

CIVIL MISCELLANEOUS

Before Bal Raj Tuli, J.

GURCHARAN SINGH,—*Petitioner.*

versus

THE STATE OF PUNJAB,—*Respondent.*

Civil Writ No. 2392 of 1969

February 10, 1971.

Constitution of India (1950)—Article 226—Declaratory decree passed by a civil Court—Whether can be implemented in proceedings under Article 226.

Held, that a petitioner cannot resort to proceedings under Article 226 of the Constitution for the implementation of a declaratory decree passed by a civil Court. He must follow the remedies open to him under the law.

(Para 2)

Petition under Articles 226 and 227 of the Constitution of India, praying that a writ of certiorari mandamus or any other appropriate writ, order or direction be issued compelling the Government of Punjab to comply with the orders passed in the Civil Suit and finally in the R.S.A. by this Hon'ble Court.

J. L. GUPTA, ADVOCATE, for the petitioner.

ABNASHA SINGH, ADVOCATE FOR ADVOCATE-GENERAL, PUNJAB, for the respondent.

ORDER

TULI, J.—(1) The petitioner joined as a Clerk in the Pepsu Civil Secretariat on July 10, 1954. In that State the conditions of service governing the petitioner were contained in the Pepsu Secretariat Services Recruitment, Promotion, Punishment and Seniority Rules, 1952 (hereinafter referred to as the Pepsu Rules). The merger of the States of Punjab and Pepsu took place with effect from November 1, 1956, and the petitioner was integrated with the Clerks of the erstwhile State of Punjab in accordance with the Punjab Integration Rules. In the erstwhile State of Punjab the rules pertaining to the promotion of a Clerk to the post of an Assistant were provided in rules 5 and 6 of the Punjab Civil Secretariat (State Service Class III) Rules, 1952. None of these rules provided for the holding of any test before a Clerk could be promoted to the post of an Assistant. Similarly, rule 15 of the Pepsu Rules did not provide for any such test, while selecting a Clerk for the post of an Assistant.

However, after the merger of the two States, an order was issued by the Chief Secretary to Government, Punjab, on June 21, 1958, prescribing a test for promotion of a Clerk to the post of an Assistant in the Secretariat. According to the rules then prevailing, the promotion was to be made on seniority-cum-merit basis. The petitioner was promoted as an Assistant on December 9, 1959, but was reverted to the post of a Clerk on February 3, 1960, on the ground that he had not passed the test. The petitioner filed a suit in the Court of Subordinate Judge, First Class, Ambala, on December 21, 1965, which was decreed on October 20, 1966, and it was declared "that the orders dated the 5th of September, 1958, and the 3rd of February, 1960, are illegal, void, unconstitutional, inoperative and not binding on the plaintiff and that the plaintiff still continues to be in the service of the State of Punjab as an Assistant and entitled to all the emoluments, pay, allowances, increments and all other rights and privileges attached to the said post from the date of his reversion, i.e., the 3rd February, 1960." The State of Punjab filed an appeal against that decree, which was dismissed on January 31, 1968, by the District Judge, Chandigarh, following the judgment of this Court in *State of Haryana v. Shamsher Jang Shukla* (1), in which it has been held that the Government was not competent to prescribe a test for promotion from the post of a Clerk to that of an Assistant by issuing Executive instructions. The State of Punjab filed a further appeal in this Court (R.S.A. No. 1624 of 1968), which was dismissed *in limine* by Mahajan, J., on February 17, 1969. The Government filed an application for permission to file a Letters Patent Appeal, which was also dismissed on April 22, 1969. In spite of the success of the petitioner in that litigation, the State of Punjab has not implemented the decree passed in his favour by the Subordinate Judge, First Class, Ambala, which has been upheld by this Court. The petitioner was, however, re-promoted as an Assistant in September, 1967. But for the period from February 3, 1960, to the date of his re-promotion in September, 1967, he has been treated as a Clerk, with the result that no consequential reliefs pursuant to the declaratory decree granted to him by the civil Court have been allowed to the petitioner. These consequential reliefs pertain to his reinstatement as an Assistant with effect from February 3, 1960, the payment to him of the arrears of pay and allowances on the footing that he was an Assistant throughout from February 3, 1960, the fixation of his pay for subsequent years on that footing and the payment of the difference between the

(1) 1968 S.L.R. 162.

