
(1958) 04 AHC CK 0011
In the Allahabad High Court
Case No : First Appeal No. 29 of 1956

Jai Shanker Hajela

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 07-04-1958

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Citation : AIR 1958 All 741 : (1959) 29 AWR 231 : (1959) 2 LLJ 165

Hon'ble Judges : V.D. Bhargava, J;M.C. Desai, J;J.K. Tandon, J

Bench : Full Bench

Advocate : Niamatullah, Harish Chandra, K.S. Hajela and K.P. Saxena, for the Appellant; B.K. Dhaon and B.N. Roy, for the Respondent

Judgement

M.C. Desai, J.—The following question has been referred to us :

"Is a reversion from a temporary or officiating higher grade to a substantive post a reduction in rank within the meaning of Article 311 irrespective of the fact whether the reversion was for some fault of the person reverted or otherwise?"

2. Though we are called upon to answer an abstract question of law, it is necessary to state the material facts giving rise to the question. The appellant was a civil servant; he commenced his service as a Sub-Deputy Inspector of Schools in 1927. In 1948 he was appointed to officiate as a Deputy Inspector.

A dispute arose between him and the State over the pay admissible to him as officiating Deputy Inspector and while the dispute was going on he was transferred from Bahraich to Ghazipur on account of complaints of insolent behaviour and insubordination. He handed over charge at Bahraich but refused to take over charge at Ghazipur so long as the dispute about his pay was not settled.

He did take over at Ghazipur but long after the expiry of the period allowed to him as joining time. On account of this absence from duty without leave, insubordination and unsatisfactory work, the State on 15-9-1950 approved of his

reversion to his substantive post of Sub Deputy Inspector and transferred him from Ghazipur to Muzaffarnagar.

He refused to comply with the orders issued by the Director of Education on 2-12-1950 requiring him to take over as a Sub Deputy Inspector at Muzaffarnagar. On 19-1-1951 the State issued a notification reverting him to his substantive appointment as Sub Deputy Inspector. He was relieved at Ghazipur on 20-12-1950 but did not take over at Muzaffarnagar on 2-4-1951 and, he was called upon to show cause why his services should not be terminated for remaining absent without leave.

A formal charge-sheet was served upon him on 30-5-1951 calling upon him to show cause why his services as Sub Deputy Inspector be not terminated on account of unsatisfactory work, disobedience, insubordination and absence from duty without leave. In reply the appellant said that if he was not appointed to work as Deputy Inspector, he might be retired in accordance with his request already made. Accordingly on 6-8-1951 order was issued by the State to the effect that he was retired with effect from 21-12-1950.

Then he instituted the suit, giving rise to this appeal, in which he pleaded, inter alia that his reversion from the post of Deputy Inspector to that of Sub Deputy Inspector contravened the provisions of Article 311 of the Constitution. The provisions are said to have been contravened in two ways, (1) that the order of reversion was passed by the Director of Education, an authority lower than the State which had appointed him as Deputy Inspector and (2) that he was not called upon to show cause against the proposed punishment of reversion.

3. The suit was contested by the State which asserted that the order of reversion was passed by the State and that he was not entitled to any notice for showing cause against the reversion.

4. The trial Court dismissed the suit holding that the reversion did not contravene the provisions of Article 311. This appeal is against the dismissal of the suit.

5. Article 311 of the Constitution enjoins that no civil servant

"shall be dismissed or removed by an authority subordinate to that by which he was appointed" or "shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

In this reference we are not concerned with the question whether the appellant was dismissed or removed by an authority subordinate to that by which he was appointed but are solely concerned with the question whether he was "reduced in rank" within the meaning of Article 311(2) when he was reverted from the officiating post to the substantive post.

6. What are the rights of a Civil servant temporarily acting or officiating on a post has been discussed elaborately by the Supreme Court in their latest decision in

Parshotam Lal Dhingra Vs. Union of India (UOI), . Parshotam Lal, who was a civil servant in Class III service, was appointed to officiate in Class II service and was subsequently reverted to his substantive post in Class III service on account of his unsatisfactory work.

