

(1968) 12 DEL CK 0002

In the Delhi High Court

Case No : Civil Writ Appeal No. 1440 of 1967

B.K. Sardarilal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-12-1968

Acts Referred:

Citation : (1968) ILR Delhi 534 Supp : (1968) ILR Delhi 534

Hon'ble Judges : S.K. Kapur, J;Hardayal Hardy, J

Bench : Division Bench

Advocate : A.S.R. Chari, S.A.K. Dhar, Prakash Narain and A.B. Saharia, for the Appellant;

Judgement

Hardayal Hardy, J.

(1) This order will dispose of a batch of 14 petitions under Art. 226 of the Constitution as they raise common questions of law. Except minor variations which have no bearing on the question that really arises for decision in the case even the facts are common to all the petitioners. By common consent, the contentions of law and fact raised in Civil Writ Petition No. 1440 of 1967 were. Therefore, taken as representative of those raised in the remaining petitions.

(2) The petition is unduly lengthy. The first 31 paragraphs deal with the grievances of the petitioner and other like-minded members of the Police Force in Delhi about the poor living conditions, lack of proper amenities and welfare programme for the non-gazetted members of the Force and the attempts made by them to obtain recognition of their representative organization known as Delhi Police Non-gazetted Karamchhari Union by the authorities and the obstacles encountered by them at the hands of the then Inspector General of Police, Shri B. B. Mishra, the allegations in these paragraphs as well as in paragraphs 43 to 50, the correctness of most of which is not admitted by the respondents, were claimed by the petitioners to be relevant to the question of mala fide only for they formed, according to them, the back-ground against which the ultimate

action taken by the authorities should be viewed.

(3) The question of mala fides was, however, not argued before us as the learned counsel for the petitioners Mr. A. S. R. Chari who appeared for the petitioners in all the 14 petitions expressly stated at the very commencement of his address, that he would confine his attack to the constitutional aspect of the case alone and would not address any arguments on the question of mala fides at all.

(4) Later, at the conclusion of the arguments, when the petitioners felt the ground slipping under their feet on the constitutional questions raised on their behalf, an attempt was made by Mr. Sital K. Dar during his arguments to argue the point of mala fides. The request made by the learned counsel for permission to raise the point was, however, declined by us.

(5) The petitioner states that he had an unblemished record of service. Having joined the Police Force as a Foto Constable on 3/4/1939, he rose to the rank of a Sub-Inspector. During the course of his employment he was awarded several Commendation Certificates and performed duties as a Security Officer at the Houses of Parliament, Supreme Court and at the residences of the Prime Minister. There was thus nothing in his conduct to justify any penal action being taken against him and yet on 14/4/1967, he and, 17 other members of Delhi Police Force were abruptly dismissed from service. The order dismissing him from service, of which copy has been annexed to the petition, reads:-

NO.F. 5/43/66-T

Government of INDIA

Ministry of Home AFFAIRS

NEW Delhi ,Dated April, 1967.

ORDER

Whereas, Shri Sardari Lal, Sub Inspector, Delhi Police No. 33 I/D, Police Station Kamla Market, Delhi hold your office during the pleasure of the President, and Where as the President is satisfied that you are unfit to be retained in the public service and ought to be dismissed from service, and where as the President is further satisfied under Sub-clause (c) of Proviso to clause (2) of article 311 of the Constitution that in the interest of the security of the State it is not expedient to hold an inquiry, Now, the President is pleased to dismiss you from service with immediate effect. By order and in the name of the President of India

(Sd.)

