
(2002) 01 GAU CK 0057
In the Gauhati High Court
Case No : Writ Petition No. 4001 of 2001

Neelam Sarang

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 23-01-2002

Acts Referred:

Constitution of India, 1950 — Article 226, 309, 311

Citation : (2002) 1 GLT 622

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : D.K. Mishra, A. Dutta, I. Longjem, R. Agarwalla and S. Jahan, for the Appellant; P. Pathak, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Patnaik, J.—The Petitioner was appointed by the Secretary to the Governor of Mizoram as Officer on Special Duty (Law) in the Governor's Secretariat on ad hoc basis by a notification dated 10th August, 1990 and was thereafter allotted Quarter No. RBIV 3 within the Raj Bhawan Complex. By an advertisement dated 1.6.10.90 applications were invited for the post of Officer-on-Special Duty and the Petitioner amongst Ors. submitted applications for the said post. By an order dated 12.2.91 of the Secretary to the Governor the services of the Petitioner were regularised as Officer-on-Special Duty with effect from 11.2.91. An order was issued on 28.5.2001 by the Secretary to the Governor that consequent upon abolition of the temporary post of Officer-on-Special Duty (OSD) in the Governor's Secretariat, the services of the Petitioner who has been temporarily holding the post of Officer-on-Special Duty (OSD) was terminated and she was relieved of her duties with immediate effect. Along with the said order dated 28.5.2001, a Banker Cheque of Rs. 62,529/- only drawn in favour of the Petitioner, being equivalent three months' salary in lieu of termination notice, was enclosed. Aggrieved, the Petitioner has filed this writ petition under Article 226 of the Constitution with a prayer to quash the order of abolition of the post

of Officer-on-Special Duty and the consequent order dated 28.5.2001 terminating her service.

2. On 6.6.2001, the Court issued rule and passed an interim order staying the operation of the impugned order dated 28.5.2001 and further directed that the . Petitioner will not be evicted from the residential quarter that she has been occupying until further orders. The Respondent Nos. 1 and 2 then filed Misc. Case No. 888/2001 stating therein that by the order dated 28.5.2001 the services of the Petitioner were terminated with immediate effect and she was handed over a Cheque of Rs. 62,529/- on the same day and that the said order had already been given effect to and it will not be possible to reinstate her in the post pursuant to the interim order passed by the Court. In the said application the Respondents applied for modification of the said interim order dated 6.6.2001. On 1.8.2001 the said Misc. Case was disposed of with a direction that the Petitioner shall be allowed to stay in the said quarter in the premises of Raj Bhawan and the Petitioner may encash the Cheque for Rs. 62,529/-, but the encashment shall be without prejudice to the right of the Petitioner and that the main writ petition be listed for hearing.

3. At the hearing of the main writ petition, Mr. D.K. Mishra; learned Counsel for the Petitioner, relying on the averments in the writ petition submitted that on 24.5.2001 the Petitioner was asked by Capt Anupam Aide-de-Camp (Army) to vacate her Quarter within 2 days so that he may occupy the same as per the Governor's order and the Petitioner met the Governor of Mizoram, but she was told by the Governor that the order to vacate the Quarter could not be reversed and thereafter on 28.5.2001 the services of the Petitioner were terminated with immediate effect on the ground that the temporary post of Officer-on-Special Duty held by the Petitioner was abolished; Mr. Mishra submitted that the post of Officer-on-Special Duty was not a temporary post but a permanent post and that rules under the proviso to Article 309 of the Constitution of India for recruitment to the said post had been framed by notification dated 27.6.90. Mr. Mishra argued that it will be apparent from the sequence of events leading to the termination of the services of the Petitioner that the decision to abolish the post of Officer-on-Special Duty was taken only as a cloak or pretence to remove the Petitioner from service and not in good faith. He submitted that the post of Officer-on-Special Duty had been created way back in 1990 and was permanent in nature. He argued that there has been no assessment by experts whether the Petitioner was required and the decision to abolish the post suddenly had been taken to get rid of the services of the Petitioner because the Petitioner did not vacate the Quarter in Raj Bhawan. The entire action of the Respondents, according to Mr. Mishra, was vindictive and arbitrary and the impugned orders abolishing the post of Officer-on-Special Duty and terminating the services of the Petitioner who was holding the said post are liable to be quashed by the Court. Mr. Mishra cited the decisions of the Supreme Court in *M. Ramanatha Pillai Vs. The State of Kerala and Another*, *State of Haryana Vs. Shri Des Raj Sangar and Another*, and *K. Rajendran and Others Vs. State of Tamil Nadu and Others*, in

support of his submission that an order abolishing a post and the consequent order terminating the services of the person holding the post can be interfered by the Court if the order abolishing the post has been made arbitrarily, not in good faith, or as a cloak to remove the person holding the post.

