CHAPTER I

SERVICES UNDER THE UNION AND THE STATES*

The administration of the union and the states has to be carried on through the agency of large number of persons employed in the various services and posts under the union and the states. The two broad classifications of services under the union are: (1) civil and (2) defence. The services under the state governments consist of civil services only. The defence services are entrusted with the duties pertaining to the defence of the country and naturally they do not come in touch with the common man. It is personnel belonging to various civil services and posts under the union and the states who are required to serve the needs of the public. Hence, the civil services under the union and the states are also called the public services (vide entry 70 of list 1 and entry 41 of list II of the VII schedule, respectively). There is relationship of master and servant between the union and the states and its servants. The relationship between the union and the states and its servants is not left to be regulated as a mere contractual relationship in view of the provisions contained in part III of the Constitution (fundamental rights) and part XIV (articles 309 to 323) and special provisions relating to certain specified services, the servants under the union and the states after their appointment acquire a status. Their rights and obligations are all required to be determined by the provisions of statutes and statutory rules which may be framed or altered by the competent authority unilaterally and are not to be determined by consent of both the parties as in the case of contractual relationship.[1]

The subject matter relating to services under the union and all India services fall within the legislative power of Parliament vide entry 70 of list 1 of the VII schedule to the Constitution read with articles 245 and 246(1). Similarly, the services under the states fall within the legislative power of the states vide entry 41 of list II of VII schedule read with articles 245 and 246(2). By virtue of these legislative powers it is competent for Parliament or the legislature, as the case may be, to make any law relating to the services. Matters relating to the services include the power to create or abolish the services or posts fixing the strength of a cadre or cadres, prescription of powers and duties attached to the post and every matter relating to services including matters relating to

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1 *Roshanlal Tandon* v. *Union of India,* AIR 1967 SC 1889: 1968(1) SCR 185.

recruitment and conditions of service. It is competent for the legislature to provide by legislation for all matters relating to the services in exercise of its legislative power.

Recruitment and conditions of service

Out of various matters relating to the services, two matters, namely, recruitment and conditions of service under the union and the states have been singled out for special treatment under article 309. The first part of article 309 only reiterates the power of Parliament and the legislature to make laws relating to the services even in respect of recruitment and conditions of service which is included within its legislative power under article 246. The problems relating to recruitment and conditions of service are manifold and require to be regulated as and when the necessity arises and cannot wait for legislative enactments the framing of which naturally takes some time. Therefore, under proviso to article 309 it is provided that the recruitment and conditions of service could be regulated by the rules framed by the President or the Governor, as the case may be, subject to the acts of appropriate legislature. Having regard to article 309 of the Constitution, it is competent for the President or any person authorised by him or the Governor or any person authorised by him to regulate by rules the method of recruitment and conditions of service to the services under the union or the states, respectively.

Rules framed under article 309 have to be strictly confined to recruitment and conditions of services of persons mentioned therein.[2] Under article 309 the power of legislature to regulate recruitment and conditions of service is wide and includes power to constitute a new cadre by merging certain existing cadres.[3] The rule making power is conferred on the President or the Governor or their delegate personally and does not form part of the executive power of the state.[4] Subject to the law made by legislature the rule has the same efficacy as that of legislative enactment.[5] This legislative power carries with it the power to amend or alter the rules with retrospective effect.[6] It is neither legal nor proper for the high court or administrative tribunal to issue a mandate to the state government to make service rules under article 309.[7]

Though non-statutory rules cannot modify statutory rules there is nothing to prevent the government from issuing administrative instructions on matters

2 *State of Punjab* v. *Kailash Nath*, 1989 (1) SLR 12 at 18.
3 *S.P Shivprasad Pipal* v. *Union of India*, AIR 1998 SC 1882.
4 *State of Uttar Pradesh* v. *Baburam*, AIR 1961 SC 751; *B.S. Vadera* v. *Union of India*, AIR 1969 SC 118; *Chandrasekhara* v. *State of Mysore*, 1962 Mys LJ 87.
5 *Jaichand* v. *Union of India*, SLR 1969 Del 386.
6 *T.R. Kapur* v. *State of Haryana*, AIR 1987 SC 415.
7 *Mallikarjuna Rao* v. *State of Andhra Pradesh*, AIR 1990 SC 1251.

upon which the statutory rules are silent.[8] While making instructions for promotion etc., the instructions should not override statutory rules.[9]

