

PETITIONER:
STATE OF MADRAS AND ANOTHER

Vs.

RESPONDENT:
K.M. RAJAGOPALAN.

DATE OF JUDGMENT:
27/09/1955

BENCH:
JAGANNADHADAS, B.
BENCH:
JAGANNADHADAS, B.
BOSE, VIVIAN
BHAGWATI, NATWARLAL H.
SINHA, BHUVNESHWAR P.
IMAM, SYED JAFFER

CITATION:
1955 AIR 817 1955 SCR (2) 541

ACT:

Indian Independence Act, 1947 (10 and 11 Geo. VI, C. 30)s. 10(2)(a)-The India (Provisional Constitution) Order, 1947--Article 7(1)-Independence, Conferral of Automatic and legal termination of service-Persons holding civil posts in India-Previous to Independence-Whether deemed to have been appointed and continue in service after Independence-Government of India Act, 1935, ss. 240 (2) and 247.

HEADNOTE:

The respondent was recruited to the Indian Civil Service by open competition in 1936 and joined duty in the Province of Madras in October 1937. Since then he was serving under the Government of Madras in various capacities, his last office being Sub-Collector of Dindigal. He went on leave in June 1947. While on leave he received a letter from the Government of India asking him whether he was willing to continue in the service of the Government after the then contemplated transfer of power from the British Government to the Dominion of India on the 16th August, 1947. He sent a reply expressing his willingness to continue in service. On 9th August, 1947 'he received a letter from the Government of Madras dated 7th August, 1947 signed by the Chief Secretary thereof stating that it was decided not to retain his services from and after the 15th August, 1947, and that his services would be terminated with effect from the afternoon of the 14th August, 1947.

The respondent filed a suit against the State of Madras and the Union of India for a declaration that the order issued by the Chief Secretary to the Government of Madras on the 7th August, 1947 purporting to terminate his services was null, void and inoperative and that he should be deemed to continue in service. The High Court granted the declaration prayed for accepting the respondent's contention that the order terminating his service was in violation of the statutory guarantee relating to his service under s. 240 of the Government of India Act, 1935 which remained in force till the midnight of the 14th August, 1947, Held, 1. The conferral of Independence on India, brought

about an automatic and legal termination of service on the date of Independence.

Reilly v. The King ([1934] A.C. 176) and Nokes v. Doncaster Amalgamated Collieries Ltd., ([1940] A.C. 1014), followed.

2. But all persons previously holding civil posts in India are deemed to have been appointed and hence to continue in service, except those governed by "general or special orders or arrangements" affecting their respective cases: vide Article 7(1) of the India (Provisional Constitution) Order, 1947 read with section 10(2)(a) of the Indian Independence Act and sections 240(2) and 247 of the Government of India Act as adapted.

3. The guarantee about prior conditions of service and the previous statutory safeguards relating to disciplinary action continue to apply to those who are thus deemed to continue in service but not to others.

4. Those previously holding civil posts in India had the right, and were in fact given the option, of declining to "continue in service" under the new regime and in the event of their exercising that option they ceased to serve on and from the date of the passing of the Constitution.

5. Equally the new Government had the right to refuse to continue them in service and intimation of this fact given to persons ahead of time came into operation and had legal effect from the moment the new Government assumed office on 16-8-1947.

6. As the petitioner was informed that his services would not be required after 14-8-1947 his services terminated on that date because this was a special order within the meaning of Article 7(1) of the India (Provisional Constitution) Order, 1947. Accordingly there was no continuance of service in his case after 14-8-1947 under the deeming provisions of that Order.

Lall's case (1948) F.C.R 44, West Band Central Gold Mining Co. Ltd. v. The King (1905) 2 K.B. 391, Virendra Singh v. The State of Uttar Pradesh (1955) 1 S.C.R. 415, Baj Bajendra Malojirao Shitole v. The State of Madhya Bharat (1954) S.C.R. 748, Ladore v. Bennett (1939) A.C. 468 and Govindan Sellappah Nayar Kodakan Pillai v. Punchi Banda Mudanayake (1953) A.C. 514, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal NO.203 of 1954. On appeal from the Judgment and Order dated the 30th March 1954 of the Madras High Court in C. S. No. 216 of 1952.

543

M. C. Setalvad, Attorney-General of India, V.K. T. Chari Advocate-General of Madras (R. Ganapathy Iyer, Porus A. Mehta and P. G. Gokhale, with them), for the appellant.

M. K. Nambiar (C. V. L. Narayan, with him), for the respondent.

1955. September 27. The Judgment of the Court was delivered by

JAGANNADHADAS J.-This is an appeal by the State of Madras and the Union of India against the judgment and decree of the High Court on a certificate granted by that Court under article 133 of the Constitution. The appeal arises out of a suit filed by the respondent herein, who was a member of the Indian Civil Service,, for a declaration that the order issued by the Chief Secretary to the Government of Madras on the 7th August, 1947, purporting to terminate his services as from the afternoon of the 14th August, 1947, is null,

void and inoperative and that he must be deemed to continue in the Indian Civil Service as a Member thereof. The suit was filed on the original side of the High Court of Madras and after having been partly tried by a Single Judge who recorded the evidence, was thereafter heard by a Bench of two Judges in view of the important constitutional question that arose for consideration in the case. The Bench found in favour of the plaintiff and decreed the suit and hence the appeal by the State to this Court.

