

tioners. It may be that the contract contains a number of reciprocal promises some of which have been performed and some of which have not, but that fact alone would not, in my opinion, lead one to the conclusion that the petitioners have not fulfilled the conditions on which alone exemption can be claimed. If the petitioners fail to comply with the terms of the contract, it would be open to Phelps and Company to bring an action against them for specific performance or for recovery of damages. Phelps and Company has no power to recall the shares which have been allotted by them or to divest the petitioners of the right of ownership which has come to vest in them.

Associated
Clothiers,
Limited
v.
Union of India
and others

Bhandari, C. J.

For these reasons I would allow the appeal, set aside the order of the learned Single Judge and direct the officers concerned to grant a certificate to the petitioners that the conditions prescribed in the notification of 1937 have been fulfilled. I would order accordingly. There will be no order as to costs.

Khosla, J.—I agree.

Khosla, J.

APPELLATE CIVIL.

Before Bhandari, C. J. and Khosla, J.

THE STATE OF PUNJAB,—Appellant.

versus

PREM PARKASH DIXIT AND OTHERS,—Respondents.

Letter Patent Appeal No. 53 of 1954

East Punjab Local Authorities (Restrictions of Functions) Act (IX of 1947)—Section 4, Constitution of India, Article 311—Person appointed by Government to discharge functions under the Act—Whether holds a civil post under the State—Constitution of India, Article 311—Whether applies to Temporary Government employees.

1957

Feb., 15th

Held, that the answer to the question whether a particular person is a municipal servant or a Government servant is determined by the functions which he performs. If he performs the functions relating to a municipal committee, he is a Municipal Officer, but if he performs the functions relating to Government, he is a Government servant. A person appointed by the State Government under section 4 of the East Punjab Local Authorities (Restrictions of Functions) Act, as a Superintendent of Water Works to discharge the duties of the Municipal Committee in the Water Works Department cannot be said to be the holder of a post under the State within the meaning of Article 311 of the Constitution.

Held also, that a temporary Government servant is not entitled to the rights and privileges conferred by Article 311 of the Constitution. A person cannot be deemed to be a member of a service unless he is permanently absorbed therein and he cannot be deemed to be a holder of a civil post unless he holds the said post in a permanent capacity.

Appeal under clause 10 of the Letters Patent from the order of Hon'ble Mr. Justice Kapur, passed in Civil Writ No. 41 of 1954, dated 13th July, 1954, directing the Punjab Government to reinstate the respondent No. 1.

S. M. SIKRI, Advocate-General, K. S. CHAWLA, Assistant Advocate-General and H. L. SARIN, for Appellant.

H. L. SIBAL and PREM PARKASH DIXIT, for Respondent.

JUDGMENT

Bhandari, C. J. BHANDARI, C.J.—This appeal under clause 10 of the Letters Patent raises the question whether a person appointed by Government to discharge the functions of a Municipal Committee under the East Punjab Local Authorities (Restriction of Functions), Act, 1957, can be deemed to be the holder of a civil post under the State.

On the 29th of December, 1947, the State Government suspended the Water Works Department of the Municipal Committee of Muktsar and

on the 29th April, 1949, the said Government appointed the petitioner as Superintendent of Water Works to discharge the functions of the said Department on a salary of Rs. 152 per mensem. On the 13th February, 1954, the State Government terminated the services of the petitioner under section 45 of the Punjab Municipal Act, and on the 2nd March, 1954, the latter presented a petition under Article 226 of the Constitution in which he complained that his removal had been effected without charges or hearing and in contravention of the provisions of Article 311 of the Constitution. The learned Single Judge before whom the petition came up for consideration found in favour of the petitioner and issued a direction requiring the State Government to reinstate the petitioner to the office from which he had been unlawfully removed. The State Government are dissatisfied with the order and have come to this Court in appeal under clause 10 of the Letters Patent.

The State of
Punjab
v.
Prem Parkash
Dixit
and others

Bhandari, C. J.

Section 4 of the East Punjab Local Authorities (Restriction of Functions) Act, 1947, is in the following terms:—

“The State Government if satisfied that a local authority having jurisdiction in any Notified Area is incapable of performing or does not adequately perform any or all of its functions, may suspend such branches or departments of the local authority as are entrusted with these functions, and shall appoint any person or persons either by name or designation to discharge such function or functions.”

Section 5 empowers the State Government to direct that the expenses of discharging such

The State of Punjab
 v.
 Prem Parkash
 Dixit
 and others

functions shall be paid by the local authority. Section 8 declares that the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the Punjab Municipal Act or any other enactment in force in the Punjab.

Bhandari, C. J.

The first point for decision in the present case is whether the petitioner is the holder of a civil post under the State and is thus entitled to the rights and privileges conferred by Article 311 of the Constitution. Mr. Sibal, who appears for the petitioner, contends that as soon as the Water Works Department was suspended by the State Government all the functions of the said Department came to vest in the State Government, that all the posts in the said Department became civil posts under the State and that the relationship of master and servant came into existence between the State and the municipal employees. The State, it is contended, had a right to select and engage all officers and servants of the Water Works Department; it had a right to direct the source from which their salaries should be paid; it had a right to dismiss or discharge such officers and servants and it had a right to control their conduct. These four elements, it is argued, make it quite clear that the petitioner was a servant of the State and was entitled to invoke the help of Article 311 of the Constitution.

