
(1964) 07 AHC CK 0019
In the Allahabad High Court
Case No : Civil Misc. Writ No. 1330 of 1959

R. Christopher

APPELLANT

Vs

Executive Engineer, Irrigation Workshop and Others

RESPONDENT

Date of Decision : 30-07-1964

Acts Referred:

Constitution of India, 1950 — Article 311, 311(1), 311(2)

Citation : AIR 1966 All 97

Hon'ble Judges : S.N. Dwivedi, J

Bench : Single Bench

Advocate : S.C. Khare and Virendra Swarup, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

S.N. Dwivedi, J.—The petitioner was employed as an automobile fitter in the Government irrigation Workshop, Izatnagar, Bareilly. The Executive Engineer, incharge of the workshop, dismissed him with effect from June 11, 1958. He has filed the present petition against that order. His grievance is: the Executive Engineer has dismissed him from service without observing the procedure prescribed in Article 311(2) of the Constitution. He was not given any opportunity of producing his evidence and of cross-examining the departmental witnesses. He was not given a notice asking him to show cause against the proposed penalty. After the conclusion of the enquiry he was served with the order of dismissal.

2. On behalf of the respondents Sri S.L. Mazumdar, Assistant Engineer, Incharge of the workshop, has filed a counter-affidavit. The counter-affidavit alleges that the petitioner was given an opportunity to defend himself, but he did not avail of it. It is said that in effect he boycotted the enquiry. In paragraph 9 of his affidavit Sri Mazumdar has, however, admitted that no show-cause notice was sent to him asking him to explain why he should not be dismissed. It is asserted that such a notice was not sent to him because Article 311(2) does not apply to him.

3. It would follow from paragraph 9 of the counter-affidavit of Sri Mazumdar that the petitioner has been dismissed from service without observing the mandatory provision of Article 311(2) of the Constitution. The petitioner was not given an opportunity of showing cause against the action proposed to be taken against him. His dismissal from service is, therefore, in plain violation of Article 311(2). If Article 311(2) applies to him, then the order would undoubtedly be void. The only question for consideration accordingly is whether that Article applies to him.

4. Before taking up that question I would like to mention one fact. In this case the arguments were closed on April 13, 1964, and judgment was reserved by me. The case was listed again before the Court and on May 12, 1964. I directed the Standing Counsel to file a supplementary-affidavit giving replies to certain questions formulated by me. The Standing Counsel has now filed the supplementary affidavit giving replies to those questions. I shall advert to the supplementary affidavit later.

5. It is argued on behalf of the respondents that the petitioner is governed by the Standing Orders for the workshop and that as he does not hold a civil post nor is a member of any civil service of the Uttar Pradesh he is not entitled to the protection of Article 311(2). In support of their contention reliance has been placed on certain cases which shall be referred to by me later.

6. The protection of Clause (2) of Article 311 is extended to the persons specified in Clause (1) of that Article. Clause (1) refers to a person who is a "member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State". It is not the petitioner's case that he is a member of the civil service of the Union or an all India service or a civil service of the State. He says that he held a "civil post" under the State of Uttar Pradesh. The narrow question thus is whether he held a civil post under the State of Uttar Pradesh when he was dismissed. If the answer to the question is in the affirmative, then the order of his dismissal would be void as being in contravention of Clause (2) of Article 311.

7. The words "civil post" are not defined in the Constitution. What they mean is to be ascertained from the various provisions of the Constitution. Article 309 provides that the appropriate Legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. Clause (1) of Article 310 provides that every person who is a member of a defence service or of a civil service of the Union or of an all India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, that every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State. Clause (2) of Article 310 refers to the abolition of a post. It would appear from Article 310 that a civil post means a post other than a post connected with defence. The words "civil post" in Clause (1) of Article 311 would, therefore, mean a post other than a post connected with defence.

8. There still remains the question what is the meaning of the word "post" in Clause (1) of Article 311. Article 311 is found in Chapter I of Part XIV of the Constitution. Articles 309, 310, 313, 320 and 321 are also in the same Chapter. Article 313 provides that all the laws in force immediately before the commencement of the Constitution and applicable to any public service or any post which continues to exist after the commencement of the Constitution shall continue in force so far as consistent with the Constitution. Article 320 deals with the functions of the Union Public Service Commission and the State Public Service Commission. Sub- Clause (c) of Clause (3) of Article 320 is significant. According to this provision the State Public Service shall be consulted on all disciplinary matters affecting a person "serving under the Government of a State in a civil capacity". Similarly Sub-clause (e) of Clause (3) provides that the State Public Service Commission shall be consulted on any claim for the award of a pension in respect of injuries sustained by a person "while serving under the Government of State in a civil capacity".

