

16

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

OA No.659/2004

Date of Decision: 7.12.2004

Ms.Ambily Shaji & 3 others ..

Applicants

(By Advocate: Dr.Surat Singh)

versus

Govt of NCTD & Others ..

Respondents

(By Advocate: Shri Vijay Pandita)

CORAM:

Hon'ble Shri S.K. Naik, Member(A)

To be referred to the Reporter or not? YES


(S.K. Naik)
Member(A)

17

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.659/2004

New Delhi, this the 7th day of December, 2004

Hon'ble Shri S.K. Naik, Member(A)

1.Ms.Ambily Shaji
A-8-B, Vishal Kunj
DDA Flats, Near Rajouri Garden Police Station
New Delhi

2.Ms. Babita Sebastian
Room No.49, 2nd Wing, New Nurses Hostel
LNJP Hospital, New Delhi

3.Ms. Juby J. Malkunnel
Room No.37, 1st Wing, 1st Floor
New Nurses Hostel, LNJP Hospital, New Delhi

4.Ms. Lincy Mathew
1/18, Lalita Park
Laxmi Nagar, New Delhi

Applicants

(Dr. Surat Singh, Advocate)

versus

Government of NCT of Delhi, through

1. Chief Secretary
5, Sham Nath Marg, Delhi
2. PHC cum Joint Secretary(Health)
Technical Recruitment Cell
1, Jawhar Lal Nehru Marg, New Delhi
3. Secretary
Delhi Subordinate Services Selection Board
UICS Building, Shahdara, Delhi
4. Medical Superintendent
GB Pant Hospital, New Delhi
5. Medical Superintendent
LNJP Hospital, New Delhi

(Shri Vijay Pandita, Advocate) .. Respondents

ORDER

By virtue of this OA, applicants four in number, have challenged the order dated 26th February, 2004 passed by Respondent No.5 vide which their services as Staff Nurse have been terminated primarily on the ground that they could not succeed in the test for regular recruitment. The relevant facts of the case are that the applicants were engaged on contract basis during the strike period from 9.5.1998. Admittedly it was not a regular appointment. Subsequently, they had preferred OA No.1920/2001 in this Tribunal and the Tribunal vide its order dated 26.1.2002 taking note of the submissions made by the respondents that the selection was under process, while restraining the respondents from terminating the services of the

17

applicants gave certain directions with regard to an opportunity to be provided to the applicants for being considered in the process of regular selection. The applicants thereafter appeared in a written test held on 29.9.2002 for the purpose of selection but failed to qualify the same. Thereafter, they filed another OA No.3172/2003 challenging the method of written test to be in contravention of the direction issued by the Tribunal in OA No.1920/2001 decided on 26.4.2002 and seeking a direction to the respondents to appoint them on regular basis merely on the basis of their experience gained over the years. That OA was however dismissed by the Tribunal vide its order dated 5th January, 2004 holding that the Tribunal in its earlier order had clearly stated that selection/recruitment has to be done in accordance with the rules and instructions. It was only after the applicants failed in their several attempts to get themselves regularized and since they failed in the written test held for regular selection that the respondents have passed the impugned order terminating their services.

2. Learned counsel for the applicants has challenged the termination order solely on the ground that selection on the basis of which regular appointments have been made by the respondents has been challenged before the Hon'ble Delhi High Court in CWP No.1443/2003 filed by Ms.Manindra & Ors. Vs.GNCTD and CWP No.5253/2003 by Ms.Beenा & Ors. Vs. GNCTD and the High Court has already directed that any regular appointment shall be subject to the outcome of the writ petitions. In order to establish the nexus of the applicants with the writ petitions, the learned counsel has submitted that the entire process of selection has been challenged by similarly placed contractual employees and therefore the matter is subjudice and the respondents have arbitrarily and illegally terminated the services of the applicants whereas they ought to have waited until the final outcome of the writ petitions before the High Court. The counsel further contends that since the applicants have put in almost 6 years of service and on the basis of the principle laid down by the Tribunal in OA No.2453/2003 (Parasnath & Ors. Vs. GNCTD) decided on 31st January, 2003, services of the applicants could not have been disengaged until regularly selected candidates were available for their replacement and therefore prayed that in view of the matter being subjudice before the Delhi High Court and in view of the principles laid down in the case of Paras Nath (supra) the order of termination is not only arbitrary but also illegal and should be set aside.

3. Learned counsel for the respondents, at the outset, has raised the preliminary objection that in view of the applicants having agitated their case for regularization in OA No.1920/2001 followed by dismissal of OA No.3172/2003 they are debarred from filing another application on the same issue. He has stated that the Tribunal in its order dated 5th January, 2004 in OA No.3172/2003 has discussed the claim of the

3/12

applicants in the manner they wish to be regularized i.e. without any reference to either the written test or interview but purely on the basis of their experience which has been correctly turned down. Further, the applicants themselves having appeared and failed in the test, they cannot be allowed to file repeated OAs. In this regard, he has referred to the decision of the Delhi High Court in CWP No.7217/2000 and other connected CWPs decided on 23rd July, 2002. The High Court, while dealing with the question as to whether the petitioners were barred under the principle of constructive resjudicata, has held in para 13 as under:

"13. The grievances of the petitioners raised in the writ petition was the same, cause of action wherefor, as notice hereinbefore, arose in March, 1999 itself which they could have raised at the earliest stage. It is not in dispute that the principles of resjudicata/constructive resjudicata apply to the proceedings under the administrative Tribunals Act, 1985. New contentions, however, cannot be permitted to be raised in a subsequent Original Application filed under Section 19 of the Administrative Tribunals Act, if such contentions could have and ought to have been raised in the first application.

