
(1969) 04 AHC CK 0005
In the Allahabad High Court

State of Uttar Pradesh and Another	APPELLANT
Vs	
Virendra Nath Srivastava and Another	RESPONDENT

Date of Decision : 29-04-1969

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (1970) 1 LLJ 620

Hon'ble Judges : Gyanendra Kumar, J;Gangeshwar Prasad, J

Bench : Division Bench

Judgement

Gyanendra Kumar, J.—Both these appeals have been filed by the State of Uttar Pradesh and the Chief Engineer, Irrigation Department, Uttar Pradesh. By his orders dated 7 and 20 August 1968, G.C. Mathur, J., allowed the writ petitions filed by Virendra Nath Srivastava and Chaudhri Anis Ahmed, respondents, respectively, giving rise to these appeals which involve common questions of fact and law and can be disposed of by a single Judgment. Respondent Virendra Nath Srivastava was a confirmed Executive Engineer in the Irrigation Department of the Government of Uttar Pradesh. In this department there are 23 permanent posts of Superintending Engineers and 35 posts of officiating Superintending Engineers. In 1960, Virendra Nath was selected by a committee set up by the Government of Uttar Pradesh for the post of an officiating Superintending Engineer and in November 1964, he was actually appointed as officiating Superintending Engineer. On the other hand, Chaudhri Anis Ahmed was a confirmed Assistant Engineer in the Irrigation Department of the Government of Uttar Pradesh. After his selection by the departmental committee, he was promoted as officiating Executive Engineer on 15 August 1964 and was posted at Bareilly. In August 1966, Virendra Nath Srivastava was transferred to the Fifth circle, Irrigation Works, Bareilly, where Chaudhri Anis Ahmed was already working as an officiating Executive Engineer. In this circle there is an earthen dam over the river Deoha, in the district of Nainital, known as Nanak Sagar Dam, which had been completed in 1962. Both Virendra Nath Srivastava and Chaudhri Anis Ahmed were put in charge of the said Nanak Sagar Dam. On account of

heavy rains there was a seepage of water in the dam about the end of August 1967. Some steps were taken by the respondents and their staff to stop the seepage but in spite of their efforts the dam gave way at about 1.30 a.m. on the night intervening 7 and 8 September 1967, causing considerable loss of life and property. Sri Tamreshwar Prasad, Minister of Irrigation and Power, Uttar Pradesh, on getting the news of the breach of the dam, reached the site on the morning of 8 September 1967. Dr. K.L. Rao, Union Minister of Irrigation and Power, also visited the dam on 10 September 1967 and made the following remark:

The dam was well-constructed except that the filter provided at the DS Toe of the dam did not seem to be adequate. The bursting of the dam appears to be on account of failure of its foundation.

2. There was a lot of furore in the press and the public over the bursting of the dam resulting in considerable loss to life and property. On 4 October 1967, the Government set up a committee of experts to enquire into the cause of the disaster and to fix responsibility for the same. It is conceded on behalf of the State that the said enquiry committee has not yet given its report. The Minister of Irrigation and Power, Uttar Pradesh, again visited that dam on 8 October 1967, and, inter alia, made certain enquiries from the respondents. Soon after, by separate orders dated 26 October 1967, passed by the Governor, Virendra Nath Srivastava was reverted with immediate effect from the post of an officiating superintending Engineer to his substantive post of an Executive Engineer. Likewise, Chaudhri Anis Ahmed was reverted from the post of officiating Executive Engineer to his substantive post of an Assistant Engineer, with immediate effect, although a number of officers junior to them were allowed to continue as officiating Superintending Engineers and officiating Executive Engineers. The impugned orders of reversion did not give any reason for these immediate steps taken against these officers. Both these officers then filed separate writ petitions in this Court which were allowed by G.C. Mathur, J., as stated at the outset, giving rise to these two connected appeals by the State of Uttar Pradesh and Chief Engineer, Irrigation Department.