The case for the plaintiff is short and simple. He was recruited to the Indian Civil Service by open competitive examination in 1936 and joined duty in the then Province of Madras in October, 1937. Since then he was serving under the Government of Madras in various situations. The last office he held was as Sub-Collector and Joint Magistrate at Dindigal. On the 2nd June, 1947, he went on leave. While on leave, he received a letter from the Government of India dated the 19th June, 1947, wherein he was asked whether he was willing to continue in the service of

69

544

the Government after the then contemplated transfer of power from the British Government to the Dominion of India on the 15th August, 1947. The plaintiff sent a reply expressing his willingness. On the 9th August, 1947, however, he received a communication from the Government of Madras dated the 7th August, 1947, and signed by the Chief Secretary thereof, stating that it was decided not to retain him in service from and after the 15th August, 1947, and that his services would therefore be terminated as on the afternoon of the 14th August, 1947. He was directed, therefore to apply for extension of leave for which he was then eligible so as to avail himself of the full period of leave which was to his credit. On receiving the order of termination of his services, he made attempts to get it cancelled, by interviewing the Chief Secretary and the Chief Minister of the Madras State at the time. But the attempts proved futile. In the course of these interviews, he says he was given the impression that the order of termination, though issued under the signature of the Chief Secretary to the Government of Madras was in fact so issued under the sanction of the Secretary of State for India, which, according to him, subsequently turned out not to be a fact. Being then under that mistaken impression, he reconciled himself to the situation and availed himself of the full period of leave and accepted the compensation which was awarded for premature termination of services and also began drawing his pension. Later on he came to know from one Shri Seshadri, another young Civilian, who was in a similar plight and who had also filed a similar suit that certain documents produced in the course of that suit showed that these orders were passed without the sanction of the Secretary of State for India. He accordingly brought these matters again to the notice of the Government and made further attempts to get the order in his case reversed. These again proved futile. He thereupon filed an application for a writ in the High Court on the 7th November, 1951, to quash this alleged illegal order against him. But the High Court rejected it on the ground of there having been

545

long delay since the passing of the orders sought to be quashed. The plaintiff thereafter gave the requisite notice to the Government under section 80 of the Civil Procedure Code and filed this suit on the 15th July, 1952. In the

plaint he made the offer to refund the amount of compensation paid to him after making such adjustments as may be called for towards his claim for salary for the intervening period.

The plaintiff's claim is based on the contention that the termination of his services by the order dated the 7th August, 1947, is in violation of the statutory guarantee relating to his service under section 240 of the Government of India Act 1935, which continued to be operative till the midnight of the 14th August, 1947, and he relies on Lall's case (1). To this suit both the State of Madras and the Union of India were impleaded as defendants and their defence was substantially the same. It is to be found in paragraph 6 of the written statement filed by the State of Madras which is as follows:

"This defendant states that on the transfer of power to the newly constituted Dominion of India in pursuance of the Indian Independence Act as and from the appointed day, viz., 15th August, 1947, the tenure of the service of the plaintiff came to an end and he had no legal claim to continue in service thereafter.

The plaintiff was holding office only during His Majesty's pleasure. When His Majesty's Government decided to transfer its power to the Dominion of India as and from the 15th day of August, 1947, the career of the plaintiff under covenant with the Secretary of State came to a legal termination as and from the 15th day of August, 1947. It is, therefore, not correct to state that there was any termination by the Government of Madras and that there has been utter lack of legality in the order passed by the said Government. It is further submitted that the alleged termination of the plaintiff's services was only from the 15th August, 1947, and that on such date the

(1) [1948] F.C.R. 44.

546

Province of Madras acting under the instructions from the Government of India were competent to decline to accept the offer to continue in service made by the plaintiff".

There were other minor pleas such as estoppel, etc. which, it is unnecessary to notice at this stage. The High Court negatived the defence of the State and accepted the contention of the plaintiff and granted him the declaration prayed for.

The main contention of the learned Attorney General before us appearing for the State is that the plaintiff has misconceived the legal position, that what happened in this case was not a wilful order of termination of the services of the plaintiff which fell within the scope of section 240 of the Government of India Act, 1935, and whose validity was liable to be tested with reference thereto. According to him the political changes which came into force from the 15th August, 1947, operated in law to terminate the services of all persons in the position of the plaintiff as and from the 15th August, 1947, that in that situation it was open to the new Dominion Government of India or the Governments of the various Provinces, either to invite such persons to continue to be in their respective services or to intimate that they were no longer required, and that it was in the exercise of this option that the Government of Madras communicated to the plaintiff an advance intimation on the 7th August, 1947, that he would not be retained in service as and from the 15th August, 1947. The substantial question, therefore, for our decision is whether this contention put forward by the learned Attorney-General is correct. It may be mentioned that, as appears from their judgments, the

learned Judges of the High Court appear to have been under the impression that this defence of automatic termination of the services was abandoned during the course of the arguments before them by the learned Advocate-General of Madras. This impression seems to be erroneous. In any case there is nothing to preclude the question which is purely one of law being reopened before us with our leave in view of its being

547

one of considerable importance. The learned Attorney-General has based his contention as regards automatic termination of such services on three grounds:

(1) The political change which came into operation on the 15th August, 1947, resulted in creating a new Sovereign State of India and on the creation of such Sovereign State, the pre-existing contracts of service under the previous Government became automatically terminated.

(2) The contract between the Secretary of State for India and the plaintiff being one of service became terminated on the Secretary of State ceasing to have control in respect of the services contemplated under the contract.

(3) The statutory changes which came into operation as from the 15th August, 1947, by themselves brought about a termination of such services and the protection of section 240 of the Government of India Act) 1935, was no longer available to a person in the situation of the respondent.

