
(1959) 10 MP CK 0016

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 80 of 1956

Gajraj Singh Bheru Singh Rajput

APPELLANT

Vs

State of M.B. and Others

RESPONDENT

Date of Decision : 22-10-1959

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(2)

Citation : AIR 1960 MP 299 : (1962) JLJ 61 : (1960) 5 MPLJ 892

Hon'ble Judges : V.R. Newaskar, J;H.R. Krishnan, J

Bench : Division Bench

Advocate : K.A. Chitale and S.M. Kutumble, for the Appellant; S.L. Dubey, Dy. Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

The applicant used to be since 1945, a Sub-Inspector in the Police force of Gwalior, having been, in fact, promoted from the post of police constable to that of Sub-Inspector by a special order of the Ruler of Gwalior. Having been provisionally taken in the Madhya Bharat police force on the formation of that State, he was, in 1952 ostensibly retrenched from service by an order of the Deputy Inspector General of Police, dated 18-11-1952, on two grounds, namely, consistently bad record and not having the minimum qualification of being a matriculate, these being grounds 2 and 7 of the pre-Constitution retrenchment rules made by the Madhya Bharat Government on 9th July 1949. An appeal to the Inspector General of Police which is provided by the rules, was dismissed on 2-1-1954, the Inspector General holding that, firstly, the service record was not of the desirable type, and secondly, the applicant was not even a matriculate. The Deputy Inspector General did not afford the applicant an opportunity to show cause. The Inspector General himself seems to have asked him to show cause but not in accordance with the procedure provided in Article 311 or the post-Constitution service rules for punishment as such.

The applicant did not come up soon after the Inspector General's order, but

memorialized the Government though there is no provision for it in the rules. The Government dismissed his memorial on 25-2-1955, but he again sent a petition (to the Minister concerned) for review. This again was thrown out on 4-10-1955 and the petitioner came up to this Court on 23-10-1956 one year after the dismissal of the review application one year and eight months after the rejection of the memorial, and two years and nine months after the Inspector General's appellate order, which alone has been provided for in the rules.

The applicant's contention in regard to delay is that he had been petitioning the Government because, having been appointed by the Ruler, he felt that the Government alone was the proper authority that could punish him. Secondly, even if there was delay, his conduct does not show acquiescence in the order of the so-called retrenchment and, in any event, the opposite party Government is not likely to be adversely affected by the matter being taken up even after some delay. On merits, he has urged that, firstly, this is an order of punishment as it contains findings about his inefficiency and not merely an order of removal from service in accordance with the service contract or any objective test like educational qualifications, length of actual service and the like. Secondly, this being punishment, there was a contravention of Sub-article (1) because having been appointed to this post by the Ruler of the erstwhile Gwalior State, he could not have been removed from service or otherwise punished by an authority subordinate to its equivalent authority, namely, the Madhya Bharat Government itself, as provided in the Convention. Thirdly, it is urged that since an opinion about his inefficiency or dishonesty has been made the basis of the so-called retrenchment, usual notices to show cause and opportunity to answer the charges should have been given, which admittedly, they were not. It is, therefore, prayed that a writ of certiorari or any other appropriate direction should be given to the State Government for the setting aside of the order of retrenchment and his reabsorption into the service.

In reply, it is argued on behalf of the State that this is not a case of punishment but one of retrenchment in accordance with a scheme framed by Government. Therefore, the procedure laid down in Article 311 has no application. Again, after the formation of Madhya Bharat, the services of the applicant were provisional and precarious without any claim on Government till his absorption into the permanent police cadre in the new State. It was especially pointed out that there was delay, even making all allowances, of more than one year. Properly speaking, the delay is of two years and nine months as the approach to the Government in the two petitions was really outside the scope of the rules. Therefore, it was urged by the State that the petition must be thrown out.

It would be convenient now to take up the ground of delay. The general principle is that an application for the filing of which a definite period of limitation is prescribed, should be thrown out in limine if that period is exceeded, unless the principles contained in Section 5 of the Limitation Act apply, and sufficient cause is made out. Clearly, in applications for writ, no such mechanical process would

be possible. Something approximating to a rule of limitation in this mechanical sense is implied in an earlier Nagpur decisions of 1953 but in the later Full Bench decision reported in *Krishna Rafeshwar v. Chief Secretary*, M. P. AIR 1954 Nag 151, it was laid down that the High Court cannot lay down a rule of limitation as such.