Furthermore, having regard to the principles contained in Order Rule 2 of the Code of Civil Procedure, reliefs cannot be sought for in piecemeal unless leave therefore is sought for and granted. Once the principles of constructive resjudicata are held to be applicable, the Tribunal had no jurisdiction to entertain the second application even on a question, which was not raised before it. Subsequent decision of a coordinate bench in a different matter on a question which was not raised, cannot clothe the Tribunal with the jurisdiction to entertain a second Original Application particularly when even a review on that ground would not have been maintainable. Furthermore, even an application for review would not have been maintainable having regard to the fact that the judgement of the Tribunal merged with the judgement of this Court and as such, even a review application could have been filed only before this court and not before the Tribunal. Question No.1 is answered accordingly."

4. Learned counsel contends that the applicants earlier having challenged their claim before this Tribunal twice cannot be permitted to raise the same for the third time before this Tribunal and therefore submits that on this score alone, the OA is liable to be dismissed.

5. On the merits of the case, learned counsel has contended that the respondent-department issued an advertisement on 7.5.1998 for appointment of qualified nurses on contract basis as they were urgently in need of such nurses during the 'strike'. The advertisement clearly stated that nurses below the age of 65 years having approved certificate/diploma in nursing were invited for appointment 'on contract' on the basis of walk-in-interview. Thus, there was no iota of selection procedure adopted by the department due to urgency and therefore their engagement was done on contract dehors the rules. The applicants were engaged on contract basis initially for a period of 89 days but were allowed to continue thereafter from time to time.

7/21

Further, in view of the direction given by this Tribunal in OA No.1920/2001 necessary grace of one month in age for appearing in the written test conducted on 29.9.2001 to one of the applicants Ms. Ambily Shaji was granted. However, since the applicant had failed to qualify in the written examination the question of giving weightage on account of their experience did not arise. The counsel contends that though the applicants have themselves admitted that they have failed to qualify in the written test, which is the prime requirement, they have no right to continue in service. Further he has contended that their services have been terminated since regularly selected candidates were available for being appointed against the place they were engaged. In the case of Paras Nath(supra) the Tribunal had only directed that "the staff nurses who had been appointed on contract basis or otherwise on temporary basis subject to the availability of the vacancies should be allowed to continue till the regular appointments are made and till then their services shall not be terminated". The learned counsel contends that having regard to this direction of the Tribunal, services of the applicants were not terminated until regular candidates were available but when the regularly selected candidates have been posted, the applicants have no right to continue and the order of termination has been rightly passed.

6. With regard to the contention raised by the learned counsel for the applicants that in view of the challenge to the selection pending before the High Court applicants have a right to continue, the learned counsel for the respondents contends that firstly the applicants are not parties to the challenge of the selection made by the respondents; and secondly, the Hon'ble High Court has neither stayed the selection nor has it set aside the same but has only ordered that "any regular appointment made by the respondents shall be subject to the outcome of the writ petitions". Thus the respondents are not debarred from appointing/posting regularly selected candidates and the applicants cannot derive undue benefit from the said order by relying on the further observation of the High Court that the petitioners therein were given option for re-appointment on the basis of which they were reappointed and therefore there is no threat of their termination. Since the observation was only in respect of the petitioners therein, the present applicants cannot claim any legal protection therefrom.

7. Concluding his argument, the learned counsel submits that firstly the applicants are barred from raising the issue before this Tribunal under the principle of resjudicata, secondly even on merits, they have no case since they appeared in the written test on their own and failed therein and thirdly regularly selected candidates have been appointed against their place. Thus, the OA deserves to be dismissed.

3a

g2

8. I have considered the above contentions raised by the parties and also perused the records of the case.

9. Learned counsel for the applicants has tried to make out a case in favour of the applicants on the basis of the observations made in Paras Nath (supra) case in which the practice of declaring results without merit list was deprecated and further the order of the Delhi High Court in CWP 1443/2003 etc. vide which the selection/appointment has to be made subject to the outcome of the said petitions. However I find that the applicants are not parties in those petitions. The dispute in those petitions pertained to the preparation of merit list which had not been done by the respondents. In my view, this has no relevance to the dispute under adjudication here because preparation of merit list will have its basis on the number of candidates who had qualified in the written test. In the case of applicants, however, they themselves admit that they have not qualified the written test. Thus, the reliance placed by the learned counsel for the applicants on the matter of selection pending before the Delhi High Court would not be material to the dispute under adjudication in this OA. Respondents have clearly stated that since the applicants did not qualify the written test, they have no right to continue and secondly that since regularly selected candidates have been appointed against their place, they necessarily have to go. Order of this Tribunal in the case of Paras Nath (supra) cannot protect them any further since they have been replaced by regularly selected candidates.

10. Under the circumstances, I find no merit in the present OA and the same is accordingly dismissed but without any order as to costs.

S.K. Naik
(S.K. Naik)
Member(A)

/gtv/