

CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD

Transfer Application No. 1236 of 1987

(Writ petition no. 5240 of 1983)

S.K. Vishwakarma

... Petitioner

Vs.

Union of India & others

... Opp. Parties

Hon'ble Mr. K. Obayya, AM,

Hon'ble Mr. JP Sharma, JM

(Delivered by Hon'ble JP Sharma, JM)

Writ petition no. 5240 of 1983 filed by the petitioner in the Hon'ble High Court of Judicature at Allahabad on transfer to the Tribunal under Section 29 of the Administrative Tribunals Act, 1985, was registered as Transfer Application No. 1236 of 1987.

2. The applicant was working as Extra Departmental Branch Post Master in Village Mohammadpur Taluka, District Allahabad and his services were dispensed with without issuing any show-cause notice by respondent no. 3 by order dated 23-4-1983. The applicant was appointed on 5-8-1977 by respondent no. 3 in the vacancy caused on account of the fact that the person working at that place namely Gaya Prasad was put off duty on account of a departmental enquiry against him, but he was exonerated in the said enquiry. Consequent upon reinstatement of Gaya Prasad, the services of the applicant were terminated. The writ petition was admitted by the Hon'ble High Court and stay was also granted, but it was dismissed in default of the applicant on 18-8-1983. There was a stay order passed on 2-5-1983 that if the petitioner has not already been relieved, then the order of termination of the

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petitioner shall not be given effect to till 12-5-83. It appears that the said stay did not operate in view of the dismissal of the writ petition before admission or whatever may be the reason. Respondent no. 4/Gaya Prasad was allowed to work at that place. The applicant in the writ petition has prayed for the following reliefs: -

- i) to issue a suitable writ, order or direction in the nature of certiorari quashing the impugned order dated 23-4-83 (Annexure-2 to the writ petition) passed by respondent no. 3;
- ii) to issue a suitable writ, order or direction in the nature of mandamus commanding the respondents not to implement the impugned order dated 23-4-1983 (Annexure-2) and not to interfere with the peaceful functioning of the petitioner on the post of Extra Departmental Branch Post Master, Mohammadpur Taluka, Allahabad during the pendency of the writ petition in this Hon'ble Court;
- iii) issue any other or further writ, order and direction to which the petitioner may be found entitled in the circumstances of the case; and
- iv) to award the costs of the writ petition to the petitioner".

3. The respondents contested the writ petition by filing counter affidavit before the Hon'ble High Court. In para 15 of the counter affidavit dated 24-8-83 the respondents have admitted that in view of the services rendered by the petitioner the answering respondent will be given preference in case any occasion arises for making any appointment in future in the same capacity as well as in nearby branch post office. In view of this categorical offer of appointment to the applicant, the Bench thought it proper to give opportunity to the learned counsel for the respondents to call for the respondents as to whether they are giving him appointment as according to the learned counsel for the applicant, the vacancy has occurred in the same branch post office as Gaya Prasad was put off duty. The respondents, however, did not give any positive reply so the arguments were heard.

3. The brief facts are that the applicant was given an appointment on 5-8-1977 by respondent no. 3 as Extra Departmental Branch Post Master. A copy of the letter of

appointment is Annexure-1 to the writ petition. Subsequently the applicant filed the original appointment letter given to him at the time of appointment and it goes to show that certain words have been added in it in different ink and pen. After the word appointed and before the word EDBPM the word 'provisionally' has been added. The contention of the learned counsel for the applicant is that this word 'provisionally' has been added subsequently after filing of the writ petition when the respondent no. 3 called him to see the appointment letter. The applicant continued to work on this post of EDBPM to the entire satisfaction of the respondents. The services of the petitioner, however, were terminated in clear violation of Rule 6 of EDA Conduct and Service Rules 1964. Rule 6 of the said Rules provides that services of an employee, who has not already rendered more than 3 years continuous service from the date of his appointment shall be liable for termination by the appointing authority at any time without notice for generally unsatisfactory work, or any administrative ground connected with his conduct. The case of the applicant is that since he has already got more than 5 years service to his credit, his services cannot be easily dispensed with by the impugned order. So the order impugned dated 23-4-83 is violative of principles of natural justice, fair play and the mandatory provisions of Article 311 (2) of the Constitution of India come into play protecting the applicant as no show-cause notice was issued to the applicant. It is further said that while working for all these six years, the applicant on the good-will made certain investment in order to make functioning of the branch post office efficient and proper. It is further said that Gaya Prasad cannot be appointed in place of the petitioner even though he might have been exonerated because the appointment of the petitioner was made against a permanent and substantive vacancy.

