

(2018) 06 BOM CK 0157
In the Bombay High Court
Case No : Writ Petition No. 504 Of 2017

Laxmikant D. Kolvekar, Chief Electrical Engineer, Electricity Department, Vidyut Bhavan, Panaji, Goa **APPELLANT**

Vs

State of Goa And Ors. **RESPONDENT**

Date of Decision : 28-06-2018

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(2)

Citation : (2018) 06 BOM CK 0157

Hon'ble Judges : N.M. Jamdar, J;Prithviraj K. Chavan, J

Bench : Division Bench

Advocate : S.D. Lotlikar,r. C. Padgaonkar, Dattaprasad Lawande, Deep Shirodkar, Nitin Sardesai, Gautami Kamat

Final Decision : Dismissed

Judgement

- 1,Serial number,1.
- 2.,Name/Designation of post,Chief Electrical Engineer.
- 3.,Number of posts,"1 (2011) (subject to variation dependent on work load.
- 4.,Classification,"Goa General Service Group 'A' Gazetted.
- 5.,Scale of Pay,"PB-4 Rs.37,400-67000 + Grade Pay Rs.8,700/-
- 6., "Whether Selection postÂ or non selection post",Â Selection.
- 7.,Age limit for direct recruits.,Not applicable.

7a., "Whether benefit of added years of service admissible under rule 30 of C.C.S.

(Pension) Rules, 1972.", "Not applicable.

8., "Educational and other qualifications required for the direct recruits.", "Not applicable.

9., "Whether age and educational qualifications prescribed for the direct recruit will apply in the case of promotees.", "No.

10., "Period of promotion, if any.", "Two years.

11., "Method of recruitment, whether by direct recruitment or by promotion or by deputation/ transfer/ contract and percentage of the vacancies to be filled by various methods.", "By promotion, failing which, by transfer on deputation and failing both, by short term contract.

12., "In case of recruitment by promotion/deputation/transfer grades from which promotion/deputation/transfer is to be made.", "contract): Officers of the Central Government/ Central Public Sector Undertaking connected with power sector, or officers of the State Government/Union Territories/State Electricity Boards/State Public Sector Undertakings connected with power distribution, possessing a Degree in

Electrical Engineering and holding
analogous post or with at least 5 years
regular service in the grade of
Superintending Engineer or equivalent
(Period of deputation shall ordinarily not
exceed 4 years).

13., "If a D.P.C. exists, what is its composition.", "Group A, D.P.C. consisting
of:

1. Chairman/ Member of the Goa

Public Service Commission

"Chairman.

2. Chief Secretary or his nominee

"Member.

3. Administrative Secretary/Head

of Department" Member.

14., "Circumstances in which the

Goa Public Service Commission is to be

consulted in making recruitment.", "Consultation with the Goa Public

Service Commission is necessary for

making promotion, confirmation,

selecting an Officer for appointment on

transfer on deputation (including short

term contract) and for

amending/relaxing any of the

provisions of these Rules.

21. Even while considering the above grievance in the context of arbitrariness, the argument that the Respondent No.3 being junior is brought in only to humiliate the Petitioner, has no merit. The Petitioner joined the Electricity

Department on 2 February 2001, twenty years thereafter. Respondent No.3 was promoted on ad hoc basis as Assistant Engineer on 22 June 2000. When the Petitioner came to the Electricity Department from Irrigation Department as

Assistant Engineer, he came as a regular Assistant Engineer. It is on 30 October 2001, Respondent No.3 was promoted on regular post as Assistant Engineer i.e. eight months thereafter. As far as the entry in the Government",,

service is concerned, Respondent No.3 joined the Government service before the Petitioner and joined the Electricity Department 20 years before the Petitioner. Respondent No.3, therefore, had 36 years of experience in the Electricity",,

