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STATE OF MAHARASHTRA

v.

BAISHANKAR AVALRAM JOSHI & ANOTHER

March 10, 1969

B [S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.]

Constitution of India Art. 311(2)—*reasonable opportunity—whether requires supply of copy of Enquiry Officer's report—Bombay Reorganisation Act,* 1960, *ss.* 60 *and* 61—*whether liability to pay arrears of salary if arising out of contract under s.* 61 *or in respect of 'actionable wrong other than breach of contract' under s.* 61.

C The first respondent while he was holding the post of a Senior Jailor in March, 1954, was suspended on the allegations that he had committed certain acts of misappropriation and maltreatment of prisoners. After an enquiry into the allegations, the Enquiry Officer made a report in January, 1955. A show cause notice was then issued to him to which he replied by a written statement. The respondent was dismissed by an order of Inspector General of Prisons in February, 1955. The respondent D filed a suit for a declaration that enquiry report was never supplied to him and consequently he had not been given reasonable opportunity within the meaning of Art. 311 of the Constitution. He also prayed for a decree for arrears of pay from April, 1954 to May, 1960. His suit was dismissed by the trial court but he succeeded in the first appeal where the order of dismissal was declared illegal and void. An appeal by the respondent to the High Court claiming arrears of salary was allowed.

E As the State of Bombay had, in the meantime, been reorganised, the High Court also directed that the liability for arrears of salary upto the date of suit would be that of the State of Maharashtra and the liability arising out of the declaration that the appellant was in Government service would be the liability of the State of Gujarat. A Letters Patent appeal filed by the State of Maharashtra was dismissed.

F In appeal to this Court, it was contended, *inter alia*, on behalf of the appellant that the liability to pay arrears of pay was not a liability arising out of a contract within the meaning of section 60 of the Bombay Reorganisation Act of 1960 but it was a liability in respect of an actionable wrong other than a breach of contract within the meaning of section 61 of the Act.

HELD : (1) The High Court had rightly found that the failure on the G part of the competent authority to provide the respondent with a copy of the report of the Enquiry Officer amounted to denial of reasonable opportunity contemplated by Art. 311(2) of the Constitution. The Inspector General of Prisons had the report before him and the tentative conclusions arrived at by the Enquiry Officer were bound to influence him and in depriving the plaintiff of a copy of the report he was handicapped in not knowing what material was influencing the Inspector General of Prisons. [920 F]

H *Union of India* v. *H. C. Goel*, [1964] 4 S.C.R. 718, 728, referred to.

It is true that the question whether reasonable opportunity has or has not been afforded to the Government servant must depend on the facts

of each case, but it would be in very rare cases indeed in which it could be said that the Government servant is not prejudiced by the non-supply of the report of the Enquiry Officer. [921 B] A

(2) The decree of the High Court decreeing payment of arrears of salary is truly a liability in proceedings relating to a contract within s. 60(2)(a) of the Act. Although the words 'actionable wrong' other than breach of contract in this context are wide words and include something more than torts, but even so where a suit is brought by a Government servant for arrears of salary, the decree more properly falls under s. 60 of the Act rather than under s. 61. [925 B] B

State of Tripura v. *The Province of East Bengal*, [1951] S.C.R. 1, 44, *State of Bihar* v. *Abdul Majid*, [1954] S.C.R. 786, *Owner of S. S. Raphael* v. *Brandy*, [1911] A.C. 413-14, *Inland Revenue Commissioner* v. *Hambrook*, [1956] 1 All E.R. 807, 811-12, *Reilly* v. *R.*, [1934] A.C. 176, 179; *Terrell* v. *Secretary of State for the Colonies*, [1953] 2 Q.B. 482, 499; *R.* v. *Doultre*, [1884] 9 A.C. 745 and *Bushe* v. *R.*, (May 29, 1869, The Times), considered. C

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 647 of 1966.

