

(1960) 03 AHC CK 0043

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 1861 of 1959

Mazhar Hasnain

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 31-03-1960

Acts Referred:

Constitution of India, 1950 — Article 226, 309, 311, 311(2)

Citation : AIR 1961 All 316

Hon'ble Judges : V.D. Bhargava, J

Bench : Single Bench

Advocate : S.C. Khare, for the Appellant; O.N. Mehrotra and Shambhu Prasad, Senior Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

V.D. Bhargava, J.—This is a petition under Article 220 of the Constitution filed by Mazhar Hasnain challenging an order of the District Judge, Faizabad.

2. According to the petitioner, he was appointed as Deputy Record Keeper in the civil court at Hardoi in October 1931. He worked there in different capacities and on 1-9-40, he was confirmed in Class III post in the scale of 70-4-90 as Munsarim Civil Judge's Court at Hardoi and Inter on he was confirmed in Class II post as the Central Nazir. Under an administrative order of the erstwhile Chief Judge of the Oudh Chief Court, passed in May 1946 the petitioner's services were transferred to the judgship of Faizabad from Hardoi and another person, Sri Krishna Chandra Srivastava was sent there.

The petitioner continued to work in that judge-ship which also included the district of Sultanpur. There he was working as Central Nazir. In 1950 the State Government decided to create a separate Judgship at Sultanpur and separated it from the Judgship of Faizabad. As a result of this a post of Sadar Munsarim was created in Sultanpur Judgship and the petitioner was transferred there by an order dated 27-4-1956 which was in the following terms :

"Sri Mazhar Hasnain is the senior most official in the Judgeship in the scale of Rs. 150-10-200. He is appointed Munsarim in the scale of Rs. 200-10-250."

3. It appears that there was one Iqbal Hasan, who was at that time working as Record Keeper in class II grade. He made a representation to the District Judge, Faizabad, that he was actually senior to the petitioner. The District Judge rejected the representation. Thereafter a representation was made on 21-8-1956, i.e. about a month later, to the Shite Government that it be declared that Iqbal Hasan was senior to the petitioner. That representation of Iqbal Hasan appears to have been allowed by the State Government and the State Government declared that Iqbal Hasan was senior to the petitioner and, therefore, directed that the order of 27-4-1956 appointing the petitioner should be modified and Iqbal Hasan being senior was to be posted as Munsarim, Sultanpur.

That order was communicated by the State Government to the District Judge of Faizabad, who accordingly passed an order on 20-5-1959 modifying the previous order passed by his predecessor on 27-4-1956 and appointing Iqbal Hasan Munsarim of the District Judge's Court at Sultanpur, and he directed that if Mazbar Hasnain wished to continue to remain on the staff of District Judge, Sultanpur he could remain there, as Iqbal Hasan was to retire after a short period and Mazhar Hasnain being the next senior official there, might be appointed as his successor. In case he wanted to come back to Faizabad he could do so and take over charge as record keeper there. Aggrieved by this order of the District Judge this petition has been filed.

4. A preliminary objection has been raised on behalf of the State Government that ordinarily cases of dismissal and termination of service or reduction in rank should be tried by means of a separate suit and not by means of a writ petition. In the case reported in Union of India (UOI) Vs. T.R. Varma, their Lordships laid down that it would be proper exercise of discretion if the petitioner were directed to file a suit in a case of dismissal or termination of services.

This observation will apply with greater force to the cases where there has been super session or reduction in rank. In this case actually the question is as to how much more amount he is entitled to, and that relief can really be granted only in a suit. Even if I declare today that the petitioner is entitled to remain as Munsarim at Sultanpur yet since he has not worked as Munsarim at Sultanpur I do not think that in a writ petition I can direct payment of arrears of his salary. That will not be within the writ jurisdiction of this Court and, in my opinion, the proper forum would be a civil court. The present remedy is now being chosen improperly by the petitioner in coming to this Court.

5. Learned counsel for the petitioner prays that since he does not wish to challenge any question of fact and this petition was filed some time back, the petition may be disposed of on merits,

6. So far as the question of seniority is concerned, it is a matter of an administrative nature depending on the Rules, which have been framed by the

Government under Article 309 of the Constitution. These Rules, as has been held by their Lordships of the Supreme Court as well as by this Court, have a binding effect and are not justifiable. In a recent case reported in *Krishna Lal Dalela Vs. Director of Education, U.P., Lucknow*, a Bench of this Court has said that relying on these Rules, the petitioner has no legal right to be selected or promoted to a particular post. They have relied on another decision of this Court reported in *Jagannath Prasad Vs. State of U.P. and Others*, , in which Hon. Mootham, J. (as he then was) had held that the Rules made under Article 309 of the Constitution are administrative rules and the contravention of their provisions will not confer upon the aggrieved official a cause of action.

