
(1986) 07 PAT CK 0007
In the Patna High Court
Case No : L.P.A. 28 of 1984

Ishwar Dayal Sah

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 02-07-1986

Acts Referred:

Constitution of India, 1950 — Article 310, 311

Citation : (1987) PLJR 819

Hon'ble Judges : S.S. Sandhawalia, C.J;A.K. Sinha, J

Bench : Division Bench

Advocate : Rajendra Prasad Singhand Uday Bhanu Roy, for the Appellant; Amar Nath Singh, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Sandhawalia, C. J.

1. Whether the very cancellation of an appointment on the ground of the being void ab initio would be removal within the meaning of Article 311 of the Constitution, has come to be the primal question in this appeal under Clause 10 of the Letters Patent. The appellant was appointed as an Assistant teacher, entirely on a temporary basis, by the District Superintendent of Education, Purnea, vide his order dated the 23th April, 1976 (Annexure "2"). It is claimed on his behalf that thereafter, he continued to serve in the said post till the 23rd of March, 1983, when a notice was issued to the appellant and others, asking them to produce caste certificates, and, in pursuance thereto, the appellant produced his caste certificate, stating that he belonged to the backward Suri caste, Later, on the 21st of May, 1983 (Annexure 3), Respondent No. 2 issued another letter, directing the appellant and some others, to submit their explanation against the allegation that they had obtained employment on the basis of wrong caste certificates submitted by them, claiming to be Scheduled caste. The appellant averred that, in reply to the above said communication, he filed a show cause, taking the ground that, in fact, he had never produced any

certificate showing that he belonged to the Scheduled caste. However, Respondent No. 2, on the 14th September, 1983; issued a fresh communication (Annexure "4"), Informing the appellant that he had not submitted his show cause, despite earlier requests, and, directing him to file his show cause within three days. In reply thereto, the appellant then submitted his show cause on. the 24th September, 1983 (Annexure "5"), wherein he chose to take the ground that, in fact, his appointment was not made against a post reserved for the scheduled caste. However, by an order dated the 12th November, 1983 (Annexure "1") Respondent No. 2 cancelled the appointment of the appellant on the ground that he had obtained employment against a post reserved for the scheduled caste by submitting a false certificate of his caste and both his show-cause applications, having been duly considered, had been found to be unsatisfactory.

2. Aggrieved by the above, the appellant preferred Civil Writ Jurisdiction Case No. 5918 of 1983, challenging the cancellation of his appointment.

3. Before the learned Single Judge it was pointedly urged that the impugned cancellation of the appointment of the appellant amounts to his removal from the service within the meaning of Article 311 of the Constitution and was therefore, void, because no Departmental enquiry therefore had been made. It was further urged that the appellant had been appointed under the direction of the District Establishment Committee and only the said Committee could remove the appellant from the service and not the District Superintendent of Education who had done so, vide Annexure "1".

4. Both these contentions did not find favour with the learned Single Judge, who held that Article 311 of the Constitution was not attracted to the situation, and the requirements of natural justice had been fully complied with, and, in fact, the appellant had never even claimed to adduce any evidence in support of his stand. It was further held that Respondent No. 2 was fully competent to declare the appellant's appointment illegal, because the case was not one of removal under Article 311 of the Constitution.

5. As before the learned Single Judge so before us, the Learned Counsel for the appellant first forcefully projected his stand that even the cancellation of the appointment of the appellant on the ground of having wrongly obtained. the tune against a reserved scheduled caste vacancy, was tantamount to removal from the service within the meaning of Article 311 of the Constitution, and, consequently, the procedural requirement of a departmental enquiry must be rigidly adhered to.

6. Primal reliance was attempted to be placed on Khem Chand Vs. The Union of India (UOI) and Others, , 1961 BLJR 309 (Smt. Lalita Kumari v. State of Bihar and others) and 1984 BBCJ 632 :1984 PLJR 633 (Lakshman Ram and another v. The State of Bihar and another.)

