

(1956) 09 MP CK 0002

In the Madhya Pradesh High Court

Case No : Civil Miscellaneous Case No. 14 of 1955

Diwan Chand Sahni

APPELLANT

Vs

The State of Madhya Bharat

RESPONDENT

Date of Decision : 13-09-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 16, 220, 226

Citation : AIR 1957 MP 100

Hon'ble Judges : Samvatsar, J;Nevaskar, J

Bench : Division Bench

Advocate : M.B. Rege, for the Appellant; J.D. Patel, Deputy Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Nevaskar, J.—This is a petition under Article 220 of the Constitution of India submitted by the Petitioner Shree Diwanchand Sahni for the issue of a writ of mandamus for quashing the order issued under the signature of the Chief Secretary, Madhya Bharat, dated 30-6-1953, requiring the Petitioner to go on compulsory leave from 1-12-1950 to 16-12-1951 and for the issue of such other directions as the circumstances of the case may be deemed to require.

2. The Petitioner's case is that the Petitioner was employed in the former Holkar State as a Foreign Member on a salary of Rs. 1000/- P.M. He continued to occupy this post till the formation of Madhya Bharat. After the integration of the States in Central India into Madhya Bharat the Petitioner was appointed to function as Administrator Dhar State during the transitional period until the integration of administration of merging States after which on 1-12-1948 he proceeded on leave.

Some time before the expiry of his leave the Petitioner solicited the orders of the Government regarding the post and the place where he should join. To this query he received a reply by telegram dated 12-1-1949 informing him that he was on

the surplus list. This was followed by another communication dated 20-1-1949 informing him that he, was "surplus to the requirement of the Government" and that he was ordered to be discharged with immediate effect.

The Petitioner thereupon made representations to the Government for reconsideration of his case on the ground that his case did not fall within the ambit of the Rules which the Government set down for the guidance in the matter of absorption of the personnel of the pre-existing States. This representation, according to the Petitioner, went un-heeded and on 1-2-1950 the Petitioner was sanctioned combined leave for two years out of which two months and eight days was to be privilege while the rest was to be furlough. This leave was stated to take effect from 1-12-1948 i.e. the day he first proceeded on leave.

3. The Petitioner again made representations against the treatment meted out to him and pressed for this demand for special compensation. His claim for Special compensation was negatived. Yet on a further representation he was informed by a letter dated 30-11-1950 that his case was under special consideration in view of the "peculiar circumstances of his service before retrenchment".

Later he was required to submit particulars of his past service to the Special Recruitment Board appointed by the Government of India for selection of officers for the I.A.S.... The Petitioner accordingly did so. After an interview by the Board he was first informed by a telegram dated 5-10-1951 for joining to Gwalior in anticipation of his posting and later by an order dated 17-12-1951 he was taken up as an officer on special duty.

On 18-8-1952 the Government however directed that the period from 1-12-1950 to 16-12-1951, in continuation of the period of his leave for two years covered by the earlier order dated 1-2-1950, be treated as leave without allowance. Later on however the Government on 30-6-1953 passed the following order:

The orders issued in the Appointments Department's Memo No. 305/11-AD dated January 20 1949 in so far as they relate to Shri D.C. Sahni are hereby cancelled.

(2) With effect from January 1, 1949, Shri D.C. Sahni is substantively absorbed in Madhya Bharat Administrative Service (Senior) on Rs. 1000/- P.M. which he was drawing before the formation of Madhya Bharat and which is guaranteed to him under the terms of Covenant, as Government are satisfied after scrutiny of the relevant records that there were permanent posts substantively vacant in the Senior Cadre of the Madhya Bharat Administrative Service. During the period Shri Sahni will, however, be treated as on leave in accordance with the orders already passed by Government until December 17, 1951 when he joined his duties under the Madhya Bharat Government.

4. Afterwards the Petitioner, it is stated, made representation for payment to him of his salary due for the period he was "compulsorily off duty" and eventually made a demand for justice by a notice dated 4-12-1954. This demand was

however repelled.

5. The Petitioner says that he was not surplus to requirements of the Government when he was ordered to be discharged from service on 20-1-1949 as was plain from the events culminating in the order of the Government dated 30-6-1953 and that the said order established the continuity of his service from 1-1-1949 and that it was not competent for the Government to deprive the Petitioner of the benefit of the full salary for the period of his enforced absence.

6. He accordingly prayed for quashing of the order dated 30-6-1953 in so far as it required the Petitioner to go on compulsory leave. He further, prayed for such other and further directions as might be considered appropriate.

7. In the return submitted on behalf of the State it was contended that the Petitioner as a member of the permanent Civil Service in the employment of former Holkar State had no legal right to a continued employment in the new State of Madhya Bharat and that the Government of the new State was the sole arbiter to determine whether particular member of the permanent Civil Service of the integrating State should or should not be absorbed as a permanent Civil Servant in the new State. The Rules framed by the Government setting out the conditions and the procedure for such absorption were purely executive in nature and in no way calculated to create legal right in any member.

