
(1970) 08 KL CK 0005
In the High Court Of Kerala
Case No : O.P. No. 931 of 1970

Ramanatha Pillai

APPELLANT

Vs

State of Kerala and another

RESPONDENT

Date of Decision : 06-08-1970

Acts Referred:

Constitution of India, 1950 — Article 16, 226, 309, 310, 310(2)

Citation : (1971) KLJ 210

Hon'ble Judges : P. Govindan Nair, J;M.U. Isaac, J

Bench : Division Bench

Advocate : S. Easwara Iyer, for the Appellant;

Final Decision : Dismissed

Judgement

1. Two questions arise in this petition under article 226 of the Constitution of India. They are:

(1) Whether the removal of the petitioner from service has infringed article 311; and

(2) Whether, even if article 311 is not infringed, the petitioner is entitled to any relief on the ground of equitable estoppel.

The facts may be stated thus: A Vigilance Commission was constituted for the State of Kerala by Ex. R1 order dated 29-5-1965 and by Ex. R2 order dated 16-4-1966 the constitution, jurisdiction, powers and functions of the Commission were defined. The post with which we are concerned in this case is the post of the Vigilance Commissioner. According to Ex. R 2, the Vigilance Commissioner was to hold office for a period of three years from the date he assumed charge or till he attained the age of 62, whichever occurred first. The post of the Vigilance Commissioner was sanctioned by Ex. R6 dated 26-10-1965. Ex. R6 is in these terms:

In modification of the order issued in the G.O. read as third paper above,

Government accord sanction for the creation of a temporary post of Vigilance Commissioner on a consolidated pay of Rs. 2500/- (Rupees two thousand and five hundred only) per mensem for a period of three years from 3-6-1965 i.e. the date on which Sri P.D. Nandana Menon assumed charge as Vigilance Commissioner.

The continuance of the temporary post of Vigilance Commissioner for a further period of one year from 3-6-1968 was ordered on 24-1-1968 by Ex. R7 and this was followed by Ex. R8 dated 15-11-1968 according sanction for the continuance of the post till 28-2-1970. In the meantime, Sri P.D. Nandana Menon who was the first Vigilance Commissioner, retired, and by Ex. R3 dated 24-9-1968, the petitioner was "appointed as Vigilance Commissioner on a consolidated pay of Rs. 2,500 (Rupees two thousand and five hundred only) p.m. for a term of three years from the date of his assuming charge". The petitioner assumed charge on 3-10-1968. On 2-11-1968, Ex. R2 was modified by Ex. R4, and it was ordered that the Vigilance Commissioner will hold office for a period of five years or till he attained the age of 60 years, whichever occurred first. This was followed, on 20-12-1968, by the agreement between the petitioner and the State Government evidenced by Ex. P2 and this agreement provided that the petitioner will serve as Vigilance Commissioner for a period of five years. We must point out one provision in Ex. R2 to the effect that the petitioner can be removed from service only in the manner in which the Chairman of the Public Service Commission constituted for a State can be removed under the Constitution of India. Provisions similar to those contained in the Constitution of India in regard to the removal of the Chairman of the public service Commission are incorporated in the agreement, Ex. P2, about the removal of the Vigilance Commissioner. Notwithstanding the above provisions, a term of five years, and the provision that he can be removed only in the manner in which the Chairman of the public Service Commission can be removed, Ex. P3 order has been passed, on 24-2-1970, abolishing the post of the Vigilance Commissioner with effect from 28-2-1970. Nothing is mentioned in this order as to what is to happen to the petitioner. But, it is stated in the counter-affidavit filed on behalf of the State Government that the Vigilance Commission itself has been abolished and that the personnel working in the Commission who were regular Government servants on deputation from other Government departments have been withdrawn. The petitioner thus found himself in the curious position of having an agreement with the State Government to serve the State for a period of five years as Vigilance Commissioner but with the post of Vigilance Commissioner and the Vigilance Commission itself abolished.

2. The petitioner complains that the provisions contained in the order of his appointment Ex. R3, and in the agreement Ex. P2, have been violated, that this is violative of article 311 of the Constitution and that in any view of the matter the State Government is estopped from terminating his services. His prayer, therefore, is that this Court be pleased "to issue a writ of mandamus or other appropriate writs, directions or orders restraining the 1st Respondent from

terminating the office of the Petitioner as Vigilance Commissioner before the expiry of the term fixed by Exhibit P2 agreement and to issue a writ of certiorari or other appropriate writs, directions or orders quashing Ex. P3 order of the 1st respondent to the extent of terminating the office of the petitioner as Vigilance Commissioner."

