

(1961) 04 MP CK 0017

In the Madhya Pradesh High Court

Case No : Civil Miscellaneous Petition Case No. 33 of 1959

Roop Singh Devi Singh

APPELLANT

Vs

Sanchalak Panchayat and Samaj Sewa and Another

RESPONDENT

Date of Decision : 20-04-1961

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 311
Madhya Bharat Panchayat Rules, 1951 — Rule 144, 145

Citation : AIR 1962 MP 50 : (1962) JLJ 80

Hon'ble Judges : V.R. Newaskar, J; H.R. Krishnan, J

Bench : Division Bench

Advocate : S.D. Sanghi, for the Appellant; S.L. Dubey, for the Respondent

Final Decision : Dismissed

Judgement

Krishnan, J.—The petitioner, who had been temporarily appointed as the Secretary, Kendra Panchayat, Makdone, in District Ujjain, was removed from service by the order of the Director, Panchayat and Samaj Sewa, dated 19-10-1957. He addressed the Government what he describes as "a revision application" and got on 20-2-1959, that is, about a year and a half after the removal, an unfavourable reply, after it, he took some months to obtain certain certified copies and ultimately filed this petition in October 1959. His allegation is that the authority that dismissed him is not the authority that appointed him and, further that it is subordinate; the requirements of Article 311 of the Constitution have not been fulfilled; and again, that in regard to some of the grounds of removal, he had not been called upon or provided an Opportunity to explain or show cause.

The questions for decision are, firstly, as a preliminary point, whether a delay of about sixteen months spent in seeking relief in a manner admittedly not provided by statute or rules, should be condoned by this Court; secondly, whether an employee of a local authority--though appointed by Government--is in the civil service of the State and is as such, entitled to the benefit of the procedure laid

down in Article 311; thirdly, whether a change of name of the appointing authority will affect the validity of the order of removal of the employee, if it had not been formally incorporated by amendment in the appropriate rules; finally, whether the mention of certain additional allegations in the body of an order can be presumed to have coloured the operative portion if it expressly acts out only one of them.

2. The facts are the following: The petitioner, who had been appointed temporarily on 20-7-1953 by the Development Commissioner, Madhya Bharat, got into certain difficulties in April 1956. Certain grants had been, made to different kendra panchayats for construction work (nirman karya) and the Minister in-charge of panchayats had called a meeting at Ujjain on the 5th April of the sarpanchas of the Panchayats to assess the progress of the work done by different panchayats in that district. There was also a direction that the secretaries of the panchayats should send in time a complete statement of how the money had been spent and what had been done. In a properly run institution, the preparation of this statement would have been the simplest affair. However, it happened, at that meeting no statement was brought from Makdone panchayat; the authorities concerned were kept in the dark about the real state of affairs in this regard in that panchayat. Normally, both--the sarpanch and the secretary--, would have been blamed; but we are here concerned with the action taken not against the former, but only against the latter.

3. The matter of the statement was taken seriously by the higher authorities. The Assistant Director Rural Uplift of the Ujjain District, called upon the petitioner to explain the default and to show cause why he should not be removed from service. The latter urged that he had been on leave for a few days till the 30th of March; on that date, he was going to prepare the statement concerned, but the sarpancha had ordered him to go to a place called Karedi where a mela was to be held under the supervision of the authorities of the kendra panehayat and the Minister was to visit that place as well. He left on that assignment and, therefore, was not in a position to prepare the statement. He attached to this cause, the written order by the sarpancha, dated 30th March, 1956, directing him to go to Karedi mela and stating (which was apparently superfluous) that in view of the urgency of the Karedi visit, the statement about the progress of construction work could not be prepared.

It is unnecessary in this proceeding to consider the extent of the sarpancha's complicity in this scheme of keeping the authorities in the dark in regard to the construction work. On seeing this cause, the Deputy Inspector (Up-Nirikshak) for Rural Uplift, pointed out to the petitioner that at all events he had time to prepare the statement before leaving for Karedi, and asked him to explain this and show cause against the action for his disregarding the orders. The petitioner again replied in triplicate as directed, asserting that there was really no time to prepare the statement. Here, the petitioner lets himself go and questions the Up-Nirikshak why he was not making use of the statement that had already been

sent to him on a previous occasion, and why he thought there was some mystery in this matter, which he was anxious to expose:

"For the reasons I have already set out, I have not acted irresponsibly and because of this difficulty I could not do the work for the highest functionary in the Panchayat Department".

