

(1960) 07 SHI CK 0001
In the High Court Of Himachal Pradesh
Case No : Civil Writ Petition No. 1 of 1959

Sarwan Singh and Others

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 12-07-1960

Acts Referred:

Constitution of India, 1950 — Article 226, 311(2)

Citation : AIR 1960 HP 24

Hon'ble Judges : C.B. Capoor, J.C.

Bench : Single Bench

Advocate : M.L. Aukta, for the Appellant; Kedar Ishwar, Government Advocate, for the Respondent

Judgement

C.B. Capoor, J.C.

1. This is a petition under Article 226 of the Constitution of India and is directed against the Union of India and the Lieutenant-Governor (Administrator), Himachal Pradesh Administration. The petitioners are Sarvasri Sarwan Singh, Jia Lal Chauhan, Siri Dev and Bhupinder Singh. They were previously employed in the erstwhile States of Suket, Mandi, Nahan and Simla Hill States Agency. On the formation of the Himachal Pradesh, they were absorbed in the service of the Himachal Pradesh, as junior clerks with effect from 1-9-1948 and were subsequently confirmed in the said posts with effect from 23-9-1949. On 14-11-1949, one Shri Sant Ram, a clerk, junior to the petitioners in the list of seniority, was promoted as senior clerk in the grade of Rs. 80-5-120/8-200/10-220. Thereafter, Sarvasri Shiv Lal, K. C. Puri, A.R. Dewan, Sant Ram and Vidya Sagar and some others, who were junior to the petitioners, were promoted as senior clerks in the aforesaid grade.

The petitioners made representations to the Chief Commissioner, Himachal Pradesh, in April, 1951, against their supersession. On 4-7-1952, the petitioners made a representation to the Chief Minister, Himachal Pradesh, also. The Government of Himachal Pradesh revised the previous orders and determined

the seniority of each individual, on merits, and issued Office Order No. A. 37-137/53" dated 19-3-1956, according to which the petitioners were placed at Nos. 6, 3, 5, and 9, respectively, in the list of seniority pertaining to tie senior clerks. By another order, issued simultaneously the petitioners were promoted as Assistants in the grade of Rs. 160-10-330 and their position in the list of Assistants was at Nos. 7, 3, 6 and 8, respectively. The copies of the aforesaid orders are Annexures D and E to the petition.

2. The petitioners continued to work as Assistants until 18-5-1957, when, by an Office Order No. A. 37-137/57 dated 18-5-1957 (copy of which is Annexure F), they were reverted to the posts of senior clerks retrospectively with effect from the date on which they were promoted as Assistants and it is that order, which is sought to be quashed by this petition.

3. The main grounds on which the validity of the aforesaid order has been attacked are : (1) that it was in the nature of a penalty inasmuch as it deprived the petitioners of the benefit of officiating service rendered and of increments earned by them and had resulted in loss of emoluments and allowances. (2) That prior to the passing of the said order, no opportunity was afforded to the petitioners to show cause against it. (3) That the respondent No. 2 was not competent under the rules to revise an order, or decision passed by the Himachal Pradesh Government.

4. Prior to the filing of the present petition, another petition, under Article 226 of the Constitution of India, was filed by the petitioners. Inter alia, it was opposed on the ground that the petitioners had not exhausted the remedies available to them under the Departmental Rules and as such the petition was not competent. The petition was, thereafter, withdrawn and an appeal was filed to the President of India, which was dismissed and thereafter the present petition was filed.

5. The petition has been contested. The main grounds of contest being : firstly, that Sarvasri Sant Lal, K. C. Puri, A. R. Dewart, Sant Ram and Vidya Sagar Pahuja were promoted as senior clerks on the basis of merit by the Chief Commissioner, Himachal Pradesh; secondly, that the order of the Chief Minister, Himachal Pradesh, whereby the seniority list was revised and the petitioners were promoted to officiate as Assistants in place of Sarvasri Shiv Lal, K. C. Puri, A. R. Dewan and Sanfi Ram was without jurisdiction and against the rules of the Himachal Pradesh Subordinate Service (Promotion and Recruitment) Rules, 1951; thirdly, that on a memorial in the form of an appeal being submitted by Sarvasri Shiv Lal, K. C. Puri, A. R. Dewan, Sant Ram and Vidya Sagar Pahuja to respondent No. 2, the order of the Chief Minister dated 19-3-1956, referred to above, was cancelled and the petitioners were reverted to the posts of senior clerks; fourthly, that the aforesaid order of 18-5-1957 was not tantamount to a penalty or punishment inasmuch as, prior to the making of the aforesaid order, the petitioners were merely officiating as Assistants and did not have a right to hold the said posts and as such the said order was a perfectly valid one and was also upheld by the President of India; and, fifthly, that the provisions of Article

311 of the Constitution of India were not attracted and the respondents did not labour under the duty of affording an opportunity to the petitioners to show cause against the proposal to revert them to their substantive posts of senior clerks.

