

(1960) 04 PAT CK 0008
In the Patna High Court
Case No : Title Suit No. 1 of 1955

P.N. Sarkar

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 01-04-1960

Acts Referred:

Constitution of India, 1950 — Article 299, 309, 310, 311

Citation : AIR 1960 Patna 366 : (1960) 1 FLR 138 : (1961) 1 LLJ 196

Hon'ble Judges : V. Ramaswami, C.J.;Kanhaiya Singh, J

Bench : Division Bench

Advocate : K.D. Chatterji, S.K. Sarkar, Chunilall and Leela Seth, for the Appellant; Government Advocate and Government Pleader, for the Respondent

Judgement

Ramaswami, C.J.—The case of the plaintiff is that in March, 1945, he was appointed by the Court of Wards as General Manager of Gidhaur and Dhamna Wards" Estates in the district of Monghyr on a graded salary of Rs. 400/- to Rs. 500/- per month. The appointment was made by the Board of Revenue with the sanction of the Provincial Government of Bihar. The order of the Board of Revenue, which is addressed to the Commissioner of Bhagalpur Division, reads as follows :

"With reference to Mr. B. C. Mukherji's letter No. 8W, dated the 3rd January 1945, I am directed to say that with the previous approval of the Provincial Government conveyed in the Revenue Department letter No. 1074R, dated the 23rd February, 1945, a copy of which is enclosed, the Board appoints Babu Prithwis Narayan Sarkar, General Manager, Wards and Encumbered Estates, Ranchi. as General Manager for the Gidhaur and Dhamna Wards Estate, Monghyr, in the scale of Rs. 400-25/2-500 plus (sic) quarters and the use of an estate car for official purposes subject to the orders of the Government contained in the Revenue Department's letter No. 529 R. T. dated the 12th October, 1944, a copy of which was forwarded to you with the board's Memo. No. 20-123-4. dated the 26th October, 1944. The appointment will be on a temporary basis."

It appears that an inquiry was made by the Divisional Commissioner of Bhagalpur with regard to certain allegations of misconduct against the plaintiff. On the 20th November, 1950, the Board of Revenue dismissed the plaintiff from the service of the Court of Wards. The order of the Board of Revenue is contained in annexure 1 of the plaint and reads as follows :

"The Board has carefully considered your findings on the aforementioned proceedings. If the managers of the respective estates had simply done every thing after obtaining previous approval of their superior officers as laid down under the departmental rules, and had not put their fingers in for some ulterior gain, the whole episode would not have looked so fishy as it apparently is."

2. As to the case of Mr. P. N. Sarkar, even if your findings are taken in toto and the benefit of doubt given to him on charge of personal gain is not questioned, the charges proved are serious that the Board agrees with you that he should not be retained in the service of the estate. The Board, therefore, with the approval of Government directs that Mr. P. N. Sarkar may be dismissed from the service of the Court of Wards."

The case of the plaintiff is that the order of the Board of Revenue dated the 13th November, 1950, dismissing the plaintiff from the service of the Court of Wards is ultra vires and illegal as the second notice contemplated by Article 311 of the Constitution was not given to the plaintiff. It is alleged that the plaintiff was entitled to a notice to show cause against the proposed punishment of dismissal after the decision had been taken by the Board of Revenue as to the punishment to be inflicted.

It is alleged that this opportunity was never given to the plaintiff and so the dismissal of the plaintiff was illegal and ultra vires. The plaintiff has accordingly prayed for a declaration that the order of dismissal is illegal, null and void and "the plaintiff be deemed to be still holding the aforesaid post of General Manager of Gidhaur and Dhamna estate under the Court of Wards."

2. The defendants contested the suit on the ground that the plaintiff was not holding a civil post under the Government of Bihar, but that he was an employee of defendant No. 3, Maharaja Bahadur Pratap Singh, before the date of dismissal, and the salary of the plaintiff used to be paid out of the income of the Gidhaur Wards Estate. It is contended on behalf of the defendants that the provisions of Article 311 of the Constitution are not applicable to the plaintiff and he was not entitled to a second notice for showing cause against the proposed punishment. It was also submitted on behalf of the defendants that the departmental inquiry was conducted with fairness and fullest opportunity was given to the plaintiff to take part in the inquiry and to vindicate his conduct. It was submitted that the charges against the plaintiff were fully established by the evidence adduced at the inquiry and the Board of Revenue rightly came to the conclusion that in the interest of administration it was not desirable to allow the plaintiff to continue as the Manager of the Gidhaur Wards Estate.