4. This matter was sent up. In the meantime, other authorities were at work. It appears that the Inspector had held an inquiry generally into the affairs of the Makdone kendra panchayat. The sarpancha himself had given a report and at one stage, the Collector seems to have field an inquiry. As a result of all these inquiries a charge-sheet was served on the petitioner through the sarpancha on the 13th June, 1956, containing five heads. One of them--No. 3--is the same as the charge about the statement which was due on the 5th at Ujjain and which he could have prepared as the letter had been received on the 28th itself and even according to himself, he had joined duty on the 30th, to which--as it involved public monies--the authorities concerned attached very considerable importance, the petitioner soon after sent his cause on all these charges.

For several months nothing seems to have happened, as there were changes in the structure of the department itself. The matter was taken up in July 1957, when the Inspector investigated the affairs of the Makdone kendra panchayat, and inter alia, took down the statement of the petitioner on these charges. On the 6th September 1957, the petitioner was at the office of the Deputy Director, Social Welfare and Panchayat at Indore, whether in connection with this or with some other matter. There again, he was examined and his answers recorded. Ultimately, he got a communication dated 29-10-1957, but which he asserts he received on 14-11-1957, under the signature of the Deputy Director signing for the Director, that he had been removed from service (sewa se prithak kiya gaya hai) :

"for failure to discharge duties promptly in time, not posting the sarpancha with the proper course of business and tampering with the records in his charge and similar serious lapses."

But this is not the original order, but only a gist as understood by the Deputy Director: the original was the order actually signed by the Director on 19-10-1957 Annexure "L" filed by the petitioner. The first paragraph enumerates a number of allegations; at least one of them--regarding the tampering with the books--had never been put to the petitioner for his explanation or cause. However, the operative part of the order which is the later separate paragraph, runs:

"Rupsingh mantri admits that he failed to prepare the statements (that is the one regarding progress of construction work) but he explains that he did not have sufficient time to prepare them. But there is no sufficient reason for accepting this explanation. Hereby it is clear that the secretary has committed a serious default (bhayankar bhool) an the discharge of his duties. Moreover, the Makdone

kendra panehayat itself has now been abolished and its area amalgamated with the kendra panehayat of Tarana and, therefore, there is no need for the services of this secretary. In these circumstances, it is necessary to retrench the services of this mantri. Accordingly, his services are retrenched and for the period of suspension he is ordered to be paid, as indeed it is proper, the due subsistence allowance."

The only allegation mentioned in the operative portion is the admitted failure to prepare the statement. Further, the order ends by describing the action as "retrenchment". The Deputy Director communicating the order actually calls it "removal from service". At a few places in the return, the word used is "dismissal".

5. The petitioner has urged that there has been no proper inquiry as required by law--according to him, Article 311; he has also explained the delay in approaching this Court and accordingly prays that the order should be quashed by this Court and the Director (Panchayats) directed to appoint him as secretary or mantri of some kendra panchayat. 1.--Delay-

6. The preliminary point is, whether the petition is so delayed as to disentitle the petitioner to the assistance of this Court. Though there is no limitation in this regard, and the Court will not call upon the petitioner under Article 226, to give a strict arithmetical account of every day, it is the accepted principle that delay that is considerable and unexplained, disqualifies the petitioner to any assistance. This has been discussed at some length in the Full Bench decision reported in Krishna Rajeshwar v. Chief Secretary M. P. Govt. Police Dept. Nagpur AIR 1954 Nag 151. This principle has been followed in this, Court's judgment in Gajraj Singh Bheru Singh Rajput Vs. State of M.B. and Others, . It is certainly a principle of prudence and diligence, to be applied reasonably; and further, the explanation of the delay, if any, should be considered sympathetically. But this does not mean that delay, especially of the order of several months, should be overlooked as a matter of course.

7. In this case, the delay after February, 1959, is of no significance. There was some misunderstanding about the issue of copies of certain papers; which was cleared sometime in July. After this, the petitioner still took three months to move this Court, but even this can be overlooked in the special circumstances. But the delay between October or November 1957 and February or March 1959 calls for a satisfactory explanation. The petitioner's statement is that while the law does not provide for a revision by Government, he was labouring under the honest misconception; after all, action against him had been taken under the order or advice of the Minister of his department; he thought it proper to make an application to him before moving this Court.

