

CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH :::: GUWAHATI -5.

O.A. NO. 7 of 1994  
T.A. No.

DATE OF DECISION 13.1.95

Shri Sashi Ranjan Bora and Others

PETITIONER(S)

Shri J.L. Sarkar and Shri M. Chanda

ADVOCATE FOR THE  
PETITIONER (S)

VERSUS

Union of India and others

RESPONDENT (S)

Shri S. Ali, Sr. C.G.S.C. and  
Shri G. Sarma, Addl. C.G.S.C.

ADVOCATE FOR THE  
RESPONDENT (S)

THE HON'BLE JUSTICE SHRI M.G. CHAUDHARI, VICE-CHAIRMAN.

THE HON'BLE SHRI G.L. SANGLYINE, MEMBER (ADMINISTRATIVE).

1. Whether Reposters of local papers may be allowed to see the Judgment? yes
2. To be referred to the Reporter or not? YES
3. Whether their Lordships wish to see the fair copy of the Judgment? { No
4. Whether the Judgment is to be circulated to the other Benches?

Judgment delivered by Hon'ble Vice-Chairman. *kechandhari*

8

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH

Original Application No.7 of 1994

Date of decision: This the 13<sup>th</sup> day of January 1995.

The Hon'ble Justice Shri M.G. Chaudhari, Vice-Chairman

The Hon'ble Shri G.L. Sangliyine, Member (Administrative).

1. Shri Sashi Ranjan Bora  
Divisional Accountant  
Office of the Executive Engineer  
Gas Thermal Project, Rokhia,  
Agartala, West Tripura
2. Shri Sushen Lal Saha  
Divisional Accountant  
Public Health Engineer, Division No.V,  
Kumarghat, Tripura (North)
3. Shri Bijoy Kumar Dutta Purkayastha,  
Divisional Accountant  
Office of the Executive Engineer,  
Micro Hydel Division, P.W.D.,  
Pasighat, Arunachal Pradesh
4. Shri Pradip Kumar Paul,  
Divisional Accountant  
Office of the Executive Engineer,  
Southern Division No.3,  
P.W.D., Udoypur, Tripura
5. Shri Bimal Biswas  
Divisional Accountant  
Office of the Executive Engineer  
Flood Management Division No.1,  
Battala, Agartala.
6. Shri Bijit Bhushan Deb  
Junior Grade Divisional Accountant  
Office of the Executive Engineer  
Flood Management Division No.III  
Udaipur, Tripura.
7. Shri Tapan Lal Mukherjee  
Office of the Executive Engineer  
Gumti Electrical Division  
P.O. Gumti Project, South Tripura.
8. Shri Deepak Chakraborty  
Divisional Accountant  
Office of the Executive Engineer,  
Rig Division, Banamalipur,  
Agartala, West Tripura.
9. Shri Rakhal Krishna Dey  
Divisional Accountant  
Office of the Executive Engineer. .... Applicants  
By Advocate Shri J.L. Sarkar and Shri M. Chanda.

-versus-

1. Union of India  
Through the Comptroller and Auditor General of India,  
New Delhi

*[Signature]*

2. The Accountant General (A & E),  
Meghalaya etc. Shillong
3. The Chief Engineer  
P.W.D., Arunachal Pradesh  
Itanagar
4. The Chief Engineer  
P.W.D., Arunachal Pradesh  
Itanagar.

.... Respondents

By Advocate Shri S. Ali, Sr. C.G.S.C.  
and Shri G. Samma, Addl. C.G.S.C.

....

ORDER

CHAUDHARI.J. V.C.

This is an application filed on 10.1.1994 by the respective applicants in O.A. Nos. 33/94 to 38/94 which applications are also listed for hearing, as they feel that if they succeed in this application it may also help them in their individual cases.

2. The parent department of the applicants is the department of Chief Engineer, PWD, Arunachal Pradesh, where they were working as Accounts Clerks. They volunteered for being posted on deputation as Divisional Accountants in the pay scale of Rs.1400-2600 in the office of the Accountant General (A& E), Meghalaya, Shillong, and were selected and posted in different divisions of Arunachal Pradesh under the administrative control of the AG (A&E), Shillong, in the year 1989 initially for one year. It is not disputed the period of deputation can be extended to a maximum period of 3 years. By order dated 22.2.1993 the applicants are repatriated to their parent department. That order is challenged in each of the other applications.

