

PATNA HIGH COURT

Lachmi

Vs

Military Secretary

Misc. Judicial Case No. 64 of 1954

(Das, C.J. and Imam, J.)

19.04.1955

JUDGMENT

Imam, J.

1. There are four petitioners in this application, namely, Lachmi, Lakhan, Balkishun and Ram Baran. They have filed this application under Article 226 of the Constitution of India with a prayer that this Court should declare the order of their dismissal from service dated 18-03-1953, as illegal and without jurisdiction, and direct the opposite party to reinstate the petitioners from the date of dismissal, and that the directions may be given by issuing a writ in the nature of certiorari, or any other appropriate writ under Article 226 of the Constitution.

2. The case of these petitioners is that petitioner 1, Lachmi was a garden store-keeper at Raj Bhawan, Patna, and that petitioner 2, Lakhan, was a mate in the Raj Bhawan garden. The remaining petitioners, namely, Balkishun and Baran, were mazdoors of the Raj Bhawan garden. It is their case that they have been dismissed by the Military Secretary to the Governor at Raj Bhawan, Patna, and that they have been illegally dismissed. They claim to be Government servants of the inferior grade, as such they are entitled to casual leave, sick leave, holidays leave besides Sundays. They claim to have been dismissed not because that they were guilty of not doing their duties, but because they refused to do private work of their immediate superior officers, and that being so, their dismissal was not justified, more specially when there has been a direction by the Government through a letter of the Chief Secretary, Mr. L.P. Singh, prohibiting officers from employing peons as domestic servants. This, in short, is the case of these petitioners.

3. On behalf of the opposite party, namely, the Military Secretary to the Governor of Bihar, Raj Bhawan, Patna, and the State of Bihar, a counter-petition supported by a counter-affidavit has been filed in which it is alleged that the allegations that these petitioners were enjoying the cadre

and privileges of the Government servants of the inferior grade is wrong and that the statement of petitioner 1 that he was promoted to the rank of garden storekeeper is also wrong. What really happened was that petitioner 1 had to keep charge of the garden implements and, therefore, his request for extra wages for that work was accepted and he was being paid an extra three rupees every month for that work. It is also alleged in the petition on behalf of the opposite party that the Raj Bhawan garden mazdoors are contingent menials and are paid monthly wages from garden contingencies that the garden mazdoors are employed entirely on a temporary basis, that their number is increased or reduced according to the requirement obtaining at the time, that these mazdoors are employed and discharged on the spot as all casual labourers, that there is no letters of appointment issued to them, nor is there any practice of issuing any letter of discharge to them, that they are liable to be discharged from employment without being asked to show cause against such proposed order, that the mere fact that a number of mazdoors have continued to work for a number of years at a stretch does not make them government servants, nor is there any change in their status as contingent menials, that they do not belong to any grade of Government service, and that they are not given any uniform or livery nor any badge and they are not governed by the rules relating to chaprasis or other employees of Grade IV. It is also alleged that the statement that Lakhari was promoted to the rank of the mate is not correct. The fact is that experienced mazdoors in the Raj Bhawan are put in charge of a group of mazdoors and they are called mates, and for this, they are paid extra Rs. 5/- per month, and that this fact cannot in any way, change the nature of their employment. It is also alleged that there are no rules governing the terms of employment of the garden mazdoors in the Raj Bhawan; they are paid out of garden contingency and a register for their attendance is maintained, and on the basis of their attendance their monthly pay roll is prepared and they are paid according to that pay roll. Then it is alleged that the concession regarding a weekly holiday or sick leave or casual leave given to the mazdoors does not, in any way, alter their status, nor does it attract the rules relating to Grade IV Government servants to the garden mazdoors. It is further alleged that an order of suspension or an order to show cause against proposed dismissals was an act of grace shown to the petitioners and not under any rule whatsoever and the issue of those orders does not attract the provisions of the Bihar Service Code, the Boards Miscellaneous Rules and the Civil Services (Classification, Control and Appeal) Rules, much less Article 311 of the Constitution.