8. It was admitted that the Petitioner was declared surplus to requirement by the order dated 20-1-1949 but that later on, on representation made by the Petitioner, his case was considered by the Government on equitable grounds and the Government came to the conclusion that the Petitioner could be continued as a permanent member of the Civil Service in the new State of Madhya Bharat only by bridging over the gap in the continued tenure of his service by treating the period of discontinuance of service as a period on leave admissible to him under the Rules.

Accordingly the Govt. by their letter dated 18-8-1952 informed the Petitioner the manner in which the Government were prepared to treat his case. The Petitioner, it is said, did not demur or protest against the proposed treatment of his case. The Government therefore by order dated 30-6-1953 made an order for the continuance of the Petitioner in service on condition that the period of discontinuance could only be treated as of leave. The Petitioner took advantage of the order and that he could not for that reason approbate and reprobate.

It was open for him, at his option, to refuse to accept the employment on the proposed terms in which case he could have received compensation in accordance with the terms of Article 16 of the Covenant dealing with this subject.

9. It was further contended that even after the Petitioner had reached the age of superannuation he was given two extensions for an aggregate period of one year and three months.

10. On the whole, it is claimed, the case of the Petitioner was treated

sympathetically, fairly land to the greatest advantage of the Petitioner. The Petitioner, it is said, reaped all the benefits under the impugned order. It is only after his retirement from service that the Petitioner seeks to challenge the order. This he should not be allowed to do, particularly in a proceeding under Article 226 of the Constitution.

11. It was next urged in the alternative that the Petitioner virtually asks for a money claim against the Government in lieu of his enforced absence from service under an alleged "Void" order which this Court ought not to grant in a petition under Article 226 of the Constitution. The Petitioner can enforce his claim in a Civil Suit which affords an adequate remedy. The Petitioner has not made but a special case for not pursuing the normal remedy available to him in law.

12. The allegations of mala fides were denied. On the other hand it is asserted that his case was treated sympathetically. It is also urged that the order dated 30-6-1953 could be read as a whole and the direction contained therein as to the leave cannot be avoided.

13. Lastly it is said that the Petitioner cannot call aid the Fundamental Rules which could only be applied after he is taken in service and not before.

14. The contentions on either side referred to above raise the following questions:

1. Has the Petitioner any legal right to be continued in service of the State of Madhya Bharat on the ground that he was in the permanent service of the former Holkar State?

2. Is the order of the Government dated 30-6-1953 contrary to law to any extent?

3. Can the order dated 30-6-1953 be dissected so as to enable the Petitioner to take advantage of the order in so far as it directed his sorption in the service of the State and to attack the order in so far it deals with the question of his leave?

4. Did the Petitioner take advantage of the order and should the Petitioner for that reason be not allowed to reprobate?

5. Is the remedy under Article 226 of the constitution the proper remedy under the circumstances?

15. The first and the foremost question to be considered is whether the Petitioner had any legal right to be in the service of Madhya Bharat Government. Did he acquire any right by reason of the fact that he was a permanent servant of the Holkar State which merged in Madhya Bharat? Under Clause 16 of the Covenant it was agreed between the Covenantee States that Civil Servants in the integrating States would, if absorbed in the new State, not be employed on terms less advantageous than those on which they were serving and that if they are not so absorbed they would be granted compensation.

This was a political decision between the Covenantee States and did not create

any legal right amongst the Civil Servants of merged States to claim to be in service in the new State. Mr. Rege did not press that idle Petitioner had stay legal right to be in service. He however based his argument on the contention that the State of Madhya Bharat, who declared the Petitioner surplus to requirement of the Government, had to accept later on that this was not a true statement inasmuch as on the material date there were posts with the Government suitable for the Petitioner.

The Government therefore in recognition of that fact directed the absorption of the Petitioner from 1-1-1949 by the order dated 30-6-1953. This order established the continuity of service of the Petitioner. If that was so he could be deprived of his salary for the intervening period only in accordance with the rules in force and not arbitrarily.

It was urged that the Petitioner was through out prepared to join duty immediately on the expiry of the period of his leave but was erroneously declared as surplus to requirement of the Government. This order was reviewed later and the mistake was corrected. If that was so how could he then be compelled to be treated as on leave when he neither asked for it nor was bound to have it?

The action of the Government, in so doing, affected his fundamental right to the salary which he should be deemed to have lawfully acquired at least for the period subsequent to the promulgation of the Constitution. The exercise of executive power by the State was, according to the learned Counsel, arbitrary and affected the fundamental right of the Petitioner.

The learned Counsel relied upon the decisions reported in T.K. Gopala Chetty v. The Director of Public Instruction in Mysore (S) AIR 1955 Mys 81 (A); Wazir Chand Vs. The State of Himachal Pradesh, and The State of Bombay Vs. Bombay Education Society and Others, , for the view that where the arbitrary and unlawful executive action of a Public Officer results in the infringement of the fundamental right of the Petitioner he can seek relief by means of an appropriate writ.