3. The main condition put forward before us on behalf of these aggrieved officers is that the orders of their reversion were really passed by way of punishment and were attended with grave evil consequences to them and as such the reversion to their substantive posts amounted to their reduction in rank inasmuch as these orders were passed without giving them an opportunity of being heard or showing cause against their proposed reversion, they violated the mandatory provisions of Article 311(2) of the Constitution of India and should be struck down.

4. In their respective writ petitions the two respondents had alleged that the selection for the permanent posts of Superintending/Executive Engineers, as the case may be, is made in accordance with the prevailing rule which is to the effect that on their being a vacancy in the permanent cadre of these posts, it is only an officiating Superintending/Executive Engineer, as the case may be, who can be

appointed and confirmed in the respective permanent post, according to his seniority.

5. In Para. 33 of the counter-affidavit filed on behalf of the State by Sri D.C. Dubey, Deputy Secretary to Uttar Pradesh Government, Irrigation Department, it was admitted that the cases of the Superintending/Executive Engineers.

who are officiating as such are examined by a committee appointed for that purpose and persons found suitable for being confirmed as permanent Superintending/Executive Engineers alone are appointed and confirmed as such.

In Para. 34 of this counter-affidavit it was further averred that the

correct facts are that according to the administrative directions, a committee is constituted consisting of the Secretary to Government, Uttar Pradesh, Irrigation Department, Chief Engineer, Irrigation Department, and the Chief Engineer, Public Works Department, for recommending the names to the Government for permanent/officiating appointments as Superintending/Executive Engineers. This committee makes recommendation for permanent appointment, as Superintending/Executive Engineer out of Superintending/Executive Engineers who are actually officiating as Superintending/Executive Engineers.

For the sake of convenience and brevity we have taken the liberty of mentioning both the posts together as Superintending/Executive Engineers.

6. In this connexion reference may also be made to the

Rules for the selection of Assistant Engineer for promotion to the grade Executive Engineer in Irrigation Branch " (vide annexure II to the State's application dated 27 November 1968).

Rule 1, Clauses (e) and (f) of the above rules lays down that in selecting candidates, regard shall be had, amongst others, to their professional ability and previous record or service.

7. On 27 January 1969 Sri Kamal Narain Singh, Chief Standing Counsel for Uttar Pradesh Government, made a statement before us that the State adheres to the counter-affidavit filed on its behalf of 14 May 1968 that the rules contained in annexure II (vide supra) had statutory force and were not merely departmental directions. On 28 January 1969 Sri Kamal Narain Singh further conceded that there had been no such case in which an officer was selected as a permanent Superintending Engineer who was not officiating as Superintending Engineer. Similarly with regard to Executive Engineers Sri Kamal Narain Singh stated that there had been no case till now of an Assistant Engineer having been selected as a permanent Executive Engineer if he was not already acting as an officiating Executive Engineer at the time of his selection. He added that there was no rule to this effect but that is what happens in actual practice under administrative directions. It has well been recognized that a long continuing practice has the force of a rule vide *Kishori Lal v. Sharut Chunder* LL.R. 8 Cal. 593 at 597.

8. From the admissions in the counter-affidavit filed on behalf of the State of Uttar Pradesh and the statements made by their Chief Standing Counsel before us on 27 and 28 January 1969, it is abundantly clear that an officer could be appointed as a permanent Superintending Engineer only if he was posted as an officiating Superintending Engineer at the time of his selection to the permanent post of a Superintending Engineer. Similarly an officer could be appointed as a permanent Executive Engineer only, if at the time of his selection, he was already working as an officiating Executive Engineer. In this view of the admitted rule of practice, the respondents in question cannot be appointed as permanent Superintending Engineer or permanent Executive Engineer, as the case may be, once they have been reverted to their substantive posts of Executive Engineer and Assistant Engineer, respectively. Thus they will be visited with serious and grave evil consequences in the matter of their future promotion and prospects, on account of reversion of Virendra Nath Srivastava from the post of an officiating Superintending Engineer to his substantive post of an Executive Engineer and that of Chaudhri Anis Ahmad from the officiating post of an Executive Engineer to his substantive post of an Assistant Engineer, particularly when a number of their juniors were allowed to continue to officiate as Superintending Engineers or Executive Engineers, as the case may be.

