
(1958) 11 BOM CK 0003

In the Bombay High Court

Case No : Miscellaneous Petition No. 523 of 1956 (No. 470 of 1956 and Special Civil Application No. 73 of 1957)

Joshi W.W.

APPELLANT

Vs

State of Bombay

RESPONDENT

Date of Decision : 19-11-1958

Acts Referred:

Constitution of India, 1950 — Article 124, 218, 226, 227, 248
Independence (Rights, Properties and Liabilities) Order, 1947 — Article 10
Independence Act, 1947 — Section 9
States Reorganisation Act, 1956 — Section 116, 116(1), 2, 59(2), 8

Citation : (1959) 2 LLJ 485

Hon'ble Judges : V.M. Tarkunde, J;D.G. Tambe, J

Bench : Division Bench

Judgement

Tambe, J.—An important question of law arises out of a preliminary objection raised on behalf of the State of Bombay. The preliminary objection raised relates to the maintainability of the petition against the present State of Bombay. This decision will govern the preliminary objection raised in three cases, viz., Miscellaneous Petition No. 523 of 1956, Miscellaneous Petition No. 470 of 1956 and Special Civil Application No. 73 of 1957. The consideration of this question turns on the interpretation of Ss. 87, 88 and 116 of the State Reorganization Act, 1956, Act XXXVII of 1956, hereinafter called the Act.

2. The case in general that falls for our consideration is that petitioners before us were the services of the former State of Madhya Pradesh. Their services were terminated by the orders of the Government of the then State of Madhya Pradesh prior to the date the Act came into force. Two of the petitioners were serving on the date of termination of their service in the territories which now form part of the State of Bombay. Two of the petitioners had challenged the orders of their dismissal by petitioners under Arts. 226 and 227 of the Constitution before the then High Court of Judicature at Nagpur, on the ground of contravention of Art. 311(2) of the Constitution. These petitions were filed against the State of

Madhya Pradesh. Their cases have come on transfer before this Court on a certificate issued by the Chief Justice of the High Court of Judicature at Nagpur under S. 59(2) of the Act. On the applications of these petitioners the State of Bombay is joined as a party to their petitions. The remaining petitioner has directly come to this Court after the State Reorganization Act came into force. All of them claim that their petition is maintainable against the State of Bombay and that the State of Bombay is liable to reinstate them or give them such relief as is available to them under law, on the orders of dismissal being quashed by this Court. The question is whether they are entitled to the relief asked by them against the present State of Bombay.

3. There were also other cases pending before this Court arising out of a similar set of facts. In one of those cases, viz., Surjuprasad Gumasta and Another Vs. State of Madhya Pradesh and Others, a preliminary objection was raised on behalf of the State of Madhya Pradesh that no writ could be issued by this Court against the State of Madhya Pradesh in respect of the order of dismissal made by the former State of Madhya Pradesh prior to the date the Act came into force. This question was referred to a Full Bench of this Court and awaiting the decision of the Full Bench these three cases and other cases were kept pending. The Full Bench took the view that this Court could not issue a writ against the present State of Madhya Pradesh or any of its officers and it, therefore, directed that the names of the State of Madhya Pradesh and its officers (the Accountant-General of Madhya Pradesh in that case) should be struck off the record. The Full Bench further directed that the petition should continue against the State of Bombay and should be disposed of in accordance with law.

4. In the course of the judgment of the Full Bench the learned Chief Justice, who delivered the judgment of the Court, observed :

"... If the complaint of the petitioner is that he has been dismissed by the State of Madhya Pradesh and that the State of Madhya Pradesh should reinstate him, noting is easier than for him to file a petition in the High Court of Madhya Pradesh and to get a writ from that High Court. If, on the other hand, the relief he seeks is that the Bombay Government should reinstate him, the Bombay Government being the successor or the Madhya Pradesh Government, then the petition is well founded and could be maintained in this Court and this Court can give him relief if he is entitled to that relief."

It is the petitioner's case in all the three petitions that they are entitled to claim relief against the State of Bombay. As already stated, the preliminary objection of the present State of Bombay is that the petitioners cannot claim any relief against it and, therefore, the petitioners are not maintainable.

