary

would ordinarily revert to the parent State cadre on the expiry of 4 years, and officers who had been borrowed for the post of Joint Secretary and

Secretary would similarly revert on the expiry of 5 years and, therefore, the Petitioner who had been borrowed would remain as Secretary for the

period of 5 years. It was contended on behalf of the Petitioner that if the tenure of the Petitioner was to be extended or curtailed it required the

concurrence of the lending authority, and in the present case there was no such concurrence and, therefore, the Petitioner was entitled to remain as

Secretary.

28. Counsel for the Petitioner relied on the decision reported in Parshotam Lal Dhingra Vs. Union of India (UOI), that the appointment to a

temporary post for a certain specified period also gives the servant so appointed a right to hold the post for the entire period of his tenure, and his

tenure cannot be put an end to during that period unless he is by way of punishment dismissed or removed from service. Counsel for the Petitioner

also relied on the observation appearing at p. 49 of the report that if the termination of service is sought to be founded on negligence, inefficiency or

other disqualification, then it is a punishment and the requirement of Article 311 must be complied with. Counsel for the Petitioner also relied on the

decision of Union of India v. Jeewan Ram AIR 1958 S.C. 904 (908) in support of the contention, that an order would amount to a penal order if it

withheld his right to the post for the period. Counsel for the Petitioner also placed reliance on the decision of the Supreme Court in The State of

Bombay Vs. F.A. Abraham, that if the order entailed loss of his seniority in his substantive rank by the stoppage or postponement of his future

chances of promotion, then the order would amount to penalty. In Abraham''s case it was said by the Supreme Court that the Government had the

right to consider the suitability of a person to hold a post. But in Abraham''s case, the enquiry was made after the order had been brought into

existence and, therefore, in Abraham''s case the enquiry could not have been the occasion for the reduction.

29. Mr. Solicitor-General, appearing for the Respondent, contended that the question in the forefront were whether the Petitioner had a right to

hold the post and, if so, whether he was reduced or removed and secondly, if he was not reduced or removed, whether the action that was taken

in the present case amounted to punishment or any stigma. The contentions advanced by Mr. Solicitor-General were that the Petitioner had no

right to hold the post of the Secretary and his position was that he came on a deputation from the Assam cadre, and a person on deputation had no

right to a post so long as the deputation was not converted to something else. In other words, a civil servant on deputation would be occupying a

temporary post outside his cadre, and outside his cadre he would be officiating. The other contention advanced by Mr. Solicitor-General was that

reduction must be in the substantive post in a given case and that in the present case the Petitioner had not substantive appointment to the post of a

Secretary in the post of a Secretary in the Ministry of Social Security and the Petitioner"s substantive appointment was in the Assam cadre and the

Petitioner had a lien in the Assam cadre and, therefore, the Petitioner on being asked to go back to the State of Assam, there was neither any

punishment nor any reduction in rank. It was also contended by Mr. Solicitor-General that the order did not amount to any stigma.

30. The All India Services Act, 1951, defines "All India Services" meaning the service known as Indian Administrative Service or the service

known as the Indian Police Service. Section 4 of the All India Services Act enacts that

all rules in force immediately before the commencement of the All India Services Act, 1951, and applicable to All India Service shall continue to be

in force and shall be deemed to be rules made under the Act.

Section 3 of the All India Services Act, 1951; contemplates that the Central Government may, after consultation with the Governments of the

States concerned, make rules for the regulation of recruitment and the conditions of service of persons appointed to All India Service. The Indian

Administrative Service (Recruitment) Rules, 1954, came into existence in exercise of the powers conferred by Sub-section (1) of Section 3 of the

All India Services Act, 1951. These Rules are called Indian Administrative Service (Recruitment) Rules, 1954. In Rule 3 it is stated that the service

shall consist, inter alia, of all members of the Indian Civil Service not permanently allotted to the judiciary.

31. The Indian Administrative Service (Cadre) Rules, 1954, came into existence in exercise of powers conferred by Sub-section (1) of Section 3

of the All India Services Act, 1951. The Indian Administrative Service (Cadre) Rules, 1954, speaks of constitution of cadres. In Rule 3 it is stated

that there shall be constituted for each State or group of States an Indian Administrative Service cadre. The cadre so constituted for a State or a

group of States is referred to as the State cadre or as the case may be a joint cadre. In Rule 6 of the Indian Administrative Service (Cadre) Rules,

1954, it is stated that a cadre officer may, with the concurrence of the State Government or the State Governments concerned and the Central

Government, be deputed for service under the Central Government or another State Government or under a body incorporated or not which is

wholly or substantially owned or controlled by the Government. It has to be noticed that the two cadres are the State cadre and the joint cadre.

There is no such thing as the Central cadre. Rule 6 of the Indian Administrative Service (Cadre) Rules, 1954, underwent change by a notification

No. 6/16/64-AIS(I) dated September 6, 1965, by which a cadre officer might be deputed for service under a municipal corporation or a local

body by the State Government on whose cadre he is borne or by the Central Government in concurrence with the State Government on whose

cadre he is borne and for service under an international organisation or a private body by the Central Government in consultation with the State

Government on whose cadre he is borne.

32. The Hand Book of Rules and Regulations for the All India Services, vol. II, 4th ed., corrected upto March 31, 1965, deals with Indian

Administrative Service (Fixation of Cadre Strength) Regulations are made in pursuance of Sub-rule (1) of Rule 4 of the Indian Administrative

Service (Cadre) Rules, 1954. It will appear that for the State of Assam there are 55 posts under the State Government and 22 senior posts under

the Central Government and the strength is shown as 77.

33. It is necessary also to refer to the Government of India Ministry of Home Affairs office memorandum No. F. 31 (21)-E.0/58 dated August 11,

1958, which deals with the procedure for the selection and appointment of officers to Secretariat posts of and above the rank of Under-

Secretaries to the Government of India and certain important non-Secretariat posts. This office memorandum is in the nature of executive

instructions. In those instructions it is stated that there shall be a Standing Committee of Cabinet to be designated as the Appointments Committee

of Cabinet and the Committee shall consist of the Prime Minister, the Minister for Home Affairs and the Minister or Ministers concerned with the

particular appointment in question. The Committee shall consider all recommendations and take decision in respect of the appointments specified in

the schedule to those instructions and decide all cases of disagreement relating to appointments between the Ministry concerned and the Union

Public Service Commission. The executive instructions also speaks of the Central Establishment Board in accordance with para. 4 of the scheme

published with the Ministry of Home Affairs resolution No. F. 34(3)-E.O/57 dated October 17, 1957. The Central Establishment Board shall

consist of six members including the Chairman. The Cabinet Secretary is the ex-officio Chairman and the Home Secretary is an ex-officio member.

