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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

AHMEDABAD BENCH

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T.A. No. 421 of 1986
with
T. A.No. 40 of 1986 with
T. A.No. 77 of 1986 with
T.A. No. 127 of 1986 with
T. A. No.137 of 1987 DATE OF DECISION 12-05-1988

Shri P. M. Pandya & Ors.
Shri M. D. C. Nair & Ors.
Shri G. M. Chauhan & Ors.
Shri A. M. Raval & Ors. Petitioner
Shri Shashidharan Nair & Ors.

Shri B. P. Tanna
Shri Girish Patel
~~Shri B. P. Tanna~~ Advocate for the Petitioner(s)
Shri B. P. Tanna & Shri S. Tripathy

Versus

Union of India & Ors. Respondent

Shri R. P. Bhatt Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. P. H. Trivedi : Vice Chairman

The Hon'ble Mr. P. M. Joshi : Judicial Member

1. Whether Reporters of local papers may be allowed to see the Judgement ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of the Judgement ?
4. Whether it needs to be circulated to other Benches of the Tribunal.

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JUDGMENT

OA/421/86
with
OA/40/86
with
OA/77/86
with
OA/127/86
with
OA/137/87

12-05-1988

Per : Hon'ble Mr. P. H. Trivedi : Vice Chairman

We have heard this batch of cases together because the facts and circumstances leading to the individual cases are essentially identical. The petitioners claim that on being eligible to appear at the departmental examination required to be passed for their promotion and appointment to higher posts held in July and November, 1986, they were held guilty of unfair practices and debarred from appearing for different periods varying from 1 to 3 years in subsequent examinations. This was done without giving show cause notice and giving them any opportunity to plead their case. Further, this was followed by an entry of adverse nature in their annual confidential report with the consequences which followed or is apprehended that they will be refused promotion. Their representations against such adverse remarks or refusal of promotion as the case may be have not been considered or replied to. The petitioners, therefore, contend that the principles of natural justice have been violated and the decision of the respondents to debar the petitioners from examination for adopting unfair practices is of a penal nature taken without giving a fair opportunity required in the interest of natural justice and causes further penal consequence because of adverse remarks based upon such a decision holding them guilty of adopting unfair practices and debarring them for appearing in the examination is made a basis for adverse entry in the C.R. and has caused or apprehended to cause further penal consequences of refusal of promotion as a result thereof.

2. The respondents' contention is that after a detailed examination of the nature of the questions set and the replies given by the petitioners thereto the valuers of the answers have come to the conclusion regarding

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the petitioners' adoption of unfair practices and that this conclusion has been examined in great detail by highly responsible superior authorities of the Income Tax Department, as a result of which the conclusion has been confirmed that the petitioners have adopted unfair practices. In exercise of the powers vested in the respondents under the rules governing the departmental examinations the respondents have, therefore, taken the action of giving nil marks and of debarring the petitioners for various periods from appearing in the departmental examinations. This does not require any notice for the reason that in matters regarding holding and declaring results of examinations the competence of the respondents cannot be doubted and there are decisions to the effect that authorities should be left free to make their decisions regarding the evaluation of the results and conclusions regarding unfair practices being adopted. Holding the candidate guilty of adopting unfair practices and debarring him from appearing in the examination is not a penalty or a penal consequence in terms of the prescribed penalties under the Discipline and Appeal Rules. The conclusion regarding adoption of unfair practices is derived entirely from the internal evidence of the nature of the questions set and the answers given. It is not necessary to establish whether A copied from B or B copied from A. If such internal evidence shows that correspondence or coincidence of the answers was of such a nature that there was a guilty collusion between A and B regardless of who copied from whom or whether both copied from a third source which was smuggled in or resorted to, it does not become necessary to establish directly that A copied from B or from a third source.

3. Mr. Girish Patel has argued that in this case 174 persons were found by the respondent authorities to have copied or adopted unfair practices. In such a case right course for the authorities would have been to cancel the examination if they are unable to find the precise nature of involvement of guilt of any individual candidate. Instead of doing this, the respondents passed 18 candidates and have individually found 174 candidates having adopted unfair practices. If they had done the former,

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the respondents could have argued that no notice was required to be given but as they are visiting individual officers who are examinees with the adverse consequences of debarring from appearing in the examination, the passing of which is required for promotion and making adverse remarks in the C.Rs. which creates a hurdle in their promotion, besides giving a stigma to the petitioners, the requirement of natural justice must be fulfilled. For this reason the petitioners are required to be given an opportunity to show cause and their representation should be considered before visiting them with such adverse consequences.