The expression "serving under the Government of a State in a civil capacity" in Sub-clauses (c) and (e) should, to my mind, take its colour from the expression "civil services and civil posts" in Sub-clauses (a) and (b) of Clause (3). It seems to me that the former expression is a synonym of the latter expressions. If it were intended to attribute a different meaning to the former expression, then the makers of the Constitution would have repeated the latter expression at least in Clause (c). A person holding a "civil post" would accordingly mean a person "serving under the Government of a State in a civil capacity." This inference is supported by other provisions of the Constitution, Article 321 provides that an Act made by Parliament or the Legislature of a State may provide for the exercise of additional functions by the Union Public Service Commission or the State Public Service Commission as respects the services of the Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution. What is significant to observe is that Article 321 does not use the expression "civil service" or a "civil post" and simply refers to the "service of the Union or the State".

Chapter V in Part VI deals with the High Courts in the States. Article 229 occurs in that Chapter. Clause (1) of Article 229 provides that appointments of officers and "servants of a High Court" shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct. Here again the words "civil post" are not repeated and the comprehensive expression "servants" is used. Clause (2) of Article 229 also speaks about the officers and servants. It cannot be denied that the servants of a High Court hold a civil post within the meaning of Clause (1) of Article 311. Article 98 provides for a secretarial staff in each House of Parliament and empowers Parliament to regulate the recruitment and conditions of service of persons appointed to the secretariat staff. Article 187 likewise provides for a secretariat staff for a State Legislature and enables the State Legislature to regulate the recruitment and conditions of service of persons appointed to such staff. Article 146 provides for appointment of officers and

servants of the Supreme Court by the Chief Justice of India. Here again the expression "civil post" is replaced by the comprehensive terms "officers" and "servants". Similarly Article 148 refers to persons serving in the office of the Comptroller and Auditor General. The foregoing provisions of the Constitution, in my view, indicate that a person who is serving under the State in a civil capacity is ordinarily a person who holds a civil post. There should generally exist a relationship of master and servant between the State and the employee. That is enough to satisfy the test.

9. It is argued on behalf of the respondents that the word "post" suggests that the service under the State should not be of a casual nature. It is not necessary to decide this question in the present case because the supplementary affidavit filed in compliance with my order states that the petitioner was not employed as a casual fitter. In the supplementary affidavit they have further admitted that there are "four posts of litters in the Automobile branch of the workshop and that all of them were temporary". The petitioner was holding one of the four temporary posts on daily wages. The supplementary affidavit thus clearly admits that the petitioner was holding a post of fitter in the automobile branch of the workshop. The post of an automobile fitter in the workshop is a civil post under the Government. It takes up the work of the irrigation department.

10. I shall now refer to the cases relied on by the respondents. In *Bhawani Sahai Vs. Syed Naqui Imam and Another*, , it was held that a person employed as a copyist on piece-wages could not avail of the protection of Article 311(2). But there was a concession by counsel in that case to that effect. In *Lachmi and Others Vs. Military Secretary to the Governor of Bihar and Another*, , it was held that Malis employed as casual labour from the contingency fund in the Raj Bhawan garden did not hold a civil post. At p. 402, Das, C. J., referred to the control test for deciding the question and held that the Malis were not paid by the State. That case is distinguishable for two reasons. Firstly, the petitioner is admittedly not employed as a casual labour. According to the supplementary affidavit he is holding the temporary post of an automobile fitter in the Government workshop. Secondly, he is being paid by the Government, In *Hari Kishan Vs. The State*, it was held that a contingency paid staff was not even a paid servant and Article 311(2) did not apply to him. That case is also distinguishable from the present case for the reasons already shown by me in connection with the Patna case.

