(1991) 07 CAL CK 0004

Calcutta High Court

Case No: F.M.A. No. 851 of 1989

State of West Bengal and Others	APPELLANT
Vs	
Phanindra Kumar Das	RESPONDENT

Date of Decision: July 10, 1991

Acts Referred:

- Constitution of India, 1950 - Article 310(1), 311, 311(2), 367, 37
- General Clauses Act, 1897 - Section 3(60), 3(8)

Citation: 96 CWN 120

Hon'ble Judges: Ajoy Nath Ray, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: Aninda Mitra and G.S. Dey, for the Appellant; Joyanta Mitra, Bharati Mutsudhi and Kali Ratan Roy, for the Respondent

Final Decision: Allowed

Judgement

A.M. Bhattacharjee, J.

In his judgment appearing hereinafter, my learned brother Ray, J. has decided to dismiss the appeal preferred by the State with costs and I agree with the order proposed. The sombre and solemn declaration in Article 310(1) of the Constitution proclaiming all civil servants to hold their offices during the pleasure of the President or the Governors is a pompous verbiage and a hyperbole. The President or the Governor, meaning thereby the Central Government or the State Government (Vide, Section 3(8) and Section 3(60) of the General Clauses Act, 1897, read with Article 367 of the Constitution), cannot terminate the service of a Civil servant at his will or pleasure. Even a temporary servant or a probationer or one temporarily officiating in a higher post cannot be discharged or reverted back at pleasure, if the foundation of the order of discharge or reversion is some alleged inefficiency, incapacity or any other blameworthy conduct of the servant, without giving the servant, concerned an opportunity of being heard against the proposed action.

2. If the order of reversion of a servant to his substantive or permanent post is absolutely innocuous without any whisper of anything adverse, the Court may not ordinarily go behind the order and send for the official records or "delve into he secretariat files to discover whether some kind of stigma can be inferred on such research", on a mere allegation of the servant to that effect. I say "may not" and "ordinarily", because there are some decisions of the Supreme Court which have taken the view that it is open to the Court to go beyond the order to ascertain its true character by looking at the antecedent circumstances and other relevant materials. While a three-Judge Bench of the Supreme Court in S.P. Vasudeva Vs. State of Haryana and Others, has observed that the "whole position in law is rather confusing", another three-Judge Bench in The State of U.P. Vs. Ram Chandra Trivedi, has asserted that "it Is no longer open to urge that the Constitutional position is not clear".

3. I had the occasion to consider and ascertain in the law on the point in Copal Chandra Koley vs. State (1981 Labour & Industrial Cases 422) and edeavoured to summarise the relevant law and I am glad to find, with the concurrence of my learned brother Ray, J. that the later cases-laws pouring out form our apex Court during the following decade, have not effected any appreciable alteration in the legal position. As I have said in Gopal Chandra Koley (supra, as 425), the principle of law enunciated in the seven-Judge Bench decision of the Supreme Court in Samsher Singh Vs. State of Punjab and Another, providing a large number of earlier decisions, same of which have also been referred to by Ray, J., may be clear, but confusion and contradictions have very often resulted in the application of that principle to the facts in different cases. To quote our ancient Jurist Jamini -- "PRAYOGE HI VIRODHA SYAT.

4. Ray, J. has held in the case at hand, on a consideration of the materials on record, that the foundation, and not merely the motive, for the order of reversion, ex facie innocuous, was some alleged misconduct of the officer. There should be no doubt that, as succinctly put by Ray, J. with his usual forceful felicity, if any misconduct, misbehavior or the like of or relating to the officer was in fact the foundation for the Order of reversion, then the Order shall fall through as being without any foundation in law if the requirements of Article 311(2) are not complied with.