Department as against the 16 years of the Petitioner. It is not that a rank junior has been brought in with the sole intention to humiliate the Petitioner. The Petitioner's hue and cry that a junior has been involved to insult him is thus not,,

warranted. It was either the Petitioner or Respondent No.3 in the feeder grade that could be given the officiating charge. The State was faced with the situation that there was no qualified Superintending Engineer to man the important,,

post of Chief Electrical Engineer, head of the Department. Once the appointment of officiating post was withdrawn from the Petitioner, it was given to Respondent No.3. If it is in this context that the officiating post was taken away from",,

the Petitioner and given to "his junior", we do not find that the action of the State smacks of any arbitrariness. The Petitioner having appointed on officiating basis, had no right to continue on the same and for administrative exigencies he",,

could be asked to work on the substantive post at any time. ,,

22. The second ground on which the impugned order is assailed is based on Article 311 of the Constitution of India. The leading decision on this point is of Parshotam Lal Dhingra vs. The Union of India , which is expounded in the",, case of State of U.P. and ors. vs. Sughar Singh . Mr. Lotlikar relied upon the following passage in the case of Sughar Singh :,,

9. The first decision which has now become a locus classicus on the subject is the decision in Parshotam Lal Dhingra v. Union of India. The principles that were laid down in that case are as follows:,,

(1) Article 311 of the Constitution of India makes no distinction between permanent and temporary posts and extends its protection equally to all government servants holding permanent or temporary posts or officiating in any of them.,,

(2) The protection of Article 311 is available only where dismissal, removal or reduction in rank is sought to be inflicted by way of punishment and not otherwise.",,

(3) If the termination of service or reduction in rank is not by way of punishment, Article 311(2) is not attracted. To determine whether the

termination or the reduction is by way of punishment one has to consider whether the servant has the",,,

right to hold the post from which he has been either removed or reduced. In the case of a probationary or officiating appointment to a permanent or temporary post there is no such right. This does not mean, however, that the termination of",,,

service or reduction in rank of a servant who has no right to the post can never be dismissal or removal or reduction by way of punishment. If government expressly chooses to penalise the servant for misconduct, negligence, inefficiency or",,,

the like by inflicting on him the punishment of dismissal, removal or reduction, the requirements of Article 311 must be complied with.",,,

(4) A reduction in rank must be a punishment if it carries penal consequences with it and the two tests to be applied are:,,

(i) Whether the servant has a right to the post or the rank and,,

(ii) whether evil consequences such as forfeiture of pay and allowances, loss of seniority in his substantive rank, stoppage or postponement of future chances of promotion follow as a result of the order?",,,

Where either of these tests apply, the reduction in rank must be one within the meaning of Article 311(2) of the Constitution and will attract its protection.â??"",,,

Based on this passage, it was contended by Mr. Lotlikar that protection of Article 311 extends even to those Government servants holding a post on officiating basis.â He contended that the averments made in the affidavit-in-reply clearly",,,

state that the order is stigmatic and amounts to punishment and, therefore, it is in breach of Article 311.â It is contended that the stand taken by the State clearly shows that the alleged misconduct and incompetence of the Petitioner is the",,,

foundation of the impugned order dated 1 June 2017.,,,

23. To appreciate the law laid down by the Apex Court in the case of Sughar Singh, the decision will have to be examined in its entirety.â The facts were that the respondent-Sughar Singh was a permanent Head Constable in the U.P. Police",,,

Force.â He was appointed as an officiating Platoon Commander.â He was served with a notice to show cause as to why an adverse entry should not be enteredâ in his character roll that he was suspected to have got entries of date of,,

birthâ and educational qualifications altered on the authority of a fictitious certificate which had to be corrected later on, and he was severely warned.â His explanation was not found acceptable and Sughar Singh was reverted from his",,,

officiating post to the substantive post of Head Constable.Â Sughar Singh challenged his order of reversion. The order was quashed by the High Court and the State of U.P. filed an appeal.Â The question that arose for determination of the,,

two learned Judges of the Apex Court was whether the order was in violation of Article 311 of the Constitution of India.Â Â The learned judges noted that the appointment ofÂ Sughar Singh was never on substantive basis and merely on,,
officiating basis.,,