3. The following issues were framed by the learned Subordinate Judge :

"1. Is the suit maintainable as framed?

2. Is there any cause of action for the suit?

3. Is the suit barred under Order 7, Rule 11 of the Civil Procedure Code?

4. Did the plaintiff hold appointment under the Board of Revenue as Court of Wards and as such is he entitled to all the privileges and rights enjoyed by a member of a Civil Service under the State of Bihar?

5. Is the order of dismissal passed against the plaintiff wrongful and void?

6. Is the judgment of Mr. K. Raman bad in law or in facts?

7. Is the plaintiff entitled to a notice under Article 311(2) of the Constitution of India?

8. to what relief, if any, is the plaintiff entitled? "

When the suit was taken up for hearing, learned counsel for the plaintiff said that he would press only issues 4 and 7 and that he would not press the other issues. Learned counsel also said that he would not adduce any evidence in this case since it was admitted on behalf of the defendants that the second notice contemplated by Article 311 of the Constitution was not given to the plaintiff before the order of dismissal was passed.

4. It is necessary to state that when the suit was taken up for hearing a petition was filed on behalf of the defendant No. 3 saying that his name may be expunged from the suit as the estates of Gidhaur and Dhamna have been notified under the Bihar Land Reforms Act and the estates have ceased to exist under the Court of Wards. It was also alleged that defendant No. 3 has attained majority and the estates have been released from the management of the Court of Wards. Counsel on behalf of the plaintiff said that he had no objection if the name of defendant No. 3 was struck off from the category of defendants. The prayer of defendant No. 3 was accordingly allowed and his name was struck off from the plaint.

5. The sole question presented for determination in this case is whether the plaintiff was holding a civil post under the State of Bihar within the meaning of Article 311 of the Constitution and whether he was entitled to a notice in terms of that Article before the order of dismissal was passed by the Board of Revenue. On behalf of the defendants the learned Government Advocate submitted that the plaintiff was a statutory agent of the Court of Wards and that he was not holding any Civil post under the State Government. It was pointed out that Section 40 of Act IX of 1879 imposed a duty upon the General Manager to

"manage the property committed to him diligently and faithfully for the benefit of the proprietor and to act in every respect to the best of his judgment for the ward's interest as if the property were his own."

Section 41 deals with the specific duties of the Manager. The section also states that the Manager shall be entitled to such allowance to be paid out of the property, as the Court of Wards may think fit for his care and pains in the execution of his office. The section further states that the Manager shall be responsible for any loss occasioned to the property by his wilful default or gross negligence. It was pointed out by the Government Advocate that the plaintiff was paid out of the income of estate taken by the management of the Court of Wards and that the salary of the plaintiff was not paid out of the Government revenue.

It was contended that the plaintiff :as the General Manager of the Court of Wards had statutory duties and statutory powers and that his legal position was more like that of a statutory agent of the ward than of a Government servant. The Government Advocate, therefore, stressed the argument that the provisions of Article 311 of the Constitution were not applicable to the case of the plaintiff.

6. I do not accept the argument of the Government Advocate as correct. It is true that the plaintiff had to perform statutory duties and that he had statutory powers under Ss. 40 and 41 of Act IX of 1879. It does not, however, necessarily follow that the plaintiff was not holding a Civil post under the State Government within the meaning of Article 311 of the Constitution. On the contrary the appointment of General Manager is made by the Board of Revenue under Act IX of 1879 with the sanction of the State Government. Section 20 of Act IX of 1879 states that the Court of Wards may appoint one or more Managers for the property of any ward and one or more guardians for the care of the person of any ward under the charge of the Court and may control and remove any Manager or guardian so appointed. Section 5 of the statute states that "the Board of Revenue shall be the Court of Wards for the territories to which this Act extends."

