

(1969) 02 PAT CK 0034

In the Patna High Court

Case No : C.R. No. 2 of 1969 and M.J.C. No. 1 of 1969

State of Bihar

APPELLANT

Vs

Sri Ganesh Pd. Dubey and The Bihar State Public Service
Commission
 The Bihar State Public Service
Commission Vs Sri Ganesh Pd. Dubey and Another

RESPONDENT

Date of Decision : 10-02-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 112(c), 151, 80
Constitution of India, 1950 — Article 166, 166(1), 227, 311, 311(2)

Citation : (1969) PLJR 177

Hon'ble Judges : Tarkeshwar Nath, J

Bench : Single Bench

Advocate : Lal Narain Sinha, A.G. and K.P. Verma, I in C.R. No. 2 of 1969, Basudeva Prasad, Nawal Kishore Prasad Sinha and Mrs. Sudharani Jayaswal in M.J.C. No. 1 of 1969, for the Appellant; Kailash Roy, Tarkeshwar Dayal, Prabha Shankar Misra and Rajendra Prasad Singh for Opp. Party No. 1 in C.R. No. 2 of 1969 and M.J.C. No. 1 of 1969, Basudeva Prasad, Nawal Kishore Prasad Sinha and Mrs. Sudharani Jayaswal for Opp. Party No. 2 in C.R. No. 2 of 1969, for the Respondent

Final Decision : Dismissed

Judgement

Tarkeshwar Nath, J.—The application in revision by the State of Bihar (defendant no. 1) is directed against the appellate order making the ad interim order of injunction absolute against the State of Bihar and restraining it from removing opposite party no. 1 (plaintiff) from the post of Director of Public Instructions, Bihar (hereinafter referred so as D.P.I. for the sake of brevity), till the disposal of Title Suit no 326 of 1968. The other application (registered as M.J.C. No. 1 of 1969) is by the Bihar State Public Service Commission u/s 151 of the CPC and Article 227 of the Constitution of India for expunging the adverse findings in that appellate order. The facts giving rise to this application are these. Opposite party no. 1 (plaintiff) instituted the aforesaid title suit in the Court of Munsif III Patna, on 18.11.1968 against the petitioner and opposite party no. 2 (defendants 1 and

2) for a declaration that the refusal of defendant no. 2 to concur in his appointment to the post of D.P.I. was illegal, without jurisdiction, unconstitutional and malafide. The plaintiff wanted a further declaration that his threatened reversion by defendant no. 1 was ultra vires, unconstitutional and invalid. The plaintiff asked for a perpetual mandatory injunction restraining the defendants from reverting from him the post of D.P.I. The case of the plaintiff was that he was the senior most member of Bihar Education Service Class I, and held a post under defendant No. 1. The highest post in the Directorate of the Education Department was that of D.P.I. The plaintiff joined the Bihar Education Service in Class I on 9th September, 1941, and was appointed Professor of Physics, Science College Patna, on the basis of the recommendation of the Public Service Commission. The plaintiff became the Head of the Department of Physics in course of time and was elected as the Dean of Faculty of Science of the Patna University in the year 1952. Later on, the plaintiff was appointed as Principal of Ranchi College, and he joined there on 16.3.1954. Defendant no. 1 created a temporary post of Director, Text Book Research Bureau in the grade of Rs. 350-1000, and the plaintiff was appointed to that post, but this action of defendant no. 1 was malafide and it put the plaintiff to a financial loss of about Rs. 500/- per month. This post was abolished in July, 1967, Sri S.M. Ahmad, who was junior to the plaintiff in service, was appointed as Additional D.P.I. (a post newly created) and the representations of the plaintiff were ignored. On 1-8-1961 the plaintiff was promoted and appointed as the Additional D.P.I. (Science Teaching), and he continued to hold that post till 31-12-1965, when it was abolished. That post was upgraded with effect from 1-4-1962 and the pay was fixed at Rs. 1850-2150. That post was equivalent in grade to that of the D.P.I. whose salary was Rs. 1850-2250. By the notification dated 29-12-1965 a new post of Director, Bihar State Institute of Science Education was created in the grade of Rs. 1000-1500 and by another notification dated 30-12-1965 the plaintiff was transferred to that post. This order of transfer amounted to reduction of the plaintiff in rank, as he had officiated for nearly four years as Additional D.P.I. Sri K. Ahmad was the substantive holder of the post of D.P.I. but he retired in September, 1967. Defendant no. 1, instead of promoting the plaintiff to hold that post, directed Sri Shriballabh Sharan, I.A.S., Deputy Secretary to the Government in the Education Department, to take over charge from Sri K. Ahmad. Defendant no. 1 communicated to the plaintiff the so-called adverse remarks made in the Character Roll for the fiscal years 1964-65, 1965-66 and 1956-57 and then he submitted an elaborate representation praying for expunging those remarks. During the pendency of the representation the plaintiff was substantively appointed as the D.P.I. by defendant No. 1 by notification no. 774-E dated 21st March, 1968, and a true copy of the said notification was enclosed and marked Annexure "I".

2. Later on, defendant no. 1 wrote to defendant no. 2 on 2-9-1968 for obtaining concurrence with regard to the further continuance of the plaintiff as D.P.I. but the latter returned the relevant file on 3-9-1968 with a note of refusal to concur.

Defendant no. 1 took steps to fill up the said post by promoting a person who was very much junior to the plaintiff in Class I of the Bihar Education Service. Defendant no. 2 (as constituted) was incapable of discharging its constitutional functions fairly and impartially so far as the plaintiff was concerned. The Chairman of the Commission was a lecturer in English in the Patna Science College in Class II of the Bihar Education Service, when the plaintiff was the Professor of Physics in the said college. Another Member, Dr. Harbansh Narayan Yadav, of the State Public Service Commission was also an unconfirmed member of the Bihar Education Service in Class I at that time and he was junior to the plaintiff in service until his appointment as a Member of the Commission. Another Member of the Commission was on foreign tour, whereas the remaining fourth Member, instead of being an academician, was a politician. The plaintiff alleged that the verdict of the Public Service Commission against the plaintiff was mala fide and fit to be ignored on account of his antecedent relations with the Chairman of the Commission. The post of D.P.I. was throughout treated as a cadre Post and the impending revision of the plaintiff would amount to reduction in his rank. Moreover, the impending and threatened reversion was malafide, illegal and unconstitutional. The recommendation of defendant no. 2 was kept secret and defendant no. 1 had made complete arrangements for the reversion of the plaintiff, and hence defendant no. 1 waived the statutory right to a notice u/s 80 of the Code of Civil Procedure. The plaintiff alleged that the cause of action for the suit arose for the first time on 3.9.1968 when defendant no. 2 refused to concur in his appointment as D.P.I. and again on 16.11.1968 when he learnt that his reversion was to be implemented forthwith for want of that concurrence. In those circumstances, the plaintiff instituted the said suit for the reliefs already indicated.

