

(1955) 07 GAU CK 0005
In the Gauhati High Court
Case No : Civil Rule No. 140 of 1954

Md. Tahir Majumdar

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 14-07-1955

Acts Referred:

Assam General Clauses Act, 1915 — Section 18, 21, 3
Constitution of India, 1950 — Article 226, 311

Citation : AIR 1956 Guw 12

Hon'ble Judges : Sarjoo Prasad, C.J; Ram Labhaya, J

Bench : Division Bench

Advocate : F.A. Ahmed and G.K. Talukdar, for the Appellant; D.N. Medhi, Sr. Govt. Advocate, for the Respondent

Judgement

Ram Labhaya, J.—This petition of Md. Tahir Majumdar under Article 226 of the Constitution of India is directed against an order of Mr. S.K. Mallick, Deputy Commissioner, Cachar, dated 1-3-1951 by which he directed that the petitioner be compulsorily retired. This order and his previous order suspending him are both challenged on the ground that he was not competent under the rules either to suspend the petitioner or to direct his compulsory retirement. Both orders are said to be without jurisdiction and therefore null and void. Suitable writs are prayed for in order that the order of retirement be not given effect to.

2. It may be stated at the outset that the learned Counsel for the petitioner has not tried to invoke the aid of Article 311 of the Constitution of India. He has not tried to show that the order directing compulsory retirement of the petitioner is an order of removal or dismissal within the meaning of these expressions which they carry in Article 311.

His case shortly stated is that quite apart from the provisions of Article 311 the Deputy Commissioner had no competency whatsoever for suspending or for directing the retirement of the petitioner under the statute or any ruler, that may have the force in law. The case thus is considerably narrowed down in scope. All

that has to be seen is whether the Deputy Commissioner had authority for passing the orders which he did.

3. The facts which bear on the contention raised may now be briefly stated. The petitioner was appointed Revenue Sheristadar, Cachar in 1948, after a fairly long term of service. He claims that the order appointing him was passed by the Government of Assam. He got two increments in the years 1949 and 1950. The last increment that he got was on 13-1-1950. On 18-1-1950, some five days after that he got a confidential letter from the Deputy Commissioner asking him to show cause why disciplinary action be not recommended against him on grounds stated in para 6 of the petition.

It is not necessary for the purposes of the present petition to reproduce them. The petitioner submitted his explanation on the same day. The Deputy Commissioner did not feel satisfied and on 20th January ordered his suspension. The petitioner represented to the Government against this order but he received no orders on his representation. On 22-8-1950 the Deputy Commissioner framed fresh charges against the petitioner and asked him to show cause why he should not be removed. The petitioner showed cause on 15-7-1950.

It was at this stage that the Deputy Commissioner proposed to the Government that departmental proceeding be initiated against the petitioner. The Government authorised the Additional Deputy Commissioner to conduct the departmental proceeding. It further authorised the Deputy Commissioner to dispose of the proceeding himself after receiving the report from the Additional Deputy Commissioner. The Additional Deputy Commissioner submitted his report to the Deputy Commissioner. The report was to the effect that all the charges excepting charge No. 6 which related to the delay in putting up certain files concerning recruitment of the temporary staff, were not substantiated:

In regard to charge No. 6(a), (b) and (c) it was found that the petitioner's responsibility so far as supervision of the staff under him was concerned, had not been properly discharged. Lack of proper supervision was what was found against him. He was exonerated from responsibility in regard to all other charges. The Deputy Commissioner; accepting the finding arrived at by the Additional Deputy Commissioner directed the compulsory retirement of the petitioner.

4. The statement in the counter-affidavit amplifies the position in regard to facts stated by the petitioner. It is brought out that before suspending the petitioner the Deputy Commissioner had telephonic communication with the Secretary to the Government in the Finance Department and had the approval of the Government for suspending the petitioner. It is also claimed that the appointment of the Revenue Sheristadar could be made by the Deputy Commissioner with the sanction of the Commissioner and as the post of the Commissioner was abolished on 1-4-1948, the appointment could be made by the Deputy Commissioner with the sanction of the Government.

On the relevant dates there was no Commissioner and the powers of the Commissioner were being exercised by the Government in the Finance Department. It is further affirmed that before placing the petitioner under suspension the Deputy Commissioner consulted the Secretary in the Finance Department over the telephone and in view of the gravity of the matter the Government accorded their approval to his suspension on the telephone. Further before departmental enquiry the Deputy Commissioner by his telegram dated 20-1-1950 sought the approval of the Government to the drawing up of the proceeding.