5. For the purposes of deciding this objection it will have to be assumed that the orders for termination of service made in Miscellane-Petition No. 523 of 1956, Miscellaneous Petition No. 470 of 1956 and Special Civil Application No. 73 of 1957 were bad in law on account of the contravention of Art. 311(2) of the

Constitution of India.

6. The principal argument in these three petitions was advance before us by Sri M. R. Bobde, learned counsel for the petitioner, in Miscellaneous Petition No. 523 of 1956. We, therefore, propose to deal with his argument first. Sri Bobde contends that the illegal and wonderful action of the then State of Madhya Pradesh in dismissing the petitioner from service was an actionable wrong within the meaning of S. 88 of the Act. The liability, to redress the wrong, incurred by them State of Madhya Pradesh has, under the provisions of Clause (b) of that section, become the liability of the present State of Bombay. In the alternative, Sri Bobde contends that the dismissal of the petitioner being illegal, the petitioner, in Miscellaneous Petition No. 523 of 1956 in the eye of law still holds his post at Arvi within the meaning of S. 116(1) of the Act and, therefore it must be taken that from the date the Act came into force the petitioner is a servant appointed by the present State of Bombay from 1 November, 1956, and in this view of the matter also the petition is maintainable against the present State of Bombay.

[Sri G. R. Mudholkar, learned counsel for the State of Bombay, on the other hand, contends that neither S. 88 nor S. 116 of the Act is attracted to the facts of these cases. Admittedly the petitioners were not, in fact, holding any post on the date the Act came into force. Section 116 of the Act has therefore, no application. He further contends that the liability contemplated by S. 8 of the Act is a liability to pay damages. The claim made by the petitioners is not to recover damages but is for getting the impugned order quashed and reinstatement in the service. Such a claim does not fall within the scope and ambit of S. 88. According to him, the provisions that are attracted to the facts of these cases are those of S. 87 of the Act and under those provisions the reliefs claimed by the petitioners are not available to them against the State of Bombay.]

7. It is a matter of common knowledge that Parliament in its wisdom considered it necessary to reorganize the existing States in India, and to provide for it and other matters connected therewith the States Reorganization Act was passed by Parliament. As a result of reorganization, the boundaries of various States changed. Some of the States merged into other Status in their entirety, while some of the States got split and certain parts thereof merged into one State and other parts into another State. These events were bound to give rise, and did give rise, to various complex problems including the apportionment of assets and liabilities and distribution of service personnel of a former State between its successor States. We are here concerned with these questions relating to the former State of Madhya Pradesh. It comprised of two territories known as (i) Central Provinces and (ii) Berar. The capital of this State was located at Nagpur and its High Court also was located in Nagpur and was known as the High Court of Judicature at Nagpur. As a result of the Act, eight districts of the Madhya Pradesh merged into the present State of Bombay and the remaining districts merged in the new State of Madhya Pradesh. The said eight districts are,

Buldana, Akola, Amraoti, Yeotmal, Wardha, Nagpur, Bhandara and Chanda. From 1 November, 1956, the date on which the Act came into force, these eight districts came under the jurisdiction of this Court. The High Court at Nagpur ceased to function at Nagpur and was removed to Jabalpur. Looking to the aim, scope and the object of the Act, in our opinion, the intention of Parliament clearly appears to be to provide for a solution of all problems arising out of the States reorganisation. Effect can only be given to this intention of Parliament by liberally construing its provisions so far as the language used would permit.

8. It cannot be doubted, and it has not been disputed before us, that on establishing their cases on merits the petitioners would have been entitled to the reliefs claimed against the then State of Madhya Pradesh if these cases had been disposed of by the Nagpur High Court prior to the date the Act came into force. Their cases, however, were not decided by the date. It is to be seen whether this liability of the State of Madhya Pradesh has been passed on to the present State of Bombay under any of the provisions of the Act.

9. Part VII of the Act relates to apportionment of assets and liabilities; Ss. 87 and 88 fall under this part. The word "liability" in its widest import means an obligation or duty to do something or to refrain from doing something. We see no reason why any restricted meaning should be given to the word "liability" used in this Act. In our opinion, Parliament intended to include in the word "liability" not only a financial obligation but also obligations of every other kind, including one of reinstating a Government servant wrongly dismissed.

