

(1940) 10 FED CK 0001

In the Federal Court

Raja Prithwi Chand Lal Choudhury

APPELLANT

Vs

Sukhraj Rai and Ors.

RESPONDENT

Date of Decision : 14-10-1940

Acts Referred:

Citation : AIR 1941 FC 1

Hon'ble Judges : Justice Maurice Gwyer, Justice Shah Sulaiman, Justice Srinivasa Varadhachariar

Bench : Full Bench

Judgement

Varadachariar, J.—This is an appeal by a plaintiff whose suit against the North-West Frontier Province Government has been dismissed by

the Courts below on a preliminary finding that the suit was not maintainable. The only point for determination by this Court is whether this finding is

consistent with the true interpretation and effect of Ss. 240 and 243, Constitution Act. The facts relevant at this stage may be briefly stated. The

petitioner was appointed a Sub-Inspector in the police force of the North-West Frontier Province in March 1928, and in April 1938, he was

dismissed on certain charges by the Deputy Inspector-General of Police of that Province. His appeals to the Inspector-General of Police and to

the Provincial Government failed and he instituted this suit praying for a declaration that the order of dismissal was illegal and void and that he ought

still to be regarded as continuing in office. He also claimed arrears of pay and, in the alternative, damages for wrongful dismissal. The plaintiff

impugned the validity of the order of dismissal on various grounds; but, in the view we take of the case, it is unnecessary to refer to all of them. It is

sufficient to state that one of the grounds urged was that as the plaintiff had been appointed by the Inspector-General of Police, the Deputy

Inspector-General who was only a subordinate authority was not competent to dismiss him. Though the papers relating to the appointment are not

on the record (as the suit has been disposed of on a preliminary point) it may be pointed out that the plaint alleged that the plaintiff had been

appointed by the Inspector-General of Police and the written statement admitted the correctness of this allegation. It is common ground that the

order of dismissal dated 4th April 1938, was passed by the Deputy Inspector-General of Police. The Provincial Government contested the suit,

maintaining that the dismissal was valid and proper and that in any event the plaintiff had no remedy by way of suit. They asked for and obtained a

preliminary decision on the question of the maintainability of the suit.

2. Founding himself on the declaration in S. 240(1), Constitution Act, and the decision of the Judicial Committee in ("37) 24 A.I.R. 1937 P.C. 27 :

166 I.C. 513 : I.L.R. (1937) Mad. 517 : 64 I.A. 40 (P.C.), Rangachari v. Secretary of State and ("37) 24 A.I.R. 1937 P.C. 31 : 166 I.C. 516 :

I.L.R. (1937) Mad. 532 : 64 I.A. 55 (P.C.), Venkata Rao v. Secretary of State that every person who holds any civil post under the Crown in

India holds office during his Majesty's pleasure, the learned Subordinate Judge proceeded to hold that there was nothing in S. 243, Constitution

Act, or in the provisions of the Police Act (5 of 1861) or the rules framed thereunder to restrict the Crown's unrestricted power of dismissal, so as

to give the aggrieved officer a remedy by civil action. The appellate Court confirmed this decision, with the following observation:

Our interpretation of Sec. 243, Government of India Act, is that if anything were contained in the Police Act, then S. 240, Government of India

Act, would not apply to that extent. There is however nothing in the Police Act which restricts the power of the Government to dismiss a police

officer at its pleasure.

3. It is apparent that the bearing of sub-s. (2) of S. 240, Constitution Act, on the case was not sufficiently realized in the Courts below, though the

plaint and the grounds of appeal laid stress on the circumstance that the plaintiff had been dismissed not by the authority that appointed him, but by

a subordinate authority. The argument before this Court mainly rested on this ground. It may be convenient to mention at this stage how the order

of dismissal came to be passed by the Deputy Inspector-General. Under S. 7,

Police Act (5 of 1861), as it stood prior to its adaptation by the Adaptation of Indian Laws Order, 1937, the appointments of all police officers below a certain grade were (under such rules as the Local Government should from time to time sanction) made to rest with the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendents of Police; and the section further provided that these officers "may, under such rules as aforesaid, at any time dismiss, suspend or reduce any police officer." Though a number of superior officers are specified in the section, the intention apparently was that the rules should provide for different grades of officers in the subordinate police service being appointed and dismissed by specified grades of officers in the superior ranks of the service and not that the power should be exercised by any of them indiscriminately.