(B.VENKATARAMAN)

Joint Secretary to the Government of India in the Ministry of Home Affairs. Seal. GOVT.of India. Ministry of Home Affairs. (6) The petitioner contends that he being a substantive holder of the post and rank of Sub-Inspector of Police no order for his dismissal from service on the ground of his "un-fitness" could be

passed without affording him reasonable opportunity to show cause against the action proposed to be taken in regard to him as required under clause (2) of Article 311 of the Constitution. He further contends that sub-clause (C) of the Proviso to clause (2) of Article 311 which empowers the President to dispense with the Opportunity contemplated under Clause (2) if he is satisfied that in the interest of the Security of the State it is not expedient to give such opportunity to the employee concerned, requires the subjective satisfaction of the President himself and that this power cannot be delegated to an officer subordinate to the President. In the present case, the petitioner contends, it is apparent on the face of the impugned order that the power has been exercised by a delegate of the President and not by the President himself. To re-inforce his argument the petitioner submits that on the material dates the President who was about to lay down his high office was not even in Delhi and. Therefore, no material concerning the petitioner and others similarly dismissed from service, was or could have been placed before him to enable him to exercise his discretionary powers.

(7) In the affidavits filed on behalf of the respondents by Shri B. B. Mishra, Inspector General of Police and Shri B. Venkataraman. Joint Secretary to the Government of India, Ministry of Home Affairs, the petitioner's averments regarding his service career have not been traversed although the allegations of mala fides have been denied. No attempt has, however, been made in either of the affidavits to counter the allegation about the President not having personally dealt with the petitioner's case and the contention is sought to be met by a straight defense. The stand taken in the affidavit of Shri Venkataraman which alone deals with this aspect of the case is that in a case like this the President was not required to pass any orders in person and that the impugned order was passed by Competent Authority under the Government of India Allocation of Business Rules.

(8) This naturally reduces the scope of controversy and brings it within narrow limits. The petitioner admits that beyond the right conferred by clause (2.) of Article 311. he has no other right to challenge the legality of the order of dismissal. He also admits that the right conferred by clause (2) of Article 311 is controlled by Sub-clause (C) of the Proviso to clause (2), His attack is, Therefore, directed against the validity of the respondent's claim that an order under sub-clause (C) need not be passed by the President himself and has, in fact, to be passed by Competent Authority under the allocation of Business Rules. 1961.

(9) The argument presented by Mr. Chari on behalf of the petitioner is that u/s 7 of the Police Act, 1861, an order of dismissal of a Sub-Inspector of Police can be passed by the President or by the Officers mentioned in the said Section. The exercise of power under that section is, however, subject to the provisions of Article 311 of the Constitution and to such rules as the State Government may from time to time make under the Police Act. In the present case it is not disputed that the order was not made by the President himself nor by any of the

authorities mentioned in the Section. On the Contrary it is stated in the affidavit filed on behalf of the respondent that the order was made by a Competent Authority under the Allocation of Business Rules, 1961. According to Mr. Chari the Officers mentioned in Section 7 are not among those envisaged by those rules.

(10) Mr. Chari further contends that the Allocation of Business Rules were made by the President under Article 77(3) of the Constitution and relate to the transaction of the business of Government of India while the power under sub-clause (C) of the Proviso to clause (2) of Article 311 is the power of the President himself and not being an executive function of the Government, cannot be regulated by rules framed under Article 77(3). Mr. Chari submits that under Article 310, the tenure of Office of persons serving the Union (leaving aside for the present from consideration, services under the States) is that every person who is a member of a defense service or a civil service of the Union or of an All India Service or holds any post connected with defense or any civil post under the Union, holds office during the pleasure of the President except as expressly provided by the Constitution. The power of the President under Article 310 is distinct from his power under Article 53. In support of his argument, the learned counsel relies on a passage from the Judgment of the Supreme Court in the *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, where it was held :-

"The first question is whether the power of the Governor under Article 310 to terminate the services of a Government Servant at pleasure is part of the executive powers of the State under Article 154 of the Constitution. Article 154 speaks of the executive power of the State vesting in the Governor; it does not deal with the Constitutional powers of the Governor which do not form part of the executive power of the State. Article 162 says that, subject to the provisions of the Constitution, the executive power of the State shall extend to matters with respect to which the Legislature of the State has power to make laws. If the Legislature of the State has no power to make a law affecting the tenure at pleasure of the Governor, the said power must necessarily fall outside the scope of the executive power of the State. As we will presently show, the Legislature has no such power and, Therefore, it cannot be a part of the executive power of the State." (11) The argument in that case related to the power of the Governor under Article 310 in the context of Articles 154 and 162. The analogous provisions, so far as the power of the President under Article 310 is concerned, are Articles 53 and 73. The service tenure of a public servant who holds office during the pleasure of the President is, however, subject to the limitations or qualifications mentioned in Article 311 - but even Parliament cannot make a law abrogating or modifying this tenure so as to impinge upon the over-riding power of the President under Article 310 as qualified by Article 311. Mr. Chari argues that since the executive power of the President is co-extensive with the legislative power of Parliament and the rules framed under Article 77(3) have relation to the executive power of the President and have nothing to do with his constitutional powers under Articles 310 and 311, there can be no delegation of