3. On 18.11.1968 itself the plaintiff filed an application under Order 39, Rules 1 and 2 and Section 151 of the CPC for an injunction restraining the defendants from removing him from the post of D.P.I. till the disposal of the suit, as his reversion would lower him in the estimate of the Society and cause irreparable mental torture and financial loss. On the same date (18-11-1968) the Munsif granted an ad interim injunction against defendant no. 1 and issued a notice to show cause by 16-12-1968.

4. On 25-11-1968 defendant no. 1 filed an application for vacating the order of ad interim injunction denying the allegations of the plaintiff. It was stated in that petition that the temporary post of Director, Text Book Research Bureau, was created earlier in the year 1959, and the previous incumbent of that post was Dr. B.N. Mishra Madhav, but on his appointment as Director of Bihar Rashtra Bhasa Parishad, the plaintiff was appointed as the Director of Text Book Research Bureau in July, 1960. There were a number of complaints against the plaintiff, when he was the Principal of the Ranchi College, and the Bihar University had requested the Government to recall him from the University service. The appointment of Sri S.M. Ahmad as Additional D.P.I. did not mean the supersession of the plaintiff. Moreover, the record of the service of the plaintiff

was definitely unsatisfactory, as would be borne out by his character Rolls. It was not correct to say that the plaintiff was promoted to the post of Additional D.P.I. in August, 1961, and, on the other hand, a second post of Additional D.P.I. was created by the Government in August 1961 for organising and supervising science teachings in Schools, and then the plaintiff was transferred to that post. The posting of the plaintiff as Director, Institute of Science Education in December, 1965 did not mean any reduction in his rank. The record of service of the plaintiff not being satisfactory, a decision would not be taken immediately as to who should be the permanent successor of Sri K. Ahmad when he retired from the post of D.P.I. in September, 1967, and as such the Government made an interim arrangement by appointing Shri S.V. Sharan, I.A.S. as D.P.I. in addition to his own duties. The representation of the plaintiff was examined and the remarks for the years 1964-65 and 1965-66 were slightly modified but those for the year 1966-67 remained unaltered. The other representation filed by the plaintiff for expunging all the adverse remarks was rejected, and the order of the Government was communicated to the plaintiff by letter dated 16th November, 1968, Defendant no. 1 further stated that the plaintiff was not substantively appointed to the post of D.P.I. and, on the other hand, he was appointed only for a period of six months, which was quite clear from the copy of the notification dated 21.3.1968 (Annexure "1" to the plaint). The Government had requested the Public Service Commission on 2.9.1968 to concur in the appointment of the plaintiff as D.P.I., but the latter did not concur and stated in the letter dated 3.9.1968 that the Commission did not consider the plaintiff suitable for appointment as D.P.I. On the representation of the plaintiff the Government allowed him to continue temporarily in that post for a further period of two months and the Public Service Commission was requested by letter dated 19.9.1968 to concur in the temporary appointment of the plaintiff as D.P.I. till 20.11.1968. But the Commission did not concur (vide the letter dated 20.9.1968). The plaintiff was however, allowed to continue as temporary D.P.I. for sometime more.

4. Defendant no. 1 further stated that the Government finally decided to appoint another officer as D.P.I. By notification no. 652 (c) dated 18-11-1968 the plaintiff was posted as Director of State Institute of Education and by notification no. 653 (c) dated 18-11-1968 the services of Dr. N.S. Nagendra Nath, an officer of the Bihar Education Service, Class I, employed by the Patna University, were recalled and he was appointed as D.P.I. Copies of these notifications were marked Annexure "A". The Public Service Commission (defendant no. 2) had discharged its constitutional functions fairly and impartially and there was absolutely no justification for the plaintiff to challenge the integrity of that body. The post of D.P.I. was outside the regular cadre of Bihar Education Service and concurrence of the Commission had to be obtained in promoting an officer of the Bihar Education Service to the post of D.P.I. Defendant no. 1 took a further objection that the suit was not maintainable in absence of a notice u/s 80 of the Civil Procedure Code. The order transferring the plaintiff and appointing Dr. N.S.

Nagendra Nath was passed by the Government on 18-11-1968 a day before the service of the notice of injunction, and as such the suit had become infructuous.

6. The learned Munsif heard the parties and came to the conclusion that at least there was a fair question to be raised at the time of trial, but the balance of convenience was not in favour of the plaintiff and no irreparable injury was likely to be caused to him, if the order of ad interim injunction was withdrawn. He thus passed an order on 6.12.1968 vacating the order of ad interim injunction but directed the parties to become ready for the hearing of the suit within a period of three months. At the instance of the plaintiff, he stayed the operation of that order till 9.12.1968 as the plaintiff wanted to file an appeal against the order dated 6.12.1968.

7. The plaintiff (opposite party no. 1) filed Miscellaneous Appeal no. 142 of 1968 on 7.12.1968 and it was admitted on the same date by the District Judge and then transferred to the file of the 2nd Additional Subordinate Judge for disposal. He further directed that the petition for ad interim injunction should be heard positively on 9.12.1968.

8. The learned Additional Subordinate Judge heard the miscellaneous appeal itself in part on 9.12.1968 and stayed the operation of the impugned order of the learned Munsif upto 14-12-1968, on which date he proposed to pass the final order in the appeal itself after further hearing the parties on 10-12-1968. He heard the parties again on 10-12-1968 and fixed 14-12-1968 for judgment. On 14-12-1968 he allowed the appeal, set aside the order of the Munsif and made the ad interim order of injunction restraining defendant No. 1 from removing the plaintiff from the post of D.P.I. absolute till the disposal of the suit. Being aggrieved by this order, defendant no. 1 has filed an application in revision, whereas defendant no. 2 filed an application to expunge the adverse findings recorded against it by the Additional Subordinate Judge, These two applications have been heard one after the other, and they will be governed by this judgment.