Then the Apex Court referred to the decision of Parshotam Lal Dhingra and culled out the principle as above.Â The passage, which we have quoted, shows that the reduction in rank must be a punishment if it carries penal consequences with",,

it and the two tests to be applied are : (i) whether the servant has a right to the post or the rank; and (ii) whether any evil consequences ensued such as forfeiture of pay and allowances, loss of seniority in his substantive rank, stoppage or",,

postponement of future chances of promotion.Â It was noted by the Apex Court that all these situations did not arise in the case of Sughar Singh.Â AÂ clear imputation was made against Sughar Singh, an adverse entry was made and he",,

was reverted.Â In that context, the Apex Court observed thatÂ the order merely states that Sughar Singh is reverted and that he is reverted to his substantive post of Head Constable and by no stretch of imagination can thisÂ be construed",,

as casting a stigma on the respondent. It was noted that there was nothing to show that Sughar Singh had lost his seniority in the substantive rank.Â It was held thatÂ the orderÂ was not anÂ order attended with penal consequences.Â,,

Thus, the learned Judges observed thatÂ no evil consequences that ensued.Â In the present case, the first test is not satisfied, that there any substantive right in the Petitioner. The second test is also not satisfied as there is absolutely no",,

effect on the seniority or pay and allowances of the Petitioner. There is no question of affecting further chances of promotion as the Petitioner is not qualified to be promoted.Â The chances of appointing on officiating post cannot be,,

considered as chances contemplatedÂ in these tests which clearly contemplates a regular promotion.Â,,

24. In the case of State of Bombay vs. F.A. AbrahamÂ , the Apex Court considered an appeal by the State of MaharashtraÂ in respect of setting aside the order of reversion of the Respondent from the rank of officiating Deputy",,

Superintendent of Police to the rank of Inspector of Police.Â The order of reversion simply stated that the Respondent was reverted to the rank of

Inspector. Reasons were sought by the Respondent, which were not communicated. A",,,

confidential memorandum was sent by the District Superintendent of Police, Parbhani to the Deputy Inspector General of Police, Aurangabad. Allegations of corruption were made against the Respondent and an enquiry was held, ,,

The High Court had followed its earlier decision in the case of M.A. Waheed vs. State of Madhya Pradesh, (1954) NLJ 305 and held that if a person officiating on a higher post is reverted to the original post, it may not amount to reduction",,,

in rank, but he is reverted for his unsatisfactory work, it would. Setting aside this decision, the Apex Court held that the observations in M.A. Waheed case that when a person officiating in a post, is reverted for unsatisfactory work, that",,,

reversion amounts to a reduction in rank, were not correct. A person officiating in a post has no right to hold it for all times and that no reduction in rank for it was the very term on which he had been given the officiating post. Referring to the",,,

case of Parshotam Lal Dhingra the Apex Court held 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 very transitory",,,

character and, in the absence of any special contract or specific rule regulating the conditions of the service, the implied term of such appointment, under the ordinary law of master and servant, is that it is terminable at any time. It was",,,

observed that the servant, so appointed, does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at",,,

any time. The Apex Court further observed that the High Court was in error in holding that the Government's refusal to supply the respondent with the reasons why action was taken against him proved that the reversion was a",,,

reduction in rank by way of punishment, as only the refusal cannot prove that. It was further observed that if the action is justifiable under the terms of the employment, then the motive inducing the action is irrelevant in deciding the question",,,

whether the action had been taken by way of punishment. ,,,

25. The decisions in the case of Parshotam Lal Dhingra and F.A. Abraham were reiterated by the Apex Court in the case of State of Mysore and ors. vs. M.K. Gadgoli and ors., In this case, the Respondent was holding a substantive",,,

post of Clerk in Bombay Government and had been appointed as an officiating Aval Karkun. He was reverted with an order clearly stating that his work was

reviewed, his confidential sheet was examined and it was found that his work",,, was unsatisfactory. The High Court taking note of these observations in the order, held that if the Respondent's work was remarked as unsatisfactory and that his record was stated to be not good, was a clear stigma on his work as an Aval",,,

