
(1989) 03 MP CK 0013

In the Madhya Pradesh High Court

Case No : Second Appeal No. 402 of 1985

Sardar Badeo Singh Nageena Singh

APPELLANT

Vs

State of Madhya Pradesh and others

RESPONDENT

Date of Decision : 29-03-1989

Acts Referred:

Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 — Rule 18

Citation : (1989) MPJR 510 : (1989) MPLJ 443

Hon'ble Judges : K.L. Shrivastava, J

Bench : Single Bench

Advocate : A.R. Tiwari, for the Appellant; S.S. Samvatsar, Dy. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

K.L. Shrivastava, J.

This appeal is directed against the judgment and decree dated 2-12-1985 passed by the VIIIth Additional Judge to the District Judge, Indore in Civil Appeal No. 53-A of 1985 whereby the judgment and decree passed by the VIIth Civil Judge, Class II, Indore dismissing the appellant's suit (C.S. No. 38-A/84) For declaration that the order of his compulsory retirement passed by the superintendent of Police, Indore is void and is of no legal consequence, stand affirmed.

It is not in dispute that on 17-10-1950 the appellant was appointed by the I. G. Police of the erstwhile State of M.P. as Constable. In due course, by the order dated 29-6-1953 he was promoted as Head Constable.

On the charge that they were responsible for two prisoners having escaped on 26-2-1981 from custody, the appellant along with two constables was subjected by the S. P. to a Departmental Enquiry in a common proceeding.

The charge was held proved by the Inquiring Officer and ultimately by the order

dated 26-9-1981 the S. P., Indore imposed on the appellant the penalty of compulsory retirement.

The appellant preferred departmental appeal before the DIG. but was unsuccessful. He then filed the aforesaid civil suit for declaration that he continues to be in service, with the result already stated.

This appeal has been admitted on the following substantial questions of law:

(1) Whether the Superintendent of Police was in the circumstances, competent to pass an order of compulsory retirement against the appellant? and

(2) Whether Rule 18 of the M. P. Civil Services (Classification. Control and Appeal) Rules, 1966 has been violated and if so, what would be the effect?

The contention of the appellant's learned counsel is that the order of compulsory retirement passed by the S.P. amounts to punishment of "removal" within the meaning of Article 311 of the Constitution and being in infraction of the constitutional guarantee thereunder is vitiated.

The relevant portion of Article 311 may usefully be reproduced. It runs thus:

311(1) No person is 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 he 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 enquiry in which he has been informed of the charge against him and given a reasonable opportunity of being heard in respect of those charges.

As to the connotation of the term "appointing authority".

As to the connotation of the expression "Appointing Authority" in the decision in *Bhagwandas vs. State of M.P.* 1985 MPLJ 356 : 1985 J LJ 599 with reference to two Supreme Court decisions in *Krishna Kumar's* case AIR 1979 SC 1112 and *Mysore S.R.T. Corporation's* case AIR 1977 SC 749 it has been held that the status of appointing authority has to be determined with reference to the date of appointment and dismissal of a Government servant by an authority, who on the date of appointment was subordinate to the one appointing him, is illegal. As to the law as laid down on the subject by the Supreme Court an excerpt from paragraph 5 of the decision in *Krishna Kumar's* case (supra) and the following two paragraphs may usefully be reproduced. They run thus:

Whether or not an authority is subordinate in rank to another has to be determined with reference to the state of affairs existing on the date of appointment. It is at that point of time that the constitutional guarantee under Article 311(1) becomes available to the person holding for example, a civil post under the Union Government that he shall not be removed or dismissed by an

authority subordinate to that which appointed him.

Besides, delegation of power to make a particular appointment does not enhance or improve the hierarchical status of the delegate. An Officer subordinate to another will not become his equal in rank, by reason of his coming to possess some of the powers of that another. The Divisional Engineer in other words, does not cease to be subordinate in rank to the Chief Electrical Engineer merely because the latter's power to make appointments to certain posts has been delegated to him.

Since the appellant was appointed by the Chief Electrical Engineer and has been removed from service by an order passed by respondent No. 1 who, at any rate, was subordinate in rank to the Chief Electrical Engineer on the date of appellants appointment, it must be held That respondent No. 1 had no power to remove the appellant from service. The order of removal is patent violation of the provisions of Article 311(1) of the Constitution.

In this very connection the decision in Dinkarrao Gangaram Najgarh Vs. The State of Madhya Pradesh, is also pertinent. Interpreting Article 311(1) of the Constitution, the Supreme Court in the decision in State of M.P. vs. Shardul Singh, 1971 MPLJ 363 has held that the guarantee provided under the aforesaid provision does not include within itself a further guarantee that the Departmental Enquiry should also be initiated or conducted by the authority named therein.

In the decision in The State of Uttar Pradesh Vs. Madan Mohan Nagar, which is by five judges in the impugned order of compulsory retirement it was stated that the employee had out lived his utility. It was held that the order of compulsory retirement which casts a stigma amounts to punishment of removal and attracts Article 311 of the Constitution. In the decision in Murlidhar's case 1986 (1) MPWN 57 it has been held that order of compulsory retirement passed as a measure of penalty is a case of removal from service and it would attract the provision of Article 311 of the Constitution.

In view of the law as stated in paragraphs 9 and 10 above, the decision in Ghanshyam Das's case 1978 MPLJ 59 cannot be relied on to support the respondents stand.