7. Similar are the observations of their Lordships of the Privy Council in AIR 1937 31 (Privy Council) They have said that the rules there were framed u/s 96B of the Government of India Act, and have held that these rules do not give any Government official a right to enforce the privileges conferred upon them in a court of law.

8. Thus so far as the question of seniority is concerned, it is a matter which is not justifiable in a court of law, much less in a writ petition. Therefore for the purpose of this writ petition it is to be assumed that the decision of the State Government declaring Iqbal Hasan as senior is correct and we have to proceed on that basis.

9. Learned counsel for the petitioner argued that he had been appointed as a permanent Munsarim at Sultanpur and, therefore if he has been reverted back to any post lower in rank, it is a reduction in rank and it would attract the provisions of Art, 311 of the Constitution, and as he has not been given any opportunity or charge-sheet the order is an incorrect order,

10. The second ground taken by learned counsel for the petitioner is that so far as appointment of Munsarims is concerned, it is under the control of the District Judge. The petitioner being an employee of the District Judge, Sultanpur, the order reverting him back by the District Judge, Faizabad, is an incorrect order. It Has further been contended that it is not merely on the ground of seniority that a person is entitled to a higher post, and merely if Iqbal Hasan had been declared senior to the petitioner, that would not have been a ground for the District Judge to set aside the previous order. And lastly it has been contended that since the appointment of Munsarim. was within the powers of the District Judge, he has not exercised that power because he has reverted back the petitioner on an order from the State Government.

11. So far as applicability of Article 311 of the Constitution is concerned, in my opinion, it would not apply in the present case, as has been held by their Lordships of the Supreme Court in the case reported in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, , "A reduction in rank may be by way of punishment or it may be an innocuous thing", i.e., merely if it is reduction in rank it would not always amount to a punishment. In the same case their Lordships have laid

down :

"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 of 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 al-though in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty."

12. I am supported in my view that if a reduction in rank is not by way of punishment, it does not attract the provisions of Article 311, by a decision of the Madras High Court reported in *Devasahayam v. State of Madras* AIR 1958 Mad 53. It was held in that case :

"The reduction in rank contemplated by Article 311 is reduction as a punishment and where no punishment is involved that Article has no application."

It further held :

"Any variation in the order of seniority to the prejudice of an officer in the civil service does not give rise to a right whose violation could be remedied by invoking the jurisdiction of the Court under Article 226."

13. It cannot be said by any stretch of the language or by interpretation of the order of the District Judge that this modification has been by way of any punishment. His seniority has been determined and the order of the State Government makes it clear perfectly that he would be entitled to the post after Iqbal Hasan. Therefore, there has been no loss of seniority, no postponement or stoppage of promotion, and no slur put on his conduct and work, and this reduction is really not a reduction in rank at all. It is only maintenance of seniority according to which the appointment should have been made.

14. Learned counsel for the petitioner relied on the observations of their Lordships of the Supreme Court in *Parshotam Lal Dhingra Vs. Union of India* (UOI), to the effect that :

"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 of that rank."

The sole question that arises is : Was the petitioner entitled to the rank? If he had been sent and another person was senior who had not been appointed, the petitioner was not entitled to the rank and in fact he was appointed by mistake, and if that mistake has been corrected, it cannot be said that any right of the petitioner has been taken away from him. He has been placed at the place,

where he should have been, if there had been a proper interpretation as has been made by the State Government.

15. If this contention of the learned counsel is accepted that once a person is transferred on promotion to another place, thereafter he cannot be reverted back on representation made by some other person, then in that event, the right of representation will lose all its force. An appointment, where an appeal or revision is possible. Is always subject to the result of such appeal or revision. Hera Iqbal Hasan had made a representation about his seniority and if his representation has been allowed, the consequence of it would automatically be reversion of the petitioner and appointment of Iqbal Hasan to the post He has not been appointed on account of his being treated as junior.

16. Another question which may be taken into consideration is, that if there is any charge, which is levelled against an employee, naturally a charge-sheet is to be given to the employee against whom action is desired to be taken, and, in that event, it will be for the prosecution first to lead evidence about the charges, that are to be levelled against him and thereafter, there would be an opportunity for an explanation to be given by the person, who is charged.

