

(A)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW DELHI

O.A. No. 54 1986.
~~PAY No.~~

DATE OF DECISION 25-7-1987

Som. Dutt Sharma Petitioner

Shri Pankaj Kalra Advocate for the Petitioner(s)

Versus

Union of India and others Respondent

Shri P.H. Ramchandani Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. Justice K.S. Puttaswamy .. Vice-Chairman

The Hon'ble Mr. Kaushal Kumar, .. Member(A)

1. Whether Reporters of local papers may be allowed to see the Judgement ? yes
 2. To be referred to the Reporter or not ? yes
 3. Whether their Lordships wish to see the fair copy of the Judgement ? no
 4. Whether to be circulated to other Benches. yes
- (Judgment delivered by Hon'ble Mr. Justice K.S. Puttaswamy, Vice-Chairman)

J U D G M E N T

This is an application made by the applicant under Section 19 of the Administrative Tribunals Act, 1985 ('the Act').

2. In

2. In accordance with the Directorate of National Sample Survey (Recruitment to Class III Posts) Rules ('Rules') framed by the President under the proviso to Article 309 of the Constitution, which inter alia regulated the recruitment to the posts of 'Investigators' in the Field Operation Division of the National Sample Survey Organisation (FOD, NSSO), the Assistant Director, FOD, NSSO, Chandigarh ('Director') some time before July, 1978 called for applications to the vacant posts of Investigators in his office through the Employment Exchange of the area ('EE'). In response to the same, the EE, sponsored the name of the applicant and several ~~others~~ ^{Others} who were on its live register. All those sponsored by the EE including the applicant were interviewed by a duly constituted 'Board' consisting of a Deputy Director, an Assistant Director and an expert and with due regard to his performance at the interview, the applicant was selected to the post of investigator. On that selection, the Director by his Order No.12(3)/Estt./PBs/78/4588 dated 17-7-1978 (Annexure-II) appointed the applicant as an Investigator, in pursuance of which he joined service on 29-7-1978. From 29-7-1978 till 8-9-1985 the applicant had continued to serve as an Investigator in that or the other office, where he was posted.

3. On 9-9-1985 (Annexure-VI) the Assistant Director, FOD, NSSO of Delhi had terminated the services of the applicant and that order reads thus:

" No.2/2/E/DR/85/5070

Govt. of India
Department of Statistics,
Ministry of Planning

NATIONAL SAMPLE SURVEY ORGANISATION
(FIELD OPERATIONS DIVISION)

4/19, Asaf Ali Road
New Delhi - 110 002.
Dated: 09-09-1985

OFFICE ORDER

In compliance to Division's Memo No.A-12026/1/83-E.II dated 3-9-1985, the services of Shri Som Dutt Sharma, Investigator on ad hoc basis is terminated with effect from 9-9-1985 after-noon. He is directed to hand over

all

"all Government goods/papers to his Superintendent to-day positively.

Sd/- M.K.SHARMA
Assistant Director".

In this application made on 17-1-1986, the applicant has challenged this order and has sought for a direction to the respondents to re-instate him to service with all consequential reliefs on a large number of grounds. We will notice and deal with them in due course. In justification of the impugned order, the respondents have filed their reply.

4. Shri Pankaj Kalra, learned counsel for the applicant, contends that the order of termination made by the Director, through the applicant had been regularly recruited and appointed under the Rules then in force, however, applying the later Rules and orders of Government, was illegal and impermissible.

5. Shri P.H. Ramchandani, learned senior Counsel appearing for the respondents in refuting the contention of Shri Kalra, contends that the appointment of the applicant, was de hors the Rules and was made only on the basis of the executive orders and instructions then in force and that since the applicant was unsuccessful in the examination held by the Staff Selection Commission ('SSC') his termination was legal and valid.

6. When the Assistant Director, Punjab called for applications and the EE sponsored the name of the applicant and others, the Rules then in force provided for recruitment to the posts of Investigators as hereunder:

"Direct recruitment through Employment Exchange, failing which by advertisement, failing which by transfer from other Divisions of National Sample Survey Organisation or from other Central Government Departments".

This was the mode of recruitment stipulated in the Rules made by the President under the proviso to Article 309 of the Constitution.

7. If there are Rules made by the President under Article

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309 of the Constitution regulating the recruitment to a post, then the appointing authority is bound to make such recruitment only in conformity with such Rules and not otherwise. The authority is even bound to ignore any executive orders and instructions to the contrary. When the field is covered by legislation made either by the Parliament or the President, then the same should be regulated in conformity with that legislation only and not otherwise.

8. When the Assistant Director initiated the steps and made the appointment of the applicant to the post, he was doing so only under the Rules and in conformity with the Rules. Even otherwise, we are satisfied that the applicant was appointed by the Director only under the Rules and in conformity with the Rules and not de hors the Rules as strongly pressed before us by Sri Ramchandani. From this it follows that the appointment made on 17-7-1978 was a valid appointment.