4. The rules in force in the North-West Frontier Province at the time of the plaintiffs appointment provided that a Sub-Inspector of Police could be dismissed by the Inspector-General of Police, and, as already stated, the appointment of the plaintiff was also made by the Inspector-General of Police. It is only as regards officers below a Sub-Inspector in rank that the rules provided for appointment and dismissal by officers subordinate in rank to the Inspector-General of Police. In 1934 however, the Provincial Government modified these rules and provided that a Sub-Inspector could be dismissed by the Deputy Inspector-General. The rule did not differentiate between Sub-Inspectors appointed before the date of this modification and those who might be appointed later. We do not know whether at the Same time a change was made to the effect that even the appointment of Sub-Inspectors could be made by the Deputy Inspector-General) though we have been told that some such rule is now in force in that province. We presume that it was on the strength of the modified rule that the order dismissing the plaintiff was passed by the Deputy Inspector-General.

5. Sub-section (2) of s. 240, Constitution Act, contains a statutory prohibition to the effect that no office holder shall be dismissed from service by any authority subordinate to that by which he was appointed. Referring to the corresponding provision in S. 96B, Government of India Act, 1919, their Lordships of the Judicial Committee observed in ("37) 24 A.I.R. 1937 P.C.

27 : 166 I.C. 513 : I.L.R. (1937) Mad. 517 : 64 I.A. 40 (P.C.),

Rangachari v. Secretary of State that the protection thus afforded to the officeholder could not be permitted to be destroyed by a delegation

purporting to be made under the"" rules. Emphasizing the distinction between a safeguard enacted in the section itself and one merely contained in

the rules, their Lordships expressed it as their clear opinion that the dismissal by an authority subordinate in rank to the officer who made the

appointment ""was by reason of its origin bad and inoperative."" In this respect, the position under s. 240 of the Act of 1935 is, if anything, stronger

than it was under the Act of 1919. In the latter, S. 96B opened with the words ""subject to the provisions of...rules made thereunder,"" and this

afforded some room for the argument (accepted by the High Court at Madras in ("34) 21 A.I.R. 1934 Mad. 516 : 154 I.C. 884 : 57 Mad. 857 :

67 M.L.J. 123, Rangachari v. Secretary of State) that the declaration contained in the section could be qualified by the rules to be made under the

Act. In the Act of 1935, sub-s. (2) of S. 240 has been enacted in unqualified terms, and there is accordingly no scope for the contention that this

provision can be qualified or taken away by statutory rules. Unless the plaintiff is for any reason precluded from relying on this declaration, his

dismissal by the Deputy Inspector-General of Police must, on the authority of the decision in ("37) 24 A.I.R. 1937 P.C. 27 : 166 I.C. 513 : I.L.R.

(1937) Mad. 517 : 64 I.A. 40 (P.C.), Rangachari v. Secretary of State, be held to be inoperative as one ""made by an official who is prohibited by

statute from making it"".

6. It was accordingly contended on behalf of the respondent that in view of the terms of S. 243, Constitution Act, the plaintiff was not entitled to

rely upon s. 240. Section 243 provides that the ""conditions of service"" of the subordinate ranks of the police forces in India shall be determined by

or under the Acts relating to those forces respectively, and the section opens with the words ""notwithstanding anything in the foregoing provisions

of this chapter"". The plaintiff's office admittedly fell under the category of subordinate ranks of the police force, and the rule authorising the

dismissal of Sub-Inspectors by the Deputy Inspector-General of Police must have been made either under the Indian Police Act of 1861 or under

the Devolution Rules (as appears from the High Court's judgment in ("34) 21

A.I.R. 1934 Mad. 516 : 154 I.C. 884 : 57 Mad. 857 : 67 M.L.J.

123, Rangachari v. Secretary of State). We are however unable to hold that S. 243, Constitution Act, has the effect of depriving the plaintiff of the

benefit of sub-s. (2) of s. 240. It was argued that the expression "conditions of service" in s. 243 was wide enough to comprehend a provision as

to the authority competent to terminate an officer's tenure of office and that it was clearly the intention of the section that even this should be

provided for by Indian legislation or rules made thereunder. It was also urged that the opening words "notwithstanding anything in the foregoing

provisions of this chapter" had the effect of totally excluding the application of Ss. 240 and 241 to the subordinate ranks of the police force in

India. These contentions do not seem to us warranted by the contest.