For the purpose of appreciating the above arguments, it is necessary to notice the various events that lead up to the political changes, and the statutory provisions by which they were brought about, in so far as they relate to the class of services with which we are concerned in this case. The starting point of these changes was the announcement of His Majesty's Government dated the 20th February, 1947, that power would be transferred to Indian hands by His Majesty's Government by June, 1948, in accordance with the Cabinet Mission Plan of May, 1946. Since then the attention of the Government was engaged in the various steps to be taken to bring about the transition as smoothly as possible. One of the steps taken in this direction, in so far as it concerns this case, was the announcement by His Excellence the Viceroy on the 30th, April, 1947. That announcement purported to relate to "grant of compensation for premature termination of their service in India to Members of Civil Services appointed by the Secretary of State and to regular officers and British Warrant

548

Officers of the Indian Naval and Military Forces", and was inter alia as follows:

"1. His Majesty's Government have announced their intention that the British Government's authority in India will be finally transferred to Indian hands by June, 1948. It is the aim of His Majesty's Government that the transfer of power should be effected in an orderly and regulated manner so that the new authorities may assume their responsibilities in conditions conducive to the best interests of India and maintenance of good relations with Great Britain. His Majesty's Government are confident that during this period of transition the Services and all those who man them, whether British or Indian will respond to this call.

2. To those serving under covenant or other -form of agreement with the Secretary of State for India or who hold commissions from His Majesty the King, the transfer of power will mean premature termination on that date of a career under the ultimate authority of His Majesty's Government and

the British Parliament; and for many there is added to the heavy call of present duty the burden of anxiety for their own future and that of those who depend on them.

3. The Government of India are naturally and rightly most anxious and His Majesty's Government share their anxiety that the administration shall not be weakened by the loss of experienced officers. To this end, Government of India undertake that those members of the Secretary of State's Services who continue to serve under the Government of India after the transfer of power shall do so on their present terms as to scales of pay, leave, pensionary rights, and safeguards in matters of discipline and that provisions to this effect should be made in the Treaty to deal with matters arising out of the transfer of power. The Government of India will now propose to Provincial Governments that they should give similar assurances to members of the Secretary of State's service who agree to join Provincial services.

4. The Government of India recognise that some Indian members of the Secretary of State's services

549

may be genuinely anxious about their prospects under the Provincial administrations where they are at present employed, and every effort will be made to arrange suitable transfers in such cases.

5. The Government of India agree that compensation should be payable to such Indian Officers of these services as-

(1) are not invited to continue to serve under the Government of India after transfer of power; or

(2) can satisfy the Governor-General that their actions in the course of duty during their service prior to the transfer of power have damaged their prospects, or that the appointments offered to them are such as cannot be regarded as satisfactory in the altered circumstances; or

(3) can show to the satisfaction of the Governor-General that they have legitimate cause for anxiety about their future in the Province where they are now serving, and that no suitable transfer can be arranged.

But the Government of India feel that sentiments of patriotism will naturally impel Indian Officers to continue to serve their country and that, in the light of the undertaking that they have given, and the consideration that in fact Indian members of the Service will have improved prospects, there is no ground, save in these special cases, for payment of compensation to Indian officers on account of the transfer of power.

6. His Majesty's Government have been reviewing the whole position. They have noted the undertaking which the Government of India have given in regard to officers whom they desire, should continue to serve under the Government of India. They recognise the force of the Government of India's arguments, and they agree that to Indian Officers compensation should not be admissible except in the cases which I have just mentioned. Many Indian members of the Secretary of State's services will however become members of provincial services and in their cases His Majesty's Government's agreement that they need not be compensated is conditional upon the Provincial Governments guaranteeing the existing terms of ser-

550

vice'. If they are not prepared to do so His Majesty's Government reserve the right to reconsider the matter.

7. With these reservations I am now authorised by His Majesty's Government to inform members of the Secretary of State's services that they accept the obligation to see that

they are duly compensated for the termination of their careers consequent on the transfer of power..... "

After this announcement was issued, His Majesty's Government, for various political reasons, decided to advance the date of transfer of power and made an announcement on the 3rd June, 1947, detailing various steps which were proposed to be taken to bring about an early transfer of power. Paragraph 20 of that announcement ran as follows:

"The major political parties have repeatedly emphasized their desire that there should be the earliest possible transfer of power in India. With this desire His Majesty's Government are in full sympathy, and they are willing to anticipate the date of June, 1948, for the handing over of power by the setting up of an independent Indian Government or Governments at an even earlier date. Accordingly, as the most expeditious, and indeed the only practicable way of meeting this desire, His Majesty's Government propose to introduce legislation during the current session for the transfer of power this year on a Dominion Status basis to one or two successor authorities according to the decisions taken as a result of this announcement. This will be without prejudice to the right of the Indian Constituent Assemblies to decide in due course whether or not the part of India in respect of which they have authority will remain within the British Commonwealth".

In pursuance of what was indicated herein, the Indian Independence Act was passed on the 18th July, 1947. In pursuance of the power vested in the GovernorGeneral thereunder a number of legislative orders were passed by him. The relevant provisions of the Indian Independence Act as well as of some of the legislative orders will be presently noticed. But it

551

will be convenient at this stage to state the further steps taken by the Government relating to the services of the kind we are concerned with., in pursuance of their plan announced on the 3rd June, 1947, to speed up the transfer of power. Within about two weeks after the announcement of His Majesty's Government dated the 3rd June, 1947, a circular letter was issued, by the Government of India to the Chief Secretaries of all the Provincial Governments on the 18th June, 1947, which inter alia stated as follows:

"That in view of the latest announcement of His Majesty's Government (dated the 3rd June, 1947), it is essential to ascertain with the least possible delay, the wishes of individual officers to whom His Excellency the Viceroy's announcement of the 30th April 1947 applies in regard to continuance in service after the transfer of power. This will enable Government to decide which officers they should continue to retain in service after the transfer of power and to make arrangements to replace officers who desire to quit service, of their own accord or whom Government may not wish to continue in service".