3. The applicants claim that they are entitled (although they are on deputation) to appear in the

*hsl*

Divisional Test Examination for regular absorption in the existing post of Divisional Accountant. That request has been refused by the respondents who contend that the applicants do not have any right to claim regular absorption in the borrowing department and therefore the question of allowing them to appear at the test examination does not arise. They maintain that the applicants are bound to go back to their parent department. In support they rely on relevant rules which we shall presently consider. In order to overcome the difficulty arising by reason of the rules the applicants have filed the present application praying for directing amendments of the said rules or setting them aside. The rules in question are the Indian Audit and Accounts Department (Divisional Accountant) Recruitment Rules, 1988 (hereafter referred to as Recruitment Rules).

4. The aforesaid recruitment rules have been made by the President of India in exercise of powers conferred by clause(5) of Article 148 of the Constitution and after consultation with the Comptroller and Auditor General of India to regulate the method of recruitment to the post of Divisional Accountant under the cadre control of the Accounts and Entitlement Offices of the Indian Audit and Accounts Department. These have come into force on 24.9.1988.

5. The applicants since have been sent on deputation in the year 1989 these rules would ordinarily apply to them. The applicants however have made twofold prayer which is as follows:

That the respondents be directed to make necessary provisions in the Indian Audit and Accounts Department (Divisional Accountant) Recruitment Rules, 1988, to enable the Divisional Accountants on deputation basis

OR.....

*haz*

or State PWD/RWD Accounts Clerk having requisite qualification to appear in the Divisional Grade Examination by amending the said Recruitment Rules 1988

OR

That the Indian Audit and Accounts Department (Divisional Accountant) Recruitment Rules, 1988 be set aside and quashed.

It will thus be noticed that the vires of the rules have not been challenged directly and the 1st prayer is made on the footing that the rules are valid but need to be amended. The two prayers are therefore, mutually inconsistent.

6. The contention of the applicants leading to aforesaid prayers inter alia are as follows:

1. The recruitment to the posts of Divisional Accountant is regulated in accordance with Appendix I of CPWA/in the Chapter-VII of the Comptroller and Auditor General Manual of Standing Orders whereby PWD Accounts Clerks/ Upper Division Clerks eligible for recruitment as Divisional Accountant through initial recruitment examination reliance is placed on paras 247 and 249 of Chapter VII aforesaid.
2. The Recruitment Rules 1988 are defective and contradictory because there is provisional recruitment of Divisional Accountant on transfer basis but no provision for appearing in the examination for Divisional Accountant Grade Examination.
3. Earlier to the 1988 Rules also Divisional Accountants were appointed on deputation basis from amongst the Accounts Clerks of PWD/RWD Arunachal Pradesh and they were termed as Emergency Divisional Accountants whereas in the instant case the applicants are treated as

deputationists...

*JKR*

deputationists and were not allowed to appear in the Divisional Grade Examination. Earlier the deputationists were termed as Emergency Divisional Accountants and were allowed to appear in the said examination and many were regularised as Divisional Accountants. Since the applicants were not allowed to appear in the examination this results in practising hostile discrimination leading to violation of Articles 14 and 16 of the Constitution. It is contended that as there is not made any provision in the 1988 Rules for allowing the Divisional Accountants on deputation to appear in the Divisional Grade Examination although there is provision for appointment, recruitment by transfer and this amounts to a serious defect in the Rules and the rules therefore need to be amended.

4. The applicants would be eligible and entitled to for recruitment as Divisional Accountant on regular basis being comparable with Accountant/Sr. Accountant who are eligible under the 1988 rules. However there being no provision made in the said rules to enable the Divisional Accountant who are working on deputation basis. The rules therefore appear to be defective and contradictory.
5. It is legitimate expectation of the employees working in the field of accounts under the respective State Governments for getting a scope of opportunity of absorption in the higher scale and grade of accounts service under the control of AG (A & E) and specially when there is provision in the CPWA Code for absorption.....

*MLR*

absorption from the State PWD/RWD Accounts Clerks.