He applied for a writ against reversion on the ground that it amounted to his reduction in rank within the meaning of Article 311 and that since he had not been called upon to show cause against it, the reversion was invalid. The petition was dismissed by the Punjab High Court and the Supreme Court affirmed the decision of the High Court. The present case is covered by the decision in the case of Parshotam Lal (A) and it must be held that the appellant was not reduced in rank when he was reverted.

7. The Supreme Court speaking through Das, C, J. observed at page 42 :

"A substantive appointment to a permanent post in public service confers normally on the servant so appointed a substantive right to the post and he becomes entitled to hold a "lien" on the post xxxxx An appointment to a permanent post in Government service on probation means x x x x that the servant so appointed is taken on trial xxxxx. An appointment to officiate in a permanent post is usually made when the incumbent substantively holding that post is on leave or when the permanent post is vacant and no substantive appointment has yet been made to that post. Such an officiating appointment comes to an end on the return of the incumbent substantively holding the post from leave in the former case on a substantive appointment being made to that permanent post in the latter case or on the service of a notice of termination as agreed upon or as may be reasonable under the ordinary law.

It is, therefore, quite clear that appointment to a permanent post in a Government service, either on probation or on an officiating basis, is from the very nature of such employment, itself of a transitory character and, in the absence of any special contract or specific rule regulating the conditions of the service, the implied law of master and servant, is that it is terminable at any tune.

In short, in the case of an appointment to a permanent post in a Government service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain x x x x x x x if his service is terminated at any time."

It may be added that an officiating appointment can come to an end not only when a substantive appointment is made but also when another officiating appointment is made; it is open to the State to revert one officiating civil servant and appoint another civil servant to officiate in his place.

I mention this because this is what happened in the present instance; the appointment of the appellant as officiating Deputy Inspector came to an end not because the permanent incumbent of the post returned from leave or another

civil servant was permanently appointed as Deputy Inspector. The Civil Servant, who took over from the appellant did so as an officiating Deputy Inspector. The rights of civil servants holding a substantive post or appointed on a temporary or in an officiating capacity were summarised by the learned Chief Justice in the following words :

"In the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a. right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years" service or the post is abolished and his service cannot be terminated except by way of punishment for misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after due notice to him.

An appointment to a temporary post for a certain specified period also gives the servant so appointed a right to hold the post for the entire period of his tenure and his tenure cannot be put an end to during that period unless he is, by way of punishment, dismissed or removed from the service. Except in these two cases the appointment to a post permanent or temporary, on probation or on an officiating basis or a substantive appointment to a temporary post gives to the servant so appointed no right to the post and his service may be terminated unless his service had ripened into what is, in the service rules, called a quasi-permanent service."

It is clear that when a civil servant holding one substantive rank is appointed to officiate in a post in a higher rank, the only right that he possesses is that his service in the substantive rank cannot be terminated except by way of punishment for misconduct, negligence etc., after proper enquiry or by superannuation and that he has no right to continue in the post in the higher rank .and can be reverted from it to the substantive rank without the reversion amounting to punishment.

It is evident that if a person does not get or loses after having got, something to which he has no right it cannot be said that he has suffered by the deprivation or loss and there cannot be any punishment if there is suffering in one respect or another. Allowing a civil servant to officiate in a higher rank is just like granting him a licence revocable at will. He has all the benefits that are derived from the licence and so long as it continues he can enjoy all of them, but he has no right to the continuation of the licence itself and cannot be aggrieved when the licence is revoked at will by State. When the licence is revoked, he will naturally lose all the benefits that would accrue from it in future but the loss of the benefits expected in future does not amount to punishment because he had no right to them, the licence being revocable at will.

