

(1976) 09 MP CK 0021

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 779 of 1975

S.S. Dausage

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 07-09-1976

Acts Referred:

Constitution of India, 1950 — Article 226, 311

Electricity (Supply) Act, 1948 — Section 10, 5, 78, 8, 9

Citation : (1978) ILR (MP) 726

Hon'ble Judges : S.M.N. Raina, J;G.P. Singh, J

Bench : Division Bench

Advocate : Gulab Gupta, for the Appellant; M.C. Nihtani, Advocate General and K.K. Adhikari, Government Advocate for State, for the Respondent

Final Decision : Dismissed

Judgement

S.M.N. Raina, J.—This is a petition under Article 226 of the Constitution of India.

2. The petitioner was appointed as Shift Engineer on 24-1-1951 by the Government of the former State of Madhya Pradesh. On the Constitution of the Madhya Pradesh Electricity Board (hereinafter referred to as "the Board") on 1-4-1952, the petitioner was in the employment of the Board and he worked in various capacities. He qualified himself as a Power Plant Engineer having obtained Master's degree from the Columbia University, U.S.A. where he was sent on Overseas Scholarship by the former State of Madhya Pradesh. On 1-2-1972 the petitioner was appointed by the State Government as a Member of the Board, u/s 5 of the Electricity (Supply) Act, 1948 (hereinafter referred to as "the Act"). Immediately before his appointment the petitioner was working as the Chief Engineer of the Board. Initially the petitioner was placed in charge of the River Valley Project of the Board. On 9-5-1973, he was re-designated as Member-in-Charge of Generation (Thermal and Hydel) and Extra High Tension Transmission (440 KV and above), vide Annexure B. On 29-9-1975 the State Government terminated the appointment of the petitioner as Member of the

Board by order of that date vide Annexure C. The contention of the petitioner is that the aforesaid order is illegal being in contravention of the provisions of section 10 of the Act. He has, therefore, filed this petition praying that the order dated 29-5-1975 (Annexure C) be quashed and it be declared that he still continues to be a Member of the Board.

3. The main point for consideration in this case is whether the impugned order contravenes the provisions of section 10 of the Act which reads as under:

10. Removal or suspension of members--(1) The State Government may suspend from office for such period as it thinks fit or removes from office any member of the Board who--

(a) is found to be a lunatic or becomes of unsound mind; or

(b) is adjudged insolvent; or

(c) fails to comply with the provisions of section 9; or

(d) becomes or seeks to become a member of Parliament or any State Legislature or any local authority; or

(e) in the opinion of the State Government--

(i) has refused to act; or

(ii) has become incapable of acting; or

(iii) has so abused his position as a member as to render his continuance on the Board detrimental to the interests of the general public; or

(iv) is otherwise unfit to continue as a member; or

(f) is convicted of an offence involving moral turpitude.

(2) The State Government may suspend any member pending an inquiry against him.

(3) No order of removal shall be made under this section unless the member concerned has been given an opportunity to submit his explanation to the State Government, and when such order is passed, the seat of the member removed shall become vacant and another member may be appointed u/s 5 to fill up the vacancy.

(4) A member who has been removed shall not be eligible for re-appointment as member or in any other capacity to the Board.

(5) If the Board fails to carry out its functions, or refuses or fails to follow the directions issued by the State Government under this Act, the State Government may remove the Chairman and the members of the Board and appoint a Chairman and members in their places.

4. The aforesaid section provides for removal of a member of the Board if he is

found to be disqualified for being a Member on the grounds specified therein or is found to be guilty of misconduct, or is otherwise unfit to continue as a Member. Removal from office ordinarily means: "deprivation of office by act of competent superior officer acting within scope of authority" vide Black's Law Dictionary, Fourth Edition, p. 1459. The question of removal can, therefore, legitimately arise only where a person has a right to continue in office and is ousted against his will. In the case of a civil servant, removal for the purpose of Article 311 of the Constitution has been construed as termination of service by way of a penalty or, in other words, termination with a stigma. Removal from office u/s 10 of the Act must also be construed in the same sense looking to the provisions and the phraseology of the section.

