ment. If that be so, apart from anything else, the landlord is bound to fail. But this point has not been considered by the Prant Officer as he dismissed the landlord's application on a different ground. Now that we have differred from the Prant Officer in the view that he has taken with regard to the landlord's holding, we must remand the matter back to him and direct him to determine whether the landlord has succeeded in establishing his *bona fide* personal requirement. If he concurs with the view taken by the Mamlatdar, then he will dismiss the landlord's application. If, on the other hand, he differs from him, he will give the landlord the relief to which he is entitled in law. Costs costs in the appeal before the Prant Officer.

Order accordingly.

K. B. S.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Dixit.

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Feb. 16

SHRINIVAS GANESH CHANDORKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* UNION OF INDIA (ORIGINAL DEFENDANT) RESPONDENT.*

Constitution of India, art. 311—Government of India Act, 1935 (25 & 26 Geo. V, c. 42) s. 240 (3)—Whether the common law between master and servant applied to Government servants—Temporary Government servant, whether entitled to same rights as a permanent Government servant under the Constitution of India—Whether Government bound to give reason when discharging a temporary servant—Whether order of discharge can be challenged as mala fide*—Whether rules of natural justice applicable where Government discharges a temporary servant.*

The common law governing the relationship between master and servant applies equally where the employer is the State except when the case is governed by Art. 311 of the Constitution of India or s. 240 (*3*) of the Government of India Act, 1935. In the case of temporary Government servants the said provisions have however no application.

The plaintiff, who was employed as a temporary clerk in the Military Accounts Department of the Government of India, was discharged from service on the ground that he was declared medically unfit for further service. In a suit filed against the Union of India for a declaration that the order of discharge was not valid and that he still continued to be in service, the plaintiff contended—

(*i*) that a temporary Government servant, is entitled to the same rights as a permanent Government servant has under s. 240 (*3*) of the Government of India Act, 1935, or Art. 311 of the Constitution of India,

(*ii*) that the Government having given reason for dispensing with his services the order of discharge became an order of dismissal or removal and was governed by s. 240 (*3*) of the Government of India Act, 1935.

(*iii*) that the order was based on a medical certificate issued under art. 447 (*a*) of the rules framed by Government but the certificate was not properly issued as the employee's case was not covered by the said rules;

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(*iv*) that the order passed by Government was *mala fide;*

(*v*) that the Government should have dispensed with his services after complying with the rules framed in that behalf for the Department in which the employee was serving;

(*vi*) that the Government had not framed any rules which entitled it to dispense with the services of a temporary servant, and in the absence of such rules the Government had no powers to dispense with the services of a temporary servant; and

(*vii*) that when the Government dismissed the employee it constituted a domestic tribunal which was bound to observe the rules of natural justice and afford an opportunity to the employee of being heard:

Held, (*i*) that a temporary Government servant cannot claim the rights provided in Art. 311 of the Constitution of India or in s. 240 (3) of the Government of India Act, 1935;

(*ii*) that the impugned order being one of discharge and not of dismissal or removal from service, the Government was not bound to give any reason;

(*iii*) that the issue of a medical certificate under a particular article had no relevancy to the rights of the employee and the Government had merely based its order of discharge on the facts and materials contained in the certificte;

(*iv*) that inasmuch as neither s. 240 (3) of the Government of India Act 1935 nor Art. 311 of the Constitution of India applies to a temporary Government servant the Government had the right to dispense with his services and it was not open to the employee to question the motives of his employer;

(*v*) that the departmental rules applied where Government wished to pass an order of suspension, reduction, removal or dismissal but as the impugned order did not fall in any of the categories, the rules had no application;

(*vi*) that in the absence of a written contract or a rule, the principles of common law applied as between the State and its employees; the Government was therefore entitled in law to dispense with the services of a temporary servant; and

(*vii*) that it was not a case where Government had levelled any charges against the employee or given any reason for discharge which suggested moral turpitude or blameworthy conduct on the part of the employee which called for any enquiry and therefore no question of a domestic tribunal or rules of natural justice could arise,

Shyamlal v. *State of Uttar Pradesh,*[1] referred to.