6. In their petition, the petitioners had set out, in detail, the loss that has ensued to them as a result of the order of reversion and one of the items of loss was that they will have to disgorge the excess pay etc. received by them during the period that they officiated as Assistants and in paragraph 8 of the written-statement filed by the respondents, it has been averred that the question of refund of excess salary drawn by the petitioners is under the active consideration of the Administration and in the peculiar circumstances of the case, a sympathetic view may be taken in that behalf.

7. The relevant portion of the impugned order dated 18-5-1957 runs as below :

"On consideration of the representations of Sarvasri Devi Singh Negi, H. C. Jain, Siri Dev, Jai Lal Chauhan, Bhupinder Singh and Sain Ram Negi,, to the Officer-on-Special Duty, Himachal Pradesh, Sarvasri S. L. Bahl, K. C. Puri, A. R. Dewan, S. R. Sharma and Vidya Sagar Pahuja were reverted from the posts of Assistants and Stamp Auditor to the posts of senior clerk with effect from 19-3-1956. This reversion was given effect to vide Office Order No. A. 37-137/53 dated 19-3-1956, after revising the roll of seniority of the senior clerks vide Office Order No. A. 37-137/53 dated 19-3-1956. Sarvasri S. L. Bhal, K. C. Puri, A. R. Dewan, S. R. Sharma, Damodar Singh and Vidya Sagar Pahuja, represented against the above orders to the Lieutenant-Governor.

After considering the same, the Lieutenant-Governor has decided to set aside the seniority drawn up vide Office Order mentioned above and to restore these officials to the positions which they would have retained on 19-3-1956, had their seniority not been revised. In-conformity with this decision, promotions and reversions from 19-3-1956, onwards will be regulated as per details given in the statement attached with this office order. Simultaneously, office orders of promotions of the individuals mentioned in this statement, issued on 19-3-1956, and thereafter will stand modified to the extent they are inconsistent with the above decision." Statement enclosed with Office Order No. A. 37-137/53 dated 18-5-1957.

* * * * *

Name of officials who are promoted as officiating Assistants and I/c Issue and "Record Branches. Name of officials who have been reverted from the posts of Assistants and I/c Record Branch to their permanent posts.

Assistants From To From TO

- | | | | |
|-----------------------------|---------|----------------------------------|---------|
| 1. Shri S. L. Bahl. 19-3.56 | Onwards | 1. Shri Jai Lal Chauhan. 19-3-56 | Onwards |
| 2. ? K. C. Purl. Do. | | 2. ? A. N. Kashyap | Do. |

3. ? A. R. Dewan. Do. 3. ,, Sri Dev. Do.

4. ? S. R. Sharma. Do. 4. ? Bhupinder Singh. Do.

5. Shri Baldev Singh. 19-3-56 5. Shri Sarwan Singh 16-5-56

6. ,, Vidya Sagar Pahuja ? 6. ? Dhani Ram Sharma. 21-5-56

(a) Stamp Auditor 19-3-56 to 21-11-56

(b) Assistant 21-11-56 Onwards Incharge Issue and Record

7. Shri Devi Singh. 19-3-58 Onwards 7. Shri Chet Bam Verma. 31-7-56 Onwards

8. As a result of the Government Order dated 19-3-1956, Sarvasri Jai Lal Chauhan, Sri Dev and Bhupinder Singh were promoted as Assistants on 19-3-1956 and Sarwan Singh was promoted as Assistant on 16-5-1956 and their reversion to their substantive posts of senior clerks, took place with effect from the date on which they were promoted as Assistants. On analysing the aforesaid order, it will be found that the petitioners were reverted to the posts of senior clerks; that the reversion took effect not prospectively, but retrospectively, and, lastly, that the seniority list, which was prepared by order dated 19-3-1956 was revised.