Appeal by special leave from the judgment and decree dated June 19, 24, 1963 of the Gujarat High Court in Appeal No. 704 of 1960 from Appellate Decree. D

P. K. Chatterjee and *S. P. Nayar*, for the appellant.

I. N. Shroff, for respondent No. 1.

S. K. Dholakia and *Vineet Kumar*, for respondent No. 2. E

The Judgment of the Court was delivered by

Sikri, J. This appeal by special leave arises out of the suit filed by Bhaishankar Avalram Joshi, hereinafter referred to as the plaintiff, for a declaration that the order of dismissal, dated February 2/4, 1955, passed by the Inspector General of Prisons, Saurashtra, was illegal and void on the ground that it contravened the provisions of Art. 311(2) of the Constitution. The plaintiff also prayed for a decree for Rs. 2,690 being arrears of his pay from April 1, 1954 to May 7, 1956. F

The plaintiff failed before the Civil Judge, Rajkot, but on appeal succeeded before the District Judge, Central Saurashtra, inasmuch as he declared order dated February 2/4, 1955, illegal and void. The plaintiff appealed to the High Court claiming arrears of salary and the State of Bombay filed cross-objections praying that the suit be dismissed. The second appeal was heard by the High Court of Gujarat (Miabhoy, J.) who directed that the decree passed by the lower appellate court "be varied so as to show that the appellant (plaintiff) continued to be in Government service till the date of the suit only and there will be a decree for Rs. 2,690 G H

A being arrears of pay due to the appellant (plaintiff) upto the date of the suit. There will be a further provision in the decree that the liability arising out of the declaration that the appellant is in Government service is the liability of the State of Gujarat and that the liability for the payment of the arrears of pay is the liability of the State of Maharashtra". The State of Maharashtra filed
B an application for leave to appeal under the Letters Patent but this was dismissed. The appeal is now before us.

The learned counsel for the appellant, the State of Maharashtra, contends, first, that the High Court erred in holding that there had been a breach of Art. 311(2) of the Constitution, as, according to him, there was no duty to supply a copy of the
C report of the enquiry held against the plaintiff. Secondly, he contends that the High Court erred in fastening the liability in respect of the arrears of pay on the State of Maharashtra.

Before we deal with the above points we may give a few facts. The plaintiff entered service in the Gondal State in 1927 as a jailor. The Gondal State merged with the United States of
D Saurashtra. On March 6, 1953, the plaintiff was appointed senior jailor, Surendranagar District Jail. On March 25, 1954, he was suspended, and at that time he was acting as Accountant at Rajkot Central Jail. On March 7, 1954, he was served with a charge sheet. In substance the charges were that while he was serving at Surendranagar he had committed certain acts of mis-
E appropriation of food stuffs meant for prisoners, maltreatment of prisoners and acceptance of illegal gratification from them. The plaintiff filed a written statement on September 4, 1954, and an enquiry was held by Mr. Gangopadhyay. The plaintiff appeared before that officer and cross-examined witnesses. He also examined himself and some witnesses. He was also allowed to ap-
F pear through an Advocate in the enquiry proceedings. The Enquiry Officer made a report and on or about January 7, 1955, the following notice was issued to him calling upon him to show cause why he should not be dismissed from service :

"To

G Shri Bhaishanker A. Joshi,
Accountant, Rajkot Central Prison
(Under suspension)

Charges framed against you under this office No. C/ 14 dated 27-3-54 and in particular the charge of having accepted illegal gratification from prisoner Ratilal Jivan
H have been established to the satisfaction of Government. You are hereby asked to show cause why the punishment of dismissal from service should not be inflicted upon you.

You should please submit your reply to this office, through the Superintendent, Rajkot Central Prison, within a week from the date of receipt of this letter without fail.

Sd/- M. J. BHATT

Inspector General of Prisons,
Government of Saurashtra."

The plaintiff filed a written statement. He was dismissed by the Inspector General of Prisons by his order dated February 2/4, 1955. This order was amended on February 9, 1955, in which it was stated that "the aforesaid order should be read so as to show that the plaintiff was dismissed from service on account of charge of accepting illegal gratification from prisoner Ratilal Jivan having been conclusively proved against him in the departmental inquiries conducted against him by the Government".

In the plaint the plaintiff alleged that copy of the enquiry report was never supplied to him, and consequently he had not been given reasonable opportunity within the meaning of Art. 311 of the Constitution. The State of Bombay admitted that the plaintiff was not supplied with a copy of the report of the Enquiry Officer, but pleaded that the plaintiff had not asked for copy of the report and had not been prejudiced by the non-supply of the copy of the report.

The High Court held that the failure on the part of the competent authority to provide the plaintiff with a copy of the report of the Enquiry Officer amounted to denial of reasonable opportunity contemplated by Art. 311(2) of the Constitution.

