

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

D.A. No. 1557 /998

Date of Decision: 24-8-1998

Dr. N.K. Rai

...Applicant

(By Advocate Shri K.B.S. Rajan)

Versus

Union of India & Ors.

...Respondents

(By Advocate Shri N.S. Mehta)

CORAM:

HON'BLE MR. JUSTICE V. RAJAGOPALA REDDY, VC (J)

HON'BLE SHRI/MRS.

1. TO BE REFERRED TO THE REPORTER OR NOT? YES
2. WHETHER IT NEEDS TO BE CIRCULATED TO OTHER BENCHES OF THE TRIBUNAL?


(V. Rajagopala Reddy)

Vice-Chairman (J)

Cases referred:

OA No.1557/98

New Delhi this the 24th day of August 1999

O R D E R

By Reddy, Jai

Hon'ble Members Smt. Lakshmi Swaminathan and Shri N. Sahu, having heard the OA, expressed divergent opinions. Hence, the OA is referred to me for my opinion. Since I have had the advantage of perusing the erudite opinions expressed by the Hon'ble Members where the facts are elaborately narrated and discussed, it may suffice if I give the outline of facts, before I proceed to consider the questions that arise in this case.

2. The applicant was a Lecturer in the National Institute of Visually Handicapped. He was sent on deputation for a period of five years or till further orders in the Institute of Secretariat Training and Management (ISTM). He joined the ISTM on 9.1.88 in the post of Joint Director (BT) and has been working there since then. Sometime thereafter, in 1997, Respondent 1 had issued an advertisement for filling up the post of Joint Director (BT) in ISTM on deputation basis.

3. According to the relevant recruitment rules the post of Joint Director was to be filled up on the basis of transfer on deputation of officers under the Central Government, including under the Defence Services (other than Junior Commissioned Officers).

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They should possess degree from recognised Universities or have three years service in posts in the scale of Rs.3000-4500. Other qualifications prescribed are not necessary for our purpose. The applicant along with others had applied for the post in pursuance of the said advertisement. The applicant was, however, not considered, initially, eligible for the post as, according to the selection committee, he was not an officer under the Central Government which was a requirement under the Rules. Later, on the representation made by the applicant dated 30.9.97, he was, however, found to be eligible. The applicant was then selected by the Selection Committee and was appointed for the post of Joint Director (BT). Subsequently, however, while finalising the terms of the deputation the respondents had reverted to the earlier view that the applicant was ineligible as he belonged to an autonomous body and was thus not an employee under the Central Government. Accordingly the applicant got reverted to his parent organisation by an order dated 25.8.98, which is under challenge in this

OA.

4. The only question, that arose in the case and debated, was whether the applicant, being an officer in NIVH, could be said to be an officer "under the Central Government", within the meaning of the Recruitment Rules for the appointment of Joint Director in ISTM. It was the contention of the learned counsel for the applicant that the officers under the Central Government need not be in the service of the Government. An officer of an Organisation which is totally controlled by the Government is ~~the~~ ^{an} officer

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under the Govt. It was further argued that respondents are estopped, having earlier selected and appointed the applicant from resiling and stating that he was not eligible to be appointed. The learned counsel for the respondents, however, submits that the applicant was not an officer of NIVH which is an autonomous body with its own constitution and that the Central Government has no control over the NIVH or its officers and that the applicant cannot be called as an officer under the Govt. He refutes the contention of estoppel and submits that there can be no estoppel against the Statute.

5. Considering the rival contentions advanced, learned Judicial Member (Smt. Lakshmi Swaminathan) has taken the view that the applicant was not an officer under the Central Government for the purposes of the rules, being an officer of a statutory autonomous organisation. On the other hand, the learned Administrative Member (Shri N. Sahu) has taken the view that the applicant, being an officer of NIVH and it being totally controlled by the Government and does in essence being a department of the Central Government, the ~~applicant~~ should be considered as an officer under the Central Government.

6. I again heard the learned counsel on either side and carefully considered their oral submissions as well as the written arguments given by the respondents' counsel.

