

(1965) 04 AHC CK 0011

In the Allahabad High Court

Case No : Supreme Court Appeal No. 14 of 1965

General Manager, Kanpur Electricity Supply Administration

APPELLANT

Vs

R.P. Nigam and Another

RESPONDENT

Date of Decision : 02-04-1965

Acts Referred:

Constitution of India, 1950 — Article 132(1), 133(1), 311(2)

Citation : AIR 1966 All 429

Hon'ble Judges : W. Broome, J; Jagdish Sahai, J

Bench : Division Bench

Advocate : Shanti Bhushan, for the Appellant;

Final Decision : Dismissed

Judgement

Jagdish Sahai, J.—This application by the General Manager, Kanpur Electricity Supply Administration has been filed under Articles 132(1), 133(1)(a), (b) and (c) of the Constitution of India.

2. On 16th of September 1947 when the Government of Uttar Pradesh purchased the undertaking of the Kanpur Electric Supply Corporation Limited, the respondent, Sri R.P. Nigam was already in the service of the Corporation as an Assistant Accountant getting a salary of Rs. 550 per month. On 17th of November 1953 an agreement deed was signed on behalf of the Governor as one party and by Sri Nigam the respondent, the other party. This agreement it is said governed the conditions of service of Sri Nigam. The services of Sri Nigam were terminated by Sri K. C. Gupta, the General Manager of the Corporation on 22nd of July 1959. Sri Nigam filed writ petition No. 2456 of 1959 which was allowed by Oak, J. on 29-11-1961. The order passed by Sri Gupta, General Manager, dated 22-7-1959 terminating the services of Sri Nigam was quashed and the Corporation was directed to pay the costs of Sri Nigam.

3. The Corporation filed a special appeal which came up for hearing before a Bench consisting of one of us (Jagdish Sahai, J.) and G. C. Mathur, J. The special

appeal was dismissed on 30th October 1964. It is against that judgment that this application is directed.

4. The main submission that was made in the special appeal was that the provisions of Article 311(2) of the Constitution of India did not apply to Sri Nigam's case because on 1-4-1939 the U. P. Electricity Board was constituted and took over the undertaking from the State Government the same day with the result that on 22-7-1959, Sri Nigam was not a Government servant, but the servant of the U. P. Electricity Board. The argument was that being the servant of Electricity Board, Sri Nigam was neither a member of a civil service nor held a civil post.

5. This submission was against the categorical stand taken by the General Manager, Kanpur Electricity Supply Administration, the sole respondent, in the writ petition. The writ petition was filed in this Court on 10-10-1959. Paragraph 6 of the affidavit filed in support of the writ petition reads:--

"That in 1948 the designation of the petitioner was changed from Accounts Officer to Deputy Executive Officer. This new designation was to take effect from 29th March 1943. After the purchase of the undertaking of the Corporation the petitioner became the employee of the State and held a civil post under the State. His name appeared in the civil list of the State as Deputy Executive Officer."

In the same words reads Para. 5 of the writ petition.

On behalf of the General Manager, Kanpur Electricity Supply Administration a counter-affidavit sworn by Sri K. G. S. Nataraj the Executive Officer of the said Administration, was filed in this Court on 27th November 1959. Paragraph 6 of that counter-affidavit reads:--

"That Para. 6 of the applicant's affidavit is admitted."

There is thus no doubt, that what was contained in Para. 5 of Sri Nigam's writ petition and Para. 6 of the affidavit filed by him in support of his writ petition was categorically admitted as correct by the General Manager. That being the position, there was a clear admission by the General Manager to the effect that Sri Nigam held a civil post under the State of U. P. and this admission was made long after 1-4-1959 on which date it is said that the Electricity Board took over the undertaking from the U. P. Government. The writ petition was heard and disposed by Oak, J. on the basis of this admission.

On the second day of the bearing of the appeal before the bench Mr. Brij Lal Gupta orally stated that the U. P. Electricity Board having taken over the undertaking from the U. P. Government on 1-4-1959, Sri Nigam was not holding a civil post under the State of U. P. on 22-7-1959. He made no written application either for adjournment of the case or for permission to file a supplementary-affidavit stating the correct facts. He only orally requested the Bench hearing the case to adjourn the case for several days so that he could

make enquiries and if necessary make a proper application supported by an affidavit. The Bench did not think it proper to allow the adjournment in view of the circumstance that the special appeal was filed as far back as 29th of January 1952 and the counter-affidavit as far back as 27th November 1959 and neither in the memorandum of appeal nor in the counter-affidavit it was stated that Sri Nigam had ceased to be a Government servant because on 1-4-1959 the undertaking had been taken over from the State Government by the U. P. Electricity Board. In view of the categorical admission made in the counter-affidavit that Sri Nigam was holding a civil post under the State of U. P., the Bench dismissed the special appeal on 30-10-1964.

