

(1959) 06 CAL CK 0022
In the Calcutta High Court
Case No : C.R. No. 549 of 1957

Probodh Chandra Jha

APPELLANT

Vs

Director of Public Instruction and Others

RESPONDENT

Date of Decision : 22-06-1959

Acts Referred:

Bengal Subordinate Services (Discipline and Appeal) Rules, 1936 — Rule 7
Constitution of India, 1950 — Article 311(2)

Citation : AIR 1960 Cal 306

Hon'ble Judges : R.S. Bachawat, J

Bench : Single Bench

Advocate : Prafulla Kumar Roy and Jagannath Ganguly, for the Appellant; J. Majumdar and P.K. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Bachawat, J.

1.The petitioner asks for an appropriate writ quashing an order of his discharge from service. On July 22, 1954 he was appointed to act as a Sub-inspector of Schools, Ratua, Dist. Malda, on a purely temporary basis with effect from the date on which he would join his appointment vice Phanindra Kishore Ganguly promoted or until further orders. As required by the Order of appointment, be furnished character certificates and an affidavit stating that he had never taken part in any criminal or subversive activities. By letters dated 3-11-1955 and 18-11-1955 the Deputy Inspector-General of police reported to the Director of Public Instructions that the petitioner was considered unsuitable for employment and that he was connected with the subversive organisation. Apparently, acting upon this report, the Director of Public Instructions on 28-11-1955 passed an order terminating the services of the petitioner. The order dated 28-11-1955 stated that the petitioner was not considered to be suitable person for employment in govt. service and was accordingly served with one month's notice of discharge with effect from the date of the communication of the order

to him. In spite of subsequent representations to the Director of Public Instructions and a memorial to the Education Minister, the order of discharge has not been set aside. The petitioner also asked for permission from the Director of Public Instructions to serve as a temporary teacher in aided secondary schools but no permission was given as the Director had nothing to do with regard to such appointments. This Rule was obtained on 26-2-1957.

2 On behalf of the petitioner it is urged that the order of discharge is an order of dismissal or removal from service by way of punishment inasmuch as:

(a) the order on the face of it reflects on the character and efficiency of the petitioner by stating that he is not considered to be a suitable person for employment in govt. service;

(b) the order is founded on the supposed disqualification of the petitioner being connected with subversive organisation;

(c) the order deprives the petitioner of his future pay and allowances and diminishes his chances of future employment in govt. service and that, there being no enquiry the order is, in placid contravention of the provision of Article 311(2) of the Constitution and that, in any event, before being discharged on the ground of unsuitability he ought to have been given an opportunity of being heard and as no such opportunity was given the order is in contravention of the principles of natural justice.

3. The petitioner was employed on a purely temporary basis. It was an implied term of the contract of employment that it might be terminated at any time by reasonable notice. The contract was terminated by giving one month's notice in accordance with this implied term. The question is whether the petitioner was dismissed or removed "within the meaning of Article 311(2) of the Constitution."

4. The material part of Article 311(2) of the Constitution reads thus:

"No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

5. The expression "dismissed, removed or reduced in rank" has a special technical meaning, in the context of the Service Rules and Regulations, it denotes three major punishments. Dismissal and removal denote termination of employment by way of punishment. A termination of employment simpliciter which is not by way of punishment is not a dismissal or removal. An order of discharge of a civil servant engaged under a contract in accordance with the terms of his contract is often not treated by the Service Rules as an order imposing the penalty of dismissal or removal from service and in fact is not so treated by Rule 7 of the Bengal Subordinate Service (Discipline and Appeal) Rules, 1936, by which the conditions of service of the petitioner are regulated. Such an order of discharge by itself is not a punishment and does not amount to a dismissal or removal. See *Satish Chandra Anand Vs. The Union of India*

(UOI), . Nor is there a dismissal or removal where the services are terminated upon the appropriate authority being satisfied that the employee is disqualified or not suitable for employment in accordance with Service Rules regulating the conditions of service, such as Rule 25(4) of the Subordinate Agriculture Service Rules because the employee has not made sufficient use of his opportunities or has otherwise failed to give satisfaction. *Hartwell Prescott Singh Vs. The Uttar Pradesh Government and Others*, or the Railway Services (Safeguarding of National Security) Rules, 1949 because he is engaged in subversive activities. *P. Balakotaiah Vs. The Union of India (UOI) and Others*, . In the last case delivering the unanimous judgment of the Supreme Court Venkatarama Aiyar J. observed :

"Now, this Court has held in a series of decisions that it is not every termination of the services of an employee that falls within the operation of Article 311, and that it is only when the order is by way of punishment that it is one of dismissal or removal under that Article. Vide *Satish Chandra Anand Vs. The Union of India (UOI)*, ; *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, ; *The State of Bombay Vs. Saubhagchand M. Doshi*, and *Parshotam Lal Dhingra Vs. Union of India (UOI)*, . The question as to what would amount to punishment for purposes of Article 311 was also fully considered in *Parshotam Lal Dhingra's* case. It was therein held that if a person had a right to continue in office either under the service rules or under a special agreement, a premature termination of his services would be a punishment. And likewise, if the order would result in loss of benefits already earned and accrued, that would also be punishment."

