(30)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

O.A.No.2128 /1997 Date of Decision: 26- 8 -1998

Shri Brij Mohan .. APPLICANT

(By Advocate Shri V. K. Rao)

versus

Union of India & Ors. .. RESPONDENTS

(By Advocate Shri M. S. Mehta)

CORAM:

THE HON'BLE SHRI T. N. Bhat, Member (J)

THE HON'BLE SHRI S. P. BISWAS, MEMBER(A)

1. TO BE REFERRED TO THE REPORTER OR NOT? YES

2. WHETHER IT NEEDS TO BE CIRCULATED TO OTHER BENCHES OF THE TRIBUNAL?

(S.P.Biswas)
Member(A)

Cases referred:

1. Jarnail Singh V. State of Punjab (1986) 1 ATC 208
2. D. K. Yadav V. MMA Industries Ltd. 1993 (4) SLR 126
3. State of Haryana & Ors. V. Piara Singh & Ors. (1992) 4 SCC 118=
4. Rajbinder Singh V. State of Punjab & Ors. 1988 (1) SLR 351
5. Himansu K. K. Vidyarthi & Ors. V. State of Bihar & Ors. 1997 4 SCC 391
6. State of UP & Anr. V. K. K. Shukla (1991) 1 SCC 691
7. M. B. C. Patel V. Jt. Ag. & Mar. Advisor, Govt. of India AIR 1995 SC 415
8. P. K. Ramachandran V. State of Kerala & Anr. JT 1997 (8) SC 189
9. K. C. Sharma & Ors. V. UOI & Ors. 1998 (1) SLJ 54

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

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OA No.2128/1997

New Delhi, this 26th day of August, 1998

Hon'ble Shri T.N. Bhat, Member(J)
Hon'ble Shri S.P. Biswas, Member(A)

Shri Brij Mohan
s/o Dukhi Lal
6, Chatham Lines, Allahabad ... Applicant

(By Advocate Shri V.K. Rao)

versus

Union of India, through

1. Secretary
Ministry of Public Grievances
New Delhi

2. Registrar
Central Administrative Tribunal
Allahabad Bench, Allahabad

3. Shri V.K.Srivastava
So(Admn.), CAT, Allahabad

4. The Chairman
Central Administrative Tribunal
Principal Bench, New Delhi

5. Vice-Chairman
Central Administrative Tribunal
Allahabad Bench, Allahabad .. Respondents

(By Advocate Shri N.S. Mehta)

ORDER

Hon'ble Shri S.P. Biswas

Heard rival contentions of consel for both the parties.

2. Three issues fall for determination in this OA. These are as under:-

(i) Applicant, a staff car driver (SCD for short) of Allahabad Bench of CAT, received an adverse order terminating his temporary services on 26.4.91, preferred

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an appeal dated 21.5.91 against the aforesaid order, got necessary relief in terms of series of ad hoc appointments beginning from 6.11.91 but was finally discharged from ad-hoc services by verbal order on 7.10.92 on account of unsatisfactory working. The question is: can the applicant turn back after nearly two and half years in September, 1993 and question original termination that took place on 26.4.91 after having acquiesced with this order?

(2) Are the respondents legally justified in opposing the applicant's claims mainly on the basis of limitation? Or the case deserves consideration on merits as well?

(3) Is the replacement of an initial ad hoc appointee legally barred by yet another such appointee in a situation where the first one has been admittedly considered to be lacking in integrity and has also been assessed to be poor performer?

3. To appreciate the legal issues involved, brief description of the background facts is considered essential.

On being duly selected, after trade test and interview, the applicant herein was appointed purely on temporary basis as SCD in Allahabad Bench of CAT on 13.12.89 (A-6). Paras 2 and 3 of A-6 communication indicate the terms and conditions. This was initially for a period of 3 months. Thereafter, the said appointment was extended until further orders w.e.f. 13.3.90 (A-9) on identical conditions as in A-6. By A-10 order dated 26.4.91, applicant's services were terminated in pursuance of the proviso to sub-rule (1) of Rule 5 of the CCS (Temporary) Service, Rules, 1965. A-10 was preceded by a show cause notice (A-11) dated 6.4.91 to which the applicant replied on 16.4.91 by A-12. Prior to that, a letter of warning communicating applicant's indifferent working, backed by unexplained unauthorised absence, was also served on the applicant on 20.2.91 by A-16. Applicant did not challenge A-10 order in any legal forum but continued making repeated represenbtations. It was only after his appeal of 21.5.91 that the respondents decided to re-engage him on sympathetic consideration w.e.f. 6.11.91 as per A-5 dated 1.11.91 but purely on ad hoc basis. Applicant thus continued working as SCD at Lucknow on purely ad-hoc basis with as many as four extensions granted between 6.11.91 and 6.10.92. Each such extension varied from one month to three months as stipulated in the respective orders. The final hammer fell on the applicant on 7.10.92 when his services were verbally dispensed with the instructions that he will not be taken on duty.