10. Turning to the provisions of S. 87, they deal with the apportionment of rights and liabilities accrued or which may accrue under a contract between the existing States, i.e., the States that existed prior to the reorganization and any other person. It is the contention of Sri Mudholkar that it is this section that is attracted to the facts and circumstances of these petitions. According to him, the petitioners by their petitions seek to enforce their rights under their contract of service with the former State of Madhya Pradesh. The grievance of the petitioners, in substance, is that the tenure of their service has been illegally cut short. It is well settled that the tenure of service of a Government servant does not form part of his contract of service. The office was formerly held by him during the pleasure of His Majesty and now under Art. 310(1) of the Constitution it is held during the pleasure of the President or the Governor, as the case may be. It is undoubtedly true that under the Constitution there are certain limitations imposed on the exercise of this pleasure by the President or the Governor in terminating the services of a Government servant. Those limitations are enshrined in certain articles of the Constitution, including Art. 311 thereof.

11. The common law doctrine that a servant of a Crown holds office during the pleasure of the Crown and the limitations subject to which it has been accepted in India has been stated by the learned Chief Justice of India, who delivered the judgment of the Court in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, he observes :-

"Under the English common law all servants of the Crown held office during the pleasure of the Crown and were liable to be dismissed at any time and without any reason being assigned for such dismissal. No action lay against the Crown in respect of such dismissal, even though it were contrary to the express term of the contract of employment, for the theory was that the Crown could not fetter its future execution action by entering into a contract in matters which concerned the welfare of the State.

The limitations subject to which this doctrine is accepted in India in the words of the learned Chief Justice are :-

"... The opening words of Art. 310(1), namely, "Except as expressly provided by this Constitution," reproduce the opening words of S. 240(1) of the 1935 Act, substituting word "Constitution" for the word "Act." The exceptions contemplated by the opening words of Art. 310(1) quite clearly refer, inter alia, to Arts. 124, 148, 218 and 324 which respectively provide expressly that the Supreme Court Judges, the Auditor-General, the High Court Judges and the Chief Election Commissioner shall not be removed from his office except by an order of the President passed after an address by each House of Parliament, supported by the requisite majority therein specified, has been presented to him in the same session for such removal on the ground of proved misbehaviour or incapacity. There are clearly exceptions to the rule embodied in Art. 310(1) that public servants hold their office during the pleasure of the President or the Governor, as the case may be. Subject to these exceptions, our Constitution, by Art. 310(1), has adopted the English common law rule that the public servants hold office during the pleasure of the President or Governor, as the case may be and has, by Art. 311, imposed two qualifications on the exercise of such pleasure. Though the two qualifications are set out in a separate article, they quite clearly restrict the operation of the rule embodied in Art. 310(1). In other words, the provisions of Art. 311 operate as a proviso to Art. 310(1)."

This being the position in law, it is not possible for us to accept the contention of Sri Mudholkar that the tenure of office of a Government servant is a matter of contract. Apart from this, the claim made by the petitioners is not one arising out of an alleged breach of any term of the contract between them and the State Government. On the other hand, the claim is founded on the alleged contravention of the provisions of Art. 311 of the Constitution. This being the nature of the claim of the petitioners, it is not possible for us to hold that the cases of the petitioners are governed by S. 87 of the Act.

12. Section 88 of the Act reads as follows :-

"Where, immediately before the appointed day, an existing State is subject to any liability in respect of an actionable wrong other than breach of contract, that liability shall -

(a) if there be only one successor State, be a liability of that State;

(b) if there be two or more successor States and the cause of action arose wholly within the territories which as from that day are the territories of one of them, be a liability of that successor State; and

(c) in any other case, be initially a liability of the principal successor State, but subject to such financial adjustment as may be agreed upon between all the successor State concerned, or in default of such agreement, as the Central Government may by order direct."

It is the contention of Sri Bobde that the provisions of Clause (b) of this section are attracted. To call in aid these provisions it is necessary for the petitioners to first establish that their claim relates to the "liability in respect of an actionable wrong" of the former State of Madhya Pradesh. We have already held that the word "liability" used in this Act has to be understood in its widest import and would include a liability to reinstate a Government servant wrongly dismissed. We have also said that in the event the petitioners are able to establish their cases on merits, and for purpose of this decision we will have to assume that they would be able to establish their cases on merits, then the former State of Madhya Pradesh would have been liable either to reinstate them or to hold a fresh inquiry against them, as the case may be.

