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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.

Original Applications 250 & 251 of 1989.

Date of decision : March 1, 1990.

In O.A.250 of 1989:

Bholanath Majhi ... Applicant.

Versus

Union of India and others ... Respondents.

In O.A.251 of 1989.

Bipin Bihari Patnaik ... Applicant.

Versus

Union of India and others Respondents.

In both the cases:

For the applicants ... Mr. Antaryami Rath,
Advocate.

For the respondents ... Mr. P. N. Mohapatra,
Addl. Standing Counsel
(Central)

.....

C O R A M:

THE HON'BLE MR.P.S.HABEEB MOHD., MEMBER (ADMN.)

A N D

THE HON'BLE MR.N.SENGUPTA, MEMBER (JUDICIAL)

1. Whether reporters of local papers may be allowed to see the judgment ? Yes.
2. To be referred to the Reporters or not ? *yes*.
3. Whether Their Lordships wish to see the fair copy of the judgment ? Yes.

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JUDGMENT

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N. SENGUPTA, MEMBER (J)

Since in both the Original Applications
these involve common question of law we are disposing of
the same by this common judgment.

2. The case of the applicant in Original Application No. 251/89 is that they joined as sepoy (Gr.D post) in the office of Respondent No.3 on 8.7.1976 and was confirmed in that post on 8.12.1981, and that of the applicant in O.A. 250/89 is that they joined as sepoy on 11.1.1978 and was confirmed with effect from 1.3.1982. In 1979 Central Excise and Land Customs Department Group 'C' Recruitment Rules were made by the President under the proviso to Article 309 of the Constitution of India. In those Rules a reservation of 10% of the vacancies in the be grade of Lower Division Clerksto/filled by direct recruitment was made for Gr. D employees borne on the regular establishment subject to the condition:

- (i) Selection would be made through a Departmental examination confined to such Gr.D employees who fulfil the requirement of minimum educational qualification, namely matriculation or equivalent.
- (ii) Are within the maximum age limit of 45 years (50 years in case SC and ST caste candidates).
- (iii) Must have put in at least 5 years of service in Gr.D, and
- (iv) Maximum number of recruits by this method would be limited to 10% of the vacancies in a year. Unfilled vacancies would not be carried over.

Abdul Salam
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11/9/90
The Central Board of Excise and Customs on 9.12. 1982
communicated a decision taken at the request of the

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Employees Federation that the Departmental examination provided in the Recruitment Rules would be a qualifying one and that out of the 10 % quota, 5 % of the vacancies in a Calender year shall be filled on the basis of seniority subject to rejection of unfit and the remaining 5 % on the basis of qualifying examination with typing test to be held departmentally. In 1983 they appeared at the Departmental Examination for the promotion to the rank of L.D.Clerks and by order No.181-Estt. dated 26.9.84 they were appointed as L.D.C. on regular basis though the result of the examination was not communicated to them. In due course the applicant in O.A.251 of 1989 was confirmed in the post of L.D.C. with effect from 23.6.1987. When matter stood thus, Respondent No.4 issued letter dated 24.5.1989 (copy at Annexure-6) calling upon them to show cause within 10 days as to why their appointment as L.D.C. on permanent basis should not be reviewed and they be not deconfirmed. As the notice issued indicated that they were going to be reverted to Group D and as no other efficacious remedy is available, they have been compelled to approach this Tribunal for quashing the notice (copy at Annexure-6).

3. The respondents in their reply have alleged that in view of the clarification issued by the Government of India in their letter dated 9.12.1982, the applicants have no cause for grievance as they were appointed on the basis of merit only without considering cases of the 5 % who were

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entitled to appointment on the basis of seniority subject to rejection of the unfit. They have also alleged that the applicant not having exhausted the Departmental remedies, the application~~s~~ is not entertainable in view of the provisions of S.20 of the Administrative Tribunals Act 1985.

4. We have heard Mr. A. Rath for the applicant and Mr. P.N. Mohapatra for the Respondents. With regard to the submission of Mr. Mohapatra based on Section 20 of the Administrative Tribunals Act, it may be stated that it has been held in a number of previous cases that in ordinary circumstances, before exhausting departmental remedies, an application should not be entertained but there may be extraordinary circumstances justifying acceptance of an application before recourse to departmental remedies is made. In the instant case the notice was for reversion to the lower rank, therefore there was an urgency, so we are unable to accept the contention of Mr. Mohapatra, that the application~~s~~ is to be rejected on the technical ground of non-exhausting departmental remedies.

5. The propriety of the notice for reversion may now be examined. In this connection a reference to page 3 of the counter may be made where it has been stated that the applicants being educationally qualified appeared at the departmental examination along with others, a merit list was drawn up and basing on the merit list they

Not Eept 1.9.90.

were appointed as L.D.Clerks on regular basis against 10 % vacancies in preference to some of their seniors in Group D. This would mean that the applicants were appointed on the basis of their performance in the Departmental examination. Mr. Mohapatra during the course of his arguments has heavily relied on the letter dated 9.12.1982 and has contended that as that letter was issued on the request of the Central Excise and Customs Employees Federation, that is binding on the applicants and as the notice was issued to follow the instructions contained in that letter, the applicants cannot question the notice to show cause against reversion and deconfirmation. It is true that it is common now a days for the employees to form associations or unions to have adequate bargaining power and enter into agreements with the employer, but that cannot extend to creating estoppel as amongst the individuals or to legalise one that is not supportable in law. There is no dispute that the rules for recruitment to Group 'C' of the year 1979 were framed by the President in exercise of his power under the proviso to Article 309 of the Constitution. The letter dated 9.12.1982 was issued from Central Board of Excise and Customs, therefore there can be no doubt that the said letter conveyed executive instructions. Provisions of Rules framed under Art. 309 cannot be modified by executive order (see AIR 1981 SC 1990- State of Maharashtra v. Chandrakant). The administration being alive to this position in para 2 of the letter dated 9.12.1982 stated:

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" Necessary amendment to the Central Excise and Land Customs Group 'C' posts Recruitment Rules is being issued separately. "

From the counter it would be found that the proposed amendment has not yet been made. Therefore, the respondents relying on the instructions contained in the letter dated 9.12.1982 could not say that the appointment of the applicants, which were admittedly made in accordance with the Rules of 1979, was invalid. In this connection it would be pertinent to refer to a decision of the Delhi High Court reported in 1970 S.L.R.8(.K.K.Viz v. The Government of Himachal Pradesh) where a similar question arose. That case also related to promotion of a certain percentage from the subordinate service under a Regulation governing the conditions of service. Subsequently instructions banning appointments and promotions were issued. The ^{appointments} of the applicants before the High Court ~~were~~ appointed in a regular manner were sought to be invalidated. The High Court observed;

" The appointments which were made in exercise of statutory powers confirming to the mode provided by the statute, could not be rendered invalid by reason of an executive instruction."

It is also now the settled position that executive ^{not} instructions can only supplement and supplant any portion of the statutory rules. On reading the letter dated 9.12.1982 there can be no doubt that it purported to modify that part of the 1979 Rules which dealt with promotion of Group 'D' staff to Group 'C' and substitute another rule. This, in our opinion, was not competent.

New Encl. 10

6. For these reasons we hold that Annexure-6 is invalid and we quash the same. The applications are allowed but without costs.

..... Member (Administrative)

Member (Judicial) १८७०