4. The first point for determination is whether these petitioners are Government servants, and if not, whether they hold civil post under the State. On behalf of the petitioners, reference was made to the Bihar Service Code, the Bihar Pension Rules, the Bihar Treasury Code, Volume I as well as Bihar Treasury Code, Vol. II, and the Bihar and Orissa Treasury Manual. So far as the Bihar Service Code is concerned, reference was made to R. 2 which says :

"These rules apply to all Government servants under the rule making control of the State Government. They also apply to the staff attached to the Patna High Court and to the Secretariat staff of the Assembly and Council."

This is an important rule, because the Government House or Raj Bhawan is not mentioned. The note attached to this rule is

"Services controlled by the State Government as the agent of the Government of India are under the rule making control of the State Government for the purpose of this rule."

The next rule referred to in this Code is R. 24 which is as follows :

"Inferior service means any kind of service which may be specially classed as such by the State Government, and any other kind of service the maximum pay of which does not ordinarily exceed Rs. 35 a month."

The note attached to this rule is, "A list of posts specially classed as inferior or superior is contained in Appendix 4." Appendix 4 mentions, under the heading "the following posts have been specially declared inferior", amongst others 'malis, mates, mazdoors'. A reference was also made to Rule 200 which says; "Menials paid from contingent grants may only be granted leave without allowances." It was submitted, in view of Appendix 4, that malis, mates and mazdoors employed in the inferior grade were, for the purposes of this Code, Government servants of the State, and therefore, the petitioners must be deemed to be Government servants. In order further to show that these persons are Government servants, reference was made to 'Schedules of Pay and Allowances, etc. issued by the Finance Department of the Government of Bihar.

At p. 42, it is mentioned, "wholetime contingent menials and other low paid servants", and under the heading 'prescribed scales', it is mentioned "Rs. 17 1/2-1/2-25." Reference was also made to the Bihar Pension Rules. Our attention was drawn to R. 45 which deals with cases where no claim to pension is admitted, and as inferior grade Government servants or contingent menials are not mentioned therein, we are asked to infer that they are entitled to pensions and thus Government servants. Reference was also made to R. 149, specially to the note which says "contingent menials who have rendered satisfactory and continuous service for twenty years or above should be allowed a gratuity equal to six months wages which will be payable on retirement or discharge from Government service." It was submitted that this was further proof of the fact that the petitioners were Government servants. Our attention was also drawn to the Bihar Treasury Code, Vol. I. In paragraph 5 of the Preface at p. iii, it is stated as follows :

"The rules and instructions contained in the new Code now supersede the corresponding old rules and instructions contained in those codes and manuals."

According to R. 293 of the above Code, classification of charges is mentioned, namely, contract i.e., charges for which a lump sum is placed annually at the disposal of a disbursing Officer for expenditure without further sanction of any kind. They generally consist of charges the annual incidence of which can be averaged with reasonable accuracy. The second class is non-contract which is divided into four categories. With the first three, we are not concerned, but the fourth category is as follows :

"Fully vouched contingencies, i.e., charges which require neither special sanction nor countersignature, but may be incurred by the head of the office on his own authority subject to the necessity of accounting for them. These may be passed on fully vouched bills without countersignature."

It is clear from the fourth category that even though special sanction or countersignature is not necessary and charges may be incurred by the head of the office on his own authority. The necessity of accounting for them is there. This is important in view of what will be stated later. According to R. 302 it is provided under sub-rule (2) as follows :

"The pay of the following establishments may be drawn and charged as contingent expenditure: "Clause (b) of sub-rule (2) states, "mazdoors engaged in the civil department on manual labour and paid daily or monthly wages."

Note 1, attached to the rule, is as follows : The pay of inferior Government servants of classes other than those mentioned in clause (e) may also be drawn and charged as contingent expenditure at the discretion, of Heads of Departments." Reference was also made to R. 303 which is as follows :

"Contingent charges incurred on account of the wages of mazdoors engaged on manual labour and paid at daily or monthly rates shall be supported by a certificate signed by the disbursing officer to the effect that the mazdoors were actually entertained and paid." Rule 304 is to the following effect :

"In the case of all other inferior servants whose pay is drawn on contingent bills, certificates in the following form shall be furnished by the disbursing officer."

