

6

CENTRAL ADMINISTRATIVE TRIBUNAL

PRINCIPAL BENCH: NEW DELHI

O.A. NO. 286/91

DATE OF DECISION: 13-12-1991

DR. SUNIL GOMBER

APPLICANT

VERSUS

UNION OF INDIA & ANOTHER

RESPONDENTS

CORAM:

THE HON'BLE MR. P.K. KARTHA, VICE CHAIRMAN (J)

THE HON'BLE MR. I.K. RASGOTRA, MEMBER (A)

FOR THE APPLICANT

SHRI G.D. GUPTA, COUNSEL

FOR THE RESPONDENTS

MRS. RAJ KUMARI CHOPRA, COUNSEL

(JUDGEMENT OF THE BENCH DELIVERED BY

HON'BLE MR. I.K. RASGOTRA, MEMBER (A)

Dr. Sunil Gomber has filed this application under Section 19 of the Administrative Tribunals Act, 1985 aggrieved by the act of the respondents in not appointing him as Assistant Professor of Paediatrics, even though he was duly selected and recommended by the Union Public Service Commission (UPSC) for the post. Accordingly the sole issue raised for adjudication is whether any legal right accrued to the applicant for appointment to the post on the score that he had been selected and recommended for appointment by the UPSC. The brief facts of the case are that the applicant, who possesses degree of M.D. (Paediatrics), applied for the post of Assistant Professor of Paediatrics, in the Ministry of Health and Family Welfare, Department of Health, advertised by the UPSC vide advertisement No. 32 dated 6th August, 1988. He was called for an interview and selected for the said post. The UPSC vide letter dated 16.3.1987 advised him as under:

"I am, however, to make it clear that the offer of appointment, will be made to you only after the Government have satisfied themselves after such enquiry as may be considered necessary that you are suitable in all

d

(1)

respects for appointment to the service and that you are in good mental and bodily health and free from any physical defects likely to interfere with the discharge of your duties. The offer of appointment will also be subject to such other conditions as are applicable to all such appointments under the Central Govt."

The applicant submits that although the post was initially reserved for Scheduled Castes, it was to be treated as unreserved in case no Schedule Caste candidate was available and it was in accordance with the failing provision in the advertisement that he had applied for the post which culminated in his selection. Nevertheless no appointment letter has been issued to him so far. His representation to the Department of Health, Ministry of Health and Family Welfare have not elicited any response. The post, however is lying vacant.

By way of relief, he has prayed that:

- (i) the act of the respondents in not issuing appointment letter as per the recommendations of the UPSC, be declared as illegal;
- (ii) the applicant be declared entitled to being appointed to the post retrospectively with effect from the date from which he was recommended by the UPSC for appointment to the post of Assistant Professor of Paediatrics, with all consequential benefits.

2. The stand of the respondents as explained in their counter affidavit is that all posts of Assistant Professors in accordance with the Central Health Service Recruitment Rules, 1982 are to be filled 100% by direct recruitment from the UPSC. Accordingly one post of Assistant Professor of Paediatrics was referred to UPSC for direct recruitment. The post was initially reserved

2

for Scheduled Castes candidate failing which it was to be treated as unreserved. The UPSC, however, could not find any candidate from the Scheduled Caste and consequently treated the post as unreserved and recommended the applicant for appointment to the post. According to the instructions as then existed the post had to be dereserved before it could be offered to general candidate. However, before the proposal for dereservation could be finalised the Department of Personnel & Training issued fresh instructions vide O.M. dated 25.4.1989 banning dereservation in cases of direct recruitment. The matter was referred to the Department of Personnel and Training by the respondents for dereservation of the vacancy. The proposal was, however, not agreed to by the Department of Personnel & Training, (DOP&T) although the UPSC had advised that the post should be got dereserved. The matter was again taken up with the Department of Personnel & Training but that Department did not agree to dereserve the post. The DOP&T, however, advised that the general candidates may be appointed against future general vacancies. There is, however, no clear vacancy available in the general category, and therefore, the applicant has not been given the letter of appointment. The respondents are in a dilemma as in the meantime the reserved vacancy cannot be filled up by referring it to the UPSC for fresh action unless appointment is given to the candidate already recommended by the UPSC.

3. Shri G.D. Gupta, learned counsel for the applicant fervently argued that the applicant has a legal right to be appointed as Assistant Professor of Paediatrics as he had been selected and recommended for appointment to the said post by the UPSC. He further urged that the applicant is entitled to appointment against the 1989 vacancy. Referring us to the last sentence of the paragraph 1 of the O.M. dated 25.4.1989, the learned counsel submitted that the ban on dereservation does not



apply to the vacancies relating to earlier years which have been filled up. It was contended that the vacancy in question should be deemed to have been filled up as the process of selection had been completed inasmuch as the candidate had been recommended for appointment after going through the process of formal selection by the UPSC. All the stages of filling up the vacancy had been completed except issuing the letter of appointment. In the process the applicant had been conferred the right to appointment by virtue of his selection and recommendation for appointment by the authorised Selection Committee constituted under the Constitution of India. He further submitted that the executive instructions cannot be applied retrospectively and withholding of appointment of the applicant was illegal.

