Ashok Kumar Choudhury Vs Union of India (UOI) and Others

Court: Gauhati High Court

Date of Decision: Aug. 1, 1995

Acts Referred: Constitution of India, 1950 â€" Article 12, 226, 311(2)

Citation: (1997) 3 GLR 257

Hon'ble Judges: D.N. Baruah, J

Bench: Single Bench

Advocate: A.R. Borthakur, A.K. Thakur, A.K. Bora and N.C. Goswami, for the Appellant; P. Prasad and R.P. Kakati, for the Respondent

Final Decision: Allowed

Judgement

D.N. Baruah, J.
In this application under Article 226 of the Constitution of India, the Petitioner has challenged the Annexure-D order

dated 25.1.94 issued by the Managing Director, Respondent No. 3, whereby the Petitioner was dismissed from service. The Petitioner has also

prayed for issuance of appropriate writ or direction to the Respondents to give all benefits of service from the date of dismissal.

2. The facts, as stated by the Petitioner, are as follows:

In pursuance of an advertisement published in the news paper for the post of Deputy General Manager in the Tribal Cooperative Marketing,

Development Feration of India Ltd. (for short the ''TRIFED) the Petitioner applied for the said post Interview was held and the Petitioner was

selected. Thereafter, the Petitioner was appointed Deputy General Manager by Annexure-A letter dated 22.9.92 issued by the Respondent No. 2,

the General Manager (Personnel and Administration) TRIFED. The Petitioner joined duties in TRIFED Zonal office at Guwahati on 1.10.92. His

appointment was on probation for a period of one year from the date of his joining which could be extended for a further period at the discretion of

the appointing Authority. By Annexure-A/1 order the probationary period of the Petitioner was extended for a further period of six months with

effect from 22.9.93. Thereafter, by Annexure-B order dated 25.1.94 the Petitioner was dismissed from service. Petitioner at the time of his

appointment submitted certificates showing that he passed AMIE from the Institution of Engineers (India). He also passed MBA from the

University of Illionois at Chicago. He also stated that lie belonged to Scheduled Caste Community. However, on verification during the period of

his probation the authorities came to know that these informations were not correct. According to the Petitioner, all the information supplied by him

were correct and he belongs to Barar Community of Punjab, which is a recognised Scheduled Caste Community. In spite of that by Annexure-B

order dated 25.1.94 the Petitioner was dismissed from service. According to the Petitioner, the order of dismissal was illegal and arbitrary and the

same was passed only to harass the Petitioner. Therefore, the order of dismissal is liable to be set aside. Hence the present petition.

3. Respondents have filed affidavit-in-opposition and the Petitioner also filed affidavit-in-reply.

In the affidavit-in-opposition filed by the Respondents it has been stated that the petition is not maintainable as the TRIFED is not a State or an

instrumentality of the State within the meaning of Article 12 of the Constitution of India. The Government of India neither have substantial control

over the management of TRIFED nor it has been funded by the Government of India. Therefore, the TRIFED is not amenable to writ jurisdiction.

On merit the Respondents have stated that on enquiry made by the Secretary of the TRIFED, the Academic Adviser, Graduate Professional

Programme of the University of Illionois vide letter dated 20.10.93 stated that the Petitioner did not receive MBA Degree from the said University

at Chicago or from Urbana and the Petitioner never attended in either of the Institutions. The Institute of Engineers (India) vide Annexure-C letter

dated 26.8.93 also informed the Asstt. General Manager thus:

It is confirmed that the candidate referred to above appeared in the Section A examination in November 1966 with Roll No. 5382, but could not

secure final pass in the said examination. His marksheet, therefore, appears to have been forged.

Further since he did not pass in Section-A examination, the question of his appearing in Section B Examination does not arise...

4. The Zonal Manager, TRIFED, Guwahati was added as party Respondent No. 5 vide order dated 19.8.94. This Respondent also filed an

Affidavit on 17.1.95. The Petitioner also filed an additional affidavit in reply reiterating the averments made in the petition.

