

(1965) 03 CAL CK 0024
In the Calcutta High Court
Case No : A.F.O.O. No. 199 of 1965

State of West Bengal and Others

APPELLANT

Vs

Hirendra Nath Banerjee

RESPONDENT

Date of Decision : 05-03-1965

Acts Referred:

Constitution of India, 1950 — Article 309, 311
West Bengal Premises Tenancy Act, 1956 — Section 26

Citation : AIR 1967 Cal 285

Hon'ble Judges : S.A. Masud, J; D.N. Sinha, J

Bench : Division Bench

Advocate : S.M. Bose, General, B.C. Dutt, Addl. Govt. Pleader and P.K. Banerjee, for the Appellant; Mahindra Nath Ghose and Anil K. Sen, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—This is an appeal from an order of Basu, J., dated 5th March, 1965 whereby he made the rule absolute and issued a writ in the nature of mandamus restraining the State of West Bengal from removing the respondent from the post of Registrar, Rent Controller's Office, Calcutta, otherwise than in due course of law, and not to give effect to certain orders in that behalf.

2. The post of a Registrar of the Rent Controller's office, Calcutta, has been created by statute, namely, Section 26 of the West Bengal Premises Tenancy Act, 1956 (West Bengal Act XII of 1956) (hereinafter referred to as the "said Act"). The relevant provisions are as follows:

"26. Appointment of Controller, Additional and Deputy Controllers and Registrars.—

(1) The State Government may, by notification, appoint a person to be the Controller for any area or part of area to which this Act extends to exercise the powers and discharge the duties of the Controller in accordance with the provisions of this Act in such area or part.

(2) The State Government may also, by notification, appoint any person to be an Additional Controller or a Deputy Controller or a Registrar or Deputy Registrar for any area to which this Act extends.

(4) A Registrar or a Deputy Registrar shall exercise such of the functions of the Controller relating to the rent deposited u/s 21 as may be delegated to him by the Controller in writing."

3. The respondent Hirendra Nath Banerjee was originally in the clerical establishment of the Rent Controller's Office. He was subsequently promoted to the office of the Deputy Registrar and on or about the 13th June, 1960, he was appointed permanently as Registrar of the Rent Controller's Office, Calcutta. The relevant part of the notification runs as follows:

"Calcutta: No. 9088 I, R.--13th June 1960 In exercise of the power conferred by Subsection (2) of Section 26 of the West Bengal Premises Tenancy Act, 1956 (West Bengal Act XII of 1956) the Governor is pleased to appoint Sri Hirendra Nath Banerjee, Deputy Registrar, Rent Control Office, Calcutta, permanently as Registrar for Calcutta, as defined in Clause (a) of Section 2 of the said Act with effect from the date on which he takes over charge."

4. The respondent's pay scale was Rs. 300-700. On the 26th March, 1964 an order was made by the Governor of West Bengal to the following effect:

"The Governor is pleased to allow Shri Hirendra Nath Banerjee, Registrar, Rent Control Office, Calcutta, to act until further orders as Certificate Officer, Mayurakshi Revenue Divisions, Birbhum with Head Quarters at Suri with effect from the date he takes over charge."

4A. The wording of this notification is somewhat peculiar. It is not the case of the appellant that the respondent ever made an application himself or voluntarily wished at any time, to be transferred as Certificate Officer, Mayurakshi Revenue Divisions, Birbhum, and the use of the expression "allow" has occasioned certain comments which will be presently noticed. The respondent's complaint in this case is against this order of transfer. In the petition it is alleged that this order removing him from Calcutta was made because the respondent had taken "strong hands" in preventing the accountant of the office of the Rent Controller from indulging in unfair and unlawful activities, and the accountant being in "friendly terms" with the Rent Controller, the respondent fell in disfavour with the Rent Controller himself. It is further alleged that this accountant had been warned for his irregular activities and dereliction of duties by the previous Rent Controller but he continued to indulge in the same activities and the respondent's recommendation for the transfer of the said accountant from his post, was turned down by the Rent Controller, and when the respondent became strict, the Rent Controller took upon himself the obligation to remove the respondent from the post of the Registrar. It is claimed that these allegations are allegations of mala fides on the part of the Rent Controller. The second ground taken is that the respondent's post is not transferable and therefore, the order of