13. It has next to be seen whether that liability of the former State of Madhya Pradesh is in respect of "an actionable wrong other than breach of contract." Now the term "actionable wrong" has not been defined in the Act; there is, therefore, no reason to give it a restricted meaning. We find useful guidance to construe this term in the majority view of their lordships of the Supreme Court in *The State of Tripura Vs. The Province of East Bengal*, wherein their lordship have construed an identical term "liability in respect of an actionable wrong other than breach of control" appearing in Art. 10 of the Indian Independence (Rights, Property and Liabilities) Order, 1947. The problems with which the said order dealt with are similar to the problems dealt with in the Act. It is a matter of history that in the year 1947 India was partitioned into two Dominions, India and Pakistan. An Act to make provision for the setting up in India of the independent Dominions of India and Pakistan, was passed by Parliament (Indian Independence Act, 1947). Under the provisions of this Act from the appointed day, i.e., 15 August, 1947, the former province of Bengal ceased to exist and its territories were divided into two new provinces to be known respectively as East Bengal and West Bengal. East Bengal formed part of the Dominion of Pakistan whereas West Bengal formed part of the Dominion of India. Section 9 of the Indian Independence Act empowered the Governor-General to make such provision by order as appears to him to be necessary and expedient for bringing the provisions of this Act into effective operation in respect of various matters mentioned therein. In exercise of the power conferred on him by S. 9, the Governor-General of India made an Order known as "The Indian Independence (Rights, Property and Liabilities) Order, 1947." Articles 10 of this order inter alia deals with apportionment of the liabilities of the former Province of Bengal in

respect of an actionable wrong other than breach of contract between its two new successor provinces of East and West Bengal.

14. We now turn to the facts in the Supreme Court case in *State of Tripura v. Province of West Bengal*. They in brief are :

"The Incometax Officer, Dacca, acting under the Bengal Agricultural Incometax Act, 1944, sent by registered post a notice to the manager of an estate belonging to the Tripura State but situated in Bengal, calling upon the latter to furnish a return of the agricultural income derived from the estate during the previous year. The notice was received by the manager in the Tripura State. The State, by its then Ruler, instituted a suit in June 1946, against the Province of Bengal and the Incometax Officer, in the Court of the Subordinate Judge of Dacca for a declaration that the said Act in so far as it purported to impose a liability to pay agricultural incometax on the plaintiff was ultra vires and void, and for a perpetual injunction to restrain the defendants from taking any steps to assess the plaintiff. The suit was subsequently transferred to the Court of the Subordinate Judge of Alipore. The partition of India under the Indian Independence Act took place on 15 August, 1947, and the Province of East Bengal in which the estate was situated, was substituted as a defendant in the place of the Province of Bengal on an application made by it, and in its written statement it contended that the Court of Alipore which was situated in West Bengal had no jurisdiction to proceed with the suit. The High Court of Calcutta, reversing the order of the Subordinate Judge of Alipore, held that the provisions of the Indian Independence (Legal Proceedings) Order, 1947, and the Indian Independence (Rights, Property and Liabilities) Order, 1947, did not apply to the case ..."

15. The State of Tripura, therefore, took an appeal against the decision of the High Court to the Supreme Court and one of the contentions raised on behalf of the State was that its suit was maintainable against the Province of East Bengal under Art. 10 of the aforesaid order of 1947. The High Court had not accepted this contention as in its view the phrase "liability in respect of an actionable wrong" was synonymous with "liability for damages for a completed tortious Act." The majority of the Judges of the Supreme Court constituting the Bench that decided this case did not accept this view of the High Court. At p. 11 of the report Patanjali Sastri, J., who delivered the judgment on behalf of Kania, C.J., and Chandrasekhara Ayyar, J., and himself, observed :

"... The learned Judges have placed much too narrow a construction on the phrase "liability in respect of an actionable wrong." They have assumed that the phrase connotes only a liability for damages for a completed tortious Act ... The intention being thus to provide for the initial distribution of rights, property and liabilities as between the two Dominions and their Provinces, a wide and liberal construction, as far as the language used would admit, should be placed upon the terms of the order, so as to leave no gap or lacuna in relation to the matters sought to be provided for. There is no reason, accordingly, why the words

"liability in respect of an actionable wrong" should be understood in the restricted sense of liability for damages for completed tortious acts. We consider that the words are apt to cover the liability to be restrained by injunction from completing what on the plaintiff's case was an illegal or unauthorized act already commenced."

