(1962) 05 P&H CK 0003

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Sohan Singh (Dr.)		APPELLANT
	Vs	
State of Panjab		RESPONDENT

Date of Decision: May 23, 1962

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 80
- Constitution of India, 1950 - Article 16, 226, 310, 311

Citation: (1962) 2 LLJ 725

Hon'ble Judges: Falshaw, C.J; Tek Chand, J

Bench: Division Bench

Judgement

Tek Chand, J.

Dr. Sohan Singh has instituted the present suit for a declaration that the orders (vide memo. No. 142710-CH-4HB-56/9713 dated 22 November 1956; by the Punjab Government reducing the seniority of the plaintiff from No. 9 to 15 in the revised list of Civil Assistant Surgeons, Class I (Gazetted), in the Punjab Civil Medical Service, Class II, received by the plaintiff under No. 86-90-8410/MG dated 28 December 1956, endorsement No. 87-E.L., dated 4 January 1957, is illegal, ultra vires, arbitrary and against rules and conditions of the services of the plaintiff and that the plaintiff''s rank is at No. 9 in the said list.

2. The facts as stated in the plaint are that in 1940 the plaintiff was recruited to the Punjab Medical Service, Class II, and was confirmed with effect from 18 April 1941 in the permanent vacancy, and his seniority was fixed subsequently on the basis of the date of his confirmation in accordance with the recruitment and conditions of service rules. The plaintiff''s name continued to appear at serial No. 9 in the civil list published from time to time till 1 January 1950.

3. In 1941 the Punjab Government invited applications for recruitment of 18 posts of Assistant Surgeons in the Punjab Civil Medical Service, Class II (Men''s Branch), with

an express condition that the candidates should be willing to offer themselves for military duty if required by the Punjab Government. Those not willing would be employed temporarily and only for the duration of the war. Later on [vide letter No. 2678/225/3-M/41/32638 dated 13 June 1941, from the Secretary to Government of Punjab, Medical and Local Government Department, to the Secretary to the Government of India, Defence Department (Army Branch)], it was stated that in order to encourage the medical officers, who were already in the Punjab Civil Medical Service, to offer themselves for military duty, the Government of the Punjab bad decided to give concession that if an Assistant Surgeon in permanent employment offers himself and is called for military duty, then the period spent by such an Assistant Surgeon on proved active service while on military duty, would count double for pay and promotion in the Civil Medical Department.

4. The grievance of the plaintiff-petitioner is that his seniority has been altered without justification to his disadvantage and brought down from serial No. 9 to 15 in 1951. On 17 July 1954, a notice u/s 80, Civil Procedure Code, was given to the Government. In reply, the Director of Health Services, Punjab (vide his letter No. 5929/COM/ dated 1 November 1954), assured the plaintiff that the alterations in the seniority list were merely tentative and before final decision is taken in the matter adequate opportunity would be given to him and to others interested to represent their cases for purposes of refixing their seniority. These assurances, it was alleged, have not materialized and no opportunity, though promised, was ever granted.

5. On 6 July 1954. the protest of the plaintiff was rejected by the defendant without giving him any opportunity of being heard. On 5 May 1955, his seniority was reduced further. The petitioner moved this Court under Article 226 of the Constitution by Civil Writ Petition No. 1 of 1955, but the same was dismissed in limine on 5 January 1955. Petition under Article 136(1)(c) for leave to appeal to the Supreme Court was also dismissed on 12 May 1956, and the Supreme Court refused to grant him special leave to appeal. On 4 January 1957, Government''s decision was communicated to the plaintiff whereby his name in the seniority list which had been put at No. IB was again placed at No. 9 on revision. The plaintiff is not satisfied with this revision. The plaintiff maintains that the revision of the seniority list is arbitrary and has resulted in recurring loss and damages to him. In these circumstances, the plaintiff has prayed for a decree for declaration as indicated above.

6. The defendant does not admit the plaintiff''s claim and the parties'' pleadings gave rise to the following issues:

(1) Whether the plaintiff''s name appeared at serial No. 9 in order of seniority in the cadre of the Punjab Civil Medical Service, Class II, in the civil lists published from time to time till 1 January 1950?

