Mohammad Matteen Qidwai vs The Governor-General In Council on 28 April, 1952

Equivalent citations: AIR1953ALL17, AIR 1953 ALLAHABAD 17

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

Sapru, J.

1. Those are two cross-appeals and arise out of the same judgment. Second Appeal no. 751 of 1949 was filed by the Governor-General of India in Council (now Union of India) through the Oudh and Tirhut Railway. Second Appeal no. 2029 was filed by the plaintiff, Mohammad Matin Qidwai. It is proposed to dispose of the two appeals by a common judgment.

2. The suit out of which these appeals arise was brought by the plaintiff for a declaration that the order of his removal from service dated 20-12-1944 was void, illegal and ineffective and he is, therefore, entitled to he regarded as continuing in his post. Also included in the reliefs claimed, was a prayer for a sum of us. 1,024-12-0 as arrears of pay and allowance from the date of his removal till the date of the suit. The defendant contested the suit on the grounds that the plaintiff was never appointed by the General Manager, Oudh and Tirhut Railway, that the Chief Engineer was authorised to remove the plaintiff, that the order of removal was justified, that the plaintiff had no cause of action for the suit, that the suit was time-barred and that he was not entitled to get the salary and allowances for the period during which ho did not work. The learned Munsif decreed the suit for declaration and for recovery of under Section 597 as arrears of salary but dismissed the claim for the allowance claimed. Both parties went in appeal to the lower appellate Court. That Court confirmed the decree of the learned Munsif and dismissed both the appeals. Both, the plaintiff and the defendant, have now come up in appeal to this Court.

3. Shortly put, the plaintiff's case was 'this. The plaintiff was originally appointed a sub-permanent way inspector by the Chief Engineer, Ro-hilkhand and Kumaun Railway, by an order dated 6-1-1930, The Rohilkhand and Kumauu Railway and the Bengal North Western Railway which were company--owned and managed railways were taken over by the State on 1-1-1943. For purposes of administration they were combined into one and were given the name of the Oudh and Tirhut Railway, On this amalgamation, the services of the plaintiff as also of the other employees were terminated from the midnight of 31-12-1942. Thereafter, the plaintiff ceased to be an employee of the Rohilkhand and Kumaun Railway and his appointment to the Oudh and Tirhut Railway was a fresh one. The two Railway Companies which were at that time company concerns had a common

General Manager. He was authorised by the Government of India to offer a new appointment, along with others, to the plaintiff with effect from 1-1-1943. The terms of this new appointment were to be governed by the conditions printed on the reverse of the offer dated 13-10-1942. These terms arc EX. 1 in the case. The plaintiff communicated his acceptance of this offer by his letter dated 17-10-1942.

4. Objection was raised in the Court below that the offer by the General Manager was not made by the Governor-General and that, therefore, there was no valid contract of service under Section 29, Contract Act. Reference was made in this connection in the lower Court to Section 175(iii), Government of India Act, 1935. The lower appellate Court held that the letter of the General Manager showed that it was under the directions of the Government of India that he had made the offer before the Company was actually taken over by Government. The learned Judge further came to the conclusion that the offer was made by him on behalf of the Government of India (Railway Board) and that, therefore, the plaintiff must be deemed to have been in service under a valid contract. On the question whether there was any ambiguity in the letter of the General" Manager to the plaintiff, the view of the lower appellate Court was that the letter was clear on the point that the conditions of service in future would be governed by State rules.

In view of his finding that there was nothing indefinite or uncertain about the letter, the learned Judge held that the contract was not, as was pleaded before him, void under Section 29, Contract Act. The learned Judge further held that service agreements were executed by the employees of the two amalgamated Railways practically more than two years after Government had taken them over and for that delay the plaintiff was in no way responsible. The learned Judge further held that the service of the plaintiff was neither temporary, nor for a fixed period. In plain terms, the finding of the learned Judge was that the plaintiff was appointed to his present post by the General Manager of the Bengal North Western Railway and the Rohilkhand and Kumaun Railway on behalf of and under the authority of the Government of India. These are findings of fact which we are bound to accept in second appeal and we do accordingly.