It is manifest that the Board of Revenue is not a statutory body with a distinct legal personality independent of the Government. On the contrary, the Board of Revenue is nothing but a name for a body of Civil servants under the State Government. This legal position is made clear by a brief examination of the history of legislation on this topic :

"The first Board of Revenue was established by the order of the Court of Directors of the East India Company in 1771. It consisted of the Governor and Members of the Council and an Accountant-General with assistants and was located at Calcutta. That body was succeeded by a Committee of Revenue under whom there- were provincial Councils stationed at Burdwan, Murshida-bad, Patna, Dinajpur and Dacca. In 1781 the Provincial Councils were abolished and their duties were transferred to the Committee of Revenue which had been reorganised and now consisted of four covenanted servants of the Company. In 1786 this Committee of Revenue was abolished and a Board of Revenue was again established.

This Board consisted of a number of Government servants whose duties were

superintendence and control over subordinate officers and rules for their guidance were incorporated in Regulation II of 1793. By Regulation III. of 1822 three such Boards of Revenue for the Lower, Central and Western Provinces were respectively established, and the Board of Revenue for the Lower Provinces, within which fell the present province of Bihar and Orissa, consisted of such number of members as the Governor-General in Council might from time to time appoint. In 1829 by Regulation I of that year, Commissioners were vested, with the powers of the Board subject to certain modifications but were placed under the instructions and control of a Sadar or Chief Board of Revenue.

Section 4 of that Regulation prescribed that Commissioners and the Sadar Board were to be guided by the orders of the Governor-General in Council who was empowered to fix the stations at which they should reside when not employed on duties of circuit. By Act XLIV of 1850 the Board of Revenue in the Customs, Salt and the Opium Departments, which had been constituted by regulation 4 of 1819 was merged in the Sadar Board of Revenue which has henceforth to be styled as the Board of Revenue for the Lower Provinces of the Presidency at Fort William in Bengal.

Finally upon the partition of Bengal in 1912 and the creation of the province of Bihar and Orissa, the legislature of this province passed Act I of 1913 constituting a Board of Revenue for Bihar and Orissa, and by Section 5 of the Act all references to the Board of Revenue constituted under the Board of Revenue Regulation III of 1882 or the Bengal Revenue Commissioners Regulation I of 1829 or to the Boards referred to in the Bengal Board of Revenue Act of 1850 were to be construed as reference to the Board as reconstituted by the Bihar and Orissa Act." Hakim Jan v. Muhammad Hussain, 2 Hammond's Indian Election Petns. 94 at p. 100.

My concluded opinion, therefore, is that the plaintiff was holding a civil post under the State of Bihar within the meaning of Article 311 of the Constitution and that he was entitled to receive notice in terms of this Article before the order of dismissal was passed by the Board of Revenue.

7. It was contended by the Government Advocate that even if the plaintiff was assumed to be a Government servant, the provisions of Article 311 of the Constitution would not be applicable because there was no formal contract executed by the plaintiff as required by Section 175(3) of the Government of India Act, corresponding to Article 299 of the Constitution. It was argued by the Government Advocate that the appointment of the plaintiff was, therefore, invalid and the provisions of Article 311 of the Constitution would not be attracted.

It was submitted that the contract executed by the plaintiff was not expressed to be made in the name of the Governor of the State, nor was it executed by some one authorised by the Governor of the State in this behalf. It was argued that the plaintiff had no proper or binding contract of service with the defendants and the provisions of Article 311 of the Constitution would not, therefore, be applicable. I

do not accept this argument as correct. I do not consider that Section 175(3) of the Government of India Act which corresponds to Article 299 of the Constitution, applies to a case of appointment of Government servants.

I do not consider that the employment of a Government servant requires a formal document in writing as prescribed by Article 299 of the Constitution. The reason is that the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. It is true that the origin of Government service is contractual. There is an offer and acceptance in every case.

But once appointed the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. The important point to be noticed is that the emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is also important to notice that the tenure of the office is terminable at the pleasure of the President or the Governor of the State under Article 310 of the Constitution, corresponding to Section 240 of the Government of India Act. It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Article 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant.