(2) If issue (1) is proved, then does the fixation of seniority of the plaintiff at aerial No. 15 in the said list tantamount to reduction in rank within the meaning of Article

311(2) of the Constitution of India?

(3) If issue (2) is proved, then was the plaintiff not given a reasonable opportunity to show cause and is the fixation of his seniority at serial No. 15 in excess of the powers of the Punjab Government and ultra vires of the Constitution of India?

(4) Has this Court no jurisdiction to try this suit?

(5) Is the suit time-barred?

(6) Whether the Punjab Government decision contained in their letter No. 2678/225/S-M/41/32638 dated 13 Jane 1941 violates Article 16 of the Constitution of India?

(7) Whether the letter referred to in issue (6) is not applicable to the conditions of service of the plaintiff and does not form a part thereof on the grounds alleged in Paras. 11 (a) to (f)?

(8) If issue (7) is proved, then does the letter under reference empower the Punjab Government to give benefit of double service to the members of the Punjab Civil Medical Service who were not recruited before the letter was issued?

(9) Are the orders fixing the seniority of the plaintiff in contravention of Fundamental Rule 12(c) and its effect?

7. The senior Sub-Judge dismissed the plaintiff''s suit with costs on 3 January 1958. The first issue was decided in plaintiff''s favour end on the second issue the learned Senior Sub-Judge held that showing the name of the plaintiff at serial No. 15 did not amount to reduction in rank and did not involve any violation of the guarantee under Article 311. The third issue consequently did not arise and the issue (4) was not pressed. On the issue (5) was held that the plaintiff''s suit was time-barred. The issue (6) was not pressed at the time of arguments as stated by the trial Court. The issue (7) was decided against the defendant and the issue (8) against the plaintiff. The issue (9) was not pressed. Against the dismissal of his suit, the plaintiff has come up to this Court in this appeal.

8. In the meanwhile, a communication was received by the plaintiff (vide No. 1335-5HBI-60/31486 dated 12 July 1960), from the Secretary to Government, Punjab Medical and Public Health Department, stating inter alia that the seniority list was being revised as per annexure B after withdrawing the benefit wrongly given previously. According to annexure B, the serial number of the plaintiff was shown at No. 1. In other words, according to this letter, the stand taken by the plaintiff was accepted by the Government. In this appeal, the plaintiff filed an affidavit, dated 27 March 1961, stating that the Government''s decision contained in the memorandum referred to above had not been implemented so far and he thought that the Government was awaiting the decision of this appeal. In the counter-affidavit of Sri S.S. Grewal, I.A.S., Secretary to Government, Punjab,'' Medical and Health

Department, the first paragraph of the plaintiff''s affidavit was con-framed and it was stated that the memorandum along with annexures A and B had been received. The second paragraph of the plaintiff''s affidavit was denied wherein it was alleged that Government''s decision had not been implemented. As the denial was cryptic and without any explanation, a further affidavit was submitted by Sri Grewal clarifying the former affidavit. He deposed in this affidavit that the denial in his affidavit that related to averment of the plaintiff appellant that the Government appeared to be awaiting the decision of the appeal. He further deposed that memorandum No. 1335-5 HBI-60/31486 dated 12 July 1960, contained tentative decision of the Government which had not been finalized so far, the matter being still under consideration.

9. This case had come up before this Bench in September 1961 when was heard in part. The case was adjourned because it was conceded that the Punjab Government had accepted the point of view of the plaintiff and that it would soon implement its decision to place the plaintiff at serial No. 1 in the seniority list. This appeal again came up before us on 4 May 1962. Learned Counsel for the Punjab State submitted that the Government had not taken any decision be far and desired that the matter be disposed of by this Court after hearing arguments. This attitude of the Punjab State is not intelligible to us. No reason has been assigned as to why the decision already taken by the Punjab Government in plaintiff''s favour has been deferred or is not being implemented. Thus delay has no doubt been to the serious detriment of the plaintiff through no fault of his. In the circumstances, this Bench had no alternative but to hear arguments and dispose of the appeal on the points arising.