7. Before one adverts to and examines the aforesaid contention, it seems apt to

clear the decks of certain cobwebs of facts which were sought to be projected to befog the basic issue. The clear cut stand of the respondents which is otherwise manifest from the impugned order itself is that the post against which the appointment of the appellant and some others sailing in the same boat with him had been made was made against a post exclusively reserved for the scheduled castes. This is the basic factual premise on which the matter has to proceed. It is significant that despite a number of opportunities having been given to the petitioner it was not challenged that the post against which the appointment was made fell in the category of scheduled caste. Evert in the writ petition itself directed against the impugned order which expressly says so, it has not been specifically averred that the post against which the appellant and the others were appointed was not reserved scheduled caste post. Instead, the somewhat evasive stand taken on behalf of the appellant now was that he does not belong to the scheduled caste and that he did not submit any caste certificate to claim appointment against such a post. Once the foundational base of the fact that the appellant along with some others was appointed against the post reserved for scheduled caste is accepted as it must be, then it is common ground that the appellant's own stand now was that does not belong to the scheduled caste and would, therefore, not be entitled to appointment against the posts reserved for them. Herein the firm stand of the respondent State again is that the appellant submitted a false caste certificate to assume the character of scheduled caste and secured his appointment against the post reserved as such That this was the specific case he was asked to meet is manifest from a number of notices issued to the appellant and even his own averment in paragraph 15 in the following terms :

15. That on 23.3.1983 notice was issued to the petitioner and others asking them to produce caste certificate. The petitioner produced his caste certificate stating that he belongs to Surf caste (Backward annexure-2)

Herein, therefore, there seems no doubt that the authorities were repeatedly asking the appellant as also others in his category to give their explanation and in fact the appellant seems to have been dragging his feet to show cause whilst the authorities were repeatedly clamouring for the same. In any case, it is common ground that the appellant did submit not one but two show cause petitions or representations against a number of notices issued to him. These were duly considered and the authorities came to the firm conclusion on facts that the same were wholly unsatisfactory. The impugned order (Annexure 1) is itself in the following terms --

Annexure 1

Office of the District Superintendent of Education, Purnea.

Office order

The services of (1) Shree Ishwar Dayal Sah, Teacher, Primary School Balua Kurshail, Circle Jokihat, (2) Shree Shambhu Saran Mandal, Assistant Teacher,

Primary School Mangal Circle, Jachadhaman (sic) West and Shree Dhaneshwar Prasad Sharma, Teacher, Primary School, Dwargaon Circle, Jalasi (sic), are terminated as directed by the District Officer, Purnea with effect from the date of issue of the letter on the ground of being appointed wrongly by showing certificate of being "Harijans" although they belonged to general category and also on account of two show cause petitions having been found to be unsatisfactory.

S/d- Ram Deo Prasad Sinha

District Superintendent of Education Purnea.

Memo No. 14, 945-57, Purnea, Dated 12th November 83.

8. It is plain from the above that the authorities competent to do so. had come to the firm finding not against the appellant alone but equally against some others that they had got themselves appointed against the posts reserved for scheduled caste whilst in fact they did not belong to such a caste and had submitted caste certificates which were not genuine. The explanations rendered by the appellant were admittedly considered and found unsatisfactory. It is significant to notice that no allegation of mala fides is herein alleged and could possibly be raised against the respondents officers. There is not a hint or suggestion as to why the authorities would pin upon the appellant and some others for the allegation that the posts against which they were appointed were reserved scheduled caste posts and the appellant was disentitled to the same because of the fact of not belonging to the scheduled caste. The findings of the authorities now stand affirmed by the learned Single Judge. In no uncertain terms he has found rightly that at no stage did the appellant even lay a claim to adduce evidence and disprove the allegations levelled against him. In the Letters Patent jurisdiction, we find no adequate ground to disturb what is a concurrent finding of fact now and no such material could be referred to far from being placed before us which could possibly merit the delving afresh as in a trial forum into questions which have already been duly arrived at concurrently.

9. The cobweb of facts having been cleared, I am inclined to bold that in view of somewhat long continuance in office and the nature of allegation against him including the suggestion of some wrong doing, the requirement of natural justice before the appointment of the appellant was cancelled or declared void ab initio would be attracted in the present case on the peculiar facts of his case. It was argued on behalf of the appellant and, in my view, rightly that the declaration of the appellant's appointment being void at the threshold on the specific grounds alleged against him will involve serious civil consequences in the context of rampant unemployment within the country. However, it is more than patent on the record that the requirements of natural justice in this context have been more than amply complied with. It bears repetition that on the appellant's own saying, the authorities were persistently pestering the appellant and others to give their explanation in this context. Procrastination and delay, if any, to render

such an explanation seems clearly to lie at the door of the appellant himself. Notwithstanding that, it is the admitted common ground that the appellant did submit his caste certificate as also two representations or show cause petitions against numerous notices issued to him. The learned Single Judge rightly noticed that he had no further evidence to adduce and did not even claim an opportunity for doing so. It has not been challenged before us that the petitioner's explanations have been duly considered and it was only thereafter that the impugned order has been passed. It is well-settled that the requirements of natural justice have to be modulated to each situation and are not inflexible and doctrinaire. In the present context the learned Single Judge firmly arrived at the under mentioned conclusion :--

