
(1958) 09 MP CK 0024

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 590 of 1956

Jagannath Prasad Saxena

APPELLANT

Vs

State of Madhya Pradesh and Another

RESPONDENT

Date of Decision : 15-09-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Constitution of India, 1950 — Article 311, 363

Citation : AIR 1959 MP 136 : (1959) 1 LLJ 512 : (1959) 4 MPLJ 257

Hon'ble Judges : M. Hidayatullah, C.J.; P.K. Tare, J

Bench : Division Bench

Advocate : Jagdish Swarup and G.P. Singh, for the Appellant; M.P. Shrivastava, for the Respondent

Final Decision : Allowed

Judgement

M. Hidayatullah, C.J.

The petitioner Jagannath Prasad Saxena was serving as an assistant geologist in the Vindhya Pradesh State till 18th June 1956 when he received an order of the Lieutenant Governor, Vindhya Pradesh, terminating his services on payment of his salary for the period of notice admissible to him under the rules. It is this order which he questions in this petition. To understand, however, his case it is necessary to set out the facts at some length.

Rewa State granted him a stipend to study a course of geology at Lucknow University. Under the agreement executed by him, he was to serve the state after completing his University education for a period of five years. On 19th August 1949, having obtained the degree of M.Sc. (Geology) from the University, he was appointed as assistant geologist to that State. Annexure 1 to the petition is the order appointing him. Jagannath Prasad Saxena was to get a time scale of Rs. 300--15--450 with effect from the date he joined his duties.

Prior to this, however, several constitutional changes had taken place and in

March 1948 the United State of Vindhya Pradesh had come into being on agreement between the Rulers of the States comprised in Baghelkhand and Bundelkhand. The United State of Vindhya Pradesh came to an end on 1 January 1950 because of an agreement made on 26th December 1949 between the Governor-General of India and the Rulers of the Statea forming the United State of Vindhya Pradesh.

From that day the governance of Vindhya Pradesh was taken over by the Government of India. Later, from the 23rd January 1950 Vindhya Pradesh was to be administered in all respects as if it were a Chief Commissioner's Province vide the States' Merger (Chief Commissioners' Provinces) Order, 1950. It continued as a Chief Commissioner's province till the States Reorganisation Act was passed when it became a part of the present State of Madhya Pradesh.

When the Chief Commissioner's Province was inaugurated the President passed an order in relation to the terms and conditions of staff employed in Vindhya Pradesh on its becoming a centrally administered area with effect from 1 January 1950. The President in that order was placed to decide that--

"(1) Pending examination of the strength of the cadre of each service, all the existing posts shall be deemed to have been created by the competent authority on the existing terms and conditions, unless in any particular case specific orders have been and/or are issued abolishing the post or revising its terms; and

(2) pending further orders, the incumbent of the posts shall also be deemed to have been appointed under proper authority, unless in any particular case the services of a person have been and/or are dispensed with in accordance with the procedure that may be/has been laid down in this regard."

(Copy of letter No. F. 15(60)--S/52, dated the 7th November 1952 from the Assistant Secretary to the Government of India, Ministry of States, New Delhi, to the Chief Secretary to the Government of V. P., Rewa.)

The State of Vindhya Pradesh had a post of geologist which was sanctioned by the Government of India on a time scale of Rs. 300--15--450. After the inauguration of the Chief Commissioner's Province, Saxena continued to be designated an assistant geologist though there was only a post of geologist in the State according to the re-organisation scheme of the Director of Industries sanctioned by the Director of Industries.

In the budget provisions for 1953-54. however, a provision was made for an assistant geologist and one Govind Singh was appointed to that post. As a result, therefore, though the sanctioned post was that of a geologist carrying a salary of Rs. 300--15--450, two assistant geologists were in employment. The time scale of Govind Singh's post was Rs. 250--250--25--400 E.B.--25--750.