5. There should therefore be 50% reservation of posts of Divisional Accountants for recruitment from amongst the State PWD/RWD Accounts Clerks and there should also be a provision for regular examination in every year, for Divisional Grade Examination where eligible Accounts Clerks working under State Government be allowed in the said examination.
6. The nature of work, sources of recruitment of Emergency Divisional Accountant and the present applicants who are recruited on deputation basis are exactly similar. Therefore the present applicants cannot be discriminated in the examination and in the matter of absorption in the event of passing the examination. There therefore seems to be some contradiction in the 1988 rules and the Code and the action of the respondents not allowing applicants to appear in the examination is violative of Articles 14 and 16 of the Constitution. Hence the rules are liable to be set aside and quashed.
7. Although there is a provision in the 1988 Rules for recruitment of Divisional Accountants on transfer basis from amongst PWD/RWD Clerks but there is no provision for allowing the Divisional Grade Examination to the Divisional Accountants who are working on deputation basis.
7. It will thus be noticed that the applicants have not challenged the vires of the Rules. The rules are therefore binding upon them. They cannot compare the rules with the pre-existing position and then allege discrimination. It is fallacious to assume that they could be governed

earlier....



earlier by different norms as they were not until 1989 deputationists and by the time they were sent on deputation the new rules came into force they would therefore be subject to these. It is material to note that they had volunteered for deputation and that was after the 1988 rules. It is not therefore open to them to contend that they should be treated as under the old rules. There does not therefore arise any question of they being treated differently as a class than those who were similarly situated. They do not form the same class as those who were governed by earlier rules in the past. There is therefore no substance in the grievance of alleged discrimination practised against them or of violation of Articles 14 and 16 of the Constitution.

8. It was during the course of his argument that Mr Sarkar contended that the President was not competent to make the 1988 Rules under Article 148(5) of the Constitution as thereby he has transgressed on the ~~process~~<sup>powers</sup> of the Comptroller and Auditor General of India, who is a constitutional authority and the President could not make rules inconsistent with the standing instructions that have been issued by the Comptroller and Auditor General which should be deemed to be in force notwithstanding the rules and therefore respondents cannot deny the opportunity to the applicants to appear in the examination with the ultimate object of getting absorbed in the borrowing department as divisional accountants.

9. Reliance is placed upon certain paras of Chapter VII of the Comptroller and Auditor General's Manual of Standing Orders.

Para 247 (old 314) dealt with organisation of a

separate....

*hsl*

separate cadre of Divisional Accountants. Para 249 (old 315) provided that recruitment to the cadre is made by the Accountant General by selection through a competitive and qualifying test called Initial Recruitment Examination of Divisional Accountants from the following three sources:

- (1) Public Works Department Accounts Clerks
- (2) Upper Division Clerks of Audit Offices
- (3) Direct recruits.

Note 1 below the para provided that it is desirable that persons should be employed as Divisional Accountants reasonably soon after finishing their period of probation of a maximum period of 3 years vide para 250 (old 319).

✓ 10. Relying on these provisions it is <sup>contended</sup> concluded by Mr Sarkar that since the applicants belong to source No.1 above and have also worked as Divisional Accountants for a period equal to the period of probation mentioned in the note they are eligible to appear at the examination and that right is being denied to them by the respondents relying upon the 1988 Rules and that is illegal. On that line of argument Mr Sarkar submits that the Rules 1988 are inapplicable and incompetent.

11. The Manual produced before us is 1969 edition. The learned counsel has referred to corresponding paragraphs from later manual which is not produced.

Chapter I of the Manual states in so far as material thus:

"1. The Comptroller and Auditor General of India is the administrative head of the Indian Audit and Accounts Department and is appointed under Article 148(1) of the Constitution of India..... his powers and duties are determined under Articles 148(5) , 149 and 151

of....

*bill*

of the Constitution and the Government of India (Audit and Accounts) Order 1936 as adapted by the India (Provisional Constitution) Order, 1947.

7. The office of the Comptroller and Auditor General is mainly concerned with formulating policies, giving directions and according sanctions only in such important matters where field officers do not have the necessary powers....."

The Comptroller and Auditor General therefore is the administrative head and is mainly concerned with formulating policies and giving directions. Since his powers and duties are determined under Article 148(5), 149 and 151, these articles may now be noted.

Article 149 provides that the Comptroller and Auditor General shall perform such duties and exercise such powers in relation to the accounts of the Union and of the States..... as may be prescribed by or under any law made by Parliament.

Under Sub article (5) of Article 148 it is provided thus:

"(5) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor General."

The rules in question namely the Indian Audit and Accounts

Department,....