The duty of the Central Establishment Board is, inter alia, to make recommendations for the selection and appointment to all posts of and above

the rank of Under-Secretary to the Government of India in the Secretariat except the post of Additional Secretary, Special Secretary and

Secretary to the Government of India.

34. Article 312 of the Constitution speaks of All India Services and. it is stated there that Parliament may by law provide for the creation of one or

more All India Service belonging to the Union and the States and subject to the other provisions of chap. I in pt. XIV of the Constitution regulate

the recruitment and conditions of service of persons appointed to any such service. It is also necessary to bear in mind Article 309 of the

Constitution in order to appreciate the true character and scope of rules which derive their force from the statute.

35. I have already referred to the All India Service Act, 1951, and Indian Administrative Service (Recruitment) Rules, 1954. Indian Administrative

Service (Pay) Rules, 1954, All India Service (Discipline and Appeals), 1954, are rules framed under the All India Services Act, 1951. In the

present case reliance is placed on the resolution of the Government of India Ministry of Home Affairs resolution No. 34(3)-E.O/57 of the

Government of the Ministry of Home Affairs dated October 17, 1957, published in the Gazette of India on October 26, 1957, in support of the

contention that the Petitioner is entitled to hold tenure post of Secretary to the Ministry of Social Services for a period of 5 years. Aid is also

drawn by the counsel for the Petitioner from the Maxwell Report where the observations are made to the effect that Secretary should be appointed

for 5 years with eligibility for reappointment. It is an admitted feature of the present case that the Petitioner belongs to the Assam cadre of the

Indian Civil Service. Assam cadre is a State cadre as contemplated by the Indian Administrative Service (Fixation of Cadre Strength) Regulations

under Sub-rule (1) of Rule 4 of the Indian Administrative Service (Cadre) Rules, 1954. The Indian Administrative Service (Cadre) Rules, 1954,

contemplated in Rule 6 that a cadre officer may, with the concurrence of the State Government or the State Government concerned and the

Central Government, be deputed for service under the Central Government or another State Government. The services of the Petitioner in the

present case were placed by the Assam Government at the disposal of the Government of India. In the year 1951 the Petitioner became

Secretary, Union Public Commission. From the month of January, 1955 upto the month of February 1961 the Petitioner was Joint Secretary to the

Government of India in the Ministry of Transport and Communication. Between the months of February and July 1964 the Petitioner served as

Managing Director of Central Warehouse Corporation in the Ministry of Food and Agriculture in the Government of India. Thereafter the

Petitioner became Secretary in the Ministry of Social Security which is called the Ministry of Social Welfare.

36. The three letters which are to be found in the annexure to the affidavit-in-opposition and which were written in the month of July 1964, and in

the month of March 1965 indicate first that though the letter dated July 29, 1964, stated that the Petitioner was to be Secretary in the department

of Social Security for six months in the first instance, the order of the President dated July 31, 1964, stated that the Petitioner was appointed as

Secretary from July 30, 1964, until further orders. The letter dated March 6, 1965, stated that the Appointments Committee of the Cabinet

approved the proposal to continue the Petitioner. None of these letters and memorandum indicates that the Petitioner was appointed for any

specific period. Counsel for the Petitioner contended that the word ''approved'' occurring in the letter dated March 6, 1965, would mean

confirmed. Reliance was placed on the decision reported in Commissioners for the Port of Calcutta and Another Vs. Asit Ranjan Majumder and

Others, where it was said that the word ''confirmed'' was equivalent to the word ''approved''. In that case reference was made to the decision in

The Queen v. Mayor, Aldermen and Citizen of York, Dock Labour Board (1853) 1 El.B.I. 588 : 118 E.R. 558 where it was said that word

''confirmed'' was a word the natural meaning of which was more than endorsed or verified and that it was equivalent to ''approved''. Extracting that

observation counsel for the Petitioner contended that the word ''approved'' occurring in the letter dated March 6, 1965, in the present case would

indicate that the Petitioner was in the first instance on probation for six months and was thereafter confirmed. I am unable to accept either of the

contentions. The letters do not state that the Petitioner was appointed on probation or for any particular period and the letters do not show that any

appointment of the Petitioner was confirmed. The Petitioner in the present case as will appear from Indian Administrative Service (Cadre) Rules,

1954, and Rule 6 thereof went on deputation. All India Service Cadre Rules contemplate that the All ""India Services could be utilised by a State

and Centre. Every member of the All India Service is a member of a cadre which may be a State cadre or a joint cadre. In the present case the

Petitioner had a substantive post with a lien in the Assam cadre. A person who is brought on deputation is either occupying a temporary post

outside his cadre or he is officiating in another post outside his cadre. The Petitioner in the present case while on deputation from the State Cadre

went outside his cadre to occupy a temporary post to which he was appointed. The All India Services Act, 1951, indicates that Fundamental

Rules are to continue. The Fundamental Rules indicate that there may be permanent posts and there may be temporary posts. The Indian

Administrative Service Rules, 1954, show that the Petitioner belongs to the Indian Civil Service which is one of the constituents of the Indian

Administrative Service. The Indian Administrative Service (Cadre) Rules, 1954, deal with deputation of cadre officers in Rule 6 thereof. It will

appear that under the deputation Rules no period is fixed. In the present case there is no evidence to show that the deputation was for any fixed

period.

37. Fundamental Rules speak of permanent post, but it does not follow that when a person goes on deputation he is substantively appointed to that

post or that he has a right to that post by reason of his being taken on deputation to occupy the post. An important feature in this case is that in the

affidavit-in-opposition it is alleged in para. 15 that the Petitioner holds a lien on substantive post in the Assam cadre and that statement in para. 15

of the affidavit-in-opposition is not denied in the affidavit-in-reply affirmed by the Petitioner on January 24, 1967. What the Petitioner contends is

that if the Petitioner is reverted to the State cadre this will amount to a reduction in rank, and also it will amount to loss of pay, loss of status, loss of

seniority and loss of future prospect. Fundamental Rule 9(13) defines that Hen means the title of a Government servant to hold Substantively, either

immediately or on the termination of a period or periods of absence, a permanent post, including a tenure post to which he has been appointed

substantively. The definition of "lien" indicates two things. First, that a person has a lien on his substantive post and secondly, lien would entitle a

person holding a lien to hold a substantive post immediately or on termination of his absence.