8. It is true that Article 311 makes no distinction between a permanent civil servant and a temporary civil servant and the latter is as much entitled to the protection of Article 311 as the former. It should, however, be borne in mind that

the protection is against only reduction in rank and dismissal or removal, and not against termination of service in another manner. A temporary civil servant cannot be dismissed or removed by an authority lower than the one appointing him or without his being called upon to show cause against the dismissal or removal.

This was made clear by the learned Chief Justice at page 43 and he observed that an officiating civil servant also is entitled to the protection against the liability of being "dismissed, removed or reduced in rank without being given an opportunity to defend." When he used the words "reduced in rank", he did not mean to convey that a civil servant holding one substantive post and officiating in a higher post cannot be reverted without giving an opportunity to show cause against it; the words "reduced in rank" must not be torn from the context. What the learned Chief Justice meant to do was to describe the protection in the words of the Constitution; he used the entire phrase "be dismissed or removed or reduced in rank", without implying that every one of the three actions can be taken against an officiating civil servant.

The word "officiating" is generally used when a servant having held one post permanently or sub-stantively, is appointed to a post in the higher rank, but not permanently or substantively, and while still retaining his lien on the previous post. When a person is appointed in civil service for the first time, and the appointment is not permanent, it may be a case of acting temporarily or on probation but not of officiating.

9. The service of a civil servant can be terminated under the contract of employment or the rules of service or superannuation, compulsory retirement or retrenchment of the post on expiry of the period in the case of a temporary post or on being found unfit or unsuitable after trial in the case of probation. It can also be terminated by dismissal or removal; dismissal and removal are the punishments inflicted upon a Civil servant on account of inefficiency, misconduct etc.; the civil servant not only loses the service but also forfeits the right to pension, if earned.

The service rules generally provide for the circumstances in which the punishment of dismissal or removal can be inflicted and the procedure to be followed. Any termination of service otherwise than by dismissal or removal cannot amount to dismissal or removal. When a civil servant retires or is compulsorily retired or his service is dispensed with at the end of the period of probation or even during probation, it cannot be said that he is "dismissed" or "removed." "Dismissal" must always be by way of punishment; there can be no "dismissal" in exercise of the State's power of terminating the service under the contract of service or under the rules. "Removal" also is always a punishment; it differs from "dismissal" only in one respect, viz., that "removal" does not bar, as "dismissal" does, re-employment in future.

When the service is terminated in exercise of the State's power under the

contract or the rules, neither of the two words is appropriate or is used; instead the order simply says that the service is terminated or dispensed with or that the servant is superannuated or compulsorily retired. Even if he was officiating in the post or was appointed on probation, he is neither "dismissed" nor "removed" but simply his "service is dispensed with." On the other hand, when the termination is by way of punishment, it is either "dismissal" or removal and the order invariably uses one word or the other. Consequently there can be no termination of service by way of punishment without "dismissal" or "removal" and there can be no "dismissal" or "removal" except by way of punishment.

10. The case of "reduction in rank" is somewhat different; it may be by way of punishment or may be in exercise of the power under the contract or the rules. If the post is retrenched, the State may instead of dispensing with the service altogether, provide him with service in the lower grade in which case he can be said to be "reduced in rank". The contract and the rules generally do not provide for reduction in rank in any other circumstance; so any other reduction in rank must be by way of punishment. The words "reduced in rank" used in conjunction with the words "dismissal" and "removal" in Article 311 must refer to reduction in rank by way of punishment.

In a nutshell, cases of termination of service on superannuation, compulsory retirement, retrenchment of the post, expiry of the period of employment, accomplishment of the purpose of employment, being found unsatisfactory or unsuitable during or at the end of the period of probation and cases of reduction in rank consequent on retrenchment of the post are not "dismissal, removal or reduction in rank" within the meaning of Article 311 and are outside its purview.

