
(1953) 05 GAU CK 0006
In the Gauhati High Court
Case No : Civil Rules No's. 17 and 54 of 1953

Bijoy Chandra

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 05-05-1953

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(2)
Government of India Act, 1935 — Section 240
Government of India Rules — Rule 116, 119

Citation : (1953) 05 GAU CK 0006

Hon'ble Judges : Sarjoo Prosad, C.J; Ram Labhaya, J

Bench : Division Bench

Advocate : S.K. Ghose and B.C. Barua, for the Appellant; S.M. Lahiri, General, R. Goswami, Jr. Govt. Advocate and C.R. Lahkar, for the Respondent

Judgement

Ram Labhaya, J.—This order shall dispose of Civil Rules Nos. 17/53 and 54/53.

2. Rule No. 17/53 was issued on a petition of Bijoy Chandra Talukdar under Article 226 of the Constitution of India by which a writ in the nature of mandamus or other appropriate writ was prayed for. Petitioner's case as disclosed in the petition was that one Profulla Chandra Barua of village Kamarkuchi, Mouza Upper Borbhag, District Kamrup was the Mouzadar of Upper Borbhag Mouza. Petitioner's father remained his sole surety for about 12 years. The "Mouzadar" applied for one year's leave in April 1949. Leave was allowed. The Petitioner was appointed to officiate as "Mouzadar" on 11-4-1949 by order conveyed to him by Memo No. 244-R dated 11-4-49 from the Deputy Commissioner, Kamrup. The order was to the following effect:

As nominated by Sjt. Prafulla Chandra Barua, "Mouzadar", you are appointed to officiate as "Mouzadar of Upper Borbhag "Mouza during the period of leave granted to him. You will act in his place on his security and responsibility and collect the revenue of 1355 B. Section only.

3. The "Mouzadar" got his leave extended from 11-4-1950 to 10-2-1951 and

again for one more year with effect from 11-2-1951. The last extension of leave for one year was allowed as a matter of grace on the distinct understanding that no further extension of leave shall be granted. When this leave was allowed it was ordered that the Petitioner shall continue to act as "Mouzadar" on the security and responsibility of the permanent "Mouzadar". This order was conveyed to the Petitioner. Before however the last period of leave expired, the "Mouzadar" tendered his resignation on 4-10-1951 to the Deputy Commissioner, Kamrup, who accepted this resignation on 6-10-1951. It is averred in the petition that when accepting the resignation the Deputy Commissioner asked the Petitioner to continue as "Mouzadar". No reference is made to any written order in the petition. It is further alleged that the Deputy Commissioner then invited applications for filling in the vacancy caused by the resignation of the permanent "Mouzadar". The Petitioner also applied. 16 candidates including the Petitioner were interviewed. The Deputy Commissioner found Respondent 5 to be the best candidate. In regard to the Petitioner his opinion was that his record of service had not been impressive and in his opinion he was not the best candidate for the appointment. He therefore appointed Respondent 5, Tarini Charan Talukdar as permanent "Mouzadar" in place of the "Mouzadar" who had resigned by his order dated 5-12-1951.

4. In para 8 of the petition it was alleged that the Petitioner as "Mouzadar" was a public officer and was holding a civil post under the State of Assam & the terms of his appointment and the conditions of his service were governed by the provisions of the Assam Land Revenue Manual and a "Kabuliyat" executed by him as therein prescribed. He having acted as officiating "Mouzadar" of the "Mouza" in question for several years, was entitled to a legitimate expectation that he will not be removed from that office except on lawful grounds. It was further pleaded that he was not liable to be removed from his office of "Mouzadar" till a reasonable opportunity of showing cause against the action proposed to be taken against him had been offered to him as required by Article 311 of the Constitution. The correctness of certain observations bearing on the fitness of the Petitioner to act as "Mouzadar" was also challenged and it was urged that if the Deputy Commissioner had given the Petitioner a chance he could have satisfied him on these matters.

5. The Deputy Commissioner submitted his order appointing Respondent 5 as the "Mouzadar" for confirmation to the Government. The Petitioner and 7 other candidates preferred separate appeals. All these appeals were dismissed.

6. It has been contended that both the original and appellate order involved an infringement of the Petitioner's constitutional right and were opposed to the principles of natural justice.