5. It may, however, be every difficult to ascertain with exact precision as to whether, when a temporary servant is discharged by an innocuous order of termination, the factor which led the employer to order termination was merely a motive or really the foundation. Motive is what induces a person to take certain action. Foundation is the basis or the ground on or for which an action is taken, suppose, a temporary servant is found to be absolutely inefficient or unsuitable for the job. His immediate superior sends a written report to that effect to the appointing authority and the latter, after making some enquiry in the matter, agrees with the report and decides to discharge the employee by a more order of termination simpliciter without any

murmur therein about his unsatisfactory conduct or performance. Here, the incapacity of the servant was obviously the factor which induced the employer to take the action and was thus the motive: The incapacity of the servant was also the basis or the ground for the action taken and was therefore the foundation. The motive for the action and the ground or basis for the action may very often have no appreciable distinction and may be so inextricably intertwined as to defy and differentiation, except by indulging in legal verbiage or longomachy.

6. What has weighed most with my learned brother Ray, J. in holding that the alleged misconduct of the employee was the foundation for the Order of termination was the initiation of some sort of disciplinary proceeding against the employee which went upto the level of the Minister and the absence of any thing on the record to show that the same was dropped. This and the various other materials and attending circumstances adverted to by Ray, J. would go to show that such a view is quite reasonable. But I would only add that, even If any other view, namely, the alleged misconduct was merely a motive, and not the foundation, is also possible, this Court in a series of Division Bench decisions in State Bank of India Vs Amal Kumar Sen (1988 Labour & Industrial Cases 1585). Sudhanshu Mohan vs. Life Insurance Corporation (92 CWN 1092) and then in United Bank of India Vs. Rashyan Udyog and others, etc., has consistently held that since the Court, as pointed out by Mathew, J. in Kesavananda Bharati (AIR 1973 SC 1416 at 1949), is mandated by the Constitution, Articles 37, 38, 39A etc., to secure and promote Social and Economic Justice and since Socio-Economic Justice in the present Indian context would mean Justice to the weaker and the poorer, a new juristic principle must inevitably be evolved to the effect that if two views are possible, whether of the (sic) or the law, the view in favour of the weaker or the poorer should be accepted, so that our Constitutional resolve to secure and our Constitutional mandate to promote Socio-Economic Justice are fruitfully and effectively carried out. In the case at has, the employee, since retired locked up in battle with the State must obviously be regarded to be the weaker and the poorer, and therefore even if two views are possible, one holding the alleged misconduct to be the foundation, and the other holding the same to be the mere motive, the former, being favourable to the employee, must be accepted.

7. I accordingly concur in the order proposed by Ray, J. with pleasure and without hesitation.

8. The appeal must be dismissed with appropriate costs. Without filing an affidavit in the Court below inspite of several opportunities given and noted in the judgment by Justice Ajit Kumar Sengupta, (paper book, page 55) the State vehemently pursued this appeal, and relied, by our implicit permission, on their stay petition in the appeal Court, which found its place in the paper book theoretically without necessity or leave, but in practive prevented the matter from going ex parte in any sense of the expression.

9. The writ petitioner (respondent) was reverted to his substantive post in a manner that cast a serious stigma on him. An important paint of the State''s argument before us was that the order of reversion being ex facie without any aspersion, there could be no complaint against an order of more reversions passed without a personal hearing or a two-sided enquiry into the truth of the charges made against the respondent by the show cause letter of 10-2-1983 (part extracted at paper book page 61, top; full text given to us in plain copies and relied upon by both sides at hearing).

10. This approach and argument of State was apparently followed contemporaneously, since the stand taken by the appellant in their stay petition is identical, if not a little more stark; in the eight and ninth paragraphs (pages 82, 83 of the paper book) the stand taken does not Sake note of the legal position that even a person on deputation in a post cannot be reverted with a stigma unless he is first heard; the position in law today is the same for all types of probationary or temporary service or officiation under the State.

11. The Order being without an express stigma is not conclusive. It has to be ascertained in each case whether the non-speaking order has its very foundation some aspersion to the temporary incumbent, or whether the order could merely be suspected as being motivated by the aspersion. In the latter case the Order is good, since such a mere suspicion cannot reasonably be held as any possible detriment to the future career or life of the service holder. Even a future superior officer, having access to all relevant papers, would, in such a case, be unable to link the Order to the aspersion; thus, there would be no stigma, now or ever, just an allegation, of which nobody could certainly be said to have taken any note.

