

(1968) 06 CAL CK 0029
In the Calcutta High Court
Case No : Civil Revision No. 521 (W) of 1964

Kalipada Ghosh

APPELLANT

Vs

Sub-Divisional Officer, Vishnupur and Others

RESPONDENT

Date of Decision : 06-06-1968

Acts Referred:

Bengal Subordinate Services (Discipline and Appeal) Rules, 1936 — Rule 10
Constitution of India, 1950 — Article 226, 311, 311(2)

Citation : AIR 1969 Cal 164

Hon'ble Judges : D. Basu, J

Bench : Single Bench

Advocate : M.C. Chakrabarty and Kalyanbrata Roy, for the Appellant; P.K. Banerjee, for the Respondent

Judgement

D. Basu, J.—The petitioner was appointed Tahsildar, by the agreement at Annexure "A" to the petition, executed by the Additional District Magistrate, Burdwan, on behalf of the Governor and he was discharged by the order at Annexure "C", with effect from the date of the order, i.e., the 31st January, 1962, "for misappropriating Government money and tampering with official records".

2. The only point pressed on behalf of the petitioner at the hearing is that the impugned order at Annexure "C" is bad because of contravention of Article 311(2) of the Constitution as well as the provisions of the Bengal Subordinate Services (Discipline and Appeal) Rules, which were attracted by Clause 4 (e) of the Agreement. Admittedly, no opportunity was given to the petitioner to show cause before the impugned order was made nor any notice given.

3. Though the Agreement at Annexure "A" was for the period from the 1st June 1957 and the 1st August, 1957, it is both parties' case that this was renewed till the date of the impugned order and that the question at issue is to be decided on the terms of the Agreement.

4. It is patent law that no proceeding under Article 226 of the Constitution lies for the breach of an agreement for which there is remedy under the general law. But the petitioner seeks to avoid it by invoking Clause 4 (e) of the Agreement itself. The Agreement was one of an appointment for a specified term, on the condition (Clause 2) that it was terminable earlier, by one month's notice on either side; Clause 4 then lays down certain additional terms;

5. Sub-clause (a) provides that the Tahsildar would be entitled to engage in "other work" provided Government consented.

6. Sub-clauses (c)--(d) provide that for leave and travelling allowance, the petitioner would be governed by the relevant rules in the West Bengal Service Rules relating to Grade HI employees. Then comes Sub-clause (e):

"Save and except the provisions in Clause 4 (a) hereof, the employee shall during the period of his employment under these presents as a Tahsildar be governed by the Government Servants Conduct Rules, and he shall also be governed by the Subordinate Services (Discipline and Appeal) Rules,"

7. Another provision of the Agreement, referred to at the hearing is Clause 11 which says-

"That the Government shall have the right and be entitled to discharge the employee or terminate this Agreement without any previous notice if the employee commits any breach of any of the terms and conditions herein contained or if he is found to be otherwise negligent or inefficient or his work is found to be otherwise unsatisfactory and the decision of the Government in this respect shall be final and binding."

8. The resultant of the foregoing provisions of the Agreement is that-

(i) The Agreement was terminable with one month's notice on either side;

(ii) But the employee would not be entitled to any notice if he was negligent or inefficient or his work was unsatisfactory,

(iii) In other respects, he would be governed by the Government Services (Discipline and Appeal) Rules,

9. It has been rightly argued on behalf of the petitioner that Clause 11 of the Agreement was not attracted to the facts of the instant case inasmuch as that clause referred to negligence or inefficiency in the execution of the employee's duties and not a serious misconduct such as misappropriation or tampering with official records. In this interpretation, the petitioner is fortified by the observations of the Supreme Court in *State of Uttar Pradesh and Another Vs. Sri C.S. Sharma*, where similar provisions in Sub-rules (1) and (2) of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, were construed. If this construction be correct, the only conclusion that emerges is that the validity of the impugned order is to be tested by the provisions of Article 311(2) of the Constitution and Rule 10 of the Bengal Subordinate Service Rules.

10. It is needless to go into the Rules inasmuch as I am satisfied that this case falls under Article 311(2), which applies equally to permanent and temporary employees. Once it is held that the impugned order is not covered by Clause 11 of the Agreement, the provisions of Article 311(2) would be attracted, provided the order constitutes "removal" or "dismissal". It has been repeatedly held by the Supreme Court that in such cases, the form of the order or the language employed therein e. g., the use of the word "dismissal" as in the instant case, is not conclusive on the question whether it constitutes "removal" or "dismissal", so as to attract Article 311(2), *The State of Orissa and Another Vs. Ram Narayan Das*, ; *Jagdish Mitter Vs. The Union of India (UOI)*, , and that in order to solve this question, the Court is entitled to look into the facts antecedent to the order as well as its contents and "substance" (ibid). If the order "entails penal consequences in addition to termination of the service, it is obviously a case of dismissal, according to the principles laid down in *Purshottam's* case. The same conclusion must be arrived at where the order of discharge adds a stigma, e. g., that the employee has been found "to be undesirable to be retained in Government service" as in *Jagdish Mitter Vs. The Union of India (UOI)*, . The reason is that in such a case-

