
(1962) 02 AHC CK 0004
In the Allahabad High Court

Tufall Ahmad

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 22-02-1962

Acts Referred:

Constitution of India, 1950 — Article 311

Government of India Act, 1935 — Section 232, 233, 234, 235, 236

Citation : (1962) 1 LLJ 674

Hon'ble Judges : B.D. Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.D. Gupta, J.—This is a plaintiff's second appeal arising out of a suit for declaration that the order dismissing the plaintiff was illegal and invalid and that the plaintiff still continued to be in the service of the defendant, as also for recovery of arrears of his salary up to the date of suit. The defence was a denial of the plaintiff's assertion that the order of dismissal was illegal and invalid. The trial Court upheld the defence contention and dismissed the plaintiff's suit. On appeal by the plaintiff, the appellate Court agreed with the view taken by the trial Court and confirmed the decree of the trial Court. The plaintiff has now filed this second appeal on the ground that the view taken by the Courts below is incorrect.

2. In order to appreciate the controversy, the flowing facts may be set forward. At the relevant time the appellant was admittedly an employee holding the post of supervisor, stores, A grade. Sometime in November 1949, the plaintiff fell ill and was on medical leave on 9, 10 and 11 November 1949. On 12 November, which was a Saturday, the plaintiff attended to his duties, but did not attend to his duties on Monday, 14 November 1949. On 15 November 1949 also the plaintiff did not attend his duties; but an application was received seeking leave without salary from 14 November 1949 up to 30 November 1949. This application was accompanied by a medical certificate, dated 14 November 1949 from a registered medical practitioner. On 26 November 1949, the plaintiff was

informed that the medical certificate had not been believed and that the plaintiff had been treated as having been absent without permission, and that the plaintiff's services had, therefore, been terminated for long absence. This action was taken under Para 263(j) of the Regulations for the Army Ordinance Services (India), Part I, which ran as follows:

Employees absent for more than six consecutive working days or frequently absent for short periods, without leave will be discharged.

3. It is In respect of the aforesaid order of discharge that the plaintiff filed the present suit on the assertion that the said order constituted his dismissal without the plaintiff having been given any opportunity to show cause. In the plaint, the plaintiff founded his claim on the basis of Article 311(2) of the Constitution of India as also, in the alternative, on the ground that the order was in violation of Clause (6) of Army Instructions India-212 of 1949, which is exhibited as Ex. 20 on the record of this case. The plea under Article 311(2) of the Constitution of India was given up for the obvious reason that the Constitution had not come into force in November 1949 and the plaintiff founded his claim u/s 240 of the Government of India Act, 1935. There was no controversy that the plaintiff's services had been terminated without the plaintiff having been given any opportunity to show cause. The sole question for determination, therefore, was whether the appellant was entitled to the protection of Section 240 of the Government of India Act, 1935 and whether, in the alternative, the plaintiff's contention that his services had been terminated in violation of Clause (6) of Army Instructions India-212 of 1949, had any force.

4. At the hearing of this appeal, learned Counsel for the appellant sought to raise a third ground on the basis of depot procedure 33, but the said procedure not having been relied upon before the Courts below nor even in the grounds raised in the memo, of this second appeal, and there being nothing on the record of the case to show whether the said procedure 33 was applicable to the appellant, this argument could not be proceeded with.

5. Coming to the plea of the appellant founded on Army Instructions India-212 of 1949, Clause (6) thereof provided that no order of dismissal, removal or reduction shall be passed without giving the employee concerned an opportunity to show cause. Clause (1) thereof provided that the aforesaid Army Instructions would apply to all permanent and temporary civilian Government servants, both gazetted and non-gazetted, paid from the defence services establishment. It may at once be stated that there was no dispute that originally the plaintiff was an extra temporary employee, and that the benefit of the aforesaid clause was not available to an extra temporary employee. What, however, was urged on plaintiff's behalf was that he had ceased to be an extra temporary employee, and had become a temporary employee on the regular cadre with effect from 1 August 1949 by virtue of an order of the Government, dated 19 August 1949 constituting Ex. 18 on the record of this case. A perusal of that order shows that the Government had decided to abolish the designations "temporary

establishment," "extra temporary establishment," etc. The order further provided that, with effect from 1 August 1949 the establishment falling under Para 2(a) of the said order was to be brought on to the regular establishment and was entitled to all the benefits of that establishment in various matters including rules applicable to the regular, temporary, or permanent establishment. Paragraph 2(a) enumerated various categories and may be reproduced:

Non-industrial, e.g., clerical establishment, drawing establishment (draftsmen, etc), telephone operators, store-keepers, storemen, scientific and laboratory assistants, hospital establishment, etc.

