

(1962) 08 CAL CK 0019
In the Calcutta High Court
Case No : Civil Revision No. 3054 of 1959

Barada Kanta Adhikary

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 21-08-1962

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(1)

Citation : AIR 1963 Cal 161 : (1962) 5 FLR 272 : (1963) 1 LLJ 149

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : Biswanath Bajpayee, for the Appellant; P.K. Banerjee, for Opposite Parties Nos. 1 and 2, P.K. Sen Gupta and Amar Prosad Chakravarti for Opposite Party No. 3, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Mukharji, J.—This is an application under Article 226 of the Constitution. The petitioner was a Mistry instructor (Carpentry) of the Murshidabad Institute of Technology, Berhampore, West Bengal. His complaint is that his services were wrongly terminated. He challenges the order of termination dated the 31st July, 1959. That order of the 31st July, 1959 stated:

"I am directed to inform you that it has been decided to terminate your service in the post to which you were appointed on a temporary basis, I do hereby give you one month's notice for the termination of your service. This notice will take effect from the 1st August, 1959."

The petitioner obtained this Rule on the 17th September, 1959.

2. Three main obstacles stand in the way of any relief being granted to the petitioner in this case.

3. The first obstacle is that the petitioner's letter of appointment shows that he was appointed on "purely temporary basis". The letter dated the 3rd September,

1957- communicated to the petitioner is the letter of appointment and is in the following terms:

"You are hereby offered the post of Mistry instructor (Carpentry) of Murshidabad Institute of Technology on pay of Rs. 110/- per month plus usual allowance on purely temporary basis."

4. On the records he continued to be temporary and he was not made permanent. In fact there are certain complaints about the unsatisfactory nature of his work. Be that as it may this much is certain that he was never made permanent and he always remained temporary until the notice of termination of his services as stated before. That being the case it is difficult for him to get any relief having regard to the principles laid down by the Supreme Court in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, and specially the observations made there at p. 42 in paragraph (11). The relevant observations on this point are at page 42:

"It is, therefore, quite dear that appointment to a permanent post in a Government service, either on probation or on an officiating basis, is, from the very nature of such employment, itself of a transitory character and, in the absence of any special contract or specific rule regulating the conditions of the service, the implied term of such appointment, under the ordinary law of master and servant, is that it is terminable at any lime. In short, in the case of an appointment to a permanent post in a Government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time. Likewise an appointment to a temporary post in a Government service may be substantive or on probation or on an officiating basis. Here also, in the absence of any special stipulation or any specific service rule, the servant so appointed acquires no right to the post and his service can be terminated at any time except in one case, namely, when the appointment to a temporary post is for a definite period, in such a case the servant so appointed acquires a right to his tenure for that period which cannot be put an end to unless there is a special contract entitling the employer to do so on giving the requisite notice or the person so appointed is, on enquiry held on due notice to the servant and after giving him a reasonable opportunity to defend himself, found guilty of misconduct, negligence, inefficiency or any other disqualification and is by way of punishment dismissed or removed from service or reduced in rank."

5. It is unnecessary to discuss any further arguments on this point because they are all elaborately dealt with in this leading judgment of the Supreme Court on this point. There was no special contract in this cast and there was no special time stipulated in this case before me. I have quoted the letter of appointment it specified no time. It clearly said that the service was on "purely temporary basis." That puts an end to this matter. Certain service rules have been shown

but they came into operation from the 1st November, 1959 after the petitioner's services terminated on the 31st July, 1959. The notice of termination shows that it was a case of termination and not a punishment. It is true that there was complaint about the inefficiency of his work, but the notice of termination did not put in on that ground. It is also true that when the petitioner wanted an opportunity to show cause he was given that opportunity. But those facts do not make either his services anything else than temporary or make the notice of termination a punishment. He was given one month's notice.

6. The next obstacle on the way of the petitioner is whether Service at such an Institution as Murshidabad Institute of Technology which is called a kind of sponsored and aided Engineering Institution for Diploma courses, is at all a "Civil Service" or "Civil post under a State". No doubt the Government has a good deal of control both in the matter of finances as well as in the matter of approval of appointments, as well as for nominating members of the Governing Body. Nevertheless, on the facts so far disclosed I am not prepared to hold nor am I "satisfied that service of this institution is "a civil service of a State" or "a civil post under a State" within the meaning of Article 311(1) of the Constitution.