In fact, the test is one of due diligence. The forty-five days or any other precise test cannot be prescribed but each case would depend upon its circumstances and in general, the applicant should account for any avoidable delay after the order he seeks to impugn. It is conceivable that an application even within 45 days, would be one showing want of diligence while another filed much longer afterwards may still be found to be sufficiently diligent. Every-thing would depend upon the circumstances but the extreme cases such as the ones referred to in *Bhagwandas Vs. Senior Superintendent, Way and Works, Eastern Rly.*, and *Surrendra Nath Vs. The Chief Conservator of Forests, Punjab, Simla and Another*, would be patently wanting in diligence and liable to dismissal on that score alone.

Shri Chitale, appearing for the applicant, has, in this connection urged that in the absence of a prescribed term of limitation, the standard of diligence in seeking an equitable relief should be applied. Even if there is delay the test should be, whether it amounts to acquiescence in the order impugned against, the application being, as it were, a belated second thought, or, whether during this interval, the opposite party has so changed its position that it would be patently inequitable to entertain the application and grant an equitable relief.

He has also pointed out that the return speaks of a delay of only about one year, possibly, starting from the date of dismissal of the review petition addressed to the Minister concerned and not of any longer period, say, from the Inspector General's order or the order of the Government. He has further drawn our attention to the fact that the return does not mention that the delay has caused a particular prejudice or inconvenience to the opposite party.

The fact remains that the remedy provided by the rules was exhausted in January 1954. It is difficult to agree with the contention that because the applicant thought that Government alone could have dismissed him, he thought fit that he should approach the Government and that too, once by memorial and again by review. There is obviously no objection to any dismissed or retrenched Government employee memorialising Government as often as he likes. But that being a course not prescribed by the law, he should simultaneously, at any rate, give effect to his intention if any, of moving the High Court. In this case, he has not done so. Even after the memorial to the Government, he waited for one year and eight months.

The position is worse that after knowing that nothing would come out of the review application, he still waited for more than a year. All this does show that the petitioner was either prepared to accept the position which, of course,

granted him the usual pension and other benefits on retirement or he had some other ulterior purpose.

In certain circumstances, the want of diligence, if it is gross, will itself disentitle the party to the equitable relief. The position, of course, would be different if it is satisfactorily explained. But here, there is no satisfactory explanation. Where the want of diligence is still there, but it is not gross, then other considerations come in. If the applicant has got a genuine case, it will fall to us to examine, whether by granting the relief the opposite party would be seriously inconvenienced. In the present case, the allegation is that the retrenchment was improper, amounting in effect, to a dismissal without following the procedure indicated in Article 311. If it is accepted, the relief is reinstatement with effect from the date of removal. The applicant was removed as long ago as 1952 but the delay upto January 1954 and after the filing of the application was not due to his fault. Even out of the intervening two years and nine months, he says that about one year was taken in his moving the Government by a memorial. In my opinion, it was unnecessary and at all events, outside the rules. Still, we have one year and eight months to be accounted for. During all this period. Government has necessarily to carry on appointing fresh members to the police force. There was some confusion in 1948 when following the political changes, a number of employees had to be continued in provisional employment. But even there, the last date for final reabsorption was sometime in 1955 and at all events, whatever application the applicant had decided to make, he should have made before that. In this case, it was perfectly easy for him to do so. Once, these employees from the erstwhile States had been fixed up, every reappointment which pushes in the old employee at some odd point in the administrative machinery, causes a jolt.

For one thing, the employee himself might have got rusty during the period of idleness. For another, the fresh employees appointed afterwards, have their expectations seriously jeopardised by the interlocking of the old employee. All this is inevitable; but if the delay in reinstating the old employee is short, then, for one thing, he would not have got so rusty and for another, the new-comers would not have accustomed themselves to the new framework and the order of seniority. No doubt, Government should take the consequences of dismissals or removals if they are found to be wrong; but the jolt caused by reinstatement should not be such as to impose disproportionate demoralization and inefficiency. This is an extraordinary relief at the discretion of the Court and it is a look out of the ex-employee, even if he has a genuine grievance, to see to it that it is possible to give him the proper relief without jolting the administrative machinery too much. Thus applying the very standards relating to equitable relief, an unexplained delay even of one year and on my reckoning it is at least two years and nine months in the present case is such as to impose a disproportionate strain on the opposite party.

