

State of Kerala Vs. Madhavan

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Court : Kerala

Decided On : Feb-10-1961

Reported in : AIR1962Ker50; (1961)IILLJ484Ker

Judge : P. Govinda Menon, J.

Acts : [Prevention of Corruption Act, 1947](#) - Sections 5(1), 5(2), 6, 6(1) and 6(2); Indian Penal Code (IPC) - Sections 161; [Constitution of India](#) - Articles 226, 311 and 311(1)

Appeal No. : Criminal Appeal No. 130 of 1960

Appellant : State of Kerala

Respondent : Madhavan

Advocate for Def. : M. Bhaskara Menon, Adv.

Advocate for Pet/Ap. : Public Prosecutor

Disposition : Appeal dismissed

Judgement :

P. Govinda Menon, J.

1. This appeal has been filed by the State against the order passed by the Special Judge, Trivandrum in C. C. 13/59 acquitting the accused who had been charged

under Section 5(1) (d) and Section 5(2) of the Act II of 1947 read with Section 161 of the Indian Penal Code, on the ground that the sanction of the competent authority under Section 6 of the Act for his criminal prosecution had not been obtained and that the trial is therefore invalid and vitiated. That a defect of this kind if it really exists is fatal and cannot be cured is well settled- Therefore if it is found in this case that the prior sanction of the competent authority as laid down in Section 6 read with Article 311 of the Constitution is not obtained the trial would be abinitio void though a fresh trial would be possible after obtaining proper sanction and a charge-sheet is submitted afresh.

2. The question therefore for consideration is whether the sanction order Ext. P-20 is valid and proper. Section 6 (1) of the Prevention of Corruption Act--Act 2 of 1947 lays down that no court shall take cognizance of an offence punishable under Section 161 or Section 164 or Section 165 of the Indian Penal Code, or under Sub-section (2) of Section 5 of this Act, alleged to have been committed by a public servant, except with the previous sanction of the authority competent to remove him from his office. Article 311(1) of the Constitution provides that] no Government servant can be dismissed or removed by an authority subordinate to that by which he was appointed.

3. In this case the accused was appointed on 25th November 1939 by the Government of Cochin and Ext. D-I is the order of appointment. It is therefore contended by the accused that only the successor Kerala Government can under Article 311 dismiss or remove him from service and hence under Section 6 of the Act the Kerala Government is the only competent authority to sanction the prosecution. On the question whether the accused was appointed by the Government of Cochin State there is no dispute. What the learned Public Prosecutor contends is: that the sanction granted by the Director of Health Services is perfectly valid as he must be deemed to be the authority, on whom the powers of the appointing authority, viz., the Government now vests by delegation by the Kerala Government and therefore the Director of Health Services can dismiss or remove the accused from service and therefore can sanction the prosecution of the accused under the Act.

4. In the first place no such delegation has been produced in the case. Even if there is any such delegation, I do not think it will satisfy the requirements of Article 311 of the Constitution. That a change in the rules altering by downgrading it, the appointing authority would not affect the guarantee afforded by a statutory provision appears to be well settled,

5. In *R. T. Rangachari v. Secretary o State*, AIR 1937 PC 27 Lord Roche observed :

'The courts below held that power of dismissal was in fact delegated and was lawfully delegated to the Person who purported to exercise it. Counsel for the respondent candidly expressed a doubt as to the possibility of maintaining this view and indeed it is manifest that if power to delegate this power could be taken under rules it would wipe out a proviso and destroy a protection contained not in the rules but in the section itself.'

The principle laid down in the above decision was followed and applied by the Federal Court in *Surajnarain v. N. W. F. Province*, AIR 1942 FC 3 where Varadachariar. J. observed :

'In the Act of 1935, Sub-section (2) of Section 240 has been enacted in unqualified terms and there is accordingly no scope for the contention that this provision can be qualified Or taken away by statutory rules.'

In *Mahadevprasad v. S. N. Chatterjee*, AIR 1954 Pat 285 Ramaswamy, J. pointed out :

'If the argument of the Government advocate is correct, either the legislature or the Governor or the Rajpramukh may enact a rule under Article 309 vesting the power of dismissal in a subordinate authority, an authority subordinate in rank to the authority which had appointed the civil servant, and the constitutional protection contained in Article 311 could be wiped out and destroyed by the exercise of the power conferred under Article 309. That is surely not a correct method of interpretation of Article 311.'

In *Sobhagmal v. State*, AIR 1954 Raj 207, Wanchoo, C, J. observed :

'Obviously therefore Article 311 means that the dismissing authority should be at least coordinate in rank with the appointing authority and should not be subordinate in rank. Thus if a person is appointed by the head of one department and he is transferred to another department he can only be dismissed or removed by the head of the other department'.

The same view has been taken by Rajagopalan, J., in *N. Somasundaram v. State of Madras*, AIR 1956 Mad 419 :

'Where an authority higher than the one entitled under the statutory rules to order an appointment, in fact orders a valid appointment it is the factum of that appointment that controls the scope of the guarantee conferred by Article 311(1) of the Constitution and if such a civil servant is dismissed or removed from service by an authority, no doubt, competent under the rules to order the appointment and also to order dismissal, which, however is lower in rank than the authority which in fact ordered the appointment, such an order would contravene the provisions of Article 311(1) of the Constitution'.

In *Bajnath Prasad Tripathi v. State*, AIR 1950 Bhopal 36 it was pointed out that:

'The words to remove him from his office are significant and would clearly show that the authority contemplated therein is the one competent to remove that public servant from his office and not any public servant holding the office held by the accused person'.

6. Therefore the competence of the authority to order removal or dismissal will have to be determined with reference to the requirements of Article 311(1) of the Constitution and one of the requirements is that the authority that orders dismissal or removal should not be one subordinate in rank to that by which the civil servant in question was appointed and the principle would appear to be that it is the factum of the appointment of the civil servant who claims the guarantee that determines the scope of the guarantee conferred by Article 311.

7. The learned Public Prosecutor sought to rely on Sub-section (2) of Section 6 which states, where for any reason whatsoever any doubt arises whether the

previous sanction as required under Sub-section (1) should be obtained the sanction shall be given by that authority which would have been competent to remove the public servant from his office at the time when the offences were alleged to have been committed. Section 6 of the Act cannot override the provisions of the Constitution and consequently sub-section (2) thereof can be made applicable to only such cases where it cannot be ascertained with reasonable certainty as to who had actually appointed the accused person. There is no such doubt here.

It is agreed that it is by virtue of EXT, DI that he was first appointed and that he continued to hold the office even after the integration and at the time of the prosecution. If that be so, it is only the Kerala Government who has got the right to dismiss the accused from service and under Section 6 (1) (c) it is only that authority which is competent to remove him from his office who can validly accord sanction. In the absence of such sanction from the State Government the terms of Section 6 cannot be said to have been complied with and when there is no legal sanction the special Judge has no jurisdiction to take cognizance of the case and the trial is ab initio invalid and is liable to be quashed. There is therefore no ground for interference. The appeal is dismissed.