

(1955) 03 PAT CK 0012

In the Patna High Court

Case No : Misc. Judicial Case No's. 123 of 1954 and 55 of 1955

Brajnandan Prasad and Another

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 23-03-1955

Acts Referred:

Bihar and Orissa Subordinate Services (Discipline and Appeal) Rules, 1935 — Rule 2
Civil Services (Classification, Control and Appeal) Rules — Rule 55
Constitution of India, 1950 — Article 14, 16, 311, 320

Citation : AIR 1955 Patna 353

Hon'ble Judges : Das, C.J.;Ahmad, J

Bench : Division Bench

Advocate : B.C. Ghose and A.K. Chaudhary, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Das, C.J.—These two applications have been heard together and will be governed by this judgment. The two petitioners are Brajnandan Prasad and Harinandan Lal. Brajnandan Prasad was appointed as a temporary clerk in the Industries Department of the Government of Bihar on 18-9-1943. The appointment was temporary for one month with effect from 15-9-1943. Harinandan Lal was also appointed as a temporary assistant in the same department on 22-9-1943. Later on, 8-2-1949, these two petitioners were appointed to two temporary posts in the Upper Division in the said department. The appointment was made by means of an order, being Order No. 13S3, dated 19-2-1949. The order was in these terms:

"Department of Industries Bihar.

Order No. 1383 6A-4-49

Patna, dated 19-2-1949.

Sri Brijnandan Prasad and Harinandan Lal are appointed to the post of temporary

Uppar Division Assistants in the scale of Rs, 120-8-200 plus the cost of living allowance as admissible under the rules with effect from 8-2-1949.

Sd/S. M. Ali.

Addl. Director of Industries, Bihar."

On 54-11-1949, a first information was given by one Mr. J. Dayal, the then Deputy Director of Industries, Bihar to the Senior Superintendent of Police, Patna, in which allegations were made against certain persons, including the petitioners, that by dishonest means bogus permits had been obtained for the supply of iron and steel by several persons. It appears that a petition of complaint was also subsequently filed aiter obtaining the sanction of the State Government, in which it was alleged that the two petitioners were also in the conspiracy as a result of which bogus permits for the supply of iron and steel were obtained. It appears that the complaint was withdrawn due to defective sanction, but cognizance of the case was taken under a charge-sheet submitted on 30-8-1951.

As a result of the allegations made against: the petitioners, they were arrested on 15-11-1949 and on 16-11-1949, the then Director of Industries passed an order to the effect that as the two petitioners had been arrested on a criminal charge on 15-11-1949, they would remain under suspension with effect from the date of their arrest until the termination of the proceedings, against them. In the criminal case which was instituted against the petitioners, they were discharged on 22-7-1953.

It has been stated at the bar that the case has now ended in acquittal of the other accused persons. After the order of suspension passed against the petitioners on 16-11-1949, the petitioners were paid a subsistence allowance till May, 1951, when the subsistence allowance was stopped. The petitioner made a representation on 3-7-1951, and it appears that their subsistence allowance was restored.

Again, in January and February, 1952, their subsistence allowance was stopped and the petitioners again made a representation to the State Government to which no reply was given; but their subsistence allowance was restored. Then on 22-11-1952, the following order was passed against the petitioners;

"Department of Industries, Bihar. Patna.

Memo No. 5205/IE-70/1949.

Dated Patna, the 22nd November, 1952.

To (1) Shri Birjnandan Prasad Mohalla Salempur Ahra, P. O. Kadamkuan, Patna-3.

(2) Shri Harinandan Lal Mohalla Bakerganj Bazaza, P. O. Bankipore Patna-4.

Shri Brijnandan Prasad

Shri Harinandan Lal is informed that the State Government in the Development have abolished the Upper Division post held by him in the Iron Section of the Industries Department with effect from 1-11-1952. His services are accordingly deemed to have terminated on the forenoon of 1-11-1952.

2. He is further informed that the joint representation dated 3-7-1951, submitted by him has been rejected by Government.

Sd/S. M. Ali

Director of Industries, Bihar."

The order stated, in effect, that the two temporary posts to which the petitioners were appointed with effect from 8-2-1949, were abolished with effect from 1-11-1952, and the services of the petitioners were accordingly terminated with effect from the forenoon of that date. It appears that the petitioners were allowed to draw their subsistence allowance till 31-10-1952.

The petitioners made certain representations against the order terminating their services; which representations were rejected. It is unnecessary in this case to state the details of these representations or to refer to certain orders alleged to have been made by the then Minister in charge of the Development Department. It has been stated on behalf of the State of Bihar opposite party 1, that the orders of the Minister relate to confidential documents regarding which the State of Bihar has claimed privilege.

