CENTRAL ADMINISTRATIVE TRIBUNAL

ERNAKULAM BENCH

Dated thursday the twenty eighth day of September

Nineteen hundred and eighty nine

PRESENT

Hon'ble Shri S.P. Mukerji, Vice Chairman

and

Hon'ble Shri N.Dharmadan, Judicial Member

ORIGINAL APPLICATION No.42/89

R. Padmanabhan Nair : the applicant

V.

1. The superintendent of Post Offices, Alleppey Division, Alleppey.

2. The Union of India represented by the Secretary to Government, Department of Posts, New Delhi. : the respondents

M/s. Rajendran Nair & PV Asha : Counsel for the applicant

Mr. P. Santhalingam, ACGSC : Counsel for the respondents

JUDGMENT

Shri N. Dharmadan, Judicial Member

A short but important question effectively presented by the learned counsel for the petitioner, Shri Rajendran Nair, is whether the termination of service of a provisional Extra Departmental Sub-Post Master, hereinafter referred to as EDSPM, who was posted as

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a substitute on a leave vacancy but allowed to continue for more than three years, attracts the provisions of Chapter V-A of the Industrial Disputes Act, 1947.

2. The petitioner was posted as EDSPM at Thuravoor South Post Office by Annexure-I order on a leave vacancy for 29 days from 1.2.80 to 29.2.80 with the stipulation that he will be discharged at any time without assigning any reason. But he was allowed to continue till 6.6.1983, when he was relieved by Shri P.A. Gopalakrishnan Nair Mail Overseer under Rule 267 of the Posts and Telegraphs Financial Handbook Vol.I. The Annexure-II is the relieving certificate.

3. The petitioner applied for the post when the first respondent has taken steps for selecting a regular EDSPM. But his application was not considered. Hence he filed OP 5031/83 before the High Court and obtained the following interim order on 20.6.1983.

> "Notice returnable in a week. Before a fresh appointment is made the respondents will take into consideration the petitioner's claim for appointment under Section 25-H of the Industrial Disputes Act".

4. The respondents did not obey this order and it is clear from Annexure-IV judgment, which was passed while disposing of the above OP 5031/83 by this Tribunal when the same was received on transfer after renumbering it as TA K-585/87. The relevant portion of the said judgment reads as follows:

"The petitioner states that he was not interviewed though he applied for the post ofEDBPM. We direct the respondents to interview him also and consider his application in the light of the performance at the interview and other particulars furnished in his application and strictly in conformity with the instructions outlined in Ext.P-1 within two months from the date of receipt of this order. If the petitioner is still aggrieved, it is open to him to move this Tribunal for appropriate relief."

5. Though the petitioner was also interviewed as directed by the Tribunal, he was not selected. One Shri Santhosh Kumar was selected and he was appointed as EDSPM and posted in the vacancy with effect from 6.12.1988. Aggrieved by the action of the respondents, the petitioner approached this Tribunal for the second time with the prayer that he is entitled to the protection of Chapter V-A of the Industrial Disputes Act.

6. The learned counsel for the petitioner submitted that it is now well settled that in the light of the decisions of the Supreme Court and High Courts that P &T is an industry. So, the provisions of the Industrial Disputes Act are applicable in this case and the termination of the service of the petitioner is bad, illegal and violative of the provision of Section 25.F of the Act. The petitioner is also entitled to the benefits of Section 25-H of the Act.

7. The respondents are not seriously disputing the fact that P & T is an industry. In the light of the latest pronouncements on the subject by the High Courts and Tribunals there is no scope for any doubt for the proposition that the P & T is an industry. This question has been well settled by the decisions in Kunjan Bhaskaran & others V. Sub Divisional Officer, Telegraphs, Changanessery and others (1983 LAB.I.C 135), Director of Postal Services V. K.R.B. Kaimal (1984KLT 151), P.K. Vasu V. the Secretary, Ministry of Communications in O.A. 173/87 of Ernakulam Bench and M.A. Bukhari V. Union of India and others, ATR 1989 (1) CAT 162. Accordingly we hold that the department in which the petitioner is working is an industry coming under the definition of Section 2(j) of the Industrial Disputes Act, 1947.

8. A seriously contested question which was argued in this case is whether Chapter V-A of the Industrial Disputes Act, 1947 applies to P & T. The learned counsel for the respondents, Shri P. Santhalingam contended that P & T has rules and executive orders governing the selection, appointment and other service matter of EDSPM and hence the provision of the Industrial Disputes Act are not applicable. We are not inclined to accept this contention. The Supreme Court has considered the very nature of the Postal Service in its larger concept and held that the Postal Service is really a branch of public service providing service to the citizens subject to the provisions of the Post Office Act and Rules made

thereunder. This is made clear from the following decisions such as Union of India V. Amar Singh, AIR 1960 SC 233, Commissioner of Income Tax, Delhi V. M/s. P.M. Rathod and Co., AIR 1959 SC 1394 and Tria and Co. Ltd. V. Post Office, (1957)2 QB 352. So, it is also well settled that the P & T is a public oriented service establishment which is constituted for serving the public and the persons serving in it are governed by its Rules, either statutory or Executive Regulations and Executive orders.