11. The learned Chief Justice said at page 47 :

"The words "dismissed", "removed" and "reduced in rank" as used in the service rules were well understood as signifying or denoting the three major punishments which could be inflicted on Government servants. It is only in those cases where the Government intends to inflict those three forms of punishments that the Government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. It follows, therefore, that if the termination of service is sought to be brought about otherwise than by way of punishment, then the Government servant whose service is so terminated cannot claim the protection."

On page 48 he pointed out that a civil servant on probation has no right to hold the post and the termination of his service at the end of the probation or during it cannot amount to "dismissal, removal or reduction in rank by way of punishment." The use of the words "reduction in rank" here though in the case of termination of service there cannot possibly arise any question of reduction, confirms what I said earlier, that the learned Chief Justice simply borrowed the entire phrase "be dismissed or removed or reduced in rank" from Article 311 and did not suggest that there can be reduction in rank whenever there can be

dismissal or removal.

"If the servant is appointed to officiate under the general law the implied term of his employment is that his service may be terminated on reasonable notice and the termination of the service of such a servant will not per se amount to dismissal or removal from service The principle is that when a servant has a right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service, of such a servant or his reduction to a lower post is by itself & prima facie a punishment. If the servant has no right to the post, as where he is appointed either on probation or on an officiating basis and whose temporary service has not ripened into a quasi-permanent service as defined in the Temporary Service Rules, the termination of his employment does not deprive him of any right and cannot, therefore, by itself be a punishment.

One test for determining whether the termination of the service of a Government Servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post, If the Government has, by contract or under the rules the right to terminate the employment at any time, then such termination in the manner provided by the contract or the rules, is, prima facie and per se not a punishment and does not attract the provisions of Article 311". (See page 48).

12. Though termination of service can be effected by the State in exercise of its power under the contract or the rules, as pointed out above, it does not follow that it cannot be brought about through dismissal or removal. In certain circumstances the service can be terminated either in exercise of the State's power under the contract or the rules (such as by compulsory retirement or on being found unfit or unsuitable during probation), or by dismissal or removal by way of punishment and in those circumstances the State has the choice of acting one way or the other.

Merely because it can terminate their service in exercise of its power without taking the trouble of going through a departmental enquiry against the servant, it cannot be said that it cannot or would not terminate his service by dismissing or removing him after departmental enquiry.

It has the choice and it may elect not to exercise its power of terminating the service but to punish him by dismissal or removal. Therefore, a civil servant on probation, or who has reached the age of compulsory retirement may be dismissed or removed by "way of punishment; I have no doubt that in such a case the State will use one word or the other to denote how the service is terminated. As observed by the learned Chief Justice on page 49 :

"cases may arise where the Government may find a servant unsuitable for the post on account of misconduct, negligence, inefficiency or other disqualification. If such a servant was appointed to a post permanent or temporary, either on probation or on an officiating basis, then the very transitory character of the

employment implies that the employment was terminable at any time on reasonable notice given by the Govt. But the Government may take the view that a simple termination of service is not enough and that the conduct of the servant has been such that he deserves a punishment entailing penal consequences.

In such case the Government may choose to proceed against the servant on the basis of his misconduct, negligence, inefficiency or the like and in flict on him the punishment of dismissal, removal or reduction carrying with it the penal consequences. In such a case the servant will be entitled! to the protection of Article 311(2)."

13. If the service is terminated by the State in exercise of its powers under the contract or the rules, it is not a punishment even though it is motivated by unsatisfactory work or conduct of his Civil servant or the State uses the word "remove" instead of "terminating his service". In such a case the unsatisfactory work or conduct is the motive or reason for the State's exercising its power of terminating the service otherwise than by dismissal or removal. The reason for an order is not a part of its operative portion.

14. The question of termination of service does not arise when a civil servant is reduced in rank or from one position to another in the same grade. If he continues to be in service though in a lower rank or grade, it cannot possibly be said that his service has been terminated. Service cannot be divided into parts and it cannot be contended that reversion amounts to termination of service in the higher rank or grade.