9. Injunction can be granted to prevent the breach of an obligation existing in favour of the plaintiff, whether expressly or by implication. If the plaintiff applied for an injunction in respect of the violation of a right and the fact of this violation is denied, then the onus rests upon him to establish that violation. The fundamental principles on which an injunction can be granted are well settled, and reference may be made to (1) Province of Bihar Vs. Kamakshya Narain Singh, . Relying on a catena of decisions their Lordships observed that they were not concerned to decide what was the correct answer to be given to the question in the hearing of the suit, but merely whether there was a fair point for trial. In (2) Firm Ram Kishun Shah Etwari Sahu Vs. Jamuna Prasad and Others, , it was held that if there was a fair and substantial question to be decided as to the rights of the parties in the suit, injunction could be granted, but the lower courts must exercise their discretion according to the well settled judicial principles and not act in an arbitrary manner. These decisions were referred to in (3) Firm Kedar Nath Babu Lal Vs. Prabhu Narayan Sahu and Others, and the same view

was taken with regard to the scope of granting an injunction under the provisions of Order 39, Rule 1 of the Code of Civil Procedure.

10. The learned Advocate General appearing for the petitioner raised two points. The first one was that the learned Additional Subordinate Judge had acted illegally in the exercise of his jurisdiction in granting an injunction, in as-much as the administrative orders passed by the proper authorities in the discharge of their duties could not and should not be interfered with by the Civil Court. The second point was that it was not open to the court to go behind the order of the Government and investigate as to what advice was given to him by the Council of Ministers.

11. The learned Advocate General developed the second point in the following manner. The plaintiff was appointed temporarily to act as D.P.I. by notification No. 774 dated 21-3-1968 and the very same notification indicated that the said appointment was made by promotion on a temporary basis for a period not exceeding six months in anticipation of the concurrence of the Public Service Commission. The plaintiff was to take over charge from Sri S.V. Sharan. A copy of that notification was forwarded to the plaintiff and he was requested to hand over charge of his duties as Director, Institute of Science Education, to Shri Bishwanath Saran, Reader, Institute of Science Education, Patna. A copy of this notification has been marked Annexure "1" to the plaint. The learned Advocate General pointed out that this notification itself made it quite clear that the appointment of the plaintiff was for a period of six months only and he did not hold the post of D.P.I. on a substantive basis. In these circumstances, he urged that the plaintiff had no right to continue as D.P.I. and there was no violation of any right of the plaintiff. He further urged that it was open to the Government to appoint someone else as D.P.I. and appoint the plaintiff as Director, State Institute of Education. It is significant to notice that the plaintiff himself has referred to this notification in Paragraph 14 of his plaint, but his claim that he was substantively appointed to the post of D.P.I. is not borne out by this notification. At the time of the hearing of the miscellaneous appeal before the Additional Subordinate Judge, the plaintiff wanted to make out that the decision of the Council of Ministers in the meeting held on 20.3.1968 to appoint him as D.P.I. was without any reservation and time limit, and the learned Additional Subordinate Judge referred to Annexure "1" to the plaintiff's affidavit dated 27-11-1968. This annexure contained an extract from the minutes of proceedings of the meeting of the Council of Ministers held on 20.3.1968. Relying on that extract, the learned Additional Subordinate Judge took the view that it was obvious that the Council of Ministers did not qualify the appointment of the plaintiff as temporary, but the Government notification issued under the signature of the Secretary to the Government showed it to be temporary. It was contended before me on behalf of the plaintiff that the Secretary to the Government was a mere authenticating authority, according to the Rules of Executive Business, and as such he had no right to put qualifications or limitations upon the apparent unqualified order of the Council of Ministers. In

reply, it was submitted on behalf of the State of Bihar that no Government order was final until it was communicated to the persons concerned. In other words, it was urged that the actual and correct order of the Government with regard to the appointment of the plaintiff as D.P.I., was what the aforesaid notification dated 21.3.1968 contained. It is somewhat difficult to appreciate as to how the plaintiff was able to get a copy of the extract from the minutes of proceedings of the meeting of the Council of Ministers, but in any event, the entire discussion about the said decision of the Council of Ministers seems to be irrelevant, inasmuch as the plaintiff has not claimed any relief in the plaint for a declaration that the said notification dated 21.3.1968 appointing him temporarily to act as D.P.I. was, in any manner, invalid or illegal. I have already indicated in the earlier part of this judgment the reliefs asked for by the plaintiff, and those reliefs do not at all relate to the notification dated 21.3.1968. This aspect of the case has escaped the attention of the Additional Subordinate Judge, and he has unnecessarily discussed this question at great length, relying on Annexure "1" referred to above. It should be further pointed out that the petition for injunction was heard in part in the trial court on 26.11.1968 and then the hearing was adjourned by 27.11.1968. The plaintiff appears to have filed on 27.11.1968 a large number of documents (Annexures 1 to 15) with an affidavit, but there is no note of it in the order sheet of the title suit, and the learned Standing Counsel (who also appeared for the petitioner) made a grievance that the copy of the list of documents was not made over to the lawyer appearing for the petitioner in the trial court. The argument on the question of injunction was concluded in the trial court on 2.12.1968 and orders were passed on 6.12.1968.

12. The learned Advocate General referred to (4) Bachhittar Singh Vs. The State of Punjab, in support of his contention that before the opinion of the Council of Ministers could amount to a decision of the Government it must be communicated to the person concerned. The relevant observations in that decision are as follows:--

The business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities, The Constitution, therefore, requires and so did the Rules of Executive Business framed by the Rajpramukh of Pepsu provide, that the action must be taken by the authority concerned in the name of the Rajpramukh. It is not till this formality is observed that the action can be regarded as that of the State or here, by the Rajpramukh. We may further observe that, constitutionally speaking, the Minister is no more than an adviser and that the head of the State, the Governor or Rajpramukh till the abolition of that office by the Amendment of the Constitution in 1956 is to act with the aid and advice of his Council of Ministers. Therefore, until such advice is accepted by the Governor whatever the Minister or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State. Indeed, it is possible that after expressing one opinion about a particular matter at a

particular stage a Minister or the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion which of them can be regarded as the "order" of the State Government? Therefore, to make the opinion amount to a decision of the Government it must be communicated to the person concerned. In this connection we may quote the following from the judgment of this Court in (5) The State of Punjab Vs. Sodhi Sukhdev Singh, :

Mr. Gopal Singh attempted to argue that before the final order was passed the Council of Ministers had decided to accept the respondent's representation and to reinstate him, and that, according to him, the respondent seeks to prove by calling the two original orders. We are unable to understand this argument. Even if the Council of Ministers had provisionally decided to reinstate the respondent that would not prevent the Council from reconsidering the matter and coming to a contrary conclusion later on, until a final decision is reached by them and is communicated to the Rajpramukh in the form of advice and acted upon by him by issuing an order in that behalf to the respondent.

Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character.

This decision was cited before the Additional Subordinate Judge, but he distinguished it on the ground that according to the relevant rules of Executive Business of the State Government concerned, the order or proposal of the Council of Ministers was subject to acceptance by the Rajpramukh and the order as modified by the Rajpramukh was ultimately communicated to the person concerned. He however, failed to notice in that decision that it was conceded during the course of the argument that the case of the kinds before their Lordships did not fall within Rule 34 which required certain classes of cases to be submitted to the Rajpramukh and the Chief Minister before the issue of orders.

13. Learned counsel for the plaintiff submitted that according to the Rules of Executive Business, proposals relating to the appointment of D.P.I. had to be submitted to the Chief Minister or brought before the Council of Ministers. He relied on item no. 27 of the Third Schedule of the Rules of Executive Business. This item deals with proposals relating to appointment to be made by Government to civil services and posts whether by direct recruitment or by promotion. Rule 12 lays down that all cases referred to in the Third Schedule shall be submitted to the Chief Minister through the Secretary to the Council after consideration by the Minister-in-charge, with a view to obtaining his orders for circulation of the case under Rule 13 or for bringing it up for consideration at a meeting of the Council. Rule 8 provides that subject to the orders of the Chief Minister under Rule 12, all cases referred to in the Third Schedule to these rules

shall be brought before the Council in accordance with the provisions of the rules contained in Part II. According to Rule 13(1) the Chief Minister may direct that any case referred to in the Third Schedule may instead of being brought up for discussion at a meeting of the Council, be circulated to the Ministers for opinion, and if the Ministers are unanimous and the Chief Minister thinks that a discussion at a meeting of the Council is unnecessary, the case shall be decided without such discussion. If the Ministers are not unanimous or if the Chief Minister thinks that a discussion at a meeting is necessary, the case shall be discussed at a meeting of the Council. Learned counsel pointed out that according to Rule 14(2), the Secretary of the department concerned had to issue the necessary orders in accordance with the opinion of the Council of Ministers. All these rules were referred to in support of the contention that the notification dated 21-3-1968 was not in accordance with the decision of the Council of Ministers dated 20-3-1968. In my opinion, these questions should not have been and cannot be gone into, as they are not within the scope of the present suit, according to the plaint as it stands.

14. Learned counsel for the plaintiff opposite party no. 1 submitted that although according to Article 166(1) of the Constitution of India all executive actions of the Government of a State had to be expressed to be taken in the name of the Governor and according to Clause (2) of that Article orders made and executed in the name of the Governor had to be authenticated in such manner as might be specified in rules to be made by the Governor, yet these provisions regarding authentication were directory and not mandatory, Clause (2) itself provides that the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it was not an order or instrument made or executed by the Governor. Learned counsel referred to (6) *Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others*, laying down that strict compliance with the requirements of Article 166 gave an immunity to the order in so far as it could not be challenged on the ground that it was not an order made by the Governor, but if the requirements of that Article were not complied with, the resulting immunity could not be claimed by the State. This however, did not vitiate the order itself. He then referred to (7) *R. Chitrlekhan V. State of Mysore* (1964) 6 S.C.R. 386. It was pointed out in that case that the law was settled that the provisions of Article 166 of the Constitution of India were only directory and not mandatory in character and, if they are not complied with, it can be established as a question of fact that the impugned order was issued by the State Government or the Governor. He referred to (8) *Bejoy Lakshmi Cotton Mills Ltd. Vs. State of West Bengal and Others*, . Relying on (9) *P. Krishna Menon Vs. The Commissioner of Income Tax, Mysore, Travancore-Cochin and Coorg, Bangalore*, , it was held in that case that if the provisions of Article 166 of the Constitution were not complied with it could be established as a question of fact that the impugned order was issued in fact by the State Government or the Governor. Lastly, learned counsel referred to a recent decision of the Supreme Court in (10) *Ishwarlal Girdharlal Joshi etc. Vs. State of Gujarat and Another*, .

He relied on the following passage occurring on page 875:

It is obvious that the executive action of the Government was in fact expressed to be taken in the name of the Governor, that the orders were authenticated in the manner required by Rule 13 of the Rules of Executive Business already quoted. The validity of the order could not of course be called in question that it was not an order made by the Governor. Had the Government sheltered itself behind the constitutional curtain, it is a little doubtful if the appellants could have successfully pierced this barrier by merely stating that the Government had not passed the orders or made the necessary determination without alleging definite facts. In addition to the constitutional provision there is also the presumption of regularity of official acts. Orders of Government, whether at ministerial or gubernatorial level, are all issued in the same form and the constitutional protection as well as the presumption both cover the case.

But, as it happens frequently, Government tried to establish that everything was regular. A batch of counter affidavits was filed on behalf of Government to show how the matter was dealt with from stage to stage and the appellant filed affidavits in rejoinder and were not slow to point out infractions or supposed infractions. As they sought to do this on facts furnished by the affidavits on behalf of Government we may say a word about those affidavits.

He contended that although there was a presumption of regularity of official acts and orders of the Government and constitutional protection, yet opportunity was given in that case to the appellant to point out the irregularities and infractions at one stage or the other before the passing of the order in question. All these decisions were cited to support the contention that it was open to the plaintiff to establish that the notification dated 21.3.1968 appointing the plaintiff temporarily as D.P.I. did not represent correctly the decision of the Council of Ministers dated 20.3.1968. I have already indicated that no relief was asked for in the plaint in this connection and as such this question did not at all arise for consideration and was unnecessarily mooted before the Additional Subordinate Judge in the miscellaneous appeal. The learned Additional Subordinate Judge took the view that there was a serious question for determination about the contention of the plaintiff-appellant that the notification appointing him as D.P.I. was substantially different in nature from the order of the Council of Ministers passed in that respect, and the real nature of the appellant's appointment as D.P.I. can be determined only after examining the aforesaid controversy fully at the time of the trial of the suit. He further observed that the controversy could not be summarily disposed of at that stage by holding that the appointment of the appellant was a purely temporary one or that he was merely officiating as D.P.I. and could, therefore, be reposted or transferred to any other inferior post. Learned counsel for the plaintiff pressed that this was one of the serious questions to be decided at the trial and that plaintiff had a prima facie case. In my opinion, the learned Additional Subordinate Judge acted illegally in the exercise of his jurisdiction in treating that question as a question which arose for

determination inasmuch as this question did not at all arise on the facts stated in the present plaint. It was not open to him to allow the plaintiff to raise this question and then come to the conclusion that a prima facie case was made out on that score. The position thus is that so far as the second point raised by the learned Advocate General is concerned, the order of the Governor dated 21st March, 1968, has not been challenged in the plaint, and as such the further question as to in what circumstances it could be challenged need not be gone into.