It seems to us that the High Court came to a correct conclusion. The plaintiff was not aware whether the Enquiry Officer reported in his favour or against him. If the report was in his favour, in his representation to the Government he would have utilised its reasoning to dissuade the Inspector General from coming to a contrary conclusion, and if the report was against him he would have put such arguments or material as he could to dissuade the Inspector General from accepting the report of the Enquiry Officer. Moreover, as pointed out by the High Court, the Inspector General of Prisons had the report before him and the tentative conclusions arrived at by the Enquiry Officer were bound to influence him, and in depriving the plaintiff of a copy of the report he was handicapped is not knowing what material was influencing the Inspector General of Prisons.

A As observed by Gajendragadkar, J., as he then was, in *Union of India* v. *H. C. Goel*(1), "the enquiry report along with the evidence recorded constitute the material on which the Government has ultimately to act. That is the only purpose of the enquiry held by competent officer and the report he makes as a result of the said enquiry".

B It is true that the question whether reasonable opportunity has or has not been afforded to the Government servant must depend on the facts of each case, but it would be in very rare cases indeed in which it could be said that the Government servant is not prejudiced by the non-supply of the report of the Enquiry C Officer.

In the result we must over-rule the first contention urged on behalf of the appellant, the State of Maharashtra.

The plaintiff is not concerned with the second contention but it is a dispute between the State of Maharashtra and the State of D Gujarat. As is well-known, the State of Bombay was re-organised into the above two States and the Bombay Reorganisation Act, 1960, contained various provisions for the apportionment of assets and liabilities between the two States. We are here concerned with ss. 60 and 61 of the Bombay Reorganisation Act, 1960, which read thus:

E "60. (1) Where, before the appointed day, the State of Bombay has made any contract in the exercise of its executive power for any purposes of the State, that contract shall be deemed to have been made in the exercise of the executive power,—

(a) if such purposes are, as from that day, exclu- F sively purposes of either the State of Maharashtra or the State of Gujarat, of that State; and

(b) in any other case, of the State of Maharashtra;

and all rights and liabilities which have accrued, or may accrue, under any such contract shall, to the ex- G tent to which they would have been rights or liabilities of the State of Bombay, be rights or liabilities of the State of Maharashtra or the State of Gujarat, as the case may be;

Provided that in any such case as is referred to in clause (b), the initial allocation of rights and liabilities H made by this sub-section shall be subject to such financial adjustment as may be agreed upon between the State

(1) [1964] 4 S.C.R. 718, 728.

of Maharashtra and the State of Gujarat, or, in default of such agreement, as the Central Government may by order direct. A

(2) For the purposes of this section there shall be deemed to be included in the liabilities which have accrued or may accrue under any contract— B

(a) any liability to satisfy an order or award made by any court or other tribunal in proceedings relating to the contract; and

(b) any liability in respect of expenses incurred in or in connection with any such proceedings.

(3) This section shall have effect subject to the other provisions of this Part relating to the apportionment of liabilities in respect of loans, guarantees and other financial obligations; and bank balances and securities shall, notwithstanding that they partake of the nature of contractual rights, be dealt with under those provisions. C

61. Where, immediately before the appointed day, the State of Bombay is subject to any liability in respect of any actionable wrong other than breach of contract, that liability shall,— D

(a) if the cause of action arose wholly within the territories which, as from that day, are the territories of the State of Maharashtra or the State of Gujarat, be a liability of that State; and E

(b) in any other case, be initially a liability of the State of Maharashtra but subject to such financial adjustment as may be agreed upon between the States of Maharashtra and Gujarat or, in default of such agreement, as the Central Government may by order direct." F

The learned counsel for the State of Maharashtra contends that the liability to pay arrears of pay was not a liability arising out of a contract but was a liability in respect of an actionable wrong other than a breach of contract.

This Court in *State of Bihar* v. *Abdul Majid*(1) held "that the rule of English Law that a civil servant cannot maintain a suit against the Crown for the recovery of arrears of salary does not prevail in India and it has been negatived by the provisions of the statute law in India". Mahajan, C.J., speaking for the Court, observed at p. 802: G

"As regard torts of its servants in exercise of sovereign powers, the company was not, and the Crown in H

(1) [1954] S.C.R. 786.

A India was not, liable unless the act has been ordered or ratified by it. Be that as it may, that rule has no application to the case of arrears of salary earned by a public servant for the period that he was actually in office. The present claim is not based on tort but is based on *quantum meruit* or contract and the court is
B entitled to give relief to him."