The Accounts Officer having raised an objection to the appointment of two assistant geologists on the ground that such posts were not created, the Government of Vindhya Pradesh passed an order on 17th February 1954 creating

two temporary posts of assistant geologists on the above scale with effect from 20th August 1953. The post of geologist was ordered to be kept in abeyance. The date chosen was apparently to cover the employment of Govind Singh. In making the appointment of Govind Singh, the Union Public Service Commission was consulted and Govind Singh was approved by the Commission.

That left over Saxena, the petitioner, who was also in the employment of the State. With regard to him it was decided that Saxena should be offered the other post and he was asked to appear before the Union Public Service Commission. It appears that Saxena claimed to be appointed to the post of geologist inasmuch as he was already holding the post of assistant geologist and there was no other post in which he could be absorbed prior to the creating of the two temporary posts of assistant geologists. The Lieutenant Governor agreed with the Chief Minister that it was impossible to go back on the arrangement which had been made and on 30th September 1955 he passed the following order on the file:

"I agree with the Chief Minister that we cannot go back. It is obvious that Sri Saxena did not care to appear before the UPSC who have selected Shri Govind Singh. I presume that Shri Saxena is functioning temporarily in the second post of Assistant Geologist. If he is not doing so, he may be so appointed in a temporary capacity. Immediately the requisition should be sent to the UPSG for the second geologist and Shri Saxena be instructed to appear before the UPSC.

X X X

Sd/- K. Santhanam, Lt. Governor, dt. 30-9-55."

Immediately thereafter, we find the following notings on his* file which have been unreservedly placed in our hands by the Government:

"Shri Saxena was a permanent employee on ,1-12-49 and is therefore eligible for the integration. As the Cabinet has already approved him for a higher grade, no fresh reference to the Cabinet about him is necessary. Also, as this is a case of integration no reference to the UPSC either is necessary.

The case of Shri Govind Singh is different. He was appointed as Assistant Geologist in August '53 and UPSC's approval was necessary, which has since been received.

Shri J. P. Saxena may be integrated as Geologist in the scale of 300--450 with effect from 1-4-1950. There should be no difficulty in doing so, for the post of Geologist was kept in abeyance from 16-1-1954, and not from 1-4-1950. That is, the post of Geologist as provided in the Re-organization scheme is available for Shri Saxena's integration for the period 1-4-1950 to 15-1-1954. Thereafter the post will be held in abeyance and Shri Saxena will shift to the post of Asstt. Geologist in the scale of Rs. 250--750.

I have consulted the other members of the Central Integration Committee. They have no objection to the aforesaid proposal.

Sd/- K. K. Sharma, Dated 7-1-56.

Proposal seems to be reasonable.

Sd/- S. N. S. D/- 16-1-56,

C.M./L.G.

This is a flagrant instance in which the Secretariat have failed to carry out the orders of the Chief Minister and myself as laid down in pages 22 and 23. No application for review by Shri Saxena and no recommendation by the Minister concerned can justify this failure to carry out orders.

"As regards the arguments mentioned by the Chief Secretary, I do not think that they are correct. The post of a geologist is a highly technical one and Shri J. P. Saxena who was a mere graduate without experience was appointed as Assistant Geologist on 19-8-1949. Whether it was stated so expressly in the order or not, his appointment should be deemed to have been made on probation. It is unthinkable that any Government should appoint on permanent basis a raw graduate without any experience to a technical post without a period of probation. So Shri J. P. Saxena must be deemed to have been appointed on probation and the question of integration does not arise. It is only a question of fixation and confirmation.

The cabinet considered this case carefully, decided that he did not deserve to be fixed as a Geologist above Shri Govind Singh, created two posts of Assistant Geologists and asked both of them to appear before the UPSC. Shri Govind Singh did so and he was appointed as Assistant Geologist. Shri Saxena did not appear before the UPSC and he has been trying to enter by the back door.