The legal relationship is something entirely different, something analogous to status. The conception of status is that of a condition imposed by law and not by contract of the parties. It is much more than a mere contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. The duties and obligations of status are, therefore, fixed and determined by general rules of law quite independent of the will of the person affected, and that person cannot also by his own act or will modify his obligations and duties of his status. The distinction between contract and status has very well been pointed out by Viscount Halldane in *Salvesen v. Administrator of Austrian Property* 1927 AC 641 as follows :

"If this was a judgment determining the status of the supposed husband and wife it may well be that it should be regarded as having been binding on third parties as having been a judgment in rem. For what does status mean in this connection? Something more than a mere contractual relation between the parties to the contract of marriage. Status may result from such a contractual relationship, but only when the contract has passed into something which Private International Law recognises as having been superadded to it by the authority of the State, something which the jurisprudence of that State under its law imposes

when within its boundaries the ceremony has taken place. This judicial result is more than any mere outcome of the agreement inter se to many. It is due to a result which concerns the public generally, and which the State where the ceremony took place superadds; something which may or may not be capable of being got rid of subsequently before a competent public authority, but which meantime carries with it rights and obligations as regards the general community until so got rid of."

8. In the next place I think that the expression "contract" in Article 299 of the Constitution applies only to commercial contracts and not to contracts of employment of Government servants. It is a well known fact that there is no formal document executed in the case of Government servants, except in the case of covenanted servants and in a very small number of cases where there is employment on special terms. Usually Government service starts with nothing more than a letter of appointment, and except in the case of minority of Government servants there is no formal contract. After appointment the name of the employee is included in the Civil list and in the Case of certain officers the appointments are also notified in the State Gazette or in the India Gazette.

The salary of the Government servant is paid out of the consolidated fund. This state of affairs has been existing since the Government of India was taken over by the British Crown and this state of affairs continued when the Government of India Act, 1939, was enacted by Parliament and also when the Constitution was framed by the Indian Constituent Assembly. It is, therefore, necessary to interpret Section 175(3) of the Government of India Act and Article 299 of the Constitution in the historic context and setting of this state of affairs.

I do not think that it Was the intention at Parliament or of the constitution makers that the majority of the Government servants employed by the Union and State Governments should forfeit the protection guaranteed under Article 311 of the Constitution and that a formal document of contract should be executed in each case in accordance with the provisions of Article 299 of the Constitution or Section 175(3) of the Government of India Act. My conclusion, therefore, is that the expression "contract" in Article 299 of the Constitution and in Section 175(3) of the Government of India Act must be given a restricted meaning so as to exclude the case of Government servants whose employment though originating in contract is regulated after appointment by statutory rules and regulations, and not by contract. This view is supported by the observation of Vivian Bose, J. who delivered the dissenting judgment in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, . At. page 50 of the report the learned Judge observed as follows :

"The word "contract" is used in Article 310(2) but as these "contracts" are as much subject to "pleasure" as any other engagement of service (except) as otherwise provided by the Constitution), they are not contracts in the usual sense of the term; nor are the conditions of service that apply to Government servants who do not serve under a special "contract". A contract that can be

determined at will despite an, express condition to the contrary (and that is what Article 310(2) contemplates) is not a contract as usually understood; nor are conditions of service that can be unilaterally varied without the consent of the other contracting party and even behind his back. But they are convenient terms to convey a thought and that is the sense in which "contract" is used in Article 310(2) and the sense in which it has been used in some Privy Council rulings.

Now these "conditions of service" (and of course special "contracts" as well) confer "rights" and though the conditions can be varied unilaterally because of the "pleasure", they cannot be ignored long as they are in force; and if a dismissal, or removal or reduction in rank infringes one of these rights" then, in my judgment Article 311 is attracted."

In support of the opposite view point the learned Government Advocate referred to the decision of the Bombay High Court in *Krishnaji v, Secretary of State*. AIR 1937 Bam 449 and to the decision of the Calcutta High Court in *Subodh Ranjan Vs. Major N.A. O'Callaghan and Another*, . For the reasons already given I differ with great respect from the view taken in these two cases. I hold accordingly that the plaintiff was holding a civil post under the State of Bihar within the meaning of Article 311 of the Constitution and that he was entitled to a notice in terms of that Article before the order of dismissal was passed by the Board of Revenue.

In view of the admitted position that notice was not given to the plaintiff to show cause against the proposed punishment, it must be held that the order of the Board of Revenue dated the 13th November, 1950, dismissing the plaintiff from the service of the Court of Wards is ultra vires and illegal.