those powers to authorities envisaged by the Allocation of Business Rules, 1961.

(12) Mr. Chari next contends that even the rules framed by the President under Article 309 of the Constitution which may provide for delegation of his power to an authority subordinate to him cannot provide for delegation of the President's pleasure as those rules too are in relation to the executive power of the President and have no relation to his Constitutional powers under Article 310. This argument is sought to be supported by the following passage from Babu Ram Upadhyaya's case :

"A law made by the appropriate Legislature or the rules made by the President or the Governor, as the case may be, under the said Article (309) may confer a power upon a particular authority to remove a public servant from service; but the conferment of such a power does not amount to a delegation of the Governor's pleasure. Whatever the said authority does is by virtue of express power conferred on it by a statute or rules made by competent authorities and not by virtue of any delegation by the Governor of his power, There cannot be conflict between the exercise of the Governor's pleasure under Article 310 and that of an authority under a statute, for the statutory power would be always subject to the overriding pleasure of the Governor." (13) The next case cited by Mr. Chari is Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., where according to the learned counsel the rule laid down in Babu Ram Upadhyaya's case was re-affirmed and followed.

(14) That is, however, not the real problem, as the question in our opinion is not whether the extent of the pleasure recognised by Article 310 can be affected or impaired by rules made under Article 309 nor is it whether the Parliament or the Legislature can make a law regulating the conditions of service of a public servant without affecting the powers of the President or the Governor under Article 310 read with Article 311. These questions have been settled by the two judgments of the Supreme Court referred to by Mr. Chari himself. The principles emerging from Babu Ram Upadhyaya's case were formulated by Subba Rao J. who spoke for the majority, in the form of 7 propositions which read :-

"(1) In India every person who is a member of a public service described in Article 310 of the Constitution holds office during the pleasure of the President or the Governor as the case may be, subject to the express provisions therein.

(2) The power to dismiss a public servant at pleasure is outside the scope of Article 154 and, Therefore, cannot be delegated by the Governor to a subordinate officer, and can be exercised by him only in the manner prescribed by the Constitution.

(3) This tenure is subject to the limitations or qualifications mentioned in Article 311 of the Constitution.

(4) The Parliament or the legislatures of States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon

the President or the Governor under Article 310, as qualified by Article 311.

(5)The Parliament or the Legislatures of States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Article 310 of the Constitution read with Article 311 thereof.

(6)The Parliament and the Legislatures also can make a law laying down and regulating the scope and content of the doctrine of "reasonable opportunity" embodied in Article 311, of the Constitution; but the said law would be subject to judicial review.

(7)If a statute could be made by Legislatures within the foregoing permissible limits, the rules made by an authority in exercise of the power conferred there-under would likewise be efficacious within the said limits."

(15) What was held in that judgment was explained in Mtoi Ram Deka's case by Gajendragadkar J. who was a member of the Bench that had decided Babu Ram Upadhyaya's case but had along with Wanchoo J. taken a different view. The learned Judge observed:-

