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IN THE CENTRAL ADMINISTRATIVE TRIAUNAL
AHMEDABAD BENCH

O.A. No. 277 OF 1990
~~Exhibit~~

DATE OF DECISION 24.8.1993.

Sureshbhai Chaturbhai Makwana, Petitioner

Mr. BB Gogia, Advocate for the Petitioner(s)

Versus

Union of India & Ors. Respondents

Mr. Akil Kureshi, Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. R.C.Bhatt, Judicial Member.

The Hon'ble Mr. M.R.Kolhatkar, Admn. 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?

Sureshbhai Chaturbhai Makwana,
Aged about 20 years,
Occu: Unemployed,
Luharia Darwaja, Lathi,
Dist: Amereli.

..... Applicant.

(Advocate: Mr.B.B.Gogia)

Versus.

1. Union of India, through
Secretary,
Post & Telecommunication Department,
Government of India,
New Delhi.

2. Sub-Divisional Inspector,
Lathi Sub-Division,
Department of Posts,
Lathi : 364 430.

3. Badhia Nathalal Panjibhai
Outside Luharia Gate,
Vankar Vas,
Lathi.

..... Respondents.

(Advocate: Mr. Akil Kureshi)

ORAL ORDER

O.A.No. 277/1990

Date: 24.8.1993.

Per: Hon'ble Mr. R.C. Bhatt, Judicial Member.

Heard Mr. B.B.Gogia, learned advocate for the applicant and Mr. Akil Kureshi, learned advocate for the respondents.

2. The question which arises for consideration before us is whether the Extra Departmental Agent appointed provisionally and as per the conditions in the appointment order is entitled to the protection under the provisions of Section 25 F of the Industrial Disputes Act.

3. In the instant case before us the applicant was given provisional appointment by the respondents vide Annexure A-2 dated 1st June, 1989, it would be proper to reproduce the appointment order Annexure A-2 in order to understand the valid conditions of this appointment order.

"Whereas the post of Extra Departmental DA/CAI Lathi (Dudhala Line) has become vacant, and it is not possible to make regular appointment to said post immediately the appointing authority was decided to make provisional appointment to the said post for period from 1.6.1989 F/N till regular order and appointment is made.

2. Shri Suresh C. Makwana is offered the provisional appointment. He should clearly understand that the provisional appointment will be terminated when regular appointment is made and he shall have no claim for appointment to any post.

3. The S.D.S(P) Lathi also reserves the right to terminate the provisional appointment at any time before the period mentioned in para 1 above without notice and without assigning any reason.

4. Shri S.C.Makwana will be joined in the Extra Departmental Agent (Conduct and Service) Rules- 1964 as amended from time to time and all other rules and orders applicable to Extra Departmental Agents.

5. In case the above conditions are acceptance to Shri S.C.Makwana, he should sign the duplicate copy of this mamo and return the same to the undersigned immediately."

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The case of the applicant is that the respondents have terminated his services by the order dated 9th April, 1990 and have appointed respondent No.3 in his place. It is the case of the applicant that the termination of the services of the applicant from 10th April, 1990 on the basis of

order Annexure A-3 is illegal, ineffective, violative of Articles 14 & 16 of the Constitution of India and it is also violative of Section 25F of I.D.Act. The applicant has referred to some decisions in this connection in this application. The applicant has prayed that the impugned order Annexure A-3 dated 9th April, 1990 be held invalid, null and void and the same be quashed and the applicant be treated in service with all the consequential benefits etc.