The Chief Secretaries were accordingly asked to make arrangements "to send immediately to every officer belonging to any service specified in the schedule, and serving under the Provincial Government, a copy of the enclosed letter from the Government of India to the officers concerned, whereby the officer was asked to communicate within ten days of the receipt of the letter whether he wishes to continue in the service of the Government or whether he desires to retire from service". The circular letter of the Government of India to the Chief Secretaries further asked them that in

forwarding the replies received thereto from the individual officers, they may inform them, in case of persons who have decided to quit service, the earliest date on which the Government will be in a position to release the officer and in case of persons who offer to continue in service, whether for any reason, they would prefer him not to continue in the service, notwithstanding the officer's desire to remain in the

70

552

service and pointed out that in the latter case the Provincial Government will be incurring liability to pay compensation. In pursuance of these instructions the individual letters to the officers concerned were presumably sent and replies were obtained, and the necessary orders were passed in respect, at any rate, of such of the officers whom the various Governments were not prepared to retain service after the transfer of power. Pausing here, it will be seen that the announcement of the Viceroy dated the 30th April, 1947, and the circular letter issued by the Government of India to the Chief Secretaries on the 18th June, 1947, as well as the individual letters issued by and under the authority of the Government of India to those officers on the same date asking for information from them as to their desire to continue in service or not, were all based on the assumptions clearly stated or indicated therein, (1) that transfer of power brings about an automatic premature termination of the services, (2) on such termination, it would be open to the servant concerned either to decline to continue in the service of the new Government or to offer to continue his services, and (3) that in case the individual servant intimated his desire to continue in service, it was open to the Government either to, accept the offer or not. Thus the continuance of service was contemplated only in respect of such of the previous servants who intimated their desire for the continuance of their services and whose offer in this respect was accepted. While, therefore, discontinuance of service was to be brought about by the option of either of the parties and on such discontinuance the servant was to become entitled to compensation, the continuance of the service was a matter which would depend upon the mutual consent of both, viz., the individual servant and the Government concerned. That the position so taken up must have been perfectly within the knowledge of every one of the persons to whom these circular letters were sent is virtually admitted by the plaintiff himself in his evidence and also appears clearly from the fact that a copy of the Viceroy's announcement dated the 30th April,

553

1947, appears to have been enclosed with the individual letters dated the 18th June, 1947, sent to each of the officers by the Government of India. The plaintiff himself in his letter dated the 2nd July, 1947, to the Chief Secretary to the Government of Madras, wrote as follows:

"I am in receipt of your Memorandum No. 2738 of 1947-4, Public (Special) Department, dated 5th June, 1947, enclosing the announcement of His Excellency the Viceroy. I wish to state that I desire to continue to serve the Madras Government and that I desire no transfer to any other Province". (The reference to the date 5th June, 1947, is probably a mistake since it is clearly admitted in the plaint that the plaintiff intimated his desire to continue in service in reply to the letter dated the 18th June, 1947.)

To complete the course of events as regards the individual case of the plaintiff, the further facts may be stated.

After receiving this reply from the plaintiff dated the 2nd July, 1947, the Chief Secretary to the Government of Madras wrote to him a letter dated the 7th August, 1947, as follows:

"I am to say that with reference to your reply to the letter cited electing to continue in service after the transfer of power, the Government have decided not to retain you in service after 15th August, 1947. Your services will be terminated on the afternoon of 14th August 1947 and you may proceed on leave (your present leave will be automatically converted into leave) preparatory to retirement as from 15th August 1947. You may therefore apply for the leave (extension of leave) for which you are eligible direct to Government. The Accountant-General is being asked to certify the amount of leave for which you are eligible.

A formal communication will issue to you shortly from the Government of India terminating your services as from 14th August, 1947 A.N.

I am to express regret that the decisions in your case has been delayed so long".

This is clearly an advance intimation that the termination of the services of the plaintiff would become

554

operative at the very moment when the transfer of power comes into force, i.e., on the midnight of 14th/ 15th August, 1947. The mention of the termination on the afternoon of the 14th August, 1947, was clearly because of the official practice that a person who hands over charge of his office in the afternoon of a particular day, continues in service and draws the salary for that day. (Vide Audit Instruction (1) at page 163 of the Fundamental Rules, 3rd Edition). A letter was immediately addressed by the Chief Secretary to the Government of Madras under date 8th August, 1947, to the Under Secretary of State for India, India Office, London, and a copy thereof was sent to the plaintiff. The letter runs thus:

"I am directed to say that Mr. K. M. Rajagopalan I.C.S. proceeded on three months' leave on the 3rd June, 1947, and that as he will not continue in the service of Government in India, after the transfer of power, he will be entitled to compensation or settlement grant, as the case may be, as from the 15th August, 1947".

On the 8th August, 1947, a formal Government Order No. 377 was passed which is as follows-

"Mr. K. M. Rajagopalan I.C.S proceed on three months' leave on the 3rd June, 1947, and that as he will not continue in the service of Government of India after the transfer of power, he will be entitled to compensation or resettlement grant, as the case may be, as from the 15th August, 1947".

This order was published in the Fort St. George Gazette dated the 19th August, 1947. Presumably this order (along with other similar orders) was also intimated to the Government of India and the Government of India sent a telegram to the Government of Madras on the 14th August, 1947, as follows:

services of..... Rajagopalan".

On the 29th September, 1947, the Government of Madras passed a G. O. sanctioning payment of pound 4,500/- as compensation for the plaintiff and ordered disbursement thereof by the Accountant-General. This compensation was drawn by the plaintiff in April,

555

1950. In the light of this background it is now necessary

to notice the various statutory provisions which brought about the political change and particularly those which relate to the services.