6. When the judgment was being dictated and the fudges had reached the concluding portion, Mr. Brij Lal Gupta stood up and submitted that the case of Sri Nigam would not fall under Article 311(2) of the Constitution of India also on the ground that the order terminating his service, dated 22-7-1959 was not one of dismissal or removal or reduction in rank. This point was not seriously argued. Actually the Bench hearing the appeal while dealing this submission in the penultimate paragraph of their judgment observed:--

"When we were closing the dictation of judgment Mr. Brij Lal Gupta submitted that the petitioner's case did not fall under Article 311(2) of the Constitution of India on the ground that Nigam was neither dismissed nor removed nor reduced in rank with the result that the provisions of that Article would not be attracted. The learned single Judge while dealing with the similar submission made before him, relying upon the case of Parshotam Lal Dhingra Vs. Union of India (UOI), , held that inasmuch as the petitioner's services were terminated on the ground of his physical incapacity to perform his duties he was "removed" for his disqualification with the result that it would be deemed to be an order of removal within the meaning of Article 311(2) of the Constitution of India. Mr. Brij Lal Gupta has not shown to us how this view of the learned single Judge is wrong."

7. Mr. Brij Lal Gupta has not appeared before us in support of this petition. Mr. Shanti Bhushan who has now appeared for the General Manager, Kanpur Electricity Supply Administration in this petition, has submitted that the services of Sri Nigam were terminated under Clause (13) of the agreement of his service. According to Mr. Shanti Bhushan an order passed under Clause (13) "was in the nature of compulsory retirement on the ground of physical incapacity and the provisions of Article 311 of the Constitution should not be applied to the case of such compulsory retirement."

8. We would like to point out that this point was not raised either in the counter-affidavit filed on behalf of the General Manager or before the learned single Judge or before the Division Bench hearing the special appeal. It is for the first time raised by means of this petition. Mr. Brij Lal Gupta only baldly stated that the order, dated 22-7-1959 was not an order of dismissal or removal or reduction in rank without showing how and for what reason. In fact the Bench clearly said in its judgment, dated 30-10-1964 that the submission was made while it was

dictating the penultimate paragraph of the judgment and when called upon to show how the view taken by Oak, J. that Sri Nigam had been removed within the meaning of Article 311(2) of the Constitution of India is wrong, Mr. Brij Lal Gupta could not do so.

We do not think it proper to certify a case as fit for appeal to the Supreme Court on a ground which was never canvassed either in the counter-affidavit or before the learned single Judge or before the Division Bench hearing the appeal. If the point had been raised earlier, Sri Nigam would have had an opportunity of meeting it and the learned single Judge and the Division Bench would have had an opportunity of dealing with it. To allow it to be raised at this stage would be to permit a surprise to be sprung on Sri Nigam. Besides, in our opinion, it would be unjust to grant a certificate on this plea at this stage. We even doubt whether the petitioner would be entitled to urge this point when it was not taken at earlier stages. Besides, whether Clause (13) of the agreement entered into on behalf of the (Governor one party and Sri Nigam the other party would still govern the conditions of service of Sri Nigam has not been enquired into the point not having been raised earlier.

9. The case was hilly fought out before the learned single judge and the Division Bench by eminent counsel on behalf of the General Manager (Sri N. D. Pant before the learned single Judge and Sri Brij Lal Gupta before the Division Bench) and the point which is now being urged was not taken before either of the two Benches. It is settled law that "in a case fully fought out between the parties and well represented by eminent counsel on both sides if a point available on the face of it is not argued or pressed then the presumption is that that point is without substance." (See *Raj Kishore Prasad Jaiswal and Others Vs. Subak Narain Singh and Another*, . The Privy Council in *Brij Narain Rai v. Mangla Prasad Rai* 21 All LJ 934 : AIR 1924 PC 50 observed;

"It is true that the point was not actually taken so far as appears in any of these cases, but when a long series of cases extending over a long period of time when parties were represented by eminent counsel are decided in a way where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad."

10. In the present case the judgment of the Court of the first instance (Oak, J.) was affirmed in appeal by the Division Bench (Jagdish Sahai and G. C. Mathur, JJ.). It is not known with any amount of certainty as to what is the value of the subject-matter of dispute in the Court of the first instance and now. That being so, it is difficult to hold that the case is covered by Clauses (a) and (b) of Article 133(1) of the Constitution of India. But assuming that it does fall under those clauses, in view of the facts mentioned above we are unable to certify that the appeal involves some substantial question of law. Consequently no certificate can be granted under Clauses (a) and (b) of Article 133(1) of the Constitution of India. We do not think if it can be certified even under Clause (c) because as

already pointed out the question of law on which appeal is proposed to the Supreme Court was not raised either before the learned single Judge or before the Division Bench and cannot, therefore, be said to be involved in the proposed appeal to the Supreme Court. In our Judgment there is no question relating to the interpretation of the Constitution also, in view of the circumstance that the point was never argued in the High Court. A certificate under Article 132(1) of the Constitution cannot also, therefore, be granted.

11. That being the position, in our opinion, we are unable to certify the case as a fit one for appeal to the Supreme Court of India. The application is rejected.