The Regional Manager and Another

Vs

Pawan Kumar Dubey

Civil Appeal No. 1844 of 1975

(CJI A.N. Ray, M.H. Beg, Jaswant Singh JJ)

08.03.1976

JUDGMENT

BEG, J. -

1. This appeal by special leave granted to the Regional Manager of U.P. State Road Transport Corporation, Allahabad, challenges the findings of a learned Single Judge, affirmed by a division Bench of the Allahabad High Court, holding that the respondent, Pawan Kumar Dubey, was reverted from the post of a Senior Station Incharge, in which he was officiating to his substantive post of a Junior Station Incharge by means of an order dated February 20, 1973 passed as a measure of punishment inflicted upon him for alleged misconduct indicated by an adverse entry communicated to him by a letter dated January 25, 1973. His juniors, it was found, were still officiating in posts of Senior Station Incharge. The respondent's of promotion were said to be adversely affected by the reason given for the reversion in the impugned orders that the respondent was "not fit yet" for the higher post.

2. The learned Single Judge and the Divisions Bench in the Allahabad High Court were referred to several decisions of this Court mentioned by the Division Bench. These were : State of Bombay v. F. A. Abraham; ((1962 Supp 2 SCR 92 : AIR 1962 SC 794 : (1963) 2 LLJ 422) Champaklal Chimanlal Shah v. Union of India; ((1964) 5 SCR 190 : AIR 1964 SC 1854 : (1964) 1 LLJ 752) Divisional Personnel Officer v. Raghavendrachar; ((1966) 3 scr 106 : AIR 1966 SC 1529 : (1967) 1 LLJ 401) and State of U. P. v. Sughar Singh. ((1974) 2 SCR 335 : (1974) 1 SCC 218 : 1974 SCC (L & S) 124

3. The Allahabad High Court had followed what it considered to be the ratio decidendi of Sughar Singh's case (supra), the last case of this Court available at the time. Special leave to appeal was sought in the case before us on the ground that Sughar Singh's case had been misunderstood by the High Court and required some elucidation by this Court. Special leave was assumed to be one of law only. The appeal was, therefore, to be heard on the special leave paper book with such additional documents from the record of the case as the parties any choose to file.

4. We find that, although a number of documents were filed, neither side has chosen to file a copy of the order impugned which has been interpreted by the Single Judge as well as by the Division Bench of the Allahabad High Court as ones amounting to award of a punishment not merely in the light of the circumstances preceding the order but also from the terms of the order itself and its effect upon the respondent's future. The question, therefore, arises whether we really have before us any point of law of such a nature as to justify interference in exercise of the exceptional power of this Court under Article 136 of the Constitution.

5. Even though we have come to the conclusion that the question before us is substantially one of fact, we would like to explain a little the law applicable to such cases in view of the submission that Sughar Singh's case had led to some misunderstanding of it. Not much clarifications seems necessary so far as conditions for the application of Article 311(2) are concerned as this question has been considered and decided by this Court in a number of cases including the recent decision by a Bench of seven Judges of this Court in Shamsher Singh v. State of Punjab ((1975) 1 SCR 814 : (1974) 2 SCC 831 : 1974 SCC (L & S) 550) it was pointed out in that case (at p. 837) : [SCC p. 851 : SCC (L & S) p. 570 para 63]

> No abstract proposition can be laid down that where the services of probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment on the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or, inefficiency, or, for similar reason, without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge, it may, in a given case, amount to removal from service within the meaning of Article 311(2) of the Constitution.

6. Shamsher Singh's case related to an order of termination of services of a probationer which, on the face of it, appeared to be innocuous. Nevertheless, this Court, after examining the facts and circumstances constituting the background of the order and its consequences, held it to be substantially one of punishment and set it aside for a violation of Article 311(2) of the Constitution. It was explained there (at p. 837) : [SCC p. 851 : (L & S) p. 570, para 64]

> Before a probationer is confirmed, the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other reason not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal or an inquiry. But, in those cases, the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an inquiry on charges of misconduct or inefficiency or corruption, and, if his services are terminated without following the provisions of Article 311(2), he can claim protection. In Gopi Kishore Prasad v. Union of India (AIR 1960 SC 689 : (1960) 1 LLJ 577) it was said that if the Government proceeded against the probationer in the direct way without casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way of punishment. Instead of taking he easy course, the Government chose the more difficult one of starting proceedings against him and branding him as a dishonest and incompetent officer.