5. Where the term of office is prescribed or is otherwise provided, the quitting of office on the expiry of the term does not amount to removal of the person concerned because, on the expiry of the term of his office, he automatically ceases to hold it. Termination is brought about by efflux of the time and not by an order of removal passed by a competent authority.

6. In the instant case the petitioner was appointed temporarily until further orders as a Member of the Board with effect from 1-2-1972. Since no fixed term of office of a Member is prescribed by the Act or Rules framed thereunder, it is obvious that it is open to the State Government to fix the term by specifying it in the order itself or by an independent order. Section 5 of the Act empowers the State Government to appoint a Member of the Board. The power of appointment necessarily carries with it the power to determine the period for which a particular Member shall hold office in the absence of any restriction on such power either in the Act or Rules framed thereunder.

7. Shri Gulab Gupta, learned counsel for the petitioner, urged that in view of the provisions of section 8 of the Act read with clause (a) of sub-section (2) of section 78 of the Act, it was obligatory on the Government to frame rules prescribing the term of office of the Members of the Board; and the Government having failed to frame any rules for the purpose, a Member, once appointed, is entitled to continue indefinitely in this office unless removed in the manner laid down in section 10 of the Act. We are unable to accept this contention. In the first place, neither the language of section 8 nor that of section 78 of the Act suggest that framing of rules regarding the term of office of the Members of the Board is obligatory on the Government, because it is left purely to its discretion. Section 8 provides that the Chairman and other Members of the Board shall hold office for such period as may be prescribed. The use of the word "may" in this section as well as in section 78 indicates that framing of rules is left to the discretion of the Government. It is, no doubt, true that sometimes the word "may" in a statute has the force of "shall"; but, looking to the entire scheme of the Act, we do not think that the word "may" in section 8 or section 78 can be construed in that manner.

8. Members of a statutory Board usually hold office for terms varying from three

to seven years as may be prescribed by the Act under which the Board is constituted or by rules framed under the Act; and we do not agree with the learned counsel that it would be proper for the State Government to prescribe the normal term of office of a Member of the Board by rules. But that is another matter. In the absence of rules, it cannot be said that the power of appointment cannot be exercised unless the term is prescribed; nor can it be said that a Member, once appointed, is entitled to continue indefinitely until he is actually removed for incompetence or misconduct, or on the ground of incurring some disqualification.

9. As pointed out above, since the power to appoint carries with it the power to appoint for a particular term, it is open to the appointing authority to lay down the period for which the appointee shall hold office; and where such period is specified, he would cease to hold office on the expiry of the term. It is true that in the instant case the term of office of the petitioner was not laid down; but the expression "temporarily until further orders" in the order of appointment (Annexure A) clearly suggests that his appointment was temporary and could be brought to an end by a further order. The subsequent order, dated 9th May 1973, (Annexure B) does not amount to a fresh order of appointment of the petitioner as a Member of the Board. That order was passed merely to re-designate him as the Member in charge of Generation (Thermal and Hydel) and Extra High Tension Transmission (440 K.V and above). The object of the order was merely to indicate the charge held by the petitioner and it cannot be construed as an order of fresh appointment of the petitioner. The petitioner is, therefore, not entitled to treat this order as an order of his appointment as a Member of the Board. This order must be read with the earlier order, dated 21st January 1972 (Annexure A); and it is clear that there is nothing to show that the temporary nature of the appointment of the petitioner was, in any way, modified by the later order.

10. A person appointed to an office temporarily until further orders is always in a precarious position. He continues in office only so long as a further order as contemplated by the order of appointment is not passed. He has no right to continue in office after the subsequent order is passed and, therefore, in such a case the question of removal does not arise, unless the Government chooses to remove him on the ground of misconduct or incompetence, thereby casting a stigma on him. The crucial point for determination in this case, therefore, is whether the petitioner was actually removed from office by casting a stigma on him, or the term of his office was brought to an end by a further order as contemplated by the order of appointment and thereby he ceased to hold such office.