The allegation against the petitioner is that he obtained the employment on production of a certificate showing him to be a member of the scheduled caste. Notices were issued to him to show cause as to whether the allegation was correct or not. The petitioner filed his show cause and denied the allegation. Respondent no, 2 after per-sing the show causes was not satisfied with the same and passed the order against the petitioner. The requirements of natural justice were fully complied with. It may also be mentioned that in this case it was not necessary to take evidence in support of the allegations or to allow the petitioner to adduce evidence because the petitioner did not ask for the same.

The Learned Counsel for the appellant could not lay any serious challenge to this aspect of the case. We are wholly inclined herein to agree with the learned Single Judge and would affirm his finding that in the present context the rule of natural justice stood amply satisfied.

10. That brings me to the primal submission that the appellant herein was entitled to a regular inquiry and all the necessary requirements of a reasonable opportunity of being heard in respect of the alleged charges against him in the specified terms of clause (2) of Article 311. The core question, therefore, raised It whether in this context Article 311in general and clause (2) thereof in particular would be attracted to the situation. I am inclined to the view that it is not for detailed reasons indicated hereinafter,

11. The sharp distinction betwixt the very cancellation of appointment on the ground of its being void ab Initio and the procedure visualised in Article 311for the dismissal or removal of a civil servant deserves some highlighting and collaboration. As the very history and the language of Articles 310and 311indicate; they are applicable only to persons who are members of the civil Service of the Union or of All India Service or a Civil. Service of State or holding a civil post under the Union or the State. The sine qua non for the applicability of Article 311, therefore, it either the membership of one or the other services of the Union or the State or at least the holding of a civil post there under. It is almost axiomatic to say that the person must validly or lawfully be a member of such a service or be a holder of such a civil post. The right under Article 311arises in favour of and is conferred on persons who are validly and legally

members of the civil service or holding a civil post. If the very appointment or the threshold entry into the service or the very holding of the civil post is put in issue, the rights under Article 311 cannot possibly arise. To put it tersely, the prerequisite of Article 311 is a valid and lawful membership of a service or the holding of a post. If the very appointment thereto is vitiated by fraud, forgery or crime or illegality, it would necessarily follow that no constitutional rights under Article 311 can possibly flow from such a tainted force. In such a situation, the question is whether the person concerned is at all a civil servant of the Union or the State and if he is not validly so, then the issue remains outside the purview of Article 311. To put it picturesquely, a person must first validly and lawfully cross the threshold to enter the arena of the civil service of the State or the Union to claim the umbrella or shelter of Article 311. If the very entry or the crossing of the threshold is put in issue and the door is barred against him, the cloak of protection, under Article 311 is not attracted or available.

12. Yet again a reference to clause (2) of Article 311 would show that it postulates some misconduct during the course of service which may have merited dismissal removal or reduction in rank. It clearly envisages some deviation from his duty by a public servant and requiring the serving of charges upon him for such dereliction, the holding of inquiry against him and a reasonable opportunity of being heard in respect of these charges. The two basic postulates of clause (2) of Article 311, therefore, are a valid and lawful entry into the civil service and his subsequent misconduct or dereliction of duty during the holding of such a post, whereon in the case of the very cancellation of the original appointment neither of these two things will enter into consideration and the provisions of clause (2) of Article 311 cannot be attracted. Therefore, the cancellation of appellant's appointment being on the ground of patent illegality or irregularity in the initial appointment itself, is, in the eye of law, only a declaration that from the very beginning there was in fact no valid appointment to the post.

13. The view I am inclined to take is buttressed by a long line of unbroken precedent. Way back in AIR 1965 Kerala 149 (P. Kunhikrishnan Nair v. State of Kerala and others) the identical issue was raised before K. K. Mathew, J.. Repelling the same with his deep lucidity, he observed as follows :--

Assuming that the real reason why the service of the petitioner as Panchayat Executive Officer was purported to be terminated in that his character and antecedents were not found acceptable to the appointing authority. I take the view that the real effect of the order was not to terminate the service of the petitioner as Panchayat Executive Officer, but only to declare that he has never been appointed to that post.

and again--

Therefore Ext. P 4 order can only mean that the Government have finally decided that the petitioner was ineligible for appointment. It cannot therefore be said

that the petitioner's service as Panchayat Executive Officer was terminated by Ext. P 4 as the appointment itself was void. In this view of the matter no question of the applicability of Art. 31] arises in this case.