But even if reversion could be said to amount to termination of service in the higher rank or grade, it is neither "dismissal" nor "removal" and therefore, not a punishment. When the learned Chief Justice said at page 49 that the State may punish a Civil servant for misconduct, negligence, inefficiency etc., by reducing him in rank within the meaning of Article 311, he meant his reduction from substantive post in one rank to a post in a lower rank and not the reversion 1mm officiating appointment in a higher rank to his substantive post in the lower rank.

The only right of a civil servant holding a substantive post in one rank is to hold that post till his superannuation or compulsory retirement or till he is dismissed or removed or reduced in rank on account of misconduct, inefficiency etc., after a proper enquiry, he has no right to retain the post in the higher rank in which he has been officiating Reduction in rank means reduction in rank which he holds in his substantive appointment.

A Civil servant can hold only one rank at a time; he cannot possibly hold two or more ranks. It : he holds a substantive post in one rank, that is the rank he holds even though at the moment when the question arises he is officiating in a post in a higher rank.

So long as he is officiating in a post in the higher rank, it cannot be said that he

holds the higher rank. Even when officiating, he retains his substantive rank and since he cannot hold two ranks he cannot be said to hold the higher rank also. When he is reverted, he only loses the officiating rank but his substantive rank remains unimpaired.

It follows that his reversion from an officiating appointment does not amount to his reduction in rank, it would amount to his reduction in rank only if he were reduced to a rank lower than the substantive rank. The learned Chief Justice said at page 49.

"A reduction in rank may be by way of punishment or it may be an innocuous, thing. If the Government servant has (a) right to a particular rank, then the very reduction from that rank will operate as a penalty for he will then lose the emoluments and privileges of that rank.

If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to reduce the servant to a lower rank in truth and reality the Government has terminated the employment as and by way of penalty."

An order of simple reversion is not an order which visits the civil servant with any penal consequences, it does not debar him from future promotion and does not disentitle him to the extra pay or allowance that he had earned during the officiating period. Of course after the reversion he will not be entitled to the future extra pay or allowance but that is not the penal consequence contemplated by the learned Chief Justice.

What is required is another consequential order by way of penalty, such as that of debarring promotion in future. In the end the learned Chief Justice laid down at page 50 that if the servant had a right to the post or rank from which he was reduced or if he has been visited with penal consequences such as of forfeiture of his pay or allowances (already earned) or loss of seniority in the substantive rank or the stoppage or postponement of promotion in future; he must be held to have been punished by reduction in rank within the meaning of Article 311.

15. There are two famous cases decided by the Supreme Court to which reference may be made though not cited at the Bar. One is *Hartwell Prescott Singh Vs. The Uttar Pradesh Government and Others*, and the other is *The State of Bombay Vs. Saubhagchand M. Doshi*, In the former case, relying upon the case of *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, it was held that termination of the service of a civil servant employed on probation in a

temporary vacancy does not amount to "dismissal" or "removal". Imam J, observed at page 150 (of SCJ) : (at p. 887 of AIR) :

"Reversion from a temporary post held by a person does not per se amount to reduction in rank because the temporary post held by him is not his substantive rank."

In the latter case the compulsory retirement of a civil servant who had reached the age of superannuation, even though for inefficiency or dishonesty, was held not to amount to "dismissal" or "removal", Reliance was again placed on the decision in the case of Shyam Lal (D), by Venkatarama Aiyar J., who observed at page 165 (of SCJ): (at p. 895 of AIR) :

"An order of dismissal is a punishment laid on a Government servant, when it is found that he has been guilty of misconduct or inefficiency or the like, and it is penal in character, because it involves loss of pension which under the rules would have accrued in respect of the service already put in.

"Now, the policy underlying Article 311(2) is that when it is proposed to take action against a servant by way of punishment and that will entail forfeiture of benefits already earned by him, he should be heard and given an opportunity to show cause against the order. But that consideration can. have no application where the order is not one of punishment and results in no loss of benefits already accrued, and in such a case, there is no reason why the terms of employment and the rules of service should not be given effect to.

