

(1997) 10 PAT CK 0029

In the Patna High Court

Case No : Civil Writ Jurn. Case No. 1297 of 1997

Dr. Ram Ashray Yadav

APPELLANT

Vs

State of Bihar and Another

RESPONDENT

Date of Decision : 03-10-1997

Acts Referred:

Constitution of India, 1950 — Article 317, 317(2)

Citation : AIR 1998 Patna 125

Hon'ble Judges : Asok Kumar Ganguly, J

Bench : Single Bench

Advocate : S.N. Jha and Anil Kumar Tiwari, for the Appellant; K.K. Mandal, S.C.G.S.C., Yugal Kishore, Standing Counsel, Ajoy Kumar and Sheo Nandan Mishra, for the Respondent

Final Decision : Dismissed

Judgement

Asok Kumar Ganguly, J.—The subject-matter of challenge in this writ petition is the order of suspension dated 22-1 -1997 passed by the Governor of Bihar in exercise of power conferred by Clause (2) of Article 317 of the Constitution of India.

2. The admitted facts of the case which are necessary for disposal of this writ petition are stated below :--

3. The petitioner was appointed on 22-1 -1991 to the post of Chairman of Bihar Public Service Commission (hereinafter referred to as the said Commission) by the Governor of Bihar in exercise of power conferred under Article 316 of the Constitution of India. The petitioner has asserted that he joined on 31-1-1991. It is not in dispute that the tenure of the petitioner's is for six years and such appointment continued till 22-1-1997.

4. The petitioner's grievances are that an order of suspension dated 22-1-1997 was passed by the Governor of Bihar in exercise of power under Article 317(2) of the Constitution of India, and according to the petitioner's assertion the same

was served upon the petitioner on 23-1-1997 after the petitioners tenure has come to an end. The petitioner has asserted in the writ petition that the condition precedent to the passing of an order of suspension has not been satisfied in the case, inasmuch as, according to him, an order of suspension can be passed only when there is a preceding reference, and in the instant case there is no reference. As such, the order of suspension cannot be sustained. He further challenged the order of suspension inter alia on the ground that the said suspension order was communicated to him on 23-1-1997 when he had already relinquished his office. Therefore, such order is of no effect. The petitioner has also stated that the said order of suspension was passed without placing it before the Council of Ministers and as the same was not placed before the Council of Ministers, the said order has not been passed in accordance with law.

5. Before this Court the main point which has been urged by the petitioner is on the question of order of suspension though it has been urged that there does not exist any reference and, therefore, the suspension order is invalid.

In para 4 (XII) of the writ petition it is made very categorically clear that the petitioner is not making any submission on the merits of the reference. It has been stated that the petitioner has reserved his right to contest the reference on merit should the Supreme Court decide to entertain the reference and proceed with the enquiry.

6. The main submission is that an order of suspension pre-supposes that the person suspended is holding an office. Since in this case the petitioner had left his office before the order of suspension was served upon him, therefore, the said order is wholly inoperative and invalid.

7. Learned counsel appearing for the respondent has filed counter-affidavit in this matter, and from the counter-affidavit filed in this matter, it appears that there exists an order of reference. Annexure-A of the said counter-affidavit discloses the said order of reference which is made by the President of India in exercise of its power conferred under Article 317(1) of the Constitution of India. The order of reference which is dated 22nd January, 1997 and signed by the then President of India is set out below :--

Whereas, Dr. Jagannath Mishra, then M.L.A. and Leader of the opposition, Bihar sent a letter in Feb. 1994 enclosing a list containing 32 specific charges against Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission (hereinafter referred to as the Commission) and seeking action against him under Clause (1) of Article 317 of the Constitution (a copy whereof is set out in Annexure-1 hereto.)

Whereas the Governor of Bihar obtained reply of the Chairman of the Commission on the various charges levelled by Dr. Mishra and also forwarded his comments after perusing the reply of the Chairman of the Commission (copies whereof are set out in Annexure-11 and III respectively).

And Whereas I am satisfied from the aboveresferred material before me that it is necessary to enquire into the various charges levelled by Dr. Mishra, other than those listed at paragraphs 5,6, 8, 10, 21 and 22 of the enclosure to his letter.

Now, therefore, in exercise of the powers conferred upon me by Clauses (1) of Article 317 of the Constitution, I, Shanker Dayal Sharma, President of India, hereby refer to the Supreme Court of India for enquiry and report as to whether Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission, ought, on the ground of misbehaviour, to be removed from the office of the Chairman of the Commission.

Sd/- S. D. Sharma PRESIDENT OF INDIA.