transfer is illegal and invalid. A third point had been taken in the petition but not sufficiently developed in the court below, but we allowed it to be taken and argued fully in the court of appeal. It is as follows: The complaint is that the office of a Certificate Officer, Mayurakshi Revenue Divisions, Birbhum, to which the respondent had been transferred, has not been validly created and is not in conformity with the provisions of the Bengal Public Demands Recovery Act (Act III of 1913) and as such, the respondent could not be transferred to such a post. There are various other points taken which we shall notice, but they are not of much importance, as in our opinion, these three points are sufficient to dispose of the appeal. A point has been taken namely, that emoluments of the office of the Certificate Officer, Mayurakshi Revenue Division, Birbhum, were less than that of the Registrar, Rent Controller's Office, Calcutta, and as such the order of transfer amounted to a demotion and could not be made except as a disciplinary measure after giving opportunity to the respondent to defend himself of any charges that may be put forward. A further point was taken, namely, that the transfer was not to a "Head Quarter" station. This point, however, has not been pressed before us.

5. The point of mala fides has found favour with the court below. It has been pointed out that allegations have been made in the petition against the Rent Controller which have not been denied, & as such should be taken to be admitted. Certain allegations have undoubtedly been made in the petition and they involve the respondent No. 3, in the original application, namely, the Rent Controller, Calcutta. It is certainly a legitimate matter of comment that the Rent Controller has not, in his affidavit, made his denials more comprehensive and vigorous. In our opinion, however, a charge of "mala fides must be specific and with sufficient particulars, so that the allegations, if true, may bring home the charge of mala fides. In this case, however, the allegations in the petition are somewhat vague. It is stated that the accountant of the Rent Controller's Office was indulging "in unfair and unlawful activities" without giving particulars of what these unfair and unlawful activities were. Again, expressions like "irregular activities" and "dereliction of duties" have been used in paragraph 6 of the petition but no particulars have been given. Then again, the charge is that the Rent Controller took upon himself the obligation to remove the respondent from his post as a Registrar. There is absolutely no evidence to show that the Rent Controller took any hand in transferring the respondent. It cannot be denied that the Rent Controller was not the authority who could transfer the respondent. Therefore, the charge that he is involved in it, merely raises a suspicion, but does not prove it. The affidavit in opposition filed by the Rent Controller in which there are general denials might have been more comprehensive but on the other hand it must be remembered that the allegations in the petition regarding the charge of mala fides are also in general terms and are lacking in sufficient particulars. On the strength of it, and in the absence of any other evidence, I am not prepared to come to the conclusion that the allegations of mala fides, have either been admitted or proved. I now come to the point as to whether the