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4. The respondents in their counter affidavit admitted the appointment of the applicant as EDBPM but said that he was given a provisional appointment as there was no clear vacancy in that branch post office and only as an ad-hoc arrangement, the applicant was employed as substitute because the person in whose place the petitioner was appointed, was facing a departmental enquiry under Rule 8 and he was put off duty till such time the enquiry is completed. Thus, the applicant was appointed provisionally in place of respondent, Gaya Prasad and he cannot claim any lien on the post in any manner. It is further said by the respondents that no notice is required to be given under rule-6 as the said rule is not applicable to the applicant. The order passed by the respondent-3 dated 23-4-83 is not violative of Article 311 (2) of the Constitution of India. It is also stated by the respondents that the correction by adding the word 'provisionally' was made in the appointment letter after the letter was cyclostyled and there is no interpolation. The respondents also stated that the applicant had knowledge that he was being appointed in place of Gaya Prasad and the statement of fact by the petitioner in the writ petition that one Gauri Shankar Dwivedi was working as EDBPM cannot be taken for granted as Gauri Shankar has not been impleaded as a party and it cannot be expected that Gauri Shankar did not disclose the fact that the applicant is being appointed in place of Gaya Prasad.

5. We have heard the learned counsel for both the parties at length. Firstly there is admission of the respondents in para 15 of the counter affidavit in which the respondents have given an undertaking to give appointment to the applicant as and when a clear vacancy occurs. The respondents, however, rescinded from their undertaking. The miscellaneous application filed by the applicant on 7-8-90

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clearly shows that a clear vacancy has occurred by virtue of Gaya Prasad EDBPM having been terminated from service in an enquiry and as such the respondents were bound to accommodate the applicant in that vacancy as per their own undertaking given in writing. The learned counsel Sri KC Sinha has pointed out that the applicant should have been on guard to intimate the respondent no. 3 about the vacancy accruing pursuant to termination of Gaya Prasad. This is not a correct approach to the matter. A person, who has given an undertaking must abide by that undertaking. The respondent no. 3 has reciled from his undertaking given in the counter affidavit, even the opportunity given by the bench to make the matter decided by conciliation has failed as the respondents have not shown any interest though the message was given in writing by the applicant himself to the Superintendent of Post Offices, Allahabad.

6. The Hon'ble Supreme Court in Superintendent of Post Offices Vs. P.K. Rajamma, reported in 1977 SC, page 1677 has held that the Extra Departmental Agent is not a casual worker, but he holds the post under the administrative control of the State. It is apparent from the rules that the employment of EDA is a post which exists 'apart from' the person who happens to fill up at any particular time. Though such post is out side regular staff serving, there is no doubt that it is a post under the State. The rules make it clear that these EDAs work under the direct control and supervision of the authorities, who obviously have the right to control in the manner in which they must carry out their duties. If the respondent holds a civil post, the dismissal or removal, as the case may be, would be unquestionably in ~~law~~ valid for non compliance of Article 311 (2) of the Constitution of India. Thus, the services of the applicant cannot be terminated in a unilateral manner without giving a show-cause notice as envisaged under Rule 6 of EDA Conduct and Service Rules, 1964.

7. The learned counsel for the respondents Sri KC Sinha argued at length that the appointment of the petitioner was ad-hoc, but in the counter affidavit in para 4 it is clearly stated that the vacancy was notified on 5-4-77 and the petitioner was appointed provisionally in place of the respondent/ Gaya Prasad. This clear admission that the vacancy was notified goes to show that the appointment of the applicant was against the vacancy which for all purposes existed and cannot be termed as casual vacancy otherwise the respondents should have given in the counter affidavit that the vacancy was of ad-hoc nature or of a definite duration and not having any permanency. If the respondents have not adopted that procedure, then in that case they are now estopped to take the stand that the vacancy was for a short duration till Gaya Prasad is exonerated or condemned in the enquiry proceedings. The word provisional, it appears, as also contended by the applicant is an addition some time afterward - may be after the issue of appointment letter to the petitioner, but no specific finding can be given on that and that also is not relevant in the circumstances of the present case. In para 13 of the counter affidavit the respondents have themselves admitted that the order dated 23-4-1983 is without jurisdiction, erroneous in law and arbitrary and Sri KC Sinha pointed out that this is a factual mistake. Affidavit when deposed should contain the correct facts through there appears to be some missing order in it, but it cannot be inferred or added on the basis of surmises and conjectures. The admission in para 16 of the counter affidavit that the word provisionally was added subsequently also add weightage to the contention of the applicant that the word 'provisionally' has subsequently been added.

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8. Taking all these facts into consideration and on the basis of the undertaking of the respondents in para 15 of the counter affidavit, the application is allowed with the direction that the respondent no. 3 shall appoint the applicant as EDBPM in a clear vacancy within a period of three months from the receipt of a copy of this judgment and in any case the applicant shall be entitled to all remuneration of the post of EDBPM from the date he is appointed or after three months, whichever may be earlier. The parties shall bear their own costs.

*Jones*

MEMBER (J)

*Chambery*

MEMBER (A)

Dated : Allahabad

August 10, 1990.

ES/-