"What the said Judgment has held is that while Article 310 provides for a tenure at pleasure of the President or the Governor, Article 309 enables the legislature or the executive, as the case may be, to make any law or rule in regard, inter alia, to conditions of service without impinging upon the over-riding power recognised under Article 310. In other words in exercising the power conferred by Article 309, the extent of the pleasure recognised by Article 310 cannot be affected or impaired. In fact, while stating the conclusions in the form of propositions, the said judgment has observed that the Parliament or the Legislature can make a law regulating, the conditions of service without affecting the powers of the President or the Governor under Article 310 read with Article 311. It has also been stated at the same place that the power to dismiss a public servant at pleasure is outside the scope of Article 154 and, Therefore, cannot be delegated by the Governor to a subordinate Officer and can be exercised by him only in the manner prescribed by the Constitution. In the context, it would be clear that this later observation is not intended to lay down that a law cannot be made under Article 309 or a Rule cannot be framed under the proviso to the said Article prescribing the procedure by which, and the authority by whom, the said pleasure can be exercised. This observation which is mentioned as proposition number (2) must be read along with the subsequent propositions specified as (3), (4), (5) and (6). The only point made is that whatever is done under Article 309 must be subject to the pleasure prescribed by Article 310." (16) The observation in the above judgment that a law can be made under Article 309 or a Rule can be framed under the proviso to the said Article prescribing the procedure by which and the authority by whom the pleasure of the President can be exercised, would prima facie negative the argument of Mr. Chari that the pleasure of the President under Article 310 cannot be delegated by him to

another authority and must in all cases be exercised by him personally. It may be mentioned here that Subha Rao J. was also a party to the decision in Mto Ram Deha's case and although, he wrote a separate judgment in that case in which he marked back to what was said by him in babu Ram Upadhya's case he did not express his dissent from what was said by Gajendragadkar J. while explaining the ratio decidendi of that case.

(17) The question as we see it and that is precisely how Mr. Prakash Narain, learned counsel for the respondents would like us to see it, is whether the power under Article 311 is the executive power of the Union or is it a power with which the President has been invested by the Constitution de hors the executive power of the Union and is as such the executive power of the President.

(18) In S. Kapur Singh Vs. Union of India (UOI), , the Supreme Court held that by the Constitution, the executive power of the Union is conferred upon the President and it is in exercise of that executive power that the President may dismiss a member of the Civil Service of the Union or of an All India Service from his appointment.

(19) In Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and Others, , however. Shah J. who delivered the majority judgment in that case made certain observations which when divorced from their context, may suggest a contrary conclusion. The learned Judge said:-

"There is a vast array of other powers exercisable by the President-to mention only a few-appointment of Judges : Arts. 124 and 217, appointment of Committees of Official Languages Act: Art. 344, appointment of Commissions to investigate conditions of backward classes: Article 340, appointment of Special Officer for Scheduled Castes and Tribes: Article 338, exercise of his pleasure to terminate employment: Article 310, declaration that in the interest of the security of the State it is not expedient to give to a public servant sought to be dismissed an opportunity contemplated by Article 311(2) -these are executive powers of the President and may not be delegated or entrusted to another body or officer because they do not fall within Article 258." (20) The observations were no doubt made in a case where the question was about the validity of a notification issued by the President under Article 258(1) of the Constitution whereby the functions of the Central Government under the Land Acquisition Act in relation to acquisition of land for the purpose of the Union within the limits of the territorial jurisdiction of the Divisional Commissioners were with the consent of the State Government, entrusted to the said Commissioners. Learned Judge held that for the purpose of that case it would serve no useful purpose to decide whether under Article 258(1) by a Presidential notification only executive functions of the Central Government may be entrusted to the State or to an Officer of the State. Learned Judge also held that by the notification only "the functions of the Central Government under the Land Acquisition Act I of 1894, in relation to acquisition of land for the purpose of the Union" had been entrusted to the Commissioners of Divisions.

(21) The question of executive powers of the President under Article 311(2) and the possibility of their entrustment to another body or officers, Therefore, came for consideration only to the extent whether or not those powers also fell within Article 258. The wider question regarding the nature of those powers and their delegation to bodies or persons other than the States and their officers was not under consideration in that case at all. This is clear from Article 258 and the newly introduced Article 258A which was brought in by the Constitution (Seventh Amendment) Act, 1956 and are among the Articles which are included in Chapter II of Part XI of the Constitution providing for administrative relations between the Union and the States. The observations regarding Article 311(2) will, Therefore, have to be read as confined to what was actually under discussion in that case.