7. By the affidavit of Sri Raghab Chandra Das, Superintendent, Revenue Department of the Government of Assam, it has been affirmed that when the resignation of Prafulla Chandra Barua was accepted, the Government by its order dated 27-11-1951 directed the Deputy Commissioner, Kamrup to take necessary

action to fill the vacancy after inviting applications for the same. The Government further directed that the Petitioner be allowed to continue till the new "Mouzadar" was appointed. Under this order of the Govt., the Petitioner was permitted to continue on the work temporarily on the distinct understanding that on the appointment of the permanent "Mouzadar", the Petitioner's service would terminate. In support of this statement reference is made to the order dated 27-11-1951 addressed to the Deputy Commissioner, Kamrup. The order was to the effect that the vacancy be filled after inviting applications for the same and that the Petitioner be permitted to continue till the new "Mouzadar" was appointed. The allegations contained in para 8 of the petition were expressly denied. One of these allegations was that a "Kabuliyat" had been executed by the Petitioner. This allegation was repudiated.

8. At the trial the main contention raised was that the Petitioner was the holder of a civil post under the State of Assam and could not be dismissed or removed until he had been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him in conformity with the requirements of Article 311(2). It is contended that the order appointing Respondent 5 as the permanent "Mouzadar" amounts to either a dismissal or at least a removal of the Petitioner from the civil post which he was holding. He was not given any opportunity by the Deputy Commissioner or by the Government to show cause against the proposed dismissal or removal. A right guaranteed to him by the Constitution was thus violated and he was entitled to relief by an appropriate writ under Article 226 of the Constitution.

9. Mr. Lahiri, the learned Advocate for Respondent 5, joins issue on the two questions involved in the contention. He urges that the Petitioner was neither the holder of a civil post under the State of Assam, nor was he dismissed or removed and therefore there was no infringement of Article 311 of the Constitution.

10. It seems to me that it clearly is not a case of dismissal or removal within the meaning of Article 311 of the Constitution of India and therefore it is not necessary to decide the other question whether the Petitioner was holding a civil post under the State of Assam. The facts of the case lie in a very brief compass. The Petitioner originally were appointed to officiate as "Mouzadar" in place of the permanent incumbent on his security and responsibility and was permitted to collect revenue for one year only. By order dated 26-2-1951, he was directed to continue to act as "Mouzadar" again on the security and the responsibility of the permanent "Mouzadar". This order covered the last period of leave which commenced from 11-2-1951. Under this order the Petitioner could continue to act as "Mouzadar" till 10-2-1952. Before this period expired the permanent incumbent resigned the appointment. The resignation was accepted in October, 1951.

The Petitioner alleges that when this contingency occurred, the Deputy Commissioner Kamrup asked him to continue as "Mouzadar" and then invited applications for filling in the vacancy. The Petitioner also put in his application

for the permanent appointment. The order of 27th November addressed to the Deputy Commissioner was, as stated above, to the effect that pending the appointment of the permanent incumbent, the Petitioner shall be allowed to continue as "Mouzadar". Mr. Ghose has urged that the order of the Provincial Government addressed to the Deputy Commissioner was not conveyed to the Petitioner. He was not informed that he shall continue to act till the permanent appointment was made. There is no allegation that a written order was sent to the Petitioner or that a copy of the order of 27-11-1951 was sent to him. But the Petitioner himself admits that he was asked to continue as a "Mouzadar". It was a case of continuance. On his own showing it was a continuance, though for an indefinite period, of an officiating arrangement.

Assuming that the order of the Provincial Government was not formally communicated to him, it is clear that the Petitioner could not conceivably be unaware of the situation in which he was. The Deputy Commissioner did invite applications for the permanent appointment. The Petitioner knew it and applied for the appointment. He could see that his appointment could continue only till the permanent appointment was made unless he was himself selected for the permanent appointment. It is immaterial whether the order of the Government was formally communicated to him or not. He was undoubtedly aware of its nature. His conduct shows that unequivocally. He" did not raise his finger of protest before the Deputy Commissioner made the appointment. He did not argue that there was no vacancy.