6. What may be noted is that supervisor, stores, was not included in the categories mentioned In the aforesaid list. It may also be noted that the aforesaid order, dated 19 August 1949 (Ex. 18), also mentioned In Para. 5 thereof, that proposals for the classification of categories of employees not mentioned in Para. 2 (a) and (b), which latter related to industrial employees, included under the "temporary establishment," "extra temporary establishment," etc., should be submitted to Government for approval. It was further stated in the aforesaid paragraph that, meanwhile the order, dated 19 August 1949 may be implemented In the case of categories specifically mentioned in Para. 2 (a) and (b).

7. There Is no controversy that the appellant did not fall within category 2(6). The argument on behalf of the plaintiff was that he fell within the category of "store-keepers "specified in 2(a). The Courts below took the view that "supervisor, stores" could not be treated as "store-keeper" and that, therefore, the plaintiff was not entitled to claim that he belonged to the category of "store, keepers." The view taken by the Courts below receives strong support from the fact that, in a subsequent letter mentioning orders of the Government, dated 4 January 1950 (Ex. 19), the categories enumerated therein mention supervisors (technical and non-technical) as the very first category, whereas "store-keepers" are mentioned in that letter as a separate category. In the circumstances, the view taken by the Courts below, that the plaintiff being employed as supervisor, stores at that time could not claim to fall within the category of "storekeepers, "appears to be perfectly correct. Moreover there was nothing on the record to indicate that the nature of the duties to be performed by the supervisor, stores were identical with those to be performed by " store-keepers." The result is that the view taken by the Courts below on this poll appears to be perfectly correct.

8. It was next urged that the classification" contained in the letter Ex. 19, referring (sic) orders of the Government, dated 4 January 1950, in which supervisors were included, was directed to be enforced retrospectively as from 1 August 1949, and that, therefore, the plaintiff should have been deemed to have belonged, as from 1 August 1949, to that type of staff which was entitled to the protection contained in Para. 6 of Army Instructions India-212 of 1949. The argument appears obviously to have no force. The benefit of the retrospective provision could only be made available to those employees who were on the staff

in January 1950. The services of the plaintiff had already been terminated in November 1949, and if that termination was not in contravention of any rule at the time of termination, it could not be said that, even though the plaintiff had been removed from service validly with reference to the rules in existence at the time of his removal, he must be deemed to have been wrongly removed by virtue of an order passed after his removal in January 1950. In my opinion it is perfectly clear that the plaintiff having ceased to be an employee in November 1949, the benefit of the order of January 1950 could not be availed of by the plaintiff. The result, therefore, is that, in my opinion, the Courts below were perfectly right in their view that the termination of the plaintiff's services was not in violation of Clause (6) of Army Instructions India-212 of 1949, because the provision contained therein was not applicable to the plaintiff.

9. The next contention on behalf of the appellant was that the appellant held a "civil post" under the Crown in India and that, under Clause (3) of Section 240 of the Government of India Act, the appellant could not be dismissed without having been afforded an opportunity to show cause. The Courts below took the view that the plaintiff could not be held to have occupied a "civil post within the meaning of that expression in Clause (1) of Section 240 of the Government of India Act, 1935. It has been strenuously contended on behalf of the appellant that the view of the Courts below was wrong and that the correct view would be that the appellant held a "civil post."

10. Learned Counsel relied on the decision of a Full Bench in *M.A. Kidwai v. Improvement Trust* 1953 A.L.J. 160, particularly on the observation (In Col. 2 at p. 169 of the aforesaid report) to the effect that the question had primarily to be determined with regard to the functions performed by the person concerned. This argument is founded on an observation without reference to the context in which the observation was made. The question before the Full Bench was whether an employee of the Improvement Trust could be treated as having held a "civil post" under the State Government or to have belonged to the civil service of the Crown, or was merely an employee of a local authority. It was in this connexion that it was observed that:

The true test to determine whether a person held a civil post under the Crown as contemplated by Section 240 of the Government of India Act or was a member of a civil service of the Union or the State or held a civil post under the Union or the State had primarily to be determined in relation to the functions which he performed. If his duties relate to activities which fell directly within the sphere of the Union or the State and his services were under the direction and control, as also his appointment was by either the Union or the State, then he could fall under those services which were contemplated by either Section 240 of the Government of India Act or by Article 311 of the Constitution of India, but if the sphere of activity of the employee fell within the sphere of activity of a local authority constituted under some statute. . . then the position of that employee . . . fell outside the scope of either Section 240 of the Government of

India Act or Article 311 of the Constitution of India.