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7. Before I proceed further to consider the rival contentions raised, it is necessary to consider, in brief, the nature and Constitution of NIVH. NIVH was established in the year 1979 by upgrading the National Centre for the Blind. It was registered under the Societies Registration Act. It is an apex level national organisation in the area of visual disability. Its objects are to conduct and promote research in all aspects of education and rehabilitation of the visually handicapped as also research in bio-medical engineering leading to the effective evaluation of aids. Its General council consists of several officers of Union of India and certain other States. Its Academic Council is represented by a Director. The composition of Executive Council and the General Council shows that highly placed officers of the Central Government are entrusted with the affairs of the Management. The powers of appointment are also entrusted in the hands of the Executive Council and the General Council. Only the Director of the Institute is appointed by the Executive Council but with the prior approval of the Government. The Executive Council is also empowered to sanction expenditure and to invest funds of the Institute. The administrative, executive and financial powers are entirely with the Executive Council. It is, however, seen that the directions issued by the Government are binding on the NIVH. Under clause 14 (4), in case Government of India is satisfied that the NIVH is not functioning properly the Govt. of India shall have the power to take over the administration of the Institute and to appoint an administrator for this purpose. The NIVH being a registered society under the Societies Registration Act, has got its own seal with a

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distinct corporate structure. The officers are bound to act within the terms and conditions of their appointment.

8. In order to ascertain what factors determine when an officer could be said to be under the control of the Govt., it is necessary to consider the case law as this aspect did come up before the Supreme Court in a catena of cases. A similar expression, namely, "office of profit under Govt. of India" occurring in Article 102 (1)(a) of the Constitution has come up for discussion before the Constitution Bench in **Abdul Shakur v. Rikhab Chand & Anr.** (AIR 1958 SC 52). Under Art. 102 (1) a person shall be disqualified for being chosen and for being member of either House of Parliament, if he holds an office of profit under the Government of India. The appellant before the Supreme Court was appointed as Manager of Durgah Committee under the provisions of Durgah Khawaja Sahib Act. He was elected to the Concil of States by the Electoral College of Ajmer. His election was questioned as hit by Article 102 (1) (a) of the Constitution on the ground that he was holding an office of profit under the Government. When the matter ultimately came up before the Supreme Court it was held that the appellant's election was wrongly set aside and that the appeal should be allowed. The Constitution Bench of the Supreme Court, after considering the nature and constitution of the Durgah, observed that the Durgah was a body corporate with perpetual succession acting

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within the four corners of the Act. It was further observed:

"Merely because the committee or the members of the committee are removable by the Government of India or the committee can make bye-laws prescribing the duties and powers of its employees cannot in our opinion convert the servants of the committee into holders of office of profit under the Government of India. The appellant is neither appointed by the Government of India nor is removable by the Government of India nor is he paid out of the revenues of India. The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government though payment from a source other than Government revenue is not always a decisive factor. But the appointment of the appellant does not come within this test."

9. The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment and payment from out of the Govt. revenues, appear to be the important factors in determining the question whether a person was holding an office of profit under the Government or not.

10. **Guru Gobinda Basu v. Sankari Prasad Ghosal and Ors.** (AIR 1964 SC 254) is also a Constitution Bench decision. Relying upon the earlier Constitution Bench decision of the Supreme Court in **Abdul Shakur's** case (supra), the Supreme Court narrated the following characteristics features to determine

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whether an officer is under the control of the authority concerned:

- (1) the appointing authority;
- (2) the authority vested with power to terminate the appointment;
- (3) the authority which determines the remuneration;
- (4) the source from which the remuneration is paid; and
- (5) the authority vested with power to control the manner in which the duties of office are discharged.

11. The Court held that all factors need not be present. Where several elements are present in a given case then the officer in question holds the office under the authority so empowered. The Court while holding, drew the distinction between "the holders of an office of profit under the Govt." and "the holder of a post or service under the Government" (see Articles 58(2) and 66(4) of the Constitution). In the above case the appellant was a Chartered Accountant. He was a partner of a firm of Auditors which was wholly owned by the Govt. The Court was required to consider the question whether the Chartered Accountant can be said to hold an office of profit under Government. Since it was found that he was removable by the Govt., the Comptroller and Auditor General of India exercised full control over him and his remuneration was fixed by the Central Government it was held that he holds an office of profit under the Government.

