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CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.2064/2003

New Delhi this the 21st day of May, 2004.

HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

Sunita Kumari,
S/o Sh. Sanjay Kumar,
R/o B-22, Dr. Gidwani Road,
Adarsh Nagar,
Delhi. -Applicant

(By Advocate Shri Shyam Babu)

-Versus-

1. Govt. of NCT of Delhi
through its Secretary,
Players Building,
I.P. Extension,
New Delhi.

2. The Director of Education Delhi,
Govt. of NCT of Delhi,
Player's Building,
I.P. Estate,
New Delhi.

3. The Dy. Director of Education,
District North - West (A),
Hakikat nagar,
Delhi. -Respondents

(By Advocate Shri Mohit Madan, proxy for Mrs. Avnish Ahlawat, Counsel)

1. To be referred to the Reporters or not? Yes

2. To be circulated to other Benches? Yes

S. Raju
(Shanker Raju)
Member (J)

(17)

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O R D E R

Applicant impugns respondents' order dated 2.6.2003, terminating her services under Rule 5 (1) of the Central Civil Services (Temporary Service) Rules, 1965 (the Rules, for short). Reinstatement with all consequential benefits has been sought.

2. Applicant, who belongs to a general category and was also registered with the Employment Exchange in the same category, in pursuance of an advertisement issued by the Delhi Subordinate Services Recruitment Board (DSSRB) applied for the post of TGT (Domestic Science). 79 posts were advertised in the category, out of which 36 were unreserved and 11 and 14 were for SC and ST categories.

While applying applicant has annexed a draft for Rs.100/- on account of fee for gazetted Group 'B' post. Consequent upon selection on provisional basis, an offer of appointment was sent to applicant, which shows that appointment is temporary and provisional for a period of one year subject to medical fitness and verification of character and antecedents. The merit of the general candidate in so far as last candidate is concerned, was 72 marks as per DSSRB results, whereas applicant has secured 43 marks, treating her to be a ST candidate she was offered the offer of appointment.

3. In the offer of appointment it has been stipulated that being a nominee of the DSSRB appointment of applicant is subject to her category, status, caste/tribe certificate. It is also stated that the same is liable to be terminated at any time by giving one month's notice or salary in lieu thereof. It was also stated that applicant has to produce the original certificate regarding caste. The offer of appointment also stipulated that at any stage if the information given and declaration made by the candidate is found false the appointment would be terminated.

4. Applicant was appointed on 31.12.99 and was asked to produce the ST certificate.

5. Applicant has been asked to present before the Deputy Director of Education on 9.11.2001, wherein on being pointed out about her status it has been categorically admitted that she has not claimed the benefit of reservation and she belongs to general category. She further stated

that the application form had been filled up by applicant in her own handwriting and the signature belongs to her. She further stated that the answers given by her have been after due deliberations and are not false.

6. While filling up the application form applicant in the column of age relaxation has ticked right and in column 3 (a) where it is asked whether the candidate seeks benefit of reservation she has ticked right and in corresponding column category of ST she has ticked right. It is on this basis despite securing only 43 marks and assuming to be a general candidate she could not have qualified in the merit for appointment as she has been treated as ST candidate she got qualified as per her marks.

7. Applicant was served a show cause notice on 10.12.2001, proposing termination as per the conditions laid down in her offer of appointment dated 31.12.99 on the ground that on direction to produce ST certificate applicant having admitted in writing that she did not belong to ST category she misled the DSSRB and concealed the facts. Applicant submitted a reply to the show cause notice and approached this Court simultaneously in OA-3383/2001, challenging the termination.

8. In the OA it is contended that the termination is in violation of Article 311 (2) of the Constitution of India and applicant is to be deemed confirmed. It is also alleged that the termination is stigmatic in nature. The Tribunal rejected the argument of deemed confirmation and on

the issue of jurisidiction of show cause notice the show cause notice was not found to be stigmatic. Accordingly OA was dismissed on 8.5.2003.