It was also observed in Shamsher Singh's case (at p. 838) : [SCC pp. 851-852 : SCC (L & S) pp. 570-571, para 65]

> The fact of holding an inquiry is not always conclusive. What is decisive is whether

> the order is really by way of punishment. (See State of Orissa v. Ram Narayan Das.) ((1961) 1 SCR 606 : AIR 1961 SC 177 : (1961) 1 LLJ 552) If there is an enquiry, the facts and circumstances of the case will be looked into in order to find out whether the order is one of dismissal in substance (see Madan Gopal V. State of Punjab ((1963) 3 SCR 716 : AIR 1963 SC 531 : (1964) 1 LLJ 68)). In R. C. Lacy v. State of Bihar (C.A. No.590 of 1962 decided on October 23, 1963), it was held that an order of reversion passed following an enquiry into the conduct of the probationer in the circumstances of the case was in the nature of preliminary inquiry to enable the Government to decide whether disciplinary action should be taken. A probationer whose terms service provided that it could be terminated without any notice and without any cause being assigned could not claim the protection of Article 311(2). (See R. C. Banerjea v. Union of India ((1964) 2 SCR 135 : AIR 1963 SC 1552) A preliminary inquiry to satisfy that there was reason to dispense with the services of a temporary employee has been held not to attract Article 311 [see Champaklal C. Shah v. Union of India (supra)]. On the other hand, a statement in the order of termination that the temporary servant is undesirable has been held to import an element of punishment (see Jagdish Mitter v. Union of India (AIR 1964 SC 449 : (1964) 1 LLJ 418)).

7. We think that the principles involved in applying Article 311(2) having been sufficiency explained in Shamsher Singh's case it should no longer be possible to urge that Sughar Singh's case could give rise to some misapprehension of the law. Indeed, we do not think that the principles of law declared and applied so often have really changed. But, the application of the same law to the differing circumstances and facts of various cases which have come up to this Court could create the impression some times that there is some conflict between different decisions of this Court. Even where there appears to be some conflict, it would, we think, vanish when the ratio decidendi of each case is correctly understood. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

8. We have examined the record of the case of Sughar Singh. Our judgment in the case perhaps does not fully bring out the factual background on which the decision of that case was based. In that case, the government servant concerned had been suspected of making an alternation in his own service record. It was not shewn how he could possibly have had access to his service record as he was not in charge of the record. One of the alternations made meant an increase in his age so that he would, according to the altered state of the record, have had to retire earlier. Sughar Singh complained, when asked to show cause against the alleged tampering, that it must have been manipulated by his enemies interested in injuring him. It could not be determined who was responsible for the alternations. Nevertheless, the following adverse entry was made on Sughar Singh's record :

> 1966 - Is suspected to have got entries of date of birth and educational qualifications altered on the authority of a fictitious certificate which had to be corrected later on. Severely warned.

9. Two years later, as a result of this entry, based expressly on bare suspicion, without further inquiry into the question whether Sughar Sigh could be responsible for tampering with the record, a reversion order, innocuous on the face of it, had been made on August 12, 1968. The effect of the

reversion order was that Sughar Singh who, apart from this entry, had an excellent record, was reverted from a post in which he had been officiating from March 16, 1961, until the reversion order dated August 12, 1968. It was shewn that about 200 officers, junior to him, were still officiating in the cadre from which Sughar Singh had been reverted to his substantive post of Head Constable. No administrative need or exigency could be shewn to justify the reversion order. All officers, including Sughar Singh, who had been officiating, had been selected after special training for the higher cadre. The question naturally arose : Why was Sughar Singh selected for this discriminatory treatment ?