3. It must be stated here that the prayer in the petition, before it was amended subsequently, ended with the prayer for the issuance of a writ of mandamus restraining the 1st respondent from terminating the office of the petitioner as Vigilance Commissioner before the expiry of the term fixed in Ex. P2 agreement. This was so, because the petitioner approached this Court, even before Ex. P3 order was passed, on the basis of paper reports, one of which has been produced along with this petition as Ex. P1, that the Government have decided to terminate the service of the Vigilance Commissioner, Shri Ramanatha Pillai. Later, when the order Ex. P3 was passed, the prayer in the petition was amended and it is the amended prayer that we have extracted above.

4. The first question that arises for consideration is whether there has been violation of article 311 of the Constitution. Article 311, in so far as it is relevant for the purposes of this case, reads as follows:-

311. (1) No 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 shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation of the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

5. It is contended on behalf of the petitioner that he has a right to the post of the Vigilance Commissioner, not because the post is a permanent one to which he has been appointed substantively, but because his appointment is for a specific term of five years. It is urged that the agreement, Ex. P2, gives the petitioner a right to hold the post for a period of five years, and that if that right is interfered with, article 311 of the Constitution would be infringed. Article 311, it is urged, can be infringed either by interfering with the right to hold a post or by denial of the pay and allowances of the incumbent attached to the post. One or the other of the consequences, it is submitted, is sufficient to attract the article, and reliance has been placed for this proposition on the two well-known decisions of the Supreme Court in Parshotam Lal Dhingra Vs. Union of India (UOI), and in Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., . In answer to these arguments, counsel on behalf of the 1st respondent

has urged that the right to create or abolish a post is always a governmental function and nothing in article 311 covers, or is intended to cover, or fetter, in any manner, the right of a State Government to create or abolish a post, according to its policy decisions, according to the exigencies of circumstances, or according to administrative necessities; the creation, the continuance or the abolition of a post, it is urged, will have to be decided by the State Government according to the above criteria, in the interests of the general public. For this proposition counsel for the first respondent has relied on the very same decisions of the Supreme Court relied on by Counsel for the petitioner and referred to above.

6. The question whether removal from service resulting from the abolition of a post will be a removal within the meaning of article 311 has not as such been considered by the Supreme Court either in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, or in *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, . But, authority in regard to this aspect is not wanting and a number of decisions have been cited before us by counsel appearing in the case. Excepting the decision of the Jammu and Kashmir High Court in *Abdul Khalik v. State of Jammu and Kashmir AIR 1965 J&K 15* and the dissenting judgment of Oak C.J. in *State of Uttar Pradesh and Another Vs. Dr. Prem Behari Lal Saxena*, no decision has been cited by counsel for the petitioner wherein the view has been taken that a removal resulting from the abolition of a post-when the post has been abolished bona fide and in the exercise of governmental functions-will be a removal within the meaning of article 311 of the Constitution. The decision in *Abdul Kalik v. State of Jammu and Kashmir AIR 1965 J&K 15* has been noted in all the other cases in *P.V. Nasik and Others Vs. State of Maharashtra and Another*, , in *P. Bhupathi Reddy and Others Vs. Government of Andhra Pradesh*, and in *State of Uttar Pradesh and Another Vs. Dr. Prem Behari Lal Saxena*, cited by counsel for the respondents and has been dissented from. There is also a decision of the Delhi High Court in *Dr. S.C. Sharma v. Union of India AIR 1958 SC 36* where it has been stated, very categorically, that the abolition of a post and the removal from service resulting therefrom will not infringe article 311 of the Constitution. We shall extract a passage from this decision first:

In fact, the Government could have totally abolished those posts held by the Departmental candidates. In that event, the departmental candidates would have lost their jobs not because they were removed from service, but because the posts held by them ceased to exist. There is no fundamental right or any kind of right in the incumbents of posts under the Government that these posts must be continued by the Government for any amount of time. The Government has the discretion to create and abolish posts. The incumbents of the posts so abolished automatically go out of the service and I am not aware of any protection given by law or the Constitution to such incumbents against such abolition of posts.

7. There is a very detailed analysis of the dicta of the Supreme Court, in what we

may respectfully term a very reasoned judgment of Pathak J., in State of Uttar Pradesh and Another Vs. Dr. Prem Behari Lal Saxena, . After referring to relevant passages from the judgement in P.L. Dhingra's case and after due consideration of the arguments advanced, the learned judge came to the conclusion that Dhingra's case is authority for the proposition that termination of service resulting from abolition of post will not attract article 311 (2) of the Constitution. Abolition of post, it was held is another exemption like compulsory retirement or superannuation according to the service rules, to the proposition that every termination of service will attract article 311 (2) of the constitution. We are in agreement with this view. To the same effect are the decisions of the Bombay and Andhra Pradesh High Courts we have referred to earlier. We, therefore, reject the contention of counsel for the petitioner that article 311 of the Constitution will be attracted even incases of abolition of posts.

