BOMBAY HIGH COURT

G.P. Oak

Vs.

State of Bombay

Special Civil Appln. No. 2116 of 1956

(Shah and Gokhale, JJ.)

11.02.1957

JUDGMENT

Shah, J.

1. The petitioner was an officiating clerk in a temporary vacancy in the office of the Divisional Forest Utilization, Poona. Later on the post was made permanent and the petitioner was confirmed; but shortly afterwards the Divisional Forest Officer passed an order that the orders of confirmation should not be given effect to and the petitioner was informed that his services were no longer required. On appeal to the Government of Bombay the petitioner was informed by the Conservator that the order terminating his services was cancelled and that he was reinstated. Simultaneously, another letter was addressed suspending the petitioner pending departmental enquiry on the ground that he had been found indulging in objectionable activities, which conduct was in contravention of R. 30 of the Bombay Civil Services Conduct, Discipline and Appeal Rules. The annexure to the charge sheet set out nine items all of which were answered by the petitioner. Later on, the Conservator informed the petitioner that all the charges against him were proved and called upon him to show cause against the proposed dismissal. Ultimately the petitioner was dismissed. On appeal the Government did not consider it necessary to revise the order passed by the Conservator. Thereafter the petitioner filed an application under Article 226 of the Constitution for a writ of Certiorari or any other appropriate writ, order or direction. This application had been filed more than seven months after the date on which the dismissal order was confirmed by the Government of Bombay. As however a Rule had been issued by the High Court and the High Court had heard the counsel for the parties on merits their Lordships did not think it proper to dispose of the application merely on the ground of delay.

Shah, J.

(After stating the facts His Lordship proceeded).

2. It was also urged by Mr. Bhabha that the petitioner as a temporary employee of the State cannot challenge the order of dismissal on the plea that it violated the constitutional protection granted to civil servants under Article 311 of the Constitution, it being open to the State Government or to an officer competent in that behalf to dismiss the petitioner from service having regard to the precarious nature of the tenure of his employment. According to Mr. Bhabha, Article 311 of the Constitution confers a protection only upon civil servants who are permanently employed in certain posts and a temporary servant cannot claim protection of Article 311 against dismissal or discharge from service. We are not impressed by that argument. Article 310 of the Constitution provides that every member of a civil service of the Union or of an all-India service or who holds any civil post under the Union holds office during the pleasure of the President and every person who is a member of a civil service of a State or who holds any civil post under a State holds office during the pleasure of the Governor of the State. By clause (2) of Article 311 it is provided that no person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. Articles 310 and 311 do not appear to make a distinction between civil servants who are permanently employed and those who are temporarily employed. The expression "no person" in clause (1) of Article 311, in our judgment, includes all civil servants, whether they have been appointed temporarily as members of a civil service or as permanent employees : and there is nothing implicit in the context of Article 311 or in its content which supports the plea that protection is conferred only upon persons who have been permanently appointed to a post in the civil service of the Union or of the State.

2. In the view we are taking we are supported by the observations made in a judgment of this Court, *Shrinivas Ganesh Chandorkar v. Union of India*[3], In that case the plaintiff, who was a temporary employee of the Military Accounts Department, was discharged from service on the ground that he was declared medically unfit for further service. The plaintiff then filed a suit challenging the order and he invoked the provisions of Section 240 (3) of the Government of India Act, 1935, and contended that he was dismissed from service without any reasonable opportunity being given to him to show cause against the charge that he was permanently incapacitated. It was held by this Court that the order was not an order of dismissal or removal from service and, therefore, the plaintiff could not contend that he was entitled to the rights given to an employee under Section 240 (3) of the Government of India Act. It was observed in that case that "it is only in cases falling within Article 311 or Section 240 (3) that the Government as an employer is bound to conform to certain rules of natural justice indicated in that article and that section. But if the case does not fall either within the ambit of Article 311 or Section 240 (3), then the relationship of master and servant is governed by the rules if there are any which would constitute the contract of employment, or it would be governed by the Common law if the rules do not provide for the employment of the particular person." At p. 676 (of Bom LR) : (at p. 58 of

AIR) of the report, the learned Chief Justice, in dealing with the contention that a temporary employee of the Government was entitled to the benefit of the guarantee under Section 240 (3) of the Government of India Act, observed :

> "Therefore, in order to succeed, Mr. Vakharia must satisfy us that the Union of India, which is the employer in this case, acted in such a manner that its action came within the ambit of section 240 (3) of the Government of India Act. In other words, its action was tantamount to dismissing or removing the plaintiff from service. If Mr. Vakharia satisfies us on that count, then undoubtedly if reasonable

[3]58 Bom LR 673 : (AIR 1956 Bom 455)

> opportunity has not been afforded to the plaintiff, the plaintiff would be entitled to succeed."