Applicant has, therefore, chosen to challenge in this OA not only A-10 order of termination dated 26.4.91 but also respondents' refusal to extend his ad-hoc services in follow up of A-1 to A-5 series of ad-hoc orders.

4. Shri V.K. Rao, learned counsel for the applicant has taken several grounds to assail the aforesaid orders. For the sake of brevity, we have decided to bring out only those for sharp focus that have legal bearing in the facts and circumstances of the case. A-10 order is not a termination simpliciter. Though innocuous on the face of it, it is really punitive in nature. Drawing strength from the decision of the Hon'ble Supreme Court in **Jarnail Singh V. State of Punjab (1986) 1 ATC 208**, the learned counsel argued to say that it is the substance of the order i.e. the attending circumstances as well as the basis of the order that have to be taken into consideration. In other words, when an allegation is made by the employee assailing the order of termination as one based on misconduct, though coched in innocuous terms, it is incumbent on the court to lift the veil and to see the real circumstances as well as the basis and foundation of the order complained of. Such an order could not be served without complying with the provisions of Article 311(2) of the Constitution. He drew our attention to para 11 of the judgement in the case of **D.K. Yadav V. JMA Industries Ltd., 1993(4) SLR 126** decided by the apex court. It was held therein that "The order of

termination of the service of an employee/workman visits with civil consequences of jeopardising not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman, fair play requires that a reasonable opportunity to put forth his case is given and domestic enquiry conducted complying with the principles of natural justice".

5. The counsel would further argue that the post is not abolished. Nor any regular appointment has been made and yet one Mr. D.K. Misra has been appointed on part-time basis replacing the applicant. This is in violation of the law laid down by the Apex court in **State of Haryana & Ors. V. Piara Singh and Ors. (1992) 4 SCC 118.** It has been held therein that an ad-hoc or temporary should not be replaced by another ad-hoc or temporary employee. He must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

6. Yet another plea taken by the counsel relates to the fact that the working of the applicant had improved substantially after the show cause notice particularly after 26.4.91. His past conduct stood condoned with his re-engagement in November, 1991 and still the services of the applicant were terminated by an oral order for which there is no

provision in law especially when such an order has been passed by R-2 and R-4, being not legally competent to do so.

6. That apart, the counsel contended that respondents action is highly discriminatory since a Scheduled Caste candidate, appointed after due process of selection, has been replaced by a fresh ad-hoc hand only to deprive the livelihood of a person belonging to a weaker section of the community. This is against the principles enunciated by the Hon'ble Supreme Court in **Rajbinder Singh V. State of Punjab & Ors. 1988(1) SLR 351**, the counsel would submit.

7. Shri N.S. Mehta, learned counsel for the respondents opposed applicant's claim vehemently. The main plank of his attack is that challenge of A-10 order dated 26.4.91 is highly time-barred. Applicant got reliefs after the impugned order and also acquiesced with the developments thereafter. He cannot therefore legally come up with such a belated challenge after two and a half years.

8. Besides the plea of limitation, respondents relied heavily upon the judicial pronouncements of the apex court in the case of **Himansu K. Vidyarthi & Ors. V. State of Bihar & Ors. (1997) 4 SCC 391 and State of U.P. & Anr. V. K.K. Shukla (1991) 1 SCC 691.** In the former case, it has beenheld that "Every department of the Government cannot be

treated to be industry. When the appointments are regulated by statutory rules, the concept of industry to that extent stands excluded. The petitioners were not appointed to the posts in accordance with the rules but were engaged on the basis of need of the work. They are temporary employees working on daily wages. Their disengagement from service cannot be construed to be a retrenchment under the Industrial Disputes Act. The concept of retrenchment therefore cannot be stretched to such an extent as to cover these employees. Since the petitioners are only daily-waqge employees and have no right to the posts, their disengagement is not arbitrary".

9. In the case of Shukla (supra), their Lordships decided that a temporary government servant has no right to hold the post. Whenever the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditins of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If the services of a temporary government servant is terminated in accordance with the terms and conditions of service, it will not visit him with any evil consequences.

The learned counsel argued that the respondents resorted to the first step and hence their actions cannot be questioned.