The instrument which brought about the transfer of power from the British Government to the Dominion Government of India in accordance with the announcements of His Majesty's Government dated the 20th February, 1947 and the 3rd June, 1947, is the Indian Independence Act, 1947, (10 & 1.1 Geo. 6, Ch. 30) passed by the British Parliament and which became law on the 18th July, 1947. The preamble thereto is as follows:

"An Act to make provision for the setting up in India of two independent Dominions, to substitute other provisions for certain provisions of the Government of India Act, 1935, which apply outside those Dominions, and to provide for other matters consequential on or connected with the setting up of those Dominions".

By section I of the said Act two independent Dominions to be known respectively, India and Pakistan, were to be set up in India as from the 15th day of August, 1947, with territories assigned to each of them as indicated in sections 2, 3 and 4 thereof. Under section 5, there was to be a Governor-General for each of the Dominions to be appointed by His Majesty who was to represent His Majesty for the purposes of the government of the Dominion. By section 6 it was provided that Legislature of each of the new Dominions was to have full power to make laws for that Dominion including laws having extra-territorial operation and laws which would be valid notwithstanding any repugnancy to the law of England or to the provisions of any existing or future Act of the Parliament. It was also provided that the assent to the laws as made by the Legislatures, was to be given by the Governor-General in the name of His Majesty without any power of disallowance by His Majesty and without any power of reservation of laws for the significance of His Majesty's pleasure. By section 7, it was specifically provided that as from the 15th

556

August, 1947, His Majesty's Government in the United Kingdom was to have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India. Temporary provisions as to the government of each of the new Dominions as from the 15th August, 1947, until such time that each of the two Dominions evolves its own independent Constitution were made by sections 8 and 9. By section 8(1) the respective Constituent Assemblies of India, and Pakistan which had already come into existence and were functioning for the purpose of evolving a new Constitution for each of the Dominions, the first by virtue of the Cabinet Mission Plan of May, 1946, and the second by reason of the announcement of His Majesty's Government dated the 3rd June, 1947, were recognised as interim Legislatures for each of the Dominions. By section 8(2) the pre-existing Government of India Act, 1935, with modifications and adaptations to be made by the Governor-General and subject to any other provision or alteration to be made by the Constituent Assembly functioning as the interim Legislature, was to continue in force. By section 9 of the Act, the Governor-General was given various and extensive powers to make provisions in order to bring the provisions of the Indian Independence Act into operation and for removing difficulties arising in connection with the transition of power from the British Government to the Dominions and to carry on the business of the Governor-General in Council in

the interim period. It was specifically provided that the Governor-General's power in this behalf was to be retrospective as from the 3rd June, 1947.

It will be seen that by virtue of the Indian -Independence Act a completely independent Dominion of India was set up with a wholly independent Legislature and with a completely independent Government free from any kind of fetters as regards their functioning, either from the British Parliament or from the British Government. The Government of the Dominion, however, was still to be carried on in the

557

name of His Majesty the King of Great Britain, by the Governor-General of India to be appointed by His Majesty. The learned Attorney-General strenuously contended that these changes resulted in the emergence of India as an independent Sovereign State and that it followed therefrom, on well-recognised principles of international law, that this brought about automatic termination of the contracts of service between the prior Government and its servants. In support of this principle of international law, the learned Attorney-General cited a number of authorities as also the case in *West Rand Central Gold Mining Co. Ltd. v. The King*(1), which was quoted by this Court in *Virendra Singh v. The State of Uttar Pradesh*(2). On the otherhand, Shri Nambiar for the respondent stressed the fact that however independent the new Dominion Government may be as regards the functioning of its Legislature and of its executive Government, the new Government was still to function in the name of His Majesty the King of Great Britain and that, therefore, the Dominion is not on the same footing as an independent sovereign State, which obtains sovereignty over a new country by virtue of conquest or cession. He urged that the principle of international law relied upon would not apply to such a case. In support of his contention he drew our attention to various other provisions in the Indian Independence Act and to the various legislative orders passed by the Governor-General by virtue of powers vested in him under section 9 of the Indian Independence Act as also to adaptations made in respect of various existing laws. The question as to whether the Indian Independence Act brought about a full sovereign State for each and every purpose is one of considerable importance and is not free from difficulty. We do not wish to decide that question on the present occasion. It appears to us that the present case has to be decided with reference to the question as to what exactly has been brought about by the Indian Independence Act and the subsidiary legislation which followed thereupon, in so far as they relate

(1) [1905] 2 K. B. 391.

(2) [1955] 1 S.C.R. 415, 427.

558

to the tenure of persons in the position of the plaintiff.

For this purpose it is necessary in the first instance to have a clear idea as to what was the tenure of service of the plaintiff prior to the 15th August, 1947. Persons in the position of the plaintiff were recruited directly by the Secretary of State for India by virtue of the powers conferred on him under section 244(1) of the Government of India Act, 1935 (or under the corresponding provisions in the prior Government of India Acts). The persons so recruited, were appointed to the service called the Indian Civil Service. Each person so recruited had to enter into a covenant by means of an indenture between himself and the Secretary of State. The indenture (whose form is to be

found as Appendix I of the Indian Civil Service Manual) recited that the person was appointed by the Secretary of State to serve His Majesty as a Member of the Civil Service of India and that such service was to continue during the pleasure of His Majesty, to be signified under the hand of the Secretary of State for India with liberty for the covenantor to resign the said service with the previous permission of the Secretary of State or of the Government under which he was, for the time being, serving. The indenture incorporated various covenants by the appointee with reference to the exercise of his functions during the period of his service such as (1) general fidelity, (2) obedience to orders of general nature, (3) keeping of regular accounts, preservation and due delivery and production of private accounts, (4) not to misapply or employ for improper purposes the property entrusted to his care, (5) not to divulge secrets, (6) not to accept corrupt presents or to make corrupt bargains, (7) not to trade contrary to law or regulations, (8) not to quit India without leave and to satisfy all debts due to His Majesty before departure, and (9) to make prescribed payments towards pension, etc. Apart from these covenants, his tenure was regulated by a number of statutory provisions under the Government of India Act. Section 240, while affirming that the service was at the pleasure