Karkun and entailed penal consequences since his future chance of promotionÂ was imperiled. The Apex Court did not accept this view taken by the High Court and reiterated the principle laid down in F.A. Abraham, that a personÂ",,,

officiating in aÂ post has no right to hold it for all times.Â A person is given higher officiating post to test his suitability and he holds it on the implied term that he would be revertedÂ if he was found unsuitable and had there been any",,,

disciplinary inquiry against the Respondent and instead of punishing him,Â the action was masked as a reversion simpliciter, there might have been some force in the contention that it was punitive.Â The Apex Court noted that all that",,,

happened was that a personÂ was not found suitableÂ on account of his record.",,,

26. These decisions would clearly indicate that even ifÂ the order appointing on officiating basis to a higher post is recalledÂ has imputations in respect of the service,Â Â generallyÂ it as a matter of suitability.Â In the present case, the",,,

impugned order on the face of it, is clearly innocuous and attributes no stigma whatsoever. The order is plain and simple.Â It only states that in public interest Respondent No.3 is appointed to holdÂ Â the post of Chief Electrical Engineer on",,,

officiating basis and the Petitioner has been brought back to his substantive post i.e. the Additional Chief Engineer which he is holding on ad hoc basis.Â There is absolutely no stigma that can be seen from the order.Â There is no loss of",,,

seniority and there are no evil consequences that ensue.Â",,,

27. Much was sought to be made in respect of the averments made in the affidavit-in-reply filed by the Respondent-State in respect of the work of the Petitioner. As stated earlier, the order itself does not cast any stigma on the Petitioner. It is",,,

also not theÂ case thatÂ any enquiry is held and instead of taking any punitive action, simpliciter action of reversion is taken.Â Because the Petitioner insisted that the action of the State is arbitrary and that there is nothing against the",,,

Petitioner, that the Respondent-State was provoked to answer these assertions of the Petitioner. Since clean and meritorious work was made the foundation of the challenge by the Petitioner, the Respondent-State in its reply had to answer the",,,

same.Â Had it not replied to the assertions, the Petitioner would have then claimed that the State has accepted his assertion.Â It is in this context that the

State has pointed out that the work of the Petitioner as Chief Electrical Engineer was",,,

not up to the level which was expected of the Head of the Department. There was loss to the Department.Â There was infighting amongst the seniors and absence of command and the Department had to pay extra amount to the tune of",,,

Rs.200 crores on account of overdrawingÂ from the grid.Â There was no proper control and planning. Therefore, what the State has pointed out is that the Petitioner, who was entrusted with the highest post in the Department on officiating",,,

basis, failed to maintain the level of the standard expected of that post, as there were various problems in the Department and loss was caused.Â This is not to say that there was any direct allegation against the Petitioner that he",,,

misappropriated any amount.Â Â,,

28. The post of the head of a Department entrusted with distribution of electricity in the entire State, is a not a trivial post and requires high dedication. If the State, the Appointing Authority, comes to the opinion that the work of the Petitioner",,,

on that particular post on officiating basisÂ was not satisfactory, it is not possibleÂ to sit in appeal over the said decision.Â The postÂ is not a one where the incumbent would expect memos and warnings pointing out lapses in discharge of",,,

duties.Â TheÂ expectations and responsibilities forÂ the work of theÂ Chief Electrical Engineer are important and often subjective, the quality of work to be decided by the appointing authority.Â If it is in this background the impugned",,,