The aforesaid view was then reiterated and quoted with approval by the Division Bench of the Kerala High Court in 1979 (2) Service Law Reporter 408 (K. N. Gopalan v. The Managing Director and another.) Nearer home, the Full Bench in 1983 PLJR 667 (Bijoy Kumar Bharti and others v. The State of Bihar and others) also had occasion to consider the identical issue. N. P. Singh, J., in his concurring judgment categorised such orders of purported termination under three heads and specifically framed the last one as under :--

(iii) order saying that the appointment of the temporary employee had been made in an illegal or irregular manner.

Considering this category in depth both in principle and on the basis of binding precedent, it was concluded as under : --

It cannot be disputed that whenever the service of a person appointed on temporary basis is terminated saying that the appointment in question had been made in an irregular or illegal manner, it does not amount to any stigma or penalty. In my view, such orders cannot be held to be invalid because before passing such orders opportunity to show cause was not given to the person concerned. Such employees know very well that their services could be terminated at any time even without notice. Merely because in the order there is reference to the nature of their appointment will not change the legal position.

14. It remains to briefly advert to the judgments relied upon by the Learned Counsel for the appellant. His reliance on the Khem Chand Vs. The Union of India (UOI)and Others, in this context was misplaced. The relevant part in paragraph 19, which was specifically referred to, merely elaborates the extent of reasonable opportunity provided by clause (2) of Article 311. There Is no dispute whatsoever with that proposition. This, however, plainly enough does not even touch the fringe of the question whether Article 311 would at all be: attracted to situation of the very cancellation of the original appointment and a declaration that it was void ab initio. Equally the reliance on 1981 BLJR 309 (Smt. Lalita Kumari v State of Bihar & ors.) was unwarranted. That was clearly a case of a departmental inquiry duly held against a public servant in which charges were framed, the evidence led and a finding of forged certificate arrived at. The case does not even seem to have a remote analogy to the issue herein.

15. In the context of natural justice, Learned Counsel for the appellant referred to 1984 BBCJ 632 : 1984 PLJR 633 (Lakshman Ram & another v. The State of Bihar & another). That was a case where a firm finding was that far from the rule of natural justice being complied with, it was nowhere even stated that any opportunity whatsoever had been given to the petitioner. Herein the firm finding concurrently arrived at is that the rule of natural justice had, in fact, been amply complied with. The case is thus absolutely distinguishable.

16. To finally conclude on this aspect, the answer to the question posed at the very outset is rendered in the negative and it is held that the very cancellation of an appointment on the ground of its being void ab initio would not amount to removal within the meaning of Article 311 of the Constitution and the same is thus not at all attracted to the situation.

17. Repelled on his basic stand, the Learned Counsel for the appellant had then sought to contend that the impugned order of the cancellation of the petitioner's appointment had been passed by an authority lower in rank than the appointing one. It was alleged that the appointing authority of the appellant was the District Education Committee whilst the cancellation of the order emanated from the District Education Superintendent.

18. The aforesaid submission must founder on a twin ground. Even the claim that the appointing authority of the petitioner is the District Education Committee is plainly misconceived. One cannot visualise a Committee as the appointing authority. It might well be a selecting authority or a recommending authority. But plainly enough the power for final appointment has to be vested elsewhere, indeed, annexure 2 on which the appellant's whole claim was sought to be rested would prima facie be such an authority, and it emanates from the District Education Superintendent. It does not even remotely emanate from any committee *stricto sensu* and nothing was brought to our notice to show that the District Education Committee had any statutory status and a patent appointing authority as such. Therefore, the very factual basis for the stand is lacking. Even otherwise the aforesaid contention, indeed, begs the question and proceeds upon an inherent fallacy. The rule that the impugned order must not be passed by an authority lower than the appointing one is inlaid in Article 311 itself. Consequently the threshold question is whether the impugned order is one within the ambit of clause (2) of Article 311. When it has been held, as above, that the impugned order is not one of removal and Article 311 is not attracted then no question of the mandate of clause (2) of Article 311 being applicable can possibly arise. When the primal question of the very applicability of Article 311 is negated, any finical submissions with regard to the order being by an authority lower in rank under the self-same Article cannot possibly be countenanced. All the submissions raised on behalf of the appellant having failed, we affirm the judgment of the learned single Judge and dismiss this Letters Patent Appeal, there will however, be no order as to costs.