Patna High Court
Shiva Bhikshuk Mishra vs State Of Bihar And Ors. on 25 August, 1965
Equivalent citations: AIR 1966 Pat 364, (1970) ILLJ 592 Pat
Author: Mahapatra
Bench: H Mahapatra, G Prasad
JUDGMENT Mahapatra, J.

1. The appellant brought a suit in the court of the first Additional Subordinate Judge Patna, on the 15th of February, 1954, for a declaration that his demotion from the rank of subedar-major to that of sergeant as ordered with effect from the 14th of November, 1950, was void and illegal and the order of his dismissal passed on the 7th of April, 1953, by the Deputy Inspector General of Police was likewise void and without jurisdiction. He also prayed for a decree for Rs. 3,118 on account of arrears of pay with interest at 6 per cent per annum, and in the alternative, for a decree for Rs. 3118 by way of damages with interest at 6 per cent per annum. His case was that he was appointed as a literate constable in the Bihar Police in 1933, and by his own merit and efficiency he was promoted in quick succession to the rank of assistant sub-inspector, sub-inspector, sergeant, subedar and subedar-major by 1948. He was twice nominated for the post of Wing Commander which is equivalent to the post of Deputy Superintendent of Police. While he was at Muzaffarpur in the Bihar Military Police as subedar-major, in November 1950 a Board of Enquiry was constituted to enquire about certain allegations against him arising from an anonymous petition in respect of certain alleged acts done by him while he was at Phulwari Sarif previously. During that enquiry he received an order from the Inspector General "of Police demoting him to the rank of sergeant, that is, he was reduced by two ranks with effect from the 14th November, 1950, and was transferred as sergeant to Hazaribagh. He was not given an opportunity to show cause against that punishment. On the 7th of May, 1951, he was asked by the Deputy Inspector General of Police to show cause why he should not be dismissed from service for raising subscription for the purchase of a truck and some other charges. The departmental proceeding ensuing thereupon was conducted by the Superintendent of Police, Palamau, who found the plaintiff guilty of the charges framed against him and after giving another chance to him to show cause against the proposed punishment of dismissal, the final order of dismissal was passed by the Deputy Inspector General of Police who, however, was not the authority who had appointed the plaintiff to the post of Subedar-major. The plaintiff asserted that the allegations leading to his dismissal were all false and mala fide and the departmental enquiry was vitiated by not giving him proper opportunities to defend himself adequately.

2. The State of Bihar, the Inspector General and the Deputy Inspector General of Police were made defendants in the action and two written statements were filed on behalf of them. They pleaded that the plaintiff was holding the post of a sergeant till the 31st July, 1946 and from the 1st August, 1946 he was allowed to officiate as subedar and thereafter to officiate as subedar-major with effect from the 9th January, 1948. Due to his unsatisfactory conduct while holding the temporary post of subedar-major, he was found unfit to hold the post in the gazetted rank and was reverted to his substantive post of sergeant on the recommendation of the Commandant and the Deputy Inspector General, Armed Forces, under Rule 665 of the Bihar and Orissa Policy Manual. The Inspector General of Police (defendant No. 2) was competent to declare him unfit for the post of subedar and subedar-major. In a departmental proceeding he bad been found guilty, He was dismissed from

service by the final order passed by the Deputy Inspector General of Police, Southern Range, on the 7th of April, 1953, after giving him sufficient opportunity to show cause against that action. There was no defect in the proceedings. Both the dismissal and demotion were legal acts. The reversion did not attach any stigma or impose any penalty upon the plaintiff. It was not by way of punishment nor any penal consequence followed therefrom to him.

3. On these pleadings parties went to trial. The plaintiff examined himself while the defendants brought four witnesses. Several documents were marked on both sides as exhibits. They mostly appertain to the action taken by the Government against the plaintiff in regard to his reversion and dismissal. The service book of the plaintiff was also proved in the case.

4. The trial Court dismissed the suit with costs, holding that the plaintiff was given all reasonable and fair opportunities to defend himself and to show cause during the departmental enquiry leading to his dismissal. It also held that the plaintiff had failed to prove that the defendants were actuated by malice and their action was mala fide. About the reversion, the court held that as no penal consequence followed from reversion and as his seniority was not affected, there was no stigma attached to the order of reversion. There was no legal defect in the action of the defendants against the plaintiff. The present appeal is from those findings.

5. The appellant's objection to reversion from the rank of Subedar-major to that of sergeant as ordered with effect from the 14th November 1950 by the Inspector General of Police is grounded on absence of opportunity to him to explain his position before that order was passed. He was no doubt officiating in the post of Subedar-major and had no right to that post in the sense that reversion from that will automatically mean punishment. His appointment to that post was of a temporary nature, and if for any administrative reason or for the abolition of that post or for the return of the permanent incumbent from leave or for a more suitable claimant being available for that post, he would have been ordered to revert from the officiating post, there would have been no infirmity in that.