15. The learned Additional Subordinate Judge further found that the plaintiff had a prima facie case, inasmuch as he had alleged that the view taken by the Public Service Commission was mala fide and the truth or otherwise of the allegation also had to be determined at the time of trial. He observed that the plaintiff-appellant's allegation of mala fides "against the State Public Service Commission" could not be altogether ignored or brushed aside, but the matters certainly required a careful scrutiny and examination in order to determine whether the State Government was justified or not in acting under the dictates of the said Commission in the matter of suitability of the appellant to the post of D.P.I. Learned counsel for the petitioner submitted that so far as this allegation of mala fides against the Commission was concerned, the trial court gave finding that the allegations made by the plaintiff were not enough to suggest that the recommendation of the Commission was actuated by malice, and this finding was not challenged by learned counsel for the plaintiff-appellant in the miscellaneous appeal. The contention was that finding having been accepted by learned counsel for the plaintiff-appellant, the learned Additional Subordinate Judge acted illegally in going into the question of mala fides and holding that a serious question arose for consideration in the suit. The petitioner has stated in Paragraph 20 of the present application that the learned Subordinate Judge had erred in considering mala fides of the Public Service Commission, especially when the learned Advocate for the plaintiff did not argue about mala fides and in fact he conceded that he did not allege any mala fides on the part of the Public Service Commission in the appointment of the plaintiff. Learned counsel for the plaintiff answered this contention by pointing out to the counter-affidavit of the plaintiff (in the present case) dated 9.1.1969 and affidavit of the plaintiff's son of the same date. With regard to the facts stated in Paragraph 20 of the civil revision petition, the plaintiff stated in Paragraph 14 of his counter-affidavit that the true facts had been set out in the affidavit sworn by his son, Dr. Sheo Shankar Dube on 9.1.1969. He enclosed a copy of his son's affidavit and marked it as Annexure "1". The plaintiff's son stated in Paragraph 8 of his affidavit as follows:--

That I definitely remember that immediately after entering the court room the counsel of the plaintiff-appellant Shri Tarkeshwar Dayal rose to interrupt the submissions of Shri Basudeva Prasad and stated that on a point of clarification for the purposes of appeal the plaintiff-appellant was accepting the finding of the learned Munsif that general allegation of personal bias and mala fide against the

Chairman or Members of the Public Service Commission did not render the recommendation of the Commission mala fide. It was contended by the said counsel that he wanted the appeal to be disposed of on the finding of the learned Munsif that the Commission acted with undue haste and impropriety inasmuch as work of the plaintiff as the Director of Public Instructions was not scanned by it.

In Paragraph 13 of the said affidavit, he stated that when the appeal was taken up for hearing Sri Tarkeshwar Dayal at the outset while placing the findings of the learned Munsif had stated that it was not necessary for the purposes of the injunction appeal to traverse that finding where it was held that he (plaintiff) had failed to prove that recommendation of the Commission was actuated by personal ill-will of individual Members of the Commission or of its Chairman.

16. Then comes the affidavit (filed on 13.1.1969) on behalf of opposite party no. 2 sworn by Jugal Kishore Prasad, Statistical Officer of the Bihar Public Service Commission. He has said in Paragraph 5 that Mr. Tarkeshwar Dayal clearly stated before the appellate court that he on the instruction of his client "withdrew the allegation of mala fide against the Public Service Commission" and that the injunction appeal might be disposed of on other grounds. The deponent has enclosed a true copy of the certificate granted by Shri Nawal Kishore Prasad Sinha, Advocate, working for the Public Service Commission, and it has been marked Annexure "B" This certificate dated 9.1.1969 is to the effect that Sri Tarkeshwar Dayal, Advocate in course of his submissions before the Additional Subordinate Judge II, Patna, withdrew the allegations of mala fide against the Commission in unqualified terms. In answer to this, the plaintiff filed an affidavit on 21.1.1969, enclosing therewith a copy of the Certificate (Annexure "A") given by Sri Tarkeshwar Dayal himself on 15.1.1969. Shri Dayal has stated, inter alia, in that certificate as follows:

While placing the findings of the learned Munsif on 9.12.1968 I remember saying that it was not necessary for purposes of injunction appeal to traverse the findings of the learned Munsif that plaintiff had failed to prove personal ill-will against individual members of the Commission. I remember I had not said that I am withdrawing the plea of mala fide against the Commission unconditionally.

On a perusal of these affidavits of one party or the other, this much seems to be clear that for the purpose of the disposal of the miscellaneous appeal, learned counsel for the plaintiff-appellant did not challenge the finding of the Munsif that plaintiff had failed to prove the "personal ill-will against individual Members of the Commission". The position thus is that in spite of this concession (of course confined for the disposal of that appeal), the Additional Subordinate Judge went into the question of mala fides at some length and came to the conclusion that in view of that question raised by the plaintiff he had a prima facie case. Here also, he acted illegally in the exercise of his jurisdiction in giving importance to the allegation of mala fides which was not pressed before him.