The approval of the Government was communicated to the Deputy Commissioner by the telegram of 30-1-1950. It would appear from the telegram of 20th January from the Deputy Commissioner to the Secretary, Government, Revenue Department that he informed the Government that he had placed the petitioner under suspension with reference to the telephonic conversation and he sought permission for drawing up and conducting the proceeding. The Government also referred to the telephonic conversation and confirmed that he could draw proceedings and also could dispose of the proceeding himself.

5. Mr. Ahmed's contention has been that approval of the Government for the suspension of the petitioner was not obtained before he was actually suspended. The documents on the record however do not leave any room for doubt that the Deputy Commissioner had no misgivings or doubts about his own competency in the matter. He had made previous investigation in the matter. He felt that the matter was important and could brook no delay.

He approached the Government on the telephone and after obtaining the approval of the Government suspended him and asked for further directions in the matter of the drawing up of the departmental proceeding. The Government accorded their sanction to the drawing up of proceeding by him and directed him to dispose of the case finally, himself. It has now to be seen whether the Deputy Commissioner had no authority either to suspend the petitioner or to direct his compulsory retirement.

6. Mr. Ahmed has relied on Appendix 12 of the Fundamental Rules and Assam Subsidiary Rules. This appendix gives the list of officers who are authorised to make certain appointments. According to entry No. 8 the Commissioner of Divisions is the authority who could appoint Revenue Sheristadars, and head clerks in the offices of the Deputy Commissioners. The entry here does not state that the Deputy Commissioner could make the appointment with the sanction of the Government. The power is given to the Commissioner.

It is common ground that at the relevant time there was no Commissioner in existence. The post had been abolished and the powers of the Commissioner were being exercised by the Govt. The contention then is that by virtue of this entry in Appendix 12 the Government alone had the power to appoint the Sheristadars. Since the rules do not specify any particular authority which could

dismiss him, Section 18, Assam General Clauses Act would come into play and the power at removal or dismissal also would vest in the Government.

He also infers from this that the power of suspension must also vest in the Government and relies in support of his contention on the express provisions contained in Section 18, which deal with both suspension and dismissal.

7. The answer to this argument is that the Fundamental Rules authorise the Government to delegate its powers. Rule 6 expressly provides that the Provincial Government may delegate any of its powers to any of its officers subject to any conditions which it may think fit to impose and to such extent as may be required for the convenient and efficient despatch of public business. The learned Government Advocate has relied on this provision.

He has conceded that the power of appointment and the power of dismissal including the power of suspension would vest in the Government, but he urges that in this case the power was delegated. The Deputy Commissioner did not do anything on his own initiative or responsibility. For every act he obtained previous approval and therefore all his acts are under the authority delegated to him expressly for the purposes of this case. He claims that the delegation of authority is abundantly proved by documentary evidence on the record.

8. Considering the communications that passed between the Deputy Commissioner and the Government we can have no doubt that the Deputy Commissioner was aware that he had no power to hold the enquiry himself. At any rate he was not sure that he had the powers and therefore approached the Government at every stage for permission to proceed in the matter and it is only under the authority of the Government that the enquiry was held and the impugned order of retirement was passed.

Delegation in point of fact is proved and the next question is whether the Government had this power of delegation. Mr. Ahmed relying on the provisions contained in the Public Servants (Inquiries) Act, 1850 argued that this delegation would militate against provisions contained in Sections 3 and 21 of the Act and therefore there was no valid delegation. The provisions contained in these sections would override the rules. The order of the Deputy Commissioner notwithstanding the approval or the permission given by the State Government would remain incompetent. Section 3 of the Act provides that,

the enquiry (under the Act) may be committed either to the Court, Board or other authority to which the person accused is subordinate, or to any other person or persons, to be specially appointed by the Government, commissioners for the purpose: notice of which commission shall be given to the person accused ten days at least before the beginning of the enquiry.

Provisions of Preamble to the Act have also been referred to. These are to the following effect:

Whereas it is expedient to amend the law for regulating inquiries into the

behaviour of public servants not removable (from their appointments) without the sanction of the Government, and to make the same uniform throughout India; it is enacted as follows:....

The Act is of the Central Legislature and it prescribes procedure for enquiries into the cases of officers who are not removable from their appointments without the sanction of the Government. Section 3 is an enabling section. The Government may hold the enquiry through Court or a board or an authority specially appointed for the purpose. Section 21 provides that

after the close of the inquiry the commissioners shall forthwith report to Government their proceedings under the commission and shall send with the record thereof their opinion upon each of the articles of charge separately, with such observations as they think fit on the whole case.

