

(1969) 10 MP CK 0008

In the Madhya Pradesh High Court

Case No : Miscellaneous Case No. 22 of 1969

Amrit Rao Kamerikar

APPELLANT

Vs

State of Madhya Pradesh and another

RESPONDENT

Date of Decision : 30-10-1969

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1969) JLJ 1079 : (1970) MPLJ 458

Hon'ble Judges : Surajbhan, J; S. M. N. Raina, J

Bench : Division Bench

Advocate : M. P. Bhatnagar, for the Appellant; B. L. Mourya, Dy. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

S. M. N. Raina, J.

This is a petition under Article 226 of the Constitution.

The petitioner is a civil servant. He joined service in the former State of Gwalior on 8-7-1937 as a Compounder in the Public Health Department. On the formation of Madhya Bharat he was posted as Accountant and on integration he was placed in Group "D" while S. P. Jain who was also an employee of the said Department, was placed in Group "E". He was appointed as a Head Clerk in the grade of 70-5-120 and thereafter on 22-2-55 he was appointed on the post of Steward in Civil Hospital, Barwani and was confirmed in the said post w.e. f. 1-4-1955 vide Memorandum No. 43079-107 dated 19-10-55 (Annexure "A"). S. P. Jain was also confirmed by the same order but he was placed below the petitioner as shown in the said memorandum.

On 2-9-54 S. P. Jain was promoted as Superintendent, Mercy Home, Morar. Subsequently, on 23-1-58 the petitioner was promoted to the post of Superintendent, Mercy Home consequent to reversion of S. P. Jain at his request vide order dated 23-1-58 (Annexure "B"). The petitioner continued to hold the

poet of Superintendent, Mercy Home, until 31-7-63 when he was reverted as S. P. Jain was again appointed to the said post by the impugned order dated 20-7-63 vide Annexure "C"

The contention of the petitioner is that S. P. Jain having been reverted to the post of Steward at his own request by order dated 19-10-1955 (Annexure "B") had lost all claims to the post of Superintendent, Mercy Home, and in any case he being junior to the petitioner, the petitioner could not be reverted in order to provide S.P. Jain on the said post. The petitioner submitted a representation and a number of reminders as indicated in Annexure "D" but he did not receive any reply. Ultimately by a letter dated 2-2-68 he was informed that his representation was rejected as S. P. Jain was permanently absorbed on the post of Superintendent and the petitioner was holding the post in an officiating capacity vide Annexure "E". After S. P. Jain retired from the post on 21-4-66 D. K. Sharma, a junior to the petitioner, was promoted to this post and the petitioner was again superseded. The contention of the petitioner is that his reversion to the post of Steward is discriminatory and involves penal consequences and as such offends Articles 14, 16 and 311 of the Constitution.

The petitioner, therefore, seeks a writ that the order dated 20-7-63 reverting the petitioner may be quashed, and it may be declared that the petitioner is entitled to hold the post of Superintendent as from 20-7-63 and to all other benefits accruing therefrom,

The main contention of the respondents i. e. the State of M. P. and the Director of Health Services is that S. P. Jain was permanently absorbed on the post of Superintendent in Mercy Home in the new Madhya Pradesh vide order dated 25-1-68. He was the only permanent incumbent on that post while the petitioner was holding the said post in an officiating capacity. As he had no right to hold that post he could be reverted at any time, and, therefore, his reversion was perfectly lawful. As regards the appointment of D. K. Sharma as Superintendent, Mercy Home, it has been submitted that it does not amount to supersession as at the material time the petitioner was holding the substantive rank of Steward in the scale of Rs. 110-190 while D K. Sharma was working as Accountant on a higher pay scale in the grade of Rs. 130-240. The other grounds urged in the return are that the petition is liable to be dismissed as the petitioner failed to avail of an alternative remedy and has not joined S. P. Jain and D. K. Sharma who are necessary parties to this petition.

Before considering this petition on merits we propose to deal with the legal objections raised by the respondents regarding the maintainability of the petition.