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pay so re-fixed and the pay already drawn, and the fixation of his seniority amongst the Assistants on the same footing. The petitioner has, therefore, filed the present petition praying that this Court should issue a writ of *mandamus* to the State of Punjab to grant the necessary reliefs to the petitioner, which are due to him on the basis of the decree passed in his favour by the civil Court. This petition has been resisted by the State of Punjab on the ground that the matter has not yet been finally decided because the State of Punjab and Haryana have filed appeals in the Supreme Court against the judgments and decrees of this Court holding that the Government was not competent to prescribe any test for promotion of a Clerk to the post of an Assistant.

(2) The learned counsel for the petitioner submits that there is no stay order issued by any Court entitling the respondent not to allow the consequential reliefs, which flow from the decree of the civil Court in his favour. I am of the view that in law the petitioner cannot resort to proceedings under Article 226 of the Constitution for the implementation of a declaratory decree passed by a civil Court. He must follow the remedies open to him under the law. The reason is that their Lordships of the Supreme Court held in *State of Madhya Pradesh and another v. Bhailal Bhai and others* (2), as under (para 16 and 17) :—

“(16) For the reasons given above, we are clearly of opinion that the High Courts have power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law.

(17) At the same time we cannot lose sight of the fact that the special remedy provided in Art. 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil Court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Art. 226 is a discretionary power to issue writs in the nature of *mandamus*. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it.

..... Whether repayment should be ordered in

the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay down any rule for universal application. It may, however, be stated as a general rule that if there has been unreasonable delay, the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of *mandamus*. Again, where even if there is no such delay, the Government or the statutory authority, against whom the consequential relief is prayed for, raises a *prima facie* triable issue as regards the availability of such reliefs on the merits on the grounds like limitation, the Court should ordinarily refuse to issue the writ of *mandamus* for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil Court and to refuse to exercise in his favour the extraordinary remedy under Art. 226 of the Constitution."

The petitioner filed the suit challenging the order of his reversion and in that suit, in addition to the declaration sought, he could also ask for consequential reliefs for the payment of the difference in pay to him for the period prior to the suit and for the re-fixation of his salary on the footing that his reversion was bad and he could thus obtain mandatory injunction in that suit against the Government for those consequential reliefs. The petitioner did not pray for any consequential relief in that suit and it may well be open to the State Government to urge in another suit that these consequential reliefs cannot be granted to him because of the provisions of Order II, rule 2, of the Code of Civil Procedure, on the ground that he did not ask for these reliefs in the earlier suit, which he could. By granting this writ petition I shall be depriving the Government of the normal defences open to it in a suit.

(3) The learned counsel for the petitioner, however, draws my attention to the Full Bench judgment of this Court in *Jagdish Mitter v. The Union of India and another* (3), in which the Full Bench decided the question with regard to limitation and sent case back to the learned Single Judge for the decision of the other reliefs claimed by the petitioner. In that case Jagdish Mitter was a temporary employee of the Postal Department and had been discharged from service

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on December 1, 1949. He filed a suit against the Union of India on November 11, 1952, claiming a declaration that the termination of his service was illegal, being in contravention of the relevant Rules and Regulations. That suit was dismissed by the learned Subordinate Judge, but was decreed by the District Judge on appeal. His further appeal to this Court was dismissed and so was the Letters Patent Appeal. Jagdish Mitter then filed an appeal by special leave to the Supreme Court, which was allowed and his suit was decreed. The decree passed in his favour was a declaratory decree declaring the termination of his services to be illegal. Following that decree, Jagdish Mitter was reinstated in service on July 2, 1964, as a Lower Division Clerk with effect from December 1, 1949, the date on which his services were terminated. It was further directed that the petitioner would be entitled to such of his pay and allowances for the period between December 1, 1949, when his services were terminated, and October 4, 1963, when he was reinstated by virtue of the Supreme Court decision, as would be permissible under the law of limitation. Jagdish Mitter kept on agitating departmentally for the full benefits which had accrued to him as a result of his ultimate success in the litigation, but his request was turned down on November 6, 1964, when he was offered only three years' pay preceding the date of his reinstatement from which the sum which he had already drawn while temporarily employed was to be deducted. Jagdish Mitter then filed a writ petition in this Court claiming a writ of *mandamus* directing the respondents to allow him all the consequential reliefs which flowed from the decree of the Supreme Court. The only point decided by the Full Bench of this Court was "that a public servant, after his dismissal or removal has been declared to be unlawful, can claim wages or salary only up to a period of three years and two months from the date when the cause of action accrued." The decisions of this Court in *K. K. Jaggia v. The State of Punjab*, (4), *Union of India v. Maharaj* (5) and *State of Punjab v. Ram Singh Brar* (6) were held to have not been correctly decided. The case was sent back to the learned Single Judge for deciding the claims of the petitioner with regard to seniority and other reliefs. That writ petition is still pending and has not yet been decided. The next case brought to my notice is *K. K. Jaggia v. The State of Punjab* (4). In that case Shri K. K. Jaggia had been dismissed as a result of the

(4) I.L.R. (1966) 1 Pb. 302.