It is well settled now that the doctrine of pleasure in respect of all appointments to Government service is subordinated under the Constitution, as it was under the Government of India Act, 1985, to certain restrictions provided under Article 811. Three major punishments, namely, dismissal, removal and reduction in rank can be imposed upon a civil servant only after giving him an opportunity to show cause against such action. If any of those three measures is not clamped by way of punishment, fee protection given under Article 311 cannot be invoked by the Civil servant. Whether one is holding a post permanently or temporarily or in an officiating capacity is immaterial as far as protection is concerned; he will be entitled to that before he is punished in one of the three ways. For a permanent civil servant, his termination of service in accordance with the terms of contract or the service rules or on superannuation does not attract the provisions of Article 311(2). But if such termination is by way of punishment, the civil servant must be given the charges framed against him to explain and also allowed to show cause why the proposed punishment should not be awarded. For a person holding a civil post temporarily or on probation or by way of officiating arrangement the position if almost the same. In case of the former, a the adverse order is according to the service rules or terms of contract, the Court if not called upon to go behind the order itself and

take note of the motive that might have actuated the authorities to take that action. If such order does not plant the stigma upon the civil servant, though his inefficiency or some kind of misconduct might have been in the back of the mind of the authority concerned before that order is passed, that would not call for the protection given under Article 311(2). In other words, such adverse order will not be taken to be a punishment or punitive in nature; its terms would not indicate that. The civil servant in that situation does not lose the benefits he has earned by his past service; but it the adverse order is made as a measure of punishment and it speaks to be so, the victim will be entitled to have the privileges contained in Article 311 before the final order can be made against him.

In the case of temporary, probationary or officiating civil servants termination of service or reversion to the substantive post may be ordered according to the terms of contract of service, if any, or the service rules is that reg-pect, and a situation like that would not be covered by Article 311(2) because that will amount to termination of service simpliciter. But if such action is taken not in the usual course of administration but as a measure of punitive action against the civil servant either on consideration of some complaints against him or, on finding about his inefficiency, that will be subject to the provisions of Article 811(2). Either the adverse order itself may show its punitive, nature or the facts and circumstances prior and leading to that order may disclose that, not the disguised form of the order itself but the substanee of the matter will determine the character and nature of the order. In the case or temporary servants (probationary or officiating also), the court is required to examine the substance of the matter, though such a course is not called for in a case of permanent servants where the adverse order is in compliance with the service rules or me terms of contract. This distinction between the two categories was also noticed by their Lordships of the Supreme Court in the case of Moti Ram Deka v. general Manager, North East Frontier Rly., AIR 1964 SC 600 (see Paras. 13 and 14), The reason for this distinction appears to be that while such an action against a permanent civil servant does not entail any loss of benefits earned by him and, therefore, does not affect him substantially, a temporary servant (unless he has attained quasi-permanency according to some serviee rules) has no earned benefits to retain and what he suffers by such adverse order is the loss of the pay and emoluments of the post itself which he loses.

6. It will be useful to extract a few lines of the judgment referred to above:

"It may be taken to be settled by the decisions of this Court that since Article 311 makes no distinction between permanent and temporary posts, its protection must be held to extend to all Government servants holding permanent or temporary posts or officiating in any of them. The protection afforded by Article 311(2) is limited to the imposition of three major penalties contemplated by the service Rules, viz., dismissal, removal or reduction in rank..... In regard to temporary servants, or servants on probation, every case of termination of service may not amount to removal. In cases falling under these categories, the tenus of contract or service rules may provide for the termination of the services on notice of a specified period, or on payment of salary for the said period, and if in exercise of the power thus conferred on the employer, the services of a temporary or probationary servant are terminated, it may not necessarily amount to removal. In every such case, courts examine the substance of the matter, and if it is shown that the termination of services is no more than discharge simpliciter effected by virtue of the contract or the relevant rules, Article 311(2) may not be applicable to such a case. If, however, the termination of a

temporary servant's services in substance represents a penalty imposed on him or punitive action taken against him, then such termination would amount to removal and Article 311(2) would be attracted. Similar would be the position in regard to the reduction in rank of an officiating servant."