4. Mr. P. Pathak, learned Advocate General appearing for the State of Mizoram, on the other hand relied on the averments in para 5 of the affidavit-in-opposition filed on behalf of Respondent Nos. 1, 2 and 3 and submitted that the staff strength of the Raj Bhawan was reviewed and it was found that the post of Officer-on-Special Duty was not required and thereafter action was taken with the concurrence of the Finance Department for abolition of the post of Officer-on-Special Duty and the services of the Petitioner who had been temporarily holding the said post of Officer-on-Special Duty were terminated and she was released from her duties with immediate effect. Mr. Pathak cited the decision of the Supreme Court in Joyachan M. Sebastian Vs. Director General and Others, in support of the proposition that on abolition of the post, the holder of the post has no right to continue on the post. He also relied on the decision of the Supreme Court in Mahesh Kumar Mudgil Vs. State of U.P. and Others, in which it has been held that a post automatically is abolished when there is no order of extension or when financial sanction lapses after which the user of the post has no right to hold the post. Mr. Pathak also relied on the decision of the Supreme Court in Rajendra and Others Vs. State of Rajasthan and Others, wherein the Supreme Court held that the decision taken for abolition of posts keeping in view availability of funds was bonafide and the termination of the services of the person holding the posts so abolished is not illegal. Mr. Pathak submitted that in any case the Petitioner was not selected by the D.P.C. for appointment contrary to the rules framed under the proviso to Article 309 of the Constitution.

5. In view of the aforesaid contentions of the learned Counsel for the parties, the first question to be decided in this case is whether the post of Officer-on-Special Duty held by the Petitioner was a temporary or a permanent post. F.R. 9(22) and F.R.9(30) define permanent post and temporary post as follows:

Permanent post means a post carrying a definite rate of pay sanctioned without limit of time.

Temporary post means a post carrying a definite rate of pay sanctioned for a limited time.

Thus, if the post of Officer-on-Special Duty held by the Petitioner was sanctioned without limit of time, it would be a permanent post but if it was sanctioned for a limited time it would be a temporary post. It appears from the File No. A. 11013/2/88.GHH that on 7.3.1990 one post of Officer-on-Special Duty in the rank of Deputy Secretary in the scale of Rs. 3700-5000/- was created in the Governor Secretariat for the period upto 28.2.1991. The proposal for creation of the said post on 9.2.1990 and the concurrence of the Finance Department at Page N/7 in the said file are extracted herein below:

It is a long-felt necessity to have a responsible officer for coordinating the press matters, public relations and information side in the Governor's Sectt. It has also been desired by H.E. the Governor that a Senior Officer should be made available for such important matters.

Therefore, it is proposed to create one post of Officer-on-Special Duty in the rank of Deputy Secretary in the scale of Rs. 3700-5000/- in the Governor's Sectt. by keeping in abeyance the post of Special "Officer created vide Order No. GSM/E/3/87 dt. 22.5.87 in the Household and last retained vide No. A-11011/1/88-GS dtd. 27.1.89, and also one permanent post of UDC created for Governor's Sectt.

There will be a saving of Rs. 5000/- approx. by keeping the above post in abeyance which will be diverted to meet the expenses towards pay and allowances of the post of one Officer-on-Special Duty.

If approved, the file may be endorsed to Finance Deptt. for their concurrence please.

Jt. Secy to Governor 9/2/90

Finance Deptt. (Control)

U.O. No. FIN 2325/89

9.2.90

Finance concur to the proposal for creation of one post of Officer-on-Special Duty in the rank of pay of Rs. 3700-5000/- p.m. for a period upto 28.12.1991.

For kind information and approval.

Deputy Secretary Govt. of Mizoram Finance Department.

Thus initially the post of Officer-on-Special Duty was created for a period upto 28.2.91. Thereafter by a notification dated 27th June, 1990 Rules were framed for recruitment to the aforesaid post of Officer-on-Special Duty under the proviso to Article 309 and the Petitioner was appointed as Officer-on-Special Duty on ad-hoc basis on 10.8.1990 and a selection process was initiated and she was regularised in service in the said post with effect from 11.2.91. Thereafter the Finance Department granted approval for retention of the post of Officer-on-Special Duty upto 28.2.94 as would be evident from the note of the Under Secretary, Finance Department, Govt. of Mizoram on 14.6.93 at page 15/N of the aforesaid file extracted herein below:

The Department is informed that the post of O.S.D. has all along been retained along with other posts in the Governor's Secretariat upto 28.2.94 under Finance Department's U.O. No. indicated below:

1. U.O. No. FIN 2464/90 Period 31.3.91 1.3.91-29.2.92

2. U.O. No. FIN 2715/91 1.3.92-28.2.93 28.1.92

3. U.O. No. FIN 2819/92 1.3.93-28.2.94 1.2.93

Sd/- 14.6.93 Under Secretary Finance Department Govt. of Mizoram.