38. In the present case the fact that the Petitioner has a lien on his substantive post in the Assam cadre indicates that his substantive post is in the

Assam cadre and secondly, that because of the lien on that substantive post it is his permanent post. Fundamental Rule 14 will show that when a

Government servant is appointed in a substantive capacity to a tenure post or to a permanent post outside the cadre on which he is borne or

provisionally to a post on which another Government servant would hold a lien, the lien of the Government servant on a permanent post which he

holds substantively is suspended. In other words, Fundamental Rule 14 means that the lien which a Government servant has on the substantive post

which he holds is destroyed when he is appointed substantively to another post. The existence of a lien is of crucial importance in ascertaining

whether a Government servant is appointed substantively to a post because a person cannot have lien on two posts at the same time. In the present

case the fact that the Petitioner has a lien on his substantive post in the Assam cadre indicates that the post in the Assam cadre is a substantive post

which the Petitioner holds. In this connection reference may be made to the decision in Dhingra"s case Supra, p. 42 that a substantive appointment

to a permanent post in public service confers normally on the servant so appointed a substantive right to the post and he becomes entitled to hold a

lien on the post. The lien is the title of the Government servant to hold Substantively a permanent post. The Government cannot terminate that

substantive appointment unless it is entitled to do so by virtue of a special term of contract of employment or by the rules governing the conditions

of service. In the present case the Government has not interfered with the substantive appointment that the Petitioner holds in the Assam cadre.

39. The next question is whether the Petitioner was appointed substantively to the post of Secretary in the Ministry of Social Security. I have

already indicated that the letters and the memorandum do not show that the Petitioner was appointed for any fixed period. In the year 1964 the

Petitioner was appointed until further orders. In the year 1965 there was the approval to continue. As will appear from the letter dated July 30,

1964, the Petitioner was appointed until further orders and the approval of his continuation in that appointment is embraced within the words ''until

further orders'' occurring in the letter dated July 30, 1964. The approval does not widen the appointment nor does approval confer on the

appointment any element of permanence.

40. The reliance that was placed on behalf of the Petitioner on October 17, 1957, resolution and Clause 6 and 7 thereof was in support of the

contention that the appointment of the Petitioner as Secretary was for the fixed period of five years. The October 17, 1957, resolution which was

published in the Gazette of India on October 26, 1957, is described as a scheme for senior administrative posts of and above the rank of Deputy

Secretary to the Government of India. In pt. I it is stated that the scheme is intended to provide for systematic arrangement for manning senior

administrative posts at the Centre of and above the rank of Deputy Secretary. The first question is whether the scheme has any statutory force or

not. It is said that the resolution of the Government of India which is published in the Gazette derives its authority from the source, namely the

Government of India, and a tenure post is contemplated in that scheme and inasmuch as the Petitioner was borrowed for appointment to posts of

or equivalent to Joint Secretary and Secretary, the appointment was for a period of five years. Mr. Solicitor-General relied on the unreported

decision of the Supreme Court in J.N. Saksena v. The State of Madhya Pradesh (1967) 2 S.C.A. 365 where the Supreme Court considered a

memorandum published by the Government of Madhya Pradesh. The Supreme Court dealt with the question as to whether the memorandum in the

Madhya Pradesh case amounted to rules under Article 309 of the Constitution. In the Madhya Pradesh case the memorandum was that the State

Government decided that the age of retirement of Government servants should be 58 years subject to certain exceptions mentioned therein. In the

Madhya Pradesh case the memorandum was not published in the Gazette. In the present case the scheme was published in the Gazette. The

publication in the Gazette does not in my opinion decide the question as to whether it is a rule under Article 309 of the Constitution, In order to be

a rule under Article 309 of the Constitution it has to be an enactment or a rule under any enactment contemplated by Article 309 of the

Constitution. The Supreme Court in the Madhya Pradesh case Supra said that the memorandum in that case was an executive decision of the State

Government and was not a rule under Article 309. One of the tests that the Supreme Court applied was that the memorandum was not brought

into existence by amendment of Fundamental Rules.

41. In the present case the resolution of 1957 as its object shows is enacted to provide for systematic arrangement for manning senior

administrative posts. Mr. Solicitor-General contended first that the resolutions did not deal with conditions of service; secondly, that the resolution

was a code of conduct; thirdly, that the resolution was not law; and fourthly, that the resolution did not confer any right on the Petitioner. The

resolution is manifestly not a rule under Article 309 of the Constitution. The resolution is in the nature of executive instructions to ensure systematic

arrangement. The resolution is intended to provide a pattern of conduct so that there is a system as opposed to haphazard arrangement. In Clause

5 of the resolution it will appear that appointment of individual officers from any of the sources mentioned to posts covered by the scheme shall be

made on the advice of the Central Establishment Board and with the approval of the Appointments Committee in the Cabinet. The approval of the

Central Establishment Board indicates that there is the Cabinet approval to these appointments. The scheme in Rule 5 and in Rule 6 states that

appointments will be made on the advice of Central Establishment Board and suitability of officers would be decided on the advice of the Central

Establishment Board. In Rule 7 of the scheme it is stated that officers who are borrowed for appointment to the post of Deputy Secretary will

ordinarily revert to the parent State cadre on the expiry of four years and officers who are borrowed for appointment to the post of Joint Secretary

and Secretary will'' similarly revert on the expiry of a period of five years. The word ''ordinarily'' in Rule 7 of the scheme indicates first that

ordinarily there is reversion and secondly that there is no rigid rule as to the period but that it is flexible. This becomes clearer because in Sub-rule

(2) of Rule 7 of the scheme it appears that in exceptional circumstances there can be extension or curtailment of the period. If the period of tenure

contemplated in Rule 7 of the scheme were rigid and inflexible it could not speak of extension or curtailment, because that would be in direct

conflict with the earlier part of the rule. The harmonious construction, therefore, is that the word "ordinarily" occurring in Sub-rule (1) of Rule 7 of

the scheme shows that the borrowing from the State by the Centre for purposes of deputation will be ordinarily for the periods mentioned therein.