Besides, he has urged that this could have been investigated only before the petition was admitted, and not at the time of the hearing. He has cited Damodar v. Narayanan (S) AIR 1955 Ass 163, though, we are not certain if the petitioner

is really putting his case so high. Secondly, he points out that in the return, no objection has been taken on the ground of delay; he has, thus, been lulled into a sense of security in which he has been waiting for relief on merits from this Court without moving the civil court in a regular suit. If Government had objected in the return on the ground of delay, the petitioner could have filed a suit.

8. Though, in this case we shall, for special reasons go into the merits, still, the matter of delay will have to be examined briefly, especially, as it is urged at the Bar that certain aspects of the question have not been cleared in the case *Gajraj Singh Bheru Singh Rajput Vs. State of M.B. and Others*, . Firstly, this is a matter really for the Court itself and not, like the merits or limitation, a question between the parties. So, whether the party does or does not raise it, the Court is bound to satisfy itself that the petitioner for extraordinary relief has himself not been wanting in diligence. Therefore, the failure on the part of the opposite party to record an objection on the ground of delay is immaterial. Nor are we impressed in any manner by the ingenious argument that the petitioner would have gone to the civil court with a suit had he been cautioned in time that his petition was likely to be thrown out because of this unexplained delay. It is always the choice of the litigant, whether to follow one or both of the two lines which he feels are open to him; but he cannot blame others if he feels that his choice has been unwise. The third ground, based on the judgment of the Assam High Court calls for fuller consideration:

"The question of delay, in my opinion, is a very potent factor to be taken into account in throwing out an application for such writs in limine; but after the issue of a rule nisi when the Court has examined the record and is satisfied that the order complained of is manifestly erroneous and illegal or without jurisdiction, the Court would be loath to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection".

With all respect, one does feel that the proposition has been stated too widely. They seem to have done this because-

"The law in these cases is in a state of flux and does not finally crystallise until it has reached the stage of the Supreme Court".

Certainly, the Supreme Court's word is the last one; but it does take time and till then, the High Courts cannot work in vacuo; they have with self-confidence, formulate principles that they consider fair and equitable. In this High Court, we have already done so. Again, very commendable as it would be to investigate all preliminary matters including the effect of delay at the time of admission, it does happen very often that this is not done, and applications are admitted not because the Court is fully satisfied of the "manifest error and illegality and non-jurisdiction of the order complained against", but because it finds some prima facie case. Thus, simply because an application has been admitted for bearing, it cannot be said that the ground of unexplained delay cannot be canvassed during

the hearing.

9. The petitioner's explanation is he thought it proper to apply "in revision" before the Government, and Government itself instead of informing him immediately that there was no such provision of law, kept it for a year and a half and then rejected it apparently on merits. The question for our consideration is not what the petitioner chooses to believe, nor what this or that officer of Government considers the proper expression, but what the actual legal position is. Here is clear and undoubted--and in fact it is admitted--that there is no provision for revision. The satisfactory way of explaining delay is for the petitioner to show that he has been seeking relief elsewhere in a manner provided by the law. If he runs after a remedy not provided in the statute or the statutory rules, this Court cannot condone it; otherwise, there would be no end to such explanations and we would be called upon to act not on the law as it is, but on what the petitioner or somebody else assumes it to be. Thus, in this case we would hold that the delay of about a year and four months has not been satisfactorily explained. This is one reason justifying the dismissal of the petition.

II--Applicability of Article 311 to servants of local authorities--

10. The petition has been filed, on the basis that the petitioner is entitled to the benefit of the procedure laid down in Article 311 and as it has not been followed, the order dismissing or removing him from service should be quashed. However, at the time of the argument, it has been practically conceded that this position cannot be sustained and all that the petitioner was entitled to, was the procedure laid down in the statutory rules made under the Madhya Bharat Panchayat Vidhan. The question, however, is of considerable importance, and can be briefly stated thus:

11. Article 311 speaks of--

"A member of a Civil Service of the Union or an All India Service or a Civil Service of a State or the holder of a civil post under the Union or the State....."

The test is not the appointment of the member, but of his service or actual post. For our instant purpose, we can ignore the reference to the service under the Union or the All India Service. The petitioner was really the servant of the panchayat of Makdone, though, in accordance with the statute, his appointment was made by the head of a department of Government. He drew his pay from the funds of the panchayat and was doing the work of the panchayat. The appointment was for the panchayat, and the mere fact of its being made by a department or an officer of the State Government does not make him the member of the civil service of, the State or the holder, of a civil post under the State.