9. It was, however, contended by the Government Advocate on behalf of the defendants that the plaintiff is not entitled to a declaratory decree in this case, because of the provisions of Section 42 of the Specific Relief Act. It was pointed out that the Office of General Manager ceased to exist when the Court of Wards released the estate to defendant No. 3, Maharaja Bahadur Pratap Singh, on his attaining the age of majority. An application to this effect was made by defendant No. 3 on the 13th February 1955.

It is also not disputed that the estates of Gidhaur and Dhamna were notified under the Bihar Land Reforms Act and title to these estates has vested in the State of Bihar. A petition was filed on the 29th June, 1954, on behalf of defendant No. 3 to this effect that it was submitted by the Government Advocate that the suit had become in-fructuous on this account. It is also not disputed that the plaintiff has reached the age of 55 years, which is the age of superannuation, and it is, therefore, not possible for the Court to give a declaration that "the plaintiff is still holding the post of General Manager of Gidhaur and Dhamna Estates under the Court of Wards."

It was, however, submitted on behalf of the plaintiff that a declaration could be granted that the dismissal of the plaintiff was illegal and ultra vires and if such a

declaration was granted the plaintiff would not be debarred from seeking other employment under the Government. In paragraph 11 of his affidavit dated 2nd February 1960, the plaintiff has said that he had applied in February, 1951, to the High Court for permission to resume practice at the Bar, and after considering all the charges levelled against him the High Court unconditionally granted him permission to practise at Purulia.

In paragraph 12 of the affidavit the plaintiff has said that he worked as Assistant Public Prosecutor for about two years. In paragraph 14 of his affidavit the plaintiff has said that in September, 1959, the Deputy Commissioner enquired of him whether he was prepared to work as Government pleader and Public Prosecutor, but the plaintiff declined the offer in view of the order of dismissal made by the Court of Wards. In paragraph 15 of his affidavit the plaintiff has said that the illegal order has caused him great prejudice, and in the event of a declaratory decree being passed in his favour the bar of such further employment as may be open to the plaintiff would be removed. It is true that the plaintiff filed a petition for amending the plaint by adding a relief for recovery of arrears of salary to the extent of Rs. 4060/-. But this petition of amendment was rejected because the claim for arrears of salary was barred by limitation at the time the prayer for amendment was made. It is clear, therefore, that the plaintiff would not be entitled to recover any arrear of pay on the basis of any declaratory decree that may be granted in his favour. But a declaratory decree with regard to the invalidity of the order of dismissal in the present suit will not be *brutum fulmen* for a declaratory decree in the present case will remove the bar of such further employment in Government service as may be open to the plaintiff, as stated in paragraphs 14 and 15 of the affidavit of the plaintiff dated the 2nd February, 1960.

It is well established that it is not a matter of absolute right for the plaintiff to obtain a declaratory decree. It is discretionary with the Court to grant or not to grant a declaratory decree, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under all the circumstances of the case, to grant the declaratory decree prayed for, (See *Sree Narain, Mitter v. Kishen Soondory Dassee*. IA Sup Vol 149 at p. 162 (PC)). Reference was made in this connection by learned counsel for the plaintiff to *Vine v. National Dock Labour Board* (1956) & All E. R. 939 in which the plaintiff claimed damages for wrongful dismissal and a declaration that his purported dismissal was illegal, *ultra vires* and invalid.

The plaintiff was granted a decree for damages and a declaration by the trial judge, but the Court of Appeal held that the plaintiff should not be granted a declaration and it is sufficient if he was given a decree for damages. The plaintiff appealed to the House of Lords against the striking out of the declaration. The House of Lords allowed the appeal and held that the granting of a declaration was discretionary, and, as damages in the case would not be an adequate remedy, the declaration granted by the trial judge was properly made.

Taking Into account all the circumstances of the present case I hold that the plaintiff is entitled to a declaratory decree that the order of the Board of Revenue dated the 13th November, 1950, dismissing the plaintiff from the Court of Wards is ultra vires and illegal, as the second notice contemplated by Article 311 of the Constitution was not given to the plaintiff I would accordingly grant a decree to the plaintiff to this extent but there will be no order as to costs.

Kanhajya Singh, J.

10. I agree.