Mr. Ahmed's argument is that Section 3 allows the Government to direct an enquiry and u/s 21 , the enquiring authority can merely report to the Government. The power to decide the matter finally rests with the Government and cannot be given to the Commissioners under this Act. Therefore any provision in the Fundamental Rules which gives the authority to the Government to delegate its power of final disposal of the matter would conflict with Section 21 of the Act and to that extent the Act shall have validity and not the rule which is repugnant to the Act. This argument though plausible is not sound.

The Fundamental Rules have been framed by the State of Assam in the exercise of the powers vesting in it under the Government of India Act. It has provided for the delegation of its powers for administrative efficiency and needs. The Public Servants (Enquiries) Act does not provide for any such delegation. But as the Government acting under the provisions of the Government of India Act could delegate its authority there is no essential conflict between the rule relied on on the one side and the provisions of the Public Servants (Inquiries) Act, 1850 on the other.

It is true that the Act merely provides for an inquiry and report and not for final decision. But the Fundamental Rules which are complementary complete the picture in this respect by providing that the final decision may be given by any authority exercising delegated powers. The Government when framing the rules has given this power of delegation to itself and in doing so it has not exceeded its rule making power.

Mr. Ahmed has not argued that the rule permitting delegation is ultra vires of the Government or that it is constitutionally invalid. In the absence of any conflict between the two provisions we do not think that the delegation of authority in the case could be regarded as invalid. The authority of the Government having been validly delegated, the Deputy Commissioner was virtually exercising powers of the State Government when suspending and directing the compulsory retirement of the petitioner. His orders therefore are not without jurisdiction and they are not assailable on that basis.

9. This however is not the only reason why this petition should fail. Only two days after the order directing the compulsory retirement of the petitioner was passed, he addressed the Deputy Commissioner acknowledging the receipt of his order dated 1-3-1951 communicated to him by his letter dated 2-3-1951 and requested to be allowed to draw his arrear pay and allowances for the period of suspension less the amount already drawn by him as subsistence allowance. The test increment which fell due on 13-1-1951 was also claimed and, he stated further as follows:

I beg to add that I shall not prefer any appeal against the order passed by your honour.

This expression of his intention by him would not create any kind of estoppel against his coming to this Court. It would however indicate his attitude in the matter. His conduct in this respect is a relevant consideration when he comes for relief by way of extra-ordinary writ under Article 226. It may, considered with other circumstances or by itself disentitle him to the extraordinary relief without creating any estoppel. Not only did he state two days after the order that he had no intention of appealing against it, but later on in his representations and appeals to the Government he was merely praying for re-fixation of the pension which had been fixed on a certain basis.

The appeal to the Governor through the Revenue Minister contained the prayer that His Excellency will be pleased to call for the papers and to pass order that Article 62 of Assam Pension Manual, which is not applicable in the present case, should not stand as a bar to the re-fixation of the pension of the appellant, and the favour shown to the appellant as a special case by the Government in its letters No. PG. 5/50/41 dated 7.6.51 and PG. 5/50/56 dated 23.4.52 should not be taken away etc. Even in this appeal to the Governor the order of compulsory retirement was not challenged on any basis. The prayer was for the re-fixation of the pension. The grievance of the petitioner was that under the rules he was entitled to a slightly higher pension. The difference is of about Rs. 10/-.

The appeal was preferred on 18-4-1953. It was disallowed. From the order on appeal it appears, that the appellant had also tried to seek reemployment. This also involved acceptance of the order of compulsory retirement. The order of compulsory retirement was passed on 1-3-1951. The present petition was presented in August 1954. For about three years the order of compulsory retirement was not challenged.

The petitioner felt dissatisfied about the amount of pension allowed to him. As the amount of pension was not enhanced this petition was put in more than three years after the order of compulsory retirement was passed. For three years the petitioner was acquiescing in the order expressly and by necessary implication and was struggling to get a higher pension on the basis of compulsory retirement.

In these circumstances considering his conduct of acquiescence, his failure to

appeal from the order under the rules and also this delay which cannot be accounted for on any reasonable basis, we feel constrained to hold that no case has been made out for interference with the order by the use of any extraordinary writs under Article 226. The petition fails and is dismissed. The Rule is discharged.

Sarjoo Prosad, C.J.

10. I agree.