FIRST Appeal against the decision of K. M. Vakil, Esquire, Judge, City Civil Court, Bombay.

The facts are sufficiently set out in the Judgment.

N. D. Vakharia, for the Appellant.

V. S. Desai, for Government Pleader, for the Respondents.

Chagla C. J.—This is an appeal by an employee of the Military Accounts Department whose services were dispensed with, and he filed a suit from which this appeal arises contending that the order discharging him was not a valid order and that he continued to be in service of the Department. The appellant passed the entrance examination in June 1941, obtained a medical certificate of fitness on October 24, 1941, and he was appointed a clerk on the same date in the Military Accounts Department. In January 1948 he was transferred to Bombay and he served in the office of the Controller of Naval Accounts.

1. [1954] A. I. R. S. C. 369.

He continued to serve in this Department till December 8, 1948, when he was discharged. The order of discharge states :

"Mr. S. G. Chandorkar temporary U. D. Clerk of this office, having been declared medically unfit for further service in the Military Accounts Department by the Naval Medical Board, is discharged from service with effect from December 6, 1948."

It is this order which is being challenged by the appellant.

The first question that we have to consider is whether the appellant was a temporary or a permanent servant of Government. There is a large volume of evidence which the learned Judge has considered which leaves no doubt that the appellant was a temporary servant and was never confirmed. In his own plaint he avers that the appointment of the plaintiff had become a permanent one in pursuance of the relevant rules and other rules. This averment clearly implies that when the plaintiff was appointed he was appointed as a temporary servant, and the plaintiff has failed to adduce any evidence in support of his contention that at a later date he was made permanent or confirmed in his post. In his evidence also he has referred to his expectation that he would be confirmed in his post in or about the year 1947 and he has admitted that during the course of his service he did not receive any order or letter from the department confirming him or making him permanent. In the certificate that was issued to him on his being discharged he is referred to as a temporary clerk and in the service register which he has signed he has throughout been referred to as a temporary clerk. In the letter which he wrote on December 10, 1948, after he was discharged, he states that he had more than seven years service in the department and hence he was expecting confirmation in the department, and he makes a grievance of the fact that he asked for bread but got a stone and that instead of getting confirmation he was discharged from service. On this evidence we agree with the learned Judge that the appellant was a temporary servant of Government who was at no time confirmed in his post, nor at any time made permanent.

The interesting question that has been argued by Mr. Vakharia is as to what are the rights of a temporary Government servant *vis-a-vis* the Constitution, and Mr. Vakharia's contention is that this order of discharge was passed against his client without the constitutional safeguards guaranteed to him being complied with. The constitutional safeguards on which reliance is placed are not the constitutional safeguards given by art. 311 of the Constitution but s. 240 (3) of the Government of India Act which was in force, but as is well known the section and the article are practically in *pari materia*. What is urged is that the appellant was dismissed from service without any reasonable opportunity being given to him to show cause against the charge that was levelled against him that he was permanently incapacitated. In this Court we have held in

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several decisions that a temporary Government servant cannot claim the rights provided in art. 311 of the Constitution, and the same would be the position with regard to s. 240 (*3*). What Mr. Vakharia wanted to urge before us today was that even in the case of a temporary Government servant if the Government wishes to dismiss him or remove him or reduce him in rank, he is entitled to the same rights as a permanent servant. Mr. Vakharia's contention is that the tenure of service has nothing whatever to do with the rights that a Government servant has under s. 240 (*3*) or art. 311.

Our attention was drawn by Mr. Vakharia to a decision of the Supreme Court in *Shyamlal* v. *State of U. P.*[2] That was a case of a permanent Government servant who was asked to retire compulsorily and his grivance was that that constituted removal and he had a right to the constitutional safeguards under art. 311. At p. 374 of the judgment Mr. Justice Das, as he then was, observes :

> "Removal, like dismissal, no doubt brings about a termination of service but every termination of service does not amount to dismissal or removal."

