NOTES OF CASES

"REDUCTION IN RANK" AND THE ELEMENT OF PENALTY

Munusamy v. *Public Services Commission*[1]

In this case the Public Services Commission terminated the applicant's appointment as a Probationary Assistant Passport Officer in the External Affairs Service and reverted him to his former substantive rank in the Immigration Department. The reason for the action seemed to be realisation, after his appointment, that he did not possess the required qualifications for the post. Applicant, by way of proceedings for certiorari and mandamus, challenged the validity of this action contending that he had not been given any opportunity of being heard, thereby violating the protection guaranteed by Article 135(2) of the Constitution:—

> 135(2) No member of such a service as aforesaid [i.e. the public services] shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

Ong J. dismissed the application.

In writing this note the writer does not wish to quarrel with the decision. He wishes, however, to confine[2] himself to the narrow inquiry into what was actually held by the learned judge and what principle, if any, can be extracted from the judgment.

This task is undertaken for it appears to the writer that there has been a misinterpretation of the case on several occasions, resulting in the extraction of a principle which cannot be supported by a careful reading the judgment of Ong J. Illustrative of such misinterpretation are the following:

> "Reversion from a probationary appointment to a formerly held substantive post does not amount to reduction in rank within the meaning of Article 135 of the Federation of Malaya Constitution."[3]
>
> "Reversion from a probationary appointment to a former substantive appointment is not reduction in rank for the purposes of this Article."[4]
>
> "Ong J. held that reversion from a probationary appointment to a formerly held substantive post does not amount to a reduction in rank within the meaning of Article 135,"[5]

If the above quotations correctly state the principle of the case, it would appear, of course, that the case decided that *any* reversion from a probationary appointment to a former sustantive post will not attract the restrictions in Article 135. But did the learned judge in fact decide the case in this way?

1. (1960) M.L.J. 221.
2. For comment on other aspects of the case, see (1962) 4 Malaya Law Review at p. 305; (1963) 5 Malaya Law Review pp. 166-170.
3. The headnote given by Malayan Law Journal in its report of the case.
4. Footnote in *Malayan Constitutional Documents* 2 Ed. Vol. 1 p. 101: it is a footnote designed to annotate Article 135.
6. Koh in (1962) 4 Malaya Law Review, p. 305.

The writer respectfully submit? that the statement of the principle in such broad terms cannot be supported by a scrutiny of the judgment. It is true that Ong J. when commencing to deal with the question of reversion from a probationary appointment to a former substantive post, said:

> "In my view 'reduced in rank' means reduced in substantive rank, and not the reversion of an officer holding a post merely on probation to his original substantive rank." [6]

Surely the mere fact that Ong J. said this does not give rise to any principle. First, if this indeed was the principle then the learned judge would have had to go on further and could have dismissed the application at that stage.

Secondly, and more important, a reading of the rest of his Lordship's judgment clearly shows that he proceeded to deal with the question on other (and more restricted) considerations. Ong J. cites with approval several Indian decisions which he thought "are of the greatest assistance in determining the question arising in this case", and after considering them he states:

> "In interpreting what is 'reduction in rank' under Article 135(2) of our Constitution, and in deciding whether the applicant's reversion to his original substantive post amounts to reduction in rank, I would respectfully adopt the reasons given in the cases above referred to." [7]

And what were these Indian cases which his Lordship was inclined to follow, and what principles did they stand for? Let us just consider two cases which Ong J. quoted: *M.V.Vichoray* v. *State of Madhya Pradesh*[8] and *Kedar Nath Agarwal* v. *State of Ajmeer*.[9]

The passage from *Vichoray's* case, which the learned judge quoted, enunciated two principles; First, 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. Secondly, it is equally clear that where reversion is ordered *as a penalty*, it amounts to a reduction in rank because such reversion is apt to stand in the way of a Government servant in securing his promotion in the normal course.

In *Kedar Nath Agarwal's* case it was held that a Government employee holding a post substantively cannot be reduced in rank without complying with the requirements of Article 311 [10] although the post is a temporary one. If on the other hand he is holding the post in an officiating capacity, he can be reverted for administrative reasons, but not by way of penalty, without being entitled to the procedure in Article 311.

Ong J. also quoted from *Laxminarayan Chironjilal Bhargava* v. *Union of India*[11] where the Court applied the penalty test[12] albeit this was done not because of Article 311(2) but because of Rule 212 of the Army Instructions (India).

After citing the Indian cases, and after expressing his approval of the relevant passages, Ong J. concludes:

> *"The proper test to apply,* when one has to find the dividing line between actions which do, and those which do not, come within the purview of Article 135(2), *is whether the actions are penal in character or otherwise.* In the

6. (1960) M.L.J. at p. 224.
7. *Ibid.*
8. A.I.R. 1952 Nag. 288.
9. A.I.R. 1954 Ajm. 22.
10. Clause 2 of Art. 311 of the Indian Constitution requires the civil servant concerned "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him".
11. A.I.R. 1956 Nag. 113.
12. Ong J. does not seem to attach any significance to the Court's view that where a person holding a temporary post is not dismissed but is merely reduced in rank, he cannot invoke Art. 311 of the Constitution.

> instant case I am clearly of the opinion that the applicant's reversion was merely the logical result of the respondent's holding that he was under-qualified for confirmation in the probationary appointment, *and not action taken by way of penalising him.* It therefore does not amount to 'reduction in rank' and the provisions of Article 135(2) have no application." [13]

It is submitted that the above passage is the key to the decision, and it shows that Ong J. not only approved, but also applied, the penalty test. Having found that the reversion was not by way of penalty, he correctly decided that it did not amount to "reduction in rank" within Article 135(2). It is clear therefore, notwithstanding what he might have *said,* that he did not *decide* that no reversion from a pobationary appointment to a former substantive rank can amount to "reduction in rank".

A case can be only authority for what it actually decides and, on the preceding analysis of the case, it is submitted that the correct principle of the case on this point must be:

> Reversion from a probationary appointment to a formerly held substantive post, *not being by way of penalty,* does not amount to reduction in rank within the meaning of Article 135 of the Federation of Malaya Constitution.

The difference is not of mere academic interest, for one can foresee future cases where the applicability or non-applicability of the penalty test may be crucial to the decision. Any statement of the principle in Munusamy case must, therefore, reflect the Judge's application of this test.*

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* *This note was received prior to the recent decision of the Court of Appeal.—Ed.*

13. (1960) M.L.J. at p. 224. Italics added.