order was issued and Respondent No.3 who was the only other person from the feeder post, with longer experience, was appointed on officiating basis, we do not find that there was any stigma or imputation cast on the Petitioner so as to hold",,,

that the order was in breach of Article 311 of the Constitution of India, nor there was any arbitrariness.Â Therefore, on both, as far as right of the Petitioner and challenge to the impugned order in his individual capacity,Â there is no merit in",,,

the challenge to the order of 1 June 2017.Â,,

29. Now we turn to the challenge of the Petitioner to the extensions given to Resplendent No.3.Â Respondent No.3 was to retire on superannuation on 31 July 2017.Â He was given extension on 27 July 2017, till 31 October 2017 and the",,,

second extension was given on 30 October 2017 which is slated to expire on 31 July 2018. As regards the order of extension dated 27 July 2017,Â it has worked itself out as the extension was up to 31 October 2017.Â The challenge thus",,,

remains to the order dated 30 October 2017.,,

30. While we consider this challenge, the question is whether the Petitioner has any right in his individual capacity to challenge the order of extension. The answer is, none.Â The Petitioner can lay no claim to the post of Chief Electrical",,

Engineer, having not qualified to hold the said post.Â He was given the officiating charge and the later as ad hoc Additional Chief Engineer.Â The Petition, which the Petitioner has initiated in his own private cause, cannot be converted into a",,

public interest litigation. WhatÂ is before us is a lis in the realm of service law. It is settled that public interest litigations in the matters of service law are generally not to be entertained.Â According to Mr. Lotlikar, genesis of the impugned",,

order was to somehow give extension to Respondent No.3, which has come true.Â As far as right of the State, nothing is shown to us to show that the State has no power in law to grant extension to a government servant.Â During the",,

arguments Mr. Lotlikar showed us someÂ Office Memorandum dated 2 September 1991, 30 December 2014Â and 10 March 2016. There are absolutely no pleadings whatsoever in the Petition in respect of these memorandums.Â They",,

have been produced during the course of arguments, when the matter was part-heard. We have perused the latest memorandum, which notes earlier two.Â This Memorandum is issued by the Under Secretary (Personnel).Â It states that the",,

Government has decided not to grant any extension beyond the age of superannuation in future so as to ensure that the promotional avenues of the officers who are eligible for promotions are not blocked.Â This, according to us, is an internal",,

guideline and primarily based on the anxiety that the promotional avenues of others are not blocked by indiscriminate extensions.Â In the present case, there is no question of promotional avenue of any person beingÂ affected.Â There is no",,

qualified person in the entire Electricity Department to be appointed as Chief Electrical Engineer.Â Had this been the case, the challenge of the Petitioner to the grant of extension in individual capacity could hold some merit.Â",,

31. Thus, the challenge of the Petitioner to the extension of Respondent No.3 is more or less in public interest. TheÂ Division Bench of this Court in the case of Kashinath Shetye & ors vs. the State of Goa and ors. , had an occasion to",,

consider the challenge to the powers of the State to grant extensions in service.Â One of the arguments that was made before the bench, which is also made by Mr. Lotlikar in the present case, was that till the mode of recruitment stipulated",,

in the recruitment rules i.e. transfer on deputation, or short term contract are exhausted, the Government should not extend services of an employee.Â This

contention was repelled by the Division Bench by holding that the recruitment rules do",,,

not specify extending the services of an incumbent as one of the modes of filling up vacancies and does not denude the Government of the power to do so.Â The Division Bench, in the case of R.R. Tripathi vs. Union of IndiaÂ Â Â also laid",,,

down that power to extend services of an incumbent is an inherent power vested in the State.Â Such power would exist evenÂ in absence of a rule. It would, however, be a different matter if the rules prohibitÂ extension.Â Â We have not",,,

been shown any statutory rule prohibiting exercise of power of extension.Â,,

32. Once there is inherentÂ power in the Government to grant extension of services, subject to certain limitations in public interest, there cannot be absolute fetter on such power as, otherwise, it would prevent the functioning of the State and",,,