There will also be cross-examination and leading of evidence on those facts. This procedure will not at all apply, where reduction in rank is not on the basis of a charge and, in my opinion, even, if we accept that this reduction in rank does come within the mischief of Article 311 then in that case the petitioner had had enough opportunity of representing his case. He had filed a representation before the State Government. The State Government considered that representation and there-after orders have been passed. Therefore, it cannot be said that final orders have been passed without hearing.

17. Article 311 does not prescribe any special method as to how opportunity would be given. So far as cases of dismissal or reduction in rank on barges are concerned, there have been decisions both by their Lordships of the Supreme Court and different Courts in India and they have laid down as to the exact procedure which has got to be followed. But in cases where reduction in rank is not by way of punishment, no procedure has been prescribed.

What has been mentioned is that only reasonable opportunity to show cause against the action should be given. It cannot be denied that when representation by Iqbal Hasan was made and the counter representation was made by the petitioner, he had no reasonable cause for showing that he was senior. Therefore, in my opinion, even if Article 311 applies, there has been enough opportunity given to the petitioner and he need not have any complaint on that score, if he has been declared junior to Iqbal Hasan.

18. The next question raised by learned counsel was that the District Judge of Faizabad had no jurisdiction. The order which is being challenged is not of the District Judge but of the State Government. The District Judge was acting actually as a post office. When the representation of Iqbal Hasan had been

allowed, the State Government could only direct the District Judge, Faizabad and no other District Judge to communicate the order and to modify the original order, because the original order was that of District Judge of Faizabad and not o? the District Judge of Sultanpur. Therefore, I do not think that that argument has any force.

19. It was contended that actually there was no appeal against the appointment, of Mazhar Hasnain therefore, the order of the State Government should not be deemed to be an order against the appointment of Mazhar Hasnain as Munsarim. When Iqbal Hasan filed the representation, it was for no other purpose except to get the senior most post, which was available at that time and the fact that the representation was also made soon after the appointment, clearly shows that the representation actually was on the dissatisfaction of Mazhar Hasnain's appointment as Munsarim. In my opinion the District Judge of Faizabad had a perfectly good jurisdiction, because it was the modification of his predecessor's order which was necessary and therefore, the order cannot be challenged on that score.

20. Coming to the argument of learned counsel for the petitioner that the appointment of the petitioner was according to the rules; as appointments to selection posts are made on the seniority cum-suitability basis and, therefore, merely the setting aside of the order of seniority should not have been enough For reverting back the petitioner to Faizabad from Sultanpur.

From the order of appointment it does not appear that any question of his suitability was considered for that post. It is true that in a selection post a person cannot claim to be promoted merely on the ground of seniority. But ordinarily when selection is to be made on the ground or seniority-cum-suitability, unless a contrary opinion is expressed about the work of the senior, he would be entitled to the post.

It is only when definitely a finding is arrived at by the authority that the work of the senior is not efficient and another person is found more suitable, that a junior would be entitled to be appointed in preference to the senior, That again is a matter which would not be justifiable in a writ petition. The order of appointment clearly shows that he had been appointed only on the ground of being the "senior most official". If he ceases to be the senior most official after the order of the State Government he would have no right to the post and, therefore, the order of his reversion was correct.

If the order of the reversion passed by the District Judge is based on seniority then there would be no question of his exercise of discretion or applying of mind. It was for the District Judge, if he found Iqbal Hasan to be incompetent, to refer the matter to the State Government. But he did not find Iqbal Hasan incompetent and he was bound to appoint him in the usual course as the senior most person.

21. Even for the sake of argument if it be accepted that the order of the District

Judge was without jurisdiction and he had passed the order illegally, it is not the business of this Court in writ jurisdiction to interfere in every trifling and minor irregularity. If Mazhar Hasnain is junior and Iqbal Hasan senior, the proper order has been passed, whether by the proper authority or not, and in proper manner or not. This Court would decline to interfere in its discretionary jurisdiction.

Often writ petitions are being filed in this Court on the ground of mere technicalities. But this Court as well as their Lordships of the Supreme Court have made it clear by different authorities that before a writ petition is filed in this Court, it should be established that those irregularities or illegalities have been instrumental in the passing of some wrong order which has materially and substantially affected the right of the petitioner. If it is not so, any amount of illegality or irregularity could not be challenged in this Court.

22. Accordingly, I see no force in this writ petition and dismiss it with costs.