The plea of alternative remedy was not pressed by the learned Additional Government Advocate who appeared on behalf of the State. It is obvious that a civil suit is neither an appropriate nor an adequate remedy in such cases. As regards administrative remedy the petitioner has already stated in paragraph 7 of the petition that he had submitted a representation about his reversion and

had thereafter submitted several reminders on various dates as indicated in Annexure "D", but he did not receive any reply thereto, and ultimately his representation was rejected vide letter dated 2-13-68. The petitioner being left with no other remedy he submitted this petition. It would, therefore, appear that the petitioner has filed this petition after exhausting administrative remedies open to him.

The next contention of the respondents is that S. P. Jain and D. K. Sharma should have been joined as parties to this case. The main grievance of the petitioner is that his reversion involves penal consequences and as such offends Article 311 of the Constitution, He, therefore, wants that the order of reversion should be quashed. Although S. P. Jain is indirectly interested in the question of reversion of the petitioner he does not appear to be necessary party to this case for two reasons. In the first place, he has retired and is, therefore, not interested in the question of seniority vis-a-vis the petitioner as well as in the result of the petition Secondly the petitioner has not claimed any relief against him. As for D. K. Sharma, the only grievance of the petitioner is that though Sharma is junior to him he was promoted in preference to him in the year 1968 after the retirement of S. P. Jain This is mainly to show that his original reversion was by way of punishment and not merely on administrative grounds. The learned counsel for the petitioner made it clear that he was not challenging the promotion of D. K. Sharma and that his sole contention is that his reversion in 1963 was illegal and is liable to be quashed.

In *Somendra v. The Calcutta University*¹ it was held that merely because certain questions have to be determined incidentally in connection with the relief asked for each and every person interested in such question does not become a necessary party to the proceedings A similar view was expressed in *Rajgopal Raw v. State of Orissa*². It is, therefore, clear that neither S. P. Jain nor Sharma are necessary parties to the petition.

As regards the merits of the petition, the main point for consideration is whether his reversion was of a penal character. The petitioner was appointed temporarily on the post of Superintendent, Mercy Home, by order

Samarendra Prosad Chakravarty and Another Vs. The University of Calcutta, : A I R 1956 Oriasa 214. dated 23-1-58 vide Annexure "B", and it is not disputed that he was not confirmed in the said post. There can, therefore, be no doubt that he had no right to hold that post as such and could be reverted on administrative grounds

In *Parshotam Lal Dhingra Vs. Union of India (UOI)*, their Lordships made the following observations in connection with the right of Government to revert a civil servant from a post held in an officiating capacity in paragraph 28 as under:-

A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. If the Government servant has right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose

the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form that Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty. The use of the expression "terminate" or "discharge" is not conclusive.

It is, therefore, clear that even though the petitioner was holding the post of Superintendent, Mercy Home, in an officiating capacity, if the order of reversion entails the loss of seniority of the petitioner in his substantive rank or stoppage or postponement of his future chances of promotion, the reversion would be by way of penalty even though on the face of it, it may not appear to be penal in character.

In the instant case the only reason assigned by the Government for reversion of the petitioner in Paragraph 13 of the return is that S. P. Jain being a permanent incumbent of the post of Superintendent, Mercy Home, held a lien on the post even after his reversion at his own request as Steward and, therefore, he had a right to be promoted as a Superintendent while the petitioner had no right to hold that post. In this connection it may be pointed out that under clause (c) F. B. 13 of Madhya Pradesh Fundamental Rules a civil servant who is transferred to lower post in a substantive capacity loses hut lien on the post held by him prior to his transfer. In the return it has no doubt been stated that S. P. Jain was transferred as Head Steward in a temporary capacity, but in the order dated 23-1-1958 (Annexure "B") the word "temporary" is missing. All that is stated is that S. P. Jain was transferred to the post of Head Steward at his own request.

It is somewhat unusual for a civil servant to be reverted to a lower post, but it seems that S. P. Jain found the post more lucrative, and, therefore requested for his transfer to that post abandoning his claim to the post of Superintendent, Mercy Home. In these circumstances he could not retain lien on the post of Superintendent, Mercy Home, under F. II. 13 of the Fundamental Boles. He therefore, lost his lien on that post and he could not as of right claim to be posted back on that post after a lapse of six years.