Expressing himself on the same question, Mukherjee, J., observed :

"... The High Court took the view that the expression "actionable wrong other than a breach of contract" is synonymous with "tort." It has held that the act complained of cannot be a tortious act and even if it is so, no action would lie upon it, it being an established proposition of law that the State is not answerable for any tortious acts of its officers done in the course of official duties imposed by a statute. It seems to me that the learned Judges have attached a narrow and somewhat restricted meaning to the words of the article mentioned above and that the plain language of the provision read in the light of the context would demand and justify a wider and more liberal interpretation. In my opinion, there can be an actionable wrong which does not arise out of a breach of contract and at the same time does not answer to the description of a "tort" as it is understood in English law; and if the plaintiff's allegations are correct, it is an actionable wrong precisely of that types which we have in the present case.

The word "wrong" in ordinary legal language means and signifies "privation of right." An act is wrongful if it infrings the legal right of another, and actionable means nothing else than that it affords grounds for action in law."

The meaning of the term "actionable wrong" deducible from this decisions in our opinion is an illegal or unauthorized act infringing a legal right of another affording him a ground for action in law. It cannot be doubted that a citizen of India is entitled to protections and guarantees are infringed, it amounts to illegal and unauthorized act infringing the right of a citizen. He is on that ground entitled to protection at the hands of this Court under Art. 226 of the Constitution. Here the petitioners, who are citizens of India, are challenging the orders of their dismissal on the ground of infringement of Art. 311(2) of the Constitution. For reason stated above the wrong complained of by the petitioners in all the cases is, in our opinion, an actionable wrong within the meaning of S. 88 of the Act. As already stated, the liability to redress this wrong was initially the liability of the former State of Madhya Pradesh.

16. It is next to be seen whether it has now been transferred to the present State of Bombay under Clause (b) of this section. The successor State of the former State of Madhya Pradesh are more than one and they are the new State of Madhya Pradesh and the State of Bombay. Out of these two successor States under S. 2(m)(i) of the Act the new or the present State of Madhya Pradesh is "the principal successor State" of the former State of Madhya Pradesh. To call in aid this clause it must be shown that the cause of action arose in its entirety within the territories which as from that day, 1 November, 1956, formed part of

the territories of one of the successor States, i.e., the present State of Bombay. The meaning of the term "cause of actions" as is generally understood is "every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court." The petitioners' claim is that their services have been wrongfully terminated. Undoubtedly, therefore, the fact that the order for termination of service was made would form part of a cause of action, and it would arise at the place the order is made. It is the contention of all the petitioners that once they establish that orders for the termination of their services have been made it was sufficient to entitle them to claim relief at the hands of this Court. All these orders were made in Nagpur, which at the material time was the seat of the Government of the former State of Madhya Pradesh. The cause of action, therefore, in its entirety arose at Nagpur which now forms the territory of the present State of Bombay. Clause (b) of S. 88 is thus fully attracted to the facts of all the three cases. It is not possible for us to concede that to sustain a challenge to the termination of services under Art. 226 of the Constitution it is sufficient for the Government servant only to establish that an order for termination of his service has been made. That fact by itself alone cannot afford to him a ground to claim relief at the hands of this Court. He must further prove that the consequences of that order fell on him, i.e., as a consequence of that order he, in fact, was removed from service. In our opinion, therefore, for a claim of this kind the cause of action would arise at a place where the order of termination of service was made and also at a place where its consequences fell on the servant. If this cause of action has in its entirety arisen within the former territories of the State of Madhya Pradesh which now form part of the State of Bombay, then the liability referred to in S. 88 of the Act of the former State of Madhya Pradesh would fall on the present State of Bombay under Clause (b) thereof.