559

of His Majesty provided that dismissal or reduction in rank should be preceded by a reasonable opportunity for showing cause against the action proposed and that dismissal (or removal) from service could only be by an authority not subordinate to the appointing authority which in the present case meant that the appellant could be dismissed or removed only by the Secretary of State. The Government of India Act contained also a number of provisions specially applicable to a person recruited by the Secretary of State. The conditions of his service as regards pay, leave, pension and other matters were to be such as may be, prescribed by the rules to be made by the Secretary of State and (in the absence of any specific rules by the Secretary of State) by the rules to be made by the Governor-General or the Governor of a Province in accordance as he was in service under the Government of India or the Provincial Government [section, 247(1)]. In the matter of promotions or leave exceeding three months or in the matter of an order of suspension, he was to be directly under the authority of the Governor-General or the Governor, as the case may be, exercising their respective individual judgments [sections 247(2) and (3)]. No award of pension less than the maximum pension under the rules could be made except with the consent of the Secretary of State [section 247(6)]. He had the right to approach the Governor-General or the Governor in the exercise of their individual judgment if he had any grievance or complaint in respect of his service and a right of appeal to the Secretary of State as against the order of any authority which punished or formally censured him or interpreted any rule to his disadvantage (section 248). The Secretary of State had to make rules; specifying the number and character of the civil posts under the Crown which were to be reserved for and to; be filled by persons belonging to the Indian Civil Service recruited by him (section 246). If the conditions of the service were adversely affected by reason of anything done under the Act or for any other reason which might have appeared to the Secretary of State to justify payment of compensation, he was entitled

560

thereto, the compensation being such as the Secretary of State might fix. The said sum was payable from the revenues of the Government of India or the Provincial Government as the case may be (section 249). It will be seen from the above that the tenure of an Indian Civil Servant was basically contractual but with conditions and prospects of such service regulated by statute. A person recruited to such service was in a very special position, in comparison with persons holding other civil posts of the Government of India or the Provincial Government. He enjoyed a number of rights and privileges attached to him by virtue of the fact that he belonged to a specially recruited service with certain high posts reserved for him and having the right of appeal to the Secretary of State in respect of matters relating to his service, by virtue of sections 244, 246, 247, 248 and 249. Thus the Indian Civil Service was a specially privileged class of service under the Crown with the essential characteristic of direct and ultimate protection by the Secretary of State representing His Majesty's Government.

Now it is necessary to notice the fundamental changes brought about in this behalf by the 'Indian Independence Act. In the first instance the Secretary of State who, as a Member of British Cabinet, acting in the name of the Crown and responsible to the British Parliament, was exercising such control as was vested in him in respect of the affairs of India and in particular as regards these services, completely disappeared. It was specifically provided by section 7 (1)(a) of the Indian Independence Act, 1947, that as a consequence of the setting up of the new Dominions as from the appointed day (15th August, 1947) "His Majesty's Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India". There was a further specific provision by way of section 10 in the Indian Independence Act as regards the Secretary of State services which was as follows:

"10. Secretary of State's services etc.

561

(1) The provisions of this Act keeping in force provisions of the Government of India Act, 1935, shall not continue in force the provisions of that Act relating to appointments to the civil services of, and civil posts under, the Crown in India by the Secretary of State, or the provisions of that Act relating to the reservation of posts".

Now the India (Provisional Constitution) Order of 1947 which was issued by the Governor-General on the 14th August, 1947, under the power of adaptation vested in him under section 9(1)(c) of the Indian Independence Act and which was to come into operation simultaneously with it, gave effect to the above two provisions, viz., section 7(1)(a) and section 10(1) of the Indian Independence Act, by specifically deleting from the Government of India Act, 1935 the various sections relating to the Secretary of State and his services, i.e., sections 244, 246, 248 and 249 and 278 to 284-A (vide schedule to the India (Provisional Constitution) Order, 1947). Changes were also made by the same order in sections 240 and 247 relating to conditions of service which will be noticed presently, whose chief purpose was to withdraw the responsibility of the Secretary of State as regards matters covered by these sections. The resultant position was clearly this. (1) There was no further recruitment to a special covenanted service by the Secretary of State. (2) There was to be no statutory reservation of posts to be made

by the Secretary of State. (3.) The conditions of service as made by the Secretary of State no longer continued in operation. (4) No right of appeal or approach to the Secretary of State for redress of any personal grievances relating to such servants, or right of compensation, etc. for any adverse action to be determined by the Secretary of State, continued to subsist. True, some of the conditions of service previously governing these persons were continued by section 10(2) of the Indian Independence Act and the adaptations made thereunder which will be noticed presently. But apart from the question whether such continuance is available to all the previous members of the service a matter which will be

562

dealt with presently-the ultimate -responsibility for the framing and maintenance of the conditions of service was no longer with the Secretary of State.. It is also true that in -respect of such of these civil servants whose services were retained by the new Dominion Government the service continued to be under the Crown (as shown by the adaptation of section 240 of the Government of India Act). But this was only because in theory the new Government of India was still to be carried on in the name of His Majesty. This was no more than a symbol of the continued allegiance to the Crown. The substance of the matter, however, was that while previously the Secretary of State's services were under the Crown in the sense that the ultimate authority and responsibility for these services was in the British Parliament and the British Government, this responsibility and authority completely vanished from and after the 15th August, 1947, as envisaged in the Viceroy's announcement of the 30th April, 1947, and as specifically affirmed by section 7 (1) (a) of the Indian Independence Act. Thus the essential structure of the Secretary of State services was altered and the basic foundation of the contractual-cum-statutory tenure of the service disappeared. It follows that the contracts as well as the statutory protection attached thereto came to an automatic and legal termination as held by the Privy Council and the House of Lords in somewhat analogous situations in *Reilly v. The King*(1) and *Nokes v. Doncaster Amalgamated Collieries Ltd.*(2).