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12. In **Biharilal Dobray v. Roshan Lal Dobray** (1984 (1) SCC 551) the Supreme Court considered this question from another angle, in the touch-stone of the dependence of the organisation over the Govt. ~~had been~~. It was held that the true test depends upon the degree of control the Govt. has over the Institution in which the officer was working. Though the incorporation of a body corporate may suggest that the statute intended it to be statutory corporation independent of the Government, it is not conclusive on the question. ~~But~~ In substance it may be just the alter ego of the Government itself. The composition and the degree of dependence on the Govt. for its financial needs and the nature of the important functions it discharges may also indicative of its dependence on the Govt. In **Biharilal Dobray's** case (supra) a teacher who was employed by the Board of Basic Education under the U.P. Basic Education Act, 1972 was considered as holding an office of profit under the State on the ground that under the provisions of the Act the Teachers and other employees were to be appointed in accordance with the rules by the officers who are themselves appointed by the Govt. The disciplinary proceedings in respect of the employees were subject to the final decision of the State Govt. It was, therefore, held that the Teacher under the above act was holding an office of profit under the Govt.

13. The latest decision of the Supreme Court, on this question appears to be **Aklu Ram Mahto v. Rajendra Mahto** (1999 3 SCC 541). The question that arose before the Supreme Court was whether the

employees holding the posts of Khalasi and Meter Reader in Bokarao Steel Plant under the Steel Authority of India Ltd. were disqualified under the Representation of the People Act, 1951 to be elected as the members of the Legislative Assembly and under Article 191 (1)(a) of the Constitution. Election petitions filed against them in the High Court were disallowed. The appellants carried the matter before the Supreme Court. The Supreme Court while dismissing the appeals held that the posts of Khalasi and Meter Reader are non -executive posts and they do not come within the meaning of Section 10 of the Representation of People Act as it disqualifies only the Managing Agent, Secretary or Manager of the Company belong to Govt. It was also held that they do not hold an office of profit under the Govt. The Supreme Court, elaborately considering all the decisions on this point including **Abdul Shakur's case**, Guru Gobinda Basu and **Biharilal Dobray (supra)** ~~and~~ observed as follows:

"15. The Bokaro Steel Plant is under the management and control of Steel Authority of India Ltd. This is a company incorporated under the Companies Act. Undoubtedly, its shares are owned by the Central Government. The Chairman and the Board of Directors are appointed by the President of India. However, the appointment and removal of workers in the Bokaro Steel Plant is under the control of Steel Authority of India Ltd. Their remuneration is also determined by Steel Authority of India Ltd. The functions discharged by Steel Authority of India Ltd. or by the Bokaro Steel Plant cannot be considered as essential functions of the Government. Amongst the objects of Steel Authority of India Ltd. set out in the Memorandum of Association are to carry on in India or elsewhere the trade or business of manufacturing, prospecting, raising, operating, buying, selling importing, exporting, purchasing or otherwise dealing in iron and steel of all qualities, grades and types. These objects also include

rendering consultancy services to promote and organise an integrated and efficient development of iron and steel industry and to act as an agent of the Government/public sector financial institutions in the manner set out in the Objects clause. In this context a worker holding the post of a Khalashi or a Meter Reader is not subject to the control of the Central Government nor is the power of his appointment or removal exercised by the Central Government. Control over his work is exercised not by the Government, but by Steel Authority of India Ltd. The respondents cannot, therefore, be considered as holding an office of profit under the Central Government."

14. The Supreme Court in coming to its decision mainly followed the criteria laid down in **Guru Gobinda Basu's** case (supra), which, in turn, followed the decision of the earlier Constitution Bench decision in **Abdul Shakur's** case (supra).