That was the time when he should have prayed for redress from competent authority if the appointment which the Deputy Commissioner contemplated making involved an infringement of any of his rights as the holder of a civil post under the State of Assam. The Deputy Commissioner could then have been prevented from making the appointment. Though the mere fact that he did not apply for redress then, would not debar him from claiming relief if he could show that there was any infringement of Article 311 of the Constitution, the admitted facts show that he was aware of the orders of the Provincial Government by which the Deputy Commissioner was ordered to fill the vacancy after inviting applications and was directed also to allow the Petitioner to continue till the permanent appointment was made. There was therefore no order of any permanent appointment in his favour, nor was he appointed for an indefinite period as he could act only upto the happening of a stated contingency.

11. It may be noticed further that when a vacancy occurs, an appointment has to be made in accordance with executive instructions contained in Chapter VIII Part VI of the Assam Land Revenue Manual Vol. 1. The principles regulating such appointments are described in Rule 116 contained in Chapter VIII. It is inconceivable that a permanent appointment should have been made without any written order of appointment. There is no allegation in the petition that when the Petitioner was allowed to continue as "Mouzadar", he was asked to furnish any security. Rule 119 requires that:

In the absence of orders to the contrary a "Mouzadar" shall furnish security for a quarter of the amount realised through him as land revenue and local rate, but with the sanction of the Commissioner, the proportion to be covered by security may be raised to a half or may be reduced, or, in the case of "Mouzadars" of respectability and standing, the taking of security may be dispensed with altogether.

Normally some security would be taken from the "Mouzadar", unless there are orders to the contrary dispensing with, it. It is not alleged that he was asked to furnish security or that there was, any order dispensing with the requirements of Rule 119. There can thus be no manner of doubt that the Petitioner was allowed to continue to collect revenue for the Government till the appointment of a permanent incumbent.

12. The legal presumption would also be that the Deputy Commissioner acted in accordance with the order that he received from the Government and allowed the Petitioner to continue on the conditions contained in that order.

The Communication of the order to the Petitioner would take place in. the usual course of official business. The legal presumption that may justifiably be made in regard to the informal communication of the Provincial Government's order to the Petitioner has abundant circumstantial support.

13. The conclusion that one is irresistibly led to in these circumstances is that the Petitioner was allowed to continue to collect revenue as "Mouzadar" till the appointment of a permanent incumbent.

14. The appointment of a permanent incumbent in these circumstances would not amount to or involve either dismissal or removal of the Petitioner within the meaning of Article 311 of the Constitution, assuming that he was the holder of a civil post under the State of Assam. Clause (2) of Article 311 on which reliance has been placed, is as follows:

No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

15. Mr. Ghose urges that the effect of the permanent appointment is that the Petitioner shall be either dismissed or at least removed. I do not think it is a case either of dismissal or removal. A holder of a civil post under the State may be said to have been dismissed or removed if his services are terminated against his will and before the expiry of the period of his service. The service of a holder of civil post may be terminated by one month's notice in accordance with the conditions of his service. Similarly there may be a termination of service where the service is for a fixed period, say a period of one year. In such cases there is no dismissal or removal within the meaning of Article 311. The expression "dismissal" or "removal" would cover only cases where there is a forced termination of service before the expiry of the period prescribed for its

termination in the usual course, either due to misconduct, inefficiency or any other reasons. It has to be a premature termination and against the will of the holder of the post.

16. In-- Jayanti Prasad Vs. The State of Uttar Pradesh, it was held that:

Art. 311 applies only to a case in which a person is dismissed or removed or reduced in rank. These are technical words used in cases in which a person's services are terminated for misconduct, They do not apply to cases in which a person's period of service determines in accordance with the conditions of his service (e.g. where it has been terminated by one, month's notice in accordance, with the conditions of service). It is not so much a question of the post being held temporarily or it being of a permanent nature, the real question is whether a person's services are being "dispensed with before his normal period of service has terminated by reason of misconduct on his part, or otherwise

17. In--"Ishar Dass v. State of Pepsu" AIR 1952 Pepsu 148(B) it was held that every civil servant of the Union or the State, whether he holds a permanent or a temporary post, is entitled to the protection afforded by Article 311. Jayanti Prasad Vs. The State of Uttar Pradesh, was relied on in support of this proposition. It was further held that:

When a person is appointed for a fixed period or when there is an express condition under which he is appointed that his services are terminable by so much notice, his case does not fall within the ambit of Article 311 of the Constitution and no notice under that Article need be given to him, because his services terminate automatically after the expiry of the period for which he was employed or of the notice, as the case may be. But if the term of appointment is extended after the expiry of the period so fixed, and no further period of appointment is fixed, it cannot be said that the appointment is for a fixed period and to such temporary appointment the Article would become applicable.