So, an immediate requisition should be made to the UPSC for the recruitment of an Assistant Geologist on the scale of 250--25--400-- E-B--25 --750 and Shri Saxena should be asked to appear before the UPSC. Until he gets the approval, his appointment will continue to be treated as on probation. There is no case for reference to the Cabinet.

C. M. may see.

Sd/- K. Santhanam, Lt. Governor, 14-1-1956."

Shri Saxena not having offered himself to the Union Public Service Commission, his services were terminated, by a notice which is Annex. B to the petition which reads as follows:

"Whereas Shri Jagannath Prasad Saxena was appointed on Commerce and Industries Department Order No. 8903/G dated the 19th August, 1949, to hold temporarily the post of Assistant Geologist in the Directorate of Industries with effect from the date he joined his duties.

And whereas the said post of Assistant Geologist in the Directorate of Industries, being a permanent post it is necessary and desirable that the appointment to the

said post shall be made through public advertisement by and on the recommendation of the Union Public Service Commission.

And whereas the Union Public Service Commission having advertised the said post and after interviewing candidates applying for the said post have selected Shri Shyam Sunder Mishra and recommended him to the State Government for appointment to the said post

And whereas the Lt. Governor has accepted the recommendation of the Union Public Service Commission and appointed the aforesaid Shri Shyam Sunder Mishra to the said post of Assistant Geologist,

Now, therefore, the Lt. Governor in exercise of all the powers enabling him in this behalf, is pleased to direct that the services of the said Shri J. P., Saxena shall be terminated forthwith on payment of the notice pay for the full period admissible to him under the rules.

By order of the Lt. Governor. Sd/- N. D. Dixit, 11-6-56. Secretary to the Government of Vindhya Pradesh."

During this time, the Union Public Service Commission had advertised the other post of assistant geologist and had selected one Shyam Sunder Mishra who was appointed as has been stated in the order quoted.

The contention of Saxena is that he has been wrongly treated as a temporary or probationary, officer and that he was bound to be absorbed in the service of the State under the orders of the President and that in any case he could not be removed from the post except in accordance with article 311 of the Constitution.

It is manifest that the Lieutenant Governor treated Saxena as temporarily employed or in any event as a probationer. Saxena contends that this assumption was incorrect inasmuch as he was always treated as a permanent employee of the State. He referred us to the correspondence which had taken place between the Finance Department and the State Government as also the remarks of the Comptroller who all had stated that Saxena was always considered as a permanent employee.

Saxena invokes the order of the President and Clause 9 of the Vindhya Pradesh Merger Agreement dated 26th December 1949. He contends that as a permanent employee of the State, he must be taken to have been absorbed against the existing post of a geologist because on the day the merger took place there was no other post in which he could be so absorbed.

To begin with, no argument or claim can be founded on Clause 9 of the agreement of 26 December 1949. It has been ruled both by the Privy Council as well as the Supreme Court that such agreements are not enforceable at the instance of the subject of the State in a municipal Court because the agreements are only for the High Contracting Parties.

It is needless to refer to those decisions which have by now become quite well

known. As a result of this, the position of Saxena depended upon what the Government was to decide in his case. Of course, the Government must be deemed to have made a fair approach to the problem of absorption of services in the new State.

Though much was said in the petition about the lack of bona fides on the part of the Government of Vindhya Pradesh and its bias in favour of Govind Singh, at the hearing such a line of argument was not adopted. Shri Jagdish Swarup, who argued the case for the petitioner, founded himself on article 311 of the Constitution and the position which the petitioner enjoyed in the service of the State which he claimed was permanent.

The President's order was issued merely to regularize the payment of salaries, It had, however, the effect of creating the strength of the cadre temporarily pending examination as it was found on the date the merger took place. It also had the effect of continuing all the incumbents in these posts on the same terms and conditions of service which they enjoyed before. This also was subject to further orders which were to be passed.