5. There cannot be the slightest doubt that the plaintiff was removed from service by an order of the Chief Engineer of the Oudh and Tirhut Railway with effect from 3-2-1945. As I have pointed out before, he was originally appointed no doubt by the Chief Engineer, Rohilkhand and Kumaun Railway, by an order dated 6-1-1930. That appointment however came to an end when the two Railways were taken over by Government. Thereafter, he was appointed by the General Manager of the two combined Railways acting on behalf of and under the authority of the Government of India (Railway Board). The defendant's case is that Section 240(2) applies to a case of dismissal and has no application to that of removal. It is, therefore, contended that the case falls under the proviso to Section 241(2), Government of India Act. It is further emphasised that Rule 729, State Establishment Code-enables an employee to be removed without holding any formal enquiry.

6. I may say that on a correct reading of Section 241(2), Government of India Act, 1935, there can be no doubt that it applies only to persons employed on the express conditions that their services were of a temporary nature and can be terminated by a month's notice. It is clear that the plaintiff was admitted into service as a permanent servant and for this reason, proviso to Section 241(2) will have no application to him. The question, therefore, to be considered is whether the case of the plaintiff is

covered by Section 240(2), Government of India Act, 1935. That section is to the following effect:

> "No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which ho was appointed."

7. In order to find out who is the "such person" referred to in Section 240(2), it is necessary to consider the terms of Section 240(l) which I reproduce below:

> "Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under, the Crown in India, holds office during His Majesty's pleasure."

8. Obviously the "such person" referred to in Section 240(2) is a person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India. I shall consider a, little later the question what' constitutes a civil service of the Crown in India. It is sufficient to point out hero that this sub-section includes both "a civil servant" and "a holder of any civil post." The first question which has to be considered is whether there is any force in the argument of learned counsel that inasmuch as the plaintiff was only removed and not dismissed, his case is not covered by Section 240(2). Though the effects of removal and dismissal are the same in the sense that the person affected loses his employment, removal is undoubtedly a loss serious form of punishment inasmuch as a removed servant is not regarded as ineligible for a new appointment under Government.

The learned Judge has, however, referred to the fact that Rule 1705, State Establishment Code, makes it clear that no Railway servant can be removed or dismissed by any authority lower than that by which he was appointed. The learned Judge remarks that reading Section 240(2) and Rule 1705 together, the inference is irresistible that no Railway servant can be dismissed by any Railway Authority lower than that by which ho was appointed. Our attention on. this point was also invited to Section 277, Government of India Act, 1935. I quote the first part of 277:

> "In this part of this Act--
>
> the expressions "all-India Service,' 'Central Service Class I,' 'Central Service Glass II,' Railway Service Class I,' 'Rail-way Service Class II' and 'Provincial Service' mean respectively the services which were immediately before the commencement of Part III of this Act, so described respectively in the classification rules then in force under Section 96-B, Government of India Act; and references to dismissal from His Majesty's service include references to removal from His Majesty's service."

9. It was sought to be argued that references to dismissal from His Majesty's service include references only to the case of persons employed in the services mentioned in Section 277 and to no other service. This argument completely ignores the effect of the words "include" and 'His Majesty's Service.' The plaintiff was undoubtedly not a member of any of the civil services of a higher character mentioned in Section 277(l). At the most be could be said to be holding a civil post under

the Crown in India. It is, therefore, urged that in his case there is a distinction between removal and dismissal and that Section 277(l) cannot be so road as to include cases of persons holding civil posts. I am not disposed to accept this argument as correct, not only because it pays no attention to the effect of Rule 1705, Railway Establishment Code, which gives an assurance to the employees of the Railways that they will neither be dismissed nor removed by an authority lower than that which appointed them but also, and more importantly, because it ignores the provisions of Section 277(l) and attaches no importance to the words "include" and "His Majesty's Service' in that section. Learned counsel for the Union Government has not contested the fact that the Chief Engineer is an authority lower than the General Manager. Thus the plaintiff was removed by an authority lower than that by which ho was appointed.