9. The crucial question that arises for decision is as to whether the reversion of the petitioners from the rank of Assistants to that of senior clerks amounted to reduction in rank, as contemplated by Article 311 of the Constitution of India?

10. The scope and ambit of Article 311 of the Constitution of India and, in particular, the question as to what is tantamount to reduction in rank within the meaning of the aforesaid Article was considered, in detail, by the Hon"ble Supreme Court in the case of Parshotam Lal Dhingra Vs. Union of India (UOI), The judgment of the majority of the Hon"ble Judges, constituting the Bench, was delivered by S. R. Das, C. J., and the law on the point was summarized as below :

"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 a reduction in rank and if the requirements of the 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."

The aforesaid view has been followed in subsequent cases, some of which are *Shambhoo Ji Shambhoo Ji Srivastava Vs. State of Uttar Pradesh and Another*, and *Jai Shanker Hajela Vs. State of Uttar Pradesh*,

11. Applying the test laid down by the Hon^{ble} Supreme Court in the aforesaid case to the instant case, it would appear that if the order of reversion had been prospective in its effect, it would not have amounted to reduction in rank within the meaning of Article 311 of the Constitution of India, for the petitioners did not have a right to the post of an Assistant during the time that they officiated as Assistants. The petitioners, it is true, suffered loss in emoluments as a result of reversion, but such loss has not been held to be a penal consequence of an order of reversion. The reason being that loss in emoluments is a necessary consequence of each and every order of reversion, but it is not each and every order of reversion that has been protected by Clause (2) of Article 311 of the Constitution of India. On the other hand, an order of reversion within the ambit of the aforesaid Article, as has already been noticed, is only that order which entails punishment.

12. It has next to be seen if the retrospective operation of the impugned order will bring it within the mischief of Clause (2) of Article 311 of the Constitution of India. The effect of the aforesaid order is that the petitioners were relegated to the position which they occupied immediately prior to their promotion to the posts of Assistants. During the period that they worked as Assistants, they had drawn the salary and other emoluments admissible to an Assistant, while, as a result of impugned order, they have become liable to refund the difference between the emoluments drawn by them as Assistants and the emoluments to

which they would be entitled as senior clerks.

Thus, even though the petitioners had worked as Assistants, they were, as a result of the impugned order, entitled to get the emoluments admissible to a senior clerk only. Forfeiture of pay already drawn by the petitioners was thus implicit in the order of reversion dated 18-5-1957. Thus, to the extent indicated above, the aforesaid order entailed penal consequence and amounted to punishment. No opportunity, much less a reasonable opportunity, was afforded to the petitioners to show cause against the proposed order of reversion and that portion of it, which gave effect to it retrospectively, was in conflict with the provisions of Clause (2) of Article 311 of the Constitution of India.

13. On behalf of the respondents, my attention was invited to their reply wherein it has been stated that the question of the refund of the excess amount drawn by the petitioners was under the active consideration of the Government and that there was a possibility that a sympathetic view may be taken by the Government on that question. I, however, do not think that the aforesaid allegation can avail the respondents. There is no certainty as to what decision may ultimately be taken by the Government on that point and if legally the petitioners are entitled to the issue of a writ, their petition cannot be thrown out merely in view of the aforesaid allegations in the written statement.

14. On behalf of the respondents, it was again urged that the impugned order had merely altered the order of seniority and as it was within the powers of the Government to change the order of seniority of its employees at any time, the said order could not be said to be a penal one and in support of that contention, reliance was placed upon rulings of the Madras High Court, reported as *N. Devasahayam v. State of Madras* AIR 1958 Mad 53 confirmed, on appeal, in *N. Devasahayam Vs. The State of Madras and Others*, and of the Pepsu High Court reported as *Gurbachan Singh v. State of Pepsu*, AIR 1956 Pepsu 26. In the aforesaid Pepsu case, it was held that a mere infringement of certain rules, framed by the Government for guidance of its subordinates in the matter of seniority, could not afford a cause of action to the person concerned and that in such a case relief has to be sought from the Government of the State and not through its municipal Courts. In the Madras case, it was held that there was no rule that whenever the Government wanted to change the rules as to seniority or whenever they proposed to refix seniority with reference to a particular service on a basis different from what was adopted before, persons in service likely to be affected should be given an opportunity of being heard.

