NAGPUR HIGH COURT

Laxminarayan Chironjilal Bhargava

Vs

Union of India

Misc. Petn. No. 51 of 1952

(Sinha, C.J. and Mudholkar, J.)

24.03.1953

ORDER

Mudholkar, J.

1. This is a petition under Article 226 of the Constitution in which the petitioner seeks the following three reliefs :

> (i) A direction quashing the order of the respondent reducing the petitioner in rank with effect from 2-4-1952;
> (ii) A declaration that the confidential report of the Senior Barrack Officer for the year 1950 endorsed by the Commander, Works Engineers, Jabalpur, is an afterthought; and
> (iii) An order directing the respondent to pay all the arrears of increment from 1-4-1951 till date as recommended in the confidential report for the year 1958.

2. It is not contested before us that the petitioner is in the employment of the Defence Department from the year 1936. He was recruited at Ferozepur Cantonment and on 12-6-1937 he executed an agreement of service in favour of the Secretary of State for India in Council. Clause 1 of this agreement provides that the petitioner shall remain and continue in the service of the Government of India as a temporary clerk. Similarly, the agreement provides that the Government shall, subject to the rules and regulations of the department concerned pay to the petitioner so long as he shall remain in the service of Government the salary of the post to which for the time being he may be in such department. Clause 2 of the agreement provides that if the petitioner became desirous of resigning his situation, he shall give one clear calendar month's previous notice in writing of such desire to the officer under whose order he is serving. Clause 5 of the agreement provides that if the Government or the appointing officer shall at any time become desirous of dispensin with the services of the petitioner, the Government or the appointing officer shall, subject to the provisions of clause 6 of the agreement, give the petitioner one calendar month's notice in writing of such desire and in default of such notice, the petitioner shall be entitled to receive one month's pay or salary then receivable by him. It is not necessary to set out the terms of clause 6 of the agreement as they are not relevant in this case.

3. The petitioner, since his employment in the year 1937, has been working continuously and is still working as a civilian employee in the Defence Department. During the course of his service, he has been promoted from time to time to higher posts and the last pi emotion which he earned was on 15-8-1947 when he was appointed a permanent supervisor, Barrack S ores. Grade I. On 1-4-1949 the petitioner was promoted as officiating temporary Barrack Officer and was posted to Raipur in Madhya Pradesh. Later, on 7-4-1949 he was transferred in the same capacity to Jabalpur and on 23-8-1949 he was transferred to Pulgaon, again in the same capacity. The petitioner continued to officiate in this post till February 1952, when he was informed by the Departmental Promotion Committee that as it found him unsuited for continued retention in the grade of Barrack Stores Officer in the M.E.S., he was being reverted to the grade of supervisor B/S Grade I.

4. The petitioner's complaint is that he was not given an opportunity of showing cause against his reversion, as required by Article 311 of the Constitution, and that therefore his reversion is not warranted. Article 311 reads thus :

> "(1) 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.
> (2) 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."

We have not set out the proviso to the Article because it is not relevant for the purposes of this case.

5. Before Article 311 can be invoked, it is necessary for the petitioner to establish three things. In the first place, he must show that this article applies to a civilian who is in the employment of the Defence Department. The second thing he has to establish is that he 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". And the third thing he has to establish is that the refusal of the authorities to promote the petitioner amounts to his reversion. If the petitioner fails to satisfy any one of these three conditions, the provisions of Article 311 cannot be attracted.

6. It is common ground that the petitioner was employed initially as a temporary clerk. Nothing has been brought to our notice from which it could be inferred that he has since been absorbed as a permanent employee in the Defense Department. It is further admitted that the post in which the petitioner was officiating, that is, the post of Barrack Officer, is itself a temporary post. No doubt, the post has not yet been abolished; but it is still a temporary post. In the circumstances, not only is the tenure of the petitioner in the service of the Defense Department precarious, but his officiation in the temporary post was also precarious. That is to say, the petitioner's position as an officiating temporary Barrack Officer was doubly precarious. In the circumstances, it is difficult to see how Article 311 of the Constitution can be attracted to his case. In this connection we would refer to a decision of the Privy Council in '*Shenton v. Smith*[1]', In that case the question was whether a person who was appointed temporarily as a medical officer during the absence on leave of the actual holder of that office and was dismissed by the Government before the leave

had expired, had any cause of action and it was held that he did not have any. It seems to us that this reasoning would apply to a case where a person holding a temporary post is not dismissed from service but is merely reduced in rank.