9. Applicant filed CWP No.3218/2003 against the order passed by the Tribunal before the High Court of Delhi. By an order dated 27.5.2003, taking cognizance of the fact that final results for TGT examination held on 22.8.99 petitioner does not qualify for selection as a general candidate as the last candidate who had qualified in this category had secured 72 marks whereas petitioner had secured only 43 marks, CWP was dismissed. However, applicant sought liberty to take recourse to appropriate remedy after a final order on the show cause notice is passed and in case any grievance survives.

10. Applicant in her statement dated 31.5.2003 before the respondents denied to have filled up column No.3 (a) and 3 (b) of the application form and endorsed that there is no overwriting or cutting in it. She has asked for examination by a handwriting expert. She further admitted that she has not taken note of the ST category and when the results were published in Newspaper roll number of applicant does not correspond to ST category.

11. On reply to the show cause notice, respondents by an order dated 2.6.2003 terminated the services of applicant, giving rise to the present OA.

12. Shri Shyam Babu, learned counsel for applicant assails the impugned order on the ground that Rule 2 (1) of the Rules defines appointing authority as an

authority declared under CCS (CCA) Rules, 1965. While referring to Rule 5 (1) of the Rules it is contended that notice for termination and termination is to be served upon an employee by the appointing authority. In this conspectus it is stated that the orders issued by the Deputy Director of Education are by an incompetent authority, which is not the appointing authority of applicant. It is further stated that in the orders passed on 2.6.2003 though the Deputy Director is shown as the authority who has issued the orders, it has been stated that the competent authority is of the view that reply and stand of the respondents is devoid of merit. This, according to applicant, conclusively establishes that the Deputy Director of Education was only the conveying authority whereas some other authority competent has approved the termination. Relying upon the decision of the Apex Court in Om Prakash V. Union of India, AIR 1975 SC 1265 it is contended that the notice of termination not issued by the appointing authority is nullity in law. It is also pointed out that in the light of the decision of the Apex Court in Chander Kishore Jha V. Mahavir Prasad & Anr., JT 1999 (7) SC 256 where a statute provides a thing to be done in a particular manner, no other manner is to be adopted. Accordingly, the contention put-forth is that when it is the appointing authority who has to issue the notices, notices issued by an incompetent authority cannot be sustained in law.

13. Learned counsel for applicant raises another legal plea that in the notification issued there is no indication as to the post being temporary. The post of TGT against which applicant has been selected is a direct recruitment post. Applicant, right from the date of

appointment. has been put on probation in a substantive capacity. Appointment of applicant is made against a permanent post, which is of permanent duration. According to him, Rule 2 (d) of the Rules defines temporary service as service of a temporary government servant on a temporary post only. Referring to the decision in Praduman Kumar Jain v. Union of India, 1994 (28) ATC 70 (SC), it is contended that a direct recruit on probation is to be treated as a recruitee against a permanent vacancy.

14. Learned counsel relies upon the decision of the Apex Court in Baleshwar Das v. State of U.P., 1980 (4) SCC 226 to contend that if a person held a post in substantive capacity for an indefinite period on probation subject to confirmation it would be an appointment in substantive capacity.

15. Another leg of argument of applicant is by referring to the decision of the Apex Court in Kanhiya Lal v. District Judge, 1983 (1) SLR 621 to contend that when an order is stigmatic and penal in nature protection of Article 311 (2) of the Constitution of India would be open.

16. Learned counsel further states that notice of termination is not a notice under the Rules as it is not in the tenor of Rules.

17. Learned counsel states that assuming applicant is a temporary servant then without following the due process of law as the termination is on an alleged misconduct of securing appointment on a false statement that applicant belongs to ST category is bad in law.

18. It is lastly stated that applicant has not filled up column 3 (a) and 3 (b) of application as she has been registered with the Employment Exchange as a general candidate applied as a general candidate and there is no question of her seeking relaxation of age as she was within the age for a general candidate. Applicant has not filed any certificate of ST category.

19. In so far as marks are concerned, it is stated that apart from manipulation in the application form the marks are also manipulated by the respondents.