4. The respondents in this connection have filed detailed reply contending that the application is barred by limitation, that the applicant was appointed provisionally on administrative ground and according to Rule 11(ii) Section 1 regarding method of recruitment rules of EDA (Conduct & Service) Rules 1964, the present appointment on provisional basis was made. It is contended that as it was not possible to make regular appointment to the post of EDA Lathi which was vacant, the appointing authority decided to make a provisional appointment to the said post for the period from 1st June, 1989 F/N till regular appointment was made. It is contended that having regard to the conditions mentioned in the appointment order, the respondents were entitled not to continue him in service when a regular appointment was made by the respondents after receiving the names of the eligible candidates for the post of

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EDA from the Employment Exchange and after considering the applications and selection. It is contended that after considering the application from the candidates verification of documents etc, the respondents No.3 was selected as EDA Lathi and therefore, the applicant was relieved by engaging newly regular selected candidate vide order Annexure A-3 dated 9th April, 1990 which was served on the applicant and he was relieved on 10th April, 1990. It is contended by the respondents that the name of the applicant had not been nominated by Employment Exchange Amreli for the post of EDA Lathi and hence he was not eligible for appointment on regular basis. It is contended that no illegality is committed by the respondents in discontinuing the service of the applicant and provisions of ID Act do not apply to the facts of the present case.

5. The applicant has filed rejoinder and has produced two judgments in support of his contention that if the Extra Departmental Delivery Agent has worked provisionally for more than 240 days, a provision of I.D. Act are applicable.

6. We have heard the learned advocates at length. We have considered the decisions referred to in the application and rejoinder and the two decisions Ann. A-1

and A-2 also. However it is important to note that these two decisions can not hold field now in view of the latest decision of the Full Bench of C.A.T in the case of G.S. Parvati V/s. Sub Divisional Inspector (Postal) & Ors., reported in A.T.R. 1992(1) CAT page 361, in which the applicant of that case had sought the protection of Section 25F of ID Act for having worked for more than 240 days as provisional ED Agent. He had also in that case sought the preference under section 25H of ID Act for appointment as a regular incumbent. Full Bench of C.A.T held that any valid stipulation regarding the termination of contract incorporated in the order of appointment contemplated in clause (bb) of Section 2(oo) of the I.D. Act will not amount to retrenchment. It was also held that in such case when regular incumbent is appointed, appointment of the provisional ED Agent automatically came to an end. It is observed that the experience of such provisional ED Agent may be considered at the time of regular selection but that will not be only decisive factor for selection.

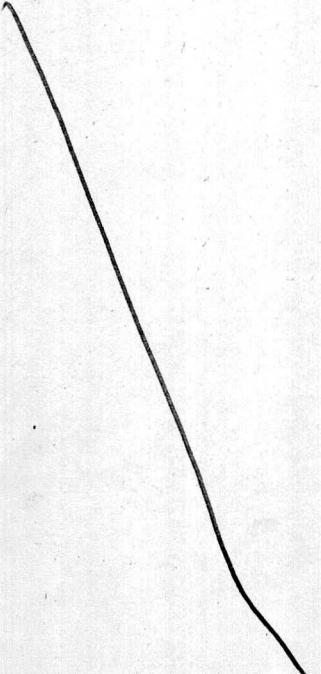
7. The learned advocate for the applicant submitted that in this appointment order given to the applicant, no definite period is mentioned and hence this

would not be considered as a contract. I do not agree with this submission because looking to the conditions in the appointment of the applicant it is clearly found that he was to be continued as provisional EDA till the regular selected person was appointed. Therefore, I do not find any substance in the submission of the learned advocate for the applicant that the provision of Section 25 F of Section 25F of ID Act would apply. In view of the decision referred to above I hold that the provision of ID Act would not apply in such a case because the non-continuance of such an employee would not amount to retrenchment.