9. But we are in this case only concerned with these executive orders and rules presumbly issued under the Article 162 of the Constitution of India regulating the selection, appointment, posting, promotion, etc. of EDSPM. They are, according to the learned counsel for the respondents neither statutory rules nor are they framed under the provisions of Articles 309 of the Constitutionof India. The power to frame rules prescribing the service matters of the respective employees coming under the Union and the States are left to the respective Legislatures under entry 70 of the List I and 41 of the List II of the 7th Schedule to the Constitution of India. Considering these powers, the Supreme Court has held in Ramesh Prasad Singh V. State of Bihar and others, AIR 1978 SC 327, that so long as the Rules under Article 309 are not framed, qualifications, method of selection to a post may be laid down in the self same executive orders by the Government under the delegated powers.

The Supreme Court held in Lalit Mohan Deb & others V. Union of India, AIR 1965 SC 868, that even after the framing of Rules under Article 309 in respect of particular service matter, the Government and the delegated agencies may pass executive orders for filling up of the lacuna in respect of certain specific matters when such rules are silent. Only draw back for these executive orders is that while implementing them if the rights of any third party is affected the rules of natural justice will have to be observed as pointed out by the Supreme Court in R.R. Verma and Others V. Union of India and others, AIR 1980 SC 1461. In view of this the matter the Railway Establishment Code, Circulars, letters etc. issued by the Railway Board have in general been held to be rules having statutory force as per the decision of the Calcutta High Court in Union of India V. Santhi Kumar, AIR 1967 Cal. 126. The Supreme Court also held in the famous case Kumar V. Union of India AIR 1982 SC 1062 that in case of conflict between these two rules the statutory rules alone shall prevail.

10. From theabove principles laid down by the Supreme Court, we are inclined to come to the conclusion that there is only very subtle distinction between a Rule or instructions issued under the executive power of the state under the Articles 162 and the rules framed in exercise of powers under Articles 309 or the statutory provisions. The Supreme Court held in Prem Prakash V. Union of India (1985) 2 SLR 757 that the executive instructions issued under Article 162 should be read

with rules and cannot be ignored. But Section 25-J of the Industrial Disputes Act, specifically states that the provisions of Chapter V-A of the said Act have precedence over these rules and executive orders even if they are statutory. It has been held by the Allahabad High Court in Nandan Lal V. Union of India and another, 1978(2) SLR 840 that the retrenchment provisions in Section 25-F overrides contrary provisions in the Railway Establishment Code. The Gujarat High Court also has taken the same view of Section 25-J of the Industrial Disputes Act, the industrial disputes between the society and its servants will be governed by the Industrial Disputes Act (in Gujarat State Cooperative Land Mortgage Bank Ltd. V. Labour Court, Rajkot, 1968 LLJ 670). Very recently the Division Bench of the Central Administrative Tribunal, Allahabad Bench has taken the view in S.K. Sisodia V. Union of India and others (1988)7 ATC 852.

> "According to Section 25-J of the industrial Disputes Act, provisions in Chapter V-A which includes Section 25-F, have overriding effect"

The Court further held

> "Rule 149 of the Indian Railway Establishment Code Manual Vol.I and Section 25-F have to be read harmoniously which means that services of a railway servant who is not covered by the Industrial Disputes Act may be terminated in accordance with the service rules governing him, but those railway servants, as are governed by the Act would be entitled to the benefits available under this Act."

In the light of the decisions we have to hold that the rules issued by executive orders or instructions governing EDSPM may have to yield way to the provisions of chapter V-A of the I.D. Act and

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in the instant case, we are not prepared to accept the arguments of the learned counsel for the respondents.

11. The next contention very strenuously urged before us by the learned counsel for the respondents is that the petitioner being only a substitute EDSPM is not a regular workman of P & T eligible to the protection of Chapter V-A of the Act even if it is accepted that Chapter V-A applies to P&T. We are afraid that this is also not welfounded argument in order to be accepted for rejecting the claims of the petitioner in this case. The industrial jurisprudence has developed considerably and expanding day by day. Consequently, the Courts are enxious to widen the scope of the term 'workman' with a view to confer more and more benefits to the working class in this country in the interest of justice so that the unequal position which prevailed for long between the employer and employee can be reduced considerably and thereby to bury deep in the fathoms the 'hire and fire' principle. The Courts are thus paving the way for effective negotiations and settlements of industrial disputes at the industrial level itself, solely by collective bargaining process without the intervention of any third agency like the Industrial Tribunal or Courts just as in the case of industrially advanced countries like England, USA, France, Japan etc.

12. The Supreme Court originally followed the 'Organisational' test of Lord Denning, in (1952) ITLR 101 per Denning.J in Jorden and Harrison Ltd. V.Mac Donald and Evans and the 'traditional test' of Control and supervision of Mac

Cardue.J in Performing Right Society, (1924) I KB 762, and gave guidance to lower authorities by lying down certain criteria for deciding the general relationship between the employer and employees in a given cases. But it has now come to the stage of 'lifting the veil' and seeing the actual position before taking a final decision with regard to the relations between the employer and employees scanning the facts and circumstances of each case.