20. On the other hand, respondents' counsel raises the preliminary objection of res judicata, as it is stated that the contentions raised have already been agitated and adjudicated in OA-3383/2001, which has attained finality by rejection of the Writ Petition by the High Court of Delhi. The learned counsel states that in view of the admission of applicant that she belongs to general category, her selection and appointment in ST category does not bestow upon her a right to claim appointment as per her marks which are much below the last meritorious candidate in the merit list.

21. It is further stated that applicant has been given an opportunity to show cause before dispensing with her services. Learned counsel states that Deputy Director is the appointing authority of applicant and the competent authority referred to is only the Deputy Director. It is also stated that applicant has admitted to have filled up

the form in her own handwriting and had concealed the fact of her belonging to general category, taking undue benefit by manipulating the record.

22. Learned counsel denies that any fabrication has been done at DSSRB or by the respondents. It is stated that applicant has committed a fraud has no right to the post and assuming she is re-instated cannot be put back on a post which belongs to general category for which she has failed to secure the requisite merit.

23. In the rejoinder pleas taken in the OA are re-iterated.

24. I have carefully considered the rival contentions of the parties and perused the material on record, including the departmental record produced by the respondents. At the outset, I hold that a selected candidate has no indefeasible right to appointment. An appointment sought on practising fraud and on concealment of the facts is nullity in law and does not attract protection of Article 311 (2) of the Constitution. The Apex Court in Union of India & Ors. v. M. Bhaskaran, 1996 (1) SCSLJ 1, while dealing with a case where the appointment has been taken on fraud, held as follows:

> It is not necessary for us to express any opinion on the applicability of Rule 3(1) (i) and (iii) on the facts of the present cases for the simple reason that in our view the concerned railway employees, respondents herein have admittedly snatched employment in Railway service, may be of a casual nature, by relying upon forged or bogus casual labourer cards. The unauthenticity of the service cards on the basis of which they got employment is clearly established on record of the departmental enquiry held against the concerned employees. Consequently, it has to be

held that respondents were guilty of misrepresentation and fraud perpetrated on the appellant-employer while getting employed in Railway service and had snatched such employed which would not have been made available to them if they were not armed with such bogus and forged labourer cards. Learned counsel for the respondents submitted that for getting service in Railway as casual labourers, it was strictly not necessary for the respondent to rely upon such casual service cards. If that was so there was no occasion for them to produce such bogus certificates service cards for getting employed in Railway service. Therefore, it is too late in the day for the respondents to submit that production of such bogus or forged service cards had not played its role in getting employed in Railway service. It was clearly a case of fraud on the appellant employer. If once such fraud is detected, the appointment orders themselves which were found to be tainted and vitiated by fraud and acts of cheating on the part of employees, were liable to be recalled and were at least voidable at the option of the employer concerned. This is precisely what has happened in the present case. Once the fraud of the respondents in getting such employment was detected the respondents were proceeded against in departmental enquiries and were called upon to have their say and thereafter have been removed from service. Such orders of removal would amount to recalling of fraudulently obtained erroneous appointment orders which were avoided by the employer-appellant after following the due procedure of law and complying with the principles of natural justice. Therefore, even independelty of Rule 3(1) (i) and (iii) of the Rules, such fraudulently obtained appointment orders could be legitmately treated as voidable at the option of the employer and in such cases merely because the respondent-employees have continued in service for number of years on the basis of such fraudulently obtained employment orders cannot create any equity in their favour or any Estoppel against the employer. In this connection we may usefully refer to a decision of this Court in District Collector & Chairman, Vizianangaram Social Welfare Residential School Society, Vizianangaram & Anr. v. M. Tripura Sundari Devi (1990) 3 SCC 655. In that case Sawant. J. Speaking for this Court held that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court