5. I have heard both sides.

Mr. A.R. Borthakur, learned Counsel appearing on behalf of the Petitioner has submitted that the allegations made in the Annexure-B dismissal

order are frivolous and violative of Article 311(2) of the Constitution of India. The order was passed without giving any opportunity of hearing and

without any authority of law. The learned Counsel further submitted that the TRIFED is an instrumentality of State within the meaning of Article 12

of the Constitution. It is administered, managed and controlled by the Government of India. The affairs of the TRIFED are run and managed by

Managing Director and other Directors, who are appointed by the Government of India. Seven Directors are elected from amongest the State

Level Tribal Cooperative Federation/Corporations run by the respective State. The entire investment in TRIFED is from Ministry of Welfare,

Government of India. On perusal of the Bye-laws of the TRIFED it will indicate that the TRIFED is an instrumentality of State as envisages in

Article 12 of the Constitution.

6. Mr. P. Prasad, learned Counsel for the Respondents has on the other hand submitted that the TRIFED does not come within the meaning of

Article 12 of the Constitution and therefore, is not amenable to the writ jurisdiction. According to Mr. Prasad the Petitioner was appointed on

probation and he remained as such till the date of his dismissal from service. In the facts and circumstances of the case he was not entitled to the

protection under Article 311 (2) of the Constitution in view of the fact that he was dismissed from service for non-possessing the requisite

qualification. As per Bye-laws the activities of the TRIFED are not in the nature of Governmental functions and duties of the TRIFED have never

been performed by the Governmental Agencies. Clause 3 of the Bye-laws deals with the objectives of the TRIFED. Clause 3.2. deals with the

functions of TRIFED and Clause 4 deals with membership and provides that membership shall be open to State Level Tribal Cooperative

Federation/Corporations, State Level Organisation dealing in minor forest produce collected by tribals, any other specialised cooperation

commodity Federations dealing in tribal produce, Government of India, National Cooperative Corporation, National Agricultural Cooperative

Marketing Federation etc. Apart from the above members, there can be nominal members from the category of persons/societies/institution not

covered by Bye-law 4.1 with whom TRIFED is likely to do business or store goods or an ange sales thereof. Capital raising has been dealt with

under Clause 8. On perusal of the Bye-laws it is clear that TRIFED does hot come within the meaning of Article 12 of the Constitution of India

and the TRIFED is an autonomous body.

7. On merit, Mr. Prasad has submitted that the Petitioner has not come with clean hands, therefore, he is not entitled to get any equitable relief

under Article 226 of the Constitution of India as he is guilty of suppression of material facts. Mr. Prasad has supported the order of dismissal.

According to him, he is not entitled to be heard before passing the order of dismissal, as the dismissal order was not passed by way of punishment.

This order was passed because the Petitioner did not have he requisite qualification. Provisions of Article 311(2) of the Constitution in his case are

not attracted.

8. On the rival contentions of the parties, the following questions fail for determination:

Whether the TRIFED is an instrumentality of the ''State'' within the meaning of Article 12 of the Constitution; and whether the impugned Annexure-

B order of dismissal is justified.

9. ""State"", as per Article 12 of the Constitution includes the Government and Parliament of India and the Government and the Legislature of each

of the States and all local or other authorities within the territory of India or under the control of the Govt. of India. The definition of State as per

Article 12 is only for the purpose of application of the provisions contained in Part-III of the Constitution. Therefore, even though a body of

persons may not constitute ''State'' within the definition, a writ under Article 226 may lie against it on non-constitutional grounds or on ground of

contravention of some provision of the Constitution outside part III, where such body has a public duty to perform or where its acts are supported

by the State or public officials. The expression ''other authorities'' referred in the said Article, means instrumentalities or agencies of the

Government and Government Departments. But every instrumentality of the Government is not necessarily a Government Department.

10. Every autonomous body having some nexus with the Government may not be a State. Finance or control by the Government may indicate that

it is an instrumentality of the Government but it is not always conclusive test to come to the conclusion that it is a State. The finance or control of

the Government itself may not be conclusive test to determine whether the body is an instrumentality of the State or Agency of the Government.

Even in general principles, there is no litmus test as to whether a particular body or agency is an instrumentality or agency of the State. The powers,

functions, finances and control of the Government are however some of the indicating factors for such determination. Where the financial assistance

from the Stale is so much as to meet almost entire expenditure of the institution, or the share capital of the corporation is completely held by the

Government, it would give some indication of the body having Governmental character. Existence of deep and pervasive State control is a relevant

consideration for determining as to whether the function of the institution are of public importance and related to Governmental functions. These are

merely indicative indicia and are by no means conclusive or clinching in any case. The combination of State aid coupled with an unusual degree of

control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the State may

largely point out that the body is ""State"". But that does not mean that Article 12 should be stretched so as to bring in every autonomous body

which has some nexus with the Government within the sweep of the expression ""State"". A wide enlargement of the meaning must be tempered by a

wise limitation. It must not be lost sight of that in the modem concept of Welfare State, independent institution, corporation and agency are

generally subject to State control.