Thus, the real criterion for deciding whether an order terminating the services of a servant is one of dismissal or removal is to ascertain whether it involves any loss of benefit previously earned.....

"While misconduct and inefficiency are factors that enter into the account where the order is one of dismissal or removal or of retirement, there is this difference that while in the case of retirement they merely furnish the back-ground and the enquiry, if held -- and there is no duty to hold an enquiry -- is only for the satisfaction of the authorities who have to take action, in the case of dismissal or removal, they form the very basis on which the order is made and the enquiry thereon must be formal, and must satisfy the rules of natural justice and the requirements of Article 311(2)."

16. Some assistance can also be had from the decision of the Supreme Court in *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, *Shyam Lal* challenged by a petition for writ an order issued by the President of India directing his compulsory retirement and the Supreme Court held that though he was compulsorily retired on account of his unsatisfactory work, it was not a punishment and did not amount to dismissal or removal within the meaning of Article 311.

The Union had an absolute right to retire any officer after he had completed 25 years of qualifying service. *Shyam Lal* had completed 25 years of qualifying

service; so when the Union retired him, it did so in exercise of its power under the rules and not by way of punishing him. It was stated at page 4.1 (of SCR) : (at p. 374 of AIR) by Das J., as he then was, that every termination of service does not amount to "dismissal" or "removal", that compulsory retirement does not involve any imputation against the work or conduct of the Civil servant, that "dismissal" and "removal" within the meaning of Article 311 must be by way of punishment involving loss of benefit already earned (such as of pension), that a civil servant compulsorily retired is still entitled to pension that he has actually earned and that though he may consider himself punished (because he incurs the loss of prospect of earning something more), there is no punishment in the eye of law because there is no loss of anything already earned.

17. Sri Niamatullah relying upon certain observations of the Supreme Court in the case of Parshotam Lal (A), argued that Article 311 applied to an officiating Civil servant; it does, but it is a quite different thing to say that his reversion to substantive post amounts to "reduction in rank." Article 311 applied to him because, even though officiating, he is a civil servant; but whether he is entitled to the protection of the Article or not depends upon whether he is "dismissed, removed or reduced in rank". A Civil servant, who is officiating in the lowest rank, cannot possibly be reduced in rank; he can only be dismissed or removed or given a notice of termination of his service. If he is dismissed or removed, he will be entitled to the protection of the Article but not otherwise.

18. Next, he relied upon the observations of the learned Chief Justice at page 49 to the effect that the State may elect to proceed against a temporary or officiating Civil servant for his misconduct, negligence etc., and inflict upon him the punishment of "dismissal, removal or reduction carrying with it the penal consequences." He contended that this observation means that an officiating civil servant can be reduced in rank within the meaning of Article 311.

Ordinary reversion to the substantive post is not reduction carrying with it the penal consequences and reversion from a post in which the civil servant is officiating to his substantive post without an order stopping or postponing his future promotion or forfeiting the extra pay or allowance earned by him while officiating is not punitive reduction but is a simple terminating of service.

19. My answer to the question is as follows :

Reversion from a temporary or officiating higher grade to the substantive post in the lower grade is not "reduction in rank" within the meaning of Article 311 even though the reversion is ordered on account of unsatisfactory work or conduct of the civil servant, provided it is ordered by the State in exercise of its power of reverting him under the contract, express or implied, or under the rules of service.

If on the other hand, the reversion is ordered as a punishment so as to entail penal consequences, if he is reverted not to his substantive post in the rank but to a post in a still lower rank, or the reversion is accompanied by a consequential

order, entailing penal consequences other than those flowing out of the reversion, he is "reduced in rank" within the meaning of the Article.

J.K. Tandon J.

20. I agree.

V.D. Bhargava, J.

21. I agree with the order of my brother Desai J.