10. A Single Judge of the Allahabad High Court held, acting on the principle that a mere reversion, from a post to which the incumbent had no right, did not amount to punishment within the meaning of Article 311(2) so that Sughar Singh had no remedy. He only took the form of the action into account. No further probe was considered necessary by the learned Judge. When the case came before a Division Bench, in special appeal, one of the learned Judges agreed with the learned Single Judge who had dismissed Sughar Singh's petition merely on the ground that Sughar Singh had no right to the post without considering the impact of the surrounding facts or the background of the order. The other learned Judge, however, carefully examined the background of Sughar Singh and the reversion order as revealed by facts on record. He pointed out that the averments of Sughar Singh, that he had a splendid record, apart from the adverse entry in question, and that there was no inefficiency on his part, were not controverted in the counter-affidavit filed. This learned Judge found the reversion order against Sughar Sigh to be punitive. He, however, added that, even if the order could not be held to be punitive, it was certainly violative of the guarantee contained in Article 16(1) of the Constitution.

11. When the matter was heard by Verma, C.J. on a reference occasioned by the difference of opinion between the two learned Judges on the Division Bench, it was again argued that both Articles 16(1) and 311(2) had been infringed. The learned Chief Justice did not find sufficient material to uphold a violation of Article 16. But, after taking into account the admission of the Counsel appearing for the State that the sudden reversing of Sughar Singh could not at all be explained or accounted for unless it could be linked with the adverse entry, the learned Chief Justice held the action against Sughar Singh to be punitive and violative of Article 311(2), of the Constitution. Sughar Singh had been held to have been punished for nothing beyond what had taken place two years before the reversion order so that it could not have been justly or reasonably connected with the delayed action based upon it. This Court could have dismissed the appeal by special leave solely on the ground that no question of law arose on the finding of fact, also upheld by this Court, that Sughar Singh was punished, in substance, so that Article 311(2) was attracted.

12. This Court's judgment in Sughar Singh's case shows that it was only following the law on Article 311(2) of the Constitution as laid down repeatedly earlier by this Court. It specifically referred to the following cases : Parshottam Lal Dhingra v. Union of India ((1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544); State of Punjab v. Sukh Raj Bahadur ((1968) 3 SCR 234 : AIR 1968 SC 1089 : (1970) 1 LLJ 373); State of Orissa v. Ram Narayan Das (supra); R. C. Lacy v. State of Bihar (supra); Jagdish Mitter v. Union of India (supra); A. G. Benjamin v. Union of India ((1967) 1 LLJ 718); Ram Gopal Chaturvedi v. State of Madhya Pradesh ((1970) 1 SCR 472 : (1969) 2 SCC 240); Union of India v. Gajendra Singh ((1972) 3 SCR 660 : (1973) 3 SCC 797 : 1973 SCC (L & S) 269); Divisional Personnel Officer v. Raghavendrachar (supra); Union of India v. Joswan Ram (AIR 1958 SC 905); Madhav v. State of Mysore (AIR 1962 SC 8 : (1962) 1 SCR 886); State of Bombay v. Abraham (supra). In Sughar Singh's case, this Court summarised the propositions of law deducible from the cases mentioned above; and, while considering the applicability of some of the

propositions of law to the facts of the case, it did observe that, on the face of it, the action against Sughar Singh did not appear to be punitive. Nevertheless, on a total consideration of all the facts, including the admission in the High Court before Verma, C.J. by the Standing Counsel appearing on behalf of the State, that the reversion order could not be explained except as a result of the adverse entry made two years earlier, it had finally applied the ratio decidendi of the State of Bihar v. Shiva Bhiskhuk Mishra ((1971) 2 SCR 191 : (1970) 2 SCC 871), where this Court had affirmed the opinion of the High Court, on facts, that the reversion was not in the usual course or for administrative reasons but it was after the finding on an enquiry about some complaint against the plaintiff and by way of punishment to him.