The learned counsel relied on the observations of the Hon'ble Supreme Court in **S.B. Patwardhan and Another Versus State of Maharashtra and others (1977) 3 Supreme Court Cases 399** where Chandrachud J speaking on behalf of the court observed that:

".....

These instructions, unlike rules regulating recruitment and conditions of service framed under the proviso to Article 309 of the Constitution or section 241 (2) (b) of the Government of India Act, 1935, cannot have any retrospective effect."

He further cited the case of **Jagdish Ram and ors. Vs. State of Himachal Pradesh and Ors. - 1971 (1) SLR 457** in support his contention that executive instructions can have effect only prospectively.

4. Mrs. Raj Kumari Chopra, learned counsel for the respondent admitted that the applicant had been selected and recommended for appointment vide letter dated 16.3.1989 as no Scheduled Caste candidate was available for consideration for appointment to the said post. However, the UPSC is only a recommendatory

21

19

-5-

body and till the candidate joins the post, the vacancy cannot be said to have been filled up. The learned counsel further submitted that the UPSC does not have any jurisdiction in the matter of dereserving the post. The post has to be dereserved by the respondents with the concurrence of the Department of Personnel and Training. In answer to a query from the Bench, the learned counsel submitted that the instructions contained in OM No. 36011/9/81-Est(SCT) dated 30.11.1981 are not applicable as the single vacancy advertised was a backlog vacancy coming from 1986, when there were three posts, two general and one Scheduled Caste. The reserved post was carried forward as it could not be filled up due to the non-availability of a Scheduled Caste candidate. The learned counsel for the respondents further resisted the suggestion that not only the appointment should be given to the applicant but it should be related back to 1989 on the ground that he never worked in that post. OM dated 25.4.1989 issued by the DOP&T is a policy matter and it is now well established that the Government of India has the right to make, alter and reframe policy keeping in view the public interest within the framework of law.

5. We have heard the learned counsel for the applicant and considered the record carefully. We find that the post of Assistant Professor, Paediatrics was advertised in 1988 and it was specifically provided that "the post is initially reserved for Scheduled Castes failing which to be treated as unreserved." It is undisputed that no Scheduled Castes candidates were available. Accordingly the UPSC treated the post as unreserved and went through the process of selection and recommended a general candidate for the post. The applicant who happened to be the general candidate selected for the post was duly

✓

advised by the UPSC vide their letter dated 16.3.1989. Once a selection has been held and a candidate recommended and the result thereof published, in our view the candidate has a right to be considered for appointment after the Government respondents have satisfied themselves after such enquiry as may be considered necessary in regard to character and antecedents and mental and bodily health etc. In a case of this kind, what has to be seen is whether the executive action is fair and just. Once the process of selection has been completed and a candidate having been given the bona fide impression that he is likely to be appointed against the said post, subject to this fulfilment of other requirements e.g. medical fitness etc. it will not be fair and just and would tantamount to a violation of the principles of natural justice if he is denied the appointment. It is not the case of the respondents that the vacancy is no longer required to be filled up. The basic question is whether the post having been treated as unreserved, as is evident from the action of the respondents, would come under the general ban on dereservation vide OM dated 25.4.1989. We are of the view that once the post has been treated as unreserved as per the advertisement published by UPSC and the process of selection completed it is for the Department to complete the process of dereservation.

There are four important stages for filling up the vacancy referred to the UPSC for the purpose:

- (a) Advertisement inviting application.
- (b) Holding of selection of the candidate by holding competitive examination, interview etc.
- (c) Making recommendations for the appointment of candidate selected; and
- (d) Issue of appointment letter by the department concerned.

However, the issue of appointment letter could be withheld if the concerned department takes a decision not to fill up the vacancy, which is a policy matter. Here, it is not a case that the respondents have taken a policy decision not to fill up the vacancy. The process of selection set into motion cannot also be stultified by OM dt.25.4.89 as the said OM was issued after the stage ^{when} the UPSC had already made the recommendation. *al*

for the appointment of the applicant. The ban so imposed should ordinarily apply to such cases which are yet to be referred to the selecting authority and where the applications are invited or where the selection is yet to be held.

In the facts and circumstances of the case, we order and direct that the respondents shall consider ^{the case of} the applicant for appointment in accordance with the recommendations of the UPSC for the post of Assistant Professor of Paediatrics against 1989 vacancy, deeming the vacancy to be unreserved as advertised in the advertisement dated 6.8.1988 after completing the other formalities as prescribed in UPSC's letter dated 16.3.1989. The applicant, however, shall be entitled to the pay only from the date he joins the post. We further direct that the above orders shall be implemented within 90 days from the date of its communication.

The OA is disposed of as above. Parties to bear their own costs.

I.K. Rasgotra
(I.K. Rasgotra)
Member (A)

/SSM/

P.K. Kartha
(P.K. Kartha)
Vice Chairman(J)