It is pertinent to note in this connection that in the year 1960 when the

petitioner had proceeded on 62 days earned leave S. P. Jain was directed to do the work of Superintendent, Mercy Home, in addition to his own duty during the said period and was granted an allowance of Rs. 15 P. M. vide order dated 8-11-1967 (Annexure "H"). Thus upto 1963 it appears that for all practical purpose S. P. Jain was treated as if he had lost his right to the post of Superintendent, Mercy Home, until he was finally reposted by the impugned order reverting the petitioner after a lapse of nearly six years. It therefore, appears that the Government reverted the petitioner under an erroneous impression that S. P. Jain was holding a lien on that post even after his reversion on a lower post at his own request.

The contention of the petitioner is that he was actually senior to S. P. Jain in the integration list prepared in the former State of Madhya Bharat.

Since paragraphs 3 and 4 of the petition have been admitted it is clear that the petitioner was placed in the integration list in Group "D" while S. P. Jain was in Group "E" and as such the petitioner was senior to S. P. Jain. Apart from the seniority as determined in the year 1953 to which reference has been made in paragraphs 3 and 4 of the petition it would appear that even in the order of confirmation dated 19-10-1955, vide Annexure "A", the petitioner was placed above S. P. Jain.

The Government have, however, produced the order dated 9-11-1955 vide Annexure R-1, which shows that S. P. Jain was confirmed as Superintendent, Mercy Home, on that date. This order goes to show that although S. P. Jain was junior to the petitioner in the integration list he was promoted to the post of Superintendent, Mercy Home, and was also confirmed in the said post by the former Government of Madhya Bharat. It would be now too late to question this confirmation. We may, therefore, for the purposes of this petition assume that S. P. Jain was subsequently appointed and confirmed on the superior post of Superintendent, Mercy Home, although he was junior to the petitioner in the rank of Steward.

No order has been placed before us to show on what posts the petitioner was absorbed in the new State of Madhya Pradesh. But in paragraph 10 of the return it is stated that S. P. Jain was permanently absorbed on the post of Superintendent, Mercy Home, in M. P. vide order dated 25-1-1968. Since he was absorbed in the post of Superintendent, Mercy Home, he was entitled to continue on that post until he was reverted at his own request to the post of Steward and after his reversion he could not claim to be reappointed to that post particularly because his reversion to the lower post was not of a temporary nature. It was brought to our notice that S. P. Jain is now trying to abandon his claim to the post of Superintendent, Mercy Home, and to be treated as confirmed on the post of Steward only so that he may be saved from the recovery which the Accountant-General has pointed out. The Deputy Director of Health Services observed as under in his memorandum dated 28-12-1968 vide Annexure "I":-

It appears as if it was the pleasure of Shri Jain to be appointed on any post and get confirmed. Now he wanted to be confirmed on the post of Steward BO that he may be saved from the recovery which Accountant-General, Madhya Pradesh has pointed out.

This shows that even the Deputy Director of Health has noticed that S. P. Jain was getting things done by the Department as he liked to suit his own interests.

Apart from this it is clear from the following facts that the petitioner has by this reversion lost his seniority in the substantive rank and his chances of promotion have also been adversely affected. It was not disputed before us that K. L. Mehar, W. M. Walimbe, D. K. Sharma, J. C. Jain, K. L. Bhopal and B. N. Saxena are all juniors to the petitioner. All of them are, however, holding various posts on the pay scale of 160-6-240 except D. K. Sharma who was holding the post of Accountant in the pay scale of 130-6-240 as shown in the Statement Annexure "F". The contention of the learned Additional Government Advocate was that these persons were promoted to the various posts while the petitioner was officiating as Superintendent, Mercy Home, and that as the petitioner was holding the substantive rank of Steward he had to be reverted to that post without affecting his juniors. Such a treatment of the petitioner is on the face of it arbitrary and unjustified.

