

# CALCUTTA HIGH COURT

D.G. of Health Services

Vs

Bikash Chatterjee

(A Ray and S Mukherjea, JJ.)

11.11.1968

## JUDGMENT

**A Ray, J.**

1. These two appeals were heard one after another.
2. These two appeals are from the judgment and order of Mitra, J. dated 2 August, 1966.
3. In appeal No. 28 of 1968 the appellant is Bikash Chatterjee and in appeal No. 37 of 1967 the appellants are Director General of Health Services, Director, Central Drugs Laboratory and the Union of India. The Council of Scientific and Industrial Research is the respondent in both the appeals. For the sake of brevity the appellants in appeal No. 37 of 1967 will be referred to as the Drugs Laboratory and the respondent Council of Scientific and Industrial Research will be referred to as the Council, and the appellant in appeal No. 28 of 1968 will be referred to as Chatterjee.
4. Chatterjee filed an application under Article 226 of the Constitution for a writ in the nature of Certiorari calling upon the respondents to show cause as to why the orders dated 18 July, 1963, 30 July, 1963, 3 August, 1963 and 9 August, 1963 should not be quashed and why a writ of Mandamus should not go to cancel the said orders and why the Drugs Laboratory would not cancel the orders dated 30 July, 1963 and 9 August, 1963 directing Chatterjee to join the post of animal care-taker and why the Drugs Laboratory would not offer to Chatterjee the upper division post to which he was entitled in law, namely the post of Animal Technician or upper division clerk in the Central Drugs Laboratory.
5. The case of Chatterjee in short is as follows. In April, 1937 he was appointed as Laboratory Attendant at Biochemical Laboratory under the Ministry of Health at a salary of Rs. 20/- per month. The laboratory thereafter came to be known as the Central Drugs Laboratory. In 1943 Chatterjee was given a permanent appointment at the said Drugs Laboratory as animal care-taker. Between 1946 and 1951 Chatterjee officiated in the "higher post" of store clerk at the Drugs Laboratory. Sometime in 1951 Chatterjee applied for the post of Senior Laboratory Assistant, Central Drugs Research Institute, Lucknow under the Council. From 1952 Chatterjee worked at the Central Drugs Research Institute at Lucknow. In 1960 Chatterjee applied for the post of

Junior Technical Assistant at the Central Drugs Research Institute which was under the Council. Chatterjee was selected to the post. Sometime in the month of March, 1961 Chatterjee made an application for permanent transfer of his service and/or for permanent absorption in the service of the Council. In paragraphs 10 to 21 Chatterjee alleges that he was completely absorbed in the service of the Council and he was treated in every respect in permanent employment of the Council. In the month of July, 1963 Chatterjee received a letter dated 18 July 1963 from the Administrative Officer, Indian Institute for Bio-chemistry informing Chatterjee that it had been decided by the Council that Chatterjee should revert to the Drug Laboratory with effect from 22 July, 1963. On August 3, 1963 the Council informed Chatterjee that Chatterjee stood reverted to the Drugs Laboratory.

6. Chatterjee impeaches 18 July, 1963 and 3 August, 1963 orders of the Council as being in excess of the jurisdiction of the Council.

7. On 30 July, 1963 the Director of Drugs Laboratory informed Chatterjee that Chatterjee should report as animal care-taker in Drugs Laboratory on 24 August, 1963. On 9 August, 1963 the Drugs Controller made an order that Chatterjee should report for duties from August 24, 1963. Chatterjee impeaches the two orders dated 30 July, 1963 and 9 August, 1963 of the Drugs Laboratory as illegal and in violation of Article 311 of the Constitution. The further case of Chatterjee is that the orders directing Chatterjee to join the post of animal care-taker would result in loss or forfeiture of higher emoluments which Chatterjee was receiving prior to the said orders. It is also alleged that as a result of the orders Chatterjee would lose seniority and it would result in the demotion of junior technical assistant which post he had held to the lower status of animal care-taker.

8. In paragraph 40 of the petition Chatterjee relied on Rules 755 and 752 of the Civil Service Regulation and in paragraph 41 of the petition Chatterjee alleged that the orders of the Drugs Laboratory were bad for violation of Article 311 of the Constitution and violation of Rules 752 and 755 of the Civil Service Regulation. The orders dated 18 July, 1963 and 3 August, 1963 of the Council were impeached as bad on the ground that Chatterjee had been permanently absorbed and it was not open to the Council to revert Chatterjee to the former service in the Drugs Laboratory.