11. It is, therefore, perfectly clear that the argument founded on the aforesaid observation, in so far as the present case is concerned, is altogether without force.

12. The expression "civil post" as used in Section 240 of the Government of India Act, 1935, has been the subject-matter of interpretation

13. In Yusuf Ali Khan v. Province of Punjab AIR 1950 Lah. 59, the view expressed was that the expression "civil post" should be construed as referring to "an appointment or an office on the civil side of the administration as distinguished from the military side." In a case decided by a Bench of this Court in Mohammad Matteen Qidwai Vs. The Governor-General in Council, , Bhargava, J. observed (in Col. 2 at p. 21) that

the word "civil" used before the word "post" in Section 240 of the Government of India Act was clearly meant to distinguish posts in the defence forces,

and that posts belonging to the military department or the defence forces were to be excluded. In Dass Mal Vs. The Union of India (UOI), it was held that Section 240(3) of the Government of India Act did not apply to civil personnel attached to the defence forces.

14. In a case decided by a Bench of the Calcutta High Court in Ramesh Chandra Vs. State of West Bengal, , it was observed (at p. 192 of the report) that Article 311 of the Constitution of India embodied provisions similar to Sections 240 and 241 of the Government of India Act, 1935. The same view was expressed in Bhugiram Hazarika Vs. Supdt. of Police and Others, as also by a Bench of the Patiala and East Punjab States Union High Court in S. Mohan v. Patiala and East Punjab States Union AIR 1954 Pep 136 wherein the view expressed by Bhargava, J. in Mohammad Matteen Qidwai Vs. The Governor-General in Council, was relied upon, A reference to the observations of Bhargava, J. in Kidwai case (supra) was also made by Bose, J., in the case of Brojo Gopal v. Commissioner of Police 1956 I LLJ 257 wherein, with reference to the same expression used in Article 311 of the Constitution of India, the learned Judge held that the words "civil service" and "civil post" had been used in contradistinction to service in or post under the "defence forces" of the Government of India. There is ample authority for the proposition that the expression "civil post" used in Article 311 of the Constitution of India means an appointment or office on the civil side of the administration as distinguished from the military side, and that the said expression does not include civilian personnel of the defence department. Reference may be made to the following cases: Subodh Ranjan Ghosh Vs. Major N.A.O. Callaghan and Another, Tarasingh Ujagar Singh Vs. Union of India, Sher Singh v. State of Madhya Pradesh AIR 1955 Nag. 175, Atindra Nath v. G.F. Gillot 1956 I L.L.J. 17 and Chhandra Bhan Varma Vs. Union of India, .

15. result, therefore, is that it can be safely stated as settled that civilian

personnel of the defence department cannot claim to be holding a "civil post" and that the protection of Section 240 of the Government of India Act, 1935, or of Article 311 of the Constitution of India, is not available to such personnel. There is no controversy that the plaintiff belonged to the civil personnel of the defence department. He could not, therefore, invoke the protection of the provision contained in Section 240 of the Government of India Act, 1935. The view taken by the Courts below to that effect appears to be perfectly correct.

16. During the course of argument, it was also urged that Sections 232 to 239 of the Government of India Act, 1935, having stood repealed before the order terminating the plaintiff's services was passed, the meaning to be attached to the expression "civil post," as used in Section 240 of the Act, should be construed as having been modified by reason of the deletion of Sections 232 to 239 of the Government of India Act. This argument seems to be wholly misconceived. Section 240 of the Government of India Act, 1935, does not make any reference to any of Sections 232 to 239, nor was any amendment made in Section 240 of the Government of India Act, 1935, such as would justify the view that the meaning to be given to the expression "civil post" in Section 240 must be deemed to have been changed. There is, therefore, no force in this argument.

17. No other point has been urged.

18. The result is that there is no force in this appeal which is, therefore, dismissed with costs.