A rule made in exercise of the power under the proviso to article 309 constitutes law within the meaning of article 235. For the same reason such rule may be struck down only on such ground as may invalidate a legislative measure, *e.g.*, violation of articles 14 and 16 and not because the court considers it to be unreasonable.[10]

Services under union territories

Under proviso to article 309, the President or any person authorised by him is competent to regulate recruitment and conditions of service of employees in connection with the affairs of the union. The services and the posts in the union territories are services and posts in connection with the affairs of the union. Therefore, it is competent for the President to frame rules of recruitment and conditions of service in respect of services under the union territories.[11]

As the services and posts under the union territories are services and posts under the union, it follows that the constitution of a joint service for more than one union territory which is administered by the same authority, viz., President of India, with common control of that service is an essential adjunct of common administrative powers. Therefore, the constitution of a joint cadre for union territories is obviously within the scope of article 309.[12]

Executive power not excluded by proviso to article 309

The executive power of the union (vide article 73) and of the states (vide article 162) is co-extensive with that of legislative power of the union and the states, respectively. Therefore, it is competent for the union government or the state government to regulate recruitment and conditions of service relating to the services under them in exercise of executive power in the absence of legislation or until statutory rules are framed under proviso to article 309 of the Constitution by the President or the Governor, as the case may be.[13] But once the field is occupied either by legislation or by statutory rules it is not competent for the executive to act contrary to or ignoring the provisions of

8 *Controller and Auditor General of India* v. *Mohan,* AIR 1991 SC 2288.

9 *Ramesh Chand* v. *Director, Department of Rural Development & Panchayats, Chandigarh,* 2005 (2) SLR (P & H) (DB) 713.

10 *Bansal* v. *Union of India,* AIR 1992 SC 978.

11 *Jaichand* v. *Union of India,* SLR 1969 Del 386.

12 *Ibid.*

13 *B.N. Nagarajan* v. *State of Mysore,* AIR 1966 SC 1942: 1968(3) SCR 682; *Sant Ram Sharma* v. *State of Rajasthan,* AIR 1967 SC 1910: 1968(1) SCR 111; *State of Haryana* v. *Shamsherjang,* AIR 1972 SC 1546; *H.A. Ramanuja* v. *State of Mysore,* 1971(2) Mys LJ 286; *Subba Rao* v. *State of Mysore,* 1970(2) Mys LJ 286.

the statutory provisions.[14]

Enforceability of rules regulating recruitment and conditions of service

Historical background: Prior to the commencement of the Constitution, the Privy Council had taken the view in *Shelton* v. *Smith*[15] that the servants of the Crown hold their office at the pleasure of the Crown and, therefore, if any public servant considers that he has been dismissed unjustly without following the procedure prescribed by rules his remedy is not by way of law suit but by an appeal of an official or political kind. However, it was also the view of the Privy Council in *Gould* v. *Stuart*[16] where the statute imposes certain restrictions and conditions for the removal or dismissal of a government servant, any order passed in contravention of those provisions would be illegal and would give rise to a cause of action in a court of law.

Government of India Act, 1919: In *Venkata Rao* v. *Secretary of State*[17] the Privy Council considered the right of a civil servant to get relief in a court of law as against wrongful dismissal. The case arose under the provisions of section 96-B of the Government of India Act, 1919, which provided that, subject to the provisions of the Act and the rules made thereunder, every person in the civil service of the Crown in India holds office during his majesty's pleasure and may be employed in any manner required by the appropriate authority within the scope of his duty but no person in that service may be dismissed by an authority subordinate to that by which he was appointed. The said section also provided for rules regulating the conditions of service. But sub-section(5) provided that no rules or other provisions made or framed under that section shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person in the civil service of the Crown in India in such manner as may appear to be just and equitable and any rules made by Secretary of State in Council delegating the power to make the rules may provide for dispensing with or relaxing the requirements of such rules to such extent and in such manner as may be prescribed provided that where any such rule or provision is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by the rule or the provision. The Privy Council held that the rules framed under the Act did not fetter the pleasure of the Crown during which the civil servant held his office. The Privy Council observed that the argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is too

14 *Ibid.*
15 [1895] AC 229.
16 [1896] AC 575.
17 AIR 1947 PC 23.

artificial and too far-reaching to commend itself for acceptance as the rules are manifold in number and minute in particularity and are capable of change.