And this is how the learned Judge poses the question:

> "The question then is whether a termination of service brought about by compulsory retirement is tantamount to dismissal or removal from service so as to attract the provisions of Article 311 of the Constitution. The answer to the question will depend on whether the nature and incidents of the action resulting in dismissal or removal are to be found in the action of compulsory retirement. There can be no doubt that removal—I am using the term synonymously with dismissal—generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer."

Mr. Vakharia says that what we have to consider is whether in this order of discharge the nature and incidents of dismissal or removal are present and if those are present then it is irrelevant whether the Government servant was permanent or temporary. There is considerable force in Mr. Vakharia's contention because if Government does not choose to dispense with the services of a temporary servant under its contract with him but wishes to inflict a punishment upon him and wishes to dismiss him or remove him, then it may be said that his case would stand on the same footing as the case of a permanent servant, that he is being punished by the State which may result in serious consequences, and such punishment should not be inflicted unless he is afforded the safeguard provided by art. 311. But the Supreme Court does not lay down, with respect, that it is not open to the Government to dispense

2. [1954] A. I. R. S. C. 369.

with the services of a temporary servant. If a Government servant is made permanent or is confirmed in his post, the tenure of his service would be regulated by the rules framed in that behalf and his services cannot be terminated before that period. In the case of a temporary servant the tenure of his service may be regulated by a written contract, it may be regulated by rules, and in the absence of a contract or the rules it would be regulated by the principles of common law. If the contract between the Government and the temporay servant permits the Government to dispense with his services without notice and at any time, the Government is as much entitled to do so as any other private employer. What has got to be borne in mind is that it is only in cases falling within art. 311 or s. 240 (3) that the Government as an employer is bound to confirm to certain rules of natural justice indicated in that article and that section. But if the case does not fall either within the ambit of art. 311 or s. 240 (3), then the relationship of master and servant is governed by the rules if there are any which would constitute the contract of employment, or it would be governed by common law if the rules do not provide for the employment of the particular person. Therefore, in order to succeed, Mr. Vakharia must satisfy us that the Union of India, which is the employer in this case, acted in such a manner that its action came within the ambit of s. 240 (3) of the Government of India Act. In other words, its action was tantamount to dismissing or removing the plaintiff from service. If Mr. Vakharia satisfies us on that count, then undoubtedly if reasonable opportunity has not been afforded to the plaintiff, the plaintiff would be entitled to succeed.

It is from that point of view that we must again look at the order discharging the appellant. It cannot be disputed that if the Government had discharged the appellant without giving any reasons at all, that order could not have been challenged by the appellant because the appellant being a temporary servant he had no security of tenure, he could not claim to continue in Government service for any length of time, and the Government like any other employer would be entitled to dispense with his services at any time if thought proper. The question is whether the fact that the Government has given a reason for dispensing with the services of the appellant alters an order of discharge into an order of dismissal or removal. It is true that we must look at the substance of the matter and we should not be influenced by the language used in the order. The mere fact that Government chooses to use the expression "discharge" is not conclusive of the matter, and notwithstanding the use of that expression it may still be an order of dismissal or removal. Both s. 240 (3) and art. 311 are based on this essential priciple that the Government is inflicting a punishment upon its employee and, therefore, before that punishment should be inflicted certain rules of natural justice

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must be carried out. Again, s. 240 (3) and art. 311 are based on this principle that the employee is being proceeded against for something which he has done which involves moral turpitude or which calls for censure upon him. The very passage on which Mr. Vakharia relies in the judgment of the Supreme Court makes that perfectly clear. Mr. Vakharia only emphasises one part of the judgment of Mr. Justice Das and that is