To repel the above view of the change brought about by the Indian Independence Act, learned counsel for the respondent relied on certain other provisions which may now be noticed. These provisions far from supporting the contention of the respondent, clearly confirm the above view. The first of these is section 10(2) of the Indian Independence Act, which is as follows:

"10. (2) Every person who-

(a) having been appointed by the Secretary of State, or Secretary of State in Council, to a civil

(1) [1984] A.C. 176.

(2) [1940] A.C. 1014,

563

service of the Crown-in India continues on and after the appointed day to serve under, the Government of either of the new Dominions or of any Province or part thereof, shall be entitled to receive from the Governments of the Dominions and Provinces or parts which he is from time to time serving the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or, as the case may be, as respects the tenure of his office or rights as similar thereto as changed circumstances may permit, as that person was entitled to immediately before the appointed day".

The contention of the learned counsel is that this provision clearly indicates that persons previously appointed by the Secretary of State to the Indian Civil Service continue under the new Government and that they are entitled to similar conditions of service as they had before. According to him the order of termination of plaintiff's service being invalid, he must be deemed to continue in service. But, it is to be noticed that the above provision does not say that all persons previously appointed shall be continued in service. It is very carefully worded and merely guarantees the same conditions of service, etc. to persons who "having been appointed by the Secretary of State continue on and after the appointed day to serve under the Government. This section has nothing to say as to who are the persons who continue in service and receive the benefit. That was obviously left to be provided by delegated legislation in the shape of orders of the Governor-General by virtue of section 9(1)(a) of the Indian Independence Act. The India (Provisional Constitution) Order, 1947, referred to above deals with this matter in article 7(1) thereof which runs as follows:

"Subject to any general or special orders or arrangements affecting his case, any person who immediately before the appointed day is holding any civil post under the Crown in connection with the

564

affairs of the Governor-General or Governor-General in Council or of a Province other than Bengal or the Punjab shall, as from that day, be deemed to have been duly appointed to the corresponding post under the Crown in connection with the affairs of the Dominion of India or as the case may be, of the Province". The Schedule to this Order also shows the adaptations made in respect of sections 240 and 247 of the Government of India Act to give effect to section 10(2) of the Indian Independence Act above quoted. Now section 247 of the Government of India Act as adapted is as follows:

"The conditions of service of all persons who, having been appointed by the Secretary of State or the Secretary of State in Council to a civil service of the Crown in India, continue on and after the date of the establishment of the Dominion to serve under the Government of the Dominion or of any Province, shall-

(a) as respects persons serving in connection with the affairs of the Dominion, be such as may be prescribed by rules made by the Governor-General;

(b) as respects persons serving in connection with the affairs of a Province-

(i) in regard to their pay, leave, pension, general rights as medical attendance and any other matter which immediately before the establishment of the Dominion was regulated by rules made by the Secretary of State, be such as may be prescribed by rules made by the Governor-General; and

(ii) in regard to any other matter, be such as may be prescribed by rules made by the Governor of the Province".

Section 240(2) as modified is as follows:

"No such person as aforesaid (referring to the persons mentioned in section 240(1) which includes persons appointed by the Secretary of State) who having been appointed by the Secretary of State or the Secretary of State in Council continues after the establishment of the Dominion to serve under the Crown in India shall be dismissed from the service of His Majesty by any authority subordinate to the

565

Governor-General or the Governor according as that person is

serving in connection with the affairs of the Dominion or of a Province, and no other such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed".

Taking these various provisions together, it is clear that the guarantee of the prior conditions of service and the previous statutory safeguards relating to the disciplinary action are now confined to such as continue in service on and after the establishment of the Dominion to serve under the Crown, i.e., of the Government of the Dominion or of a Province, as the case may be. Who the persons are who fall within the category of persons so continuing is clearly indicated by implication in article 7 (1) of the India (Provisional Constitution) Order, 1947, already quoted, which says that any person who immediately before the appointed day is holding any civil post under the Crown in connection, with the affairs of the Governor-General or Governor-General in Council or of a Province, shall, as from that day, be deemed to have been duly appointed to the corresponding post under the Crown in connection with the affairs of the Dominion of India, or, as the case may be, of the Province. It is clear that the continuance contemplated by section 10(2) (a) of the Indian Independence Act and by section 240(2) and section 247 of the Government of India Act as adapted, is the continuance impliedly brought about by this deeming provision in article 7(1) of the India (Provisional Constitution) Order. But it has to be noted that this provision is specifically preceded by the qualifying phrase "subject to any general or special orders or arrangements affecting his case". Thus all persons who were previously holding civil posts are deemed to have been appointed and hence to continue in service, excepting those whose case is governed by "general or special orders or arrangements affecting his case". Now, omitting "general orders" which has no application in this case, there can be no reasonable doubt that the special orders or arrangements contemplated herein, in so far as the 566