7. In the present case we have, therefore, to see if the reduction in rank of the plaintiff, namely, reversion from the post of subedar-major to that of sergeant was in substance a penalty imposed on him or punitive action taken against him, or it was in the ordinary course of administration in accordance with the service rules. It has to be conceded that the authorities concerned have the right to bring to end an officiating arrangement. No one has got a title to the officiating post until he is confirmed in it. Two courses are open to the Government. They can terminate the officiating appointment in the usual course without assigning any reason. They can also terminate that appointment as a measure of punishment. Though the result will be the same in both the cases, the civil servant's rights will, however, be different. In the former he cannot invoke the protection provided in Article 311(2). In the latter the Government cannot take such action before complying with those provisions and giving two opportunities, one at the first stage when charges are framed, and the other before the punishment is finalised after the enquiry. This position is indisputable. The order of reversion in the instant case did not speak of any punishment and if that would have been the entire basis of enquiry by the Court, there could have been no infirmity with reference to the procedure adopted by the Government. But as I have already said, in such a case the Court has to look to the substance of the order and its real nature and not to be content with the innocuous form in which it is expressed and communicated to the plaintiff.

It will be worthwhile examining the circumstances in which that order was passed. A departmental enquiry which ultimately ended in the dismissal of the plaintiff was then pending, but that has no relevancy to the examination of the order of reversion. The facts and circumstances subsequent to an impugned order should not be taken into account. Ex. 2(b) is a report of the Commandant, Bihar Military Police, Muzaffarpur, to the Deputy Inspector General of Police, Armed Forces, Bihar, dated 3rd October, 1950, from which it appears that there was an incident between the plaintiff and his orderly Ram Chandra Pathak on the night of the 22nd September, 1950, which the Commandant enquired. He recommended that the plaintiff should be censured for his unsatisfactory behaviour. Ext. 5 is a note in the office of the Inspector General on that report. There, it appears that the plaintiff was held to be guilty of irresponsible behaviour and a mere transfer to another place was not considered to act as an adequate deterrent. It was pointed out that if he was transferred to a district, he would have to be posted as sergeant-major on account of his seniority, but he, not having received training in the Police Training College even as a sergeant, would be a liability more than an asset as sergeant-major. This note shows that he was also on the Inspector General's list for promotion. In that background, the Deputy Inspector General expressed his opinion that the plaintiff had "tripped up very badly" and his transfer as recommended by the Deputy Inspector General of Armed Forces was no cure. Mr. M.K. Sinha recommended to the Inspector General that the plaintiff should be reverted to the substantive rank of sergeant ana posted to Hazaribagh. He said:

"Even the present charge against subedar-major Missir (plaintiff) is serious but the order of reversion would meet with the case, as it is obvious that he is not likely to make either a suitable

subedar-major or sergeant-major."

This recommendation was on the 1st of November 1950. On the following day the Inspector-General accepted this proposal and the reversion was ordered with effect from the 14th of November 1950. It is, therefore, clear that the reversion was not in the usual course or for administrative reasons but it was after a finding in an enquiry bout some complaint against the plaintiff and by way of punishment to him. By accepting the proposal of Mr. Sinha, the Inspector-General (the appointing authority) must be taken to have come to the conclusion that the plaintiff should be reverted as a measure of punishment on the complaint of his orderly which had been enquired into by the Commandant. In the written statement the defendant, Inspector-General of Police, also stated:

"Owing to his unsatisfactory conduct while holding the temporary post of subedar-major, the plaintiff was found unfit to hold the post of a gazetted rank and hence he was reverted to his substantive post of sergeant on the recommendation of the Commandant and the Deputy Inspector-General, Armed Forces."

That the action was for his "unsatisfactory conduct" admits of no doubt. It was, therefore. Sunitive in nature calling for the procedure laid own in Article 311 (2) of the Constitution. Admittedly that procedure was not followed before the impugned order was passed. For that reason the order cannot be upheld as valid and binding against the plaintiff.

8. The trial Court took the view that the order did not have any stigma on the plaintiff, nor did that affect the future chances of his promotion. Once it was by way of punishment, it was undoubtedly a stigma upon the victim, and that alone will attract the protection given to the civil servant, temporary or permanent, under the Constitution The Court below also held that no penal consequences followed from the order of reversal nor the seniority of the plaintiff was prejudiced by that. Mr. M.K. Sinha said in unmistakable terms that the plaintiff was not likely to make a suitable subedar-major or sergeant-major and that was not discarded by the Inspector-General when he passed the final orders. This is clearly a further stigma against the plaintiff marring his future chances of promotion. It is true that at a subsequent stage, he was again temporarily promoted to the rank of subedar-major for a short period before he faced his ultimate dismissal in 1953. But that will not alter or minimise the penal consequences which were likely to follow from the order of reversion. The plaintiff of course did not lose his seniority in his substantive rank though he was reduced from his officiating post in the higher rank. No doubt, the question of penal consequence in the matter of forfeiture of pay and loss of seniority must be considered in the context of the substantive and not with reference to the officiating rank from which a civil servant is reverted; but loss of future chances of promotion, if it forms a part of or attached to or follows from the order of reversion, that will be a penal consequence also.