> "or is lacking in ability or capacity or the will to discharge his duties as he should do",

and Mr. Vakharia says that if the capacity is lacking and an employee is discharged for that reason, then it constitutes a dismissal. Mr. Vakharia says that in this case as the appellant was discharged for lacking the capacity to discharge his duties because he was medically unfit, the order must be read to be an order of dismissal. Now, the expression just referred to must be read in its own context and not divorced from its context, and when we read the whole of that paragraph which has been set out in extenso earlier, it is clear that Mr. Justice Das was referring to conduct which must involve an imputation or which would require a charge being drawn against the employee. Therefore, the lack of ability or capacity or the lack of will to discharge one's duties must not be a lack which is involuntary or which is inflicted upon an unfortunate person through no fault of his, but it must be such as must involve an element of volition. No one suggests and no one can suggest that the unfortunate appellant who suffered from serious eye trouble and because of which he was declared medically unfit, had done anything which could possibly suggest either moral turpitude or conduct which may be considered blameworthy. As a matter of fact, the medical certificate on which this order was passed points out that the appellant was suffering from high myopia and lenticular opacities and in consequence thereof was completely and permanently incapacitated for further service of any kind in the clerical branch, and the certificate goes on to say :

> "His incapacity does not appear to us to have been caused by irregular or intemperate habits."

Therefore, as good a certificate of character as is possible was given to the appellant. It is difficult to understand in face of this, how Mr. Vakharia could contend that the order he is complaining of was an order which dismissed him or removed him from service. It is an order which discharged him ; it is an order which could have been passed without giving any reasons. The reasons having been given, we have a right to scrutinize those reasons and even when we scrutinize those reasons, the reasons do not suggest that Government looked upon the conduct of the appellant as unworthy conduct for which he was being punished by being asked to leave the service of Government.

Therefore, in our opinion, this order is not an order of dismissal or removal from service and, therefore, in no view of the case can the appellant contend that he is entitled to the rights given to an employee under s. 240 (3) of the Government of India Act.

This should be sufficient to dispose of the appeal, but we will also consider some of the other arguments advanced by Mr. Vakharia. It was argued that the order in question is based upon a medical certificate which is issued under art. 447 (*a*) of the rules framed by Government, which article refers to a form of medical certificate to be given respecting an officer applying for pension in India, and it is said that this certificate has not been properly issued because the appellant's case is not covered by the rules. We fail to understand what relevancy the issuing of the certificate under a particular article has on the rights of the appellant. Assuming the article has no application and assuming the certificate was issued in a form which was not applicable, the certificate contains certain facts and materials and the Government has based its order of discharge on those facts and materials. Mr. Vakharia says that if this certificate is not a proper certificate he was entitled to challenge the conclusion arrived at by Government and which is embodied in the order of discharge. But if s. 240 (3) has no application, then it is not open to the employee to challenge the reasons given by his employer for dispensing with his services. Nor is it open to the employee to say that he should be given an opportunity to controvert the accuracy of the materials on which the employer came to a particular conclusion.

Mr. Vakharia also sought to argue that the order passed by Government was *mala fide*. We do not understand how an employee is entitled to question the motives of his employer if the employer has the right to dispense with his services at any time. Whatever may be the motive which may influence the exercise of a legal right, if the legal right exists then the motive becomes irrelevant, and if in a case where s. 240 (3) or art. 311 does not apply the Government has the right to dispense with the services of a temporary servant, then it is not open to a temporary servant to say that his services were dispensed with for an ulterior motive or for a motive which was not a proper motive.

It was then urged by Mr. Vakharia that there are certain rules framed which form annexture "B" to rules 216 to 221 of Office Manual Part I of the Military Accounts Department, 1930 Edition, which deal with cases of removal of a servant for physical incapacity, and Mr. Vakharia says that the respondents should have dispensed with the services of the appellant after complying with these rules. When we look at annexture "B" it is headed thus :

"Rules relating to the suspension, reduction, removal and dismissal of public servants",

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and rule 1 says :

"Permanent servants should not be removed or dismissed except for serious offences which have been clearly proved",

and rule 2 says :

"Cases of physical incapacity should be treated according to rules."