8. Of course, this will be so only when the abolition of the post is nor a colourable exercise of power with a view to "remove" the incumbent holding the post from service. This leads us to the next point urged by counsel that the abolition of the post of the Vigilance Commissioner is such a colourable exercise of power; and that what was done was not to abolish the post but to remove the petitioner from the post of the Vigilance Commissioner which he held.

9. In support of this contention counsel referred us to a speech made by the second respondent in the floor of the assembly. The second respondent, at the time he made the speech, according to the affidavit he has filed before us, was only a member of the Legislative Assembly, he having resigned his Ministership in the then Ministry. In that speech some remarks were made about the Vigilance Commissioner. Counsel relied on those remarks made in the Assembly in support of his case that the second respondent was biased and prejudiced against the petitioner. A new Ministry was formed sometime after, and in that Ministry, the second respondent became the Minister for Home Affairs. It was under this Ministry that the Vigilance Commission as well as the Vigilance Director were functioning and it is said that the decision to abolish the post of the Vigilance Commissioner was taken in order merely to get rid of the petitioner. Counsel also pointed out that the abolition of the Vigilance Commission was followed almost immediately by the creation of anew department under a Secretary to Government to discharge the very same functions that were discharged by the Vigilance Commission and this, according to counsel, will also indicate that the object was not to abolish the Vigilance Commission but only to terminate the services of the petitioner. The order relied on for the purpose of showing that a new department was created is Ex. R5 dated 31-3-1970 which it may be noted is soon after the order Ex. P3 dated 24-2-1970.

10. In answer to these averments, affidavits have been filed by the State Government as first respondent and also by the second respondent separately. Counsel for the respondents has invited our attention to paragraphs 5 to 9, 13, 14 and 16 of the counter-affidavit of the first respondent and to paragraphs 2 to

5 of the counter affidavit of the 2nd respondent as also to the averments contained in the counter-affidavit that has been filed by the first respondent to the affidavit in support of C.M.P. No. 6153 of 1970. It is unnecessary to read all these averments. Suffice it to state the gist of those averments. They may be summarised thus: Serious doubts were expressed as to the advisability of establishing a Vigilance commission even before it was constituted in 1965 by Ex. R1. It is further stated that after the term of the first Vigilance Commissioner Shri P.D. Nandana Menon expired and he retired, the question was again considered and the working of the Commission for three and odd years reviewed and views were expressed that the Commission had not worked satisfactorily and that its existence had even contributed in a way to more delay in the disposal of vigilance work. It is said that the question was again re-examined when the duration of the sanctioned period of the post of Vigilance Commissioner was about to expire. There again, it asserted, the same views have been reiterated. It was in those circumstances, according to counsel for the respondents, that the State Government decided to abolish the Vigilance Commission. As regards Ex. R 5 relied on by counsel for the petitioner, it is pointed out that no fresh department has been created and that all that has been done by Ex. R5 was only to take away from the Home Secretary and his Deputy Secretary and certain members of his staff who were doing vigilance work and they were placed under a separate Secretary to Government exclusively entrusted with vigilance work. This it is pointed out, is only an administrative adjustment for more expeditious and effective disposal of vigilance work. Counsel for the respondents also placed before us the relevant files in which the notes are contained as to what transpired in 1965, in April 1966, long before the petitioner was appointed, and in September that year and also as to what transpired in December 1969. The notes prepared by the Chief Secretary and Secretary to Government substantiate the averments contained in the paragraphs of the affidavits of respondents 1 and 2 already enumerated. A perusal of Ex. R5 shows that there is no new department created to discharge the work of the Vigilance Commission. It appears to us that this is only an internal arrangement inside the Secretariate to achieve what the Government felt was a more satisfactory arrangement for dealing with vigilance work of the vigilance division in the Secretariate. This vigilance division consisted of a Director of Vigilance and a Tribunal for disciplinary proceedings. The Vigilance Director and the Tribunal were functioning even at the time the vigilance commission was constituted in 1965. It is seen from the files made available to us that largely the work of Vigilance Commission was in the nature of giving advices and often a case had to be referred to him at different stages before a final decision was taken and this, it has been pointed out, contributed to delays. In these circumstances, it is impossible to draw an inference that the abolition of the Vigilance Commission was with the motive of doing away with the petitioner or substantively for that purpose. If the exigencies of administration require that certain alterations should be made in the establishments or new departments created, we conceive that it is a governmental function which will not fall within the scrutiny of this court. It is

certainly not for us to sit in judgment on such action and decide whether it is proper or whether it was improper or whether this was the step which should have been taken by the Government or whether they should have adopted some other method. From all that transpired as evidenced by the papers that have been placed before us we are unable to come to the conclusion that there has been colourable exercise of power by the State Government and that the main and real object was the removal of the petitioner from service. We have, therefore, to negative this contention as well.