On this view of the case, it was not really necessary for this Court to consider whether the reversion of Sughar Sigh was contrary to the provisions of Article 16 also. Nevertheless, this Court held there, alternatively, after referring to State of Mysore v. P. R. Kulkarni ((1973) 3 SCC 597 : 1973 SCC (L & S) 142), that the action taken against Sughar Singh also resulted in a violation of the provisions of Articles 14 and 16 of the Constitution. It seems to us to be clear, after examining the record of Sughar Singh's case, that what weighed with this Court was not only that there was a sufficient "element of punishment" in reverting Sughar Singh for a supposed wrong done, from which the order of reversion could not be divorced, so that Article 311(2) had to be complied with, but, there was also enough of an impropriety and unreasonableness in the action taken against Sughar Singh, solely for a very stale reason, which had become logically quite disconnected, to make out a case of "malice in law" even if it was not a case of "malice in fact". If an authority acts what are, justly and logically viewed, extraneous grounds, it would be such a case. All these aspects of the case were kept in view by this Court when it recorded the conclusion : [SCC p. 230 : SCC (L&S) p. para 20]

> In this view of matter, we have no doubt that the order was passed by way of punishment, though all outward indicia show the order to be a mere order of reversion. Even if it were not so, we have no doubt that the order would be liable to be quashed on the ground of contravention of Articles 14 and 16 of the Constitution.

13. We do not think that Sughar Singh's case, in any way, conflicts with what has been laid down by this Court previously on Article 311(2) of the Constitution or Article 16 of the Constitution. We would, however, like to emphasize that, before Article 16 is held to have been violated by some action there must be a clear demonstration of discrimination between one government servant and another, similarly placed, which cannot be reasonably explained except on an assumption or demonstration of "malice in law" or "malice in fact". As we have explained, acting on a legally extraneous or obviously misconceived ground of action would be case of "malice in law". Orders of reversion passed as a result of administrative exigencies, without any suggestion of malice in law or in fact, are unaffected by Sughar Singh's Case. They are not vitiated merely because some other government servants, juniors in the substantive rank, have not been reverted.

14. This Court has held in S. C. Anand v. Union of India, (AIR 1953 SC 250 : 1953 SCR 655), that no question of applying Article 14 or 16 could arise where a termination of service takes place in terms of a contract of service. Again, in Champaklal Chimanlal Shah (supra), this Court held that the motive behind an order of termination of service, in accordance with the terms of a contract, would not be really relevant even if an enquiry had been held to decide whether proceedings under Article 311(2) should be instituted or the services of a government servant terminated in terms of his contract. Champaklal Chimanlal Shah's case was not one in which any question of mala fides arose. Protection of Article 16 was claimed there on the ground that Rule 5, providing for termination of services of temporary servants, was itself hit by Article 16. Such a contention was repelled. On the

other hand, Kulkarni's case (supra), relied upon in Sughar Singh's case, was one in which "misuse of power" or "detournement de puvoir" (as it is called in Fresh administrative law), had been proved. Another term for such use of power for an improper object is "malice in law".

15. We repeat that, before any such case of "malice in law" can be accepted, the person who alleges it must satisfactorily establish it on proved or admitted facts as it was in Kulkarni's case. Where the allegations are of malice in fact, which are generally seriously disputed and the case cannot be satisfactorily decided without a detailed adduction of evidence or cross-examination of witnesses, courts will leave the party aggrieved to an ordinary civil suit. This rule, relating to exercise of discretionary powers under Article 226, is also well settled.