6. If the services are terminated in accordance with the terms of the contract of employment or in exercise of a power conferred by the Service Rules, the crucial test for determining whether the termination is dismissal or removal by way of punishment is: does the termination result in loss of any benefit already earned or accrued. This test was definitely applied in *AIR 1954 SC 360* and *The State of Bombay Vs. Saubhagchand M. Doshi*, . In *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, the employee was compulsorily retired after an enquiry and a finding that he was guilty of misconduct in exercise of the power conferred on the Government by Note 1 to Article 465A of the Civil Service Regulations. 1920 to retire in the public interest without giving any reason, any employee after he had completed twenty-five years" qualifying service. It was held that the compulsory retirement had no stigma or implication of misbehaviour or incapacity and did not involve loss of benefit already earned and did not amount to dismissal or removal by way of punishment.

7. In support of the contention that the discharge of the petitioner is a dismissal or removal because it involves a distinct imputation of in-capacity and unfitness for Government service. Reliance is placed upon the following observations in *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, :

"There can be no doubt that removal--I am using the term synonymously with dismissal --generally implies that the officer is regarded as in some manner

blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer.

There is no such element of charge or imputation in the case of compulsory retirement. *** It is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be the real cause for taking the action but what is important to note is that the directions in the last sentence in Note 1 to Article 465A make it abundantly clear that an imputation or charge is not in terms made a condition for the exercise of the power. In other words, a compulsory retirement has no stigma or implication of misbehaviour or incapacity."

8. These observations were explained by the Supreme Court itself in *The State of Bombay Vs. Saubhagchand M. Doshi*, where a compulsory retirement of a Government servant under Rule 165A of the Bombay Civil Services empowering the competent authority to require the servant to retire on the ground of misconduct, insolvency or inefficiency was held not to be a dismissal or removal. Venkatarama Aiyar J. after referring to the aforequoted observations in *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, observed:

"Does it make any difference in the position, as is contended by the respondent, that Rule 165A provides, unlike Note 1 to Article 465A in *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, that the power is not to be exercised except in cases of misconduct or inefficiency? When the Government decides to retire a servant before the age of superannuation, it does so for some good reason and that, in general, would be misconduct or inefficiency. Indeed, in *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, , the Government did give to the officer concerned, notice of charges of misconduct and inefficiency and called for his explanation, though a formal enquiry was not held. In providing that no action would be taken except in case of misconduct or inefficiency, Rule 165-A only made explicit what was implicit in Note 1 to Article 465-A. The fact to be noted is that while misconduct and inefficiency are factors that enter into the account where the order is one of dismissal or removal or of retirement, there is this difference that while in the case of retirement they merely furnish the background and the enquiry, if held --and there is no duty to hold an enquiry -- is only for the satisfaction of the authorities who have to take action in the case of dismissal or removal, they form the very basis on which the order is made and the enquiry thereon must be formal, and must satisfy the rules of natural justice and the requirements of Article 311(2)."

9. A termination of employment of the Civil servant is, therefore, not dismissal or removal because misconduct or inefficiency disqualification is taken into account and furnishes the real motive for the action taken by the Government or because

it involves a reflection on the suitability of the servant for employment in Government service.

10. Similarly an order of reversion from an officiating appointment to the original appointment is not per se a reduction in rank by way of punishment. See *Hartwell Prescott Singh Vs. The Uttar Pradesh Government and Others*, . In such a case also the crucial test is whether there is any deprivation of any benefit to which the employee has already become entitled (See *Rabindra Nath Das v. General Manager, Eastern Rly.* 59 CWN 859.)

11. In *Parshotam Lal Dhingra Vs. Union of India (UOI)*, , the Supreme Court had occasion to consider an order of reversion of a Government servant from an officiating appointment to his substantive appointment in view of certain adverse reports regarding his competency and efficiency. The order stated that the officer should revert till he made good the short comings noticed. The order was passed by the General Manager, Northern Railway. On appeal the Railway Board directed that the reversion would not be a bar to his being considered again for a promotion in the future, if his work and conduct justified. The majority of the Judges held that the officiating appointment was terminable at any time on reasonable notice that the reduction did not operate as a forfeiture of any right to hold a post or of the chances of future promotion and did not affect his seniority in the substantive post and was not a reduction in rank or a dismissal or removal by way of punishment. Bose J., the dissentient Judge, thought that the order of reversion gave rise to evil consequences as the officer could not be promoted until some competent officer chose to think that he had made good his previous shortcomings and that consequently the reversion was a reduction in rank.