11. The last point urged by counsel for the petitioner is based on the principle of estoppel. Ex. P2 agreement between the petitioner and the 1st respondent State, it is contended, precludes the State Government from terminating the services of the petitioner during the period for which the agreement has been entered into. In other words, the contention is that when the State has entered into an agreement to employ a person for a specified period and when that person by accepting the offer has changed his position to his detriment, the State Government is precluded from altering the terms of the agreement on the principle of estoppel. It is urged that there has been detriment to the petition because he had to leave the bar of which he was a senior member and the himself up for a period of five years and had further agreed not to accept any employment or office of profit under the State or Union Government after the expiry of the term of the agreement.

12. Reliance has been placed for this proposition on the principle enunciated by the Supreme Court in Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., and in Century spinning and Manufacturing Company Ltd. v. The Ulhasnagar Municipal Council (1970) 1 S.C.W.R. 797.

These decisions indicate that in given circumstances an estoppel can work against a State Government or the Central Government. The question is whether the principle can be applied to matters of employment. The provisions in the Constitution relating to matters of employment under the Union or the States which are pertinent to the matter in question are those contained in articles 16, 309, 310 and 311 of the Constitution. In view of the specific provisions in article 310 of the Constitution, it appears to us that there is no scope for the application of the principle of estoppel in matters of employment under the Union or the States. This is the view taken by the Supreme Court in The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, . The view expressed there is that the pleasure of the President or the Governor under article 310 cannot be fettered by any statute or rule and it can be fettered, if at all, only by some other provision of the Constitution. It appears, therefore, that the pleasure of the President or of the Governor to dismiss a public servant cannot be fettered by any provision in his contract of service or on the principle of estoppel.

13. Raman Nayar J. (as he then was) held in the full bench decision in Srinivassan v. State of Kerala 1967 KLT 853 that there can be no plea of estoppel against article 309 of the Constitution which undoubtedly confers the power to

change the age of superannuation from time to time. Mathew J. in *Sankaranarayanan v. State of Kerala* ILR (1968) 2 Ker 664 expressed the view that the pleasure of the President or of the Governor to dismiss a public servant cannot be fettered by any provision in the contract of service, and after referring to the decisions in *Amphitrite v. Rex* (1921) 3 K.B. 500, *Robertson v. Minister of Pensions* (1949) 1 K.B. 227, *Reilly v. The King* (1934) A.C. 176, *Birkdale District Electric Supply Co. v. Southport Corporation* (1926) A.C. 355 and other cases came to the conclusion that there cannot be a fetter of discretion of a public officer when the effect of the fetter is to prevent the authority from carrying out some fundamental public purpose. Estoppel cannot operate to fetter the discretion which has to be exercised in the interests of the general public. Mathew J. summed up as follows:

So, we come to the crux of the matter, and that is that there cannot be an estoppel in respect of statutory provisions which are made for the benefit of some one other than the person against whom the estoppel is asserted; and this is not peculiar to statute law. There are provisions in the common law against which there can be no estoppel (See *Kok Hoong v. Leong Cheong Mines*, 1964 A.C. 993, 1015, 1016). The application of the principle of estoppel to a provision depends, not upon its origin, statutory or otherwise, but on its nature. Some capacities arise under common law and it has been held that there can be no estoppel against a person under an incapacity. In all cases where the courts have excluded the operation of the doctrine of estoppel it will be found that there has either been a strict prohibition against the consequences of the estoppel (as in the incapacity cases) or the person, corporation or authority against whom the estoppel is pleaded has owed a duty to the public, or possibly, occasionally to some other individual, against whom the estoppel cannot fairly operate.

14. So, where the question of the continuance of employment of a person in State service is related to public interest and public administration there can be no question of a fetter by the terms of the contract of employment of the discretion which is to be exercised in the interest of administration and of public interest. We are unable to accept the contention that the principle of estoppel pleaded by counsel for the petitioner has any application.

15. We would not like to part with this case without reiterating what the Supreme Court has said in the two decisions on estoppel to which we have already adverted to that public bodies must honour their solemn agreements. Article 310(2) of the Constitution of India gives the indication that there can be contracts providing for compensation if, before, these expiration of the terms of an agreement, a post, has to be abolished or the contract terminated. Ex. P2 agreement does not contain any such provision. Perhaps it was not thought of at the time of the agreement because at that time there was no idea to abolish the post. The petitioner had contended, as already stated, that he was a senior member of the bar and that he left the bar only because of the favourable terms contained in the agreement and further tied himself upto serve the State for a

period of five years and even agreed not to accept any office of profit under the State or Union Government after the term was over. These we consider are matters which could well be taken note of by the Government. Whether in these circumstances the State should offer any compensation or alternative employment to the petitioner is a matter for the State Government to consider. We dismiss the (sic). There will be no order as to costs.