The right of the new State to absorb or not to absorb any servant of the previous State cannot be questioned in a municipal Court. It is quite obvious that if the new State of Vindhya Pradesh had asked Saxena to go and not agreed to absorb him, Saxena would have had no remedy in any municipal Court in view of the decision of their Lordships of the Supreme Court in *Rajvi Amar Singh Vs. The State of Rajasthan*,

Saxena claims to continue in the service of the State and to impugn successfully the order of the Lieutenant Governor on two main grounds. They are that he must be deemed to have been absorbed in the service of the State of Vindhya Pradesh under the President's order as a permanent servant of the State and that as such he was entitled to the protection of article 311 of the Constitution after 26 January 1950. Since no enquiry was made and no opportunity was offered to him before his services were terminated he claims that he must be reinstated.

His main contention is that the time for taking action against him had long gone and the termination of his services cannot be justified as the concomitant of an act of State by which the new territory was acquired. As a citizen of India and as one in the service of the State, he began to enjoy the right conferred by article 311 not only from the date on which the Constitution came into force but more so under the President's order passed later.

In the order of the Lieutenant Governor as well as the return, it is assumed that Saxena was only a temporary or probationary assistant geologist in the service of the State. The order which appointed him in the United State of Vindhya Pradesh did not say that he was temporarily appointed. This is how the order ran:

"VINDHYA PRADESH GOVERNMENT. COMMERCE AND INDUSTRIES DEPARTMENT.

ORDER NO. 8903/G. Dated Rewa the 19th August, 1949. Shri Jagannath Prasad Saxena is appointed as Assistant Geologist in the Mining Department on Rs. 300/- p.m. in the grade of Rs. 300--15--450/-with effect from the date he joins his duties.

By order (Sd) A. P. Watal, Secretary to Government Vindhya Pradesh Commerce and Industries Department."

In the History of Services as well as the civil list, he is shown as holding a substantive post. There may not be any binding authority in these compilations, but, where there is nothing else, they may be looked into as part of the surrounding circumstances on which the Court may be required to act. Similarly, in the communications received from the Comptroller, Saxena was described as a permanent employee.

In a cabinet resolution No. 416 dated 16 September 1953 it was recommended that Jagannath Prasad Saxena should be fixed against the permanent post of assistant geologist. In the memorandum to the cabinet on which the above resolution of the cabinet was founded it was stated that the Finance Department had accepted the position that Saxena was a permanent employee of the State and had made the following observation:

"Government order No. 8903/G dated 19-8-49 is to the effect that Shri J. P. Saxena was given a permanent appointment as Asst. Geologist in the scale of Rs. 300--15--450. In the circumstances he cannot be made temporary at this stage merely on the fact that the scale of the post has been changed."

The Industries Minister on that noted as under:

"Shri Saxena is already a permanent Government servant and I think there is no necessity of his appearing before the U.P.S.C. We can revise his pay scale and fix him as we have done in the case of other permanent officers."

We may state here again that the entire file was placed in our hands without any claim to privilege and we were asked to refer to it freely. Such documents normally do not come before the Court and we refer to them only because no claim to privilege has been asserted before us,

From this it would appear that Saxena was employed permanently in the State of Vindhya Pradesh before 1 January 1950. Of course, even as a permanent employee of the State he had no rights which he could claim against the new State in a municipal Court because all such engagements lapse with former sovereignty and it is in the discretion of the new State whether to recognize them or not.

The services of Saxena prior to the merger could of course be taken note of by a benevolent Government, but, if it did not, no claim on the basis of his rights against the former State can be heard in Courts. The net result of this is that though Saxena enjoyed a long service as a permanent member of the services,

he stood in peril of losing all his advantage if the new State was not prepared to stand by the position which existed before,

The question therefore is whether Saxena became a permanent employee of the new State after merger. He claims to be so because for a long time he was the only employee of the State against only one post sanctioned in the Department. He also claims to continue on the same conditions of service and employment under the President's order. The President's order, however, was subject to any further orders to be passed and it was issued probably to enable all the incumbents to draw their salaries.