Further, it appears that the rule in the scheme shows that the ordinary or normal course contemplated is reversion and in exceptional circumstances

that there can be an extension or a curtailment. It is true that extension or curtailment must be with the concurrence of the lending authority.

42. In the present case, if the appointment is not to a substantive post or to a permanent post, there is no question of reduction. It appears that the

lending State and the borrowing Centre enters into an arrangement in regard to deputation of such persons. The contention on behalf of the

Petitioner was that it would not be open to the Government to club together the word of Joint Secretary and Secretary but that each post would

have a period of five years. The rule contemplates that a Government servant is initially brought in as a Deputy Secretary or he may be brought in

as a Joint Secretary or he may be brought in straightway as a Secretary. If after a person has been brought in as Deputy Secretary he is promoted

to the post of a Joint Secretary after some time and he is thereafter promoted to the post of, a Secretary according to these rules, the person so

brought in will ordinarily revert on the expiry of four years if he was brought in as a Deputy Secretary or on the expiry of five years if he was

brought in as a Joint Secretary; or Secretary. The period of four years or five years, as the case may be, has to be counted with reference to the

level at which the Government servant is initially brought by borrowing and that will be inclusive of any promotion, because if within five years he is

promoted it is to be reckoned from the initial stage at which he is borrowed. The contention on behalf of the Petitioner that it would be five years in

the case of Joint Secretary or Secretary, as the case may be, was founded on the Statement of Law in Maxwell on the Interpretation of. Statutes,

11th ed., that the word "and" occurring in Rule 7(1) in collusion of the words "Joint Secretary and Secretary" should be read as "or". In Maxwell

on Statutes at pp. 229 and 230 it is stated that to carry out the intention of the Legislature, it is occasionally found necessary to read the

conjunctions "or" and "and" one for the other. The Disabled Soldiers Act, 1601, in speaking of property to be employed for the maintenance of

"sick and maimed soldiers" referred to soldiers who were either the one "or" the other, and not only to those who were both. In the present case

to read the word ''and'' and ''or'' would be to supply certain other words to the rule, namely, ''as the case may be''. Further, if a Government

servant who is brought to hold the post is promoted from one post to the other, then, as I have already indicated it will be reckoned from the initial

stage at which he is brought. Further, Rule 7 in the scheme contemplates extension or curtailment of the period by concurrence of the lending

authority and of the borrowing authorities. Such concurrence, in my opinion, annihilates the concept of any right of a Government servant to hold

the post for a particular fixed period, because if any Government servant has any personal right it cannot depend on the agreement of the lending

and borrowing authorities.

43. The contention on behalf of the Petitioner that the appointment in the year 1964 to the post of Secretary in the Ministry of Social Security is a

tenure appointment for five years is based on the assumption that the Petitioner is appointed to the substantive post of Secretary in the Ministry of

Social Security. As I have already indicated that if he was already appointed substantively to that post, his lien to the Assam cadre would have

been destroyed. The lien of the Petitioner in the Assam cadre survives and is admitted to be so on the affidavit evidence. In the present case, the

Petitioner came on deputation holding different posts at different periods. The idea of deputation service is that the borrowing authorities utilise the

services of Government servants from the State cadre for the purpose of manning different posts at different times. The fact that the Petitioner was

Joint Secretary for the period of more than four years shows that he did not ordinarily revert to the parent State cadre which he would have done

so if the rules were inflexible and rigid. This elasticity of the rules is necessary for systematic arrangements as opposed to haphazard administration.

The tenure deputation is contemplated in the scheme for the purpose of continuity in administrative arrangements. The resolution of October 17,

1957, which embodies the scheme, does not in my opinion amount to a rule under Article 309 and it does not confer any legal right on a person to

hold a post. It is not to be lost sight of that mandamus means enforcement of a legal duty. The right is derived from Statute. If rules do not derive

force from Statute provisions which are brought into existence under the scheme cannot be enforced by way of mandamus.

44. It is necessary at this stage to refer to explanation to a rule which was relied on by the Government. That is expl. (4) to Rule 3 occurring in All

India Service (Discipline and Appeals) Rules, 1955. Rule 3 states that penalties may for good and sufficient reasons be-imposed on a member of

the Service. Explanation (4) to Rule 3 is that the reversion to a lower post of a member of the Service, who is officiating in higher post after a trial

in the higher post or for administrative reasons (such as the return of the permanent incumbent from leave or deputation, availability of a more

suitable officer, and the like), does not amount to reduction in rank within the meaning of this rule. In the present case, as I have already indicated,

the Petitioner came on deputation from the State cadre post and he was strictly not officiating in a higher post. The Petitioner was really occupying

the services of the Union in a temporary capacity and for no specified period. He was on deputation and a person who would have a more

precarious position than one who would be officiating for the obvious reason that the person could be called back by the State to hold the

substantive post that he occupied. Suitability of unsuitability of a person is essentially for the Government to decide. Sending the Petitioner to his

own cadre is not reduction and the reason is that the Petitioner is going to the substantive post that he holds. In order to constitute reduction there

must be reduction in the substantive post and loss must occur in the substantive post that the Government servant holds. Loss of remuneration is

not violative of Article 311 of the Constitution when a Government servant goes back to his substantive post.

45. In this connection reference may be made to P.L. Dhingra v. Union of India Supra, p. 49 and the observation that if the Government servant

has right to a particular rank, then the very reduction from that rank will operate as a penalty, and if however he has no right to the particular rank,

his reduction from a officiating higher rank to his substantive lower rank will not ordinarily be a punishment. The Supreme Court, however, said that

the mere fact that the servant has no title to the post or the rank and the Government has by contract express or implied or under the rules the right

to reduce to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstance be a

punishment. The test for determining whether in such cases it is or is not by way of punishment is to find out if the order for reduction also visits the

servant with any penal consequences. If the order entails or provides for the forfeiture of his pay or allowance or the loss of his seniority in his

substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that both in form the

Government had purported to exercise its right to terminate the employment or to reduce the service to a lower rank under the terms of the

contract of employment or under the rules and in truth and reality the Government has terminated the employment as and by way of penalty. In the

present case, as I have already indicated, the Petitioner did not have a right to hold the position of Secretary and, therefore, there is no question of

reduction. The reversion of the Petitioner to the State of Assam does not constitute reduction because the Petitioner is reverting to his substantive

post and not losing the seniority in the substantive post nor does the Petitioner suffer any loss in his salary in the substantive post or his future

chances of promotion in that substantive rank.