9. The learned Judge was pleased to hold that the Council was not a public body and further that the employees of the Council were not civil servants under the Government so as to be entitled to invoke Article 311 of the Constitution, This portion of the Judgment and order is the subject matter of appeal No. 28 of 1968 preferred by Chatterjee against the Council.

10. The subject-matter of appeal No. 37 of 1967 is the other portion of the judgment and order which held that the Drugs Laboratory are public servants and there is violation of Fundamental R. 113 to the effect that Chatterjee under Fundamental Rule 113 should get the benefit of the cadre to which he belonged even though he held the post in that cadre in an officiating capacity. The order of the Drugs Laboratory by which Chatterjee was asked to join the post of animal care-taker was held by the learned Judge to be in violation of Fundamental Rule 113. The learned Judge concluded by holding that Chatterjee must get a post corresponding to the post he held before his reversion. It may be stated here that before Chatterjee went to what is described as foreign service under the Council, he was a store clerk in the Drugs Laboratory. The judgment

was delivered on 2 August, 1906. The order was also drawn up. The order as drawn up was that a writ of Mandamus was directed against the respondents commanding them to cancel the orders dated 18 July 1903, 30 July 1903 and 9 August 1903. Thereafter on 28 November 1967 on the application of the Council pursuant to the notice of motion dated 30 August, 1967 the order dated 2 August, 1956 was corrected as indicated in red ink as will appear at pages 5 and G of the paper book in appeal No. 28 of 1908. The result of the order was that the name of the Council was deleted and the word 'other' was inserted before the word respondents commanding them to cancel the orders and the order dated 18 July, 1963 passed by the Council was also deleted from the order passed by the learned Judge.

11. I shall first deal with appeal No. 28 of 1968 preferred by Chatterjee. There are four principal questions in that appeal. First, whether writ will go against the Council. Secondly, whether Article 311 of the Constitution will apply against the Council. Thirdly, whether the Council is bound by Fundamental Rules. Fourthly, whether Chatterjee was absorbed in the permanent service of the Council.

12. Counsel for Chatterjee to avoid repetition of the arguments which were advanced in the trial Court relied on some decisions in support of the contention that writ of Mandamus will go against the Council. Reliance was placed on the decision in the case of Bijoy Ranjan v. B. C. Das Gupta, . In that case it was held that the State Medical Council was a public body. In the present case Counsel for Chatterjee contended that the affidavit of Malhotra at pages 99 to 100 in the paper book of appeal No. 37 of 1967 and the affidavit of Bikash Chatterjee at page 33 in the paper book of appeal No. 28 of 1968 would indicate that the Council is a public body. In paragraph 4 of Malhotra's affidavit it is stated that the Council is a Society registered under the Societies Registration Act and it is an independent and autonomous body. The Council is said to function under the Ministry of Education, Government of India but the Council is not directly under the control of the Government. In paragraph 14 of the affidavit of Bikash Chatterjee at page 39 of the Paper book in appeal No. 28 of 1968 it is alleged that a sum of Rs. GO crores is sanctioned by the Parliament for the Council and Chatterjee says that the Council is a public body. The affidavit evidence makes it clear beyond any measure of doubt that the Council is a society under the Societies Registration Act and is not a part of the Government. The affidavit evidence does not establish that the Council is a public body. In my opinion neither grants in aid of the activities of the Council nor the touch with the Government will make the Council a public body or a part of the Government.

13. It is well settled that a writ does not go against an authority unless it is a public body or the Government. The Council in the present case is a registered society and is not a public body, nor is it a Government authority.

14. If the Council is not a Government body Article 311 of the Constitution does not apply. As far as the Council is concerned, a question arose as to whether the Council would be bound by the fundamental Rules. There are decisions that if Fundamental Rules are adopted by choice such adoption of Fundamental rules will not make such a body amenable to jurisdiction under Article 226 of the Constitution. See (State Medical Faculty Case); GO Cal WN 1023 (Damodar Valley Case) and AIR 1956 Cal 56 (Port Commissioners' Case). In the present case no writ can go against the Council because first, there is no question of infraction of any Fundamental Rule by the Council, and secondly, adoption of Fundamental rules by choice does not make the rules

statutory in character and content.

