

(1954) 02 GUJ CK 0004

In the Gujarat High Court

Case No : Civil Miscellaneous Application No. 52 of 1953

Saubhagchand M. Doshi

APPELLANT

Vs

State of Saurashtra

RESPONDENT

Date of Decision : 26-02-1954

Acts Referred:

Bombay Civil Services Rules, 1959 — Rule 165A, 33, 49
Civil Services (Classification, Control and Appeal) Rules — Rule 55
Constitution of India, 1950 — Article 226, 228, 309, 310, 311
Government of India Act, 1935 — Section 240

Citation : (1954) 02 GUJ CK 0004

Hon'ble Judges : Chhatpar, J;Baxi, J

Bench : Division Bench

Advocate : T.U. Mehta, for the Appellant; A.R. Bakshi, General and B.R. Joshi, Asst. Govt. Pleader, for the Respondent

Judgement

Chhatpar, J.—This is a petition under Article 226 of the constitution of India for an appropriate writ.

The Petitioner was appointed during the administrator of the Junagadh State in the year 1948 as a Mahemandari Officer on Rs. 250/- in the grade

of Rs. 250-10-300/- He was duly confirmed on this post by the Administrator. Subsequently in January 1949 when the State of Junagadh

integrated into the State of Saurashtra the services of the Petitioner were continued under the amended Covenant whereby the former States of

Kathiawar integrated into and formed the state of Saurashtra. He occupied various posts and was last appointed to officiate as Sales Tax Officer

on 5-6-1950 by the Saurashtra Government.

By an order dated 16-4-1952 he was confirmed in this appointment with effect from 6-6-1950. So at the material date the Petitioner was a

permanent servant of the Government of Saurashtra.

On 30-10-1952 he was served with a copy of a notification worded as under:

In accordance with the provisions of the Government Resolution, Finance Department, No. 60 of 1948, dated 28-9-1950, as amended by the

Government Resolution, Finance Department, No. 60/48, dated 15-1-1952, Government is pleased to order that Shri S.M. Doshi, Sales Tax

Officer, Grade II, shall retire from Government service with effect from the date of relief.

Now the Petitioner was governed by the Bombay Civil Service Rules as adapted and applied to the State of Saurashtra. These rules contain a

general provision of compulsory retirement of all Government servants at the age of 55 excepting menials whose age of retirement is 60 years. This

provision is contained in Rule 161 which states:

Except as otherwise provided in the other clauses of this rule, the date of compulsory retirement of a Government servant, other than an inferior

servant, is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement only with the

previous sanction of Government, on public grounds which must be recorded in writing...

These Civil Service Rules however contained Anr. rule providing a premature compulsory retirement on grounds of misconduct, insolvency or

inefficiency. This rule was 165-A and read as under:

A competent authority may remove any Government servant subject to these rules from Government service, or may require him to retire from it,

on the ground of misconduct, insolvency or inefficiency;

Provided that, before any such order is issued, the procedure referred to in Note 1 to Rule 33 of the Bombay Civil Services, Conduct, Discipline

and Appeal Rules shall be followed." This note 1 in the proviso to Rule 33 reads as under:

For the procedure to be followed before an order of dismissal, removal or reduction can be passed, see Rule 55 of the Civil Service

(Classification, Control and Appeal) Rules, 1930, which has been reproduced in Appendix I to these rules. The instructions issued by the

Government for the guidance of officers in taking proceedings under that Rule are contained in Appendix II to these Rules.

Rule 55 referred to reads as under:

Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a

member of a Service (other than an order based on facts which led to his conviction in a criminal court) unless he has been informed in writing of

the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is

proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together

with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in

passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he

desires to be heard in person. If he so desires or if the authority concerned so directs an oral inquiry shall be held. At that inquiry oral evidence

shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give

evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the inquiry may, for special and

sufficient reason to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement

of the findings and the grounds thereof.

This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All

or any of the provisions of the rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing, be waived, where there is

a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged.

The full procedure prescribed in this rule need not be followed in the case of a probationer discharged in the circumstances described in

Explanation 22 under Rule 49. In such cases it will be sufficient if the probationer is given an opportunity to show cause in writing against the

discharge after being apprised of the grounds on which it is proposed to discharge him and his reply duly considered before orders are passed.

Rule 165A was in force in the State of Bombay and was also applied to the

Government servants of the State of Saurashtra. But the Saurashtra

Government made two amendments to this rule by their G.R. No. 60/48 dated 28-9-1950 and 15-1-1952, which modified Rule 165A as under:

Government is pleased to direct that the proviso and the Note to Bombay Civil Service Rule 165A shall "not" apply to the servants of this

Government. Government is further pleased to issue the following orders which shall be made applicable to such servants:

Government retains an absolute right to retire any Government servant after he has completed 25 years' qualifying service or 50 years of age,

whatever the service without giving any reason, and no claim to special compensation on this account will be entertained. This right will not be

exercised except when it is in the public interest to dispense with the further service of a Government servant such as on account of inefficiency or

dishonesty. Thus the rule is intended for use:

(i) against a Government servant whose efficiency is impaired but against whom it is not desirable to make formal charges of inefficiency or against

one who has ceased to be fully efficient (i.e., when a Government servant's value is clearly incommensurate with the pay which he draws) but not

to such a degree as to warrant his retirement on a compassionate allowance; and

(ii) in case where corruption is clearly established even though no specific instance is likely to be proved under the Bombay Civil Services,

Conduct, Discipline and Appeal Rules.