It is evident from these observations that the Court took the view that even in respect of temporary employee if an order of dismissal or removal from service is passed, the employee is entitled to claim the benefit of Article 311 of the Constitution: and if no reasonable opportunity is afforded to him to show cause against the proposed action, the dismissal or removal from service will be regarded as ineffective.

3. Mr. Bhabha on behalf of the State contended that the observations made by the Court in Shrinivas Ganesh's case are mere dicta and are not binding upon this Court. Mr. Bhabha invited our attention to certain unreported judgments delivered by Mr. Justice Tendolkar in which it was opined that the observations set out by us are mere dicta and that the true rule applicable to temporary employees of a Government department is that they are liable to be dismissed or discharged from service without being afforded an opportunity of showing cause against the action proposed to be taken against them. Now the order passed against the plaintiff in Shrinivas Ganesh's case was one of discharge from service: it was not in terms an order of dismissal or removal from service, nor was it an order terminating the employment of the plaintiff. The Court on the interpretation of the order held that the order was one merely terminating employment and did not fail within section 240 (3) of the Government of India Act, 1935. If the order was one of dismissal or removal from service, the provisions of Article 311 of the Constitution and section 240 (3) of the Government of India Act were, it was observed, attracted and the plaintiff was entitled to the benefit of an enquiry and of being afforded an opportunity of showing cause against the action proposed to be taken against him. Even assuming that these observations were not strictly necessary for the decision, we may respectfully state that these observations correctly state the true rule applicable to termination of employment of temporary employees. Articles 310 and 311 of the Constitution do not make any distinction between members of a civil service who are permanently employed in certain posts and those who are temporarily employed. When an employee of the State or the Union is dismissed or removed from service or reduced in rank, the order necessarily involves some stigma and the Constitution has provided that before that stigma attaches to the employee he must be given a reasonable opportunity of showing cause against the

action proposed to be taken in regard to him. The plea that a temporary employee may not be given that opportunity of showing cause and a permanent employee alone may be given that opportunity is not sought to be sustained on any rational principle. A temporary civil servant has also some expectation of being continued in his employment and so long as his employment continues he must in our judgment, have the same rights and privileges as the civil servants holding permanent, posts have. It is always open to the State Government or the Union Government to terminate the employment of a civil servant and a *bona fide* termination of employment does not attract the operation of Article 311 of the Constitution. It is only when an order of dismissal, removal or reduction in rank is passed that the civil servant can claim an opportunity of showing cause.

4. In *Shyammlal v. State of Uttar Pradesh*[4], their Lordships of the Supreme Court dealt with the question whether compulsory retirement of an employee holding a permanent

[4] AIR 1954 SC 369

post amounted to dismissal or removal from service. Their Lordships observed that "under the Constitution removal and dismissal stand on the same footing except as to future employment. In this sense removal is but a species of dismissal. Removal, like dismissal, no doubt brings about a termination of service but every termination of service does not amount to dismissal or removal. Article 311 does not apply to all cases of termination of service." It is true that in Shyamlal's case the civil servant concerned was a permanent employee but it was held that compulsory retirement of that civil servant was not removal or dismissal from service and he was, therefore, not entitled to be afforded an opportunity under Article 311 (2) of showing cause against the action proposed to be taken against him. Article 311 has undoubtedly a limited operation : its protection avails an employee against an order of dismissal, removal or reduction in rank, but, in our judgment, within the ambit of its operation the Article applies to all employees whether they are permanently employed or temporarily employed.

5. Mr. Bhabha relied upon a judgment of the Supreme Court in *Satish Chandra v. Union of India*[5], in support of the contention that only permanent employees are entitled to the benefit of Article 311 of the Constitution. In that case a civil servant, who had been engaged under a special contract for a certain term, was, on the expiry of the term, re-appointed by another contract on a temporary basis. In accordance with the Government rules, which formed part of the contract, he was discharged from service after notice. The employee then filed a petition under Article 32 (1) of the Constitution seeking redress for infringement of his fundamental rights under Articles 14 and 16 (1) of the Constitution. It was held by their Lordships of the Supreme Court that Article 311 had no application because there was neither a dismissal nor a removal from service, nor a reduction in rank. That case appears to have no direct application to the facts of the present case, but the ratio of the judgment destroys the contention which Mr. Bhabha raises. If Article 311 had no application to temporary employees, their Lordships' judgment could have been founded simply on the view that to temporary employees Article 311 did not afford any protection. It was unnecessary to go further and to hold that the order was not one of dismissal or removal from

service, and, therefore. Article 311 had no application. Implicit in the observation appears the view that even temporary employees are covered by Article 311 if an order of dismissal or removal from service or reduction in rank had been passed. But Mr. Bhabha relied upon the observation made at page 252 of the report to the following effect :

> "When the employment is permanent there are certain statutory guarantees but in the absence of any such limitations Government is, subject to the qualification mentioned above, as free to make special contracts of service with temporary employees, engaged in works of a temporary nature, as any other employer."