12. I venture to state the above as my reading of the law (and the rationale) on the particular subject, from the several Supreme Court Cases relied upon by the two able and persuasive Senior Advocates on both sides, the cases including those of Jagdish Mitter Vs. The Union of India (UOI), R.S. Dhaba (1969 Vol. 3 SCC 603). K.H. Phadnis Vs. State of Maharashtra, The State of Bihar and Others Vs. Shiva Bhikshuk Mishra, and Oil and Natural Gas Commission and Others Vs. Dr. Md. S. Iskender Ali,

13. Now, in the present case, after the respondent replied to the show cause letter on 11-3-83 (again not in the paper book, but copy given to us), he was told nothing by the State of its officers until 4-10-83, when the impugned reversionary Order was passed. In fact, the enquiry was not at all dropped: the Director of the respondent''s officiating department wrote to his superior on 21-5-83 stating that the respondent was reckless, abused power and lacked responsibility (paper book page 58); on that letter the superior officers and the minister made adverse comments including nothing a possibility of money defalcation (paper book page 61, 62). This led up to a recommendation for reversion and approval by the minister of the same case on 17-9-83 (paper book page 63). If this adverse opinion is not the very foundation of the order of reversion, then what is ? Any future employer looking into these files

will think thrice before putting trust in the respondent; it may be mentioned here that the respondent has already retired in 1989.

14. Very unfortunately the above foundation of the reversion Order was not explained in an affidavit by the State. Justice Sengupta called for the file. Serving together in the cause of Justice, I am grateful to his lordship that his lordship did.

15. I must also state that the case of reversion with stigma is not perfectly made out in the petition. The crucial letter of 10-2-83 is not annexed or even mentioned; the word stigma is used only once in the twentyfirst paragraph. But still, on the whole, the seeds of the case are there in the petition, in such abundance as would make its dismissal undoubtedly unjust.

16. The above discussion is enough for the disposal of the appeal. His Lordship in the Court below has also taken the view that in the totality of circumstances, the respondent was not really put on deputation, but was promoted to the post (paper book page 60) and that his reversion worked as a reduction in rank, within the meaning of Article 311, without proper inquiry.

17. I am in whole hearted agreement, with respect, with Justice Sengupta in this matter, especially in view of the extract from the extraordinary Calcutta Gazette of 31-7-81 produced before us, stating the deputational post of project officer (adult education) as a promotional one from the original post of the respondent, i.e. extension officer (social education). But even then, if the promotional deputation be itself temporary, reversion therefrom without any evil consequence would be bad, just as discharge simpliciter from a temporary post would not be so. So, in another form only, we are back to the question of stigma, which is already answered.

18. Indeed the terms of deputation (p.b; p. 35) of the tewntynine Officers, of whom the respondent was the third and the only one sent back, stated the same to be temporary, with option to send back after 6(six) months if their performance is unsatisfactory and that there would be a similar annual review of their performance. On the authority of the above case of Jagadish Mitter a review strictly limited to the assessment of suitability of continuance in a particular post does not result in a stigma, so that the respondent, whether heard or not, would not suffer a ''dismissal'' or a ''reduction in rank'' as these terms of art are explained in that case. But significantly here, there is no case made Out, of any review, annual or otherwise, for ascertaining the particular suitability of the respondent or any of the other twentyeight deputationists. The respondent was, at least impliedly, found suitable for over three years during which time he continued in the deputation.

19. After the impugned Order of 4-10-83, the respondent refused to join in the reverted post. The State refused to continue the deputation. An Order of status quo regarding service as of 14-12-1983 was passed in the writ; because of the irreconcilable differences in the stand taken as to the impugned Order, the respondent was nowhere working then. He continued to work nowhere till reaching

the age of retirement. If the Order of 4-10-88 is bad in law he must be paid his full salary and benefits, as directed by Justice Sengupta, since it was the employer, who kept the employee out of work, on the basis of an Order unsustainable in law. The appeal being heard for seven days, though not full length. 1 would allow assessed Costs of 300 gms.

Ajoy Nath Ray, J.