46. The Supreme Court in the case of State of Bombay v. Abraham Supra says, that a person officiating in a post has no right to hold it for all

times. He may have given officiating post because the permanent incumbent was not available or for some other reason. The Supreme Court says

that it is an implied term of the officiating appointment that if he is found unsuitable he would have to go back. It is not, therefore, a reduction in

rank. The Supreme Court also says that the Government has a right to consider suitability to the post to which he had been officiating.

In the decision in Divisional Personnel Officer, Southern Railway Vs. S. Raghavendrachar, the Supreme Court said that mere deprivation of higher

emoluments, however, in consequence of an order of reversion could not by itself satisfy that test which must include such other consequences as

forfeiture of substantive pay and Joss of seniority. The case of Shri Madhav Laxman Vaikunthe Vs. The State of Mysore, was referred to by the

Supreme Court where Vaikunthe''s reversion to his original post was held to be in violation of his constitutional guarantee, because the chances of

promotion were irrevocably barred for a period of three years. In Divisional Personnel Officer, Southern Railway Vs. S. Raghavendrachar, the

Supreme Court restated that the reversion of a Government servant from an officiating post to a substantive post would not by itself constitute a

reduction in rank within the meaning of Article 311 of the Constitution.

47. The recent decision of the Supreme Court in J.N. Saksena v. The State of Madhya Pradesh Supra is that an order requiring a Government

servant to retire compulsorily will not amount to a stigma if there are no express words in the order itself which would throw any stigma on the

Government servant. The Supreme Court said that if the order of compulsory retirement before the age of superannuation contained no words of

stigma it could not be held to be a removal requiring action under Article 311. In the present case it was contended that the Petitioner was being

asked to retire before the Petitioner served 35 years of service and, therefore, the order was bad. The order dated June 20, 1966, was that it had

been decided that the Petitioner should be asked either to revert to the parent State or to proceed on leave preparatory to retirement or to accept

some post lower than that of Secretary. The Cabinet Secretary who wrote the letter asked the Petitioner as to what the Petitioner proposed to do.

The letter dated June 20, 1966, was followed by the letter dated September 7, 1966, which stated that the Government had decided that the

services of the Petitioner might be placed at the disposal of the parent State, namely Assam. The author of the letter dated September 7, 1966,

asked the Petitioner whether the Petitioner would like to proceed on leave preparatory to retirement. These two letters show that the letter dated

June 20, 1966, is not an effective order at all because the Petitioner was asked as to what the Petitioner would do. Counsel for the Petitioner

placed emphasis on the word ''decided'' occurring in the letter dated June 20, 1966. All that the letter indicated was the Petitioner was asked

whether he would go on leave preparatory to retirement. But it should be stated here that the Government had no right to ask the Petitioner to go

on leave preparatory to retirement before the Petitioner had his 35 years of service. If the letter dated June 20, 1966, stood by itself, the Petitioner

could impeach that part of the letter which would require the Petitioner to go on leave preparatory to retirement. The letter dated June 20, 1966,

was superseded by, the letter dated September 7, 1966. In the letter dated September 7, 1966, the Petitioner was asked to revert to the State

cadre. The Petitioner was asked whether the Petitioner would go on leave preparatory to retirement, but there was no order to that effect; and if

the Government wanted the Petitioner to retire earlier than 35 years, the Government had not the right to do so. The Government did not contend

in the present case that the Petitioner would be asked to retire. The only contention on behalf of the Government was that the Petitioner was asked

to revert to the State cadre and it was impeached by the Petitioner as reduction in rank which caused loss of pay, loss of status, loss of seniority

and loss of future prospect.

48. Counsel on behalf of the Petitioner next contended that the order dated September 7, 1966, would amount to discrimination. It is pointed out

that discrimination was not one of the grounds urged in the petition and, therefore, it was not open to the Petitioner to contend so. Counsel for the

Petitioner thereafter did not press that point. It must be stated that counsel for the Petitioner wanted to contend that points of law could be argued

if facts were alleged and relied on the decision in Mahananda Dutt and Co. P. Ltd. v. Umacharan Law (1964) 68 C.W.N. 179 and Eastern

Railway Employees'' Congress Vs. General Manager, Eastern Railway and Others, in support of that contention. In view of the fact that the

Petitioner did not contend any ground of discrimination and did not allege facts to substantiate the plea, it was not open to the Petitioner to contend

that there was discrimination.

49. Counsel for the Petitioner laid emphasis on the decision in P.C. Wadhwa Vs. Union of India (UOI) and Another, . In Wadhwa''s case the

Appellant, a member of the Indian Police Service, held a substantive rank of Assistant Superintendent of Police and he was permitted to officiate

as Superintendent of Police, and thereafter he was posted as Additional Superintendent of Police. After he had earned one increment in that post

he was charged with a charge-sheet and was reverted to his substantive rank of Assistant Superintendent of Police, the grounds suggested for

reversion being unsatisfactory conduct. The order entailed loss of pay as well as loss of seniority and postponement of future chances of

promotion. The majority view of the Supreme Court was that a matter of this kind had to be looked at from the point of view of substance rather

than of form and what had to be considered was the effect of all the relevant factors, pre- sent therein, and if on a consideration of those factors

the conclusion was that the reduction was by way of punishment involving penal consequence, even though the Government had a right to pass the

order of reduction, the provisions of Article 311 of the Constitution would be attracted and the officer must be given a reasonable opportunity of

showing cause. In Wadhwa''s case Supra the explanation to Rule 3 in the All India Service (Discipline and Appeals) Rules, 1955, was referred to.

In that the explanation is that when a person reverts to his substantive post after having officiated in a higher post, there is no reduction. In

Wadhwa''s case Supra the Supreme Court found as a fact that the reversion was by way of punishment and that the Government servant lost his

seniority and future chances of promotion and prospects of pay. Counsel for the Petitioner contended that all the relevant factors in the present

case would indicate that the Petitioner was being asked to go to the State of Assam not merely on the ground that the deputation was at an end,

but for other reasons that the Petitioner alleged, namely, that the Deputy Minister Sm. M, Chandrasekhar bore personal grudge against the

Petitioner and the order in the present case was mala fide. The Deputy Minister Sm. M. Chandrasekhar affirmed an affidavit on January 4, 1967.