17. The learned Additional Subordinate Judge observed that "the mala fide on

the part of the State Public Service Commission" was also sought to be highlighted on the basis of the undisputed fact that the said Commission gave its view within one day, inasmuch as reference to the Commission was made by the Government on 2.9.1968 and the Commission returned the file with its view on the next day, i.e., 3.9.1968. He took note of the contention of the plaintiff "that it was hardly possible for the Members of the Commission to get together and apply their mind properly and dispassionately to the subject within such a short time." He then came to the conclusion that in the above circumstances it was not at all possible for a law court to hold summarily that the appellant had no cause at all to resist his removal from the post of D.P.I. It is true that a reference was made by the Government to the Public Service Commission on 2.9.1968, but the Government itself requested the Commission to communicate its views immediately, This appears from the copy (Annexure "A") of the letter dated 2.9.1968 of the Secretary to the Government addressed to the Secretary, Bihar Public Service Commission, This copy is annexed to affidavit filed on 13.1.1969 by Jugal Kishore Prasad, Statistical Officer of the Bihar Public Service Commission. It appears from Annexure "A" that the plaintiff took charge of the post of D.P.I. on 21.3.1968 and the term of that appointment expired on 20.9.1968. It became necessary to take a final decision about the permanent appointment to the post of D.P.I. and hence the Secretary to the Government wrote to the Secretary, Bihar Public Service Commission for the concurrence. The Statistical Officer has stated in the said affidavit that the said letter was received on 2.9.1968 and the Commission considering the urgency of the matter discussed the Government proposal in full Commission (which at that time included four Members including Chairman, one of the Members being abroad), examined the confidential Character Roll and service records of the officer and unanimously decided to refuse to concur in the Government proposal. He has further indicated that only three months earlier the Commission had thoroughly examined the confidential Character Roll of the plaintiff in connection with the appointment to the post of Principal, L.S. College, Muzaffarpur, found him not suitable for that post which was of much lower scale than that of D.P.I., and no noticeable change had been made in the plaintiff's confidential Character Roll during those three months. It is quite clear that in view of the Government's request to send a reply immediately, the Public Service Commission indicated its views on 3.9.1968. The matter being urgent, the Commission acted promptly. The grievance on this score made by the plaintiff can hardly indicate that the view taken by the Commission was actuated by malice.

18. Learned counsel for plaintiff opposite party no. 1 referred to the provisions of Order 6, Rule 10 of the CPC and pointed out that it was not at all necessary for the plaintiff to set out in the plaint the circumstances from which malice could be inferred, and it was sufficient to allege malice only as a fact. It is true that the circumstances have not to be set out, but I have already indicated that the finding of the trial court against the plaintiff in this respect was not assailed as the miscellaneous appeal by learned counsel for the plaintiff.

19. The first relief asked for by the plaintiff was to declare that the refusal of defendant no. 2 to concur in his appointment to the post of D.P.I. was illegal and without jurisdiction, unconstitutional and mala fide. The plaintiff has, however, not alleged that defendant no. 2 had committed a breach of any statutory provision or rule while giving its opinion and advice regarding the filling up of the post of D.P.I., and it is difficult to appreciate as to how defendant no. 2 can be forced or compelled to give an opinion which would necessarily be in favour of the plaintiff.

20. The learned Additional Subordinate Judge observed that in the case of the appointment of Dr. N.S. Nagendra Nath, concurrence of the State Public Service Commission had been rather hurriedly obtained before making the appointment and that he came to be appointed on probation for one year. He further observed that in those circumstances the plaintiff was entitled to allege unconstitutional discrimination, and this was a matter to be considered at the time of the trial. This question also did not arise within the scope of the present suit, inasmuch as no relief has been asked for so far in respect of the notification appointing Dr. N.S. Nagendra Nath as D.P.I.

21. The learned Additional Subordinate Judge further took the view that by the notification dated 18.11.1968 the State Government intended to transfer the plaintiff to a post which was not only far inferior in rank to that of D.P.I. but was also lower in rank to the plaintiff's admitted substantive post of a University professor and as such the plaintiff was not unjustified in alleging that the mandatory provisions of Article 311 of the Constitution had to be complied with before issuing that notification. This, according to the learned Additional Subordinate Judge, was another serious and fair question for trial between the parties. Here also, it must be pointed out that the said notification dated 18.11.1968 has not been challenged in the suit and any discussion about it was not at all material. Learned counsel for plaintiff opposite party no. 1 referred to (11) Shiva Bhikshuk Mishra Vs. State of Bihar and Others, and pointed out that in the case of reversion of even temporary civil servants the compliance with the provisions of Article 311(2) was essential. The relevant observation in that case was that in the case of temporary, probationary or officiating civil servants termination of service or reversion to the substantive post might be ordered according to the terms of contract of service, if any, or the service rules in that respect, and a situation like that would not be covered by Article 311(2) because that would amount to termination of service simpliciter; but if such action was taken not in the usual course of administration but as a measure of punitive action against the civil servant either on consideration of some complaints against him or on finding about his inefficiency, that would be subject to the provisions of Article 311(2). It was further pointed out that either the adverse order itself might show its punitive nature or the facts and circumstances prior and leading to that order might disclose that, not the disguised form of the order itself but the substance of the matter would determine the character and nature of the order, and in the case of temporary servants (probationary or officiating

also), the court was required to examine the substance of the matter, though such a course was not called for in a case of permanent servants where the adverse order was in compliance with the service rules or the terms of contract. Reliance was placed on (12) Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., Learned counsel for the petitioner, on the other hand, contended that the notification no. 652(c) dated 18.11.1968 posting the plaintiff as Director, State Institute of Education did not contain any stigma and it was not open to the court to look into the background resulting in the issuance of that notification. He relied on (13) I.N. Saksena Vs. State of Madhya Pradesh, . Their Lordships observed as follows in that decision:

Where an order requiring a Government servant to retire compulsorily contains express words from which a stigma can be inferred, that order will amount to removal within the meaning of Art. 311. But where there are no express words in the order itself which would throw any stigma on the Government servant, we cannot delve into Secretariat files to discover whether some kind of stigma can be inferred on such research.....What the appellant wants us to hold is that the mere fact that a Government servant is compulsorily retired before he reaches the age of superannuation is in itself a stigma. But this is against the consistent view of the Court that if the order of compulsory retirement before the age of superannuation contains no words of stigma it cannot be held to be a removal requiring action under Article 311.

There is a recent decision of the Supreme Court in (14) State of Punjab and Another Vs. Shri Sukh Raj Bahadur, . On a conspectus of the various cases, their Lordships laid down the following propositions:

- (1) The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.
- (2) The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.
- (3) If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.
- (4) An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.
- (5) If there be a full-scale departmental enquiry envisaged by Article 311 i.e. an Enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article.

The notification dated 18.11.1968 however, in the present case, does not contain any stigma, but apart from it this notification not being in question in the present suit, the learned Additional Subordinate Judge acted illegally in the exercise of his jurisdiction in coming to the conclusion that there was a serious and fair question for trial relating to the compliance or otherwise with the provisions of Article 311.