"..... anyone who reads the order in a reasonable way. would naturally conclude that the appellant was found to be undesirable and that must necessarily import an element of punishment which is the basis of the order and is its integral part. When an authority wants to terminate the services of a temporary servant, it can pass a simple order of discharge without casting any aspersion. As soon as it is shown that the order purports to cast an aspersion on the temporary servant, it would be idle to suggest that the order is a simple order of discharge.

The test in such cases must be: Does the order cast aspersion or attach stigma to the Officer when it purports to discharge him? If the answer to this question is in the affirmative, then notwithstanding the form of the order, the termination of service must be held, in substance to amount to dismissal. *Jagdish Mitter Vs. The Union of India (UOI)*, .

11. The punishment involved in such a case is that nobody who reads such order would consider the employee fit for re-employment anywhere.

12. In the impugned order before me, it is expressly stated that the petitioner was being discharged on the ground that he had been guilty of misappropriation and tampering with records. This stigma is even serious than what it was in the case of *Jagdish Mitter Vs. The Union of India (UOI)*, . It must therefore be concluded that the impugned order was one of dismissal in substance and Article 311(2) of the Constitution must, therefore, be complied with. The impugned order must, accordingly, be struck down as invalid.

13. It was contended on behalf of the { respondents that the petition should be rejected on the ground of delay. It is true that the petitioner came to Court on

16-4-64, to quash an order of 31-4-62. But the order was communicated to the petitioner only on 1-2-62 (Annexure "C") and he made a representation to the Col-lector on 12-6-63 (Annexure "D") which was not heeded to and that is why he served a demand notice through his lawyer on 12-3-64 and after the lapse of a reasonable time, presented this petition on 5-5-1964. I must say that the petitioner should have been prompt in his steps but it cannot be overlooked that

(a) the charges involved in the stigma were serious enough; and (b) the legal position was somewhat difficult owing to the existence of the contract, so that it was not possible for the petitioner to appreciate his legal rights without taking legal advice.

14. In the circumstances, I do not think it would be proper to discharge the Rule on the ground of delay, without giving the petitioner an opportunity to controvert the serious, allegations made against him.

15. Another point taken on behalf of the respondents was that since the extended terms of the petitioner expired before the Rule was obtained he had no locus standi to maintain the Rule. It is true that when a petitioner comes to Court under Article 226 of the Constitution praying for mandamus to enforce a legal right which had no existence at the date of the petition the Court cannot entertain the petition because the petitioner had no legal right or interest to enforce. On this principle petitions under Article 226 have been refused not only where the period of statutory licence for the same had expired before the Rule was obtained but also where it had expired before the judgment was going to be pronounced. This principle can hardly apply in the case of certiorari where the Court simply quashes a quasi-judicial order which is without jurisdiction or offends the requirements of natural justice or the like and considers necessary to interfere even at the instance of strangers *R. v. Williams* (1914) 1 KB 608 (613-4); *R. v. Brighton JJ.* (1954) 1 All ER 197 (200). In this case the footing on which the petitioner has sought for relief and has been granted by this judgment is not his alleged right founded on the agreement which had expired but his constitutional right, founded on public policy, arising out of Article 311(2). Once it is held that the protection under Article 311(2) extends equally to temporary employees as the permanent employees, the relief under Article 226 would be meaningless if it is held that it would not be available where the contract on which the temporary employment is based or the term for which the temporary appointment was made had expired before the petitioner comes to Court for relief, because in most cases of temporary employment, if not all the term would be a short one which would lapse before the petitioner can reach the Court or the Court is in a position to pronounce its judgment. The infringement of the constitutional right under Article 311(2) per se gives a cause of action to the individual even though his employment might have terminated otherwise on the date of the petition. On the records it appears that though the petitioner was initially appointed for a short term it was extended as a matter of course year by

year and if the impugned order of discharge had not been made with an imputation it may reasonably be expected that the renewal or extension would have taken place as a matter of course, as before. Once the impugned order is out of his way, the petitioner would be placed in the same position as he was on the date of the impugned order subject, of course, to the right of the respondents to proceed against him afresh in compliance with the requirements under Article 311(2). The preliminary objection thus raised on behalf of the respondents is rejected.

16. In the result, the Rule is made absolute, but without any order as to costs. The impugned order be quashed, with liberty to the respondents to proceed against the petitioner according to law.

17. On the prayer of Mr. Banerjee, on behalf of the respondents the operation of this order will remain stayed for a period of six weeks from this date.