15. A question arose as to whether Chatterjee was permanently absorbed in the Council. There is nothing in the judgment to indicate that this contention was raised before the trial Court. Counsel for Chatterjee contended that there were allegations in paragraphs 20 and 21 of the petition that Chatterjee was permanently absorbed in the council. The case of the Council, on the other hand, as will appear in the affidavit-in-opposition in paragraph 7 at page 100 of the paper book in appeal No. 37 of 1967 is that there was no sanction for permanent absorption of Chatterjee. In any event, this is a disputed question of fact. It was not raised in the trial Court. In view of the conclusion that writ cannot go against the Council the conclusion of the learned Judge about dismissal of the application against the Council is correct and that portion of the judgment is upheld.

16. The question in the other appeal No. 37 of 1967 is whether Chatterjee is entitled to any relief against the Drug Laboratory respondents. The case of Chatterjee in the petition was that there was violation of Articles 755 and 752 of the Civil Service Regulation. The orders of the Drug Laboratory dated 30 July, 1963 and 9 August, 1963 were impeached in the petition as punishment or penalty amounting to violation of the provisions contained in Article 311 of the Constitution and the further contention was that it was incumbent on the Drug Laboratory to allow Chatterjee to join the post of Animal Technician and/or upper division clerk in the Drugs Laboratory under the provisions of Rules 752 and 755. That case was not pursued at the trial. At the trial reliance was placed on the affidavit-in-opposition of the Drug Laboratory affirmed by Dr. Dharmabrota Ghosh at page 67 of the paper book in appeal No. 37 of 1967 wherein paragraph 21 it was stated that Chatterjee was governed by fundamental Rule 113. The learned Judge came to the conclusion that fundamental Rule 113 meant that Chatterjee should get benefit of the cadre to which he belonged even in an officiating capacity. The learned Judge was pleased to hold that the order of the Drugs Laboratory reverting Chatterjee to the post of animal caretaker was in violation of fundamental Rule 113 and Chatterjee must get a post corresponding to the post which he held before his reversion.

17. Counsel on behalf of Chatterjee contended that if there was breach of Fundamental Rule it was justiciable and it was contended first, that Fundamental Rule 113 enjoined that Chatterjee must get a post he last held and secondly, it was contended that the reversion deprived Chatterjee from being considered for promotion.

18. In order to appreciate the contentions on behalf of Chatterjee it is necessary to notice certain facts. First, that Chatterjee was employed as animal caretaker. That was the substantive post he held. Secondly, when Chatterjee went to what is described as foreign service of the Council Chatterjee had a lien on his substantive post of animal caretaker. Thirdly, Chatterjee acted in an officiating capacity as a lower division clerk in the Drugs Laboratory when he went to the service of the Council. Fourthly, the qualification of Chatterjee was that he had not even passed matriculation Examination,

19. It is also important to notice that the the Drugs Laboratory at pages 79 to 93 of the paper book in appeal No. 37 of 1967 has given the list of posts, the scale of pay, how posts are filled in and how promotion is effected. It will appear that some posts are filled in both by direct recruitment and by selection in proportions and there are cases where the posts are filled in entirely by

selection. It is only in the case of upper division clerks that 50 per cent is recruited by direct recruitment and 50 per cent is filled in by promotion on the principle of what is described as 'seniority-cum-fitness'. With regard to promotion it will appear that age and educational qualification prescribed for direct recruitment will not apply in the case of permanent employees eligible for promotion to upper division clerk. It will appear from the schedule that promotion or transfer in the case of upper division clerk from lower division clerks is to be made with the minimum period of three years experience. In the case of lower division clerk 100 per cent is to be appointed by direct recruitment and the qualifications are Matriculation. In the case of upper division clerk the educational and other qualifications are; a degree of a recognised university. According to the schedule aforesaid Chatterjee was not qualified for direct recruitment as a lower division clerk nor was he eligible for direct recruitment or promotion to the post of upper division clerk.

