

RAJASTHAN HIGH COURT

Sobhagmal

Vs.

State (Rajasthan)

Civil Writ No. 134 of 1953
(Wanchoo, C.J. and Ranawat, J.)

02.03.1954

JUDGMENT

Wanchoo, C. J.

1. This is an application by Sobhag Mal for issue of a writ of mandamus quashing the order of the Commissioner, Customs and Excise, Rajasthan, dated 29-7-1952 and of the Government, dated 17-1-1953, and directing them to proceed according to law in connection with the proceedings resulting in the dismissal of the applicant.

2. The case of the applicant is that he was appointed by the Government of the former state of Jaipur, on 16-10-1946, on probation for one year. Thereafter, he was appointed on 4-3-1948, as Inspector, Customs and Excise Department, as his work during the probationary period was found satisfactory. He was suspended from service by the Assistant Commissioner, Customs and Excise, Jaipur, and gave over charge on the 11th June, 1949. No reasons were given for such suspension in the letter of the Assistant Commissioner. Eventually, however, on 31-8-1951, the Divisional Assistant Commissioner, Customs and Excise, gave the applicant a charge-sheet containing three charges against him. Thereafter, an enquiry was made into these charges; but as there was delay in the enquiry, the applicant approached the Chief Secretary to the Government of Rajasthan on 5-7-1952, and the Chief Secretary asked the Commissioner, Customs and Excise to expedite the proceedings. This annoyed the Commissioner who sent a letter to the applicant to appear in person or by pleader before him on the 18th of July, and give a written reply to certain queries in the letter of the Commissioner. These queries consisted of four items, three of which were a repetition of the three charges already supplied to him, and the fourth asked him to explain why he should not be discharged from service.

Thereafter, the applicant was removed from service on 29-7-1952, and this order was confirmed on appeal by the Government of Rajasthan on 17-1-1953.

3. The applicant attacks these orders on two main grounds (1) that as he was appointed by the Government of the former State of Jaipur, he could only be removed by the Government of Rajasthan and not by the Commissioner, Customs and Excise who was an authority subordinate to the Government of Rajasthan in view of the provisions of article 311(1) of the Constitution, (2) and that the mandatory provision of article 311(2) of the Constitution was not complied with, and the order of removal was, therefore, bad.

4. The application has been opposed on behalf of the State, and it is urged that, in the first place, the applicant was not appointed by the Government of the former State of Jaipur, but by the Commissioner, Excise and Customs.

In any case, it is urged that even if he was appointed by the Government of the former State of Jaipur, his dismissal by the Commissioner of Excise and Customs, Rajasthan, was not hit by Article 311(1). It was further urged that the provisions of Article 311(2) were complied with, and the order of removal cannot be attacked on that ground. Lastly, it was urged that the application had another remedy open to him, namely a suit, and therefore this Court should not interfere under Article 226.

5. The first question that arises in this case is whether the applicant was appointed by the former State of Jaipur, or by the Commissioner of Customs and Excise of that State. On that point, the original reply of the State of Rajasthan seemed to accept the position put forward by the applicant, namely that he had been appointed by the Government of the former State of Jaipur. But later the State filed an amendment to the reply in which it was urged from certain facts that the appointment of the applicant as Inspector, Customs and Excise should be deemed to have been made by the Commissioner, Customs.

6. We have gone through the various documents which have been filed in this connection by both parties and are satisfied that the applicant was appointed by the Government of the former State of Jaipur. It is the admitted case of the parties that the applicant succeeded in a competitive examination for the Civil and Subordinate Service of the former State of Jaipur, and was appointed, by order of the Government of Jaipur, dated 16-10-1946. He was ordered to be engaged for Patta work for one

year, and if during this period his work was found satisfactory, he was to be considered for appointment as a probationary Naib Tahsildar, or probationary Inspector in the Customs and Excise Department. It is further clear that on 6-2-1948, a report was made by the Revenue Department, that the applicant may be recommended to the Customs Department for appointment as Inspector. This report was approved by the Prime Minister] on the 15th of February, 1948. The applicant was then ordered to report himself to the Commissioner, Customs and Excise, who was asked to post him. On the 4th of March, 1948, the applicant was informed by the Revenue Secretary that he had been appointed Inspector in the Customs and Excise Department on probation for one year, and was directed to report himself to the Commissioner, Customs and Excise. On 6-3-1948, the Commissioner, Customs and Excise, posted the applicant to the distillery for excise training. There is no order of the Commissioner, Customs and Excise, appointing the applicant before the 4th of March, 1948, on which date the applicant was informed by the Revenue Department that he had been appointed an Inspector in the Customs and Excise Department. The order of the Commissioner, dated 6th March, 1948, can only be treated as an order of posting, as the applicant had already been informed on the 4th of March of his appointment. It is, in our opinion, quite clear that the applicant was appointed by the Government of the former State of Jaipur, and not by the Commissioner, Customs and Excise of that State.