It is, however, sought to be argued that Section 240(2") applies only to a member of a properly constituted civil service of the Crown in India or the holder of any civil post under the Crown in India. It is contended that the plaintiff was neither a member of any civil service of the Crown in India nor the holder of any civil post under the Crown in India. It is urged that the plaintiff who is neither a member of any civil service of the Crown in India nor it is contended, the holder of a civil post under the Crown in India held office during His Majesty's pleasure and that the guarantee that he will not ho dismissed from the post by any authority subordinate to that by which he was appointed cannot be said to apply to the plaintiff. As I have said before, I cannot accept the argument that the plaintiff was not the holder of any civil post under the Crown in India. He was clearly in His Majesfy's Service. I may quote Professor Wade and Mr. Phillips on this point. They say in their Constitutional law that 'appointments to all posts in the civil service' are appointments to the service of the Crown, though made by and in the name of ministerial heads of departments. All servants serving Government in any capacity in this country were, previous to the new Republican Constitution, either members of a properly established civil service or holders of civil posts in this country.

10. In this connection, I may particularly refer to the case of Venkata Rao v. Secy. of State, 1937 ALL. l. j. 213 (P. c.). In that case the appellant was a reader in the Government Press in Madras. Ho was held to bo in the civil service of the Crown in India. Section 210 reproduces Section 96B, Government of India Act, 1915, as amended in 1919. Defiling with Section 96B their Lordships of the Privy Council observed that :

> "Section 96B and the rules make careful provision for redress of grievances by administrative process and it is to be observed that Sub-section (5) in conclusion reaffirms the supreme authority of the Secretary of State in Council over the civil service. ..... They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action but will be regulated by rule."

ll. The important point which emerges from a reading of this case is that their Lordships regarded a reader in the Government Press as a person in the service of the Crown in India and they were prepared to extend the guarantee given to such civil servants in regard to their dismissal from service to this reader. There is no evidence in this case that there is any properly constituted service

of sub-permanent way inspectors and it cannot, therefore, be said that the plaintiff was a member of any properly constituted civil service, the position of a sub-permanent way inspector, however, appears to mo in principle to be in no way different from that of a reader in a Government Press. I may in this connection also refer to the case of Mangal Sain v. State of Punjab, A. I. R. 1952 Punj. 58. In this case the question what the expression "civil post under a State" means came up for consideration before a Bench of the Punjab High Court. On this point the observations of Harnam Singh J. are important and I reproduce them below :

> "Now, the expression 'civil post' is not defined in the Constitution of India. Beading, however, Articles 310 and 311 together, the conclusion is inescapable that the expression 'civil post' as used in Article 311 means 'a post or office on the civil side of the administration' as distinguished from 'post connected with defence'."

l2. I may say that I am in complete agreement with this view. It seems to me that the only conclusion I can reasonably come to is that the guarantee embodied in Section 240(2) applies not only to members of the superior civil services or the provincial civil services but also holders of civil posts or to employees in any properly established civil service of the Crown in India. I can see no difference between the words "His Majesty's service" and the "service of His Majesty."

13. I may further point out that in the case of Yusuf All Khan v. Province of the Punjab, A. I. R. 1950 Lab. 59, it was held by a learned single Judge of the Lahore High Court that :

> "Section 240 relates to every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India. Where it does not appear that the personnel of the Civil Supplies Department had been incorporated into a service, all incumbents of appointments in that department would fall into the second category, viz., of persons 'holding civil posts under the Crown in India.' It cannot be said that, because the post is declared to be temporary, or the holder thereof is a temporary employee, he is not within the expression 'person holding a civil post under the Crown in India.' "

14. I would like to quote in this connection two well-known authorities on Constitutional Law. Professor Wade and Mr. Phillips in their well-known book on Constitutional Law, Edn. 4.p. 165, observe as follows in the Chapter dealing with "The Civil Service" :

> "The departments are staffed by administrative, profossional, technical, executive and clerical officers who constitute the Civil Service. Civil servants are all servants of the Crown. There is no comprehensive definition of a Crown Servant.
>
> A person appointed by another Crown servant under the authority of a statute may be a Crown servant as much as one appointed directly by the Crown. The facts of each appointment must be considered."

15. That the words "civil service" have a very wide connotation and do not include only what in this country are called the superior civil services is clear from the meaning as is evident from the remarks quoted above, that attaches to the words "civil service" in Britain. I beg leave to quote from the well-known book on constitutional Law, by the late Mr. Ridges, Eighth Edition, p. 196:

> "The enormous expansion of governmental functions since 1835 has resulted in huge staffs, which in 1939 numbered about 400,000, a figure that had, due to wartime expansion, risen to over 700,000 in 1945; since then it has steadily declined. They arc classified as industrial and non-industrial. The last class includes various grades: Administrative, formerly Class I or Upper Grade (now about 1,400); Executive; Clerical; Women Clerical Assistants and Shorthand Typists as General Glasses, and Executive,. Clerical, Unestablished Clerical, and Typing as Departmental Classes; etc. etc."