9. A lot of argument has been made at the bar whether the reversion of the aggrieved officers to their substantive posts was justiciable when they could not claim, as of right, to continue to work in the higher officiating posts and whether the supposed inefficiency or neglect, if any, was merely the motive or the reason for reverting them to their lower substantive posts. We think it is not necessary to go into these vexed questions as the case can be decided on the simple point whether the future prospects and chances of being appointed to the permanent posts of Superintending Engineer/Executive Engineer, as the case may be, were adversely affected by the reversion of these officers to their substantives lower posts, without giving them a chance of being heard in the matter, so as to amount to punishment and thereby attracting the provisions of Article 311(2) of the Constitution of India. It has not been seriously challenged that the officers concerned had no right to remain on the higher posts in which they were officiating; yet the orders of their reversion to their substantive posts, without assigning any reason entails penal consequences because their reversions Jeopardize their further chances of promotion, or at least result in postponement of their future prospects. As such three orders of reversion are quasi Judicial in nature. Even if in future these officers are again selected as officiating Superintending/Executive Engineer (as the case may be), they shall become junior to their juniors who had continued to officiate as Superintending/Executive Engineers meanwhile. In fact, we are informed that some of the officers who were juniors to the respondents have since Already been appointed permanently as Superintending/Executive Engineers, thereby superseding the respondents to their detriment. If the aggrieved officers had continued to officiate, in the higher posts without any break, all this period of continued officiation would have been

counted towards their professional ability and previous record of service at the time of their final absorption as permanent Superintending/Executive Engineer, as required by Rule (e) of the rules for selection (annexure II to the application filed by the State on 27 November 1968).

10. The very fact of their sudden reversion to their lower substantive posts while allowing their juniors to officiate in the higher posts, casts an aspersion on the professional ability and previous record of service of these reverted officers and also amounts to infliction of punishment on them. That being so, the officers concerned should have been granted a hearing and should have been allowed an opportunity to show cause against their sudden reversion on 26 October 1967 as required by natural justice and fairplay.

11. In the leading case of *Parshotam Lal Dhingra Vs. Union of India (UOI)*, , it was observed in p. 562:

... But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post, does not mean that an order of reduction of a servant to a lower post or rank cannot, in any circumstances, be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences. Thus, if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, then that circumstance may indicate that, although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government has terminated the employment as and by way of penalty...the Court has to Apply the two testsnamely.

(1) whether the servant had a right to the post or the rank, or

(2) whether he has been visited with evil consequences of the kind hereinbefore referred to ?

If the case satisfies either of the two tests, then it must be held that the servant has been punished and ...the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Article 311 which give protection to Government servant, have not been complied with ...the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant.

(Italicizing ours.)

12. In *Board of High School and Intermediate Education, U.P., Allahabad Vs. Ghanshyam Das Gupta and Others*, the facts were that certain students were alleged to have used unfair means at their examination, so their results were

cancelled by the examination committee in ex parte, proceedings. The objection was that the students should have been provided an opportunity of being heard before cancelling their results, because the order cancelling their examinations entailed grave and evil consequences to them and the committee had to act quasi-judicially. It was held that the final determination by the examination committee will be a quasi-judicial act inasmuch as it prejudicially affects the examinees and brings about evil consequences to them. It may be noted that the students in question had hardly any vested right to the declaration of their results by the Board; yet in Para, 11, the Supreme Court said:

Considering therefore the serious effects following the decision of the committee and the serious nature of the misconduct which may be found in some cases.... It seems to us that the committee must be held to act judicially in circumstances as these.... The serious effects of the decision of the committee on the examinee concerned. must lead to the conclusion that a duty is case, on the committee to act judicially in this matter particularly as it has to decide objectively certain facts which may seriously affect the rights and careers of examinees.... We are, therefore, of opinion that the committee when it exercises its powers ...is acting quasi-judicially and the principles of natural justice, which require that the other party ...must be heard will apply to the proceedings before the committee.