Without the President's order there would not have been the necessary sanctioned strength and the orders could be questioned with regard to the employment of each incumbent in a job. The President's order was not an order finally absorbing all the servants of the State into the services of the new State. It provided for further orders and for further examination. The fact, however, which emerges is that there is nothing to show that Saxena was a temporary employee of the old State. He was, on the other hand a permanent employee.

When the new State started making appointment to the post of an assistant geologist without creating that post, the trouble began. The Comptroller did not accept the appointment of Govind Singh or the fixing of Saxena as assistant geologist when no such posts had been created. The Government of Vindhya Pradesh in that difficulty decided to keep the post of the geologist in abeyance, that being the only post on which Saxena could be absorbed, and created two temporary posts of assistant geologists and directed both Saxena and Govind Singh to apply for those posts" and to get the approval of the Union Public Service Commission.

If they had abolished the post of geologist and terminated the services of Saxena, Saxena would have had no claim of any kind. They wished to retain Saxena provided he was approved by the Union Public Service Commission and they wanted also to appoint Govind Singh as an assistant geologist. They thus created two temporary posts of assistant geologists in place of the single permanent post of geologist and assigned these two temporary posts for absorption of Saxena and the appointment of Govind Singh.

Now the crux of the problem is what rights had Saxena to continue in the post which he enjoyed without having to appear before the Union Public Service Commission. That he was temporarily continued by the order of the President did not clothe him with any permanent rights because the matter was to be examined further. But he had a claim to be absorbed on 1-1-1950 and it is manifest that there was only one post in which he could be absorbed.

He was not, as has been shown already, a temporary employee but a permanent one. Of course, his permanent employment was not worth very much in view of the change of Government and the consequential right of the new Government to accept him or not without being answerable in a Court of law. All the same it is

quite clear that for a period of several years Saxena continued to serve the Staid and to receive his salary on the duo dates. It is important to decide in this case whether in such circumstances the guarantee of Article 311 was available to him.

Now if Government had imposed on him conditions for his absorption into the service of the new State, the Courts could have had no say in the matter. Even if conditions had been imposed on him to obtain the approval of the Union Public Service Commission as a condition precedent to his being absorbed, the order would have been justifiable. But to describe him suddenly as a probationer or temporary servant of the State, when from all accounts he was permanent, and to ask him to apply for a temporary post is to create a situation which could not exist.

The formation of the State of Vindhya Pra-desh took place on 1-1-1950. The President's order was passed on 7-11-1952. Govind Singh was appointed on 20-8-1953 and the posts of temporary assistant geologist were created on 17-2-1954 retrospectively from 20-8-1953. The order to Saxena to appear before the Union Public Service Commission was passed on 30-9-1955 on certain presumptions without hearing him. It is interesting to recall the way the order was worded :

"I presume that Shri Saxena is functioning temporarily in the second post of Assistant Geologist. If he is not doing so, he may be so appointed in a temporary capacity. Immediately the requisition should be sent to the UPSC for the second geologist and Shri Saxena be instructed to appear before the UPSC."

This is hardly an order of integration which would be covered by the right of the succeeding State to > reject rights and claims arising from engagements with the preceding State. It begs the whole question of Saxena's position. It means a reduction in rank, which, if it could be correlated to the sovereign powers, would be justifiable, otherwise not.

It is manifest that the Chief Secretary and the Chief Minister demurred to the order and made one last attempt to get it modified but failed. The reasons given on the second occasion also assumed that Saxena was a temporary employee. The order terminating his services was passed on 11-6-1956, six and half years after the question of integration arose.