12. In this regard, there are some notions which should not be confused. There is first, the notion of a "public servant" which is far wider than that of a servant

of the State or Union or a member of a service under the State or Union or an all India service. Secondly, there is the notion of the "State" as defined in Article 12, where it includes the Government and Parliament of India and the Government and Legislature of each of thy States and of local or other authorities out of the territory of India or under the control of India. But the word "State" in Article 311 is not the State as defined in Article 12 but State as defined in Article 308. Before the reorganization of 1956 it mentioned the States in Schedules A and B because in those days a servant holding a civil post in a Part C. State was really in the service of the Union. Now, we have no Part B States and so, Article 308 speaks of States other than the State of Jammu and Kashmir, that is to say, State properly so called as distinguished from the Union, and belonging to the same genus as the State of Jammu and Kashmir, and mentioned as such in Schedule IV. Service and civil post under a "State" for the purpose of Article 311 is, therefore, under the State properly so called, for purposes of this case, the State of Madhya Bharat in Part B, as it then was, and of the Madhya Pradesh as it now is.

13. Coining to local authorities (of which the panchayat is one), both, in our country and in England, they are not fully independent in the matter of appointment of their employees, but have, for certain specified services, to take as their officers, persons appointed by the Government or one of its officers. This question has come up before the Courts and has been the subject-matter of a number of reported decisions. The ruling reported in Kanhayyalal Shivasahay Sharma Vs. Deputy Commissioner of Sales Tax and Others, has set out and discussed the case law. As we are in agreement with the view taken by the Madras High Court in that judgment, it is unnecessary for us to set out the other rulings in detail. It was held that:

"An employee in the service of the District Board which owes its existence to the Madras Local Boards Act, is not a member of the civil service of the Union or a civil service of the State or a person who holds a post under the Union or the State".

In our context, we have only to read the "Kendra Panchayat" in place of the "District Board" and the "Madhya Bharat Panchayat Vidhan" in place of the "Madras Local Boards Act" :

III--The Procedure Actually Adopted-

14. There is an increasing tendency to give servants of the local authorities (and often of the statutory corporations) protection and privileges similar to those available to civil servants of the Government : most often, we have in the relevant statute or the statutory rules, provisions in regard to the procedure for the dismissal or removal or other punishment of the servant of the local authority concerned. Rules 144 and 145 of the Madhya Bharat Panchayat Rules of 1951 made u/s 113 of the Act are the relevant rules in this regard. The latter Rule 145 is to the effect that before punishing in any of the manners set out there, the

employee concerned should be expressly charged with the offence or offences and served with a copy of the charge-sheet and provided with an opportunity to show cause within the period mentioned in the order.

15. The order as already reproduced does create the impression that the Director was at one stage thinking in terms of retrenchment (kami karna) of the services of this employee in view of the abolition of the Makclone panchayat itself. But the difficulty is that he had imported other ideas also. Had it been a case of retrenchment pure and simple, the petitioner should have been told that the kendra panchayat being abolished, his services were no more required; he himself was a temporary employee and he could have been sent away after the usual notice and the notice pay.

Things would have been extremely simple and the employee would have left without a black-mark and no question would have arisen as to whether Rules 144 and 145 had been followed. Here, on the contrary, the Director mentions "a serious lapse (bhayankar bhool)". The fact of the abolition of the panchayat is only brought out as an additional but subsidiary ground, justifying the removal from service.

From the viewpoint of the employee, it is certainly a punishment. It is not a case of his leaving for no fault of his, and merely on the ground of retrenchment. Nor would a future possible employer take this view. Actually, the Director's own subordinate, who communicated the order understood it to mean a removal from service and not merely a retrenchment. In the return, the authorities have gone a step further and have described it at places as "dismissal". The employment is only a temporary one; but he is being removed not merely because his services are no more required, but is being removed for a certain lapse. Thus, the authorities had to follow Rule 145. This matter having been discussed at length by the Supreme Court in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, it is unnecessary to go into it any further.

16. One of the charges, namely, the failure to make the statement for the meeting before the Minister on 5th April 1956, is admitted by the petitioner, his explanation being that he did not have time. The authorities however, refused to accept the explanation and held, there was sufficient time. On the face of it, the view taken by the authorities is correct and it is not for this Court to differ from them on a purely factual issue. They have also taken a very serious view of this lapse; considering that there might have been a conspiracy of silence between the sarpancha and the secretary on the position in regard to the construction work for which public monies had been granted, we can-not say that they were unjust or were acting with some ulterior purpose. If this were the only ground for, the order of removal, then the petitioner can have no grievance.