In that affidavit she denied that she was subjected to any insult by the Minister of Social Security or that there was any occasion for the same. She

denied that she bore any personal grudge against the Petitioner. She denied that she made any complaint about the Petitioner to the Minister or that

the Minister found the same unjustified. An application was made for an order that Sm. M. Chandrasekhar do submit to cross-examination on her

affidavit. Counsel for the Petitioner relied on the decisions in Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and

Others, , Ujjam Bai v. State of M.P. AIR 1962 S.C. 1621 and Barium Chemicals Ltd. v. Company Law Board AIR 1967 S.C. 319 and the

decision in Union of India (UOI) Vs. Santi Kumar Banerjee and Others, and the decision in R. v. Stokesley (Yorks) Justices (1956) 1 A.E.R. 563

in support of the contention that there could be cross-examination of the deponents as to affidavits.

50. In the present case the Petitioner alleged that the Respondent Sm. M. Chandrasekhar in her affidavit stated in para. 5 that the orders were

passed by appropriate authorities for bona fide administrative reasons and denied that the orders were made mala fide. Paragraph 5 of the affidavit

of Sm. M. Chandrasekhar is verified as true to her knowledge. In the affidavit-in-opposition the deponent Joshi in para. 17(b) stated that the

orders were passed for bona fide administrative reasons. Paragraph 17(b) of the affidavit-in-opposition is verified as true to information from the

Respondent Sm. M. Chandrasekhar. In para. 19 of the affidavit-in-opposition the deponent Joshi states that the allegations in para. 37 are denied

and it is also denied that Sm. M. Chandrasekhar had any personal grudge. Paragraph 19 of the affidavit-in-opposition is also verified as true to

information received from Sm. M. Chandrasekhar.

51. On the affidavits counsel for the Petitioner contended first that Joshi in the affidavit-in-opposition did not allege that his information about

passing of orders was derived from records but stated that the information about passing of orders was derived from Sm. M. Chandrasekhar and

that would establish that Sm. M. Chandrasekhar was not only in knowledge of the passing of the order but was the source of information of the

passing of the orders. Secondly, it was said that the allegations in para. 37 of the petition that the order had been made at the instance of Sm. M.

Chandrasekhar had not been denied in the affidavit of Sm. M. Chandrasekhar. In para. 6 of the affidavit of Sm. M. Chandrasekhar she denied the

allegations in para. 37. She denied that she made any complaint about the Petitioner to the Minister or that she had any personal grudge.

52. Counsel for the Petitioner referred to the Central Secretariat Manual of Notes and Procedure, 1963, published by the Ministry of Education

and relied on the introduction at p. 10 which states that the executive power is exercised by Council of Ministers with the Prime Minister at its

head. The reason why counsel for the Petitioner relied on this statement in the Government publication is that Sm. M. Chandrasekhar had the right

to be present at the Cabinet. It was also said that at the relevant time of the passing of the orders, namely, in the months of June to September

1966, the Deputy Minister Sm. M. Chandrasekhar was the only person to be consulted. Counsel for the Petitioner relied on the decision in

Ramjilal v. The State of Punjab 68 Pun.L.R. 345 (359) that the Government acts through human agencies and in the matter whether a particular

action of the Government is mala fide or not, it is the conduct of such agencies whose duty it is to lead up to such action that has to be considered.

It was said that in the present case Sm. M. Chandrasekhar, the Deputy Minister of the Ministry of Social Security, was only the person who could

be consulted and was consulted and her action was the action of the Government.

53. It will appear from the affidavit-in-opposition that the deponent Dattatraya Shridhar Joshi, Cabinet Secretary, in para. 17(a) of the affidavit-in-

opposition stated that the Petitioner was only being asked to revert to his substantive post on reversion from a higher post in which he was

officiating and, therefore, there was no question of application of Article 311 of the Constitution. The deponent further denied in para. 17(a) that

the order was passed not on bona fide assessment of the Petitioner''s merit in work or for bona fide administrative reasons of the Government of

India. The allegations in para. 17(a) of the affidavit-in-opposition are verified as true to information from records. The allegation in para. 17(b) of

the affidavit-in-opposition that the orders were passed for bona fide reasons is Verified as true to information received from Sm. M.

Chandrasekhar. It will appear that the affidavit evidence is that, the Petitioner''s allegations are that the order was passed at the instance of Sm. M.

Chandrasekhar and that she bore grudge against the Petitioner. The affidavit evidence on behalf of the Respondents is that Sm. M. Chandrasekhar

did not bear any grudge against the Petitioner and that the orders were passed for bona fide and administrative reasons. The attempt to have the

oral evidence of Sm. M. Chandrasekhar was in aid of the contention that it was necessary to test the veracity of the deponent Sm. M.

Chandrasekhar. It is true that sometimes Court has allowed oral evidence to be led on certain matters. It will not be correct to say that in an

application under Article 226 of the Constitution whenever there is any affidavit evidence an opportunity can be asked for to have that affidavit

evidence tested by viva voce evidence as well. Ordinarily applications under Article 226 of the Constitution are determined on affidavit evidence. If

there are disputed questions of facts, Courts usually do not decide disputed facts. Sometimes Courts have passed orders for some disputed facts

to be gone on evidence. No hard and fast rule can be laid down. It is a matter for discretion of the Court in the facts and circumstances of each

case.

54. In the present case there are definite averments in the affidavit-in-opposition that the orders were passed for bona fide administrative reasons.