11. In Chander Mohan Khanna Vs. The National Council of Educational Research and Training and other[OVERRULED], the Supreme Court

observed thus:

There are only general principles but not exhaustive tests to determine whether a body is an instrumentality or agency of the government. Even in

general principles, there is no cut and dried formula which would provide correct division of bodies into those which are instrumentalities or

agencies of the government and those which are not. The powers, functions, finances and control of the government are some of the indicating

factors to answer the question whether a body is ""State"" or not. Each case should be handled with care and caution. Where the financial assistance

from the State is so much as to meet almost entire expenditure of the institution, or the share capital of the corporation is completely held by the

government, it would afford some indication of the body being impregnated with governmental character. It may be a relevant factor if the

institution or the corporation enjoys monopoly status which is State conferred or State protected. Existence of deep and pervasive State control

may afford an indication. If the functions of the institution are of public importance and related to governmental functions, it would also be a

relevant factor. These are merely indicative indicia and are by no means conclusive or clinching in any case.

12. In Sahabuddin Choudhury v. State of Assam and Ors. 1993 (2) GLJ 51 a Full Bench of this Court after examining several cases observed that

to hold that the Society is an instrumentality of the State within the meaning of Article 12 of the Constitution it must appear that the Government has

pervasive control over the functioning and finance of the Society. If that is absent it cannot be said to be an instrumentality of the State. In the said

case, the Full Bench considered the position of Assam Cadre Management Cooperative Society Ltd. and on examination the Court did not find

that the Society was dependent wholly or mainly on financial assistance of the Government. The Society was subject to the provisions of the

Assam Cooperative Societies Act, and therefore, in some respects it is subject to jurisdiction of the Registrar of Cooperative Societies and the

State Government. The Full Bench further held that it could not by any stretch of imagination be declared that all Cooperative Societies in the State

of Assam are instrumentalities of State without reference to the Constitution, status, nature and functioning of each society. It is not as if the Society

renders an important public service being obligatory function of the State. The object of the society is to train and provide secretaries for Gaon

Panchayat Level Cooperative Societies. Ordinarily it is for each Society to select and appoint its Secretary. The Assam Cadre Management

Cooperative Society Ltd. performs this function on behalf of other societies and for this purpose levies contribution from those societies and takes

assistance from the financing banks and State Government. State Government was obliged to subsidies the cost of Secretaries for a period of three

years on a tapering basis. The State Government may also step into grant assistance after this period to enable the society to tide over difficulty

caused by deficit. The General Body will not be dominated by the State Government as membership is open to various other bodies including

commercial Banks and Cooperative Societies. After considering all the aspect, the Full Bench held that Assam Cadre Management Cooperative

Society Ltd. was not a State or instrumentality within the meaning of Article 12 of the Constitution and the Society was not amenable to writ

jurisdiction of this Court.

13. From the above decisions, the law is now well settled that in order to treat a particular local authority or agency as an instrumentality of the

State there must be pervasive control over the functioning and finance of the institution. In the instant case, from the Bye-laws of the TRIFED it

appears that the TRIFED is a registered Multi-State Cooperative Society under the provisions of Multi State Cooperative Societies Act, 1984.

The learned Counsel for the Petitioner has drawn my attention to the Bye-laws of the TRIFED. I have perused the Bye-laws. From the Bye-laws it

appears that the Managing Director and the Board of Directors have all control over the administration of TRIFED. The Managing Director is

appointed with the prior approval of the Government of India by the Board of Directors. He will be the Chief Executive Officer of the TRIFED

and he conducts the business of the Federation and also exercises control over the affairs and administration of TRIFED subject to the decision of

Board or General Body. The Managing Director shall also exercise control and supervision on the administration of Fereration and conduct the

affairs of the Federation in conformity with the Act, Rules and Bye-Laws. The Managing Director can be appointed only with the prior approval of

the Government of India and seven more Directors are also appointed by the Government of India and others are to be elected from amongst

State Level Tribal Cooperative Federations/Corporations, which are run by the State Government for the welfare of the tribal population of the

respective States. The Managing Director and other Directors have all independence in the running of the affairs of TRIFED, The membership is

opened to the Corporation/Federation as mentioned in Clause 4 of the Bye-laws only.