(5) R.F.A. 8-D of 1964 decided on 6th September, 1966.

(6) 1967 (1) S.L.R. 594.

departmental enquiry held against him, which order was quashed by this Court in a writ petition on the ground that the departmental enquiry was vitiated. As a result of the writ petition, Shri Jaggia was reinstated on September 20, 1963, by a letter of the Governor of Punjab, but on the same day he was again placed under suspension with immediate effect pending completion of the departmental enquiry against him. The petitioner had been earlier suspended with effect from April 11, 1956. During the second enquiry, Shri Jaggia applied for the payment of his full salary and allowances for the period during which he had remained suspended prior to the date of his dismissal, that is, October 6, 1961, as well as for the period that had elapsed between the date of his dismissal and reinstatement. In reply he was informed that "it had been decided—

- (a) For the period of the officer's suspension prior to his dismissal, he was to be paid only subsistence allowance permissible under the rules applicable to such officers ;
- (b) for the period between the officer's dismissal and his subsequent reinstatement, he should be allowed full pay and allowances ; and
- (c) before making the payment, it should be verified from the officer what amount, if any, he had earned during the period he remained dismissed, and that amount should be deducted from the pay and allowance due to him."

Shri Jaggia filed the writ petition in this Court praying that a writ of *mandamus* be issued to the respondent-State of Punjab directing it to pay him full pay and allowances not only for the period between his dismissal and reinstatement but even for the period during which he had remained suspended prior to the order of his dismissal dated October 6, 1961. This petition was allowed by a Division Bench of this Court and the necessary writ was issued. This case is clearly distinguishable because the High Court was not giving effect to or implementing any decree passed by a civil Court, but itself adjudicated on the legal claims of the petitioner under the statutory rules and allowed him the relief. This case cannot, therefore, be considered as a precedent that the decree passed by a civil Court can be enforced or got implemented by a *writ of mandamus* issued under Article 226 of the Constitution. The technical objections to the maintainability of a civil suit as contained in Order II, rule 2, of the Code of Civil Procedure may or may not be applicable to a petition under Article 226 of the Constitution, but to a suit that provision applies and, if a

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relief is open to a plaintiff at the time he filed the suit, he has to claim that relief in that very suit, failing which it will not be open to him to file another suit to claim it. The judgment of a Division Bench of the Bombay High Court in *State of Bombay v. Dr. Sarjoo Prasad Gumasta* (7) does not help in the decision of the point before me because that case related to a suit and not to a writ petition for getting a declaratory decree passed by a civil Court implemented.

(4) The reason stated by the respondent in the return for not implementing the declaratory decree passed in favour of the petitioner is that the matter is still pending decision before the Supreme Court, which means that the Government will take decision in the case of the petitioner and other officials like him after the matter is finally decided by the Supreme Court and I have no reason to doubt that the Government will itself allow the necessary reliefs to the petitioner after the matter is finally decided by their Lordships of the Supreme Court. As I am of the opinion that the remedy provided by Article 226 of the Constitution cannot be resorted to for getting a declaratory decree passed by a civil Court implemented, I hold that this petition is not maintainable and dismiss the same as incompetent. Since the matter was *res integra* I leave the parties to bear their own costs.

N.K.S.

REVISIONAL CRIMINAL

Before A. D. Koshal and D. S. Tewatia, JJ.

DARSHAN SINGH,—Petitioner.

versus

THE STATE OF PUNJAB,—Respondent.

Criminal Revision No. 516 of 1970

February 11, 1971.

Punjab Excise Act (1 of 1914)—Sections 11, 46, 60, 71 and 75—Police officer invested with the powers of first class excise officer without being expressly empowered to submit a report under section 75—Whether competent

(7) I.L.R. 1968 Bom. 1204. \