I do not think that those, orders have any bearing on the questions urged before us and I refrain from making any reference to them,

2. On behalf of the petitioners it has been contended that the termination of their services by the order dated 22-11-1952, is tantamount to their removal from service and such removal having taken place in violation of the rules governing their service, the order is bad and must be quashed. It has also been contended that the petitioners have been deprived of their statutory right under Clause (2) of Article 311 of the Constitution, and on that ground also the order is bad and should be quashed. Thirdly it has been contended that the order dated 22-11-1952 is a mere cloak or device, and the real purpose and effect of the order was to punish the two petitioners by reason of the criminal charge preferred against them, and the punishment was imposed without giving the petitioners any opportunity of defending themselves, even though they were subsequently discharged in the criminal case on 22-7-1953.

Lastly, it has been contended that a discrimination has been made against the petitioners in the matter of the abolition of the two posts, and that the order of suspension which was passed on 16-11-1949, with retrospective effect, was an invalid order because no order of suspension could be passed with retrospective effect. On these contentions the petitioners in the two cases have asked for a writ or a direction to cancel and set aside the two orders namely, the order of suspension passed on 16-11-1949, and the order dated 22-11-1952, terminating

their services, and other consequential reliefs following therefrom.

3. The applications have been contested by the State of Bihar. The main contention of the State of Bihar is that the order suspending the petitioner and the order terminating their services were good orders validly made by the competent authority, and there are no good reasons for setting them aside.

3a. The principal question for determination is if the order dated 22-11-1952 terminating the services of the petitioners with effect from 1-11-1952, is a good order. I do not think that the validity of the order of suspension need be gone into in the present cases. The order of suspension was followed by the order terminating the services of the petitioners, and the petitioners admit that they got subsistence allowance in accordance with the rules up till 31-10-1952.

If the petitioners think that the suspension order was invalid and they are entitled to their full salary from 15-11-1949, till 31-10-1952, they can surely bring a suit for the enforcement of their claim. I see no reason why the question of the payment of the full salary to the petitioners for the period of their suspension should be decided on the present writ applications.

4. I, propose, therefore, to consider these two applications on the principal question argued before us, namely if the order terminating the services of the two petitioners was a bad order for any of the reasons given by learned counsel for the petitioners. I shall now take up these reasons one by one. The first reason given by learned counsel for the petitioners is the following.

It is contended that the order terminating the services of the two petitioners had been passed in violation of the rules of their service. Learned counsel has referred us to the Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935 and the Civil Services (Classification, Control and Appeal) Rules.

His argument is that removal from service is one of the penalties which can be imposed under Rule 2; Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935, and Note I below that rule states: ,

"For the procedure to be followed before an order of dismissal, removal or reduction can be passed, see Rule 55, Civil Services (Classification, Control and Appeal) Rules. In drawing up proceedings and conducting departmental enquiries, the instructions contained in Rules 165 to 170 of the Bihar and Orissa, Board's Miscellaneous Rules, 1939, are to be followed, except where more detailed instructions have been framed by the department concerned."

Under Rule 55, Civil Services (Classification, Control and Appeal) Rules, no order of removal can be passed on a member of a service unless he has been informed in writing of the grounds on which it is proposed to take action, has been afforded an adequate opportunity of defending himself. It is contended that the procedure laid down for imposing the penalty of removal has not been followed in " the case of the two petitioners, and therefore, the order terminating their services which is tantamount to removing them from service is bad.

Learned counsel has referred also to Clauses (b) and (c) of Explanation I to Rule 2, Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935. Clause (b) of Explanation says that the discharge of a person appointed, otherwise, than under contract, to hold a temporary appointment on the expiration of the period of the appointment, does not amount to removal or dismissal within the meaning of the rule. Clause (c) says that the discharge of a person engaged under contract in accordance with the terms of his contract, does not amount to removal or dismissal within the meaning of the rule.

The argument of learned counsel for the petitioners is that the aforesaid two Clauses (b) and (c) of Explanation I do not apply in case of the petitioners, because though the petitioners were appointed to two temporary posts in the Upper Division with effect from 8-2-1949, they were appointed for an unspecified and indefinite period; they were not discharged in accordance with the terms of their contract by notice, etc.; therefore, Clause (c) does not apply.

As to Clause (b) the argument of learned counsel for the petitioners is that as no period of appointment was specified in the case of the petitioners, Clause (b) does not apply. I agree with learned counsel for the petitioners with regard to Clause (c) of Explanation I to Rule 2, Bihar and Orissa Subordinate Services Discipline and Appeal Rule, 1935. I do not, however, agree with learned counsel for the petitioners with regard to cl. (b) of the said Explanation. The petitioners were appointed to two temporary posts in the Upper Division on 8-2-1949. There was no contract signed by the parties.