11. Standing counsel has also relied on an unreported decision of Tandon J., in *Akhlaq Ahmad v. State of U. P.*, Writ Petn. No. 265 of 1959, decided at Lucknow on May 25, 1961. In that case the petitioner was employed as a fitter in the Microscope section of the U. P. Government Precision Instruments Factory. It was held that he did not hold a civil post within the meaning of Article 311 and was, therefore, not entitled to its protection. Tandon J., took the view that the words "civil post" would mean an office or situation created for the performance of any part, other than military, of the sovereign functions of the Government." He went

on to say:

"Every activity conducted by the Government is not always some sovereign function done by it. Commercial undertakings by the Government, which per se have nothing or little to do with the exercise of sovereign functions can of be treated to be part of such function. It is true that sometime it is difficult to draw a line between the two types of functions, especially when the State is extending its activities into economic and other fields, but the distinction nevertheless is there. It is only in respect of the sovereign functions and their exercise that the situation and the individual occupying it can be called a "civil post" or the holder thereof. A "civil post" is a grant and possession of sovereign power and it differs in this respect from a mere employment on a place, office of situation. It is thus a part of the civil Government of the State, as such must have some connection with the legislative, judicial or executive functions of the Government. A factory labourer per se does not exercise any such function."

With respect to the learned Judge I am unable to share his view. There is nothing in the Constitution to show that a person who is serving the State in the sphere of its non-sovereign functions is not a person who holds a civil post. If the civil post is so narrowly construed even the employees in the postal and railway services would not be protected by Article 311(2) of the Constitution for surely those services have little relations to the sovereign functions of the State. Education irrigation, forest and health too are not sovereign functions of the State. The Constitution permits the Government to carry on business. It has established a welfare state in our country. So the area of service would be rapidly extending. It is difficult to believe that the makers of the Constitution did not intend to confer the protection of Article 311 on the servants employed in commerce and business carried on by the State.

12. What is a civil post was considered by a Division Bench of this Court in Mohammad Matteen Qidwai Vs. The Governor-General in Council, Sapru, J., said there that the word was left undefined in the Constitution because services were rapidly expanding. He further said that the term was flexible and was used to contradistinguish a service from defence service. At p. 21, Bhargava, J. said:

"all posts held by any public servant, if the posts did not belong to the Military Department or the Defence Forces, must be deemed to be "a civil post under the Crown"." This decision was given with reference to Section 240 of the Government of India Act, 1935 which also used the word "civil post". In Yusuf Ali Khan v. Province of the Punjab AIR 1950 Lah 59, it was held that a person holding a temporary post would be a person holding a civil post. In N. S. Nagaraja Rao v. State of Mysore AIR 1958 Mys 23, it was held that the conductor of a Government Motor Vehicle held a civil post. These decisions support the view which I have already indicated earlier.

13. I find little substance in the argument that if a post is temporary, it cannot be a civil post within the meaning of Article 311(1).

14. In the end it is argued that as the petitioner did not hold the post of an automobile fitter on a pay, but on daily wages, he did not hold a civil post. Article 311(1) does not say that a person who is employed on daily wages does not hold a civil post. The mode of payment to a servant is entirely different from the relationship of master and servant. The mode of payment depends on various factors such as convenience, the availability of funds, conventions and the nature of the post. It is permissible to the Government to adopt different modes of payment according to its convenience, etc. But whether a person holds a civil post under a State should not, to my mind, depend on the mode of payment of remuneration to him by the Government for the services rendered by him to the Government. English history would show that about two or three centuries ago many employees were not receiving a pay from the State. The staff of almost all the central Courts was then paid by the fees upon the business done. Masters in the Court of Chancery were paid likewise. (Holds-worth's History or English Laws, Volume I, pp. 255 and 424). The true test is whether the relationship of master and servant exists between the Government and the employee. (See *State of Uttar Pradesh v. Audh Narain Singh*, Civil Appeal No. 120 of 1963, decided by the Supreme Court on March 9, 1964: *State of Uttar Pradesh and Another Vs. Audh Narain Singh and Another*, In *Brojo Gopal Sarkar Vs. Commissioner of Police and Another*, , a Special Police Officer appointed u/s 12 of the Calcutta Suburban Police Act during the emergency without remuneration was held to hold a civil post.

15. For the reasons already stated I am of opinion that the petitioner held a civil post and was entitled to the protection of Article 311(2) of the Constitution. I have already shown that he was not asked to explain why he should not be dismissed from service. His dismissal is accordingly null and void. The petition is allowed with costs and the order dismissing the petitioner is quashed.