Then follows the form of the certificates. On these grounds it is submitted that the petitioners must be deemed to be Government servants. Reference was also made to R. 512 of the Treasury Code under heading 'Military Secretary to the Governor' which says :

"Funds required to meet disbursements on account of expenditure from the contract allowance of the Governor are drawn on a simple receipt in T.C. Form 68. The Military Secretary furnishes to the Accountant General a monthly statement showing details of expenditure on account of these charges in T.S. Form 69. Charges on account of the tour expenses of the Governor are drawn by the Military Secretary in fully vouched contingent bill (T.C. Form 36, R. 317). The Governor draws his sumptuary allowance along with his salary."

In order to appreciate this rule, a reference was made to T.C. Forms 68 and 69, and they will be found in Vol. II of the Bihar Treasury Code. In T.C. Form 68, the amount that was received from

the Treasury has to be stated and also the amount of His Excellency the Governor's contract allowance and further the undrawn balance of allotment for the previous year, and ultimately showing what the available balance is. T.C. Form 69 is the statement of expenditure from His Excellency's contract grant.

Amongst other things, there is a column for wages and allowances of house-hold servants including cook, steward, house-keeper, etc. There is column 3 for temporary house-hold servants and occasional servants engaged for State entertainment. Under column 6, it is to be stated what the expenditure is so far as house-hold sundries are concerned. A reference was also made to the Bihar and Orissa Treasury Manual in the Chapter dealing with contingencies, viz., Chap. 6. At p. 80, under the heading "Pay of Menials" in clause (c), 'Malis' are mentioned amongst others. Correction slip No. 99 states,

"the creation of a new post of contingent menial requires the sanction of Government. The pay of existing contingent menials can be altered by the controlling officer concerned up to the minimum pay fixed for the district by Government for menials classed as "Establishment" provided the money required for the year in which the order is passed can be round from his contingent grant."

It is submitted that from all these materials there can be no doubt that these petitioners are government servants, and thus they should not have been dismissed in the manner they have been without proper chance being given to show their innocence, e.g. by way of a proper enquiry, and what is known as second notice for the purpose of Article 311 of the Constitution. It was alternatively submitted that even if it is held that these petitioners were not Government servants, they had certainly held civil post under the State and therefore, the provisions of Article 311 of the Constitution would be attracted.

5. In my opinion, in order to determine whether a person is Government servant or not, the following facts have to be considered; who appointed him, who can dismiss him, who pays him and who was controlling authority over him. All that the Bihar Service Code, the Bihar Pension Rules, the Bihar Treasury Code, Vol. I with Vol. II and the Bihar and Orissa Treasury Manual show is that there can be Government servants of the inferior grade as also contingent menials, but it does not follow from this that every person who is a contingent menial etc. is necessarily a government servant. What has to be determined is whether these petitioners working in the garden of the Raj Bhawan are Government servants or they are holding Civil post under the State; the State, so far as Article 311 of the Constitution is concerned, means the State of Bihar, i.e. the Government. Under the Government of India (Governor's Allowances and Privileges) Order, 1950, S. 7, it is provided as follows :

"7. In order that the Governor may be enabled to discharge conveniently and with dignity the duties of his office there shall in each year be charged on and paid out of the revenues of each Province -

(a) for each of the purposes specified in the Second Schedule to this Order such amount, not exceeding the maximum amount specified in the appropriate column of that Schedule as may be required by the Governor; and (b) such further amount for the maintenance, improvement, removal or replacement of the Governor's official residences and official railway saloons, river craft, and aircraft, and for the purchase of official aircraft, as the Governor-General may by general or special order authorize :

Provided that the Governor may, with the approval of the Governor-General, re-appropriate, whenever necessary, from one sub-head to another sub-head specified in the said Schedule, but so as not to exceed the maximum amount specified in column 9 thereof :"