(22) The problem may also be looked at from another angle. What emerges from the decision in Jayantilal's case is this: The power of making a declaration that in the interest of the security of the State it is not expedient to give to a public servant, sought to be dismissed, an opportunity contemplated by Article 311(2) is an executive power of the President and it cannot be entrusted to another body or officer because it does not fall within Article 258 of the Constitution. That is so because Article 258 postulates entrustment of only such functions to the Government of a State or to its officers as are in relation to any matters to which the executive power of the Union extends. At the same time, the powers under Article 311(2)(C) have been treated as executive powers of the President in the same manner as are the powers under Article 310 regarding exercise of pleasure by the President. With respect to the powers under Article 310 it has been held in Mtoi Ram Deka's case that a law can be made under Article 309 and a rule can be framed under the proviso to the said Article prescribing the procedure by which and the authority by whom the said pleasure can be exercised. If such a law or a rule can be made with respect to the exercise of power under Article 310 it must necessarily follow that a rule or law can also be framed with respect to the exercise of functions under Article 311(2)(C) and if the President frames a rule for authentication of orders made and executed in the name of the President, the order so authenticated will have to be treated as an order made by the President. An order so authenticated will still be an order by the President and that appears to be the purpose of clause (1) of Article 77. Indeed, the learned counsel for the respondents, sought to uphold the validity of the impugned order on the ground that this Court had no power to call in question, by reason of clause (2) of Article 77, any order authenticated in accordance with the rules. The impugned order is ex facie made and executed in the name of the President under the rules made by the President for authentication of Government orders as per notification No. S. R. O. 167 dated 19/6/1950.

(23) The argument of the learned counsel is that irrespective of whether the impugned order was made in exercise of the executive power of the Union or of the President the protection under clause (2) is available in either case. Support for the argument is sought from a decision of the Supreme Court in K. Anandan Nambiar and Another Vs. Chief Secretary, Government of Madras and Others,

where a similar attack on the validity of a Presidential order made by virtue of the power conferred on him by Article 359 (1) of the Constitution was repulsed. Their Lordships observed:-

"It now remains to consider the other grounds on which Mr. Chatterjee has challenged the validity of the impugned orders of detention. The first contention raised by Mr. Chatterjee is that the Presidential order itself is invalid. This order has been issued in accordance with the provisions of Article 77(2) of the Constitution. Mr. Chatterjee, however, contends that the Order issued by the President by virtue of the power conferred on him by Article 359(1) is not executive action of the Government of India and as such Article 77 would not apply. We are not impressed by this argument. In our opinion, Article 77(2) which refers to orders and other instruments made and executed in the name of the President is wide enough to include the present Order." (24) I find a great deal of force in this argument and have, Therefore, no hesitation in acceding to it.

(25) Mr. S. K. Mehta who in the absence of Mr. Chari had to bear the burden of addressing the reply argument on behalf of the petitioner, attempted to meet this argument by submitting that Article 77 relates to the conduct of Government business and as such clause (1) which in terms deals with executive action of the Government of India controls the operation of clause (2). The bar created by clause (2) must, Therefore, be read as if it is confined to instruments made and executed in the name of the President in respect of the executive action of the Government of India.

(26) It is hardly open to the learned counsel to raise such an argument in the face of the clear pronouncement by their Lordships of the Supreme Court.

(27) Mr. Mehta next contended that even if Article 77(2) precludes Judicial review of the impugned order, in the present case the respondents had themselves admitted in the affidavit filed on their behalf that the impugned order was not made by the President himself but was made by a Competent Authority under the Allocation of Business Rules, 1961.

(28) I do not think that argument can be of any use to the petitioner. The constitutional prohibition contained in clause (2) of Article 77 is absolute and, Therefore, cannot be given a go-by by an admission that the respondents may choose to make. Conferment of jurisdiction and power on courts is regulated by provisions of law and not by the admissions made by the parties.

(29) The result of the fore-going discussion is that none of the objections raised by the petitioner to the validity of the order of dismissal has any merit. The petition, Therefore, fails and is consequently dismissed, but in the circumstances of this case, I do not propose to make any order as to costs.

S.K. Kapur

(30) I agree.