15. Reverting to the present case, NIVH is a society constituted under the Societies Registration Act. No doubt, the applicant was initially appointed by the Government when NIVH was a governmental organisation, as a wing of the Govt. Subsequently, the NIVH has been separated from the Govt. and then constituted as a separate society with its own constitution and the applicant was appointed to that society. He was not appointed by the Govt. but appointed by the executive council and general council of the Society, as the powers of appointment are entrusted in the hands of the two bodies. Undoubtedly, the NIVH is totally funded by the Govt. and its accounts are also audited by the Accountant General. But the administrative, executive and financial powers are vested, entirely with the executive council. It is, however, contended by the learned counsel for the

applicant that though the NIVH has a facade independence in view of its registration as a Society, it is totally dependent upon the Govt. the executive council and the general council comprises of the officers of the Central Govt. and thus directly the affairs of the NIVH are controlled by Govt. I do not agree. Once the officers are appointed as members of the executive concil or general council they will have to act in accordance with the functions and duties enjoined upon them as per the rules and bye-laws of NIVH. They will no more don the cloths of the Govt but would sit in the chairs as the members of the council. Again, the disciplinary authority is not the Government. The disciplinary proceedings are initiated and culminated in the hands of the authorities of NIVH. It is true that the Govt. have the power to issue directions which are binding upon NIVH. The said feature alone cannot be a ground to hold that the NIVH is totally under the control of the Govt. It may be that the Government has an indirect control over NIVH. The functions discharged by NIVH, in my view, cannot be called the sovereign or other essential functions of the Govt. In **Shyam Sunder v. State of Rajasthan**, (1974) 1 SCC 690 the Supreme Court held that famine relief was not a sovereign function of the State. In **N. Nagendra Rao & Co. v. State of Andhra Pradesh**, JT 1994 (5) SC 572 it was held:

"barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of the constitutional Government,"

Hence the objects of the Society which relate to rehabilitation of the visually handicapped by promotion and research in all aspects of education and bio-medical engineering cannot be said to be sovereign functions of the Government or other essential functions of the Government.

16. In my view, taking into consideration the factors specified by the Supreme Court in **Abdul Shakur's** case (supra) and **Guru Gobinda Basu's** case (supra) and also taking into consideration the true test laid down as to the degree of control of the organisation in **Biharilal Dobre's** case, the applicant cannot be said to be an officer under the Central Govt.

17. The Hon'ble Member Shri N. Sahu heavily relied on **Biharilal Dobre's** case (supra) which was discussed by the Supreme Court in **Aklu Ram Mahto's** case (supra) and explained. In view of the special features present in that case it was distinguished particularly for the reason that under the U.P. Basic Education Act, 1972 the primary education was being provided to the State coupled with the fact that the disciplinary proceedings against the employees were subject to the final decision of the State Govt. to hold that the Teachers are officers of the Govt. and Teachers working under the said Act were said to be holding the post under the State Govt. The decisions in **Abdul Shakur** and in **Guru Gobinda Basu** cases which are of

Constitution Bench judgements hold the field. It is trite proposition of law that if conflicting decisions were rendered by Benches of unequal strength, then the decision of the larger Bench of the Supreme Court should be followed even though the decision of the smaller Bench may be later in point of time. (See **Ganpat S. Balvalkal v. Vaman S. Mage**, AIR 1981 SC 1956 and **Triveni Ben v. State of Gujarat**, AIR 1989 SC 1335). In any event, the decision of the Supreme Court in **Aklu Ram's** case, being the latest, is binding upon this Tribunal.

The Hon'ble Member Shri N. Sahu also relied upon **State of U.P. v. Manbodhan Lal Srivastava**, AIR 1957 SC 912, to state that the non-consultation with the Union Public Service Commission although laid down in the Constitution under Article 232 (c), is not mandatory and such a non-consultation would not make the decision void. For the same proposition the Hon'ble Member also relied upon **Biswanath Khemka v. Emperor**, AIR 1957 Federal Court 67 and **G.S. Lamba vs. Union of India**, AIR 1985 SC 1019. This question does not arise in the present case. No argument was also advanced by the counsel for the applicant that the requirement of an officer under the Central Govt. is not a mandatory requirement. It is nobody's case that even a person who is not an officer of the Central Govt. can be appointed as Joint Director. In G.S. Lamba's case (supra) it was held that a repeated exercise of power would amount to relaxation of the rules. I may say again that it is not the case of the applicant that the mandatory requirement should be treated as having been relaxed under the rules. It is not, therefore, necessary for me to discuss the cases and examine this

point at length. However, it can be said that no such repeated exercise of power is found in the present case to invoke Lamba's principle.