In the Second Schedule for the State of Bihar, under the heading of column 6, namely, Maintenance and repairs of furnishings of official residences, a sum of Rs. 14,000/- has been allotted; and under column 7, for the purpose of contract allowance, i.e. an allowance for miscellaneous expenses including maintenance of motor cars, a sum of Rs. 32,000/- has been allotted for the State of Bihar. The question is whether the expenditure of Rs. 14,000/-, which is stated above, is subject to the control of the State Government or not. For this purpose, a reference has to be made to p. 127, Bihar and Orissa Treasury Manual, Chap. 6, Contingencies under the heading "His Excellency's personal staff." Correction slip No. 688 is the one with which we are concerned. Under the heading "How regulated", it is provided in sub-clause (b) of clause (ii) :

"House-hold charges of a semi-private character (e.g. hire of bands, expenses in connection with the visits of His Excellency the Viceroy, liveries of menial servants in attendance on His Excellency and certain other private house-hold servants), wages of house-hold servants and other charges of a semi-private nature."

In this connection, it is provided as follows :

"The charges are drawn by the Private Secretary on abstract contingent bills against the grant fixed by the Secretary of State. No addition to the contract grant is allowed without the sanction of the Secretary of State for India in Council, and no overdrawal of it is permitted. If it is exceeded, His Excellency the Governor is required to find the excess from his private purse. Unspent balances of each year's contract grant do not lapse but are carried over to the next year. Monthly statements are furnished to this office by the Private Secretary distributing the amounts drawn between the above heads. No further details need be furnished to this office. The grant is not subject to any audit or examination. Accurate accounts should, however, be maintained which can be made available for inspection by the Government of India, if called for."

It will be seen from this that the expenditure from the contingent grant is not the subject-matter of audit, and all that is required is to keep an accurate account of the expenditure in case the

Government of India may call for it. In other words, there is no one who can control the expenditure of the Governor in this regard, and should be spend more than, what is provided, the excess must be met from his private purse. It may, therefore, be said that the controlling authority, in so far as the menials are conceited, is the Governor himself, and that the payment to these petitioners must be deemed to be house-hold charges of a semi-private character. As to the question, who can appoint the malis attached to the Government House, we have a definite statement on behalf of the opposite party in the counter-affidavit that these petitioners were appointed by the Governor and were liable to be dismissed by him when he liked to dismiss them without even asking them to show cause why they should, not be dismissed. It is true that the petitioners claim to be government servants, but there is no sufficient material to hold that these petitioners are Government servants. It is for them to satisfy the Court that they are Government servants. So far as the question of their holding civil post under the State is concerned, there is absolutely no material for this; in fact, the petitioners do not claim in their petition that they are holding civil post under the State. What they claim is that they are Government servants. It is true that these petitioners were paid from the Government funds, but that, by itself, would not necessarily make them Government servants. By way of an example, it may be stated that the Judges of this Court are permitted to draw Rs. 35/- a month in order to pay their malis. In other words, though the Judge appoints the mali, through the Judge the Government pays the mali. In these circumstances, it could not possibly be held that the mali of the Judge is a Government servant. There is nothing to stop the Judge from having two malis and paying Rs. 171/2 to each of the malis. I can take judicial notice of this fact. I have referred to this in order to show that the fact that merely because a mali receives Government money by way of his pay, does not make him a Government servant. In a matter of Governor's allowances and privileges, reference, in my opinion, should be made to Article 158(3) of the Constitution. It is as follows :

"The Governor shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule." In the second paragraph of that Schedule, it is provided as follows :

"There shall also be paid to the President and to the Governors of the States so specified such allowances as were payable respectively to the Governor-General of the Dominion of India and to the Governors of the corresponding Provinces immediately before the commencement of this Constitution."

It is thus clear that the present Governor of the State is entitled to the same allowances as his predecessors were getting before the commencement of the Constitution, and thereafter according to such amendment as may have been made.

6. Having given my careful consideration to the points raised by the learned lawyers for the petitioners, I do not think that it has been established that these petitioners are Government

servants, or that they hold civil post under the State, as understood in Article 311 of the Constitution. I would, therefore, dismiss the application of the petitioners. Having regard to the peculiar circumstances of this case there will be no order for costs.

DAS, C.J.

7. This case is really a case of first impression, and the main point for decision is if the four petitioners are entitled to the benefit of clause (2) of Article 311 of the Constitution. That clause is in these terms :

"No such person as aforesaid 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."