A Municipal Committee is a public corporation created by the Legislature to administer the local and internal affairs of a city or town and is subject to the control of the Legislature as to exercise of its powers, the organisation of its government and as to its corporate existence. As the power to create carries with it the powers to impose such restrictions and limitations as the creator may devise, it is open to the Legislature to impose restrictions not only at the time of its creation but

also at any stage of its existence. A municipal committee has power to engage officers and servants to discharge the duties which have been entrusted to it by law and any persons so engaged are agents of the corporate body. *Prima facie* a municipal officer is a person whose duties and functions relate exclusively to the local affairs of the municipality as distinguished from those that relate to the State at large, or the general public, although exercised within defined limits. Answer to the question whether a particular person is a municipal servant or a Government servant is determined by the functions which he performs. If he performs the functions relating to a municipal committee, he is a municipal officer; but if he performs the functions relating to Government, he is a Government servant, *Britton v. Staber* (1), *Kahn v. Sutro* (2).

The State of
Punjab
v.
Prem Parkash
Dixit
and others

Bhandari, C. J.

The State Government in the present case found that the Municipal Committee of Muktsar was not discharging its duties satisfactorily and it accordingly directed that the duties of the Water Works Department shall henceforth be discharged by a person to be designated as Superintendent of Water Works. The State Government did not supersede the Municipal Committee or a department thereof; it merely entrusted the duties of the Municipal Committee in the Water Works Department to another person. The post was to all intents and purposes a municipal post and the salary of the incumbent thereof was to be paid out of municipal funds. The question whether a person is an employee of a municipal committee is not affected by the manner of his appointment, *Barnes v. District of Columbia* (3), *Denver v. Spencer* (4),

(1) 62 Mo. 370

(2) 33 L.R.A. 620 United States

(3) 23 L. Ed. 440

(4) 114 American State Reports 158

The State of Punjab v. Prem Parkash Dixit and others
 Bhandari, C. J.

for as pointed out in Halsbury's Laws of England, Volume 22, page 112, a person may be the servant of another although a third party has the power of appointing or dismissing him or of requiring his dismissal or has powers of direction and control in regard to his work or pays him his wages. The mere fact that a municipal employee has been appointed by the State Government does not make him a State rather than a municipal employee, *Mangal Sain Marwah v. The State of Punjab* (1). The post occupied by the petitioner was created in exercise of the powers conferred by the Act of 1947; his salary was paid out of municipal funds and his services were terminated under section 45 of the Punjab Municipal Act. His duties did not concern the State at large but related exclusively to the Municipal Committee of Muktsar. It seems to me therefore that the post of Superintendent of Water Works cannot be deemed to be a civil post under the State and the occupier of that post cannot be said to be the holder of a civil post.

Assuming for the sake of argument that the petitioner was in fact the holder of a civil post under the State Government, the question arises whether he was holding the post in a permanent or in a temporary capacity. He was appointed in place of S. Narain Singh to discharge the functions pertaining to the Water Works of the Municipal Committee of Mukstar at Rs. 152 per mensem in the grade of Rs. 152—8—200 with usual allowances. As the Water Works Department was suspended under the provisions of section 4 of the Act of 1947, it is obvious that the petitioner was appointed only for a short period. If he was only a temporary Government servant, he is not entitled to the rights and privileges conferred by Article 311, for as pointed out in *Laxminarayan v.*

(1) 53 P.L.R. 268

Union of India (1), a person cannot be deemed to be a member of a service unless he is permanently absorbed therein and he cannot be deemed to be a holder of a civil post unless he holds the said post in a permanent capacity.

The State of
Punjab
v.
Prem Parkash
Dixit
and others

Bhandari, C. J.

For these reasons I am of the opinion that the petitioner was not the holder of a civil post under the State and that even if he were to be deemed to be the holder of a civil post he was the holder of the said post in a temporary capacity and is not entitled to the benefit of Article 311 of the Constitution. I would accordingly allow the appeal, set aside the order of the learned Single Judge and dismiss the petition filed by the petitioner. There will be no order as to costs.

Khosla, J.—I agree.

Khosla, J.

APPELLATE CIVIL.

Before Bhandari, C. J. and Tek Chand, J.

S. KABUL SINGH,—Appellant

versus

NIRANJAN SINGH AND OTHERS,—Respondents.

Letters Patent Appeal No. 62 of 1955.

Constitution of India, Articles 226 and 227—Writs of Mandamus, prohibition and certiorari—Meaning and scope of—Writ of certiorari when to issue—Failure of tribunal to give effect to executive instructions, whether a ground for issue of the writ.

1957
Feb., 19th

Held, as follows:—

(1) An order of *mandamus* is, in form, a command directed to some inferior Court, tribunal or board or to some corporation or person requiring the performance of a particular duty therein specified which duty results from the official station of the party to whom the writ is directed or from operation of law. It compels a tribunal to exercise a jurisdiction which it possesses but declines to exercise.