members of the Secretary of State's services are concerned, are the special orders or arrangements which followed on the Viceroy's announcement dated the 30th April, 1947, in pursuance of which the individual civil servants had been circularised and their wishes ascertained, and the Governments concerned had finally intimated their option not to invite the continuance of the service of particular individuals as has happened in the case of the present plaintiff. To repel this conclusion, the learned counsel for the respondent urges (1) that the "special orders or arrangements" contemplated by article 7(1) of the India, (Provisional Constitution) Order, 1947, must be valid orders or bilateral valid arrangements made by the appropriate authority, amongst which category, according to him, the order of termination of the service of the plaintiff-respondent, issued by the Chief Secretary to the Government of Madras on the 8th August, 1947, does not fall, and (2) that the previous history commencing from the announcement by the Viceroy is not admissible to construe the meaning and effect of the Indian Independence Act and the legislative orders made by the Governor-General thereunder. As regards the first objection above, there is no reason to think that the words "special orders or arrangements" indicate either a valid order or a bilateral and valid arrangement. In view of the history as set out above and the extreme urgency with which all these steps had necessarily to be taken before the appointed day in order to facilitate a smooth

transition, the legislative authorities concerned must be taken to have proceeded on a recognition of the factual situation as it then existed. For a similar approach in a similar situation see for instance *Raj Rajendra Malojirao Shitole v. The State of Madhya Bharat*(1) where this Court held that article 385 of the Constitution proceeded on a recognition of the factual situation, at the time, relating to the matter involved. Even apart from this answer to the objection, the objection itself appears to be based on a misapprehension. It is true there is no clear evidence in the

(1) [1954] S.C.R. 748, 757.

567

case that the order of termination of the service of the plaintiff was one made with the sanction of then Secretary of State. It may also be that the decision not to retain his services as and from the 15th August, 1947, was based on his past record as admitted in the written-statement and works serious hardship in view of his not having had an opportunity to show cause. But it was an order to come into operation at the precise moment when the Indian Independence Act came into force. At that moment the Secretary of State's concern with this matter was at an end. There is no reason to think that an order of this kind with the sanction of the Central Government, not purporting to exercise a power of termination of services, but acting on the assumption implicit in the Viceroy's announcement that the services would come to an automatic termination and intimating the decision of the appropriate Government not to retain the services of the plaintiff as and from the 15th August, 1947, is not within the competence of the very Government under whose service, the plaintiff wanted to serve. The very nature of the situation demanded the taking of such anticipatory decisions and the communication of the same to the person concerned, in order to become operative at the crucial moment of the transition of power. As regards the second objection, it appears to us that the contention as regards the in admissibility of reference to the announcement of the Viceroy and the action taken thereupon by the Central and the Provincial Governments, both in its general aspect as also with reference to individual cases like that of the plaintiff, is without, any substance. The phrase "special orders or arrangements affecting his case" in article 7(1) of the India (Provisional Constitution) Order, 1947, can only refer to this and similar other material culminating in the orders and arrangements relating to the concerned individuals. That there were any other kind of special orders or arrangements contemplated by this provision concerning the Secretary of State's services has not been suggested and it is clear there were none. That such previous material which led up to the particular legislative provision is

72

568

admissible in evidence has been so held in *Ladore v. Bennett*(1) which was held valid in *Govindan Sellappah Nayar kodakan Pillai v. Punchi Banda Mudanayake*(2). As pointed out by Lord Atkin in the case in *Ladore v. Bennett*(3) at page 477, such documents indicate the materials which can be taken to have been before the Governor-General when he passed the relevant legislative order. This material indicates quite clearly that while the initial option to continue or not in service was with the servant concerned, the final option, to continue him or not to continue him was with the appropriate Government and that the special orders

or arrangements contemplated were the action taken in pursuance of that final option.

It was faintly suggested that the Viceroy's announcement of the 30th April, 1947, was before His Majesty's Government decided to advance the date of transfer of power by nearly a year and that the original announcement contemplated a treaty between the British Government and the future Dominion Government to regulate all these matters and that since no such treaty has in fact been entered into, the announcement was not admissible in evidence. The fact that the transition of power took the form of legislation by the British Parliament and not of a regular treaty between the two Governments in view of the changed circumstances is not a matter which can in any way effect the situation so far as it relates to the particular matter with which we are concerned. It is that very announcement that has been acted upon after the further announcement of the 3rd June, 1947. This appears clearly from the fact that the circular letter of the Government of India to the various provincial Chief Secretaries referred to this very announcement and from the further fact that the letter which was sent to each and every individual civil servant was accompanied by a copy of the said announcement.

It is clear, therefore, from the above discussion that apart from the fact that the Secretary of State

(1) [1939] A.C. 468.

(2) [1953] A.C. 514, 528.

569

and his services disappeared as from the 15th August 1947, section 10(2) of the Indian Independence Act and article 7(1) of the India (Provisional Constitution) Order proceeded on a clear and unequivocal recognition of the validity of the various special orders and the individual arrangements made and amount to an implicit statutory recognition of the principle of automatic termination of the services brought about by the political change. In our opinion, therefore, the services of the plaintiff came to an automatic termination on the emergence of Indian Dominion. The special order and arrangement affecting his case that, as made in pursuance of the Viceroy's announcement resulted in his service not being continued from and after the 15th August, 1947, and the plaintiff is not entitled to the declaration prayed for.

The learned Judges of the High Court in coming to the conclusion they did, have, with respect, missed the significance of the phrase "special orders or arrangements affecting his case" used in article 7(1) of the India (Provisional Constitution) Order, 1947, and failed to appreciate that this was to be construed in the light of all the relevant events that proceeded, commencing from and following upon the announcement of the Viceroy dated the 30th April, 1947.

The result is that the appeal is allowed, but in the circumstances without costs.

570