10. The first question raised by the Punjab State is that the plaintiff''s suit is barred by time. The trial Court noticed the fact that the plaintiff was downgraded in the seniority list because the Government had given the benefit of double service to those who had put in military service in accordance with its letter dated 13 June 1941, Ex. P.41. According to the learned Sub-Judge, the cause of action accrued to the plaintiff not when the seniority was revised but when the letter was issued by the Government laying down the policy, on 13 June 1941, Ex. P. 41. Reference was made by the trial Court to the plaintiff''s representation dated 30 November 1955, Ex. P.7, addressed to the Chief Minister, Punjab, wherein he had made a grievance that he had been deprived of his chance of promotion as Civil Surgeon in 1950. Reference was also made to another representation of the plaintiff, dated 30 October 1956, Ex. P 21, in which he had said that he was wrongfully reduced in 1951. It was also said that In the plaint he had stated that in the civil list corrected upto 1 January 1951, his name had been brought down from serial No. 9 to serial No. 15. The present suit was instituted on 11 March 1957, and on this the trial Court, held that it was time-barred. It was not noticed by the trial Court that the seniority list was published on 16 September 1961, and, therefore, this suit was well within six years of the accrual of cause of action. The plaintiff had no cause of action till the seniority lilt was published and not merely decided upon. It was also submitted by

the learned counsel for the plaintiff that there were other admissions of the Punjab State which bring his suit within time, but it sot necessary to refer to them as in our view this suit has been filed within the period allowed by Article 120 of the Limitation Act.

11. On the question arising out of the application of Article 310 of the Constitution. Mr. K.L. Kapur has placed reliance upon a Full Bench decision of the Mysore High Court in Malleshappa Hanamappa Vs. State of Mysore, and a Single Bench decision of Allahabad High Court in Lakhan Vaish Vs. State, . In Lakhan Vaish case (vide supra) it was held that in the exercise of pleasure under Article 310, it may be open to the President to terminate the services of the employees but the fixation of scales cannot be considered as exercise of pleasure under this article. Distinction was drawn between the tenure of office of the civil servant and the conditions of service. The Full Bench of the Mysore High Court also held that the expression "during pleasure" in Article 310 relates only to tenure of office of the civil servant and does not relate to the other conditions of service.

12. Learned Counsel representation the State has cited a number of decisions of several High Courts for the contrary view. A Bench of this Court in Didar Singh Cheema v. State of Punjab C.W. No. 349 of 1959 decided on 15 March 1960 expressed the contrary view. Capoor, J., maintained that the alleged breach of service rules did not give to the person aggrieved any cause of action. Relying upon the view taken in A. Sambandhan v. Regional Trafic Superintendent (Personnel), Tiruchirappalli, Southern Railway AIR 1958 Mad. 243 the learned Judge was of the opinion that a rule framed by the executive authority to determine seniority relates to one of the conditions of service of civil servant and its violation is not an actionable wrong for which the Court can grant redress. Referring to the decision of the Supreme Court in The State of Bihar Vs. Abdul Majid, the view taken by the Division Bench was that that case limited Itself to the question whether a suit lay against the State for arrears of salary, and did not lay down any general proposition that a breach of statutory rules regulating the conditions of service (not being a case of dismissal or removal or reduction in rank) would per se be Justiciable. Capoor, J., thought that Abdul Majid case did not alter the existing law in this respect as laid down by the Privy Council. The learned Judge then remarked that it would indeed be anomalous to hold that while fin the absence of special constitutional provision or a special contract to the contrary a public servant baa no remedy by law against the order of dismissal, be should be allowed to have snob a remedy against an order for any supposed breach of service rules such as those fixing seniority. After reviewing the reported decisions, the petition was dismissed and the preliminary objection of the State prevailed. The next case relied upon by the learned Counsel for the S. Framji Vs. Union of India, Obagla, C.J., who delivered the judgment, observed:

Article 310 is made subject to any provision expressly made in the Constitution itself. That is the only exception which the Constitution bas permitted to that article.

Unless, therefore, we find a specific provision in some part of the Constitution giving to a Government servant a tenure different from the tenure provided for in Article 310, every member of the civil service holds his office during the pleasure of the President.