18. It is lastly contended by the learned counsel for the applicant that the respondents are estopped from resiling his selection and appointment already made which was taken after properly considering about his eligibility for the post as he was an officer under the Central Govt. The learned counsel for the respondents, however, submits that there can be no estoppel against the statute. It should be noticed that the appointment of the applicant is made in terms of the recruitment rules. The recruitment rules to the post of Joint Director in ~~ISTM~~ have been framed in exercise of the powers conferred under Article 309 of the Constitution. The rules are hence statutory. The rules provide that for the post of Joint Director one should be an officer under the Central Govt. The law is well settled that there is no estoppel against the statute. (See *Workman v. Hindustan Lever Ltd.*, AIR 1984 SC 516 and *Yamunabhai Anantrao Adhav v. A.S. Adhav*, AIR 1988 SC 644). It is true that the applicant was appointed and thereby a legal relation was created between him and ISTM. The order of appointment has been acted upon and the applicant joined the post and worked in the organisation for a period of 9-10 months. The applicant was selected and appointed after thorough deliberations. When it was found that the applicant was not fulfilling the essential requirements laid down under the rules ^{ISTM} _{the} applicant was reverted to his parent department. It is, therefore, heart burning for the applicant. But, in my view the above reasons cannot

preclude the Government from resiling the appointment of the applicant as there is ~~no estoppel~~ ^{no estoppel} against the Statute. **Union of India v. Ramroop Singh**, AIR 1968 SC 718 has no application to the facts of the present case. In this case a person has acted upon a representation made in an export promotion scheme that import licences upto the value of the goods exported will be issued. He has accordingly exported the goods but he was not granted import lincence for the maximum value permissible by the scheme. The court observed that where a person has acted on a representation made by the Govt. then the Govt. should carry out the promise made by it, even though the promise was not recorded in the form of formal contract as required by Art. 299 of the Constitution. That question ~~was~~ ^{was} decided ^{as to the right of a party to get the licence} executed under an oral agreement. This case, therefore, will be of no help to the applicant as the question of estoppel against the Statute was not discussed nor decided. Hon'ble Member Shri N. Sahu in this regard relied upon **Kasinka Trading v. Union of India**, AIR 1995 SC 874. It dealt with the equitable principle of promissory estoppel. It is an accepted principle that no equitable principle can be availed of contrary to law. It can be invoked only in the area where law does not operate. Hence, in my view the application of equitable principles of promissory estoppel has no application to the facts of the present case, as the recruitment rules contain a specific and mandatory requirement.

19. In view of the aforesaid discussion I hold that the applicant cannot be said to be an officer under the Central Govt. I, therefore, agree with the opinion expressed by Hon'ble Member (J), Smt. Lakshmi Swaminathan.

20. The OA is directed to be posted for hearing before the Bench comprising of Hon'ble Member (J), Smt. Lakshmi Swaminathan, and Hon'ble Member (A) Shri N. Sahu, for orders.

V. Rajagopala Reddy
(V. Rajagopala Reddy)
Vice-Chairman (J)

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27.8.1999

As there was a difference of view ~~amongst~~ ^{between Bz} us, the matter had been referred to the third Member Hon'ble Shri Justice V.Rajagopala Reddy, Vice Chairman. In Paragraph 19 of the order of Hon'ble Shri Justice Reddy it is stated that "the applicant cannot be said to be an officer under the Central Govt. I, therefore, agree with the opinion expressed by Hon'ble Member(J) Smt. Lakshmi Swaminathan".

2. In view of the above, the O.A. fails and is dismissed. No order as to costs.

N. Sahu

(N. Sahu)
Member(Admnv)

Lakshmi Swaminathan

(Mrs. Lakshmi Swaminathan)
Member(J)

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