It is clear that these rules apply where Government wishes to pass an order of suspension, reduction, removal or dismissal. But when we have come to the conclusion that the order challenged is not an order which falls in this category, then ex-hypothesi these particular rules can have no application. Undoubtedly, the appellant would have been entitled to insist upon these rules being complied with if the Union of India had attempted to pass an order of suspension, reduction, removal or dismissal against the appellant.

A rather ingenious argument was put forward by Mr. Vakharia that the Union of India has failed to point out any rule under which the appellant was discharged, and according to Mr. Vakharia whenever there is a case of a temporary servant whose services are dispensed with either without notice or with notice, the case must fall under a particular rule which Government has framed which entitles Government to dispense with the services of the temporary servant. In other words, according to Mr. Vakharia in the absence of any rule Government has no power to dispense with the services of a temporay servant. In our opinion, that contention is entirely untenable. The law governing the relationship between an employee and an employer must apply equally to a case of an employee whose employer happens to be the State or the Government, unless there is something in law or in the Constitution which has made a departure from that rule. Departure, and a rather serious departure, has been made to the extent of s. 240 (*3*) of the Government of India Act and art. 311 of the Constitution. But when Government dispenses with the services of a temporary servant it is not for Government to justify that order by referring to any specific rule, but it is for the discharged servant to point out that there is something in the Constitution or in any provision of the law which constitutes a departure from the principles of common law. There is no doubt that under common law Government could have dispensed with the services of the appellant and at most it would have been compelled to pay salary for reasonable notice which it was bound to give. But apart from that there is no restriction on the right of the employer to dispense with the services of his employee. In most cases there is a written contract when Government employs a temporary servant or there are rules which govern the employment of temporary servants. We have a case here where there seems to be neither a written contract nor a rule, and in the absence of one or the other we must fall back upon principles of common law and we cannot possibly take the view

that Government was not entitled in law to dispense with the services of a temporay servant.

Mr. Vakharia has relied on the case of *Manekji* v. *Municipal Commissioner of Bombay,*[3] for the proposition that when a Government Department or a Municipality dismisses a servant, the Government Department or the Municipality is constituted a domestic Tribunal and that domestic Tribunal must observe the rules of natural justice. There is no doubt that when an authority is constituted a domestic Tribunal and has got to hold an inquiry into the conduct of a person, it must observe the rules of natural justice. But the question is whether on the facts of this case the Government is a domestic Tribunal. The Government would only be a domestic Tribunal if it was inquiring and investigating into any charge levelled against the appellant. In that case any grievance that the appellant might make with regard to the violation of the rules of natural justice would be perfectly in order. But as we have said before, the difficulty and the insurmountable difficulty in the way of the appellant is that this is not a case where Government has levelled any charges against the appellant. This is not a case where any inquiry has to be held against the appellant, and, therefore, neither the question of a domestic Tribunal nor the question of the rules of natural justice can arise in this case.

In the circumstances we agree with the view taken by the learned trial Judge that the plaintiff's suit was not well founded. The result is that the appeal fails and must be dismissed. No order as to costs. The decree of the lower Court will be confirmed except that there will be no order as to costs of the suit.

Mr. Vakharia has drawn our attention to the fact that the doctor who examined the appellant for his eye sight has made an observation in his report that :

"With such a high Myopia and lenticular opacities, in my opinion he should be categorised "C" permanent and given proper job to do. He should be able to do clerical job in Category "C".

Mr. Vakaharia says that if the appellant had been given a certificate that he was fit to do clerical job in category "C", he would have obtained some employment, but by reason of the certificate issued to which reference has been made, the appellant has not been able to secure any employment. Mr. Vakharia also points out that the appellant has had a war record of six years. We strongly recommend to the Military Department to avail themselves of the services of the appellant if it is possible in any "C" category job. In any event, they should give a certificate in terms of the report of Dr. S. Prakash which is exhibit 25 in the suit.

Appeal dismissed.

K. B. S.

3. (1929) 32 Bom. L. R. 463.