The aforesaid File No. A. 11013/2/88-GHH also discloses that on 28.5.2001 a proposal for abolition of the post of Officer-on-Special Duty was submitted by the Governor Secretariat to the Finance Department and the Finance Department concurred with the said proposal and the post was abolished. The order that were passed in the file both by the Governor Secretariat and by the Finance Department on 28.5.2001 are at Pages N/17 and N/18 in the aforesaid file and are to the following effect:

He, the Governor desired for a review of continuing need for retaining the post of OSD (Officer-on-Special Duty) which was created on 7.3.90. In fact the post was created for ad-hoc appointment as there was acute shortage of officer in the Governor's Secretariat. There was no incumbent to the post of Jt. Secretary in Raj Bhawan at that time.

In Raj Bhawan we have now a regular incumbent to the post of Jt. Secretary who is assisting Secretary to Governor in the matter of administration. Moreover, there are other supporting staff and officers and therefore there is the compelling need for continuing with her post of O.S.D.

He, the Governor may, however, kindly decide as to the action to be taken in the matter. For any decision however, a reference will have to be made to Government in the F.D. for their concurrence.

Submitted for favour of kind orders.

Sd/- 28.5.2001

This post should be
abolished

Sd/-

28.5.2001

Orders of He, the Governor pre-page submitted to F.D. for kind concurrence.

Sd/- 28.5.2001

I.D. No. FIN(E) 132/01 dated 28.5.2001

Finance Department concurs to the proposal for abolition of 1 (one) temporary post of Officer-on-Special Duty in the Governor's Secretariat carrying a scale of pay of Rs. 3700-5000/- (pre-revised) with immediate effect.

Sd/- Joint Secretary Fiance Department(E)

Secretary to the Governor.

In pursuance to order of He, prepare Finance Department concurred to the proposal for abolition of the post of O.S.D.

Order may issue abolishing the post and as the post will be abolishing he may kindly decide about Smt Neelam Sarang who has been holding the post.

For kind orders. Sd/- 28.5.2001

He

Post stands abolished. Her services should be terminated today giving required notice pay and relieve orders should be issued tomorrow. Both orders should be served simultaneously. Sd/-28.5.2001.

Order of He, the Governor pre-page. Two draft orders DFAI and DFAII are placed below for kind approval.

These drafts order has been seen by Law Secretary and also endorsed his slight modifications.

Submitted

Sd/- 28.5.2001 Secy to Governor

He, the Governor

approved

Sd/-

28.5.2001.

The aforesaid file produced before the Court thus shows that the post of Officer-on-Special Duty was sanctioned for a limited time upto 28.2.94 and there is nothing to show whether it was sanctioned for any period after 28.2.94. The post of Officer-on-Special Duty, therefore, was sanctioned for a limited time and was a temporary post. The fact that rules were framed for recruitment to the said post of Officer-on-Special Duty under the proviso to Article 309 of the Constitution and the fact that the Petitioner was regularised in the post of Officer-on-Special Duty after selection will not alter such temporary post to a permanent post.

6. In *Mahesh Kumar Mudgil v. State of U.P.* (supra) a similar question arose as to whether the post of Officer-on-Special Duty (Special Component Plan) was temporary. The Supreme Court in that case found that the post of Officer-on-Special Duty was temporary and extended from time to time by various Govt. orders and there was no Govt. order further extending this post or any sanction order from the Finance Department as required under the rules of business and the Supreme Court held that in the absence of any order of extension or any financial sanction the post lapsed of its own. In the present case, also as indicated above, the retention of the post of Officer-on-Special Duty in the Governor's Secretariat held by the Petitioner had been sanctioned by the Finance

Department for a period upto 28.2.94 and there was no material to show that the post had the sanction from the Finance Department for any period after 28.2.94. Nonetheless the Petitioner continued to have held the post even after 28.2.94. Assuming that the temporary post of Officer-on-Special Duty held by the Petitioner had continued even after 28.2.94, the aforesaid file produced before the Court shows that on 28.5.2001 the post was abolished with the concurrence of the Finance Department.

