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Dulat, J.

Court's jurisdiction and it was, therefore, in the eye of international law a nullity and it could, therefore, never be executed through an Indian Court. As I have already pointed out, this consideration does not really arise in the present case, for if the decree sought to be executed is to be deemed the decree of foreign Court, it is not capable of execution under the provisions of the Code of Civil Procedure and would not be capable of execution even if it were a decree obtained after contest. In my opinion, however, the decree in this case must now be taken to be the decree of an Indian Court to which the Code of Civil Procedure fully applies and as such the decree cannot be refused execution merely because it was obtained *ex parte*. On this view, I must hold that the executing Court was in error in refusing to execute the decree and the appeal should, therefore, be allowed and the order of the lower Court refusing execution set aside.

Full Bench

The decision of the Full Bench is that the appeal of the decree-holder is dismissed and the objections of the judgment-debtors are upheld. In the circumstances of the cases there will be no order as to costs.

LETTERS PATENT APPEAL

Before Bhandari, C.J. and Falshaw, J.

THE UNION OF INDIA,—*Appellant.*

v.

MR. PARSHOTAM LAL DHINGRA,—*Respondent.*

Letters Patent Appeal No. 28 of 1955

1956

Jan., **19th**

Writ of Mandamus—When can issue—Constitution of India, Article 311—Government Servant holding a post in an officiating capacity—Reversion to his substantive post—Whether such reversion amounts to "reduction in rank" within the meaning of Rule 55 of Civil Service (Classification, Control and Appeal) Rules and Article 311 of the Constitution—Meaning of "reduction in rank".

Held as follows:—

(1) Remedy by way of *mandamus* is not available to a person unless he has a clear legal right to the performance of the particular act the performance of which is sought to be compelled, that is a right clearly founded in or granted by law.

(2) A person who applies for a writ of *mandamus* to compel his restoration to the position from which he has been wrongfully removed must satisfy the Court—

(a) that prior to his removal from the post occupied by him he had a clear legal right to occupy the said post;

(b) that he was removed from the said post without charges or hearing; and

(c) that he has an indisputable right to reoccupy the said post.

(3) The constitutional provision protecting a Government servant from reduction without hearing is intended to refer only to a person who is occupying the higher post in a substantive capacity, for he alone has a legal right to occupy the said post. A person who is occupying the higher post in an officiating capacity has no such right and can be deprived of his post by a competent superior officer without charges or hearing. When a person who is holding a particular post in a substantive capacity is transferred to a lower post in the same service, he is entitled to protest that this transference to another post is a reduction or demotion which can be effected only as the result of a hearing. This protest is not available to a person officiating in a particular post who is reverted to his own substantive post without notice or hearing. He suffers from a double disadvantage for he is protected neither by the provisions of Article 311 of the Constitution nor by Rule 15 of the Fundamental Rules. Indeed, there is no statute or statutory rule covering his case which protects him against reduction.

(4) The expression "reduction in rank" means a transfer, without the consent of the incumbent, from a higher position to a lower position at a lower rate of salary.

Letters Patent Appeal under Clause 10 of the Letters Patent, against the judgment of Hon'ble Mr. Justice Harnam Singh, dated 15th April, 1955, passed in C.W. No. 36D of 1955.

KUNDAN LAL, for Appellant.

FRANK ANTHONY, for Respondent.

JUDGMENT

BHANDARI, C.J. By this appeal under Clause 10 of the Letters Patent we are invited to pronounce upon a question which has arisen before us on a number of occasions but to which no satisfactory answer appears to have been returned by our Courts. The question is whether a Government servant who is holding a post in an officiating capacity is within the protection of the law which declares that no person shall be reduced in rank unless he has been afforded a reasonable opportunity of being heard. Bhandari, C.J.

One Parshotam Lal Dhingra entered Railway service in or about the year 1924, was appointed Deputy Chief Controller in a substantive capacity in the year 1947, Chief Controller in an officiating capacity in the year 1950, and Assistant Superintendent Railway Telegraphs in a similar capacity in the year 1951. He was found to be negligent and incompetent in the discharge of his duties and was transferred to the post of Deputy Chief Controller on the 19th August, 1953, without charges or hearing. He applied for a *mandamus* for restoration to the former post on the ground that his degradation was an arbitrary and summary act and that he had been removed from his post upon charges which he had no opportunity to hear or defend.