8. The learned advocate for the applicant further submitted that examining the impugned order Ann. A-3 is not found that the respondent No.3 is the regularly selected candidate appointed. The respondents in the reply have categorically contended that the respondent No.3 is selected as ED Agent Lathi. It is also contended that the respondent No.3 was considered along with other candidates for the post of EDA whose names were sent from Employment Exchange Amreli and ultimately the respondent No.3 was selected and hence the appointing authority issued the order. The appointment of the respondent No.3 and relieving order of the applicant may not show that the respondent No.3 is a person who is regularly selected

person but that does not mean that respondent No. 3 is appointed on adhoc basis. The appointment of respondent No.3 shows that he is appointed temporarily but the reply of the respondents is clear that respondent No.3 is selected and he is appointed and that is why the applicant is relieved from the service. In my opinion, this appointment is absolutely legal as per the EDA (Conduct and Service) Rules 1964. The applicant was not nominated by Employment Exchange Amreli. In this view of the matter I hold that the impugned order passed by the respondents is legal and valid. The provisions of ID Act do not apply to the facts of this present case. I have considered all the submissions of the learned advocates and have perused all the documents and no other point is urged at the time of hearing. However, the respondents in future, whenever there is any vacancy of ED Agent, may consider to appoint the applicant on such post if he is otherwise found eligible.

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Per: Hon'ble Mr. M.R. Kolhatkar, Admn. Member.

I broadly agree with the reasoning and the conclusions of my learned brother Mr.R.C.Bhatt in the above order. However, I wish to make a few comments regarding the applicability of the case of Director of Postal Services (South) Kerala Circle, Trivandrum V/s. K.R.B. Kaimal & others, being the Full Bench judgment of Kerala High Court, reported in 1984 LAB IC 628. The applicant has alleged that according to that decision, P & T Department is an industry and Section 25F of I.D.Act applies. The applicant has also, in the rejoinder-affidavit depended on the decision of CAT Ernakulam Bench in the case of K. Unnikrishnan V/s. Sub Divisional Inspector, Post and Telegraphs, reported in 1990 All India Administrative Tribunal Law Times, 578. This judgment in para 7 also states that the ratio of Kaimal's judgment is that the P&T Department is an industry. With great respect, I have to differ from the interpretation of Ernakulam Bench. On going through the Kaimal's judgment it is seen that the ratio of the judgment is that the temporary clerks of P & T Department were governed by Rule 5 of Central Civil Services (Temporary Service) Rules and were not entitled to invoke Section 33-C(2) of the ID Act. The Kerala

High Court has pointed out that Special Rules under Article 309 in respect of temporary employees in P & T Department exclude the provisions of Chapter 1-A of I.D.Act. The implied exclusion of these provisions of ID Act can also be gathered from the maxim "generalia, specialibus, non-derogat" - The special exclude the general. The Kerala High Court had pointed out that this exclusion is fully supported by the Bangalore Water Supply judgment of the Supreme Court (1978 SCC (L&S) 215), on the definition of industry. The relevant observation of the majority judgment in that case is that "Rules under Article 309 of the Constitution may expressly or by necessary implication exclude the operation of the ID Act. That is a question of interpretation and statutory exclusion". Thus the reference made by the learned advocate for the applicant to the ratio of Kaimal's judgment as well as reference contained in the judgment of the Ernakulam Bench are both not quite apposite. In this particular instance, the applicant was appointed under EDA (Conduct & Service) Rules 1964 and applicant has not shown nor is there anything on record to the contrary that these have not been made under the proviso to Article 309 of the Constitution. This implies that persons appointed under these rules will be governed by the specific rules to the exclusion of provisions of

Industrial Disputes Act irrespective of whether or not P & T Department is held to be an industry. This is the additional reason why the application in this case cannot succeed, in addition to the Full Bench judgment of G.S. Parvati to which my learned brother has referred. That judgment arose on a reference relating to applicability of Section 25H of ID Act, to ED Agents and the Full Bench judgment repelled the applicability of Section 25H by holding that the termination of the ED Agent in question was outside the definition of retrenchment contained in Clause (bb) of section 2(oo) of the ID Act. Here again the question of P & T department being an industry or not had been left open. I agree with the learned brother that the application deserves to be dismissed.

10. In view of the above we pass the following order:

O R D E R

In the result application is dismissed. No order as to costs.

M.R.Kolhatkar
(M.R. Kolhatkar)
Member (A)

R.C.Bhatt
(R.C.Bhatt)
Member (J)

vtc.