
(2019) 11 UK CK 0088

In the Uttarakhand High Court

Case No : Writ Petition No. 523 Of 2019 (S/B)

Rajendra Singh

APPELLANT

Vs

State Of Uttarakhand And Another

RESPONDENT

Date of Decision : 08-11-2019

Acts Referred:

Government Of India Act, 1935 — Section 240(3)
Constitution Of India, 1950 — Article 311, 311(2), 226

Citation : (2019) 11 UK CK 0088

Hon'ble Judges : Ramesh Ranganathan, CJ;Alok Kumar Verma, J

Bench : Division Bench

Advocate : Ravi Babulkar, Pradeep Joshi

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, CJ

1. The proceeding under challenge in this writ petition Office Memorandum dated 01.11.2019 whereby the petitioner was posted to his original post of Executive Engineer, and was shifted to as Executive Engineer, Temporary Division, Public Works Department, Berinag with immediate effect. The impugned order dated 01.11.2019 records that the petitioner, an Executive Engineer (Civil) was posted, for working in the capacity of In-charge, Superintendent Engineer (Civil) in the Head of the Department Office, at Dehradun, concurrent with the vacant position, under the in-charge arrangement; and in view of the disciplinary proceedings against him, he was being posted to his original post of Executive Engineer. This order Mr. Ravi Babulkar, learned counsel for the petitioner contends is stigmatic and that it vitiates the petitioner evil consequences necessitated in the said order being set aside. Learned counsel would further state that the foundation of the impugned order is the disciplinary proceedings pending against the petitioner; the order is stigmatic in character and it is not innocuous order of posting the petitioner at a different place; and consequently the impugned order necessitate being set aside.

2. Learned counsel would place reliance upon the judgment of the Supreme Court in "Madhav Laxman Vaikunthe Vs. State of Mysore : AIR 1962 SC 8. A bare reading of the impugned order shows that the petitioner was hither to posted to work in the capacity of In-charge Superintending Engineer (Civil) in the Head of the Department office at Dehradun and In-charge or officiating arrangement confers no right on the employee concern for in-charge arrangement does not amount to promotion and his substantive post continues remain the same i.e. an Executive Engineer. Depriving the petitioner of in-charge arrangement and asking him to work in a substantive post as Executive Engineer does not vitiated such an employee evil consequences. In Madhav Laxman Vaikunthe Vs. State of Mysore, he has relied the paragraph No.3 of the said judgment which reads as under :-

3. In this Court, the appellant, who has argued his own case with ability, has urged in the first place, and in our opinion rightly, that his case is covered by the observations of this Court in Parshotam Lal Dhingra v. Union of India¹. Those observations are as follows:

"A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. If the government servant has a right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the Rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the Rules, in truth and reality the Government has terminated the employment as and by way of penalty. The use of the expression "terminate" or "discharge" is not conclusive. In spite of the use of such innocuous expressions, the court has to apply the two tests mentioned above, namely, (1) whether the servant had a right to the post or the rank or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as reduction in rank, and if the requirements of Rules and Article 311, which give protection to government servant have not been complied

with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant."

He has rightly pointed out that he would have continued as a Deputy Collector but for the order of the Government, dated August 11, 1948, impugned in this case, as a result of the enquiry held against him, and that his reversion was not as a matter of course or for administrative convenience. The order, in terms, held him back for three years. Thus his emoluments, present as well as future, were adversely affected by the order aforesaid of the Government. In the ordinary course, he would have continued as a Deputy Collector with all the emoluments of the post and would have been entitled to further promotion but for the set back in his service as a result of the adverse finding against him, which finding was ultimately declared by the Accountant General to have been under a misapprehension of the true facts. It is true that he was promoted as a result of the Government order dated March 26, 1951, with effect from August 1, 1950. But that promotion did not entirely cover the ground lost by him as a result of the Government order impugned in this case. It is noteworthy that the judgment of the High Court under appeal was given in July 1956 when the decision of this Court in *Dhingra case*¹ had not been given. The decision of this Court was given in November 1957. Of the two tests laid down by this Court, certainly the second test applies, if not also the first one. He may or may not have a right to hold the post or the rank, but there is no doubt that he was visited with evil consequences. Ordinarily, if a public servant has been officiating in a higher rank it cannot be said that he has a substantive right to that higher rank. He may have to revert to his substantive rank as a result of the exigencies of the service or he may be reverted as a result of an adverse finding in an enquiry against him for misconduct. In every case of reversion from an officiating higher post to his substantive post, the civil servant concerned is deprived of the emoluments of the higher post. But that cannot, by itself, be a ground for holding that the second test in *Dhingra case*¹, namely, whether he has been visited with evil consequences, can be said to have been satisfied. Hence, mere deprivation of higher emoluments as a consequence of reversion cannot amount to the "evil consequences" referred to in the second test in *Dhingra case*¹; they must mean something more than mere deprivation of higher emoluments. That being so, they include, for example, forfeiture of substantive pay, loss of seniority, etc. Applying that test to the present case, it cannot be said that simply because the appellant did not get a Deputy Collector's salary for three years, he was visited with evil consequences of the type contemplated in *Dhingra case*¹. Even if he had been reverted in the ordinary course of the exigencies of the service, the same consequences would have ensued. If the loss of the emoluments attaching to the higher rank in which he was officiating was the only consequence of his reversion as a result of the enquiry against him the appellant would have no cause of action. But it is clear that as a result of the order dated August 11, 1948, (Ex. 35) the appellant lost his seniority as a Mamlatdar, which was his substantive post. That being so, it was not a simple case of reversion with no