Now there must be some stage at which the right of the succeeding State to accept or not to accept the servants of a former State would come to an end. Equally, there must be some stage at which the provisions of Article 311 of the Constitution begin to operate. In the circumstances of this case, it is obvious enough that there was but one post till 20-8-1953 and that was held by Saxena. From that date two persons came to be employed with only one sanctioned post between them.

To right this mistake action was taken to create two temporary posts. All that was necessary was to create the post for Govind Singh and not for Saxena also.

He held the scale of Rs. 300--15--450 for which there was a post in existence. That post was of a geologist. The creation of temporary posts of assistant geologists with a salary greater than that of the geologist, keeping the post of the geologist in abeyance, is somewhat surprising. But more so is the action to push Saxena into a temporary post. The order by which he was dismissed contains two wrong statements.

The first is that by the order No. 8903/G dated 19-8-1949 Saxena was appointed to hold temporarily the post of assistant geologist. The order did not say so. The second mistake is in the next paragraph, where it is stated that the post of assistant geologist in the Directorate being a permanent post the recruitment to it would be through the Union Public Service Commission. There was no permanent post of assistant geologist but only the permanent post of a geologist, which, however, was kept in abeyance. The order tries to make out apparently a plausible reason for the removal of Saxena.

All this makes very sad reading. If Saxena was a permanent employee, as he undoubtedly was, either he had to be absorbed in the permanent post or not at all. We cannot understand what is meant by converting his claim into one for a temporary post and compelling him to qualify for a permanent post.

There was nothing before us even to show that Saxena was communicated the orders to appear before the Union Public Service Commission. For that there ought to have been an express direction and Saxena cannot be said to have disobeyed an order not communicated to him. Inasmuch as the whole of his file was before the Court, there should have been no difficulty to prove this.

As a permanent employee of the State, I Saxena must be taken to have enjoyed the benefits of Article 311 of the Constitution. He could not be removed from service except under its terms. See *Parshotam Lal Dhingra Vs. Union of India (UOI)*, We do not think that simply because the Lieutenant Governor "presumed" that he was temporary or that he could not be appointed as a "raw graduate" to a permanent post, he can be described legally as temporary or as a probationer. The impasse into which the Government had landed itself due to improvident action is best brought to light by quoting the note of the Chief Minister from File No. 165/ Mine/49 :

"We cannot go back. Shri Govind Singh has been selected for the post of an Assistant Geologist, by UPSC. So he cannot be demoted to a lower grade of 300--450.

There is another post of Assistant Geologist in the grade of 250--750. Shri Saxena can be appointed in this grade. Why requisition was not sent to the UPSC for this post is not known to me. Shri Saxena is afraid of going to UPSC for reasons best known to him. I think we cannot help him.

If Shri Saxena likes to remain in his present grade, a special grade may be created for this purpose. But on no account the grade of Shri Govind Singh be

scaled down."

The question was not whether Saxena was afraid to go before the Union Public Service Commission but whether he was required to do so or to apply for the job as if he was a new entrant. All this seems to have been completely overlooked.

In our opinion, Saxena was a permanent employee awaiting to be absorbed in the post available. It was wrong to treat him as a temporary servant whose services could be terminated with a month's notice. He was not required to apply for any post or to appear before the Union Public Service Commission. If he was to be removed from service, he was entitled to the benefit of Article 311 of the Constitution. The correct position was stated in the note of the Chief Secretary and the Chief Minister we have quoted above. In view of the fact that Article 311 was not observed, we are of opinion that the order dismissing him must be quashed. We do so.

The petition is allowed quashing the order of 11-6-1956.

It remains to say that we allow the application by which the State of Madhya Pradesh is sought to be substituted for the State of Vindhya Pradesh. There is no need for a notice because the Additional Government Advocate appeared for the present State.

The costs of the petition shall be borne by the State of Madhya Pradesh. Govind Singh was discharged by us, but without costs, as he did not claim any. Counsel's fee Rs. 200/-. The outstanding amount of the security deposit shall be returned to the petitioner.