Government of India Act, 1935: The Government of India Act, 1919 was replaced by the Government of India Act, 1935. The corresponding section to section 96-B of the 1919 Act was section 240(1) and 2 under the 1935 Act. Sub-section 3 was added which was similar to article 311(2) of the Constitution. While deciding a case coming under the provisions of section 240(3) of the Government of India Act, 1935, in *Punjab Province* v. *Tarachand*[18] the Federal Court held that this sub-section has been enshrined in the body of the Act deliberately in order to provide public servants with the safeguards as specified in that sub-section and that the contravention of the same gives them a cause of action for proper relief. The Federal Court pointed out that the violation of statutory provision stood on a different footing than the statutory rules and, therefore, held that dismissal made in contravention of section 240(3) of the Government of India Act, 1935 was void. This view taken by the Federal Court was similar to the view of the Privy Council in *Gould* v. *Stuart*.[19]

Limitation on doctrine of pleasure: Even before the commencement of the Constitution, it was a settled law that the 'doctrine of pleasure' was limited in India by the provisions of sub-section (3) of section 240 of the Government of India Act, which corresponds to article 311(2) of the Constitution and, therefore, any dismissal of a civil servant in contravention of sub-section (3) of section 240 of the 1935 Act or article 311(2) of the Constitution is void and gives rise to a cause of action in a court of law. The above view was reaffirmed by the Supreme Court in the case of *Abdul Majid*.[20]

Under the Constitution: As regards the enforceability of the rules regulating conditions of service, after the commencement of the Constitution divergent views were taken by the high courts. The Madras High Court in *Sambandan*[21] and *Devasahayam*[22] held that the decision of the Privy Council in *Venkata Rao* to the effect that contravention of statutory rules in dismissing a civil servant does not give rise to a justiciable right was based on the theory that the servant holds office during the pleasure of the Crown and the said principle is applicable even in respect of violations of statutory rules framed under article 309 relating to even matters other than termination or removal.

The Allahabad High Court in *Lachman Prasad* v. *Supdt. G.H/&S. Factory*[23] took the view that article 310 which provides that a civil servant

18 AIR 1947 FC 23.
19 [1896] AC 575.
20 *State of Bihar* v. *Abdul Majid*, AIR 1954 SC 254: 1954 SCR 786.
21 *Sambandan* v. *R.T. Supdt*, AIR 1958 Mad 243: AIR 1959 Mad 68.
22 *Devasahayam* v. *State of Madras*, AIR 1958 Mad 53: AIR 1959 Mad 1.
23 AIR 1958 All 345.

holds office during the pleasure of the President in case of services under the state extends only to the tenure of office and has nothing to do with the rules regulating recruitment and conditions of service. The court held that the rules regulating the conditions of service have statutory force and do not affect the pleasure of the President or Governor to terminate the services of his employees under article 310 of the Constitution and, therefore, any rule relating to conditions of service which has nothing to do with the pleasure of the President or Governor as the case may be to terminate the services are statutory rules a breach of which is enforceable in a proper case by means of a writ.

The full bench of the Mysore High Court took the same view as the one taken by the Allahabad High Court, in *Malleshappa* v. *State of Mysore*[24] and disagreed with the view taken by the Madras High Court and held that the expression 'during pleasure' in article 310 of the Constitution relates only to the tenure of office of the civil servant and does not relate to other conditions of services and, therefore, the rules which relate to conditions of service and which confer rights on the civil servants are not mere administrative orders and are enforceable.

The law was settled by the Supreme Court in *State of Uttar Pradesh* v. *Baburam Upadhyaya*[25] in favour of enforceability of service rules. The law declared by the Supreme Court is to the following effect:

(i) That in India every person who is a member of a public service whether of the union or of any state holds office during the pleasure of the President or Governor, as the case may be, as provided under article 310 of the Constitution except in respect of certain offices for which special provision has been made in the Constitution.

(ii) The power to dismiss a public servant at pleasure is a power conferred on the President and Governor to be exercised in their discretion and the power is not delegatable.

(iii) Even the exercise of the said pleasure is subject to the provisions of Article 311 (2) of the Constitution.

(iv) Parliament or the legislature of the State or the President or Governor or any authority on whom power is conferred to frame rules relating to recruitment and conditions of service may make statutes or statutory rules as the case may be without abrogating or impinging upon the overriding power conferred on the President or the Governor under Article 310.

(v) The law made by the appropriate legislature or the rules made by the appropriate authority can regulate the conditions of service including

24 1961 Mys LJ 1 (FB).
25 AIR 1961 SC 751:1961(2) SCR 675.

proceedings by way of disciplinary action without affecting the powers of the President or Governor under Article 310.

(vi) The law or the rules framed by the appropriate legislature or the rule making authority can also regulate the scope and content of the reasonable opportunity embodied in article 311 of the Constitution.