The reference was also made by the learned Counsel in the argument to the decision in Rakhal Das Mukherjee v. S.P. Chose AIR 1052 Cal 171 (D), in which the principles governing issue of writs are discussed. The learned Counsel pointed out that the fact that there is other remedy open is no ground for refusal of the present remedy particularly when the impugned order has the effect of cutting down fundamental right of the Petitioner viz., right to property which the Petitioner has earned by reason of the continuity of his service from 1-1-1949 under valid Government order till the date of his retirement. He in this connection referred to the decision reported in The State of Bihar Vs. Abdul Majid,

16. In my opinion Mr. Rege's attempt in this case to import consideration as to the fundamental right of the Petitioner is without much substance. The Petitioner in his petition never claimed infringement of his fundamental right. The petition was directed against a portion of the order dated 30-6-1953 which refused to

review previous orders dated 1-2-1950 and 19-8-1952 directing his being treated as on leave.

The Petitioner was directed to be declared surplus to requirement under a Government order which was before the promulgation of the Constitution. This order was reconsidered and the Petitioner was absorbed in the permanent service from 1-1-1949 by the order dated 30-6-1953. But this order was not unconditional. It was subject to the two earlier orders. There was no legal obligation cast upon the Government to take the Petitioner in the permanent service of the State.

Nor was the Petitioner legally bound to serve the new State. He did not actually serve the Government during the period what he styles as his enforced leave. It was open for the Petitioner either to accept the order as it stood or to claim compensation if he were legally entitled to the same. The order dated 30-6-1953 stood as a whole and it could not be dissected so as to enable the Petitioner to claim benefit under one part and be relieved from the obligation under the other part.

He would have been so entitled had he possessed a legal right to be in the permanent employment of the State from 1-1-1949. It is therefore in-correct to argue that he should be taken to be in service from 1-1-49 unconditionally and that the period of leave subsequent thereto allowed to him should be treated as the period of actual service and that deprivation of salary in respect of that period as an encroachment on the fundamental right. The very basis of this so called fundamental right is not something that inheres in him apart from the order but the very order itself dated 30-6-1953. If the order that enabled him to be absorbed in service was subject to certain terms the right claimed cannot be claimed independent of those terms.

17. There is another aspect to this question. The Petitioner was granted leave without pay for a certain period upto 30-11-1950 by the order dated 1-2-1950. The Petitioner did not and could not challenge that order then nor did he do so until he retired after taking full advantage of the order dated 30-6-1953. So was the case with another order dated 18/19-8-1952 whereby he was treated as on leave without pay till 16-12-1951.

18. These orders when passed were not challenged. They continued to be in force and were confirmed by the order dated 30-6-1953. Apart from the delay involved in impugning these orders there is this further fact that the Petitioner reaped benefit under order dated 30-6-1953 which confirmed those orders and did not challenge them till 24-8-1955 i.e. nearly two years after.

Thus the very basis of his so-called fundamental right being chimerical it is unnecessary to consider whether the Government by arbitrary exercise of his power has infringed that right. But it may be stated here that the object in bridging the period of his service which was broken might have been more in his interest to enable him to reap the benefit of the continuous service than one with

a break.

19. The conduct of the Petitioner allowing the orders dated 1-2-1950 and 18/19-8-1952 to stand as they were until his retirement after reaping full benefit of the order dated 30-6-1953 directing his absorption disentitles him to this special remedy.

20. The aforesaid discussion will make it clear that the Petitioner had no right legal or fundamental in respect of the salary for the period for which he did not actually serve nor had he any legal or fundamental right to be absorbed in the new State of Madhya Bharat. The matter of his absorption depended upon the discretionary power of the Government and was governed by the political considerations and administrative convenience.

For that reason it cannot be urged that a part of the order dated 30-6-1953 in so far as it confirmed previous orders dated 1-2-1950 and 18/19-8-52 is contrary to law. It is also clear that that order stood as a whole and cannot be dissected so as to enable the Petitioner to say that his fundamental right acquired under the other part of the order is infringed.

21. Further the Petitioner did take advantage of the order dated 30-6-1953. He cannot now be allowed to impugn the same unless it is shown that what he seeks to avoid is contrary to his legal right.

22. Lastly it may be said that by this petition the Petitioner substantially claims his salary for the period of the so-called "enforced leave". A remedy by way of suit was an equally efficacious remedy for him. In fact notice given by him to the State before filing the present petition was in respect of the suit and was actually u/s 80, Code of Civil Procedure.

23. As regards the decisions to which the learn-ed Counsel made a reference in his argument it may be said that the very basis for their applicability being absent no further question arises.

24. For all these reasons there is no force in this petition. It is accordingly dismissed.

Samvatsar, J.

25. I agree.