4. From a perusal of the petitions and the nature of causes and relief sought, we find that it would be convenient to deal with certain important questions governing the results of the case. The first question is whether the authorities are required to issue a notice before they decide that a candidate is guilty of adopting unfair practices and debarring him from appearing in the examination. The action regarding holding the candidates as having adopted unfair practice has been taken in exercise of the powers under Rule VI(9) of the Rules for the departmental examination which is reproduced from para 10 of the reply in OA/421/86.

> "A candidate who is or has been declared by the competent authority to be guilty of using unfair means in the Examination Hall, may, in addition to rendering himself liable to criminal prosecution, be liable :-
>
> (a) to be disqualified by the Competent Authority from the Examination for which he is a candidate and declared as failed obtaining ZERO marks in all the papers in which he appeared in that Examination;
>
> (b) to be debarred either permanently or for a specific period;
>
> (c) to take disciplinary action under the appropriate rules."

The respondent authorities have not produced the entire set of rules before us nor have they disclosed whether the liability of being disqualified or being debarred can be decided upon without any show cause notice. Even the analogy of the academic examination on which the learned

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advocate for the respondent relied does not hold them in this case. In academic examination while there might be adverse consequences due to the obtaining of zero mark or of being debarred, such action by itself does not result in a penal consequences. In the instant cases, however, passing of the departmental examination is a pre-requisite for promotions and debarring for any period from appearing in the examination, therefore, creates a penal consequence. We have no doubt, from a perusal of the detailed reasons given, that the respondent authorities have sufficient material to come to the conclusion that unfair practices have been adopted by the petitioners, but before the penal action of debarring the petitioner from taking future examinations is arrived at, natural justice requires that the petitioners should have been given an opportunity to represent their case. We would not go to the extent of saying that the action of awarding a zero mark in all the papers is on the same footing as that of debarring the candidates from future examination. In the case of the cancellation of examination it is not possible to establish the individual officer or examinee's involvement in the guilt of adoption of unfair practice. In the case when this is possible, the awarding of zero mark fails the candidates and to that extent it is within the ambit of fair power s of the competence of the authorities holding the examination and declaring its results. However, when this ambit is extended to debarring either permanently or for a specific period a punishment is given or a basis for punishment is sought to be founded regarding future examinations and in that case giving an opportunityto the delinquent officer becomes necessary as a part of the requirement of natural justice.

5. In the cases in which the respondent authorities have recorded adverse remarks the position has to be examined with reference to the rules governing the disposal of the representations against adverse remarks. Recording of adverse remarks by itself is not a penalty and the relevant rules provide for such remarks being used for guidance for future improvement. The rules also provide for representations being allowed to be made within a specific period and for the disposal of representations and in the case of certain category of officers for an appeal against such

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a decision disposing of the representations. We cannot, therefore, hold that recording of adverse remarks on the basis of the conclusion of adopting unfair practice is by itself a penalty or penal consequence. The respondent authorities are competent, therefore, to record such remarks. They are of course obliged to communicate the adverse remarks after recording them and to entertain representations against them within the period specified for it.

6. When the question of promotion of the petitioners comes up, the adverse remarks on the record would have to be taken into account. It may be difficult to pin point whether promotions specially to selection posts and even to posts governed by seniority cum fitness test have been withheld only for the reason of the single instance of adverse remarks regarding adoption of unfair practice. The respondent authorities can always plead that on an over all appreciation of the officer's performance and character and conduct, promotion has been withheld because he is not found fit or because of better persons being available in the case of a selection post. This would not remove the main grievance of the petitioners that adverse remarks which should not have been allowed to remain on the record have been considered and have influenced the adverse decision regarding promotion. The adverse remarks merely state the facts regarding the conclusion of debarring from the examinations having been caused by the adoption of unfair practices. But this recording of the conclusion itself, because it is in the C.R., becomes a reason for refusal of promotion. In that situation we cannot regard the mere retention of the adverse remarks as innocuous.

7. On the basis of the above analysis, it may be concluded as follows.

(1) We do not regard the decision to fail and awarding of zero marks in all the papers of the examination on the basis of the conclusion of adoption of unfair practice as one which is of a penal nature and, therefore requires a show cause notice in the interest of natural justice.

(2) The action of debarring either permanently or for a specific period a candidate from appearing in any subsequent examination in the case of departmental which are a pre-requisite for a promotion is an action

involving penal consequences and requires a notice, giving opportunity to show cause as a necessary pre-requisite in the interest of natural justice.

(3) In the circumstances of this case recording or retaining adverse remarks based on or even merely factually reproducing the decision of holding the officer as being debarred from appearing in an examination for having adopted unfair practice to be unjustified unless such remarks are retained after giving an opportunity to the officer to make representation against it and his representation is disposed of after due consideration and after an appeal against such a decision if so provided is decided upon.

(4) Any decision to refuse promotion on the basis of such adverse remarks which have been retained without observing the required procedure or for reason of debarring the officer from appearing in the examination without a prior show cause notice must also be held to be unjustified.