22. Learned counsel for plaintiff-opposite party no. 1 further submitted that the notice issued in pursuance of the order of ad interim injunction passed on 18.11.1968 was made over to the Secretary of the Education Department on 18.11.1968 itself and as such he had knowledge about the said order passed by the trial court. Learned counsel for the petitioner, on the other hand, pointed out that the peon had submitted a report that the said notice was served on 19.11.1968 and there was nothing in this report to indicate that the notice was made over to the Secretary, Education Department on 18.11.68. He referred to the affidavit sworn by the Registrar of the Education Department to support his contention, and learned counsel for plaintiff-opposite party no. 1 referred to the affidavit sworn by the son of the plaintiff regarding the tender of the notice on 18.11.1968. This question also does not arise at the present stage, and I refrain from expressing any opinion about this question.

23. Learned counsel for plaintiff-opposite party no. 1 pointed out that an application for amendment of the plaint had been filed, but this step was taken on 9th January, 1969, after the disposal of the miscellaneous appeal by the Additional Subordinate Judge and orders on that petition have not been passed so far.

24. Another contention of learned counsel for opposite party no. 1 was that the post of D.P.I. had been always treated in the past as a cadre post of the Bihar Educational Service Class I, but learned counsel for the State referred to the rules framed by the Government of Bihar and Orissa dated 15th November, 1930, in exercise of the powers conferred by the All India Services (Transferred Departments) Replacement rules and by Rules 38, 39, 40 and 41 of the Civil Services (Classification, Control and Appeal) Rules. These rules relate to the conditions of service, pay, allowances and pension of the Bihar and Orissa Educational Service, Class I. Rule 18 provides that the post of the Director of Public Instruction shall remain outside the cadre of the service but subject to the provisions of Rule 19 below it may be filled at the discretion of the local Government by a member of that service, The contention was that the post of D.P.I. was outside the cadre of the Bihar Educational Service, Class I. Learned counsel for opposite party no. 1, on the other hand, urged that these rules were framed long ago and they were not in force and the State of Bihar itself had not followed that rule in the past. No opinion can be expressed in this connection at the present stage, and, in any event, the appointment of the plaintiff itself being temporary in the first instance, according to the notification dated 21.3.1968, he could not assert that he had a right to continue in that post and that the said

post must be offered to a member of the Educational Service in Class I.

25. Learned counsel for opposite party no. 1 submitted further that consultation with the Public Service Commission was not at all necessary and the State of Bihar itself had taken up the attitude in more than one case that consultation with or concurrence of the Public Service Commission was not required for filling up permanent posts in the Selection Grade. He relied on a judgment of this Court dated 5th December, 1968, in (15) M.G. Sharan (Petitioner in C.W.J.C. 572, 591 and 681 of 1967), (16) R.S. Pathak (Petitioner in C.W.J.C. 535 of 1968), (17) G.P. Vimal and others (Petitioners in C.W.J.C. 706 of 1967), (18) A. Hayat and others (Petitioners in C.W.J.C. 716 of 1967) and (19) B.H. V. Krishnaiah and others (Petitioners in C.W.J.C. 774 of 1967) V. State of Bihar and others (sic). The appointment of Sri S.K. Banerji (respondent no. 2) was challenged on the ground that the Bihar Public Service Commission was not consulted, as required under Article 320(3)(b), and it was further urged that there was no consultation even for rejecting the claim of the petitioner (see Paragraph 39). Reference was also made to "Regulations 7 and 8 of the Bihar Public Service Commission (Limitation of Functions) Regulations, 1957," which clearly mention the cases in which the consultation with the Commission was mandatory. Respondent no. 2 was a Superintending Engineer and was holding officiating charge of the Chief Engineer in the State Electricity Board, but he was appointed as the Chief Engineer in the River Valley Project cadre. The contention was that this appointment amounted to his transfer as promotion. On the other hand, the learned Advocate General submitted that the provisions contained in the aforesaid Article were not mandatory and Regulations 7 and 8 were only applicable to the three methods of appointment, namely, appointment by promotion, or transfer from another service, or in the case of direct recruitment, According to him, the impugned appointment was not covered by any of the three categories. His submission was that when an appointment was made from one service to another, as for instance, from the Bihar Engineering Service, Class II, to the Bihar Engineering Service, Class I, the Commission was invariably consulted, but where a person holding a permanent post in Bihar Engineering Service, Class I, was appointed to a higher or equivalent post, the consultation envisaged in the rules was not necessary. The learned Advocate General relied on (20) State of U.P. Vs. Manbodhan Lal Srivastava, as well. Their Lordships accepted his contention that the consultation with Public Service Commission so far as the appointment of respondent No. 2 was concerned was not necessary and it was pointed out that there was no reason why the ratio in the said case relied upon by the learned Advocate General should not be Extended to Clause (b) of Article 320(3) of the Constitution, as the language of both the Clauses (b) and (c) was the same. Rule 7 of the Bihar Public Service Commission (Limitation of Functions) Regulation, 1957, provides as follows:

When appointment to a service or a post is made by promotion or transfer from another service, it shall not be necessary to consult the Commission unless it is proposed, by such promotion or transfer, to fill.

(a) a permanent post substantively, or

(b) a permanent post or a temporary post on an officiating or temporary basis for a period exceeding six months:

Provided that, if an appointment is made for a period not exceeding six months, and it is subsequently proposed to extend the period so that it will exceed six months in all, the Commission shall be consulted.

In the present case the Government wanted to fill up a permanent post, meaning thereby the post of D.P.I., and hence the Public Service Commission was consulted. There can thus be no valid grievance on this score, and the question as to what would have been the effect if there was no consultation does not arise in the present case, as in fact there was a consultation.

26. Learned counsel for opposite party no. 1 opposed this application on the ground that the finding arrived at by the Additional Subordinate Judge that the plaintiff had a prima facie case and that fair and serious questions arose for decision could not be interfered with in revision, and he referred to (21) Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav, . It was pointed out in that case that the revisional jurisdiction of the High Court could be properly invoked only in cases where the subordinate court had exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction so vested or acted in the exercise of its jurisdiction illegally or with material irregularity. The position, however, in the present case is that the questions which the Additional Subordinate Judge held to be fair and serious for determination did not arise on the plaint as it stood and were not within the scope of the present suit and as such it must be held that he acted illegally in the exercise of his jurisdiction in holding that the plaintiff had a prima facie case. I have already referred to (2) Firm Ram Kishun Shah Etwari Sahu Vs. Jamuna Prasad and Others, laying down that the lower court must exercise its discretion according to the well settled judicial principles and not act in an arbitrary manner. Learned counsel for the State relied on (22) Union of India (UOI) Vs. Bakhshi Amrik Singh, in support of his contention that the impugned order could be interfered with in revision and injunction should not have been granted in the circumstances of the present case. Tek Chand, J., observed as follows in that case:

There must be some equitable ground for interference by injunction such as a necessity of preventing irreparable mischief, or in cases when the injury apprehended is of a character as cannot be adequately compensated by damages, or, is one which must occasion constantly recurring grievance which necessitates a preventive remedy in order to put an end to repeated perpetration of wrongs. This power has to be exercised sparingly and cautiously and only after thoughtful deliberation and with a full conviction on the part of the Court of its urgency and necessity.