7. The extent to which the opening words of s. 243 will exclude or modify the general words contained in the preceding section or sections in the

chapter will depend upon the nature of the positive provision which follows, and it is only to the extent to which that positive provision is

inconsistent with the preceding general provision that the operation of the general provision will be excluded. The real question therefore is whether

the provision relating to "conditions of service" in s. 243 should be understood to include a rule relating to the authority by whom the Crown's

pleasure to terminate an officer's tenure of his office is to be signified. It may be that as a matter of etymology, the expression "conditions of

service" can be given a very comprehensive meaning; but, reading the four sections of the chapter together, it seems to us that the Act clearly

(intended to draw a distinction between the tenure on which an office is held on the one hand and the incidents relating to service in the office on

the other and that the duration of the office as well as the authority by which the Crown's pleasure to terminate it is to be signified were treated as

fundamental matters standing on a different footing from the incidents of service. The former were, in our opinion, regarded as of such importance

as to justify a declaration "by the Act itself, while the latter were considered to be a proper subject for the rules. This interpretation will be

consistent with the grounds of the decision in ("37) 24 A.I.R. 1937 P.C. 27 : 166 I.C. 513 : I.L.R. (1937) Mad. 517 : 64 I.A. 40 (P.C.),

Rangachari v. Secretary of State. It seems to us clear that in Ss. 241 and 242,

the "conditions of service" left to be provided for by rules could not have been intended to comprise the matters dealt with in sub-Ss. (1) and (2) of s. 240. It seems to us reasonable to hold that the same restricted meaning should have been intended when the same expression was used in s. 243.

8. We may also point out that the respondent's reading of s. 243 would also exclude the declaration in sub-s. (1) of s. 240 as to these offices

being held during His Majesty's pleasure. It may be that the Government will not be prejudiced thereby, because, even without the statutory

declaration contained in sub-s. (1), they may fall back on the common law rule (as stated in (1895) 1895 A.C. 229 : 64 L.J.P.C. 119 : 11 R. 375 :

72 L.T. 130 : 43 W.R. 637, *Shenton v. Smith* and (1896) 1896 A.C. 575 : 65 L.J.P.C. 82 : 75 L.T. 110, *Gould v. Stuart*) that all public servants

hold office only during His Majesty's pleasure. But it does not seem to us reasonable to assume that when passing the Act of 1935 the Parliament

intended to place this principle on a statutory basis as regards some offices, but allowed it to remain on a common law or implied contract basis as

regards the rest. It will be more reasonable to hold that the statutory declaration as to the nature of the tenure contained in sub-s. (1) of s. 240 was

intended to apply as much to the offices referred to in S. 243 as to the offices referred to in Ss. 241 and 242; and for the same reason the

protection afforded by sub-s. (2) must equally be held to have been intended for the benefit of both. We see no justification in the reason of the

thing for drawing a distinction for this purpose between one set of public officers and another.

9. The Advocate-General of India, to whom we had directed that notice of the proceedings should be given and to whose argument we are

indebted, invited our attention to a decision of the High Court of Australia, (1938) 60 Com. L.R. 55, *Fletcher v. Nott*, in what he described as a

similar case. That case no doubt bears some resemblance in its facts to the present case, but the judgment affords little guidance on the point now

under consideration. The main attempt of the appellant there was to bring his case under the exception recognized in (1896) 1896 A.C. 575 : 65

L.J.P.C. 82 : 75 L.T. 110, *Gould v. Stuart*, but in this he did not succeed. The argument based upon the rank of the dismissing authority in that

case was different from that arising here. There was an order of dismissal by the Commissioner of Police on 2nd December 1936, and an order of

dismissal by the executive government of the State on 5th February 1937. Under the law of the State, the Commissioner (who had been

substituted by an Act of the Legislature for the Inspector-General) was competent to dismiss the plaintiff. If the matter had rested with the dismissal

by the Commissioner, the plaintiff would have had a right to appeal to a Board with a District Court Judge sitting on it. But the supervening

dismissal by the executive government, deprived him of this right of appeal, because no appeal was provided against a dismissal by the executive

government. The plaintiff's complaint in the case therefore was against the dismissal by a higher authority and not against a dismissal by an authority

subordinate in rank to the appointing authority. The Judges who dealt with this argument answered it by holding that the executive government had

a power of dismissal independently of the provisions of the statute.

10. It was next contended on behalf of the respondent that as the plaintiff in the present case had appealed to the Inspector-General of Police

against the Deputy Inspector-General's order dismissing him, the rejection of that appeal was equivalent to a dismissal from office by the

Inspector-General himself and as such sufficient to satisfy sub-s. (2) of S. 240 of the Act. We cannot accede to this contention. In theory as well

as in practice, there is a well-marked difference between a decision given by an officer who acts in the consciousness that he is primarily

responsible for the investigation and decision of the case and the act of one who is expected only to satisfy himself that another officer who had the

primary responsibility has properly dealt with the case. The distinction seems to us one of substance and is not merely formal or technical. The pre-

existing rules provided, and S. 241 of the Act of 1935 also contemplates that, appeals may be preferred by the dismissed officer, and it is common

knowledge, that in most cases such appeals are in fact preferred. As these appeals would ordinarily be heard and decided by an authority superior

in rank to the dismissing officer, the protection intended to be afforded by sub-s. (2) of s. 240 would have been almost illusory if it were sufficient

that, no matter by what authority the order of dismissal was made the appellate authority was not subordinate in rank to the appointing authority.