The word "Government", used in this rule should be interpreted to mean the authority prescribed by Government under Appendix I to Bombay

Civil service Rules, Vol. II, Entry against Bombay Services Rule 165A.

EXPLANATION:

In all cases of compulsory retirement under these orders of officers who are Gazetted Government servants, the Public Service Commission shall

be consulted. In cases of non-Gazetted Government servants, the Heads of Departments might effect such retirement with the previous approval of

Government.

2. Now the Petitioner's services were terminated by virtue of these two amendments made to the prior Rule 165A, which required that the

procedure of Rule 33 of the Bombay Civil Services, Conduct, Discipline and

Appeal Rules should be followed before an order under Rule 165A was made.

The Petitioner claims that these amendments which have been effected after he has been absorbed in service of Government of Saurashtra as a permanent servant do not apply to him and therefore he cannot be forced to retire prematurely unless an enquiry contemplated by Rule 33 is held and he has been given an opportunity to be heard.

His second contention is that Article 311 of the Constitution of India gives him the right of being afforded a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, as the action of the Government amounts to his dismissal or removal. He contends that the amendments to the Rule 165A dispensing with an enquiry are repugnant to Article 311 and therefore void. The Petitioner in addition contends that the Covenant by which Junagadh integrated into the State of Saurashtra, guarantees continuance in service of the Petitioner on conditions not less favourable than those which were then applicable to him.

3. Now it is not disputed that the Petitioner was not given any opportunity of showing cause as to why he should be made to retire prematurely from service. He has completed 50 years of age but not 55 years. He has therefore filed the present petition to this Court for an appropriate writ.

4. The facts are not in dispute, and the questions to be decided are purely those of law, based upon the interpretation of the Constitution and Rules of service by which the Petitioner is governed.

The matter has been argued by the learned advocate for the Petitioner and the Advocate General at considerable length and various points have been discussed before us. But we are of the opinion that the petition can be decided on the main question under the Constitution, whether Article 311 would apply in the circumstances of the present case. The other question to which we would direct our attention is whether the form of procedure by way of an application for a writ is the appropriate one under the circumstances of the present case. We need not decide other points argued before us.

5. Now Article 310 of the Constitution says:

Except as expressly provided by this Constitution, every person who is a member

of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor or, as the case may be, the Rajpramukh of the State.

The prior Article 309 authorises the proper Legislature to regulate the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union or of any State and make rules relating thereto.

The subsequent Article 311 says:

(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 until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:..

6. The first question to be considered is whether a premature compulsory retirement on the ground of inefficiency or dishonesty amounts to either dismissal or removal contemplated under Article 311.

It may be noted that the corresponding provision in Section 240, Government of India Act, 1935, contained only the word "dismissal". The words

"or removal" have been added in the present Constitution. Obviously the makers of the Constitution intended to amplify the right of the servant in

giving him a constitutional right to be afforded an opportunity of showing cause against "removal" as well.

The Pepsu High Court has held that the word "removal" should be construed in its ordinary sense of physical removal from service or termination

of service: See - Ishar Dass Mehta v. State of Pepsu AIR 1952 Pepsu 148 (A) and - Shambhu Dayal v. Patiala and East Punjab States Union AIR

1952 Pepsu 152 (B); while some other High Courts seem to be of the view that "removal" must be on account of some misconduct of the

individual servant concerned and does not include compulsory retirement at a particular age, in pursuance of a general policy of Government

applicable to all such servants; See - Jayanti Prasad Vs. The State of Uttar Pradesh, ; - Kewal Mal Singhi Vs. Heta Ram and Others, ; - Mrs.

Lilawati Mutatkar v. State of Madhya Bharat AIR 1952 MP 105 (E); - Varadaraja Iyer v. State of Travancore-Cochin AIR 1953 Trav-C 140

(F)and - Ramesh Chandra Chatterjee Vs. Director General of Observatories and Another,

The learned Advocate General argues that under Article 310, all servants hold office at the pleasure of the head of the Government. This is an

absolute right in relation to the duration of the service and cannot be whittled down by any service rules. But the very opening words of the Article

make it subject to the provisions of the Constitution one of which is Article 311 and which makes it obligatory to give the servant a reasonable

opportunity of showing cause against his dismissal, removal or degradation.

His further argument is that the Government Resolutions amending the original

This brings us to the crucial point in the case whether a premature compulsory retirement on the ground of inefficiency or dishonesty or such other

causes amounts to either dismissal or removal of the servant. We are clearly of the opinion that it does. It is a quibble to argue that the Petitioner's

services have not been terminated because he has only been retired and that the retirement does not theoretically debar him from being taken up in

Government service again.