the State would not be able to overcome the difficult situations faced by the administration, such as the present one where there is no qualified person to man the post.Â One of the contentions that was advanced by Mr. Sardesai was that no",,,

public interest litigation should be entertainedÂ in the matter of extension and the cases where the court entertained the petitions wereÂ in respect of the high posts such as Chief SecretaryÂ Â and the post of Chief Electrical EngineerÂ is,,

not one such post.Â While it is true that courts in the cited decisions was considering the challenge to the extensions granted to high functionaries in the State, we are not ready to devalue the post of Chief Electrical Engineer as",,,

inconsequential post. It is an important post.Â Continuous uninterrupted electricity supply is an essential requirement necessaryÂ for overall development of the State and the failure affects the daily life and has a potential of throwing the,,

State in turmoil.Â Therefore, onlyÂ theÂ Â ground that the post of Chief Electrical Engineer is not a significant post and, therefore, public interest litigation should not be entertained in the matter of extension, is far too wide a proposition.Â",,,

33. Reverting back to the power of the State to grant extension, though there exists as inherent power, it is obviously subject to certain limitations.Â It has to be used in public interest and an extension, such as the present one, can be",,,

questionedÂ inÂ Â public interest.Â In the present case, apart from the fact that we are not inclined to examine the challenge at the behest of the Petitioner by converting the Petition into a public interest litigation, we also do not find that",,,

there is any abject arbitrariness.Â We have not been shown anything adverse against Respondent No.3. Respondent No.3 has worked 36 years in the Electricity Department.Â He holds the substantive post of Superintending Engineer.Â,,

The only other experienced person was the Petitioner, who was given chance and was not found suitable.Â Faced with this peculiar situation in the Electricity Department, the State appears to have chosen to give extension to an experienced",,,

person. It is not that the State has not given any reason whatsoever.Â In the affidavit, the work of the Respondent No.3 is commended.Â His involvement inÂ arbitration proceedings has been referred to.Â It is not possible for us to dissect",,,

and minutely analyse these reasons.Â Â TheÂ extension granted to Respondent No.3 is coming to an end on 31 July 2018.Â At this stage, if we quash and set aside the order of extension, there would be serious repercussions on the",,,

functioning of the Department.Â The State has placed on record an advertisement that has been issued on 14 June 2018, inviting applications for filling up the post of Chief Electrical Engineer and the last date is 30 June 2018.Â Keeping this",,,

position in mind, we do not find that interference in the order of extension up to 31 July 2018 is required and, that too at the behest of the Petitioner.Â",,,

34. It was urged by Mr. Lotlikar that the State will again arbitrarily grant extensionÂ which exercise will continueÂ and this will be done only to dole out favours to theÂ Respondent No.3. As on today, what is before us is an order of",,,

extension which ends on 31 July 2018. We have narrated the reasons why we are not inclined to interfere with the order of extension which is till 31 July 2018. We have noted and accepted the commitment on the part of the State that the",,,

procedure for filling up the post on regular basis is in process. Since the State is required to act in larger public interest, it is expected that the process would be completed expeditiously.Â We are not called upon to comment what would be the",,,

legality of further extension if granted to Respondent No.3 at this stage and, therefore, we do not comment on the same in this judgment.Â However, as reiterated by the Division Bench in the case of R.R. TripathiÂ that every action of the",,,

State in grant of extension cannot be arbitrary and must be in public interest. If an eventuality as the one referred to above occurs, its challenge will be considered with reference to the facts attendant at that time. As far as the present petition",,,

is concerned, the reasons given by the State for extension of Respondent No.3 till 31 July 2018 are enough to sustain the order.Â",,,

35. As a result of the discussion, we have to hold that the Petitioner is not entitled to the reliefs prayed for.Â The petition is dismissed. Rule is discharged.

No order as to costs.",,