respondent's post was a transferable one. As I have stated above, the post was created by a statute namely, Section 26(2) of the West Bengal Premises Tenancy Act, 1956. It is a specific post under a specific statute which contains no provision for transfer. The respondent did not belong to any cadre post, but was holding the post of the Deputy Registrar and he was appointed, according to the notification relating to his appointment set out above, "permanently as Registrar for Calcutta", as defined in Clause (a) of Section 2 of the said Act (Act XII of 1956). Before dealing with this point of transfer, it will be convenient to see how the post of the Registrar, Rent Controller's Office: Calcutta, was to be filled up and how the post of the Certificate Officer, Mayurakshi Revenue Divisions, Birbhum, was created. The latter would be relevant also on the other point namely, as to whether the office had been validly created. It will be observed that u/s 26 (2) of the West Bengal Premises Tenancy Act, 1956, the Governor may appoint "any person" to be a Registrar for any area to which the said Act extends. On or about the 9th February, 1951 a notification was issued, presumably under the earlier Rent Control Act, by which a member of the West Bengal junior Civil Service became eligible to hold the post of a Registrar in the Rent Controller's Office, provided he possessed the specified qualifications namely, three years experience of treasury work and capacity for controlling charge office establishments. The West Bengal Junior Civil Service, or the "W.B. J. C. S." as it is called, is filled up by members who hold cadre posts. It must have been felt that confining the appointment of a Registrar to this cadre would be in conflict with the provisions of Section 26 (2) of the West Bengal Premises Tenancy Act, 1956, and that is why a notification was issued by the State Government dated 23rd April, 1959 which is anne-xure 8 to the affidavit in opposition, made under Article 309 of the Constitution. According to this notification, the post of a Registrar in the office of the Rent Controller, Calcutta, could be filled up in two ways. One was by transfer of W. B. J. C. S. officers with treasury experience, and in such a case it was necessary to have three years' experience of treasury work and capacity for controlling charge office establishments. The second method of filling the post was by promotion of the Deputy Registrar, Rent Controller Office, Calcutta. In this instance the requisite qualification is three years' continuous service in the post of the Deputy Registrar. The respondent was appointed under the second category, having been promoted from the post of the Deputy Registrar. It will be observed, therefore, that two distinct methods of appointment have been visualised, one from a cadre post and the other from a non-cadre post. Both parties have admitted that the wordings used in the orders of appointment in the two instances are not identical. When a member of the W. B. J. C. S. is appointed as a Registrar, he is appointed "until further orders". Where, however, he is appointed under the second category, the words used are different. He is either appointed temporarily or permanently. In the present case, the respondent was appointed "permanently" to the post of the Registrar. The position, therefore, is that the post of a Registrar of the Rent Controller's Office, Calcutta, is a specified post created by a particular statute. The statute does not contain any provision for

transfer. The provision of appointment contained in the statute visualises the appointment of "any person" and this is clearly recognised in the rules made under Article 309 of the Constitution. In other words, a person who is not in a cadre post may be appointed. It does not seem to be in accord with commonsense that a person who is not in any cadre post, but who has been specifically appointed "permanently" to a statutory post of a particular description, can be transferred at will to some other post which might involve work of an entirely different nature. Before I proceed to consider the arguments advanced on behalf of the appellant on this point, it will be convenient to refer to a decision of the Allahabad High Court which deals with the exact point in the case, *Dr. Prem Beharilal Saxena Vs. Director of Medical and Health Services, Lucknow and Another*, . The facts in that case were as follows: The petitioner was one Dr. Prem Behari Lal. He was appointed by the Government of Uttar Pradesh to the post of Anaesthetist at the State hospitals at Kanpur, consisting of two hospitals namely the Ursula Horsman Memorial hospital and Sri Lajpat Rai Hospital. He was appointed after selection by the Public Service Commission and in the advertisement inviting applications it was stated that the Anaesthetist would work in the government hospitals in the city of Kanpur, under the directions of the Civil Surgeon. The Doctor was appointed in 1951. He tried his best to be accepted as belonging to the State Medical Service which is manned by persons holding a cadre post but this was refused. In October, 1957 he was served with an order transferring him from Kanpur to the S. P. Gupta Hospital at Varanasi. He represented that his appointment was in a specified post and objected to the transfer to Varanasi, but stated that he was willing to be so transferred if his post was considered to be a cadre post as he would then get the advantages of a cadre post including its scale of pay. The Government refused to treat him as holding a Cadre post and insisted upon his order of transfer being carried out. Thereupon, he made an application in the Allahabad High Court under Article 226 of the Constitution. It was held that the petitioner was recruited and appointed to a particular post which in its very nature was located at Kanpur and had to be performed at that place. His was not an appointment generally to the post of an anaesthetist but was to the post attached to the two hospitals at that place. Therefore, the petitioner could not be transferred to Varanasi and that Rule 15 of the Fundamental Rules which gives power to the State Government to transfer a government servant from one post to another did not apply. or in any event did not authorise the transfer, because before the said rule could be availed of the Government servant must belong to a category of servants which can in accordance with the terms of his employment, be sent to another post. It was held that where a Government servant had been appointed to a specific post and that post was in its very nature such that it could be performed at the particular place only, he could not under this rule be transferred to another post. In such a case the transfer order would in fact run inconsistent with the appointment itself which was not generally to any class of posts but to a specified post only.