15. By the impugned order, not only was the order of seniority altered and petitioners reduced in rank, but the reversion took effect from a back date, the result of which, as has already been seen, was that the petitioners have become liable to disgorge the excess amount in pay drawn by them as Assistants and this circumstance, in my opinion, distinguishes the instant case from the facts of cases, referred to above. Different considerations might have arisen if as a result of alteration in the order of seniority the reduction in rank had taken effect

prospectively. It was conceded at the Bar that in none of the reported cases involving reduction in rank was the rank reduced retrospectively and the question as to whether a reduction in rank with retrospective effect entailed penal consequences or not was one of first impression and, after giving careful and anxious consideration, I have been driven to the conclusion that such an order would be tantamount to a punishment inasmuch as it would normally result in forfeiture of pay and would make the persons reduced in rank liable to refund the difference between the emoluments admissible to them while they held the higher rank and those admissible to them on reversion.

16. On behalf of the respondents, it was also urged that the order dated 19-3-1956 was passed by the then Chief Minister and not by the Government of Himachal Pradesh and as such it did not have any binding effect and was rightly set aside by the Lieutenant-Governor by the impugned order. The Chief Secretary to the Government of Himachal Pradesh has claimed privilege under Sections 123 and 124 of the Indian Evidence Act in respect of the file in which the order dated 19-3-1956 was passed and it cannot, therefore, be said with certainty as to in what circumstances the aforesaid order was passed.

It has not been denied on behalf of the respondents that the then Chief Minister was in charge of the General Administration Department and it has not been shown on behalf of the respondents that under the rules of Conduct of Business the Chief Minister alone was not competent to pass the order dated 19-3-1956. That order, as would appear from a copy of it, purports to be a Government order and to have been signed by the then Chief Secretary to the State of Himachal Pradesh. There is, thus, no reason to hold that the order dated 19-3-1956 was not a Government order.

17. It only remains to consider the argument advanced on behalf of the petitioners to the effect that respondent No. 2 was not competent to pass the impugned order. The contention is barren of substance. The impugned order was passed by the Governor of Himachal Pradesh and it was perfectly within the power of that Government to reduce in rank a person or persons, who were previously promoted to a higher rank.

18. In fine, the position boils down to this that while the impugned order would not have amounted to a penalty if thereby petitioners had been reduced in rank prospectively, it entailed penal consequences because of its retrospective operation.

19. The question that next arises for consideration is as to whether the whole of the order dated 18-5-1957, in so far as it pertained to the petitioners, should be set aside or only that portion of the order which was in conflict with Article 311 (2) of the Constitution of India. The principles on which any unconstitutional provision can be severed and struck down leaving other parts of a statute untouched were laid down by the Hon'ble Supreme Court in *R.M.D. Chamarbaugwalla Vs. The Union of India (UOI)*, and the first principle is whether

the legislature would have enacted the valid part if it had known that the rest of the statute was invalid.

The aforesaid principle relating to statutes was extended by the Hon"ble Supreme Court to orders. In the case of *Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs and Others*, only a part of the order of the Collector of Customs was quashed. Following the aforesaid cases the Hon"ble Supreme Court, by a majority decision, severed the legal from the illegal part of an order made by a State Transport Authority under the Motor Vehicles Act and quashed the illegal portion only, vide *Y. Mahaboob Sheriff and sons, Y. Mahaboob Sheriff and Others and S. Shamsoddin and Others Vs. Mysore State Transport Authority, Bangalore and Others*, It is for consideration if the Government of Himachal Pradesh would have passed a prospective order of reversion if it had known that an order of reversion with retrospective effect would entail penal consequences.

The answer to the aforesaid poser must, in my opinion, be in the affirmative. An authority, which had passed an order with retrospective effect would certainly and in any case in all probability have passed the order of reversion prospectively. There would, therefore, be no interference with the exercise of discretion vested in the Government of Himachal Pradesh, or a substitution of an order of this Court for an order of the Himachal Pradesh Government if the whole of the order, sought to be impugned, is not quashed and that portion only of it is quashed which was in conflict with Article 311 (2) of the Constitution of India.

20. I, therefore, quash that portion of the order dated 18-5-1957, whereby the petitioners were reverted to their substantive rank with effect from the date on which they were promoted as Assistants. In other respects, the order is not quashed. The respondents are prohibited from giving effect to the order dated 18-5-1957, in so far as it concerns the petitioners, from a date prior to 18-5-1957.

21. The petitioners have substantially failed and it is further ordered that they shall receive one- eighth of their costs from the respondents and shall pay to the latter seven-eighth of the costs incurred by them.