10. We shall now bring out the position of law/rules/regulations on the subject of ad-hoc appointments.

(a) As per instructions of DoPT in OM No.28036/8/87 dated 30.3.88 "Where ad hoc appointment by direct recruitment is being done as a last resort, it should be ensured that the persons appointed are those nominated by the employment exchanges concerned and they also fulfil the stipulations as to the educational qualifications/experience and the upper age-limit prescribed in the R/Rules. Where the normal procedure for recruitment to a post is through the employment exchange only, there is no justification for resorting to ad-hoc appointment".

(b) In respect of claims of SC/ST candidates in ad hoc appointments, it has been laid down that - "A separate roster should be maintained for purely temporary appointments of 45 days or more but which have no chance whatsoever of becoming permanent or continuing indefinitely. Reservations do not apply to temporary

appointments of less than 45 days Wherever ad hoc appointments of more than 45 days are made, reservation should be provided to SC/ST in accordance with the presscribed percentages and a separate roster maintained by the appointing authorities as stated above."

(Details thereof are available in DoPT's OM No.36022/4/93-Estt.(SCT) dated 1.6.93.

(c) Such a temporary employee may also compete alongwith others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate.

(d) Claim for continuity in service/regularisation can be made pursuant to a scheme or an order in that behalf and that too against a regular vacant post. Mere working on a post for a number of years on ad-hoc basis will not vest the person with the right to get regularised on a post which is meant to be filled up by regular recruitment under statutory rules. If any authority is required for this proposition, it is available in **Mukesh Bai Chotabai Patel V. Jt. Agr. and Marketing Advisor, Govt. of India & Ors. AIR 1995 SC 415.**

11. It is in the background of the aforequoted rules we have to decide the legality of applicant's claim.

It is not in dispute that the applicant did not agitate over the A-10 adverse order dated 26.4.91 for more than two years. He decided to remain silent since his claim was duly considered and reliefs granted. As per applicant's own submission events pertaining to A-10 order came to a close with his conduct having been condoned followed by first ad-hoc appointment in November, 1991. If the terminated delinquent employee does not avail of the remedy by impugning the order of termination in time as per provisions under Section 20 and 21(3) of the AT Act, 1985, it would not be open to him to challenge the same and file a case/suit at any time at his pleasure. The learned counsel for the applicant did not even elaborate the reasons for the delay. The court/tribunal has to record in writing that the explanation offered for the delay was reasonable and satisfactory. This is the pre-requisite for condonation of delay in terms of law laid down by the apex court in **P.K.Ramachandran V. State of Kerala and Anr., JT 1997(8) SC 189.** We do not have before us any explanation, what to speak of convincing ones, to ignore this vital legal requirement. Repeated representations do not bring life to a case otherwise to be considered dead because of

limitation (emphasis added). Applicant's challenge of termination order is, therefore, badly hit by limitation.

12. By applying the ratio arrived at by the Hon'ble Supreme Court in **K.C. Sharma & Others V. UOI & Ors., 1998(1) SLJ 54,** the applicant would then argue that such a case could not be dismissed only on the technicality of "limitation" and merit also is required to be considered. This is for the Tribunal/court to decide. Even on the basis of merit, we find applicant has no case at all. This is not in dispute that the applicant's appointment continued only on a stop-gap measure. What goes to the root of the case is applicant's indifferent day-to-day working even in the second spell as per respondents' subsequent finding. And that sets at naught all other probable items of consideration for a merely stop-gap employee, de hors rules on reservation (emphasis added). That apart, applicant's integrity has been found to be doubtful. This has not been disputed seriously in his explanation at R-3. A purely stop-gap ad-hoc appointee does not have a legal right to claim continuation. If the competent authority is satisfied that he is not suitable for the service, no exception can be taken to such an order of termination.

The details in paras 11 and 12 aforementioned provide answer to 1st two isues.

13. We shall now come to the last plea of the applicant that he could not be replaced by another ad-hoc appointee. If an ad-hoc employee has been found to be unsuitable and has to be continued till the arrival of a regular appointee, it would be perpetuation of a wrong practice and a premium for indifferent workers. In other words, the principle that an ad-hoc employee cannot be replaced by another would be inapplicable where the termination of an existing ad-hoc appointee is effected on grounds of unsuitability. In holding this view, we find support from the decision of the apex court in **Shukla's** case (supra).

14. In the background of the detailed reasons aforesaid, the OA is dismissed but without any order as to costs.

26.8.98

(S.P. Biswas)
Member(A)

(T.N. Bhat)
Member(J)

/gtv/