

(1958) 10 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : Writ Petition No. 89 of 1958

Attique Ullah

APPELLANT

Vs

Excise and Taxation Commissioner and Others

RESPONDENT

Date of Decision : 24-10-1958

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 32(2A)

Citation : AIR 1959 J&K 70

Hon'ble Judges : K.V. Gopala Krishnan Nair, J

Bench : Single Bench

Advocate : Bishamber Nath Nehru, for the Appellant; Jawant Singh, General and Janki Nath Bhat, for the Respondent

Judgement

K.V. Gopalakrishnan Nair, J.—This is a petition for the issue of a writ or other appropriate order or direction to Respondent 1 to the effect

that the seniority of the Petitioner must be duly recognized and he must be promoted as Inspector of Excise and Taxation and to the second

Respondent that he must decide the appeal preferred by the Petitioner according to the rules of seniority.

2. Respondents 3 and 4 are persons who have been promoted as Inspectors of Excise and Taxation overlooking the seniority of the Petitioner.

The Petitioner alleges that seniority ought to have been the main criterion for making the promotions and that the Petitioner ought to have been

promoted if that test were applied. It is also argued that Respondents, 3 and 4 who are juniors to the Petitioner are not qualified for promotion.

The Petitioner had preferred an appeal to the Minister-in-charge, Excise and Taxation against the promotion of Respondents 3 and 4. That appeal

is still pending although two years have elapsed. He, therefore, deems the

appeal to have been rejected and has come up with a writ petition to this Court on that footing.

3. The Respondents have raised several objections against the maintainability, validity and merits of this writ petition. They say that the petition is mis-conceived in law and is clearly incompetent. The orders promoting Respondents 3 and 4 were made before the Constitution of the State came into force and therefore they cannot be canvassed in writ proceedings. They also point out that the petition itself is delayed and must on that ground alone be dismissed. On merits it is pointed out that promotion to the posts of Inspectors of Excise and Taxation is made on the basis of merits and ability and not on the ground of mere seniority.

The Petitioner's record of service is very blemished; he is alleged to have been suspended and fined more than once. On the other hand, the record of service of Respondents 3 and 4 has been beyond reproach and free from blemish. These Respondents were therefore rightly promoted in preference to the Petitioner who in comparison with them falls far short of the necessary standard of merit and ability. It is added that the promotions have been made upon the subjective satisfaction of the authority concerned and that they are not therefore amenable to writ jurisdiction,

4. The first question which has to be dealt with is whether the present writ petition is competent? It is common ground that the third Respondent was promoted by order dated 6-9-56 and the fourth Respondent by order dated 8-9-56. Both these orders were made and the promotions effected before the coming into force of the State Constitution. The writ is filed under the provisions of Article 32(2A) of the Constitution of India and Section 103 of the State Constitution. Now, it is clear that Article 32(2A) would apply only when one of the fundamental rights vouchsafed by Part Three of the Constitution of India is violated. The learned Counsel for the Petitioner tried to maintain that the promotion of Respondents 3 and 4 in disregard of the seniority of the Petitioner is a violation of the Petitioner's fundamental rights.

I am unable to accede to this argument. It is well settled that the right to a Government office or a right to promotion, especially in a case like the present where the Respondents 3 and 4 are promoted to officiating posts, is not

a fundamental right at all in any sense of that term. That is not a case which properly involves any question of equality before the law or equal protection of the laws. Nor is there any case of unconstitutional discrimination here. This is merely a case of alleged erroneous application of certain service rules. There is no scope at all here for the application of Article 14 of the Constitution of India.

It is unnecessary to labour this aspect because the learned Counsel for the Petitioner did not himself pursue his argument much further. If Article 32(2A) has no application for the reason that no fundamental right is involved in this case, the only provision we have to consider is Section 103 of the State Constitution. This section enables the High Court to issue writs and directions in the nature of writs even in cases where fundamental rights are not infringed. But the important thing to bear in mind is that this writ jurisdiction was conferred by Section 103 only on the coming into force of the State Constitution i.e. on 26-1-1957.

This court cannot exercise this jurisdiction in respect of an order which was passed before the jurisdiction was conferred on it. In other words, the newly acquired jurisdiction cannot be exercised for the purpose of scrutinizing and striking down orders which were passed before the Constitution came into force. Even if we assume that the pre-Constitution orders were opposed to the principles of natural justice or were irregular in other respects, we cannot subject those orders to writ jurisdiction which was conferred on the High Court much after those orders were passed.

Clear authority for this proposition is to be found in *State of U.P. v. Mohd. Nooh* AIR 1958 SC 86. That was a case where an officiating Head

Constable of Police was subjected to certain departmental disciplinary proceedings. The Superintendent of Police who was conducting the departmental inquiry himself gave evidence at the enquiry against the offg. Head Constable and on the basis of that evidence dismissed him from service. This took place before the Constitution of India, which under Article 226 conferred writ jurisdiction on the High Courts came into force.

After the Constitution of India came into force, i.e. after 26-1-1950 the aggrieved Head Constable moved the Dy. Inspector', General of Police by way of appeal but was unsuccessful.