16. I have quoted this in order to show how wide the conception of the civil service in Britain is. It strikes me that in enacting the Government of India Act, 1935, which is a British statute, the framers of the Constitution must have had the same conception of the civil service. For this reason, I am clearly of the opinion that the plaintiff was, at all events, the holder of a civil post under the Crown in India. I have indicated how and why Section 240(2) must be deemed to be applicable to him. It is beyond question that he was removed from office and for the purposes of Section 240(2) removal from office means the same thing as dismissal by art authority which was inferior to the authority which appointed him. The power of dismissal could not be delegated, having regard to the provisions of Section 240(2) to any person other than the appointing authority and any rule to the contrary is void.

The conclusion I have arrived at is that though initially the plaintiff was appointed as a sub-permanent way inspector by the Chief Engineer of the Rohilkhand and Kumaun Railway, his appointment came to an end on 31-12-1942. There- ' after, he was appointed to the same post by the then General Manager of the two combined Bail-ways, while that General Manager was still technically not a Crown servant, under the authority and on behalf of the Government of India Railway Board. He was thus, in my opinion, appointed by the General Manager under the authority of the Government of India and his services could not be terminated by an officer lower than the General Manager, though they could be terminated by one superior to the General Manager.

17-21 I shall now consider the question whether the plaintiff is entitled to the relief claimed in respect of his salary. I shall refer in this connection to the case of Mr. I.M. Lall who was a member of the Indian Civil Service and who was dismissed. In that case, i.e., The High Commissioner for India v. I.M. Lall, 1948 ALL. l. j. 266 (P. c.), their Lordships referred to the observations of Lord Blackburn in the Scottish case of Mulvenna v. The Admiralty, 1926 s. c. 842, in which that learned Judge, after reviewing the various authorities, states:

> "These authorities deal only with the power of the Crown to dismiss a public servant, but they appear to me to establish conclusively certain important points. The first is that the terms of service of a public servant are subject to certain qualifications

> dictated by public policy, no matter to what service the servant may belong, whether it be naval, military or civil, arid no matter what position he holds in the service, whether exalted or humble, Xt is enough that the servant is a public servant, and that public policy, no matter on what ground it is based, demands the qualification. The next is that these qualifications are to be implied in the engagement of a public servant, no matter whether they have been referred to in the engagement or not. If these conclusions are justified by the authorities to which 1 have referred, then it would seem to follow that the rule based on public policy which has been enforced against military servants of the Crown, and which prevents such servants suing the Crown for their pay on the assumption that their only claim is on the bounty of the Crown and not for a contractual debt, must equally apply to every public servant--See Leaman v. King, (1920) 3 K. B. 663, Smith v. Lord Advocate, (1897) 25 B. 112, and other cases there referred to. It also follows that this qualification must be read, as an implied condition, into every contract between the Crown and a public servant, with the effect that, in terms of their contract, they have no right to their remuneration which can be enforced in a civil Court of justice, and that their only remedy under their contract lies in an appeal of an official or political kind."

22. Their Lordships endorsed the statement of the law by Lord Blackburn in the case just referred to as correct. Their Lordships referred to certain sections of the Government of India Act, viz., Sections 179(9), 247(4), 249 and 250, and observed that they were unable to derive from them any statutory right to recover arrears of pay by action. Their Lordships, after referring to the Government of India Act, 1919, went on to observe that "It has been settled ever since Gibson v. East India Company, (1839) 5 Bing. (N. C.) 262, that pay could not be recovered by action against the Company, but only by petition, memorial or remonstrance. It follows that the respondent fails in his claim to arrears of pay."

23. The learned Civil Judge fell into an error in awarding a decree for arrears of pay to the plaintiff. This part of the decree cannot be allowed to stand and to this extent the appeal preferred by the Union Government must succeed.