We are accordingly of opinion that the plaintiff is entitled to invoke the aid of sub-s.(2) of S. 240 of the Constitution Act.

11. There is an alternative aspect of the case which also requires consideration, though, in the view we have above taken, we do not propose to

deal with it at length. The plaintiff was appointed at a time when the Government of India Act of 1919 was in force. The provision in s. 96B of that

statute was not qualified by anything corresponding to S. 243 of the Act of 1935; nor was there anything in the police rules in force at the time

authorizing his dismissal by an officer subordinate in rank to the Inspector-General. The change made in 1934 in the rules cannot prevail against s.

96B, Government of India Act, 1919. Under s. 84 of that Act, any law made by any authority in British India would be void so far as it was

repugnant to this provision of the statute. What then was the effect of the passing of the Act of 1935 on the plaintiff's position, even if it should be

assumed that s. 243 of the new Act should be construed as excluding the application of sub-s. (2) of s. 240 to the subordinate ranks of the Indian

police? If the Police Rule of 1934 was void at its inception, so far as it authorized or could be construed as authorising the dismissal of existing

Sub-Inspectors of Police by an officer lower in rank than the Inspector-General, could it be said that that rule became valid and operative as

against them merely by reason of the enactment of s. 243 of the new Act? Article 15(2) of the Government of India (Commencement and

Transitory Provisions) Order, 1936, dated 3rd July 1936, provided as follows:

Until other provision is made under the new Act, the conditions of service applicable to any person or any class of persons appointed or to be

appointed to serve His Majesty in a civil capacity in India shall be the same as were applicable to that person or, as the case may be, to persons of

that class immediately before the commencement of Part III of the new Act.

12. Even if the expression ""conditions of service"" should be understood in the comprehensive sense contended for on behalf of the respondent, the

plaintiff was on 1st April 1937, entitled to the benefit of S. 96B Government of India Act, 1919, notwithstanding the change made in the Police

Rules in 1934, so far as the same was inconsistent with the provision in the Act, and nothing has since happened to deprive him of that benefit.

Further, it may reasonably be contended that the benefit of S. 96B of the Act of

1919 is a right or privilege which has been saved to the plaintiff by S. 38, Interpretation Act, because there is nothing in the language of S. 243 of the Act of 1935 indicating an intention to deprive officers already in service of their existing rights and privileges. The Adaptation of Indian Laws Order dated 18th March 1937, slightly recast the language of S. 7, Police Act, 1861, but it does not seem to us to have affected the substance of the section. Even if it did, the argument based on "pre-existing rights and privileges will still remain unaffected, because Art. 11 of that order saved them in terms almost identical with S. 38, Interpretation Act. In this connexion, the Advocate-General of India drew our attention to the judgment in (1934) 1934 A.C. 176 : 103 L.J.P.C. 41 : 150 L.T. 384 : 50 T.L.R. 212, *Reilly v. The King*; we find nothing in it adverse to the plaintiff's contention. Their Lordships only observed that on the facts of that case, there was nothing to be saved by this principle of interpretation, because the pre-existing right itself was one "subject to be determined by the office being abolished by statute," and that was what actually happened.

13. It remains to consider what relief the plaintiff is entitled to on the footing that the order of dismissal passed by the Deputy Inspector-General in April, 1938, was void and inoperative. The plaintiff claims that he is entitled to a declaration to that effect. The decision in ("37) 24 A.I.R. 1937 P.C. 27 : 166 I.C. 513 : I.L.R. (1937) Mad. 517 : 64 I.A. 40 (P.C.), *Rangachari v. Secretary of State* seems to us to support this contention, though a declaration was in fact refused in that case on other grounds. The plaintiff is obviously not entitled to any relief by way of damages for wrongful dismissal. As the case has been disposed of by the Courts below on the preliminary issue, we are not in a position to say what other questions remain to be tried before the nature of the reliefs to be awarded to the plaintiff can be finally determined. It seems to us best in the circumstances to say that the plaintiff was at least entitled to a declaration that the order of dismissal passed against him was void and inoperative, and that the Courts below were not justified in dismissing the suit as wholly unsustainable. We accordingly set aside the decree of the Judicial Commissioner's Court and remit the case with a declaration that there shall be substituted for the decree appealed against a declaration in the terms above stated, with such further directions as the circumstances of the case

may require in the light of the observations in this judgment. The plaintiff will be entitled to the costs of this appeal. The Judicial Commissioner's Court will deal with the costs of the proceedings in the Courts below.