6. I now come to the manner in which the appellant supports the order of transfer. Reliance is placed upon Section 24(1) of the West Bengal Service Rules (which corresponds to Rule 15 of the Fundamental Rules) and which runs as follows :

"21(1) A Government servant may be transferred from one post to another:

Provided that except (i) on account of inefficiency or misbehaviour or (ii) on his written request, he shall not be transferred substantively to, or except in a case covered by Rule 65, appointed to officiate in, a post carrying less pay than the pay of the permanent post on which he holds a lien, or would hold a lien had it not been suspended under Rule 20."

7. It is argued that the respondent is a Government servant and he is governed by Rule 24(1) and therefore. Government may transfer him from one post to another. Looking at Rule 24(1) there can be no doubt that it is a general provision for the transfer of Government servants from one post to another. Under this rule, the only restriction placed on the power of transfer is that no transfer can be made to a post carrying less pay than the pay of the permanent post on which a Government servant holds a lien. Even this restriction does not apply when the transfer is on account of inefficiency or misbehaviour or at the written request of the Government servant concerned. At this stage, it would be relevant to point out a fact upon which the court below has commented. This is with reference to the order of transfer dated 26th March, 1964 by which the Governor was pleased to "allow" the respondent to act as Certificate Officer, Birbhum. There can be no doubt that this peculiar expression was used in an attempt to bring it within the proviso to Rule 24(1), as if the transfer was at the written request of the respondent. There is however no such request and none has been disclosed in the affidavits. It is not also the case of the appellant that there is any question of inefficiency or misbehaviour.

8. The learned Judge in the court below has come to the conclusion that the post to which the respondent has been transferred, does not carry the same pay as the post of the Registrar. Rent Controller's Office, Calcutta and I will presently refer to this particular point. There are, however, other provisions in the rules which have to be considered. The first rule to be considered is Rule 2. It is important to consider the contents, and the rule is set out below : --

"2. Subject to the provisions of the Constitution of India and except where it is otherwise expressed or implied, these rules apply to all members of services and holders of posts whose conditions of service the Government of West Bengal are competent to prescribe. Subject as aforesaid they also apply to-

(i) any person for whose appointment and conditions of employment special provision is made by or under any law for the time being in force;

(ii) any person in respect of whose service, pay and allowances or pension or any of them special provision has been made by an agreement made with him, in

respect of any matter nor covered by the provisions of such law or agreement."

9. It will thus appear that the rules are subject to the provisions of the Constitution and are also subject to the conditions of employment, whether express or implied. It is this rule which explains why Rule 24(1) is inapplicable to the facts of the present case. Generally speaking, Government posts are transferable posts, but there may be exceptions both express or implied. It is impossible to lay down as a general proposition that under all circumstances persons holding any Government post can be transferred to another without restriction. It may be that a particular post has been created for a particular purpose. It may be that a person has been appointed to a particular post because he is suitable for holding that post, and no other. The holder of a post may require a certain kind of technical knowledge, and to say that he can be transferred to another post for which he is not qualified, would be absurd. For example, supposing a person fills the post of a police officer; can he be transferred as a bus-conductor under the State Government in its Transport Department? The answer is obviously in the negative. As I have already stated, the post of the Registrar in the Rent Controller's Office, Calcutta, has been created by statute, namely, the West Bengal Premises Tenancy Act, 1956. According to the rules made under Article 309, it can be filled up in two ways. One is by the holder of a transferable post namely the cadre post of W. B. J. C. S. In such a case the appointment is subject to "further orders". Where a person in a cadre post is appointed, it is to be implied that he can be transferred, but under the second method of recruitment, namely, from the post of a Deputy Registrar, the only qualification required is that a person should be holding the post of the Deputy Registrar for three years. Therefore, it is implied that the person appointed as a Registrar is acquainted with the kind of work required in the Registrar's Office and no other qualification is necessary. When a person not belonging to any cadre post is appointed "permanently to the post of a Registrar under such circumstances, the implication is that he will continue to hold the post of a Registrar all throughout his administrative career and it is implied that he cannot be transferred elsewhere. Upon this aspect of the matter we agree with the Allahabad decision cited above, and the findings of the Court below.