14. In paragraph 3 of the affidavit-in-reply filed by the Petitioner on 14.11.94 the Petitioner has specifically stated that as per Audited Annual

Reports of TRIFED for the year 1990-91 and 1992-93 the entire investment in TRIFED was from the Ministry of Welfare, Government of India

and only 1% finance was from other sources. The Government of India invested about Rs. 18 crores against the total investment of Rs. 18.21

crores in the year 1990-91, Similarly, in the year 1992-93 also the Government of India invested about Rs. 32 crores against the total investment

of Rs. 32.23 crores. The TRIFFD has been set up for implementing the policies and programmes of Ministry of Welfare, Government of India.

Besides, monthly progress and activities report are sent to Ministry of Welfare by the TRIFED for information and monitoring TRIFED. The

Respondents have not been controverted the statements made in the affidavit-in-replv. Copies of the Auditied Annual reports have also been

annexed with the Affidavit-in-reply as Annexure J and J/1. In Annual Report for the year 1992-93 the TRIFED is shown as under the Ministry of

Welfare, Government of India. From all these it appears that substantial portion of the finance comes from the Ministry of Welfare, Government of

India and also from the State Governments. As I stated, the membership is also not open to public and restricted to the organisation/federation as

mentioned in Clause 4 of the Bye-laws of TRIFED. This will show that the Government has all pervasive control over the affairs of the TRIFED.

Under the circumstances mentioned above, I am of the opinion, that the TRIFED is an instrumentality of the State within the meaning of Article 12

of the Constitution and, therefore, it is amenable to writ jurisdiction.

15. The next question is whether the order of dismissal is justified under the facts and circumstances of the case. The Petitioner was appointed after

Interview. He submitted certain certificates. During the probationary period of the Petitioner, the authorities made enquiry regarding genuineness of

the certificates submitted by the Petitioner and on enquiry the authority came to the conclusion that the certificates produced by the Petitioner were

not genuine, Therefore, by Annexure-B order the Petitioner was dismissed from service with immediate effect. In the Annexure-B order dated

25.1.94 the Managing Director stated thus:

From the above it is clear that Shri A.K. Chaudhary has defrauded this Federation by producing the forged degree certificate and forged mark

sheet. There is all probability that his caste certificate might also be a forged document, since the name in his caste certificate and the name in his

various school certificates is not tallying. Under these circumstances it is clear that Shri A.K. Choudhary, Zonal Manager, Guwahati has lefrauded

and cheated this Federation for obtaining gainful employment in this Federation fully knowing that the documents he has produced are forged. As a

result of this finding, the said Shri A.K. Chauchary is liable to be dismissed from the service.

Hence he is dismissed from service with immediate effect. Since he was on probation on the date of dismissal no prior notice is necessary and

since he has committed an offence which is punishable under the Indian Penal Code no compensation is payable to him for the absence of notice.

16. It has been argued by Mr. P. Prasad, learned Counsel for the Respondents that the order of dismissal was not by way of punishment and he

was removed from service as he has no requisite qualification to hold the post in which he was appointed, therefore, provisions of Article 311(2) of

the Constitution are not attracted.

17. The dismissal procedure may not require to observe all principles of natural justice, and in that case provisions of Article 311(2) of the

Constitution may not be attracted. If a Government servant had no right to hold his post where it was temporary, officiating or on probation, it

would attract Article 311(2) only when it was attended with penal consequences, which constituted the punishment, and not a mere order of

discharge or reversion, unattended with any penal consequences, even though the motive behind it might have been to get rid of him. It is now

settled that "stigma" in an order of discharge of a temporary Government servant, or probationer, compulsory retirement etc. constitutes a penal

consequence, so as to attract Article 311(2) of the Constitution. In the case in hand, the Petitioner was removed from service on the ground of

submitting forged document. In my opinion, this is a stigma attached to the Petitioner, therefore, the provisions of Article 311(2) are definitely

attracted in the instant case.

18. In view of the above, I am of the opinion that Annexure-B order dated 25.1.94 is without jurisdiction, illegal and in utter violation of principles

of natural justice. Accordingly, I set aside the Annexure-B order and the Petitioner shall be deemed to be in service. The Petitioner shall be entitled

to get all consequential benefits.

In the result, the petition is allowed. However, I make no order as to costs.