He carried the matter to the Inspector General of Police in revision. Even that

proved futile. Thereupon he moved the High Court of Allahabad by way of a writ under Article 226. The High Court noticed that there was violation of the principles of natural justice in the case and therefore allowed the writ. The State of U.P. appealed to the Supreme Court which held that the Allahabad High Court was wrong because it had no jurisdiction to set aside under Article 226 the pre-Constitution order of dismissal passed against the Head Constable in question. It was urged before the Supreme Court that the appeal preferred by the Head Constable as well as the revision was much after the Constitution of India came into force. But their Lordships of the Supreme Court unambiguously held that the mere filing of an appeal or a revision after the Constitution came into force did not make any difference in principle, and that the order of dismissal which was passed before the Constitution came into force was not nullified by the mere preferring of an appeal or a revision. What was crucial was the date on which the order of dismissal was passed and not the date when that order was confirmed in appeal, or revision. In this view the appeal filed by the State of U.P. was allowed and the dismissal of the Head Constable was allowed to stand.

5. It is well to notice here that in their judgment their Lordships of the Supreme Court at more than one place said that there was a flagrant and shocking violation of natural justice and that all sense of fair play had been cast to the winds in the inquiry held against the Head Constable by the Superintendent of Police. But this circumstance did not stand in the way of the Supreme Court holding that the pre-Constitution order of dismissal should stand. The clear reason was that once we allow the provisions of Article 226 to have retroactive operation, one will not know how long backward their operation can be pushed.

6. This decision of the Supreme Court applies on all fours to the instant case. The orders of promotion made on 6-9-56 and 8-9-56 in favour of Respondents 3 and 4 respectively being pre-Constitution orders cannot properly be made amenable to the writ jurisdiction acquired later u/s 103 of the State Constitution. On this ground alone the petition has to fail; but as arguments have been addressed on some other grounds also, I think it proper to briefly refer to them.

7. The ground of delay urged against the Petitioner cannot be said to be devoid

of substance. The promotions of Respondents 3 and 4 were made in September 1956, whereas the writ was filed in September 1958. The other ground is that the promotion of Respondents 3 and 4 was made on the basis, of the subjective satisfaction on merits of the authority concerned. If this were so, I should say the Petitioner has no case. But he has tried to argue that promotion depends entirely on seniority and not on any subjective satisfaction of the authority empowered to make the promotion. I am not prepared to agree to this proposition. But the learned Counsel for the Petitioner desires that I may not go into the merits of this argument. Therefore I shall content myself with saying that I leave this question open.

8. Regarding merit and ability, I am afraid I am not able to see any greater merit and ability on the part of the Petitioner than on the part of Respondents 3 and 4. On the other hand, if the Petitioner wants to build his case on the ground that Respondents 3 and 4 are not sufficiently qualified the Petitioner will have to tar himself with the same brush. To say the least, the ground of being disqualified to hold the post of Inspector will apply as much to the Petitioner as to Respondents 3 and 4. The position would have been different if the Petitioner were fully qualified and Respondents 3 and 4 were not.

That is not the case here. I must not fail to refer to the statement made on the side of the Respondents that the Petitioner's record of service is much inferior to that of Respondents 3 and 4. This is borne out by the Service Registers of the Petitioner and Respondents 3 and 4 which have been produced before me. Therefore, if the criterion is merit and ability, one has to come to the conclusion that the Petitioner is not entitled to promotion in preference to either of Respondents 3 and 4.

Even if the Petitioner and Respondents 3 and 4 are equally good or equally bad, the Petitioner cannot make a grievance of the promotion of Respondents 3 and 4 because the Petitioner, unlike Respondents 3 and 4, has been subjected to suspensions and fines to which Respondents 3 and 4 were not subjected. The Petitioner cannot therefore succeed either in law or on merits so far as the challenge against the promotion of Respondents 3 and 4 is concerned.

9. The Petitioner's learned Counsel next points out that an appeal filed by the Petitioner to the second Respondent about two years ago still

remains undisposed of. It is rather interesting to note; that the Petitioner's learned Counsel for the purpose of making his petition impervious to

attack on the ground of the pending appeal has chosen to say that due to the long lapse of time the appeal must be deemed to have been rejected.

This position is reiterated in the affidavit filed by the Petitioner. If the appeal is to be deemed to stand rejected or decided against the Petitioner,

one cannot see any point in directing the second Respondent to dispose of the appeal.

All the same the Petitioner's learned Counsel strenuously argues that some such direction should be issued to Respondent 2 in the interests of

justice, fair-play and the like. Of course, it could well be said that the same circumstances cannot be harnessed for use by a person in two

conflicting ways in the same proceedings nor is it permissible to allow a person to seek to derive benefit from both the inconsistent stands he

chooses to adopt in a proceeding. He has to elect one of the two positions and seek only the benefit which would flow from one of them.

He cannot at one stage take one stand and get a particular advantage and having got it take different stand at a later stage and ask for another

advantage. It seems however unnecessary to pursue this line of reasoning as the learned Advocate General appearing for the Respondents has in a

frank and forthright manner stated that the second Respondent will properly dispose of the pending appeal without any unreasonable and avoidable

delay. In view of his representation, I do not think it necessary to make any direction or order regarding the early disposal of the appeal.

10. In view of the foregoing, the writ petition fails and is dismissed, but without making any order as to costs in the circumstances of the case.