7. There have been many debates as to what is "civil post" under a State. Some observations not on this ground but on the general aspect of this question will be found in the decision of the Supreme Court on the Representation of the People Act, 1951 in *Raja Bahadur K.C. Deo Bhanj Vs. Raghunath Misra and Others*, . The Courts' search for tests to define what is a civil post under the State has been so far exploratory without being decisive. It has been said that the real test for determining whether a person holds a civil post under the State is not whether he receives payment out of the State funds but whether the post is subject to and is held under the control of the State and whether the actual functions performed by him are those of the State. It will be unnecessary to discuss the authorities and it will be enough to mention the names of some of these decisions which have held for instance that it is not a civil post under the State within the meaning of Article 311, a post under a statutory Corporation such as Damodar Valley Corporation, the Commissioner for the Port of Calcutta, State Co-operative Bank or the State Bank of India or an Improvement Trust: as in *Lachmi and Others Vs. Military Secretary to the Governor of Bihar and Another*, , *Mohammad Ahmad Kidwai Vs. Chairman, Improvement Trust, Lucknow*, , *Damodar Valley Corporation v. Provat Roy*, 60 Cal WN 1023, *Nagendra Kumar Roy, Assistant Executive Engineer Vs. Commrs. for the Port of Calcutta and Others*, , *Chaturbhuj Sahai Vs. Chairman, Board of Directors, Bihar State Co-operative Bank Ltd.*, , *Baleshwar Prasad Vs. Agent, State Bank of India*, , *Sm. Ena Ghosh Vs. State of West Bengal and Others*, .

8. To seek the test of governmental functions, cannot in the present context of expanding governmental activities, be a practical, useful and dependable test. A Professor in a Government College who only teaches and takes classes may not have an obvious governmental or administrative function, but teaching or

education has to-day In many instances become a State or Governmental function. Instead of trying to formulate tests of one kind or another to define what a civil post under the State is, I am of the view that it is desirable that the Court should be left free to decide on the facts of each case whether a particular post is a civil post under the State or not. For a civil post under the State within the meaning of Article 311 of the Constitution it is no doubt always relevant and almost sometimes crucial to see the nature of the control which the State exercises in the particular case under consideration. But even where it exists such "control" may not be decisive of the question. It will be dangerous, in my view, to adopt any doctrinaire attitude in this respect. It is all the more so in the present context where various institutions receive many kinds of gifts, aids, help and encouragement from the State in divers ways. Even in the realm of education to-day the picture is far from coherent and many indeterminate expressions are used in this connection such as "Aided Colleges" or "Sponsored Institutions". In each case it is a question of fact how far the aid goes and what exactly is "sponsoring" by the Government. Attempt to evolve a rigid uniform formula to bring in different establishments of controlled institutions of this kind within the ambit of "civil service" or civil post under the State" is, in my view, bound to fail. A certain amount of flexible interpretation guided by the facts of each case is a necessity in the present context of the Governmental administration. The orthodox limits and ideas of a civil service or a civil post under the State may not to-day exhaust all such categories under Article 311(1) of the Constitution. At the same time the other extreme also will be equally inappropriate if it Includes all kinds of miscellaneous and hybrid institutions, mostly private or quasi-private with aids or controls or "sponsoring" financial or otherwise from the Government within "civil service", or "a civil post under the State". Between these two extremes I think the Courts in the present state of law should have to find in each case on its own merits whether a particular service in a particular case is a civil service or civil post under the State within the meaning of Article 311(1) of the Constitution. No doubt within these two extremes on either side there are many other intermediate stages where one test or another or combination of many tests will determine the decision in a particular case either in favour of the post being under the State or against the post being a civil post under the State within the meaning of Article 311(1) of the Constitution.

9. The third obstacle on the way of the petitioner is that if it is not a Government institution, then no writ lies against such bodies as the Murshidabad Institute of Technology, its Governing Body or Its Secretary or the principal for the simple reason that they are unincorporated bodies and private individuals. It is not necessary having regard to the view that I have expressed above to determine this point of technicality because the application fails on the first major grounds.

10. The Rule must, therefore, be discharged and the petition is dismissed. There will be no order as to costs.