7. The next question to be decided in this case is whether the abolition of the post of Officer-on-Special Duty held by the Petitioner was in good faith or was as a cloak or pretence to remove the Petitioner from service. The Petitioner has alleged in the writ petition that the post of Officer-on-Special Duty was abolished with a view to remove the Petitioner from service as the Petitioner did not vacate her quarter at the Raj Bhawan. But the Respondent Nos. 1, 2 and 3 have stated in paragraph 5 of the counter affidavit that the Governor reviewed the staff strength of the Raj Bhawan and found that the post of Officer-on-Special Duty was not required and action was taken with the concurrence of the Finance Department for abolition of the post and consequent upon abolition of the temporary post of services of the Petitioner were terminated. The file not dated 9.2.90 extracted above would show that the post of Officer-on-Special Duty in the Governor Secretariat was proposed as the Governor felt the necessity to have to a responsible officer for coordinating the press matters, public relations and information side in the Governor's Secretariat and the Governor desired that a senior officer should be made available for such important matters. Pursuant to the said proposal the post of Officer-on-Special Duty was created with the concurrence of the Finance Department on 7.3.90. But the file notes dated 28.5.2001 extracted above would show that as the Raj Bhawan had now a regular incumbent to the post of Joint Secretary who was assisting the Secretary to the Governor in the matter of administration and there were other Subordinate staff and officers it was felt that there was no compelling need for continuing the post of Officer-on-Special Duty and for this reason the Governor took the view that the post should be abolished. From these facts available from the records produced before the Court, it is not possible for the Court to hold that abolition of the post of Officer-on-Special Duty in the Governor Secretariat was not in good faith or was only with a view to remove the Petitioner from service.

8. In *State of Haryana v. Das-Raj Sangar* (supra) the Supreme Court held:

Whether a post should be retained or abolished is essentially a matter for the Government to decide. As long as such decision of the Government is taken in good faith, the same cannot be set aside by the Court. It is not open to the Court to go behind the wisdom of the decision and substitute its own opinion for that of the Government on the point as to whether a post should or should not be abolished. The decision to abolish the post should however as already mentioned, be taken in good faith and be not used as a cloak or pretence to

terminate the services of a person holding that post. In case it is found on consideration of the facts of a case that the abolition of the post was only a device to terminate the services of an employee, the abolition of the post would suffer from a serious infirmity and would be liable to be set aside. The termination of a post in good faith and the consequent termination of the services of the incumbent of that post would not attract Article 311.

It will be clear from the aforesaid decision of the Supreme Court that as long as the decision to abolish the post is taken by the authority in good faith, the said decision cannot be set aside by the Court and it is not open for the Court to go behind the wisdom of the decision and substitute its own opinion for that of the authority on the point as to whether the post should or should not be abolished. In the present case, it was the Governor who on 9.2.1990 felt the necessity of a post of Officer-on-Special Duty in the Governor's Secretariat and again it was the Governor who on 28.5.2001 felt that there is no necessity to continue such a post when now a regular incumbent to the post of Joint Secretary was assisting the Secretary to the Governor in the matter of administration and there were other Subordinate staff and officers also. At no stage either at the time of creation of the post of Officer-on-Special Duty or at the time of continuing the said post upto 28.5.2001 by expert's advice was taken as to whether or not the post of Officer-on-Special Duty should be created or continued and for this reason it is difficult to accept the submission of Mr. Mishra, learned Counsel for the Petitioner that the decision to abolish the post of Officer-on-Special Duty held by the Petitioner without any advice of an expert was not in good faith.

9. Once a post stood abolished, the person who holds the post has no right to continue in the said post. This position of law has been laid down by the Supreme Court in *M. Ramanatha Pillai v. State of Kerala* (supra) and has been reiterated by the Supreme Court in *State of Haryana-V-Das Raj Sangar*, *K. Rajendran v. State of Tamil Nadu*, *Joya Chan M. Sebastian v. Director General*, *Mahesh Kumar Mudgil v. State of U.P.* and *Rajendra v. State of Rajasthan* (supra). Once the temporary post of Officer-on-Special Duty held by the Petitioner was abolished on 28.5.2001, the Petitioner had no right to continue in the said post and the impugned order dated 28.5.2001 terminating the services of the Petitioner which was only a consequence to the abolition of the post cannot be interfered by the Court.

10. For the aforesaid reasons, the writ petition is dismissed and the interim order allowing the Petitioner to stay in the quarter in the premises of Raj Bhawan is vacated. Considering, however, the facts and circumstances of the case, the parties shall bear their own costs.