It may be that these observations are not conclusive on the point under consideration. It seems to us, however, that some elements of relationship between a public servant and Government are based on contract within the meaning of s. 60 of the Bombay Reorganisation Act, 1960. In particular, the liability
C to pay salary, when it has been fixed, arises out of a contract to pay salary. Authority is not lacking even in England where a special relationship exists between the Crown and its public servants. In *Owner or S. S. Raphael* v. *Brandy*(1) the head-note reads :

"'A stoker on board a merchant ship, who was en-
D titled to wages from the shipowners, and also as a stoker in the Royal Naval Reserve to 6£ a year as a retainer, was injured by an accident on the ship which disabled him from continuing to serve in the Royal Naval Reserve :—

Held, that the stoker was entitled under the Work-
E men's Compensation Act, 1906, to compensation from the shipowners not only in respect of his wages but also of the retainer, which must be taken into account as earnings under a concurrent contract of service."

The Lord Chancellor in the course of the speech observed :

F "A point was made before your Lordships which does not appear to have been made in the Court below, that there was no contract with the Crown at all here. The authorities cited go no further than to say that when there is an engagement betwen the Crown and a military or naval officer the Crown is always entitled to
G determine it at pleasure, and that no obligation contrary to that would be recognized or valid in law.

It was then said that there were not here concurrent contracts. I agree with Fletcher Moulton L.J. that this is almost a typical case of concurrent contracts, because the workman was being paid wages for his services on
H board a merchant ship, and at the same time he was earning his 6£ a year by virtue of his engagement with the Crown; and he was giving an equivalent for that.

(1) [1911] A.C. 413-14.

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because he was keeping himself fit and doing the work which he stipulated to do."

It is true that Lord Goddard, C.J., in *Inland Revenue Commissioners* v. *Hambrook*(1) observed :

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"If I may be bold enough to express a conclusion on a matter on which the Judicial Committee hesitated in *Reilly* v. *R*(2), it is that an established civil servant is appointed to an office and is a public officer, remunerated by moneys provided by Parliament, so that his employment depends not on a contract with the Crown but on appointment by the Crown, though there may be as indicated in *Reilly* v. *R.*(2) exceptional cases, as for instance an engagement for a definite period where there is a contractual element in or collateral to his employment."

C

But in the Court of Appeal nothing was said about these observations.

D

It will be remembered that the Privy Council had said in *Reilly* v. *R*(2) that "their Lordships are not prepared to accede to this view of the contract, if contract there be. If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for cause" it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded."

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Even Lord Goddard, C.J., in *Terrell* v. *Secretary of State for the Colonies*(3) observed that "the case (*Reilly* v. *R.*)(2) shows that there may be contractual rights existing before determination of a contract at will which are not inconsistent with a power to determine," and he stuck to this in *Hambrook's* case(1) by stating :

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"Although it is clear that no action for wrongful dismissal can be brought by a discharged civil servant, I may be allowed to say that I adhere to the opinion which I expressed in *Terrell* v. *Secretary of State for the Colonies*(3) that he could recover his salary for the time during which he has served. He would claim on a *quantum mersuit* and I am fortified in this view by *Reilly* v. *R.*(2), by *R.* v. *Doultre*(4) and by *Bushe* v. *R*(5) referred to in Robertson's book at p. 338."

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(1) [1956] 1 All E.R. 807, 811-12.
(2) [1934] A.C. 176; 179.
(3) [1953] 2 Q.B. 482, 499.
(4) (1884) 9 A.C. 745.
(5) (May 29, 1869, The Times)

A We are here concerned with a choice between s. 60 and s. 61, which lay down two broad categories. It seems to us that the decree of the High Court decreeing payment of arrears of salary is truly a liability in proceedings relating to a contract within s. 60(2)(a) of the Act. It is true, as held by this Court in the *State of Tripura* v. *The Province of East Bengal*(1), that the words B 'actionable wrong other than breach of contract' in this context are wide words and include something more than torts, but even so where a suit is brought by a Government servant for arrears of salary, the decree more properly falls under s. 60 of the Act rather than under s. 61.

In the result the appeal fails and is dismissed with costs to C the respondent, Baishankar Avalram Joshi. The State of Gujarat will bear its own costs in this appeal.

R.K.P.S. *Appeal dismissed.*

(1) [1951] S.C.R. 1,44.