should be a party to the perpetuation of the fraudulent practice. It is of course true as noted by the Tribunal that the facts of the case in the aforesaid decision were different from the facts of the present case. And it is also true that in that case pending the service which was continued pursuant to the order of the Tribunal the concerned candidate acquired the requisite qualification and hence his appointment was not disturbed by this Court. But that is neither here not there. As laid down in the aforesaid decision if by committing fraud any employment is obtained such a fraudulent practice cannot be permitted to be countenanced by a court of law. Consequently, it must be held that the Tribunal had committed a patent error of law in directing reinstatement of the respondent-workmen with all consequential benefits. The removal orders could not have been faulted by the Tribunal as they were the result of the sharp and fraudulent practice on the part of the respondents. Learned counsel for respondents, however, submitted that these illiterate respondents were employed as casual labourers years back in 1983 and subsequently they have been given temporary status and, therefore, after passage of such a long time they should not be thrown out of employment. It is difficult to agree with this contention. By mere passage of time of fraudulent practice would not get any sanctity. The appellant authorities having come to know about the fraud of the respondent in obtaining employment as casual labourers, started departmental proceedings years back in 1987 and these proceedings have dragged on for number of years. Earlier removal orders of the respondents were set aside by the Central Administrative Tribunal. Madras Bench and proceedings were remanded and after remand fresh removal orders were passed by the appellant which have been set aside by the Central Administrative Tribunal. Ernakulam Bench and which are the subject matter of the present proceedings. Therefore, it cannot be said that the appellants are Estoppel from recalling such fraudulently obtained employment orders of the respondents subject of course to following due procedure of law and in due compliance with the principle of natural justice, on which aspect there is no dispute between the parties. If any lenient view is taken on the facts of the of the present case in favour of the respondents then it would amount of putting premium on dishonesty and sharp practice which on the facts of the present cases cannot be permitted.

25. In Jammu & Kashmir Public Service Commission v. Farhat Rasool and Others, 1996 (1) SCSLJ 4, following observations have been made:

"So, we are of the opinion that the Division Bench of the High Court took a wrong view about the fulfilment of the eligibility condition. The decision of this Court in the aforementioned case cannot be called in aid by the respondent because there the question for examination was entirely different. The present is a case where almost a fraud was sought to be played by the respondent by giving wrong information as to his eligibility, benefit of which fraud cannot be allotment to the respondents.

26. The Apex Court in R. Vishwanatha Pillai v. State of Kerala & Ors., 2004 SCC (L&S) 350 held as follows:

"15. This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste community, then the very basis of his appointment was taken away. His appointment was no appointment in the eye of the law. He cannot claim a right to the post as he had usurped the post meant for a reserved candidate by playing a fraud and producing a false caste certificate. Unless the appellant can lay a claim to the post on the basis of his appointment he cannot claim the constitutional guarantee given under Article 311 of the Constitution. As he had obtained the appointment on the basis of a false caste certificate he cannot be considered to be a person who holds a post within the meaning of Article 311 of the Constitution of India. Finding recorded by the Scrutiny Committee that the appellant got the appointment on the basis of a false caste certificate has become final. The position, therefore, is that the appellant has usurped the post which should have gone to a member of the Scheduled Castes. In view of the finding recorded by the Scrutiny Committee and upheld up to this Court, he has disqualified himself to hold the post. The appointment was void from its inception. It cannot be said that the said void appointment would enable the appellant to claim that he was holding a civil post within the meaning of Article 311 of the Constitution of India. As the appellant had obtained the appointment by playing a fraud, he cannot be allowed to take advantage of his own fraud in entering the service and claim that he was holder of the post entitled to be dealt with in terms of Article 311 of the Constitution of India or the Rules framed thereunder. Where an appointment in a service has been acquired by practising fraud or deceit, such an appointment is no appointment in law, in service and in such a situation Article 311 of the Constitution is not attracted at all.