13. In *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, briefly stated the facts were that on certain anonymous letters an inquiry was made and Dr. Binapani was required to show why her date of birth should not be accepted as 4 April 1907. The doctor submitted that her date of birth had been correctly recorded as 10 April 1910. By letter dated 27 June 1963 the Government of Orissa determined the date of her birth as 16 April 1907, and declared that she should be deemed to have retired on 16 April 1962. The doctor then applied to the High Court of Orissa for a writ declaring that the order of retirement passed by the State Government was contrary to law, against the Constitution and principles of natural justice. She further sought a declaration that she was entitled to continue in service till 10 April 1968. The High Court held that the aforesaid order of the State Government amounted to compulsory retirement, before the doctor attained the age of superannuation and was hit by Article 311 of the Constitution as it amounted to removal from service, and since the doctor was not given any opportunity of showing cause against her proposed removal, the order was invalid. Thereupon, the State of Orissa appealed to the Supreme Court of India. The main contention of the counsel for the State was that the order fixing the age of the doctor was an administrative order and the High Court had no power to sit in appeal over the decision of the State authorities fixing her age. Shah, J., delivering the judgment of the Bench, observed thus in p. 269:

... The rule that a party to whose prejudice an order is intended so be passed is entitled to a hearing applies alike to Judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences.

It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act Judicially would therefore arise from the vary nature of the function intended to be performed.... If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justices be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.

14. Likewise in State of Punjab and Another Vs. Shri Sukh Raj Bahadur, Mitter, J., after considering the various authorities, thus summed up their essence. On a consideration of these cases, the following propositions are clear at 379:

1. * * * 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.

15. The antecedent circumstance that after the breach of the ill fated Nauak Sagar Dam, the Union Minister of Irrigation and Power as well as the Minister of Irrigation and Power, Uttar Pradesh, visited the spot and the litter, inter alia, made enquiries from the two engineers in question, that there was a lot of furore in the press and the public over the bursting of the dam resulting in considerable loss to life and property, that a committee of experts was set up to inquire into the cause of the disaster and to fix responsibility for same and that soon thereafter both the engineers were reverted to their lower substantive posts with immediate effect, while their juniors were allowed to continence to officiate as Superintending or Executive Engineers as the case may be, are very revealing and indicate the real nature and intent of the orders passed against the aggrieved officers. We have already held that the impugned orders of reversion visit these public servants with evil consequences and also cast aspersion on the work and worth of these officers hence their reversions were clearly by way of infliction of punishment, even though the respondents were merely officiating in the higher rank. Therefore, the respondents had to be given the benefit of a preceding opportunity to show cause, which has been illegally denied to them.

16. From the above weighty pronouncements, it is abundantly clear that from the very nature of the orders of reversion, involving grave and evil consequence to the aggrieved officers there was a duty to act judicially and the officers prejudiced by the order ware entitled to a hearing, when their future prospects of promotion were being Jeopardized or were being clearly postponed. The necessary opportunity to show cause having not been effected to the aggrieved

officers, the impugned orders of their reversion were in defiance of the protection guaranteed to Government servants by Article 311(2) of the Constitution of India, which were rightly quashed.

17. Consequently we find no merits in these appeals filed by the State and its Chief Engineer which are dismissed with costs. We maintain the direction of the learned single Judge, quashing the orders dated 26 October 1967, reverting Virendra Nath Srivastava from the post of an officiating Superintending Engineer to that of an Executive Engineer and likewise reverting Choudhri Anis Ahmad from the post of an officiating Executive Engineer to that of an Assistant Engineer. The stay orders dated 11 October 1963 in both the appeals are hereby discharged.