13. The learned Chief Justice further observed:

It is said that in India the President has no prerogatives; he is not supreme, but what is supreme in our country is the Constitution, and, therefore, if the Constitution confers any rights, those rights cannot be countered by suggeting that there are privileges or prerogatives higher than the Constitution itself. It seems to us that that argument is without much substance. When the Constitution of India accepts and adopts a doctrine well-known to the common law of England, the doctrine that a civil servant holds his office at the pleasure of the Crown, it is futile to suggest that the Constitution-makers did not wish that doctrine to have full sway, it must not be forgotten that that doctrine does not owe its origin to the sanctity in which the Crown is held in England nor to its absolute power or to its prerogatives. That doctrine is based upon principles of public policy and there Is no reason to suggest that principles of public policy which have endured for hundreds of years in England should not have been accepted by us and Incorporated in our own Constitution.

14. Our attention was also drawn to A. Sambandhan Vs. Regional Traffic Superintendent Southern Rly. Tiruchirapalli and Others, which a decision of a Letters Patent Bench. This was question in which the seniority of a railway servant was involved. It was held that even on the assumption that the seniority of a railway servant had been adversely affected, such a servant had no justiciable right which could be enforced by the High Court by the Issue of a writ. Relying upon AIR 1937 31 (Privy Council) and AIR 1937 27 (Privy Council) and referring to Parshotam Lal Dhingra Vs. Union of India (UOI), it observed:

Rules of seniority, no doubt, are based on certain equitable principles but they also depend on certain principles of administrative practice which may in certain cases lead to hardship. We do not think that we can decide the case against the appellant on this ground.

15. This was an appeal from the decision of Rajagopalan, J., in Gada Venkata Subbayya Vs. Koyallamudi Venkanna, , who had expressed the view that violation of a rule framed by the executive authority to determine seniority as one of the conditions of service of a civil servant was not an actionable wrong for which the Court could grant redress. To bold that Court bad that jurisdiction would constitute an inroad on the concept that the civil servant holds office during the pleasure of the executive not warranted by the terms of the Constitution. Reference may also be made to N. Devasahayam Vs. The State of Madras and Others, , in which similar view was taken. So far as this Court is concerned, reference was also made to three Single Bench decisions in Des Raj Kirpa Ram v. Punjab State AIR 1958 P&H. 134 Ram

Sarn Dass Ganda Mal Vs. Union of India (UOI), and Union of India v. D.S. Bajaj (1957) 59 P.L.R. 96, which are decisions by the same learned single Judge, holding that a Government servant who is aggrieved from the Government''s failure to observe service rules bas no cause of action. Chopra, J., in Gurbachan Singh v. State of Pepsu AIR 1956 P&H 26, also expressed the view chat the right of the Government to regulate or determine inter se seniority of its employees is implicit in the theory that the civil servants of a State hold office at the pleasure of the Governor or the Rajpramukh, as the case may be.

16. It thus appears that there is a great preponderance in favour of the view that to such a case Article 310 of the Constitution is attracted and the matter is not justiciable.

17. At this state may also refer to some English decisions.

18. In Shenton v. Simith 1895 A.C. 229 the respondent had been gazetted without any special contract, to act temporarily as medical officer during the absence on leave of the actual holder of that office. He was dismissed by the Government before the leave had expired. It was held in that case that he had no cause of action. A Colonial Government was stated to be on the same footing as the Home Government as to the employment and dismissal of servants of the Crown and in the absence of special contract, they held their offices during the pleasure of the Crown. Lord Hobhouse observed:

They (their lordships) consider that unless in special cases where it is otherwise provided, servants of the Grown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law suit, but by an appeal of an official or political kind.

19. In Dunn v. The Queen 1896 I.Q.B.D. 116 Lord Esher, M.R., approved of the decision in Shenton v. Smith 1895 A.C. 229 and cited with approval the following observations of Lord Watson in De Dohse v. Reg (1886) 8 T.L.R. 114, is that case Lord Watson bad said:

In the first place it appears to me that no concluded contract is disclosed in the statements contained in this petition of right; and in the second place I am of opinion that such a concluded contract, if it had been made, must have bean held to have imported into it the condition that the Crown has the power to dismiss. Farther, I am of opinion that, if any authority representing the Crown ware to exclude such a power by express stipulation that would be a violation of the public policy of the country and could not derogate from the power of the Crown.