16. In Ishwar Dayal Sah v. State of Bihar the Division Bench of the Patna High Court examined the point as to whether a person who obtained the appointment on the basis of a false caste certificate was entitled to the protection of Article 311 of the Constitution. In the said case the employee had obtained appointment by producing a caste certificate that he belonged to a Scheduled Caste community which later on was found to be false. His appointment was cancelled. It was contended by the employee that the cancellation of his appointment amounted to removal from service within the meaning of Article 311 of the Constitution and was therefore void. It was contended that he could not be terminated from service without holding departmental inquiry as provided under the Rules. Dealing with the above contention, the High Court held that if the very appointment to the civil post is vitiated by fraud, forgery or crime or illegality, it would necessary follow that no constitutional rights under Article 311 of the Constitution can possibly flow. It was held: (Lab IC pp.394-95, para 12)

> If the very appointment to civil post is vitiated by fraud, forgery or crime or illegality, it would necessarily follow that no constitutional rights under Article 311can possibly flow from such a tainted force. In such a situation, the question is whether the person concerned is at all a civil servant of the Union or the State and if he is not validly so, then the issue remains outside the purview of Article 311. If the very entry or the crossing of the threshold into the arena of the civil service of the State or the Union is put in issue and the door is barred against him, the cloak of protection under Article 311 is not attracted.

17. The point was again examined by a Full Bench of the Patna High Court in Rita Mishra v. Director, Primary Education, Bihar, AIR 1988 Pat 26. The question posed before the Full Bench was whether a public servant was entitled to payment of salary to him for the work done despite the fact that his letter of appointment was forged, fraudulent or illegal. The Full Bench held : (AIR p.32, para 13)

> "13. It is manifest from the above that the rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of the law, no statutory entitlement for salary or consequential rights of pension and other monetary

benefits can arise. In particular, if the very appointment is rested on forgery, no statutory right can flow from it."

18. We agree with the view taken by the Patna High Court in the aforesaid cases.

19. It was then contended by Shri Ranjit Kumar, learned Senior Counsel for the appellant that since the appellant has rendered about 27 years of service, the order of dismissed be substituted by an order of compulsory retirement or removal from service to protect the pensionary benefits of the appellant. We do not find any substance in this submission as well. The rights to salary, pension and other service benefits are entirely statutory in nature in public service. The appellant obtained the appointment against a post meant for a reserved candidate by producing a false caste certificate and by playing a fraud. His appointment to the post was void and non est in the eye of the law. The right to salary or pension after retirement flows from a valid and legal appointment. The consequential right of pension and monetary benefits can be given only if the appointment was valid and legal. Such benefits cannot be given in a case where the appointment was found to have been obtained fraudulently and rested on a false caste certificate. A person who entered the service by producing a false caste certificate and obtained appointment for the post meant for a Scheduled Caste, thus depriving a genuine Scheduled Caste candidate of appointment to that post, does not deserve any sympathy or indulgence of this Court. A person who seeks equity must come with clean hands. He, who comes to the court with false claims, cannot plead equity nor would the court be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. Equity jurisdiction cannot be exercised in the case of a person who got the appointment on the basis of a false caste certificate by playing a fraud. No sympathy and equitable consideration can come to his rescue. We are of the view that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquired a status by practising fraud."

27. The cumulative effect of the above ratio lays down a binding proposition that in the event either on false declaration or on practice of fraud one is appointed under the category to which he never belonged the aforesaid appointment is void ab initio and is nullity in law. Such appointments do not attract mandate of Article 311 of the Constitution of India.

28. In view of the above conclusions I proceed to deal with the contentions raised by applicant.

29. In so far as the contention that Rule 5 (1) of the Rules obligates an order to be passed by the appointing authority is concerned, the show cause notice issued clearly shows that applicant was appointed by the Deputy Director, District North-West (A). I have seen the official record as well. The offer of appointment and the appointment letter have been issued to applicant by the Deputy Director, who is the appointing authority of applicant. The notice of termination and the termination order have been issued by Deputy Director being the appointing authority. A mere reference to the competent authority cannot be construed in such a manner to interpret that whereas the Deputy Director is the only conveying authority the decision to terminate is taken by the competent authority who is the appointing authority. I have to see in the light of the decision of the Apex Court in the case of Om Prakash (supra) as to who issued the notice/order of termination. Having failed to establish as to who is the competent authority who appointed her, overwhelming evidence in the form of document does not leave any doubt as to Deputy Director of Education being the appointing authority of applicant. In such an event contention of applicant is not sustainable.