17. In the light of these principles it will have to be seen to what cases Clause (b) of S. 88 is attracted. It is not in dispute that in all the three cases the orders of dismissal were made at Nagpur and were issued from that place. Nagpur is now a part of the territories of the present State of Bombay.

18. In Miscellaneous Petition No. 523 of 1956, the consequences of the order fell at Arvi and the petitioner in that case was relieved of his post at Arvi on 21 November, 1955. Arvi is in the Wardha district and Wardha district is now one of the districts of the present State of Bombay. This petition therefore, is maintainable against the State of Bombay.

19. In Miscellaneous Petition No. 470 of 1956, the consequences of the order for termination of the service of the petitioner fell at Drug. Drug does not form part of the present State of Bombay. This petition is, therefore, not maintainable against the State of Bombay.

20. It is necessary to notice one additional argument of Sri Ghate, learned counsel for this petitioner. He contend that the consequences of the order of dismissal of his client may have fallen at Drug, a place outside the territories of

the present State of Bombay and a part of the cause of action might have accrued outside the territories of the present State of Bombay, but that would not preclude his client from claiming reliefs against the present State of Bombay. This case has come before this Court on a certificate of the Chief Justice of the former High Court of Judicature at Nagpur under S. 59(2) of the Act. This shows that the Chief Justice at Nagpur had come to the conclusion that the cause of action which entitled the petitioners to claim relief accrued within the territories of the present State of Bombay. This order is binding on the State of Bombay, and it is not open now to the State of Bombay to say that the provisions of Clause (b) of S. 88 are not attracted. It is not possible for us to accept this contention of Sri Ghate. The certificate issued under S. 59(2) is not an order made on the judicial side of the Nagpur High Court. Further it was made behind the back of the present State of Bombay in fact before the present State of Bombay was born. Such an order cannot have the effect of estopping the present State of Bombay, from raising a contention before this Court, nor can it, in any event, come in the way of this Court from deciding the contention raised.

21. In Special Civil Application No. 73 of 1957, the consequences of the order fell in Nagpur. As already stated, Nagpur forms part of the territories of the State of Bombay. This application would, therefore, be maintainable against the State of Bombay.

22. It is next to be seen how far the provisions of S. 116 of the Act assist the petitioners. To attract the provisions of this section it has first to be established by the petitioners that they were holding or discharging the duties of any post immediately before the appointed day. The appointed day, as already stated, was 1 November 1956. From the facts stated above it is clear that the petitioners' services stood terminated some time before 1 November, 1956. It cannot, therefore, be said that the petitioners were, in fact, holding or discharging the duties of any post or office immediately before the appointed day. It is, however, contended on behalf of the petitioners that, in fact, they might not be holding or discharging the duties of any post immediately before 1 November, 1956, but their dismissal being wrongful in the eye of law they continue to be in service and continue to hold the post which they formerly held. Such an order of dismissal must, therefore, be completely ignored. It is not possible for us to accept this contention. It would be noticed that even assuming that each of the orders made was in contravention of the provisions of Art. 311(2) of the Constitution it was not made by an authority having no jurisdiction to make an order. The order made, therefore, cannot be termed as non est or just a piece of paper. It cannot be said that the order made was by reason of its origin bad. A distinction has to be drawn between an order of dismissal made by an authority which was not competent to make an order and an erroneous order of dismissal made by a competent authority. The former may be non est and can be completely ignored but such would not be the case with the latter.

23. Further, even assuming for a moment that this contention of the petitioners

is well founded, it is of no further assistance to the petitioner in Miscellaneous Petition No. 470 of 1956 because he could only be deemed to be holding a post at Drug which does not form part of the State of Bombay. He, therefore, cannot be deemed to have been appointed to that post by the Government of the State of Bombay as from 1 November 1956. Consequently he cannot claim any relief against the State of Bombay even under the provisions of S. 116 of the Act.

24. In the result, therefore, in our judgment, Miscellaneous Petition No. 523 of 1956 and Special Civil Application No. 73 of 1957 are maintainable against the State of Bombay; while Miscellaneous Petition No. 470 of 1956 is not maintainable against the State of Bombay. This petition is, therefore, dismissed. We make no orders as to costs. The former two petitions will now be placed for hearing on merits.