The expression "no such person as aforesaid" has reference to clause (1) of Article 311, which clause states inter alia that no person who is a member of a civil service of a State or holds a civil post under a State shall be dismissed or removed by an authority subordinate to that by which he was appointed. Therefore, the persons who are entitled to the protection of Article 311 of the Constitution are, so far as this case is concerned, persons who are members of a civil service of a State or hold a civil post under a State. Learned Counsel for the petitioners has contended that his clients are members of the civil service of the State of Bihar, known as Government servants of the inferior grade, and furthermore that they hold civil posts under the State of Bihar. If the contention is correct, then the petitioners are entitled to succeed, because admittedly the provisions of clause (2) of Article 311 of the Constitution have not been complied with in the present case; and proviso (b) to clause (2) does not save the order of dismissal passed against the petitioners, because the authority empowered to dismiss the petitioners did not record any reasons to the effect that it was not reasonably practicable to give to the petitioners an opportunity of showing cause against the action proposed to be taken in regard to them.

8. On behalf of the opposite party, however, the main contention is that the petitioners are neither members of a civil service of the State of Bihar nor do they hold civil posts under that State. It is contended that the petitioners are what is called "contingent menials" and their employment in the Raj Bhavan is of a private or semi-private nature. If this contention of the opposite party is correct, then obviously the petitioners are not entitled to the protection of clause (2) of Article 311 of the Constitution.

9. I have already said that the case is a case of first impression, and no decision has been brought to our notice which has considered the status or position of such employees as the present petitioners. I must say that the point is not entirely free from difficulty and no very clear or definite rule regulating the employment and conditions of service of the petitioners has been brought to our notice. There are isolated rules here and there, to be gathered from different

Government publications referred to by my learned brother. Those rules also do not very clearly define the position or status of such employees as the present petitioners. There is no doubt, however, that the petitioners are paid from State funds which are placed at the disposal of the Governor; there is also no doubt that the authority competent to appoint or dismiss them is the Military Secretary to the Governor whose services are also, I believe, placed at the disposal of the Governor. I agree with my learned brother that the true test in determining whether a person comes within Article 311 of the Constitution is not whether his salary or wages are paid from State funds; the true test is whether he is a member of a civil service of a State or whether he holds a civil post under a State.

I think that the expression "civil post under a State" means that the post is under the control of the State; that is, the State can abolish the post if it so desires, or the State can regulate the conditions subject to which the post is or will be held. The real test, therefore, is the immediate or ultimate control which is exercised by the State with regard to the post in question. Learned Counsel for the petitioners has, I think, failed to establish that the petitioners are members of a civil service of the State of Bihar. I agree with learned Counsel for the petitioners that some "contingent menials", particularly wholetime contingent menials, may be members of that class of civil servants known as inferior Government servants, to which a reference has been made in R. 24 and Appendix 4 of the Bihar Service Code; for example, wholetime "contingent menials" employed in the Public Works Department and other departments of Government are probably persons who come within Article 311 of the Constitution. But the position of the personal servants of the Governor, including casual servants maintained for the upkeep of the Governor's official residence, which expression includes the gardens of Raj Bhavan, stands, in my opinion, on a somewhat different footing. As far as I have been able to make out from the relevant rules on the subject, the Governor is entitled to a certain amount of money for the maintenance of the Governor's official residence, in order to enable him to maintain with dignity the duties of his office. Within the sum to which the Governor is entitled, the Governor, or the Military Secretary under the Governor, employs servants on the Governor's personal staff as also for the upkeep and maintenance of the Governor's official residence. I have already stated that the expression "official residence" as defined in the Government of India (Governor's Allowances and Privileges) Order, 1950, includes the gardens of the Raj Bhavan. The staff so employed are not under the immediate or ultimate control of the State of Bihar; the staff is really under the control of the Governor himself and that control, if I have understood the position correctly, is exercised through the Military Secretary. I think the true position is as indicated by para 194 at p. 124 of the Treasury Manual. Item 8 of that paragraph relates to "His Excellency's personal staff". Note 2 below Item 8 explains the position with regard to the expenditure from the contract allowance of the Governor. It states, inter alia, that the expenditure from contract allowance includes household charges of a semi-private character, (e.g. hire of bands, liveries of menial servants in attendance on H.E. and certain other private household servants, wages of household servants and other charges of a semi-private nature). Correction slip No. 688 with regard to clause (ii) of Note 2 states :