10. Next comes the question as to whether the post to which the respondent has been transferred carries the same emolument or lesser emolument than the post of a Registrar. What is stated on behalf of the appellant is that the post of the Certificate Officer, Mayurakshi Revenue Division, Birbhum, does not carry any substantive scale of pay. This brings me to a consideration of the nature of the post to which the respondent has been transferred. The post of a Certificate Officer is created under the Bengal Public Demands Recovery Act, 1913. u/s 3(3) of the Bengal Public Demands Recovery Act, 1918 the expression "Certificate Officer" has been defined in the following manner :--

""(3). "Certificate Officer" means a Collector, a Sub-Divisional Officer, and any officer, appointed by a Collector, with the sanction of the Commissioner, to

perform the functions of a Certificate-Officer under this Act;"

11. Thus, the post of a Certificate Officer is one created by statute and no such post can be created or filled up except in conformity with the provisions of the said statute. From the materials disclosed in this case, we find that by memorandum dated 23rd May, 1963 the Governor accorded sanction to the creation of a temporary gazetted post of a certificate officer, having normally the rank and status of a Sub-Deputy Collector in connection with the realisation of arrears, Canal Revenue, in. the Mayurakshi Revenue Division, Suri in the District of Birbhum. The relevant portion of the said memorandum is important and is set out below :--

"The undersigned is directed by order of the Governor to say that the Governor has been pleased to accord sanction to the creation of a temporary Gazetted post of a Certificate Officer, having normally the rank and status of a Sub-Deputy Collector, in connection with the realisation of arrear Canal Revenues in the Mayurakshi Revenue Divisions at Suri in the District of Birbhum for the period upto 28-2-65 with effect from the date of appointment of the incumbent.

The Governor has also been pleased to direct that Hirendra Nath Banerjee, permanent Registrar of the Office of the Rent Controller, Calcutta should hold this post of Certificate Officer created under this order for the present, as a special case and shall draw the grade pay of the Registrar in the scale of Rs. 500-25-550-30-700 for so long as he holds the post."

12. It will be observed that the temporary post of a Certificate Officer created by the above memorandum is created by the Governor, although at the request of the Commissioner, Burdwan Division, and that the respondent is appointed to that post by the Governor. It is further ordered that although the post normally carries the scale of pay applicable to a Sub-Deputy Collector in the W. B. J, C. S. cadre, it was as a special case to bear a scale of pay which has been equated with the scale of pay of the respondent as a Registrar of the Rent Controller's Office Calcutta. It is not disputed that the normal scale of pay and this special scale of pay so ordered, are at variance and that the former is less than the latter. Going back now to Rule 24(1). the proviso states that there cannot be a transfer to a post carrying "less" pay than the post of a permanent post on which the person holds a lien". In my opinion, it refers to the normal scale of pay and not any special scale of pay that may be introduced for the time being. In my opinion, what has been done is to make an obvious attempt to get over this rule by increasing the pay scale, only for the respondent. If this principle is allowed, then very strange consequences will ensue. An officer holding a post in which there is higher scale of pay may then be transferred to a very junior post, and a special pay scale made applicable to him, to get over the mischief of the proviso. That was not the intention of Rule 24(1). For example, it would then be possible to transfer the Commissioner of Police to the post of constable by saying that he would, as a special case, draw the pay of the Commissioner of Police. What was intended was that there should be no "demotion" and one of the standard ways