20. The recent decisions of the Supreme Court in *Madhav Laxman Vaikunthe v. State of Mysore*, *State of Bombay v. F. A. Abraham*, and *the Divisional Personnel Officer, Southern Railway, Mysore v. S. Raghavendrachar*, have dealt with cases of reduction. It will appear from these decisions that it is first to be found out as to whether a servant had a right to a post and secondly, whether he has been visited with evil consequences. In Abraham's case, the person who was officiating and was reverted to the original post could not succeed on the plea of reversion. The Supreme Court held that a person would be asked to officiate either because an incumbent was away or for some other cause but there would be no right to contend that when a person who was officiating was asked to go back to his substantive post, there would be a reduction or there would be any penalty. In Vaikunthe's case, . It was held that if there was any penalty by way of forfeiture of pay or loss of seniority one could complain. In Raghvendrachar's case it was said that the respondent's rank in the substantive post, i. e. in the lower grade, was in no way affected. It may also be stated that he was visited with no penal consequences. It follows that if the respondent was officiating in a post the respondent had no right to that officiating post to which he was provisionally promoted and there can be no doubt that his reversion from the officiating post to the substantive post does not amount to a reduction in rank. These decisions are authorities for two propositions; first that a person who held a substantive post and officiated in a post could not complain of reduction or penalty when he would be asked to go back to his substantive post and secondly, a person would have no right to hold a post in which he would be asked to officiate. It would, therefore, appear that the orders of the Drugs Laboratory by asking Chatterjee to occupy the 'substantive post which he held would not mean a reduction.

21. Counsel for the respondent contended that on a consideration of Fundamental Rule 113 Chatterjee had a right to hold the officiating post. Fundamental Rule 113 is as follows:

"F. R. 113 (i) A Government servant if transferred to foreign service shall remain in the cadre or cadres in which he was included in a substantive or officiating capacity immediately before his transfer and may be given subject to the conditions prescribed under the second proviso to F. R. 30 (1) such substantive or officiating promotion in those cadres as the authority competent to order promotion may decide. (In giving promotion, such authority shall also take into account the nature of the work performed in foreign service) These amendments will not be applicable to the former Secretary of States Services Officers governed by Fundamental Rules for whom the following words should be substituted namely:--

In giving promotion, such authority shall take into account-

- (a) the nature of the work performed in foreign service; and
  - (b) the promotion given to juniors in the cadre in which the question of promotion (has) arisen.
- (ii) Nothing in this rule shall prevent a member of a Subordinate Service from receiving such other promotion in Government Service as the authority who would have been competent to grant the promotion had he remained in Government service may decide."

22. Counsel for Chatterjee contended that cadre meant post and secondly that Chatterjee held the officiating post before he went to the foreign service and thirdly, that on a construction of Fundamental Rule 113 the authorities reduced Chatterjee from that officiating post to his substantive post and it amounted to reduction. Reliance was placed on the decision in the case of The State of Mysore v. M.H. Bellary, in support of the proposition that breach of statutory rule framed under Article 309 of the Constitution is justiciable. That is not disputed. The construction that counsel for Chatterjee put upon Fundamental Rule 113 is that the cadre means post and that Fundamental R. 113 means that Chatterjee should go back to his post which he last held. The word 'cadre' is defined in Fundamental Rules 9 and 4 to mean the strength of an establishment or service sanctioned as a separate unit. I am unable to accept the construction that cadre means a post. The Supreme Court in the case of Nohiria Ram v. Union of India, discussed Fundamental Rule 113 along with certain other Fundamental Rules. In Nohiria Ram's case, the appellant held a permanent appointment as a civilian in the office of the Royal Air Force. The appellant applied for the post of a clerk in the office of the Director General, Indian Medical Services. The appellant joined the said post in the office of the Director General. An additional post was created in the office of the Director General to deal with the work of Indian Research Fund Association. The appellant was confirmed in that additional post. Subsequently the appellant wanted to revert to the office of the Director General. It was held that the post of clerk of the Research Fund was outside the cadre of the regular establishment of the Director General of Indian Medical Services and that the appellant therefore did not belong to a cadre immediately before his transfer. The decision of the Supreme Court is important for two reasons. First, that cadre does not mean post but it means the strength of the establishment and secondly, without a lien on a permanent post the transfer of a Government servant to foreign service is not admissible. In the present case it will appear, as the fact is that the lien was on the substantive appointment to the post of animal caretaker. Chatterjee in fact, under Fundamental Rule 113 was included in the cadre in which he was included in a substantive capacity immediately before his transfer. Fundamental Rule 113 does not say that a person on ceasing to be in the employment of foreign service and intending to return to what may be described as the parent service shall go back to the post he last held in an officiating capacity.