If at all S. P. Jain had to be repeated as Superintendent, Mercy Home, the petitioner could very well be provided on one of the posts carrying a pay scale of 160-240, which is equivalent to the pay scale of Superintendent, Mercy Home, by reversing one of his juniors as a number were holding such posts as indicated in Annexure "F". There was no justification for placing the petitioner below a number of juniors without any fault on his part. The impugned order dated 20-7-1963 shows that on reversion the petitioner was first appointed as Accountant on the scale of 150-220 but by a telegram dated 31-7-1963 it was directed that he should be posted as Steward on the scale of 100-190 instead of Accountant. Such an order clearly entails penal consequences inasmuch as it affects his position in the substantive rank as well as his future chances of promotion,

It may also be mentioned here that the only justification given by the Government for promoting D. K. Sharma who is junior to the petitioner as Superintendent, Mercy Home, in preference to the petitioner is that he was at the material time holding the superior post of an Accountant in the scale of 130-240 whereas the post of Steward is carrying pay scale of 110-190. But as pointed above if the petitioner had been reverted to one of the posts carrying pay scale 160-240 held by one of his juniors at the time of his reversion, this situation would not have arisen at all. Even if the petitioner had been reverted as Accountant his claim for appointment as Superintendent, Mercy Home, in preference to D. K. Sharma would have been obvious. This further goes to fortify the conclusion that the reversion of the petitioner entails penal consequences.

In Ram Chandra Chaudhuri Vs. Secretary to Govt. of West Bengal and Others, it was held at page 270 relying on P. N. Dhingra's case that if order of reversion of a civil servant would stand in the way of his earning future promotion to the higher rank even by a subsequent display of merit it is certainly a penal consequence within the meaning of that case. In Ishwar Chandra Mohanty Vs. State of Orissa and Another, it was held that though the reversion from a post temporarily held by a person does not per se amount to reduction in rank, but this is a rule of presumption open to rebuttal.

In Mohan Lal Vs. State and Others, it was held that where the service of the petitioner had been placed at the disposal of the State Electricity Board the mere fact that he had since gone on deputation of a temporary character to another Department was not a sound reason for not considering him for promotion to certain higher openings under the Board and the failure to consider him offended Article 16 of the Constitution. In the present case too even though the petitioner was holding the post of Superintendent, Mercy Home, on temporary basis, his claim to other equal posts to which juniors were promoted could not be ignored and by doing so there was a denial of equal opportunity guaranteed by Article 16 of the Constitution

The learned Additional Government Advocate relied on a decision of the Supreme Court in Divisional Personnel Officer, Southern Railway Vs. S. Raghavendrachar, . In that case the observations regarding the reversion in Dhingara's case were quoted with approval, but it was held that when a person officiating in a post is reverted for unsatisfactory work, it cannot be said that the reversion would amount to reduction in rank even though his junior who was also promoted to the superior post continued to hold that post. This case is clearly distinguishable on facts. In the present case the petitioner is not reverted for unsatisfactory work. The case of the petitioner in this case is that he has been reverted as a permanent incumbent was to be provided, and, therefore, in the ordinary course the petitioner should have been provided with an equivalent post held by his juniors and not reverted to the post of Steward affecting his future chances of promotion.

It is, therefore, obvious that the order of reversion of the petitioner to the post of Steward clearly visits him with penal consequences and is also discriminatory. As such it offends Articles 16 and 311 of the Constitution and is, therefore, liable to be quashed.

The learned Additional Government Advocate has also raised a technical objection that the petitioner has sought the relief against the order of reversion dated 20-7-1963, but the order of his reversion to the post of Steward is dated 31-7-1963. We have noticed that the order dated 31-7-1963 is at the foot of the impugned order vide Annexure "C. It being directly connected with the impugned order must be treated as a part of it. It would no doubt have been better for the petitioner to claim relief against this order as well. But this is purely a technical irregularity which is of not much consequence and we do not think that the

petitioner can be denied any relief on this technical ground alone.

No other point was pressed before us.

The petition is, therefore, allowed and the order dated 20-7-1963 and 31-7-1963 reverting the petitioner are hereby quashed. " The non-petitioners are hereby directed to treat the petitioner as continuing on the post of Superintendent, Mercy Home, or any other equivalent post carrying a similar pay scale with effect from 13-1-1963. Counsel's fee Rs. 100, if certified. Security deposit made by the petitioner shall be refunded to him.