evil consequences; it had such consequences as would come within the test of punishment as laid down in Dhingra case. If the reversion had not been for a period of three years, it could not be said that the appellant had been punished within the meaning of the Rule laid down in Dhingra case¹. It cannot be asserted that his reversion to a substantive post for a period of three years was not by way of punishment. From the facts of this case it is clear that the appellant was on the upward move in the cadre of his service and but for this aberration in his progress to a higher post, he would have in ordinary course, been promoted as he actually was sometime later when the authorities realised perhaps that he had not been justly treated, as is clear from the order of the Government, dated March 26, 1951, promoting him to the higher rank with effect from August 1, 1950. But that belated justice meted out to him by the Government did not completely undo the mischief of the order of Reversion impugned in this case. It is clear to us therefore, that as a result of the order of Reversion aforesaid, the appellant had been punished and that the order of the Government punishing him was not wholly regular. It has been found that the requirements of Section 240(3) of the Government of India Act, 1935 corresponding to Article 311(2) of the Constitution, had not been fully complied with. His reversion in rank, therefore, was in violation of the constitutional guarantee. In view of these considerations it must be held that the High Court was not right in holding against the appellant that his reversion was not a punishment contemplated by Section 240(3) of the Government of India Act, 1935. On this part of the case, in our opinion, the decision of the High Court has to be reversed and that of the trial court that his reversion to his substantive rank was void, must be restored.

3. In Parshotam Lal Dhingra on which reliance has been placed in the aforesaid judgment, the Supreme Court has categorically held that the person has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will no ordinarily be a punishment; the real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences; the order which entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponed of his future chances of promotion, then that circumstances may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality, the Government has terminated the employment as and by way of penalty.

4. In the present case, the petitioner's emoluments in his substantive of Executive Engineer has not been reduced. Since he has not right in the first place in the officiating post of Superintending Engineer, his reversion to substantive post of Executive Engineer would not amount to a punishment.

5. On the contentions that the impugned order is stigmatic, on bare reading of

the said order shows that he has been sent back to his substantive post of Executive Engineer in view of the disciplinary proceedings instead against him. A fact that the disciplinary proceedings have been initiated against the petitioner is not in dispute. Reference to the disciplinary proceedings pending against the petitioner would not amount to cause in stigma upon him since his guilt or otherwise would only be determined on conclusion of the disciplinary enquiry. We are reference to the fact that the disciplinary proceedings are pending against him in the impugned order when in fact such proceedings are pending would not amount to causing him stigma on the petitioner herein. The allegations of malafides are also without substance, malice is easier made than established. The onus of establishing malice lies heavily on the person who alleges malice. Malice requires proof of very high order (E.P. Royappa Vs. State of Tamilnadu :AIR 1974 SC 555) vague or and vague allegations malice do not suffice. Further this Court would not examine the allegations of malice behind the back of person against whom malice is alleged, and it is only if the person as arrayed as party to the proceedings and his even an opportunity to rebut, the allegation of malice would record thereafter record the finding as to whether or not the order is vitiated by malice (State of Bihar vs. P.P. Sharma : AIR 1991 SC 1260). In the present case the petitioner has not even chosen to array the person against whom alleges malice as party respondent in the writ petition.

6. Mr. Ravi Babulkar, learned counsel for the petitioner would lastly contend that the posting of the petitioner to Berinag which is a distance of 300 Km. from Dehradun would deprive him a reasonable opportunity of defending himself in the disciplinary enquiry. The mere fact that he is posted at the different place would not by itself necessitate being interference; the petitioner would be denied a reasonable opportunity of depending him in an enquiry.

7. Needless to state that in case the petitioner is so deprived, it is always open to avail his judicial remedy in accordance with law. However, we see no reason to exercise discretion under Article 226 of the Constitution of India to interfere with the said order.

8. The writ petition fails and is accordingly dismissed.

No costs.