23. Fundamental Rule 113 in the first limb deals with the position of Government servant before his transfer to foreign service. This Rule does not state that a Government servant on return from the foreign service will not go back to the substantive post on which he held a lien during the time he was in foreign service. This Rule states that a Government servant shall remain in the Cadre or cadres in which he was included in a substantive or officiating capacity before his transfer. He remained in the cadre of the Drugs Laboratory in which he was included in a substantive capacity of animal caretaker. Therefore there is no violation of Fundamental Rule 113 when Chatterjee goes back to the substantive post in which he held a lien during his foreign service.

24. Counsel for Chatterjee contended that by giving the post of animal caretaker Chatterjee's case was not considered for promotion under Fundamental Rule 113. The second limb of Fundamental Rule 113 does not lay down that a person must be promoted. It must be stated that Mr. Ghosh counsel for Chatterjee did not contend that there was any compulsive element in promotion, but that Chatterjee's case was one to be considered. There are various reasons why this case could not be and should not be accepted. The first and foremost ground is that there is no allegation in the petition with regard to this aspect of the case. Secondly, this case was not made in the trial Court. The Importance of pleadings and the importance of reason in the decision of the trial Court are too obvious to be stressed. The other side is deprived of an opportunity of meeting that case. The appellate Court is deprived of the benefit of the judgment and the views of the trial Court. Counsel for Chatterjee relied on the decision of the Supreme Court in the case of Firm Srinivas Ram Kumar v. Mahabir Prasad, in Support of the contention that by reference to Fundamental Rule 113 Chatterjee was entitled to make this case. In Srinivas's case, the plaintiff sued for a certain amount and the defendant admitted the claim to enable the Court to pass an appropriate decree. That has no relevance to the facts and circumstances of the present case. Counsel for Chatterjee also relied on the decision in the case of where a question of seniority arose on the ground that there was a rule that the person who was next below would be considered. That again depends on the relevant rule as well as facts. It was contended that in the present case Chatterjee had chances and possibilities of promotion. I have already indicated that the chances of promotion to any post do not appear from the list of posts and the manner in which the posts are filled in. The fact is that Chatterjee was permanently employed in a substantive capacity as animal caretaker in the Central Drugs Laboratory. It was contended by Counsel for Chatterjee that those who were junior to Chatterjee became senior and Chatterjee lost chances of promotion. The post of animal care taker is an isolated post. The qualification for appointment and the principles of recruitment to which I have already made reference do not indicate that Chatterjee was entitled to any of the posts by recruitment or promotion. Further I am unable to allow the case with regard to promotion unless the Central Drugs Laboratory had been given an opportunity of meeting it. The Drugs Laboratory might have said whether Chatterjee's case was considered for promotion or not. It is possible that his case was considered or that his case may be considered in the future. As far as Fundamental Rule 113 is concerned I am of opinion that there is no violation of Fundamental Rule 113. The orders complained of in the present case do not amount to any reduction in rank and do not entail any evil or penal consequences.

25. The judgment and order of the learned Judge with regard to violation of Fundamental Rule 113 is set aside. The Rule which was made absolute against the respondents Nos. 2 and 4 is discharged. The order for costs which Chatterjee was granted against respondents Nos. 1, 2 and 4 is set aside. For these reasons I am of opinion that the Rule must be discharged against the Drugs Laboratory namely, the respondents Nos. 1, 2 and 4. The discharge of the Rule as against the Council the respondent No. 3 is upheld. As regards costs of the appeal each party will pay and bear its own costs in the appeal. With regard to the costs of the trial Court each party will pay and bear its own costs including reserved costs, if any.

26. Appeal No. 37 of 1967 is allowed in part. Appeal No. 28 of 1968 is dismissed.

**S.K. Mukherjea, J.**

27. I agree.