7. The next question is whether the applicant could be dismissed by the Commissioner of Customs and Excise, Rajasthan. In this connection, reliance is placed on Article 311(1) of the Constitution, which reads as follows –

"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 by an authority subordinate to that by which he was appointed."

It is urged on behalf of the State that the article provides that a civil servant cannot be dismissed or removed by an authority subordinate to that by which he was appointed, and this means that if the authority dismissing is not directly subordinate to the authority which made the appointment, the dismissal or removal would be justified. Thus it is contended that as the Commissioner, Customs and Excise, Rajasthan, was not directly subordinate to the Government of the former State of Jaipur, he could not be deemed to be an authority subordinate to that by which the applicant was

appointed, and therefore the Commissioner, Customs and Excise, Rajasthan, could dismiss the applicant. We are of opinion this interpretation is not correct. What Article 311(1) provides is that the authority dismissing should not be subordinate in rank to that by which the appointment was made. The intention seems to be that the authority dismissing should be co-ordinate in rank to the authority appointing, and not that in the absence of direct subordination any authority could dismiss even though the authority appointing might be a higher authority in rank.

If the provision merely protected civil servants from dismissal by an authority directly subordinate, it might be possible, for example, for a person appointed by the Head of one Department, say the Commissioner of Customs and Excise, to be dismissed, in case he was transferred to another Department, say Revenue Department, even by a Tahsildar in that department, for a Tahsildar in the Revenue Department is not directly subordinate to the Commissioner, Customs and Excise. Obviously, therefore, Article 311 means that the dismissing authority should be at least co-ordinate in rank with the appointing authority, and should not be subordinate in rank. Thus if a person is appointed by a Head, of one Department, and he is transferred to another Department, he can only be dismissed or removed by the Head of the other department.

8. We, have, therefore, to see whether the applicant can be said in this case to have been dismissed by an authority subordinate in rank to that by which he was appointed. In this connection, the argument on behalf of the applicant is that he was appointed by the Government of the former State of Jaipur. The co-ordinate authority to the Government of the former State of Jaipur is the Government of Rajasthan, and therefore he could not be dismissed by the Commissioner, Customs and Excise, Rajasthan, because that authority is subordinate in rank to the Government of the former State of Jaipur, which appointed him. We are of opinion that this argument, though apparently attractive, is not sound. Article 311(1) contemplates that the authority appointing and the authority dismissing must be an authority of the same State. Where however, as in the case of Rajasthan, there has been a merger of a number of former states to form the present State of Rajasthan, the position is different. In these circumstances, we have not to see what was the authority which appointed the applicant originally when he was appointed in a former state which has been merged in the state of Rajasthan. What we have to see is the authority which appointed the applicant in the State of Rajasthan after it was created. It is common knowledge that after the creation of the State of Rajasthan, there was integration of services, and servants of the former states, which merged in Rajasthan, were

appointed in the integrated services of Rajasthan by varied in the integrated services of Rajasthan by various authorities. Therefore, the correct interpretation of Article 311(1) in the situation in which we are in Rajasthan, is that the dismissal or removal cannot be made by an authority subordinate to that which appointed a civil servant on integration in the state of Rajasthan. If, for example on integration, a person was appointed by the Government of Rajasthan, he should not be dismissed by any authority subordinate to the Government of Rajasthan. But if, on integration, a person was appointed by a Head of a Department or by a Head of an Office, or even by a lower Officer in the integrated State of Rajasthan, the dismissal could be by an authority co-ordinate to that which made the appointment in the integrated set-up. It is, therefore, not the original appointing authority in the former merging state, but the appointing authority in the State of Rajasthan, that has to be seen, and the dismissal cannot be made by an authority subordinate rank to such authority in Rajasthan.