Courts issue injunctions where the right which is sought to be protected is clear and unquestioned, and not, where the right is doubtful and there is no

emergency, and further, where the injury threatened is positive and substantial and is irremediable otherwise. It is also an important rule that the conduct of the parties seeking injunction must not be tainted with unfairness or sharp practice.

The principal function of an injunction is to furnish preventive relief against irremediable mischief. An injury is deemed to be irreparable and the mischief is said to be irremediable, when having regard to the nature of the act and from the circumstances relating to the threatened harm, the apprehended damage cannot be adequately compensated with money.

In a case like the present, there is no difficulty in assessing the amount of damages which may be said to have been suffered in consequence of premature retirement. It is a case in which full compensation can be obtained by damages and does not call for application of this extraordinary remedy by way of injunction.

* * *

On the question of balance of convenience, the lower appellate court has stretched the case out of all proportions and has rested it on loss of status as a Senior Railway Officer, and the social advantages attached to the Office giving prestige to its holder. The District Judge has also referred to the present status which enables the plaintiff to discharge his social obligations of marrying one's children and such other things, quite often in a much better way than a public servant already retired. This reason has nothing to do with the question of balance of convenience to be taken into consideration by the Court when granting temporary injunction.

* * *

.....Courts, when issuing permanent or temporary injunctions, must act in a careful and conservative manner and grant the relief only in situations which so clearly call for it as to make its refusal work real and serious hardship and injustice.

* * *

.....Where in granting or refusing injunctive relief, the Court does not apply the law to the facts either conceded or undisputed, the discretion is deemed to have been abused. Discretion cannot be used as a cloak to screen, or to save a manifest misapplication of law. Discretion is best exercised when it is in conformity with the spirit of law with a view to subserve and not impede or defeat the ends of substantial justice.

It will thus be seen that though the granting or withholding of injunctive relief is within the discretion of the Court to whom an application has been made, but this power is not unlimited and cannot be equated with the whimsical will of the Court depending upon the temperament or mood of the presiding officer. It is based on sound judgment guided by law. The Courts are not given a handle to

misapply law or to twist facts in seeming exercise of the discretionary power.

In that case their Lordships took the view that there was a manifest violation of the principles governing the grant of interlocutory relief under Order 39 of the Civil Procedure Code, clear departure from the well settled principles of the law of pleadings and there was hardly any basic rule governing grant of injunction of which breach had not been committed and as such that case fell eminently within the purview of Section 112(c) of the Code, The revision was allowed and the order of the District Judge granting temporary injunction was vacated.

27. As regards the balance of convenience, the position is that the appointment itself of the plaintiff bung temporary, he had no right to continue as D.P.I. and by granting the injunction the Additional Subordinate Judge has allowed him to continue in that post. In other words, the relief which the plaintiff would be entitled to get in the event of his success in the suit has been already granted to him in spite of the fact that there has been no adjudication with regard to the merits of his case. On the other hand, if the plaintiff succeeds in the suit, he will be entitled to be compensated for the loss, if any, suffered by him, and as such I am of the view that the learned Additional Subordinate Judge acted illegally in the exercise of his jurisdiction in granting an injunction.

28. It should be further pointed out that the relief (no. 2) asked for was some what peculiar inasmuch as the plaintiff wanted a declaration that the threatened reversion was ultra vires and unconstitutional. It was pointed out in (23) Hyderabad Stock Exchange Ltd. Vs. Rangnath Rathi and Co. a partnership firms of Stock and Shares Broker, that the mere prospect or apprehension of injury or the mere belief that the act complained of may or will be done was not sufficient. A man seeking an injunction must show that the act complained of is in fact a violation of his right and which if carried into effect will necessarily result in a violation of his right (see pages 46 and 47). Learned counsel for opposite party no. 1 tried to bring the plaintiff's case within the purview of Order 39, Rule 2 of the Code of Civil Procedure, but the plaintiff had to show that there was a violation of his right.

29. In cases where a plaintiff asks for an injunction to restrain the State of Bihar from appointing one officer or the other to a certain post or transferring him from one post to the other, the Courts have to keep in view that there was a presumption of regularity of the official acts [vide (10) Ishwarlal Girdharlal Joshi etc. Vs. State of Gujarat and Another, and the burden lay on the plaintiff to rebut that presumption. In order to obtain an injunction against the State of Bihar the plaintiff must show in those cases that the order passed by the Government was in violation of some right. It is essential that the Court should be satisfied that there was a real and reasonable apprehension of an injury, in other words, the threatened injury must appear to be substantial and positive. Ordinarily, the Court in such cases should be reluctant to grant an injunction unless there were special circumstances in favour of the plaintiff and reasonable grounds for the granting of an injunction, inasmuch as by the granting of an injunction the entire

order relating to transfers or promotions of more than one officer becomes nugatory till the disposal of the suit or the appeal.

30. On a consideration of all the matters referred to above, I am of the opinion that injunction ought not to have been granted. In the result the application is allowed and the impugned order of the Additional Subordinate Judge is set aside. In the circumstances of the present case, parties will bear their own costs of this application. The observations made regarding the plaintiff's claim should not prejudice him at the time of trial.

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31. This application is by the Bihar State Public Service Commission for expunging the adverse findings recorded against the Commission by the learned Additional Subordinate Judge. I have already indicated that the finding of the learned Munsif that the plaintiff had failed to prove malice on the part of the Commission was not assailed by learned counsel for the plaintiff-appellant in the miscellaneous appeal. Besides this, Mr. Basudeva Prasad for the petitioner in this case fairly stated that if the application in revision filed by the State of Bihar would succeed, it would not be necessary to go into the merits of the present application on behalf of the Bihar State Public Service Commission inasmuch as the findings recorded by the learned Additional Subordinate Judge would no longer be operative and effective. The application in civil revision has been already allowed and as such this application for expunging the adverse findings has become infructuous and it is accordingly dismissed but without costs.