8. In the counter-affidavit it has also been stated that the order of suspension was issued after the reference was made by the President of India. From the recitals contained in the order of reference, it appears that the same is based on certain materials on which the petitioner's reply was also obtained. To those materials, the President on application of his mind, was satisfied that it was necessary to enquire into certain charges .and so in exercise of power under Article 317(1) of the Constitution the matter was referred to the Hon'ble Supreme Court for enquiry and report whether the petitioner ought to be removed from the office of the Chairman of the Commission.

9. As in this petition, this Court is not called upon to adjudicate on the validity of the said order of reference, this Court refrains from doing so in view of the well known judicial tradition so that on constitutional issues, this Court is expected to decide only those questions which are strictly relevant for the purpose of the decision in this case.

10. Some factual dispute has been raised in this case about the service of the suspension order. But the Supreme Court clearly laid down in the State of Punjab Vs. Khemi Ram, , that in case of an order of suspension, the order is communicated as soon as it goes out of office for onwards communication and the actual service of the order is not material.

11. Here admittedly the order of suspension was sent out at about 10 p.m. on 22-1-1997 which was during the tenure of office of the petitioner. That the order could not be personally served on the petitioner on 22-1-1997 is of no consequence. Thus when the order was passed and was sent out for service on 22-1-1997 at about 10 p.m. it was within the tenure of office of the petitioner.

12. Factually it appears from para 10 of the counter-affidavit that after the order was passed by the Governor a peon of the Governor's Secretariat with a police constable went to serve the order at 10 p.m. on 22-1-1997 to the residence of the petitioner, but despite repeated efforts the peon could not served the said order at 10p.m. on 22-1-1997 on the petitioner. The peon and the constable deputed for the purpose of effecting service approached the In-charge of the Shastrinagar Police Station and despite the fact that the In-charge of the local

police station also accompanied them to serve the order and tried their best to elicit response from the petitioner, they could not obtain any response. Ultimately they contacted the petitioner on telephone, and the petitioner told them to come for service on the next day and thus the order was received on 23-1 -1997.

13. In so far as the other contention of the petitioner is concerned, it is that the said order of suspension cannot be passed unless the same is placed before the Council of Ministers. This Court cannot accept this argument for the reasons discussed below.

14. The order of suspension under Article 317(2) of the Constitution is consequential to a reference under Article 317(1) by the President of India. So the action of, the Governor is a follow-up upon the action taken by the President of India. Constitution does not provide either expressly or even by necessary implication that the Governor may exercise his power in a direction or manner which contradicts or runs counter to the exercise of discretion by the President. So here also by necessary implication the Governor may exercise the power in his discretion and especially when power of suspension is by way of an interim measure as is clear from the language of Article 317(2). The Constitution Bench judgment of Supreme Court in *Samsher Singh Vs. State of Punjab and Another*, , also lays down the position that apart from the areas where the Constitution expressly provides that the Governor can act in his discretion, there are certain provisions where by necessary implications, for example, under Articles 356 and 200 of the Constitution the Governor can act in his discretion (paras 54, 55, 56 of the judgment). Here also the Governor can act independently and in exercise of his discretion having regard to the nature of this function which is clearly in aid of and as a supplement to the exercise of discretion by the President of India. So this contention is overruled.

15. Learned counsel for the petitioner finally submitted that an order of suspension cannot survive after the expiry of the tenure of office. Since the petitioner ceases to hold the office of the Chairman of the Commission on and from the midnight of 22-1-1997, the suspension order automatically lapses. Counsel for the respondent also made the same submission that the order of suspension has become infructuous.

16. But this Court is unable to accept the submissions made by either of the learned counsel for the respective parties.

17. The usual concept of suspension and removal from office of Government employees in service jurisprudence is not applicable here. The petitioner is certainly not a Government servant. He holds a constitutional post and in order to give him protection in the independent discharge of his duties special provisions under the Constitution have been framed. In that context proceeding initiated for his removal on ground of misconduct does not "ipso facto" come to an end on the expiry of the tenure of his office. This position is made clear by the Hon"ble Supreme Court in the case of "*In, Reference under Article 317(1) of the*

Constitution of India", reported in (1990) 4 SCC 262. In para 8, page 268 of the report, the Hon''ble Supreme Court after noting the Constitutional provisison and several decisions cited before it came to the conclusion that the "issue, therefore, must be treated as a live one even after the expiry of a member"s tenure". The same principle applies in the case of a Chainnan.

18. So considering all these aspects of the matter , this Court holds that there is no merit in the writ petition. The same is hereby dismissed. No order as to costs.