24. I now come to the appeal which has been preferred on behalf of the plaintiff for certain allowances. They were disallowed by the Court below. I fail to understand how arrears of allowances could bo granted to him in view of the fact that he was not allowed any arrears of pay. For the recovery of his arrears of pay and allowances, the proper remedy of the appellant is to make a representation to Government. I have no doubt that any representation made by him will receive proper attention at the hands of the authorities concerned. For these reasons, the plaintiff's appeal for these allowances must be dismissed and I confirm, on this part of the case, the decree of the Court below.

25. For the reasons given above, I would dismiss second appeal no. 751 of 1949, except in so far as the claim for a decree for arrears of pay is concerned. I would dismiss the plaintiff's appeal for arrears of allowances. As the plaintiff has succeeded in securing from this Court the main relief asked for by him, namely, a declaration, I think that, in all the circumstances of the case, I would be

justified in granting him his costs in second appeal no. 2029 of 1948. We make no order as to costs in second appeal no. 751 of 1940.

V. Bhargava, J.

26. I have had the benefit of hearing the judgment delivered by my brother, Sapra J. and I entirely agree with the conclusions arrived at by him. I would only like to put, in my own way, the reason for holding that the removal of the plaintiff from his service was illegal which was the main question discussed in these appeals.

27. The contention of the plaintiff was that his removal was illegal as it was in contravention of the provisions of Sub-section (2) of Section 240, Government of India Act, 1935. Learned counsel for the defendant based his contention that the removal was not illegal on two grounds. The first ground was that Sub-section (2) of Section 240 of the Act did not apply to the case of the plaintiff at all and the second ground was that there had been no appointment by the Governor-General or by the Government of India so that the old appointment of the plaintiff made by the Chief Engineer of the B.N.W. and B. K. Railways had continued and, therefore, the Chief Engineer of the O. T. Railway was entitled to remove the plaintiff from service.

28. To consider the first argument, I reproduce below the provisions of Sub-sections (l) and (2) of Section 240, Government of India Act, 1935, which are as follows:

> "240 (1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.
>
> (2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed."

The first point to be examined is as to whether Section 240, Government of India Act, 1935, at all applies to the plaintiff. There was some argument on the question as to whether the plaintiff was, at all a member of a civil service of the Crown in India or held any civil post under the Crown in India. The use of the words 'member of a civil service' indicates that this first clause is meant to apply to those persons who are members of a regularly constituted service and who are not merely holding posts under the Crown. There is nothing at all on the record or in the finding of the lower Courts to show that the post which was held by the plaintiff was a post borne on the cadre of a regularly constituted service. There can, however, bo no doubt that the plaintiff was holding a 'civil post' under the Crown just before ho was removed.

The word 'civil' used before the word 'post' in this section is clearly meant to distinguish posts in the Defence Forces. the words 'civil post' cannot be confined merely to posts which are borne on the cadre of any regularly constituted service. Learned counsel for the defendant did not press the argument further in view of the fact that, in the caso of Venkata Rao v. Secy. of State, 1937 ALL. l. j. 213, their Lordships of the Privy Council recognised that a member on the clerical staff of the

Government Press at Madras was holding a civil post under the Crown in India. the words 'civil post' were examined by a learned Single Judge of the Lahore High Court in Pakistan in Yusuf Ali Khan v. Province of the Punjab, A. I. R. 1950 Lah. 59 where the provisions of Section 240, Government of India Act, 1935, were still applicable. Both these cases clearly show that all posts held by any public servant, if the posts did not belong to the Military Department or the Defence Forces, must bo deemed to bo 'a civil post under the Crown.' It is, therefore, quite clear that the plaintiff must be held to be a person governed by the provisions of Sub-section (l) of Section 240, Government of India Act, 1935. Sub-section (2) of Section 240 of the Act does not use the words 'a civil service of the Crown in India or any civil post under the Crown in India.',

29. The next point, that was urged by the learned counsel for the defendant was that Sub-section (2) of Section 240, Government of India Act, 1985, merely applied to persons who were members of ' a civil service ' and did not apply to those who merely held 'a civil post under the Crown in India'. Sub-section (2) begins with referring to the person mentioned in Sub-section (l) of that section and then goes on to lay down that 'such person as aforesaid ' is not to be dismissed from the 'service of His Majesty ' by any authority subordinate to that by which he was appointed.