The learned C.J. also expressed the view that dismissal under Article 311 was not confined to cases of misconduct only. It implied generally that:

the person dismissed was blameworthy i.e., either he has done something which is objectionable or improper or he lacks the ability or capacity or the will to discharge his duties as he should. Removal of a man from service on the other hand need not be for any fault on his part. Unlike dismissal, it involves no ignominy, nor does it carry any stigma. It merely means that a man's services are no longer required or it is not possible to retain him in service.

He expressed his dissent from what he described as a dictum in Jayanti Prasad Vs. The State of Uttar Pradesh, to the effect that Article 311 comes into operation only when a man is dismissed or removed from service for misconduct. This view he held would undoubtedly restrict the scope of Article 311. His view was that the article was meant to govern all kinds of cases of dismissal

irrespective of the fact whether a man's services are terminated because of his misconduct or otherwise.

18. With great respect to the learned C.J. my reading of the Allahabad case is that it did not seek to limit the application of Article 311 only to cases where dismissal was on account of misconduct. The learned Judges in the Allahabad case observed referring to the terms "dismissal" and "removal" in Article 311 that:

they do not apply to "cases in which a person's period of service determines in accordance with the conditions of his service (e.g where it has been terminated by one month's notice in accordance with the conditions of service). It is not much a question of the post being held temporarily or it being of a permanent nature, the real question is whether a person's services are being dispensed with before his normal period of service has terminated by reason of misconduct "on his part, or otherwise".

The very words used by the learned Chief Justice of the Pepsu High Court are used by the learned Judges of the Allahabad High Court. Where there is dismissal from service whatever its cause, Article 311 is attracted. There, no doubt, has been some emphasis on the word "misconduct" in the Allahabad case, but this was due to the fact that it was a case which some kind of misconduct had been attributed to the Petitioner though his service was terminated by a notice as provided in the conditions of service. The perusal, of the judgment as a whole indicates that there was no intention to limit the application of Article 311 to cases of dismissal for misconduct only. With great respect to the learned C.J. of the Pepsu High Court I have not been able to read into the Allahabad decision the dictum which he could not approve.

19. In-- Jayanti Prasad Vs. The State of Uttar Pradesh, the Expressions "dismissed" or "removed" were described as technical words. Teja Singh C.J. in "AIR 1952. "Pepsu 148(B)", expressed the opinion that the terms "dismissal" and "removal" had been used in Art 311 in their ordinary sense. These terms have not been defined. But it is clear that both dismissal and removal have been placed on the same level for purposes of Article 311. In both the cases it is necessary that the termination of" service should be against the will of the incumbent whether permanent or temporary and that such termination should occur before the expiry of the normal period of service. It is a premature termination of" service against the will of the incumbent that attracts the application of Article 311. It is only in such cases that it is necessary to give the persons sought to be dismissed or removed "an opportunity" to show cause against the action proposed to" be taken against him. Whether the termination of service before the expiry of the normal period of service against the will of the incumbent is described as removal or whether it is described as dismissal in the rules or conditions of service is immaterial. The application of the Article 311 would be attracted. These features are essential pre-requisites to the applicability of Article 311.

In these circumstances it would be enough to say on the authority of the decision of their Lordships of the Privy Council reported in AIR 1948 121 (Privy Council) that the terms "dismissal" and "removal" are synonymous. Their Lordships treated these expressions as such for purposes of Section 240, Government of India Act, 1935, even though the word removal did not occur in Section 240. These words should, carry the same meaning in Article 311. In this view it is not necessary to define separately, the scope of the two expressions "dismissal" or "removal". Wherever there is a termination of service before the expiry of the period for which an incumbent, whether permanent or temporary, is entitled to remain in service and against his will, whatever the cause, it will be a case either of dismissal or of removal for purposes of Article 311.

20. In the view of the matter that I take, the Petitioner cannot be said to have been either dismissed or removed. After the resignation of the last incumbent he was allowed to continue to collect revenue till the appointment of a permanent "Mouzadar". He was fully aware of the condition of his appointment. He actually applied as a candidate but was not selected. The termination in this case though against his will is not against the conditions of service. On the appointment of a permanent "Mouzadar" his period of service terminates automatically and it would not be necessary to dismiss or remove him. Article 311 has no application to his case and he cannot urge with any justification that there has been any contravention of the Article justifying the issue of any order or writ under Article 226.