11. So far as the impugned order (Annexure C) is concerned, it merely says that the petitioner shall cease to be a Member of the Board with immediate effect. Thus, on the face of it, it brings about the termination of the term of office of the petitioner by a further order as contemplated by the order of his appointment. Even in the case of a civil servant the question whether the language of the order

of termination is conclusive or whether the Court can go behind it in order to see whether Article 311 of the Constitution is attracted has been the subject-matter of a number of decisions in which divergent views have been expressed. There is however, a volume of authorities for the view that the form of an order of termination of service of a temporary public servant is not decisive of its true nature and the Court has power to go behind it and take into consideration the attendant circumstances.

12. In *S.R. Tewari Vs. District Board Agra and Another*, their Lordships made the following observations in paragraph 13 which are pertinent:

It is settled law that the form of the order under which the employment of a servant is determined is not conclusive of the true nature of the order. The form may be merely to camouflage an order of dismissal for misconduct, and it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order.

The aforesaid view was affirmed by their Lordships in *The State of Bihar and Others Vs. Shiva Bhikshuk Mishra*, and *Jagdish Prasad v. State of Uttar Pradesh* AIR 1971 SC 1224. In a recent case, namely, *S.P. Vasudeva v. State of Haryana* AIR 1975 SC 2291, their Lordships, while dealing with the question whether the Court can go behind an order of reversion of a person observed that the whole position in law was confusing. In the contest of the facts of that case they made the following pertinent observations in paragraph 5:

We may in this connection point out that where an order of reversion as in the present case, of a person who had no right to the post, does not show *ex facie* that he was being reverted as a measure of punishment or does not cast any stigma on him, the Courts will not normally go behind that order to see if there were any motivating factors behind that order.

13. It would, therefore, appear that although it is open to the Court to take into consideration the attendant circumstances to find out whether it is a case of termination or reversion simpliciter or whether such action has been taken as a measure of penalty for some misconduct, it is not permissible to probe into the motivating factors of the order. In our view the same principle can be applied to the present case for determining whether the impugned order amounted to an order of removal within the meaning of section 10 of the Act.

14. The circumstances relied upon by the petitioner to show that the impugned order was an order of removal with a stigma are as follows. There were reports in various newspapers, dated 6th June 1975, that the State Government had charged the petitioner with administrative incompetence and failure to make best use of available resources. It was further stated therein that the Chief Minister had informed newsmen that the petitioner's performance was unsatisfactory. In a news item in the *Nav Bharat*, dated 7th June 1975, it was reported that the Chief Minister of Madhya Pradesh, during his stay at Pachmarhi, had a press briefing in respect of the "Power Programme" of the Madhya Pradesh Electricity

Board in the course of which he informed the press that the petitioner had been compulsorily retired as he was found responsible for power shortage which was attributable to slackness in the discharge of his functions vide Annexure R-1. Thus, according to the petitioner, the termination of his appointment as a Member of the Board by the impugned order carried with it the stigma of inefficiency and incompetence and as such amounted to removal within the meaning of section 10 of the Act. There can be no doubt that if the termination was for inefficiency or incompetence, it would amount to removal on the ground specified in sub-clause (iv) of clause (e) of sub-section (1) of section 10 of the Act.

15. Sub-section (3) of section 10 of the Act provides that no order of removal shall be made unless the member concerned has been given an opportunity to submit his explanation to the State Government. No such opportunity was offered to the petitioner and, therefore, the order would be liable to be quashed. But the contention of the State Government is that the Chief Minister did not make any statement to the press that the petitioners performance was unsatisfactory and he was compulsorily retired on that account. In support of this contention an affidavit of Shri S.B. Patel, Public Relations Officer, Directorate of information and Publicity, has been filed. It is stated therein that Shri Patel was present at the press briefing as he was specially posted at Pachmarhi by the Directorate to arrange the press briefings of the Chief Minister and other Ministers. On the 6th of June 1975, at the press briefing, on a query made by some of the reporters, the Chief Minister informed that the petitioner had ceased to be a Member of the Board. He did not make any statement regarding the performance of the petitioner as a Member of the Board. We find no reason to disbelieve the averments made in the affidavit, particularly in the absence of any direct evidence to the contrary. The petitioner himself was not present at the press briefing and no one else present on the occasion has filed any counter-affidavit. The affidavit of Shri Patel must therefore, be accepted.