There is another and a less important aspect of the matter. A reinstated employee is entitled to draw pay for the entire period from his removal upto his

reinstatement if there is no fault of his and there has been an illegality in his removal. Thus, even an ex-employee with a good grievance, can by coming after some years, try to get pay for a period without doing anything. The question is not so much whether it is done on purpose but whether it actually happens. On behalf of the applicant, it is suggested that this hardship to the opposite party can be removed by ordering in every suitable case that though reinstated, the applicant will not get part or whole of the pay for the intervening period. Theoretically, it is possible. But here again, an employee who is reinstated without ad interim pay is still one with a fresh grievance. In any case, this cannot remove the other elements of hardship to the opposite party caused by the avoidable want of diligence on the part of the ex-employee.

In brief, while I would not stick to any cast-iron rule of limitation, I would certainly accept an application by an ex-employee filed as soon as he has exhausted the other remedies provided by the rules. Any delay after it should be very satisfactorily explained. As it has not been done, the application is fit to be dismissed on that ground alone.

Still, it would be advisable to examine the grounds on merits.

The two grounds are firstly that the removal which amounts to dismissal, has been by an authority subordinate to the appointing authority which was the Ruler himself. Secondly, since it is a removal for alleged inefficiency or unsatisfactory work, there should have been a regular proceeding with notice to show cause and inquiry. Though apparently separate, both the grounds mutually entail and can succeed only if this is a removal for unsatisfactory conduct based upon the finding that the record is consistently bad or undesirable.

Whatever might have been the uncertainty in the past, the recent decision of the Supreme Court in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, has cleared the field. The first point that emerges is that every employee, temporary or provisional, that has been in the civil employment of the Union or State, is entitled to the benefit of Article 311 if the main conditions are fulfilled. He does not get the benefit of that Article if his service is terminated according to the contract or under the rules without inflicting any blackmark.

In this case, for example, the retrenchment rules amply enabled the Government to dispense with the service of the provisional employee on grounds of his not having the prescribed minimum educational qualifications or the Government's decision that there were no adequate reasons for retaining him in the service (Sub-rule (7)). If nevertheless, the authorities choose to terminate the service on the ground of negligence, inefficiency or other disqualification, then it is really punishing the employee who, in that event, is entitled to the benefit of Article 311.

The test is not, whether the employment is provisional or temporary, but whether the employee is sent away for some reason beyond his volition at that time, such as the rules or the terms of the contract, or whether he is sent away

for something which involves a blackmark of inefficiency or undesirability. The reason is not far to seek. In the one case, he would be able to hold his head high or face a possible future employer. In the other event, he has already been tarred, as it were, without being heard, and starts a new life with a serious disadvantage which he could have prevented if he had been given an opportunity to explain.

In this case, for example, both, the Deputy Inspector General and the Inspector General, have held that his record was consistently bad and he was not of the desirable type. There was, of course, another ground that he did not have the minimum prescribed educational qualifications. But neither the authorities have pressed it, nor indeed the return itself. We are in effect, told that the real reason why the employee was sent away was, consistently bad or undesirable record. On behalf of the administration it is urged that whenever retrenchment has to be made, there has to be a selection; and the selection of those with worse record is by itself not a wrong principle.

But my objection is not to the selection itself, but to the manner in which it is done. If after giving all the possible retrenchees an opportunity to explain the badness or undesirability of the record, a selection is made of those who after the inquiry are found to be worse than the others, there can be no objection, at least, on the ground of contravention of Article 311; but, to select the apparently worse without following the principle laid down in Article 311 is obviously wrong.

The learned Govt. Advocate has referred to the cases *Shyam Lal Vs. The State of Uttar Pradesh* and *The Union of India (UOI)*, and *The State of Bombay Vs. Saubhagchand M. Doshi*, . They are the cases of emphasis and on the whole it was held that the removal was in accordance with the rules, In any case, the latest view in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, is, as it were, a complete code in this regard.

The result is that the administration having gone into the question of undesirability or consistent badness of the record, was, under the law obliged to follow the procedure prescribed in Article 311. Having admittedly failed to do so, the removal order, though ostensibly one of retrenchment, would be bad. For the same reason, the element of punishment having entered into this matter, the removal by an authority subordinate to the appointing authority is also illegal.

Had the applicant come in time, and had not disqualified himself for this Court's assistance in view of the delay and its implications, it might have been possible to grant his prayer. But in view of the delay, for reasons already set out, the application is dismissed. Hearing fee Rs. 50/- be paid by the applicant to the opposite party.