There is no allegation in the petition that the Respondent Sm. M. Chandrasekhar attended the meeting. It would not be correct to allow the

Petitioner to enlarge the allegations in the petition by asking the Respondent Sm. M. Chandrasekhar whether she attended the Cabinet meeting or

not, because no such allegation has been made in the petition. The allegations in the petition about Sm. M. Chandrasekhar bearing grudge against

the Petitioner are denied. There is no allegation in the petition that the Respondent Sm. M. Chandrasekhar made any complaint to the Prime

Minister. There is no allegation that the Cabinet did not apply its mind to the facts and circumstances of the case. There is no allegation that the

Cabinet abrogated its power of judgment and acted at the behest of Sm. M. Chandrasekhar. These are the matters which are intended to be

introduced by oral evidence, On the contrary, the affidavit evidence is that the Petitioner made a representation before the Prime Minister. The

Petitioner was allowed the opportunity to represent the case before the Prime Minister. It is not alleged that the Prime Minister showed any bias or

influence as a result of any conversation or discussion with the Deputy Minister. There is not a word in the petition that the representation with the

Prime Minister deprived the Petitioner of any opportunity to represent what the Petitioner wished to represent. To accede to the contention of the

Petitioner that the Deputy Minister Sm. M. Chandrasekhar was present at the Cabinet meeting would be to allow the Petitioner to travel beyond

facts alleged as also facts proved. There is no plea that Sm. M. Chandrasekhar was present at the meeting. There is no proof that she was present

at the Cabinet meeting. Mr. Solicitor-General rightly contended that if such allegations had been made that Sm. M. Chandrasekhar was present at

the Cabinet meeting the Respondent would have given positive evidence that she was not present.

55. The verification of the affidavits-in-opposition is based on records and on information from the Deputy Minister. The denial of grudge is made

by the Deputy Minister. The passing of order is based on records which ultimately came to be known to the deponents who affirmed affidavits in

opposition.

56. In this connection reference may be made to the decision in Barium Chemicals Ltd. v. Company Law Board Supra. In that case a contention

was advanced that the former Finance Minister must have been instrumental in having an order u/s 237(B) of the Companies Act made by the

Chairman of the Company Law Board. The order in that case was of appointment of four persons as inspectors for investigating the affairs of

Barium Chemicals Ltd. The contention was that the order was really passed at the instance of Shri Krishnamachari who was the then Finance

Minister. It was said that opportunity was not given to cross-examine Shri Krishnamachari. The Supreme Court says that the normal rule in an

application under Article 226 is to decide disputed questions on the basis of affidavits and that it is within the discretion of the High Court to allow

a person who has sworn before him to be cross-examined or not to permit it. The High Court exercised the discretion and refused permission. The

Supreme Court did not interfere with the exercise of that discretion. In the present case there are no allegations that Sm. M. Chandrasekhar was

present at the Cabinet meeting and that she dictated in making the order. It would be incorrect to allow the Petitioner any opportunity of traveling

beyond the pleadings. Allegations of grudge are made and denied.

57. The Court has allowed viva, voce evidence where determination of any disputed question of fact would be relevant as happened in the case of

Union of India v. Santi Kumar Banerjee Supra. In that application the Petitioner stated that he was promoted to the rank of ticket collector and he

was holding the post of a ticket collector. The Petitioner alleged that there was an examination and it was not held in accordance with the rules.

The Petitioner also alleged that there was illegal amalgamation of two cadres of ticket collectors and travelling ticket examiners. In the affidavit

evidence it appeared that reservation had to be made out of ten vacancies and the vacancies reserved for the reserved communities would be

included within the number of 32 posts to be filled up and the total number of candidates called would be 128. Whether the candidates called were

128 or 137 that becomes a matter of importance on the affidavits as they stood. It was in aid of that disputed fact that the Assistant Personnel

Officer was called as a witness on behalf of the Railways.

58. Again in the case of Barium Chemicals Supra the Supreme Court points out that the Court has to find out on facts as to whether a prima facie

case of mala fide has been made or not and, if the Court finds that it can do so without cross-examination, it is not compelled to permit cross-

examination. Where it is not possible for the Court to arrive at a definite conclusion on account of there being affidavits containing allegations and

counter-allegations, the Courts have permitted viva voce examination of witnesses. The Court is also to ascertain whether any useful purpose

would be served by allowing viva voce evidence. In the present case the Petitioner is under the impression that the Deputy Minister Sm. M.

Chandrasekhar bore grudge against him. She has denied the allegations. The former Minister in the department of Social Security left the Ministry

early in the year 1966. Mr. Solicitor-General submitted that the orders came to be passed in the middle of the year 1966 or shortly thereafter, and

that the orders in the present case, as it would appear from the affidavit evidence of the Cabinet Secretary, were made for bona fide administrative

reasons. The affidavit evidence of the Cabinet Secretary is that the orders were passed bona fide for administrative reasons. The verification of the

affidavits is that allegations are true and based on record. The verification which is based on information from Sm. M. Chandrasekhar is referable

to allegations of grudge which are denied by her. Sm. Chandrasekhar did not attend the Cabinet meeting. The order dated June 20, 1966, was

superseded by the order dated September 7, 1966. The September 7 order was passed after the Petitioner made representations to the Prime

Minister. There is no pleading and there is no proof that the order was made on extraneous consideration. It has not been shown that the. Deputy

Minister was responsible for making the order. There is no evidence to the effect that the Deputy Minister out of grudge against the Petitioner

complained to the Prime Minister that the Deputy Minister was present at the Cabinet Meeting, that the Cabinet did not apply its mind. The rival

contentions as to grudge of Deputy Minister can be decided on affidavit evidence. The bald allegation of grudge is not established by any fact.

There is no evidence that the new Minister, after the former Minister had left, did not apply his mind and that the Deputy Minister prevailed upon,

the members of the Cabinet to make the orders impeached. The Solicitor-General rightly contended that there were no allegations to establish mala

fide and the Petitioner wanted to introduce by oral evidence new allegations. In the present case I am unable to hold that there is any pleading and

proof of mala fide of Sm. M. Chandrasekhar.

59. The last question which was canvassed is whether this Court has jurisdiction.

60. Counsel on behalf of the Petitioner contended that jurisdiction of this Court was attracted because of two facts constituting part of the cause of

action. First, that the letter dated September 7, 1966, was received by the Petitioner at Calcutta. Secondly, that the Petitioner made demand for

justice from within the jurisdiction. Counsel for the Petitioner relied on the decisions of the Supreme Court in The State of Punjab Vs. Sodhi

Sukhdev Singh, and Bachhittar Singh Vs. The State of Punjab, in support of the contention that an order is not effective unless it is communicated.

Apart from these decisions the necessity for communication of the order is that it is only when a final decision is made that the order is

communicated. It is indisputable that an order has to be communicated in order to be effective. In the recent decision in the State of Punjab Vs.

Amar Singh Harika, the Supreme Court says that an order of dismissal of an employee takes effect not on the date when the order is passed but

on the date when the order is communicated to the employee. The ratio is that unless the officer concerned knows about the order and unless the

order is communicated to the person concerned, the order does not take effect. Therefore, in the present case the order that came to be passed

was contended by the counsel for the Petitioner to be effective only when it was communicated.