17. At different stages in the proceedings, other grounds have been mentioned and some of them are quite serious such as alleged tampering with the records. Again, it appears that the Collector had held an inquiry and there was also an

inquiry by the Inspector. The results of the inquiry were presumably communicated to the higher authorities and have been indicated in the first paragraph of the order dated 19-10-1957. But some of them have not been put down in the charge-sheet given to the petitioner. So, the question is, whether the order of removal which the Director has described as an order of retrenchment, was based only on this lapse. Where as often happens the order is a composite one, it is really difficult for the Court to find out which of the allegations has really counted with the punishing authority; and if several allegations have counted, in which proportion they have done so.

In this order, however the allegations are all set out in the first paragraph and the authority's own view point is set out in the second. Nor does the authority in this case straightway write out the decision; he gives his reason, and that is only one of the allegations, which is the one that has been admitted by the employee. He gives the abolition of the panchayat as another reason; but it is unnecessary for us to go into it. Thus, as far as this order is concerned, it is difficult to hold that the petitioner has been punished for anything but the lapse set out in the operative paragraph of the order. This was admitted by him; in regard to this, at all events, the procedure laid down in Rule 145 has been followed. No doubt, the mention in the previous paragraph of other allegations was unnecessary, but as it is clear that the authority has been guided only by one of the charges which it has set out in the operative portion, I am of the opinion that the other charges did not count. I would, therefore, find that the order is not bad for non-compliance with Rule 145.

IV--Status of the Authority Ordering Removal-

18. Rule 144 provides, which is of course, one of the basic elements in Article 311, that the removal should be by the appointing authority itself, and by implication, that it cannot be by one subordinate to it. The petitioner was appointed by the Development Commissioner Madhya Bharat, in 1953, and was removed from service by the Director, Panchayat and Social Welfare, Madhya Pradesh; he contends that the removal is against the rule and therefore fit to be quashed. Actually, there had been changes in the department, both, at the time of the Madhya Bharat, and, after 1-11-1956, when the new Madhya Pradesh came into existence. The sequence was, this office of the Development Commissioner of Madhya Bharat had been abolished and after some intermediary changes in name, the Director of Panchayat (and Social Welfare) was occupying the same status at the time of the removal order; as "far as the panchayats were concerned he was discharging the same functions. The new name itself was introduced in the rules by a formal amendment made after the date of dismissal order; but the change had been effected in November 1956 itself when the new Madhya Pradesh came into existence.

19. Originally, the Development Commissioner was in charge of both the panchayats and rural co-operative societies. By a notification dated 2nd December, 1954, the name of the Development Commissioner was altered to the

Director of Rural Uplift. The rules were accordingly amended. Later on in July 1956, still in the time of Madhya Bharat, this office was split up. Now, Rural Uplift meant Rural Uplift (Panchayat); while the Co-operative Department was put in charge of a Registrar, Co-operative Societies. On the 1st November, 1956, when the new Madhya Pradesh came into existence, no Director of Rural Uplift (Panchayat) was appointed; but an appointment was made of Shri Gorelal Shukla as Director of Panchayats for the whole of the Madhya Pradesh. He was always holding the post of the Director of Social Welfare and this one was in addition to the duties of that post. The gazette notification itself (No. 373-XVIII, LSG/56) was made on 4-1-1957, but it was with effect from the date of commencement of the new State. Subsequently, the term of this particular incumbent was extended and was later on made permanent.

But we are not concerned, with the subsequent developments. The sanction was obtained for the creation of this post on a scale which was identical with the scale of that of the Director, Rural Uplift (Panchayats). The present was sanctioned at 1000-50-1250, while the order scale was Senior IAS Cadre (which begins at 800/-) plus 200 special pay. The duties of the old Director Rural Uplift (Panchayat) were in regard to the control and supervision of the panchayats while the present office was expressly described as that of the Director of Panchayats. It is nobody's case that at any moment both the offices existed. No doubt, the appropriate consequential amendments of the rules were made later than the date of the order removing the petitioner but that is not the real test. When the names of the office have been changing, what we have to see is not the name but the substance, that is to say, the actual duties and responsibilities and the status. By that test, it is clear that the removal order has been made by no other authority than the one that made the appointment, though that authority had by now taken a new name.

20. In the result, I find that the application as without substance and I dismiss it. Hearing cost payable by the petitioner to the non-applicant Rs. 50/- (fifty).

21. Newaskar, J. : I agree.