9. In the appointment order issued on 17-7-1978 (Annexure-II) the authority had incorporated certain terms and conditions which had been accepted by the applicant also. Clause 1 of the same reads thus:

"The appointment as Investigator in this organisation is purely ad hoc in nature pending nomination of candidates by the Subordinate Service Commission and that they will be permitted to apply to the Commission, whenever the commission advertise the post for appointment by direct recruitment".

In this clause, the authority has stated that the appointment of the applicant was subject to his passing an examination to be conducted by the SSC constituted by Government in its executive order dated 4-11-1975.

10. We have earlier found that the appointment of the applicant was made really under the Rules and in conformity with the Rules. If that is so, then the aforesaid clause imposed by the authority ex abundanti cautela or by ignorance, whichever be the position, has necessarily to be ignored and the appointment treated

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treated as valid under the Rules itself. A clause in an appointment order, which is violative of the law imposed by the appointing authority and accepted by the applicant cannot prevail over the law and has to be treated as non est or ignored. If clause No.1 had to be ignored then the fact that the applicant had appeared for the examination conducted by the SSC and being unsuccessful in that examination also has necessarily to be ignored. We, therefore, ignore the aforesaid clause on which strong reliance is placed by Sri Ramchandani.

11. While the above is the correct legal position on the nature of the appointment of the applicant and its validity, the authorities have proceeded on the assumption that the appointment itself was an invalid appointment and non-passing the examination conducted by the SSC entails the termination of the applicant. The termination of the applicant is only on these grounds and no other. Both these grounds on which the termination of the applicant are founded are wrong and illegal. On this view, the termination order is liable to be quashed, without examining all other questions urged by both sides.

12. Shri Ramchandani next contends that the applicant who had made certain inaccurate statements in his rejoinder had not approached this Tribunal with clean hands and, therefore, we should decline to grant him any relief.

13. A rejoinder is not really a pleading under the Act. Even otherwise, the statements made by the applicant in his rejoinder are not deliberate mis-statements intended to deliberately misled this Tribunal to sustain his claim. At the highest, it is only an unintentional inaccurate statement and should be ignored by Tribunal. We see no merit in this contention of Sri Ramchandani and we reject the same.

14. Shri Ramchandani lastly contends that even if we invalidate the order of termination made against the applicant,

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then also, we should deny all the arrears of salary for the period he had not worked and does not also work. Sri Kalra opposes this submission of Sri Ramchandani and urges for a direction for payment of all arrears of salary with continuity of service.

15. When an order is invalidated by this Tribunal, whether an applicant should be allowed all back wages or not for the period he had not worked, is one of sound discretion to be exercised on an examination of all the facts and circumstances of that case. We are of the view that on an examination of all the facts and circumstances of the case, this is a fit case in which we should decline to grant all the arrears of salary from 9-9-1985 till the applicant reports for duty. But, this denial does not justify us to deny the continuity of service of the applicant.

16. Shri Ramchandani informs us that as on to-day there are no vacant posts against which the applicant can be accommodated and posted and, therefore, it is necessary for us to grant at least 2 months' time from this day to create a supernumerary post and accommodate the applicant. Shri Kalra opposes the request of Sri Ramchandani.

17. We are of the view that it is just and proper to grant time to the respondents at least till 31-8-1987 for the same and direct them to reinstate the applicant with all such expedition as is possible in the circumstances and that in any event from 1-9-1987.

18. On the earlier conclusion, we have reached, we consider it unnecessary to examine the other contentions urged by the applicant and respondents and we leave them open.

19. In the light of our above discussion, we make the following orders and directions:

- (i) We quash Order No.2/2/E/DR/85/5070 dated 09-09-1985 (Annexure-VI) of the Assistant Director, Department of Statistics, Ministry of Planning, National Sample Survey Organi-

sation

sation, New Delhi. We, however, deny all the arrears of salary due to the applicant from 9-9-1985 to 31-8-1987 or till he is re-instated to service, whichever is earlier. But, notwithstanding this, the applicant is entitled for continuity of service from 9-9-1985 and the same will not affect in determining the seniority and other matters in accordance with law.

- (ii) We direct the respondents to reinstate the applicant to his original post with all such expedition as is possible in the circumstances and in any event not later than 1-9-1987.

20. Application is disposed of in the above terms. But, in the circumstances of the case, we direct the parties to bear their own costs.

21. Let this order be communicated to the parties within a week from this date.

K.S. Puttaswamy
(K.S. PUTTASWAMY)
VICE-CHAIRMAN
29/7/87

K. Kaushal
29/7/87
(KAUSHAL KUMAR)
MEMBER (A)