Clause (b) of Explanation I talks of a person appointed, otherwise than under a contract, to hold a temporary appointment; that condition is clearly fulfilled in the case of the petitioners. The crucial question is what is meant by the expression "on the expiration of the period of the appointment" in Clause (b). In my view, the expiration of the period of the appointment will certainly mean, in the case of the petitioners, the date when the two temporary posts are abolished. If a person is appointed to a temporary post, it is obvious that his period of appointment expires when the post itself is abolished, even though no period was specifically mentioned in the order of appointment.

The order of appointment clearly mentioned that they were appointed to two temporary posts in the Upper Division. If the posts themselves are abolished, the appointments must necessarily come to an end. I do not see how any other conclusion is possible in the circumstances of the present cases.

My conclusion, therefore, is that the case of the two petitioners comes within Clause (b) of Explanation I, and the order terminating their services does not amount to removal within the meaning of Rule 2, Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935; therefore, there was no necessity of holding an enquiry under Rule 55, Civil Services (Classification, Control and Appeal) Rules. The services of the petitioners, were terminated not because any penalty was being imposed on them for good and sufficient reasons, but because

the very posts to which they were appointed were abolished.

5. Learned counsel for the petitioners has referred us to certain executive instructions stated to have been issued by the Government of India to the State Government, which have been referred to in para. 28 of the petition of Harinandan Lal, . I do not think that those executive instructions have any bearing on the question of the interpretation of the statutory rules like the Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935, and the Civil Services (Classification, Control and Appeal) Rules. Learned counsel for the petitioners has given to us a printed copy of a pamphlet headed "Procedure to be followed in disciplinary cases". Paragraph 6 of the pamphlet deals with the discharge of temporary Government servants. Clause (4) of the said paragraph states:

"In all other cases which are not covered by the foregoing provisions, Article 311 of the Constitution is attracted and full departmental proceedings are necessary before the temporary service can be terminated. But in the cases of persons who are appointed subject to discharge on one month's notice, or less, Bihar and Orissa Subordinate Services Discipline and Appeal Rules or the Civil Services (Classification, Control and Appeal) Rules, do not apply and it will be a sufficient compliance of Article 311 if an explanation is obtained from the person concerned asking him to show cause why he should not be discharged, and the explanation so obtained is considered before orders of discharge are passed."

The contention of learned counsel for the petitioners is that the case of the petitioners comes under the said Clause (4) of para. 6 of the pamphlet. I do not think that executive instructions issued by either the Government of India or the State Government can have any binding force on the interpretation of statutory rules. The Court must interpret the statutory rules in accordance with the language used in the statutory rules, in the light of well established rules of interpretation. I have already referred to Clause (b) of Explanation I to Rule 2, Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935, and it is clear to me that the two petitioners were discharged not by way of punishment for any reason, but by reason of the fact that the temporary posts to which they were appointed were themselves abolished.

6. The second contention relates to Clause (2) of Article 311 of the Constitution of India. That clause is in these terms:

"No such person 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."

The argument of learned counsel for the petitioners is that the order terminating the services of the petitioners is tantamount to an order of removal within the meaning of Article 311 of the Constitution and, therefore, the petitioners had the statutory right of a reasonable opportunity being given to them of showing cause against the action proposed to be taken in regard to them.

In support of this contention learned counsel for the petitioners has referred us to a number of decisions: -- Balai Chand Basak Vs. N. Roy Choudhury, Additional Refugee Rehabilitation Commissioner, West Bengal and Others, ; -- "Yusuf AH v. Province of the Punjab AIR 1950 Lah 59 (B); -- "Bijoy Chandra v. State of Assam AIR" 1954 Assam 12 (C); --"Ishar Dass"v. State of Pepsu AIR 1952.Pepsu 148 (D);. -- K.M. Rajagopalan Vs. State of Madras and Another, . There are two Supreme Court decisions also in -- Satish Chandra Anand Vs. The Union of India (UOI), and -- Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI), . As, in my opinion, the question raised is covered by the aforesaid two decisions of the Supreme Court, I do not propose to examine in detail the decisions of the various High Courts on the subject.

It is now, I think, well settled that Article 311 of the Constitution does not make any distinction between temporary and permanent servants. A person holding a temporary civil post has the statutory right given by Article 311 if he is dismissed, removed or reduced in rank. The principal question before us is if the order terminating the services of the petitioners can be said to be an order removing them from service, within the meaning of Article 311 of the Constitution of India.