Reference is made by the learned Advocate General to Rule 49 of the Civil Service (Classification, Control and Appeal) Rules, which lays down

certain penalties which can be inflicted on the servant charged with misconduct, one of which is "removal" which does not disentitle him to further

appointment in Government service. This is hardly relevant.

We have to judge the real nature of the order whatever its outward denomination may be and this is irrespective of the consequences which may

follow from it whether the servant would still be liable to be taken in service again or would be entitled to certain emoluments in form of pension,

gratuity, etc., under the rules.

We may refer to - Abraham Reuben v. Karachi Municipality AIR 1929 Sind 69 (H)where a municipal servant, against whom an enquiry on charge

of corruption was made, was required to resign from municipal service, which he did under protest. The action of the Municipality was construed

as amounting to "dismissal". Reference in that case at p. 74 was made to -
Stephenson v. London Joint Stock Bank Ltd. (1903) 52 WR 183

(I)where a servant of the Bank was required to resign, which he did. In an action
for wrongful dismissal the question was whether the servant had

retired or was dismissed. The Lord Chancellor in delivering the judgment of the
Court of Appeal said he entertained no doubt upon the point. They

had to look to the whole of the facts and doing so there could be no doubt but
that the servant was dismissed. The use of polite instead of

peremptory language did not alter the fact. In the present case the amended rule
under which action is taken refers to such grounds as inefficiency

or dishonesty. Now inefficiency or incompetency is a form of misconduct
justifying dismissal of a servant. See Halsbury's Laws of England

(Hailsham Edn.) Vol. 22, p. 154. And dishonesty certainly is, although moral
delinquency need not be a necessary element of misconduct (See p.

153 of the same Volume).

In the present case we do not know the particular ground of premature
retirement of the Petitioner. The order merely refers to the amended rule

under which action is taken. But the amended rule clearly contemplates cases of
misconduct of which moral delinquency may or may not be an

element. We are thus forced to the conclusion that the Petitioner's services have
been terminated prematurely on the ground of misconduct. We

are therefore of the opinion that the action of the Government amounts either to
dismissal or removal within the meaning of Article 311.

It is not necessary for us to give our opinion whether the word "removal" in the
Article means premature termination of service for whatever cause

as construed by the Pepsu High Court or must be associated with some form of
misconduct as held by some other High Courts. We therefore hold

that the dismissal or removal of the Petitioner without affording him a reasonable
opportunity to show cause was wrongful.

7. We now consider whether the petition for a writ under Article 226 of the
Constitution is the appropriate remedy in the circumstances of the
present case.

Mr. Mehta the learned Advocate for the Petitioner contends that as Article 311
contemplates some sort of judicial or quasi-judicial enquiry, the

order is subject to a writ of certiorari. Even if it is an administrative order, it can

be set right by a writ of mandamus. On the other hand the learned Advocate General contends that the order is a purely executive or administrative one as no rights of contending parties are to be adjudicated upon, and this High Court should not interfere by a high prerogative writ under the circumstances but direct the Petitioner to the ordinary remedy of a suit. Both sides have cited several rulings in support, which we need not refer to. The learned Advocate General even went to the length of arguing that the Petitioner has no cause of action in any Court of law relying on the Privy Council decision in - AIR 1937 31 (Privy Council) and that the only remedy was department petitions and appeals. This case was under the Government of India Act, 1919, and is no longer applicable. The difference between this Act and the Government of India Act, 1935, has been pointed out by the Privy Council in - AIR 1948 121 (Privy Council) . The provisions in the present Constitution are similar to those of the latter Act.

8. Now Article 226 as worded empowers the High Court to exercise jurisdiction. to issue to any person or authority, including in appropriate cases any Government, within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

Ordinarily, we would be reluctant to interfere by exercise of our extraordinary powers under this Article in cases of disputes between master and servant as to wrongful dismissal or removal, etc., but the present case involves a substantial question of law as to the interpretation of the Constitution, which, Article 228 requires to be determined by the High Court, as also the validity of a statutory rule of law as being against the Constitution.

9. Giving our anxious consideration, we think that this is a fit case in which we should exercise our power under Article 226. We declare that the amendments to Rule 165A referred to above dispensing with the need of giving a reasonable opportunity to a Government servant to show cause against action proposed to be taken thereunder are repugnant to Article 311 and therefore void.

We further declare that the order terminating the service of the Petitioner by taking action under the amendments was illegal and void. He was therefore at the date of the petition a member of the service of the Saurashtra Government in the post he then held. The declaration is in accordance with the indications of the Federal Court in - Suraj Narain Anand v. North-West Frontier Province AIR 1942 FC 3 (L) and of the Privy Council in - AIR 1948 121 (Privy Council) . We need not at this stage grant any further relief. The Petitioner will have his costs from the opponent.

BAXI J.

10. I agree.