20. In Gould v. Stuart 1896 A.C. 575 the Privy Council on appeal from the Supreme Court of New South Wales, Australia, expressed the view that the Crown had by law,

whether in England or in New South Wales, power to dismiss at pleasure either its civil or military officer, a condition to that effect being implied on the terms of the contract of service except where it is otherwise expressly provided. In Hales v. The King (1918) 34 T.L.R. 589, Pickfort, L.J., in his judgment said that there was a custom that a servant of the Crown held his employment only during the pleasure of the Crown and even If a special contract to the contrary could be proved, it could not bind the Crown. To the same effect are observations in Denning v. Secretary of State for India in Council (1920) 37 ITR 133. In Rodwell v. Thomas (1914) I.K.B. 596, Tucker, J., said:

The authorities show, not only that prima facie an established civil servant can be dismissed at pleasure, but that the Court will disregard any term of his contract expressly providing for employment for a specified time or that his employment can only be terminated in specified ways. The Court regards such a provision in a contract as a clog on the rig tic of the Crown to dismiss at pleasure at any time.

21. The following observations of Rowlatt, J.; in Rederiaktiebolagot Amphitrite v. The King (1921) 3 K.B. 500 are in point:

It (the Government) cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus in the case of employment of public servants it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ a ay person except upon the terms that he is dismissible at the Crown''a pleasure the reason being that it is in the Interests of the community that the Ministers for the this being advising the Crown should be able to dispense with the services of its employees if they think it desirable.

22. In Lucas v. Lucas 1943 Pro. 63, Piloher, J., said:

All the ab7ove authorities which deal with actions for wrongful dismissal appear to have bean decided on the ground that the Crown servant''s appointment or contract of employment, even though it may have been expressed to be for a period of years, was subject to the overriding right of the Crown to terminate the service, and consequently, the right to salary, at pleasure.

23. It will thus be seen that in England a servant of the Crown may be dismissed at plea-Bare and has no remedy, but in fact his tenure Is secure, "pensions and superannuation payments are authorized by statute, but no recourse can be had to the Courts to enforce payment of pensions, or to afford a remedy for wrongful dismissal either against the brown, the Treasury or the head of the department concerned." [Vide Wade and Phillip''s Constitutional Law, 5th Edo., p. 177.] [See also Anson''s Law and Custom of the Constitution, Vol. II, The Crown Part I, p. 221, and Constitutional Law by Keith, p. 196.]

24. On the question of justiciability where matters of seniority are concerned, as in the present case, the English decisions, because if their paucity, do not lend support except analogy. Doctrine of durante bene placito so deep-rooted and well established that it unthinkable for a Government servant to agitate such a matter in a Court of law. Though theoretically the civil servant appears to be without a remedy, but in actual practice, the tenure of his service is fully secured and hardly any occasion arises for him to feel perturbed. Nevertheless, the anxiety expressed by Sorutton. L.J., in Marshal Shipping Co. v. Board of Trade (1923) 2 K.B.D. 343 is not without significance:

I personally feel that the whole subject of proceedings against Government departments is in a very unsatisfactory state. I feel that it is of great public importance that there should be prompt and efficient means of calling in question the legality of the arising of Government departments which, owing to the great national emergencies arising out of the war, have been inclined to take action than they considered necessary in the interests of the State without any nice consideration of the question whether is was legal or not, and I hope than the committee which is now considering the question of proceedings against the Crown will be able to give the subject more effective remedies against Government departments than he has at present.

25. In view of the preponderance of the decisions, this appeal cannot succeed and this is so despite the fact that the Government has admitted the correctness of the appellant''s contention regarding his claim to seniority. While dismissing the appeal, this Court expects that Government''s commitment to the appellant will be honoured. In the circumstances of this case, the parties will bear their own costs of this appeal.

Falshaw, C.J.

26. I agree.