12. In support of the contention that the order of discharge of the petitioner is founded on his supposed disqualification of being connected with a subversive organisation and is therefore a dismissal or removal, reliance is placed on the following observations of Das C. J. in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, :

"But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with."

13. These observations are of no assistance to the petitioner. In a case where the Government finds that the civil servant who is holding a post, temporary or permanent, either on probation or on an officiating basis and who has not acquired a quasi-permanent status is unsuitable for the post on account of "misconduct, negligence, inefficiency or other disqualification, the Government

has two courses of action open to it. The Government may proceed to terminate the employment by exercising the powers conferred on it by the express or implied terms of the contract of employment or under the Rules regulating the conditions of service.

In such a case the termination of the employment does not amount to removal or dismissal even though the unsuitability on account of misconduct, inefficiency or other disqualification is the real reason or ground for such termination. See *Ranjit Kumar Chakravarty Vs. State of West Bengal*, .

14. But the Government may choose not to adopt this course of action. Instead of passing only an order of terminating the employment in the exercise of the powers so conferred, the Government may inflict the punishment of dismissal or removal founding the punishment on the misconduct, inefficiency, negligence or other disqualification of the officer. Thus, in *Balai Chand Basak Vs. N. Roy Choudhury, Additional Refugee Rehabilitation Commissioner, West Bengal and Others*, . the officer held a temporary appointment. The contract provided that the appointment was liable to be terminated without any notice. The officer was served with a notice to show cause why he should not be dismissed from Government Service or otherwise suitably punished for carelessness, corruption and loss of Government money. A confidential enquiry was held and upon the officer being found to be guilty of the charges an order was passed dismissing the officer from Government Service. The order was intended to be and was on the face of it an order of dismissal by way of punishment. Indeed even the use of the expression "discharge" may not be conclusive and cases may arise where the proceedings show that the order of discharge was intended to be and was in fact a dismissal or removal by way of punishment and as such is within the purview of Article 311(2) of the Constitution.

15. In the instant case the appointment was temporary and was terminable on reasonable notice. The order terminating the employment gave petitioner one month's notice of discharge and stated that the notice was served as he was not considered to be suitable for employment in Government Service. The termination is founded upon and is made in exercise of the powers conferred on the Government by the terms of the contract of employment. Though the ground of the termination is the unsuitability for employment in Government Service the order of termination does not inflict any penalty. This order is no more founded on the inefficiency or unsuitability than the orders which were under consideration in *The State of Bombay Vs. Saubhagchand M. Doshi*, , *Hartwell Prescott Singh Vs. The Uttar Pradesh Government and Others*, and *P. Balakotaiah Vs. The Union of India (UOI) and Others*, . In view of the explanation to Rule 7 of the Bengal Subordinate Services (Discipline and Appeal) Rules, 1936 the order being an order of discharge of a person engaged under contract in accordance with the terms of his contract cannot by itself be said to impose the penalty of dismissal or removal. The order does not forfeit any right or benefit to which the petitioner was entitled. Though the petitioner has now a very remote chance of

being appointed in Government Service the order does not in terms debar him from future employment. The order cannot be said to inflict a penalty because it involves the loss of prospect of earning future pay. See, *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, . Similarly the diminution of the chances of future employment in Government Service is too uncertain a loss to be considered a penal consequence. The case of *Parshotam Lal Dhingra Vs. Union of India (UOI)*, is distinguishable. The instant case is not the case of an order which reverts the officer to his substantive post and which at the same time entails or provides for stoppage or postponement of his future chance of promotion.

16. The order does not inflict any punishment and does not amount to an order of dismissal or removal. There is therefore no contravention of Article 311(2) of the Constitution. There is no infringement of any Service Rule regulating the conditions of service. Though the ground of discharge is unsuitability for employment, there is no duty to hold an enquiry. See observations of Venkatarama Aiyar J. in *The State of Bombay Vs. Saubhagchand M. Doshi*, . In fact, orders of termination of services on similar grounds have been upheld although there was no enquiry into the charges levelled against the officer. See *The State of Bombay Vs. Saubhagchand M. Doshi*, and *Parshotam Lal Dhingra Vs. Union of India (UOI)*, . The order is an administrative order and therefore no question of contravention of the principles of natural justice can arise.

17. I have, therefore, come to the conclusion that the petitioner is not entitled to any relief.

18. The Rule is discharged. There will be no order as to Costs.