30. As regards the issue whether the appointment of applicant is temporary or substantive in nature, the test laid down for direct recruitment in Praduman's case (supra) as well as Baleshwar Das (supra) has been kept in mind.

Though the advertisement does not show nature of the post but the offer of appointment dated 31.12.99 shows appointment as temporary for a period of one year. The condition of service as terms of appointment contained in terms of appointment clearly show that appointment is temporary and provisional for a period of one year. Applicant would be on probation for a period of one year, which could be extended at the discretion of the appointing authority. This clearly shows that appointment though against the permanent post is temporary subject to confirmation. There is no concept of deemed confirmation unless the rules specify maximum period of probation beyond which it cannot be extended, but once there is no outer limit specified for probation, unless a positive declaration is made one remains on temporary basis. As per Temporary Service Rules an officiating service in a permanent post is also to be treated as a temporary service. No doubt, applicant is appointed provisionally subject to verification she cannot be substantively appointed, unless she is confirmed and a positive declaration to this effect is made, in the light of the decision of the Apex Court in Mohd. Muzaffar Alam v. State of Bihar, 2002 SCC (L&S) 685. In this view of the matter the decisions cited are distinguishable. I hold applicant as a temporary government servant amenable to the Rules.

31. As regards tenor of the show cause notice is concerned, Rule 5 provides service of a temporary government servant liable to be terminated by a notice in writing given to the government servant by the appointing authority. The show cause notice issued to applicant in the present case is not a notice under Rule 5 but it is a notice to comply with

the principles of natural justice, an opportunity to applicant to have her say before provisions of Rule 5 (1) of the Rules are invoked. The order dated 2.6.2003 impugned is an order issued under Rule 5 (1), which provides either termination forthwith or through a show cause notice of one month duration. Accordingly the order issued is in accordance with the Rules.

32. As regards stigmatic order is concerned, I do not find any stigma reflected in the order, applying the test laid down by the Apex Court in Dipti Prakash Banerjee v. Satyendra Nath Bose, National Centre for Basic Sciences, Calcutta & Others, JT 1999 (1) SC 396.

33. Moreover, I do not find the order to be punitive and assuming the same is punitive a show cause notice has already been issued to applicant and after her explanation order of termination has been passed.

34. Equity demands as a sine qua non approach to the Court with clean hands. Unless a right is established one has no authorisation to continue on the post indefinitely when the application form is admitted to have been filled up by applicant herself with admission of her signature leaves no doubt and raises a presumption that all the columns filled should have been ticked marked by applicant herself. The burden to show otherwise and to establish that this has been done by the respondents lies on applicant. Except making a bald statement, not even a foundation to the aforesaid allegation has been laid down. In absence of material to show that whether the application form or marks have been tempered with being a reputed

recruiting agency I do not want to impeach their working. It is the tendency of a person to secure appointment and once a false declaration or a fraud is detected the best defence is an after thought and counter allegations, which, for want of credible materials cannot be justified and established.

35. Moreover, though I have gone to deal with all the issues raised by applicant, yet in view of the decision in Bhaskar and Vishwanatha cases (supra) those who have been found to have appointed on false certificate and not in the entitled category despite continuing for several years as the appointment is void ab initio gives no right to continue in government service. Their dismissals have been upheld.

36. Applicant assuming to be a general candidate, as admitted by her, on perusal of the merit arrived at by the DSSRB has got only 43 marks whereas the last meritorious candidate who was appointed in the general category secured 72 marks. Accordingly, she has no right to be appointed against the general category as TGT.

37. In the result, finding no infirmity with the orders passed by the respondents, OA is found bereft of merit and is accordingly dismissed. No costs.

S. Raju

(Shanker Raju)
Member (J)

'San.'