21. It is not necessary to give a decision on the question whether the Petitioner was the holder of a civil post or not. For, if he has not been dismissed or removed, there would be no contravention of Article 311 even if he is taken to be the holder of a civil post under the State of Assam. I therefore refrain from expressing any opinion on that question.

22. The learned Counsel for the Petitioner has also argued that the order by which Respondent 5 was appointed a permanent "Mouzadar", was made "mala fide". He has drawn our attention to the observations of the Deputy Commissioner in his order dated 5-12-1951, to the effect that Respondent 5 had been highly certified by the President, A.P.C.C. and M. L.A.'s Sjts. 1 Barua and G. Talukdar, and that he had produced a recommendation from Mr. S.K. Datta, I.C.S. In the petition no "mala fides" were attributed to the Deputy Commissioner. No such allegation was made. The contention raises a question of fact. It is not supported by any statement or affidavit of the Petitioner. The Opposite Party had no notice to state the case on facts so far as this contention is concerned. On this ground alone the contention may not be permitted to be raised. The learned Counsel however has argued it.

Mr. Lahiri the learned Counsel for Respondent 5 in reply has pointed out that the candidates for the appointment of "Mouzadar" have to satisfy the Deputy Commissioner that they are persons who inspire confidence both by their character and financial stability. They can do so only by producing certificates

from officials of standing or from non-officials of recognised respectability and position. The certificates referred to by the Deputy Commissioner in his order were produced to substantiate the claim of Respondent 5 that he possessed the necessary qualifications for the appointment. It has been pointed out that similar certificates were produced by the Petitioner himself in support of his claim.

23. I am not satisfied from the material on the record that there has been any attempt on the part of Respondent 5 to influence a decision in his favour by wrongful means. Clause (iv) of Rule 116 requires that a person who is selected for the appointment of "Mouzadar" should be a man who inspires confidence both by his character and by his financial stability, Certificates showing the necessary qualifications are merely evidence in support of the claim for the appointment. By themselves they do not prove "mala fides". The Petitioner himself, it has been stated, tried to establish his qualifications by similar certificates.

24. The certificates to which reference has been made above were utilised for a finding that Respondent 5 was the most suitable candidate. The Petitioner was not acceptable to the Deputy Commissioner as he felt that his record as a "Mouzadar" was not adequately impressive and he was not the best candidate. The Deputy Commissioner under the rules has to make the appointment. The power vests in him. When making the appointment he has to be guided by principles incorporated in Rule 116 contained in Chap. VIII, Part VI of Assam Land Revenue Manual, Vol. 1. The making of the appointment is entirely within his discretion. His decision is also final. In these circumstances this Court has no justification for substituting its own decision in place of his by converting itself into a Court of appeal. When acting under Article 226 this Court does not act as a Court of appeal particularly where the law confers no right of appeal. Even if this Court could come to a different conclusion on facts, interference with the order would not be justified. It is therefore not necessary to go into facts for determining which of the several candidates was the most suitable candidate for the appointment.

25. In Civil Rule No. 54/53 the order of the Deputy Commissioner has been challenged only on facts. The decision of the Deputy Commissioner is challenged as erroneous. As held above, this Court when acting under Article 226 cannot permit itself to be converted into a Court of appeal. The decision of the Deputy Commissioner is not appealable. His order appointing a "Mouzadar" is final. Article 226, in spite of the plenitude of power which it confers on the High Courts would not justify interference with the exercise of discretion by the Deputy Commissioner when passing an administrative order under executive instructions. He acted admittedly within his jurisdiction and in making the appointment he did not contravene any rule of law or procedure. There is no infringement of any legal right and therefore even in this case the petition must fail.

26. For reasons given above the petitions are dismissed with costs. Rules are

discharged. Hearing fee two gold Mohors in each case.

Sarjoo Prosad, C.J.

27. I agree.

28. In spite of the elaborate arguments at the Bar I see no reason to depart from the view which I took sitting with Ramaswami J. in- *Ajit Kumar Mukherji and Others Vs. Chief Operating Superintendent, East Indian Railway*, as to the meaning of the expression "termination of service" and the scope and application of Article 311 of the Constitution of India.