This language makes it perfectly clear that Sub-section (2) of Section 240 was meant to govern all persons who fell within either of the two classes mentioned in Sub-section (l) of that section. The use of the word ' service ' in Sub-section (2) did not imply dismissal of only those persons who were members of a service but included dismissal of all persons who may even have held ' a civil post under the Crown ' because dismissal from that post is also dismissal from the ' service of His Majesty. ' The use of the word ' such' before the word ' person ' in Sub-section (2) indicates that every person mentioned in Sub-section (l) is to bo governed by the provisions of Sub-section (2) and the word ' service' used in Sub-section (2) was never meant to be equivalent to the words ' civil service of the Crown in India. ' The applicant, who was undoubtedly holding ' a civil post under the Crown in India' in the State Railways would, therefore, be governed by the provisions of Sub-section (2) of Section 240 of the Act.

30. His third contention was that Sub-section (2) of Section 240 of the Act merely governs orders of dismissal and not orders of removal. There is no doubt that there is a distinction between dismissal and removal. A person ' dismissed ' from Government service is ineligible for re-employment whereas this disqualification does not attach to a person 'removed.' The contention that Sub-section (2) of Section 240 of the Act would not govern an order of removal was however, met by reference to Section 277, Government of India Act, 1935, which also occurs in part x of the Act. Sub-section (l) of Section 277 runs as follows:

> "277 (1). In this Part of this Act--the expressions 'All India Service', 'Central Service Class I', 'Central Service Class II', 'Railway Service Class I', 'Railway Service Class 11' and 'Provincial Service' mean respectively the services which wore immediately before the commencement of Part III of this Act, so described respectively in the classification rules then in force under Section 96B, Government of India Act; and references to dismissal from His Majesty's service include references to removal from H is Majesty's service."

It was contended on behalf of the defendant that since Sections 240 and 277 were both in the same part of the Act, the words ' reference to dismissal' in Section 277 would govern the provisions of Section 240 and the word " dismissed " in Section 240 would, therefore, include ' removed. ' It is to be noticed that in Section 240(2), the words used are ' dismissed from the service of His Majesty ' whereas in Section 277(l) the words arc ' dismissal from His Majesty's service. ' Learned counsel for the defendant argued that the words ' service of His Majesty ' in Sub-section (2) of Section 240 did not have the same meaning as the words ' His Majesty's service ' in Section 277(l). I am afraid this argument has no force at all. The mere change in form from 'service of His Majesty ' to 'His Majesty's service' cannot make any difference. If dismissal from a civil post under the Crown in India is ' dismissal from the service of His Majesty', it would also certainly be 'dismissal from His Majesty's service.

Learned counsel's contention was that the words ' His Majesty's service ' in Section 277(l) should be read as referring to the various services mentioned earlier in the same section and he has based this argument on the fact that the first clause of sub-Section (l) of Section 277 mentioning the various services and the second clause of the same sub-section enlarging the meaning of the words ' dismissal from His Majesty's service ' have been joined together by the use of the word ' and. ' The use of the words ' His Majesty's service ' in the second clause of Section 277(l), however, makes it clear that there was no intention to make this clause subject to the first clause. Had this been the intention, there was no need for using the words ' His Majesty's service. ' The proper words, which could have been used, would be ' such service. ' Farther, it is to be noticed that, in this second clause, the word ' service ' is used in the singular and not in the plural. Had it been the intention t restrict the second clause to the services mentioned in the first clause, the words used should have been 'His Majesty's services' instead of 'His Majesty's service '. The plural word ' services,' could have signified regularly constituted services having a cadre of their own. The word ' service ' in singular is not meant to refer to such regularly constituted service but to the fact that there is some one serving His Majesty income capacity or the other. Any person, who happens to bo serving His Majesty in any capacity is in ' His Majesty's service;' though he may not belong to any of the regularly constituted services of His Majesty. I cannot, therefore, accept the argument that this second clause of Section 277(l) is governed by the first clause and that the scope of the reference to dismissal in Section 240(2) was sought to be enlarged by Section 277(l) only with reference to those few services which arc mentioned in it and not with reference to all persons who are governed by Sub-section (2) of Section 240.