*hull*

Department (Divisional Accountant) Recruitment Rules, 1988 have been made by the President after consultation with the Comptroller and Auditor General of India, in exercise of powers conferred by clause 5 of Article 148 (as set out above). The rules therefore have constitutional sanction. All the clauses of Article 148 must be read together and harmoniously. Since the Comptroller and Auditor General exercises powers subject to the provisions of the Constitution which includes clause 5 of Article 148 of the Act, the Comptroller and Auditor General cannot by any stretch of imagination function de-hors or above the Constitution. Hence any rules made by the President in consultation with Comptroller and Auditor General would prevail against any other pre-existing rules like the standing orders issued by the Comptroller and Auditor General. It is not possible to hold that the Comptroller and Auditor General can function ignoring the rules made under Article 148(5) merely because he may exercise such powers as the Auditor General of India exercised immediately before the commencement of the Constitution. Apart from the fact that nothing is produced as to what these powers were that is irrelevant in the instant case as the applicants have based their case on the standing orders compiled in the first edition of the Manual published in 1953, i.e. after the advent of the Constitution. Para 1 of Chapter 1 of the Manual clearly mentions that the Comptroller and Auditor General discharges his constitutional responsibilities through the agency of the Indian Audit and Accounts Department. There can thus hardly be any doubt that standing orders are issued from time to time by the Comptroller and Auditor General in his discretion and these can be modified by him as is apparent from Memorandums I and II at the end of Volume I of the Manual. Moreover para 81 of the Manual shows that the Comptroller

and.....

*JK*

and Auditor General has the power to modify a rule. What is essence is the existence of the power and not the situations and procedure prescribed under clauses i and ii thereof. We therefore hold that the 1988 Recruitment Rules prevail over the standing orders existing until then to the extent these are rendered inconsistent with the rules as regards recruitment to the post of Divisional Accountant. We find no substance in the contention of the learned counsel that the President has acted without authority to make the rules and that the standing orders made by the Comptroller and Auditor General earlier would continue to hold the field. The learned counsel also submitted that the Rules offend Article 309 of the Constitution. Short answer to that contention is that Article 309 opens with the words, "Subject to the provisions of this Constitution.....". That renders exercise of powers under Article 148(5) by the President of India perfectly valid. We ~~object~~ <sup>reject</sup> the contention. Likewise we find no substance in the contention that the Rules are ultra-vires the Constitution either. Learned counsel submitted that the doctrine of pleasure of the President has no application and therefore also the rules made by him are not valid. Indeed on the very same basis it must be held that the Rules are not based on the pleasure doctrine but are enacted in exercise of the Constitutional powers. Learned counsel also urged that the consultation with the Comptroller and Auditor General mentioned in the preamble of the rules is not proper. ~~There has been shown~~ <sup>No basis is however</sup> any basis for urging this contention and <sup>it</sup> must be mentioned only to be rejected as being without any substance.

12. Turning now to the prayers these also appear to us to be totally misconceived. We are not the legislative body

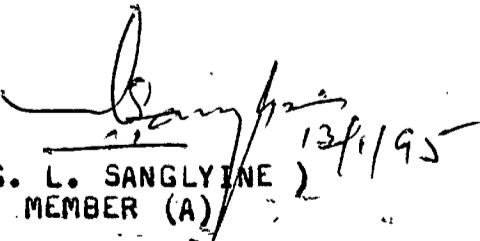
or....

*hell*

or exercise the powers under Article 148(5) of the Constitution. We cannot therefore direct to amend the 1988 rules to rectify the so called defects - which we do not find to arise - as prayed. It is only in exceptional cases where the court is satisfied that amendment in the rules is necessitated to remove some anomaly as may be noticed that the court may make such a suggestion for consideration of the Government to be carried out through legislative process. Such is not <sup>the</sup> case at all here hence question of even making such an observation does not arise. Hence the first prayer has to be rejected.

13. As far as the second prayer is concerned, no law or rule can be quashed or set aside like an order may be set aside. A court of competent jurisdiction can declare a law unconstitutional or ultra-vires the Constitution or a rule ultra-vires <sup>the</sup> act if it is found to be so. Such a question does not arise in this case. Merely because the applicants feel that the rules are not to their liking these cannot be quashed or set aside. We have already held that the rules have been made in exercise of constitutional powers and are valid so no question of striking them down can arise on the grounds urged on their behalf. The second prayer also thus has to be rejected.

14. In the result the application is dismissed with no order as to costs.

  
( G. L. SANGLYINE )

MEMBER (A)

  
( M. G. CHAUDHARI )  
VICE-CHAIRMAN