7. We are aware of the decision in '*Yusaf Ali v. Province of Punjab*[2]', in which it was held that the corresponding provision in the Government of India Act, Section 240, applies also to temporary employees in all posts declared to be temporary. The reasoning which the learned Judge gives for his conclusion is that there is nothing in the Constitution Act which would show that the provisions of section 240 will not apply to a temporary employee or to an incumbent of the temporary post. In our opinion, from the mere fact that the Constitution does not specifically draw any distinction between a permanent employee and a temporary employee and between an employee' in a temporary post and one in a permanent post, it cannot be inferred that Article 311 of the Constitution would apply not only to permanent employees or incumbents of permanent posts but also to temporary employees or incumbents, of temporary posts. A person cannot be deemed to be a member of a service unless he is permanently absorbed therein; nor, in our opinion, can he be deemed to be the holder of such post unless he holds it permanently. For holding a post permanently the post itself must be permanent and the incumbent must be a permanent employee. If the post itself is temporary then the person who is working thereon cannot be said to "hold" it. Similarly, where the post is permanent but the holder is only temporarily working on it he cannot be said to "hold" the post but to merely officiate in that post. The decision of their Lordships just referred to fully supports this view.

8. We would also refer to a decision in '*Jayanti Prasad v. State of Uttar Pradesh*[3]' on which reliance is placed or behalf of the petitioner. In that case the question which fell to be decided was whether Article 311 applied to the case of a person whose services are sought to be terminated at the expiry of the term for which he was engaged, or at the expiry of the period of notice by which, in accordance with the conditions of his service, his services could be terminated. The learned Judges held that Article 311 did not apply in that case and in the course of their judgment observed :

> "It is not so much a question of the post being held temporarily or it being of a permanent nature; the real question is whether a person's services are being dispensed with before this normal period of service has terminated by reason of misconduct on his part, or otherwise."

It seems to us that these observations are merely 'obiter' and, at any rate, they are not supported by any reasoning. In our view, therefore, the petitioner cannot invoke the provisions of Article 311 of the Constitution in so far as his main relief is concerned.

9. We would next refer to the "Army Instructions (India)". Rule 212 thereof applies to

[1] 1895 Ac 229 at p. 234
[3] AIR 1951 All 793
[2] AIR 1950 Lah 59

the civilians paid from Defence services, whether they are in permanent or temporary service of the Government or whether they are holding gazetted or non-gazetted posts. Among the penalties which could be imposed upon a Government servant for misconduct is reduction to a lower post as is set out in sub-rule 3(iii) of R. 212. Rule 212(6) provides that no order of dismissal, removal

or reduction would be passed on a Government servant unless he has been informed in writing of the grounds on which it is proposed to take action, and he has been afforded an adequate opportunity for defending himself. If it is established that this clause applies, then the petitioner is entitled to a relief from this Court. In our opinion, however, Rule 212(3) is not applicable. It is said that the reasons which the authorities have given for not continuing the petitioner in a higher post are analogous to what is stated in sub-rules (4) and (5) and that therefore in the light of the reasons given by the authorities, the
reversion of the petitioner is by way of penalty. Sub-rules (4) and (5) read thus :

> "4. Neglect of duty, inattention or disobedience renders a Government servant liable so reduction from a higher to a lower grade.
> 5. Continued and wilful neglect or disobedience, gross inefficiency, fraud dishonesty, gross misconduct and offences involving moral disgrace should be visited with dismissal or removal according as it is considered necessary or not to bar an individual from re-employment."

10. No doubt, the authorities have said that the petitioner had been negligent in the performance of his duties and that he has also disobeyed certain orders and instructions. But when they said so they did not propose to penalise him in any way for his actions. All that they thought necessary to do, in view of the shortcomings in the petitioner, was not to continue him in the higher post. In our opinion, this does not amount to inflicting penalty on a person for his shortcomings, in the strict sense of the word 'penalty'. Penalty, as we understand it, is necessarily by way of retribution or correction. Where an act is not intended to be either by way of retribution or correction, it cannot be regarded as a penalty at all. If the Departmental Promotion Committee declined to approve of the petitioner's promotion because of some shortcomings which it found in his work and suggested his reversion to the substantive post, its action cannot be characterized either as by way of retribution or of correction. We are, therefore, of the opinion that even R. 212 of the Army Instructions is of little assistance to the petitioner.

11. Thus the action of the authorities to whom the petitioner is subordinate is within the law and we cannot assist the petitioner in any way. We, however, feel impelled to observe that the way in which the petitioner's case has been dealt with by the authorities has left an impression on his mind that he has not been given a fair deal. There is at least a semblance of justification for this. In the interest, not only of the employees of Government but also in that of the Administration itself, we think that it is necessary for the authorities concerned to observe the law and the rules not merely in form but also in spirit. Where that has not been done, the error can be easily rectified by a reconsideration of the matter after hearing the employee who feels aggrieved by the action taken against him. Such a course, instead of showing any weakness on the part of the authorities, will not only clear them of a charge of lack of sympathy for their subordinates but would go a long way towards promoting confidence in the mind of the subordinates in the sense of justice and fairplay on the part of their superiors.

12. The second prayer in the petition is for a declaration that the confidential report of the Senior Barrack Officer for the year 1950 is an after-thought. Even if we have the power to grant such a declaration, we are afraid we are unable to grant one because the material which has been placed before us does not justify our doing so.

13. The third prayer is merely a consequential one. As the first two are rejected, the question of granting the third one does not arise.

14. Though we dismiss the petition, we do not think that we should award any costs to the Government. The petitioner is entitled to the refund of the outstanding amount of security deposited by him.
Order accordingly.