16. We have tried to gather, from such materials on the record of the case before us as have been made available to us by the parties, the "spirit and substance" to use the expression employed by this Court in Champaklal's case (supra), of the action taken against the contesting respondent. We have examined the background of the order of reversion. We find that, on the one hand, there is fulsome praise, in testimonials given to the respondent by his superior officers, for meritorious work done by him. On the other hand, we find that preceding the order of reversion, passed on February 20, 1973, against the respondent, there is a spurt of warnings and very vague complaints and adverse remarks of September 30, 1972, and October 4, 1972, October 21, 1972, and January 25, 1973, presumably all by a particular superior officer alleging disrespect shewn, disobedience to orders given, and aspersions said to have been cast by the respondent against the conduct of the superior officer. The respondent was warned by this superior officer, an Assistant General Manager, by a letter dated October 4, 1972. There is also a copy of an order on a complaint against the respondent that the respondent had misused the services of a chowkidar. The detailed order of June 2, 1970, show that, although, the complaint was dismissed by the General Manager, yet, he had admonished the respondent and had advised him to conduct himself more respectfully towards superior officers and to be "sweet tempered". There were some old adverse entries also against the respondent. But, they must be deemed to have been washed off by orders of his promotion, on an "ad hoc" or officiating basis, by an order of March 7, 1972, which had been approved by the Deputy Transport Commissioner of Utter Pradesh on March 18, 1972, as required by the rules. It appears that the respondent had asked for particulars to meet the vague allegations of insubordination and disobedience which had found their way into his service record for 1972-1973. It has not been shewn that the respondent was supplied with these particulars. He professed ignorance of occasions on which he had been disrespectful or of existence of any orders which had been disobeyed by him. These particulars could have been easily supplied to him if the allegations against him were justified. The respondent's representation against the last adverse entry, of the kind indicated above, made on January 25, 1973 was passed. His allegations that his juniors are still holding the posts in the cadre in which he was officiating and that there are no administrative reasons for his reversion are not controverted. In these respects, the facts of the case are similar to those of Sughar Singh's case. In addition, as the High Court points out, the express condemnation of the respondent as "not fit" for the higher post, in which his juniors were allowed to officiate, categories him as inferior to his juniors even if it was qualified by the addition of the word "yet". The only possible justifications which could be offered for this discriminatory treatment were the sudden adverse entries of 1972-73 against the respondent which were quite vague.

17. It there had been anything really serious against the respondent, proceedings under Article 311(2) of the Constitution should have been instituted. Indeed, they can still be taken if there are substantial grounds against the respondent. On the other hand, if the action against him is due merely to a feeling of pique or anger with him on the part of his superior offices, to which the

respondent's tactlessness may have contributed, it did not deserve anything more than the warnings and the adverse entry. Indeed, even the bona fides of the last adverse entry becomes doubtful when we find that the respondent was not, despite his requests, given particulars of any facts upon which the conclusion that he was disrespectful or disobedient was based. To allege such misconduct against him and then to stigmatise the respondent as "not fit" for working in the higher post could appear, on the facts and circumstances of the particular case, to be more vindictive than just and fair. It may mar or delay his chances of promotion in future. We, however, refrain from commenting further on what may or may not have been the real cause of the respondent's reversion. If the respondent is really unfit or inefficient, as compared with his juniors, there is no reason why, on a comparative assessment of merits, at a time when such assessment may be called for under the rules (there should be rules on the subject if there are none so far), his juniors in service should not be preferred over him. A decision given after fair comparisons with records of others officiating in the same cadre would have ensured that no violation of Article 16 took place. The sudden reversion of the petitioner, for the reason given in reversion order, could be held to amount to an unjustified stigma which could not be said to be "devoid of an element of punishment."

18. As we have indicated, there is no magic formula or uniform set of facts which could convert even an apparently colourless or innocuous order into punitive or unjustifiably discriminatory action. It is, however, well established that even an apparently inoffensive order may fail to pass test imposed by Articles 16 and 311 of the Constitution. Dealings of superior officers with their subordinates in government service in a welfare State must be shewn be based on fairplay and reason when facts are actually proved which indicate that these requirements may be lacking.

19. Even if the case before us could be one in which the High Court could have refrained from interfering, we do not consider it to be a fit case for invoking our jurisdiction under Article 136 of the Constitution. The High Court has only quashed an order of reversion which was detrimental to the respondent and was passed in violation of rules of natural justice. It did not give the respondent any other or consequential justice. It did not give the respondent any other or consequential relief. And, as we have already indicated, it is still open for the authorities to proceed in a just and legal way against the respondent if there is really a substantial case against him deserving punitive action.

20. As we are leaving the authorities free to take action, in accordance with either application rules for a comparative assessment of merits of the respondent and others who may be eligible to officiate in the post of a Senior Station Incharge, or, to take disciplinary proceedings, if considered necessary, no observation made by us in this judgment or by the High Court will operate as a finding on any question except that the quashed reversion order was punitive and passed contrary to rules of natural justice embodies in Article 311(2). It is not necessary to invoke the laid of Article 16 of the Constitution at all on such a finding. This, we think, was also the position in Sughar Singh's case.

21. This appeal is dismissed with costs.

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