"The charges are drawn by the Private Secretary on abstract contingent bills against the grant fixed by the Secretary of State. No addition to the contract grant is allowed without the sanction of the Secretary of State for India in Council, and no overdrawal of it is permitted. If it is exceeded, His Excellency the Governor is required to find the excess from his private purse. Unspent balances of each year's contract grant do not lapse but are carried over to the next year. Monthly statements are furnished to this office by the Private Secretary distributing the amounts drawn between the above heads. No further details need be furnished to this office. The grant is not subject to any audit or examination." This correction slip is further explained in a subsequent correction slip No. 897. In that correction slip it is stated :

"It has been decided by the Auditor General with the concurrence of the Government of India that there is no objection to a saving in the budget provision for the Contract Grant of Governor being re-appropriated by the Provincial Government in exercise of their ordinary power of re-appropriation to other budget heads merely for budgetary purposes, provided that the saving from the contract grant should not be treated as surrendered and should be carried forward as an unspent balance as required by Proviso (iii) to para 7(1), Government of India (Governor's Allowances and Privileges) Order, 1936."

If, therefore, the position is as I apprehend it to be, then the Mails employed in the Raj Bhavan are not members of a civil service of the State of Bihar; nor do they hold civil posts under the control of the State of Bihar, though the wages which they get ultimately come out of State funds placed at the disposal of the Governor. The true position is as indicated by the aforesaid rule of the Treasury Manual, namely, they are servants of a semi-private nature. Therefore, I agree with my learned brother that the petitioners are not entitled to the benefit of clause (2) of Article 311, Constitution of India.

10. Learned Counsel for the petitioners has conceded that the Civil Services (Classification, Control and Appeal) Rules apply to gazetted officers of State services, and the Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935, apply to all subordinate service officers and class IV Government servants in the State. Under Note 1 to R. 2, Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935, the procedure to be followed before an order for dismissal can be passed is the same as is indicated in R. 55, Civil Services (Classification, Control and Appeal) Rules. Under Rule 4 of the said rules an appeal lies to the authority immediately superior to the authority which passes the order of removal or dismissal. In the case under the consideration, the Military Secretary passed the order of dismissal and the appeal shall lie to the immediately superior authority. A question arose as to what authority was immediately superior to the Military Secretary. Learned Counsel for the petitioners has contended that the authority is the State Government. It is difficult to understand how the State Government can be the immediately superior authority when the Military Secretary acts under the control of the Governor. If the Governor is the immediately superior authority, he is not answerable to any Court for the exercise and performance of the powers and duties of his office

or for any act done or purporting to be done by him in the exercise and performance of those powers and duties (see Article 361 of the Constitution).

It will be somewhat anomalous to hold that a writ application will lie against the order of the Military Secretary; but no writ application will lie if an appeal is preferred to the Governor against the order of the Military Secretary and the order is ultimately passed by the Governor himself. In my opinion, the true position is that the Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935, do not apply to the Malis of the Raj Bhavan. Such Malis are not members of the subordinate services under the administrative control of the Government of Bihar; nor do they hold civil posts or appointments under the administrative control of the State Government.

Therefore, the question of following the procedure laid down in R. 55, Civil Services (Classification, Control and Appeal) Rules or of following the instructions contained in Rules 165 to 170, Bihar and Orissa Board's Miscellaneous Rules, 1939, does not really arise. The employment of such Malis being of a semi-private nature, their employment really rests in contract, and they are not entitled to the statutory protection of Article 311 of the Constitution, or the rules contained in the Bihar and Orissa Subordinate Services Discipline and Appeal Rules, 1935. Their remedy, if any, for an alleged breach of the contract of employment lies in the ordinary Civil Courts.

11. For the reasons given above, I do not think that the petitioners are entitled to any writ under Article 226 of the Constitution. I agree, therefore, that the application must be dismissed. I agree also that, in the peculiar circumstances of this case, there will be no order for costs.

Application dismissed.