16. There is no guarantee of correctness of press reports which are sometimes incorrect and even misleading. The report in the Nav Bharat, dated 7th June 1975, (Annexure R-1) that the petitioner had been compulsorily retired is patently incorrect because it is not disputed that even after the petitioner had ceased to be a Member of the Board, he continued to hold the office of Chief Engineer and ultimately retired on attaining the age of superannuation. The report, being admittedly incorrect in regard to one matter, could as well be incorrect in regard to the statement imputed to the Chief Minister. The position would have been different if the petitioner had filed an affidavit of any press reporter to show that the Chief Minister did make such a statement but; no such affidavit has been filed.

17. Shri Gupta urged that an adverse inference should be drawn against the Government as the Chief Minister has not filed any affidavit denying the statement imputed to him. The question of drawing an adverse inference could

arise if the matter were within the exclusive knowledge of the Chief Minister ; but that is not so. The Chief Minister is said to have made a statement to the press in the presence of a number of persons. He cannot now be expected to remember what he said. In these circumstances, the affidavit of the Public Relations Officer, Shri Patel, who was specially deputed to take notes of the press briefing, must be accepted as sufficient and no adverse inference need be drawn from the mere fact that the then Chief Minister has not filed any affidavit.

18. Shri Gupta further urged that the office file, in which the impugned order was passed, should be sent for to find out what was the motive behind the order; but that is not necessary because, as pointed out above, motivating factors are immaterial. In *State of U.P. and Others Vs. Sughar Singh*, their Lordships, while dealing with the case of reversion of a civil servant, held that motive behind the reversion is not relevant.

19. Shri Gupta relied on the decision of the Supreme Court in *Madan Mohan Prasad Vs. State of Bihar and Others*, ; but that case is clearly distinguishable on the ground that there the Chief Minister had made a statement in the Assembly about the services of the petitioner being unsatisfactory and their Lordships inferred therefrom that a stigma of inefficiency and misconduct was cast on the petitioner. Here the alleged statement of the Chief Minister has not been proved.

20. To sum up, the position is that the impugned order (Annexure C) does not ex facie cast any stigma on the petitioner and no attendant circumstances have been proved to show that he was removed from his office on the ground of inefficiency or incompetence. We, therefore, hold that this is not a case of removal within the meaning of section 10 of the Act and, therefore, the impugned order is not liable to be quashed on the ground that the procedure laid down in sub-section (3) of the said section was not followed.

21. Since section 10 of the Act is not attracted and no particular term has been prescribed for a Member of the Board, the impugned order is merely a further order in terms of the order of appointment of the petitioner (Annexure A) whereby he ceased to hold the office of a Member. The order is perfectly valid and cannot be challenged on any ground.

22. We must, however, observe that immense harm has been done to the petitioner's reputation as Chief Engineer by the mischievous press reports. From the statements made in paragraphs 2 and 3 of the petition, which have not been controverted, it would appear that the petitioner was working with devotion and efficiency as a Member of the Board and had brought about alround progress in the departments under his control. It would, therefore, have been in the fitness of things for the Government to issue promptly a statement contradicting the press reports. Shri Nihalani, learned Advocate-General, submitted that the Government was prepared to issue a contradiction of the reports; and we would very much appreciate if it is issued without any delay to re-habilitate the reputation and prestige of the petitioner as Chief Engineer and Member of the

Board.

23. No other point was pressed before us.

24. The petition, therefore, fails and is hereby dismissed. We do not make any order as to costs and the amount of security deposited by the petitioner shall be refunded to him.