9. In a case where the impugned order is punitive in nature on the face of it or is found to be so on an examination of the circumstances in which that order is passed it is not necessary to find if in addition to that it resulted in penal consequences, such as loss of pay or seniority or future chances of promotion. If those consequences happened, it becomes all the more penal, but without such consequences even, a punitive order of termination of service or reduction in rank will, all the same,

call for the procedure to be followed as laid down in Article 311 (2). It is in cases where the order is not penal in its form or on a finding of guilt but it visits the civil servant with penal consequences, that makes that order penal in character to attract the statutory safeguards for the victim.

10. In the case of S. Sukhbans Singh v. State of Punjab, AIR 1962 SC 1711, an Extra-Assistant Commissioner on probation was reverted to his substantive post of Tahsildar on May 20, 1952. On his reversion the civil servant (the appellant before the Supreme Court) asked for the grounds for his reversion, but the Government refused to furnish him any and asserted that he could be reverted according to the civil service rules of Punjab. Their Lordships of the Supreme Court examined the sequence of events which led up to his reversion and held:

"The only reasonable inference which can be drawn from all these facts is that the Government in fact wanted to punish him for what it thought was misconduct on his part and, therefore, reverted him. The omission of the Government to give reasons for his reversion does not make the action any the less a. punishment, but as the requirements of Article 311 (2) were not fulfilled as they ought to have been, the Government wanted to give the reversion the appearance of an act done in the ordinary course entailing no penal consequences. The circumstances' clearly show that the action of the Government was mala fide and the reversion was by way of punishment for misconduct without complying with the provisions of Article 311 (2)."

The order of reversion was quashed. It is thus clear that where the impugned action is penal in nature it is not further necessary to examine about the evil consequences that may follow. In that view, even if the finding of the trial Court that there was no loss of future chances of promotion was correct, the reversion having been ordered by way of punishment for misconduct, the plaintiff was entitled to the procedure enjoined upon the Government under Article 311 (2).

11. Since there was a failure in giving an opportunity to the plaintiff to show cause against the punishment of reduction in rank by way of reversion from the officiating post, there was a serious unremediable lacuna which vitiated that order. The plaintiff will, therefore, be deemed to continue in the officiating post as subedar-major till he was dismissed with effect from the 7th of April 1953. The order of dismissal was made by the Deputy Inspector-General of Police who was admittedly not the appointing authority for the post of subedar-major. Though the procedure under Article 811 (2) had been followed in respect of this dismissal, yet that order was also vitiated because it disregarded the constitutional provision under Clause (1) of Article 811 which provides that no holder of a civil post shall be dismissed or removed by an authority subordinate to that by which he was appointed. The Deputy Inspector-General of Police was subordinate to the Inspector-General of Police who had appointed the plaintiff to officiate in the post of subedar-major. The dismissal order is, therefore, invalid and not binding against the plaintiff. He will, therefore, be deemed to have continued in that post in spite of the order of reversion and dismissal, and entitled to his salary and other emoluments.

12. In Schedule I of the plaint a statement was given to show the difference between the salary to which the plaintiff was entitled from the I4th November 1950 to the 15th February 1954 (the date of the suit), as subedar-major and the salary that he received as sergeant. The plaintiff is entitled to a

decree for that amount, namely, Rs. 3,118 but no interest should be allowed on that.

13. The plaintiff claimed for damages alleging that there was mala fides on part of the defendants in passing both the impugned orders. The trial Court held that neither mala fides nor damages were proved. Learned counsel did not point out anything before us from the materials on record to take a different view in that respect.

14. The result, therefore, is that the plaintiff's suit will be decreed in part and it is declared that his reversion from the rank of subedar-major to that of sergeant with effect from the 14th of November 1950. was void and the order of his dismissal from service as passed by the Deputy Inspector-General of Police with effect from the 7th of April 1953, was also void. The plaintiff will get a decree for Rs. 3,318 as detailed in Schedule 1 of the plaint from the defendant No. 1. This amount will be paid within three months from the date of the decree failing which the plaintiff will be entitled to recover through execution the same amount with interest thereon at the rate of 6 per cent per annum from the date of the decree to the date of realisation. The plaintiff will be entitled to costs in both the Courts against defendant No. 1. The suit is dismissed against defendants 2 and 3 but without costs. The appeal is allowed in part, and the judgment and decree of the trial Court are set aside.

G.N. Prasad, J.

15. I agree.