13. Accordingly, almost all categories of employees are now brought within the umbrella of the generic term 'workman'. Thus seasonal and casual employee is a worker, an ad hoc employee is a worker (in L Robert D' Souza V. Executive Engineer, Southern Railway and another, (1982) 1 SCC 645), a provisional employee is a worker(in Surendra Kumar Verma etc. V. The Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and another, AIR 1981 SC 422), a probationer is a worker (in Management of Karnataka State Road Transport Corporation, Bangalore V. M. Boraiah and another, AIR 1983 SC 1320), a temporary employee is a worker(in Prabhakaran V. General Manager K.S.R.T.C., 1981 KLT 164), a badli worker is a worker (in Sarabhai Chemicals V. Subhash N. Pandya, (1984) 1 SLR 693) and even an employee employed by the employer indirectly through a contract is also a worker (in Workmen of the Food Corporation of India V. Food Corporation of India, (1985) 2 SCC 136). Very recently, it has been held by the Calcutta

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Bench of this Tribunal that an ED agent is a worker (in Asoke Kumar Sinha V. Union of India and others, 1989 LAB I.C. 670). That Bench in Birendra Chandra Behera V. Union of India and others, (1978) 7 ATC 796, rejected the contention of the learned counsel for the Government that an ED agent is only a temporary servant and hence Article 311 (2) of the Constitution of India will not be attracted, following the well-known Purushotham Lal Dhingra case, AIR 1958 SC 828. The Tribunal has virtually taken the view that when an ED agent is given the full benefits of an employee or a civil servant working under P&T department why should he be deprived of the statutory or constitutional protection ?

14. We are fully aware of the modern changing situations and the developments in the industrial jurisprudence and also the expanding trend. In the light of the latest decisions, there is nothing wrong in taking the view that a substitute who was allowed to work in the Post Office continuously as stated in Ground 'A' of the Original Application for more than three years as an employee having all benefits available for a full member is a workman coming within the purview of the Act.

15. Moreover, in the instant case the respondents have treated the petitioner throughout as a full member getting all benefits, privileges and rights available to a full member in the service. Annexure-II shows

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that the petitioner had been relieved by the respondents from duty after following the procedure of Rule 267 of the Post and Telegraph Financial Handbook Vol.I as if he is a regular employee of the P&T department and hence it is out of place for the respondents now to raise this technical contention and state that the petitioner is not a regular ' 'workman' and being a substitute not eligible for any of the benefits of such an employee of P&T department. Hence, having regard to the facts and circumstances of the case we are rejecting the contention of the learned counsel for the respondents and we hold that the petitioner is an employee having the benefits and rights of a full member in the service of P & T.

16. In this view of the matters it is unnecessary for us to go into the further question raised by the learned counsel for the petitioner whether he is entitled to the benefits of Section 25-H of the Industrial Disputes Act and we are not dealing with the same in this judgment.

17. Before leaving this case we may have to say something about the conduct of the respondents in this case. The High Court while admitting the petition, having regard to the averments in it passed an interim order directing the respondents to consider the claim of the petitioner under Section 25-H of the Industrial Disputes Act, 1947. But it was not duly complied with in the spirit in which it has

been issued by the High Court after hearing the learned counsel for the respondents. In fact the respondents were even after this directions indirectly attempting to overreach the order and this fact was brought to the notice of this Tribunal at the time of the final disposal of the case on the prior occasion. Hence, the Tribunal disposed of this case after adverting to the same in the following manner 'the High Court only directed the respondents to take into consideration the petitioner's claim also before fresh appointment was made which means that the respondents are bound to consider all the applications secured for filling up the posts of EDSPM including the application of the petitioner'. Even thereafter, the respondents were not diligent enough to consider the case of the petitioner in the manner indicated in the judgment and closed the matter. The stand now taken by the respondents in the counter affdavit is that ' the applicant cannot be considered as a retrenched employee as he was working only in leave vacancies of intermittent short durations between 01.02.1980 and 06.06.1983 as a substitute'. However, we are not very happy about the approach of the respondents towards the orders and directions issued by the High Court and Tribunal in this case.

18. In the above facts and circumstances of the case, ~~petition~~, the petitioner is entitled to the reliefs prayed for in the petition. We, therefore, hereby quash the termination of the service of the petitioner effected on

06.06.1983 and set aside the Annexure-II relieving certificate. The respondents are directed to reinstate the petitioner within a period of one month from the date of this judgment and pay all back wages and other service benefits within a period of three months from today.

19. Accordingly, the Original Petition is allowed on the above lines. The parties are left to bear their own costs in this proceeding.

28/9/89

(N. DHARMADAN)
Judicial Member

28.9.89

(S.P. MUKERJI)
Vice Chairman

28th September 1989

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