(vii) The rules made by an authority just like an Act of legislature would be efficacious within the aforesaid limits.

(viii) The rules made under a statute must be treated for all purposes of construction or application exactly as if they were in the Act and or to the same effect as if contained in the Act and are to be taken judicial notice for all purposes of construction or application. The statutory rules therefore cannot be described as or equated with the administrative instructions. Therefore, where statutory rules are framed regulating disciplinary proceedings, the appropriate authority must conform to the provisions of the rules conferring upon it the power to take the said action. If there is any violation upon it the power to take the public servant would have a right to challenge the decision of that authority.

The position which emerged out of this decision is: every rule framed by the President or the Governor under proviso to article 309 of the Constitution or by any authority empowered by them or any rules framed by or under an Act of legislature relating to recruitment and conditions of service have statutory force and the violation of any of those rules gives rise to a cause of action before a court of law and is enforceable.

The English common law rule regarding the holding of office by public servants only during the pleasure of the crown has not been adopted by the Indian Constitution in its entirety and with all its rigorous implications. The pleasure doctrine is not based upon any special prerogative of the crown but upon public policy.[26] The doctrine of pleasure is subject to rules or law made under article 309 as well as conditions prescribed under article 311.[27] There would be no escape from the conclusion that in respect of cases falling under article 311 (2) the procedure prescribed by the said article must be complied with and the exercise of pleasure regulated accordingly.

Conditions of service regulated by executive orders

In the absence of statutory provisions, it is competent for the state to regulate conditions of service in exercise of its executive power.[28] However, no such instructions can override, enlarge or reduce the scope of a rule duly

26 *Union of India* v. *Tulsiram Patel*, 1985 Lab IC 1393.

27 *Union of India* v. *J.N. Sinhna*, AIR 1971 SC 40.

28 *B.N. Nagaraja* v. *State of Mysore*, AIR 1966 SC 1942.

framed under article 309 though administrative instruction may be regarded as a guide for the exercise of jurisdiction. Therefore, when conditions of service as prescribed in the orders issued by the state in exercise of its executive powers confer rights on civil servants, it cannot be disregarded. A civil servant is entitled to enforce such conditions of service prescribed under executive orders.[29] However, a condition of service of employees cannot be retrospectively altered to the prejudice of the employees. Government has no lawful authority to prejudicially affect the rights of a government servant retrospectively by mere executive instruction.

Defence services

Among the three important articles in part XIV of the Constitution relating to services viz. articles 309, 310 and 311, article 311 which prescribes the conditions precedent for passing an order of removal, dismissal or reduction in rank is applicable only to persons employed on the civil side of the administration of the union or the state. But the provisions of article 309 regulating recruitment and conditions of service and the doctrine of pleasure incorporated in article 310 apply to civil as well as defence employees. Hence, it is competent for Parliament to regulate the recruitment and conditions of service appointed to the defence services and till then and subject to any such law made by Parliament it is competent for the President to frame rules regulating recruitment and conditions of service to defence services. The rules so framed are enforceable in the same manner as in the case of rules regulating recruitment and conditions of service in relation to civil services.[30]

Matters falling within the terms 'recruitment' and 'conditions of service'

Under article 309 the state is empowered to regulate "Recruitment and Conditions of Service". Regulation of recruitment means the prescription of qualifications for appointment to any service or post as also the prescription of the method or procedure for selection and appointment. "Conditions of Service" are manifold. Every matter relating to the terms and conditions subject to which a civil servant is employed under the state as regulated by statute, rules or orders become his "conditions of service". The expression conditions of service means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it, in matters like pension etc. There are several matters relating to conditions of service. For instance, rules regulating payment of salary, pay scale, increment, other allowances, leave, confirmation, seniority, promotion, tenure, termination, superannuation, pension, etc., are all matters relating to conditions of service. The question of enforceability of the rules depends

29 *Union of India* v. *K. P. Joseph*, AIR 1973 SC 303.
30 *Lekhraj* v. *Union of India*, AIR 1971 SC 2111.

upon the nature of the rules. Breach of every rule though framed under article 309 is not necessarily enforceable. It is to be seen whether a particular rule creates a right on the civil servant and consequently the violation of it gives him a right to enforce the rule.[31] Different posts may have different conditions of service. Different conditions for different or dissimilar post is not discrimination under article 14. Various matters relating to recruitment and conditions of service and the extent of their enforceability are dealt with separately subject wise.

31 *Supra* note 24.