of ensuring this is to see that a transfer is not made to a post which normally bears a lesser scale of pay or less amount of pay, basing this on the fact that normally, the higher a post is the greater is the remuneration. It is from this point of view that we hold that the post to which the respondent has been transferred comes within the mischief of the proviso to Rule 24(1). I think it would be appropriate here to consider the third point taken namely, that the post of certificate officer, Mayarakshi Revenue Division, Birbhum, is not one which has been created in accordance with law. I have already pointed out that the post of a "certificate Officer" has been created by statute, namely the Bengal Public Demands Recovery Act, 1913. I have also set out above the definition of "certificate officer", as set out therein. According to that definition, a "certificate officer" must be (i) a Collector or (ii) a Sub-Divisional Officer or (iii) an officer appointed by Collector with the sanction of the Commissioner to perform the functions of a certificate officer under the Bengal Public Demands Recovery Act, 1913. It is not denied that the respondent is not a Collector or a Sub-Divisional Officer. It was sought to be argued that he comes under the last category namely, an officer appointed by Collector with the sanction of the Commissioner to perform the functions of a certificate officer. In my opinion, this argument is entirely without substance. As I have stated above, the temporary post was created by the order of the Governor and the respondent was appointed to that post, also by order of the Governor. I do not see any provision for the Governor creating the post of a certificate officer, temporary or permanent. If the respondent has to come within the said category he must be appointed by the Collector with the sanction of the Commissioner. There is no material to show that the respondent was ever appointed by the Collector with the sanction of the Commissioner. It appears that he was appointed by the Governor, may be at the request of the Commissioner, but upon this also there is no specific material before the court. A person may be appointed as a "Collector" by the State Government, and thus become a certificate officer under the first category. That however, has not happened in this case and we are not concerned with the provisions of the Code of Criminal Procedure upon which Mr. Banerjee relies. The result is that the respondent has been asked to hold a post which does not exist in the eye of law.

13. Mr. Banerjee has cited a Supreme Court decision, *The State of Assam Vs. A.N. Kidwai, Commissioner of Hills Division and Appeals, Shillong*, . It appears however that the decision is against him. In that case the Supreme Court considered the meaning of the expression "appointed" in a statute. It held that the word "appointed" is inappropriate to signify the constitution of any authority but is quite proper to signify the creation of the personnel of an already constituted authority, to exercise the powers of that authority. From this point of view, I think that the definition of the expression "Certificate Officer" in Section 3(3) of Bengal Public Demands Recovery Act, 1913 is quite clear. Ordinarily, a certificate officer would be the Collector or the Sub-Divisional Officer who are persons connected with the recovery of the revenue, but any other officer may

be appointed by the Collector with the sanction of the Commissioner, not to be a Certificate Officer, but only to perform the functions of a Certificate officer. Under the said Act, it expressly says that such an officer can be appointed by the Collector, although with the sanction of the Commissioner. Therefore, it is the Collector and the Commissioner who are concerned in such an appointment. The appointing authority has been clearly stated in the statute. Under the circumstances, no other person can appoint such an officer.

14. Mr. Banerjee has cited another decision of the Supreme Court *Oriental Metal Pressing Works (P.) Ltd. Vs. Bhaskar Kashinath Thakoor and Another*, . This also seems to be against him. It was held there that a "transfer" is not the same as an appointment". Regard being had to the definition of the word "certificate officer" which in the circumstances of this case involves an appointment I fail to see how this decision helps Mr. Banerjee.

15. To sum up, we hold that the post of the Registrar, Rent Controller's Office, Calcutta, when it is held by a person who does not belong to a cadre post is non-transferable. To put it in another way, where a person is appointed "permanently" as a Registrar by way of promotion from the post of the Deputy Registrar, it is an implied condition of the appointment that the incumbent will hold the post of the Registrar, Rent Controller's Office, Calcutta, and no there, and as such it is not a transferable post. We also hold that the post of the: certificate officer.

Mayurakshi Revenue Division, Birbhum, which the respondent was called upon to occupy after transfer, is not a post which has been validly created and in any event the appointment of the respondent to that post has not been validly effected. We hold however that on the materials placed before us. it has not been established that the impugned orders were made mala fide.

16. Before concluding, we must mention that we tried to settle the matter, but for some reason or other the appellant has insisted on the respondent occupying the post of a Certificate Officer outside Calcutta, to which the respondent is not agreeable. Accordingly, the matter could not be settled.

17. For the reasons given above, the appeal fails and should be dismissed, but there will be no order as to costs.

18. Upon the Government undertaking to pay to the respondent, Hirendra Nath Banerjee, the sum of Rupees one thousand, without prejudice to the rights and contentions of the parties, within six weeks from date, there will be a stay of operation of this order for six weeks from today.

Masud, J.

19. I agree.