31. The learned Judge of the lower Court had accepted the contention of the learned counsel for the defendant that 240(2) did not apply to the plaintiff and he, therefore, sought to bring the case of the plaintiff under the proviso to Section 241, Government of India Act, 1985. He had, therefore, to rely upon Rule 1705 (c), State Railway Establishment Code to hold that the plaintiff could not be dismissed or removed by any authority lower than that by which he was appointed to the post held by him substantively. Even if this rule were to apply, it would bo subject to the provisions of Sub-section (2) of Section 240 of the Act. In the lower appellate Court, it had been contended on behalf of the defendant that the protection of RULE 1705 (c), State Railway Establishment Code was not available to the plaintiff because the power of dismissal of a person holding the post which was held by the plaintiff had been delegated to the Chief Engineer and the rule delegating that power

could modify this Rule 1705 (c) as both rules were framed in exorcise of the same power of framing rules. In the light of the view taken by me in this case, this argument need not be considered at all.

It may be argued that the restriction placed under it. 1705 (c), State Railway Establishment Code, could be taken away by another rule delegating the power of dismissal but it cannot possibly be urged that any such rule can have the effect of taking away the right granted by Section 240(2), Government of India Act, 1935. It is, therefore, not at all necessary to see whether any power of dismissal had been delegated under the State Railway Establishment Code. All that need be examined is whether the order of dismissal was by an authority subordinate to that by which the plaintiff was appointed or whether the order was passed by the authority which appointed him or by some superior authority.

32. On this question, I have to take into consideration the argument of the learned counsel for the defendant that actually there was no valid appointment of the plaintiff at all by the General Manager of the B. N. W. and R. K. Railways taking effect from 1-1-1943, and that it must bo deemed that the plaintiff's service under the R. K. Railway had continued. On the face of it, this argument must be rejected because there is a clear finding that the service of the plaintiff under the R. K. Railway was terminated by the management of that railway with effect from the midnight of 31-12-1942, by a proper notice. The fresh appointment of the plaintiff took place by virtue of the offer contained in the circular letter of the then General Manager of the B. N. W. and R. K. Railways, dated 18-9-1942, on which date the General Manager of the B. N. W. and R. K. Railways was not in Government service at all. The railways were still owned by companies and had not yet been acquired by Government. The General Manager, who issued the letter, dated 18-9-1942, was, therefore, not in the service of the Government; but this letter itself indicates that it was issued by him under instructions from and on behalf of the Government of India, Railway Department, (Railway Board).

Under Section 241, Government of India Act, 1935, appointments to the civil services of and to civil posts under the Crown in India in the case of services of the Federation and posts in connection with the affairs of the Federation were to be made by the Governor-General or by such person as he might direct. The person, who could be authorised by the Governor-General under this section to make the appointment, need not have been a Government servant. All that was needed was that there should bo a direction by the Governor-General authorising him to make the appointment.

In the present case, the letter of 18-9-1942, itself contains material showing that there was authorisation by the Government of India, Railway Department (Railway Board), giving power to the General Manager of the B. N. W. and R. K. Railways to make appointments to posts in the O. T, Eailway which was to come into existence on 1-1-1943. The appointment of the plaintiff by the General Manager was, therefore, made in his capacity as a special nominee of the Governor-Goneral under Section 241 of the Act. Since the appointment was made by him, the power of dismissal under Section 240(2) could be exercised either by himself or by some one superior to him. As he was not holding any post under the Government at the time when he made the appointment but was only a special nominee of the Governor-General, there can be no question of there being any one holding a post superior to his post and consequently the order of dismissal could only be passed cither by him or by the Government of India which had conferred the authority of appointment on him and which,

in exercise of its executive powers, had to act in the name of the Governor-General. Consequently, in this case, the power of dismissal or removal under Section 240(2), Government of India Act, 1935, could have been exercised only by the individual who was holding the post of the General Manager of the B. N. W. and R. K. Railways on 18-9-1942, or by the Government of India acting in the name of the Governor-General. In this case, admittedly, the order of removal was passed by the Chief Engineer of the 0. T. Railway and, therefore, this order is clearly in contravention of the provisions of sub-Section (2) of Section 240 of the Act.

33. For the reasons given above, I entirely agree that the plaintiff is entitled to the declaration that he has not been validly removed from service and that he is still holding a post in the Railway Department from which he was purported to be removed on 3-2.1945.