In Satish Chandra Anand Vs. The Union of India (UOI), , it was pointed out by their Lordships that the terms "dismissal" and "removal" were used in Article 311 in the same sense as they were used in R. 49, Civil Services (Classification, Control and Appeal) Rules.

Rule 49, Civil Services (Classification, Control and Appeal) Rules, is more or less similar to Rule 2, Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935. Rule 49, Civil Services (Classification, Control and Appeal) Rules, also had an Explanation which stated that

"the discharge -- (a) of a person appointed on probation, -- (b) of a person appointed otherwise than under contract to hold a temporary appointment, on the expiration of the period of the appointment, -- (c) of a person engaged under contract, in accordance with the terms of his contract, -- does not amount to removal or dismissal within the meaning of the rule."

This Explanation is exactly similar to Explanation I of Rule 2, Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935. Their Lordships of the Supreme Court were dealing with Clause (c) of the Explanation to R. 49, and held that under that Explanation the termination of the services of a person in accordance with the terms of his contract was not dismissal or removal within the meaning of Article 311 of the Constitution. In our case we are dealing with cl. (b) and not Clause (c) of the Explanation, but the same principle, in my opinion, will apply.

In the other Supreme Court decision Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI), , his Lordship Das J. referred to the earlier decision in Satish Chandra Anand Vs. The Union of India (UOI), and reiterated

the view that the terms "dismissal" and "removal" had been used in the same sense in Article 311 as in Rule 49, Civil Services (Classification, Control and Appeal) Rules. Then his Lordship observed:

"Removal, like dismissal, no doubt brings about a termination of service but every termination of service does not amount to dismissal or removal. A reference to the Explanation to Rule 49 quoted above will show that several kinds of termination of service do not amount to removal or dismissal. Our recent decision in *Satish Chandra Anand Vs. The Union of India (UOI)*, fully supports the conclusion that Article 311 does not apply to all cases of termination of service."

Their Lordships had before them a case in which an Engineer was compulsorily retired under the provisions of Article 465A, Civil Service" Regulations, and his Lordship held that though there was no doubt some imputation against the Engineer which he was called upon to explain, it was perfectly clear that the order for compulsory retirement did not amount to a removal within the meaning of Article 311 of the Constitution. His Lordship then observed further:"

"There can be no doubt that removal generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer. There is no such element of charge or imputation in the case of compulsory retirement."

In the case before us also there is no element of charge or imputation against the two petitioners. Their services have been terminated because the temporary posts to which they were appointed were abolished. That being the position, on the principles of the aforesaid, two decisions of the Supreme Court, the termination of the services of the petitioners is not removal within the meaning of Article 311 of the Constitution of India.

7. On the question of discrimination, the argument before us is that there were three temporary posts in the Upper Division, of which two were abolished but the third was retained; therefore, the seniormost man should have been retained in the third post and not the juniormost man. I do not think that any question of discrimination at all arises in the present cases. The petitioners were appointed to two temporary posts & it is not disputed before us that those two posts were abolished. As soon as those two posts were abolished, the period of appointment of the two petitioners came to an end.

I do not think that the petitioners could claim any legal right to a third post; and if they, or any of them, were not appointed to the third post, it cannot be said that there was any discrimination against them within the meaning of Articles 14 and 16 of the Constitution.

8. The last point is that the order terminating the services of the petitioners was a cloak or a device for punishing them on account of the criminal charge brought against them, of which criminal charge they were subsequently discharged. I am unable to agree on the materials before me that the order terminating the services of the petitioners was in any way a cloak or a device. The State Government may have considered the petitioners good officers or bad officers; the State Government may even have been influenced by the criminal charge which was brought against the petitioners.

That was, however, not the reason for which they were discharged. They were discharged because the posts themselves were abolished, and I have no reasons to think that the posts were abolished merely for the purpose of punishing the two petitioners. I must, therefore, overrule the contention that the order terminating the services of the petitioners was a mere cloak or device.

There is one other point to which I must make a reference, though the point has not been taken in any of the two petitions. It has been argued that before the services of the petitioners were terminated, the State Public Service Commission was not consulted, and a reference has been made to Article 320 of the Constitution. I have already held that the action taken against the petitioners was not a disciplinary action; therefore, the question of consulting the Public Service Commission did not arise.

9. For the reasons given above, I am satisfied that no case for the issue of a writ or direction of the nature asked for by the petitioners, has been made out in these two cases, and the applications must, therefore, be dismissed with costs. There should be one consolidated hearing fee of Rs. 100/-only.

Ahmad, J.

10. I agree.