9. In this case, it appears that the applicant was never appointed in the integrated set-up for he was suspended before the integration was completed. In such a peculiar case, it seems to as that the proper way to look at it is to see who would have appointed the applicant in the State of Rajasthan if he had been brought into the integrated set-up. According to Schedule II of the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1950, Inspectors in the Customs and Excise Department are members of sub-ordinate services. Further, according to Rule 14(2) of the said Rules, all first appointments to a subordinate service are to be made by the Head of a Department. The Commissioner, Custom and Excise, is the Head of the Department of Customs and Excise and therefore if the applicant had been appointed, in the integrated set-up, he would have been appointed by the Commissioner Customs and Excise Department, Rajasthan. Under these circumstances, we are of opinion that as the applicant was removed by the Commissioner, Customs and Excise, Rajasthan, it cannot be said that he was removed from service by an authority subordinate to that which appoint him, or could have appointed him in the State of Rajasthan. There is, therefore, no force in the first question urged on behalf of the applicant.

10. We now come to the second question that the provisions of Article 311(2) were not complied with. This article is more or less in the same terms as Section 240(3) of the Government of Indian Act, 1935. That section came in for interpretation before the Privy Council in - *'the High Commissioner for India v. I.M. Lall, 1*, and the following

observations at page 126 show what the protection afforded by Article 311(2) is –

"In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Prior that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which Sub-Section (3) makes provision. Their Lordship would only add that they see no difficulty in the statutory opportunity being reasonable afforded at more than one stage. If the civil servant has been through an enquiry under Rule 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry."

It may be pointed out that R. 16 of the Rajasthan Civil Services (Classification, Control and Appeal) Rule 1950 corresponds to R. 55 mentioned in the observation of their Lordships of the Privy Council. Therefore, a civil servant is entitled under Rule 16 to be informed in writing of the grounds on which proposed to take action, and to be afforded an adequate opportunity to defend himself. He is further entitled under Article 311(2) after the charges have been investigated and found proved to be given another opportunity of showing cause against the punishment proposed to be inflicted upon him. What we have to see therefore is whether this second opportunity was given to the applicant.

11. The State contends that this second opportunity was given to the applicant on the 18-4-1952. It appear that three charges were supplied to the applicant on the 31-8-1951. At the end of each charge he was asked to show cause why he should not be removed from service. Obviously this notice to show cause why he should not be removed from service cannot amount to a compliance with the requirement of Article 311 (2), because on 31-8-1951 no enquiry had been held, and the charges had not been proved. Therefore, the suggested punishment was only hypothetical, and it is only after the enquiry was over and the charges were field proved that the provisional punishment could be determined, and the applicant asked to show cause why that punishment should not be inflicted on him. The so called queries on the charge-sheet, which were given to the applicant on 18-7-1952, do not, in our opinion, take the

matter any further. What was done was that the three charges supplied to the applicant on 31-8-1951, were repeated, and instead of notice to show cause against removal being at the end of each charge, it was put down this time as the fourth item asking the applicant to show cause why he should not be discharged. This notice does not show that the Commissioner Customs and Excise, Rajasthan, had come to the conclusion that these three charges had been proved, and had provisionally determined on the punishment. The original file of this case was with the Deputy Government Advocate, and we looked through that also, and we find that here is nothing in the original file also to show that the Commissioner, Customs and Excise, had made up his mind before 15-7-1952, when these queries were sent to the applicant, whether these charges had been proved.

It appears that it was only on 29-7-1952, that the Commissioner applied his mind to the question whether the charges had been proved. Under these circumstances, the notice, which the Commissioner gave on 15-7-1952, in which the applicant was asked to show cause why he should not be removed, was of the same nature as the charges supplied to the applicant on 31-8-1951. It was the duty of the Commissioner, after he had made up his mind as to which charges were proved and which were not proved, to tell the applicant that, his opinion, such and such charges had been against him, and he proposed to inflict and such punishment, and ask the applicant show cause why such punishment should not be inflicted. This, in our opinion was not done, and therefore there was no compliance with the provisions of Article 311(2) of the Constitution. Under these circumstances, the removal of the applicant without compliance strictly with Article 311(2) was not justified.

12. We may briefly deal with the contention on behalf of the State that there was an alternative remedy open to the applicant, namely to file a suit, and therefore we should not interfere in our extraordinary jurisdiction. There is no doubt that the applicant could file a suit; but where, as in this case, the facts are not in dispute, the remedy by way of a suit could not have been equally beneficial, effective and convenient. We are, therefore, of opinion that we cannot refuse the writ of mandamus as prayed for by the applicant on this ground.

13. We, therefore, allow the application, and setting aside the orders dated 29-7-1952, and 17-1-1953 removing the applicant, direct that the Commissioner of Customs and Excise, Rajasthan should now comply with the provisions of Article 311(2) as explained by us, and then proceed to pass such punishment as he considers proper on

the applicant. The applicant will get his costs of this application from the State.

Application allowed.

Cases Referred.

1. AIR 1948 PC 121