Mr. Bhabha says that their Lordships intended to lay down that the statutory protection under Article 311 is available only when the employment is permanent and not in other cases. But their Lordships merely juxtaposed the case of a civil servant whose employment is permanent against the case of a servant employed on special contract of service. There is nothing in the observation which supports the plea that where the employment is not permanent the statutory guarantee under Article 311 does not protect the civil servant.

[5] AIR 1953 SC 250

6. Mr. Bhabha invited our attention to a judgment of Mr. Justice Tendolkar in *Kodiate Kurian Abraham v. Union of India*[6], In that case, it is true, Mr. Justice Tendolkar observed that it was the consistent view taken by this Court that Article 311 did not apply in the case of temporary servants. It may be mentioned that the order impugned by the petitioner in that case was one of removal from service : but the learned Judge proceeded to decide the case upon the premise that consequences of removal from service of a temporary employee and the termination of his employment were identical. That is clear from the reference made to the judgment in Misc Appln. No. 239 of 1952 (Bom) (E). As we have already pointed out, an order of dismissal or removal from service or reduction in rank attracts the provisions of Article 311. but not a mere termination of employment, whether the employee is holding a permanent post or is temporarily employed. Mr. Justice Tendolkar also relied upon the analogy of reversion of a probationer to a subordinate post and observed :

> 'In its very essence a person on probation may be removed from the post to which he is appointed at any time during the period of probation or on the expiry of it. Article 311 confers a right on "the member of a Civil Service" or a person who" holds a civil post" ; and in my opinion these phrases are not capable of including within their scope persons who by the very terms of their appointment are liable to be removed from the posts during the period of probation." In that judgment, Mr. Justice Tendolkar also expressed the view that the observations made in the judgment in Shrinivas Ganesh's case, to which we have already referred, were mere dicta and were not binding. With respect, we are unable to accept the view which appealed to Mr. Justice Tendolkar. However precarious the tenure of a temporary servant in the post to which he is appointed may appear to be, if he is to be dismissed or discharged from service or to be reduced in rank, he must, in our view, be

given the benefit of the statutory protection of Article 311. A dismissal or removal from service cannot, in our Judgment, be equated with mere termination of employment of a temporary servant, nor can it be equated with reversion of a probationer to his substantive appointment. The analogies on which Mr. Justice Tendolkar relied were in our judgment not true analogies. After anxiously considering the question we are of the view that the rule enunciated by the learned Chief Justice in Shrinivas Ganesh's case must be regarded as the true rule.

7. We may point out that whereas Mr. Justice Tendolkar observed that the provision of section 240 of the Government of India Act had never been made applicable to the case of a probationer, our attention was invited to an unreported judgment of this Court in *Mahadeo Shripad v. State of Bombay*[7], which lays down a different rule. It was held in that case that Rule 7 of the Police Rules assumed that a person appointed on probation had the right to hold that appointment for the period of his appointment and he could not be dismissed or discharged before the expiry of the period of probation. The learned Chief Justice in delivering the judgment of the Court observed :

"If a person is appointed on probation for one year or two years or a person is appointed for a definite period, one year, two years or less or more under the contract, he is entitled to hold that Post for that period and if the Commissioner of

[6] Misc. Petn. No. 237 of 1956, D/-8-10-1956 (Bom)

[7] Appeal No. 44 of 1955, D/-1-12-1955 (Bom)

Police wants to dispense with his service prior to that period, then he has the same rights and privileges as a permanent employee and for a very good reason because he has as much right during that definite period to continue to hold that office as a permanent employee has and, therefore, to that extent no distinction can be made between a permanent police officer and a police officer appointed on probation for a fixed period or appointed to a post for a definite period."

8. In our opinion, the principle of that case also supports the view which we are willing to take in the case before us. We, therefore, negative the contention raised by Mr. Bhabha that the circumstance that the petitioner is a temporary employee is sufficient to disentitle him to the statutory protection under Article 311 of the Constitution.

(The rest of the judgment is not material for this report.)

Petition dismissed.