61. Mr. Solicitor-General did not dispute that an order had to be communicated, but his contention was that the order was a unilateral order

passed by the Government and, therefore, it need not be part of the cause of action. I am unable to accept the contention of the Solicitor-General.

An order of the Government is apparently a unilateral order. An order is not effective unless it is communicated and no order of the Government in

cases of Government servants can be effective unless it is communicated. Therefore, communication of the order becomes a part of the cause of

action. In the present case a certain complexity arises as to whether the communication was at Delhi or at Calcutta within the jurisdiction. The

order that was sent to the Petitioner was in a sealed cover with the remarks "not to be opened except by the addressee". The affidavit evidence is

that the person who was in charge of correspondence when the Petitioner was away received a sealed cover, and when he opened it he found that

there was another sealed cover within. The person who received it made an endorsement that he received it for the purpose of transmission. Mr.

Solicitor-General contended that the order would speak from the moment it was transmitted and since it was transmitted to the Petitioner at Delhi

and his office was there and the Petitioner being away the person who received it for the purpose of transmission was authorized to receive the

letter on behalf of the Petitioner. Agency would arise when the person who appoints an agent does so for the express purpose. In the present case

I am unable to hold that when the Petitioner left for Calcutta the Petitioner appointed his personal secretary an agent for the purpose of receiving

letters which would come from the Government to the Petitioner with the words "not to be opened except by addressee". These words would

indicate that the Government in the cover gave notice that it was meant only for the addressee. Unless and until the addressee appointed a person

for the express purpose of receiving such a letter, the person would not become the agent. I am, therefore, of opinion that the receipt of the letter is

a part of the cause of action in the facts and circumstances of this case. I am unable to accept the allegation in the affidavit-in-opposition that the

order dated September 7, 1966, was served on the Petitioner at Delhi. I am unable to hold nor was such a contention advanced that the Petitioner

attracted jurisdiction of the Court by any deliberate act.

62. The other contention is whether demand for justice is a part of the cause of action. Counsel for the Petitioner contended that the rules for

application under Article 226 of the Constitution indicated that there had to be allegation in the petition that a demand for justice was made and it

was, therefore, said that if such an averment was to find a place in the petition it formed part of the cause of action. Counsel for the Petitioner relied

on the decision in the The State of Bombay Vs. Heman Santlal Alreja, . Mr. Solicitor-General on the other hand contended that demand of justice

was not part of the cause of action and borrowed the analogy of a notice u/s 80 of the Code of Civil Procedure. There have been divergent views

as to whether a notice u/s 80 of the CPC is a part of the cause of action. In the decision in Jaharlal Pagalia Vs. Union of India (UOI), . I expressed

the view that neither the issue nor the service of notice u/s 80 of the CPC formed part of the cause of action. There are observations in Madanlal

Jalan v. Madanlal AIR 1949 Cal. 495 that the phrase ''cause of action'' is for the purpose of jurisdiction sometimes an expression of wider import.

To illustrate, an assignment can sometimes form part of the cause of action within the extended meaning of the cause of action. Mr. Solicitor-

General contended that the view expressed in Pagalia''s case Supra that neither the issue nor service of notice u/s 80 of the CPC was part of the

cause of action was also the view expressed in Pagalia''s case and in the Bench decision of this Court in Niranjan Agarwalla Vs. Union of India

(UOI), where Jaharlal Pagalia''s case was considered. It was said in the Bench decision that the place from where the notice is sent or issued is not

part of the cause of action. Mr. Solicitor-General contended that if notice u/s 80 of the CPC which was a condition precedent to the institution of a

suit was not a part of the cause of action a fortiori a demand for justice would not be a part of the cause of action first, because it was not a

condition precedent to make any application and secondly there was no question of demand in the present case because there was no statutory

duty.

63. The English law is that demand for justice is essential to an application for mandamus. Mr. Solicitor-General contended that there was no such

inflexible rule in our country and that the Court could ignore the absence of a notice. In the present case it was contended by Mr. Solicitor-General

relying on the decision in Narendra Nath Chakravarty Vs. Corporation of Calcutta and Others,

where a demand for justice would be useless the absence of it is not deemed to be fatal.

In other words, it was contended that the absence of a demand for justice could not be fatal to an application in all cases. Here again no inflexible

rule can be laid down and it is a matter within the discretion of the Court and in the facts and circumstances of each case whether a demand for

justice is fatal or not. Mr. Solicitor-General relied on the decisions in The Cosmopolitan Club, Madras Vs. The Deputy Commercial Tax Officer,

Triplicane Division, Mt. Road, Madras and Another, and Sheoshankar v. State of M.P. AIR 1951 Nag. 58 that lack of a notice could be ignored

by the Court particularly where it would be futile to make a demand. I am unable to hold that in the facts and circumstances of the present case

demand for justice would form part of the cause of action. First, the cause of action is complete before there is any demand for it. Secondly, if

demand for justice would be considered it would be determined with reference to the place where the demand was made and the place from

where it was issued would not be relevant. Thirdly, there is no inflexible rule as to whether a demand for justice is essential in all cases, and in the

present case there being no statutory duty demand for justice would not be part of the cause of action.

64. For all these reasons I am of the opinion that the Petitioner is not entitled to any relief. The Rule is discharged. This is a case where I am of the

opinion that the parties will pay and bear their own costs.

65. After the conclusion of the judgment counsel for the Petitioner submitted that on April 28, 1967, on behalf of the Petitioner it was mentioned

that an affidavit of Shri A.K. Sen, who was the then Minister, would be filed on behalf of the Petitioner. I did not allow that affidavit to be used at

that time because counsel for the Respondents opposed the introduction of any such affidavit at that stage when the matter was ready for hearing.

It was also said that such an affidavit would introduce new matters. I also expressed the opinion that it would not be correct for a former Minister

who was not a party to the proceedings to affirm an affidavit in a case of this nature where the Petitioner was a Secretary of the Minister and it

would not be in the fitness of things that a former Cabinet Minister should descend into the arena of affidavits. It may be stated that no argument

was advanced in relation to that affidavit.

66. The application for contempt was not pressed and therefore it is dismissed. Each party will pay and bear its own costs in all the applications

made by them.