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The plea that the provisions of Article 311 had been violated found favour with the learned Single Judge before whom the case came up for consideration and the learned Single Judge accordingly issued a *mandamus* directing the appropriate authority to restore him to his former position. The Railway Administration has come to this Court in appeal and the question for this Court is whether the learned Single Judge has come to a correct determination in point of law.

Rule 55 of the Civil Services (Classification, Control and Appeal) Rules declares that no order of dismissal, removal or reduction in rank shall be passed on a Government servant unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself. The rights guaranteed by this rule were fully safeguarded and preserved by the enactment of section 240 of of the Government of India Act, 1935, and later by the enactment of Article 311 of the Constitution of India. It may perhaps be assumed that the framers of the Constitution were anxious to secure that a Government servant's rights in regard to disciplinary matters such as removal, dismissal and reduction in rank should not be less favourable than the rights which were enjoyed by him prior to the year 1935.

The expression 'reduction in rank' has not been defined in the Constitution or in the statutory rules, but there can be little doubt that it means a transfer, without the consent of the incumbent, from a higher position to a lower position at a lower rate of salary. An order of reduction is in substance and effect a consolidated order consisting of two parts—an order removing the incumbent from the position formerly held by him and an order appointing him to a position of less dignity in the same service.

Countless cases, some of which go back to early times, have established the principle that remedy by way of *mandamus* is not available to a person unless he has a clear legal right to the performance of the particular act the performance of which is sought to be compelled that is a right clearly founded in or granted, by law, *State ex. rel. Todd* v. *Yelle* (1). It follows as a consequence that a person who applies for a writ of *mandamus* to compel his restoration to the position from which he has been wrongfully removed must satisfy the Court :—

(1) that prior to his removal from the post occupied by him he had a clear legal right to occupy the said post [*Stott* v. *Chicago* (2)];

(2) that he was removed from the said post without charges or hearing ; and

(3) that he has an indisputable right to reoccupy the said post [*Kimball* v. *Olmsted* (3)].

A peremptory *mandamus* to restore an officer to a post from which he has been removed will not be granted if he had no legal right to hold the post in the first instance. Nor will *mandamus* lie to compel the reinstatement of an Officer after he has attained the age of superannuation ; or after the expiration of the period for which he was appointed under the terms of his contract ; or, when an officer is appointed on probation for a probationary period of a limited term, after the expiration of the probationary period ; or after his services have been terminated under the provisions of Article 187-A of the Civil Service Regulations. In none of these several cases has the officer

(1) 110 P. 2nd 162; 7 Wash. 2d 443
(2) 205 Illinois 281, 68 N.E. 736
(3) 20 Washington 629, 56 Pacific 377

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concerned a legal right to the possession of the post from which he has been wrongfully and illegally removed.

The Fundamental Rules applicable to Government Servants generally and the Railway Fundamental Rules applicable to Railway servants make it quite clear that a person holding a post in a substantive capacity has, and a person holding a post in an officiating capacity has not, a clear legal right to occupy the post to which he has been appointed. A Government servant on substantive appointment to any permanent post acquires a lien on that post (F.R. 12-A), for the expression 'lien' means the title of a Government servant to hold substantively a permanent post to which he has been appointed substantively [F.R. 9 (13)]. He continues to retain a lien on that post not only while he is performing the duties of that post or while on foreign service, or during joining time, on transfer to another post, or while on leave, but also while under suspension (F. R. 13). This lien may be suspended in certain circumstances (F. R. 14), but it may in no circumstances be terminated even with the consent of the Government servant if the result will be to leave him without a lien or a suspended lien on a permanent post (F. R. 14-A). Government is at liberty to transfer a Government servant from one post to another but, except on account of inefficiency or misbehaviour or on his written request, he cannot be transferred substantively to, or except in a case covered by rule 49, appointed to officiate in, a post on which he holds a lien, or would hold a lien had his lien not been suspended under rule 14 (rule 15). A person who is merely officiating in a particular post enjoys no such rights or privileges. He has no right to hold the post, for a person who is officiating is merely performing the duties of the post on which another person

holds a lien [F. R. 9(19)]. He can be transferred from the post held by him in an officiating capacity to the post held by him in a substantive capacity or to a post of equal rank without contravening the provisions of any rule. The strictly legal consequences which flow from these rules are—