8. In the light of the above observations we must now deal with the facts of the individual applications before us. In OA/421/86 applicants No.1 & 2 have been debarred for 2 years and No.3 for 3 years. They made their representations in March, 1986. No show cause notice was given to them before concluding that they have adopted unfair practice. Adverse C.Rs. were given to them. They have sought relief in terms of quashing and setting aside the decision regarding debarring them from future examinations for different periods and of quashing and setting aside of adverse remarks and of promotions to be made to the petitioners subject to the result of the case reserving the posts for them. The petitioners are protected by interim relief. In accordance with our above analysis and conclusions, we quash and set aside the impugned order dated 19-2-86 in respect of petitioners 1, 2 & 3 and communicating adverse C.R. to applicant No.1 on 30-9-86, applicant No.2 on 20-10-86 and to applicant No.3 on 25-7-86. The respondent is at liberty to issue fresh notice asking the petitioner to show cause and to take a fresh decision regarding such debarring or such adverse C.R. thereafter. In the meantime the representations already filed may also be disposed of by the respondents.

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The promotions which are made in the meantime be held as provisional subject to the result of such representations after the notices are so issued.

9. In the case of OA/40/86 the petitioners are working as Stenographer Selection Grade in the scale of Rs.425-640 for the next higher grade of Stenographer Senior Grade II in the pay scale of Rs.425-700 the basis of promotion is seniority cum merit. Their cases have been dropped from consideration because they are debarred from appearing in the departmental examination of Income Tax Inspectors for two years on the ground that they were found using unfair means without issue of any prior show cause notice. As fitness is a part of the criterion, their promotion is apprehended to have been withheld from them on this ground. In their cases also in the light of our above observations they are entitled to the relief to the following extent.

The impugned order debarring the petitioners from appearing at the examination for a period of 2 years is quashed and set aside. It is directed that the petitioners be not debarred from appearing in the future examinations and their promotions should not be withheld before an opportunity is given to them to represent their case and for this purpose a show cause notice be issued upon them and their representation decided upon. The promotions which are made in the meantime be held as provisional subject to the result of such representations after the notices are so issued.

10. In the case of OA/137/87 the petitioner is working as Stenographer Selection Grade II and claims seniority to Selection Grade I and also to the post of Income Tax Inspector subject to his passing the Departmental Examination. His case is that he and Mr. Mathai prepared for the examination together and the respondents had unfairly concluded that they have copied from each other or from a common source without considering the nature of the answer required. He has been awarded zero mark and debarred from appearing at the examination for Income Tax Inspector for 3 years i.e. 1987, 1988 & 1989. This order was passed on 16-2-1987 and thereafter a notice asking for his explanation was issued to him on 27th February, 1987. On that same day he made his representation. However, before any order thereon has been passed, adverse remarks based on the order dated 16-2-87 and 27-3-87 were communicated

to him by order dated 4th June, 1987. In the light of our observations the petitioner is given the relief of quashing and setting aside of the impugned order insofar as debarring him from appearing at future examination and communication of adverse remarks are concerned. It is directed that the petitioner be allowed to appear at future examination for the post of Inspector and no adverse remarks should be allowed in his C.R. before a show cause notice is issued to him and his representation in reply is disposd of. The promotions which are made in the meantime be held as provisional subject to the result of such representtions after the notices are so issued.

11. In the case of OA/127/86 by an order dated 19-2-1986 the petitioners have been debarred for various periods for appearing in examination of various papers after being declared as failed for using unfair means and their representations have been rejected. In their cases the decision has been confirmed by order dated 3-6-86 before holding the examination in 1986. However, it cannot be disputed that the impugned order dated 19-2-1986 insofar as debarring from appearing in the examinatio n is concerned was issued before any show cause notice was given to them. The fact that it was confirmed after considering their representations does not validate the impugned order or cure it of its defects. The impugned order, therefore, is quashed and set aside and it is directed that the petitioners be allowed to appear in future examination. Any order debarring them from doing so can only be passed after giving them a show cause notice and considering their represntations. The promotions which are made in the meantime be held as provisional subject to the result of such representations after the notices are so issued.

12. In the case of OA/77/86 the petitioners were found using unfair means and debarred for two years in certain subjects but this order dated 19-2-86 was also passed without any prior show cause notice. Accordingly this order is also quashed and set aside and it is declared that the petitioners are entitled to the relief of being allowed to appear in the examination for 1988 and the respondent shall be free to take any decision relating thereto on issue of show cause notice and disposal of any

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representation thereto. The promotions which are made in the meantime be held as provisional subject to the result of such representations after the notices are issued.

We dispose of the cases accordingly.

(P. H. TRIVEDI)
VICE CHAIRMAN

(P. M. JOSHI)
JUDICIAL MEMBER

Shah/-