The contention of the learned counsel for the appellant has also been that as pointed out in the decision in Krishna Narayan Dixit vs. State of M. P., 1985 MPLJ 343 : 1985 JLJ 659 where Police Regulations (for short "the Regulations") are silent, provisions of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 (for short the Rules) are applicable to the Police personnel. The learned counsel goes on to contend that the Regulations being silent as respects the punishment of compulsory retirement the applicability of the relevant rule of the rules is attracted. He urges that under Rule 10(7) of the Rules compulsory retirement has been described as major penalty and, therefore, the procedure prescribed in the Rules in regard to the same has to be held to be applicable in this case. He goes on to urge that as in view of Rule 12(3)(a) of the Rules which

lays down that no penalty of compulsory retirement shall be imposed by any authority subordinate to the appointing authority, the order passed by the S. P. is of no legal consequence.

The other contention of the learned counsel for the appellant is that Rule 18(1) of the Rules enables that any proceeding against more than one government servant may be commenced only on an order by the Governor or any other authority competent to impose the penalty of dismissal from service on all such government servants and in the absence of such an order the inquiry is vitiated and the impugned order is null and void. In this connection the decisions in Krishna Narayan Dixit's case (supra) and Moolchand's case 1982 MPWN 459 were relied on. It has to be held that this contention also has force and must prevail.

It has further been urged that Regulation No. 231 of the Regulations provides. That all cases of escape of prisoners from lawful custody of police should from a subject of special departmental enquiry by the S.S.P. or S.P. or under their order by an officer deputed by either of them.

AS a result of the foregoing discussion it has to be held that the appellant has been dismissed by an authority subordinate to that by which he was appointed and, therefore, without reference to any other provision elsewhere in any Act, Regulation or Rule it has to be held that the impugned order being violative of the constitutional guarantee under Article 311(1) of the Constitution suffers from an indelible stamp of infirmity and cannot be allowed to stand. The fact that the impugned order passed by the S.P. was confirmed by the D.I.G. in appeal is, in view of the pronouncement of the Supreme Court, in Krishna Kumar's case (supra), little to purpose as it cannot have the effect of investing the order by the S. P. with any validity. Such appellate order even by I.G. could have no other effect.

Learned counsel for the appellant has contended that the appellant is also entitled to back wages. In support of this submission he placed reliance on the decision in Union of India and another Vs. Babu Ram Lalla, wherein in the Civil Appeal in the Supreme Court held that the impugned order being a nullity the respondent is entitled to be paid salary on the footing that he had always continued in service and the void order was never in existence in the eye of law. Reliance was also placed on the decision in M.S. Sandhu's case, 1986 (I) MPWN 19 wherein deciding the miscellaneous petition it has been observed as under:

Besides in terms of clause (3) of F.R. 54-A, the petitioner cannot be refused his "full pay and allowances" because the merits of the petitioner's grievance was violation of Article 311(1), which was upheld. The view taken by me finds support from what is stated by their Lordships in Devendra Pratap's case (supra). I am of the considered view that when dismissal of a public servant is quashed by this court as unconstitutional and the order is declared void, as a natural consequence, the petitioner would be relegated to the slate which

obtained prior to dismissal and would be deemed to continue in service, as a result of which he shall be entitled to pay and allowances and other benefits admissible to him during that period, for which he was forcibly kept out of employment, on the basis of an unconstitutional order.

In the instant case, as I shall presently point out, it is not necessary for this court to expressly grant any monetary relief to the petitioner than that of mere declaration.

Section 34 of the Specific Relief Act, 1963 (for short "the Act") provides for institution of suit by any person entitled to any legal character or right to any property and the proviso to The section is in these terms:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Unnecessary relief is not further relief as held in J.S. Dhople's case, 1962 J.L.J. S.N. 228.

In the decision in Pannalal Tayal Vs. The State of M.P., the plaintiff government servant claimed declaration of right to particular pay-scale but did not claim arrears of pay, it has been observed that section 34 of the Act is not exhaustive and where the declaration claimed is in respect of matter not falling within the purview of the said section Courts have power to grant declaration independently of the requirements of the section. Holding that the declaration sought in the suit did not fall strictly within the purview of section 34 of the Act and the proviso to the section was not attracted, it has been stated thus in paragraphs 12 and 14:

Apart from this, declarations claimed by Civil servants in regard to service matters stand on a different footing. In such a case a declaratory decree serves the purpose, the consequential relief being implicit in it, and, therefore, it is not necessary for the plaintiff to seek any further relief. Once a declaration has been made, the logical consequences of such declaration are implemented by the Government and, therefore, it is not necessary to seek any consequential relief in such cases.

In a suit by a Government servant against the Government in a service matter declaration itself is sufficient because the consequential relief follows automatically from such declaration and it is, therefore, not necessary to seek it as a separate relief.

As a result of the foregoing discussion, the appeal is allowed with costs throughout. The judgments and decrees passed by the Courts below are set aside. The suit for declaration succeeds and is decreed. It is hereby declared that the order of compulsory retirement passed by the Superintendent of Police is null and void and so also the appellate order passed by the D.I.G. and the appellant shall be deemed to continue in service and shall be entitled, under law, to the consequential benefits, Counsel's fee according to schedule, if certified.