(1) that whereas a person who is appointed substantively to a permanent post acquires a clear, complete and specific right to hold the said post, a person who is appointed to officiate in a permanent post acquires no such right; and

(2) that whereas a person appointed substantively is within the protection of rule 15 forbidding a reduction in rank, a person who is officiating in a permanent post enjoys no such protection.

It may thus be assumed that the constitutional provision protecting a Government servant from reduction without hearing is intended to refer only to a person who is occupying the higher post in a substantive capacity, for he alone has a legal right to occupy the said post. A person who is occupying the higher post in an officiating capacity has no such right and can be deprived of his post by a competent superior officer without charges or hearing. It seems to me therefore that when a person who is holding a particular post in a substantive capacity is transferred to a lower post in the same service, he is entitled to protest that this transference to another post is a reduction or demotion which can be effected only as the result of a hearing. This protest is not available to a person officiating in a particular post who is reverted to his own substantive post without notice or hearing. He suffers from a double disadvantage for he is protected neither by the provisions of Article 311 of the

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Constitution nor by rule 15 of the Fundamental Rules. Indeed there is no statute or statutory rule covering his case which protects him against reduction [*People ex. rel. Kisselberg* v. *Chicago* (1)].

Our attention has been invited to a certain authority where the Judges laid down the proposition that if a person officiating in a higher post is reverted to his original post in the normal course, and not by way of penalty, he cannot be said to be reduced in rank and that on the other hand where reversion is ordered as a penalty it amounts to reduction in rank because such a reversion is apt to stand in the way of a Government servant in securing his promotion in the normal course. I must confess with all respect that the view expressed by these very learned Judges is quite incomprehensible to me. The Constitution declares in unambiguous language that *no person* shall be reduced in rank until he has been afforded a reasonable opportunity of showing cause against the action proposed to be taken in regard to him and imposes an obligation on the competent authority to refrain from demoting an officer *for any reason* whatever without affording the officer concerned an opportunity to defend himself. It declares by implication that all cases of reduction are to be treated alike. I am aware of no cannon of construction which would enable a Court to draw a distinction between a reversion which takes place in the normal course and a reversion which is ordered by way of penalty or to declare that whereas no charges or hearing are necessary in one case charges and hearing are necessary in the other.

Dhingra, who was holding the post of an Assistant Superintendent in an officiating capacity, was unprotected by any statute or statutory rule from being

(1) 104 Illinion App. 250 affirmed in 210 Illinois 479, 71 N.E. 400

transferred to a lower post, or even from being reverted to his substantive post, without charges or hearing; and it seems to me therefore that he was not entitled to a *mandamus* to restore him to his position in the event of his summary or arbitrary transfer or reversion by a competent authority.

For these reasons I would allow the appeal, set aside the order of the learned Single Judge and restore that of the General Manager of the Northern Railway. I would leave the parties to bear their own costs.

As the appeal involves the decision of a substantial point of law, I would permit the respondent, if he so desires, to prefer an appeal to the Supreme Court.

Bhandari, C.J.

FALSHAW, J. I agree.

Falshaw, J.

CIVIL WRIT

Before Bishan Narain, J.

M/S. RAM PARSHAD-NAND LAL AND OTHERS,—

Petitioners.

v.

THE CENTRAL BOARD OF REVENUE, NEW DELHI AND ANOTHER,—*Respondents.*

Civil Writ (Application) No. 275 of 1955

1956

Jan., 25th

Income-tax Act (XI of 1922)—Sections 31(4) and 35—Assessment of firm's income cancelled—Whether the assessment of the income of the individual partners can be corrected so as to exclude the income from the firm—Such mistake, whether error apparent on the face of the record—Writ of Mandamus, whether should be issued to correct the mistake—Constitution of India, Article 226.