
(2003) 12 JH CK 0049
In the Jharkhand High Court
Case No : LPA No. 269 of 2003

Deobrat Sahay

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 19-12-2003

Acts Referred:

Constitution of India, 1950 — Article 226, 311

Citation : (2004) 1 JCR 354

Hon'ble Judges : Vikramaditya Prasad, J; Gurusharan Sharma, J

Bench : Division Bench

Advocate : P.K. Sinha and P.N. Rai, for the Appellant; P.K. Prasad and M.M. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Vikramaditya Prasad, J.—The question to be answered in this LPA is whether the learned Single Judge in dismissing the writ petition filed by the appellant for quashing the office order dated 19.2.03, Annexure-9 to the writ petition, by which non-extension of the tenure of the appellant was conveyed to him and he was relieved from the duty as Director, Personnel, erred in not holding that (i) the respondents could not have terminated the service of the appellant as Director without any rhyme and reason and (ii) on a vague vigilance enquiry, his extension of tenure could not have been refused?

2. The aforesaid questions arise out of admitted facts that the appellant was promoted to the post of the Chief General Manager, Central Mines, Planning & Design Institute Limited, on March, 1997, and he became eligible to be appointed as Director for which he was interviewed in the year 1996 along with other eligible candidates and ultimately by order dated 27.5.1997 and 21.12.1997, Annexure 1 to the writ petition, he was appointed an Director, Personnel, in ECL for a period of 5 years with effect from 2.6.1997. His tenure was to expire on 1st June, 2002, but prior to that date of expiry of the tenure, status quo for further six months beyond 1.6.2002 or until further order was passed. By Annexure 3 to

the writ petition, it was reduced to 3 months and by Annexure 4 it was further extended by 3 months beyond 31.8.2002 as the extension of his tenure was under consideration. By Annexure 5, this status quo was extended beyond 31.8.2002 for one month on the same ground that the extension was under consideration. By Annexure 6/1 and 6/2, some juniors to the appellant were given extension for a further period of one year or till their superannuation. Similarly, Annexure 6/3, one Director was given extension for 7 months. By Annexure 7 dated 18th November, 2002, with the approval of the competent authority, the appellant was restrained from looking after the work of the Director, Personnel, and his duties were confined to look after the Welfare and Community Development work only. Against this order, a representation was filed by the appellant to the Coal Minister, vide Annexure 8, and thereafter the impugned order, Annexure 9 to the writ petition, issued.

3. According to the respondents, the appointment of the appellant was a contractual one for a fixed period of 5 years and his terms of appointment were to be guided by the appointment order as contained in Annexure 1. It is admitted by the respondents that PSEB (Public Enterprises Selection Board) conducted a joint appraisal of the performance of the appellant on 29.10.01 and recommended for extension of tenure of the appellant. However, in the meanwhile, the Ministry received several complaints against the appellant. Thereafter, the complaints were examined in consultation with the Chief Vigilance Officer of the respective Coal Companies and sent to CVC for their advice in the matter. Since there were several complaints and decision was likely to take considerable-time, the appellant was allowed to continue on ad hoc basis with the approval of the competent authority. Against 2 complaints, CVC recommended for initiation of the departmental proceedings other than censure. However, when the adverse comments on the conduct of the appellant came to the notice of the Government of India, it transpired that the conduct of the appellant was under cloud and suspicion and therefore, it was not expedient to recommend extension of his tenure as Director. Accordingly, a proposal was sent for non-extension of the service of the appellant for consideration of ACC and also ex-post facto regularization of tenure of the appellant as Director, Personnel, CCL, with effect from 1.10.2002 till non-extension of his tenure.

4. The answer to the questions posed above involve many sub-questions. The basic question is whether the appellant's appointment was a contractual one terminable with the efflux of time or was it a substantial appointment and therefore, the non-extension amounts to his reversal, which could not have been done without complying the requirements of Article 311 of the Constitution. The settled law is that if an appointment is made under certain regulations, then the authorities have to follow that regulations and without following that regulations, no service condition can be changed. Annexure 1 is the terms and conditions on which this appellant was appointed. The term (i) of Annexure 1 reads as follows :

"(1) Period.--The period of his appointment will be 5 years with effect from

2.6.1997 (F/II) in the first instance or till the age of superannuation, whichever is earlier and in accordance with the provisions of the Companies Act. The appointment may, however, be terminated even during this period by either side on 3 months' notice or on payment of three months' salary in lieu thereof."

Term (xiii) of Annexure 1 reads as follows :

"(xiii) Conduct, Discipline and Appeal Rules.--(a) The Conduct, Discipline and Appeal Rules framed by the PSE in respect of their non-workmen category of staff would also *mutatis mutandis* apply to him with the modification that the Disciplinary Authority in his case would be the President.

(b) The Government also receives the right not to accept his resignation if the circumstances so warrant i.e. if the disciplinary proceedings are pending or a decision has been taken by the competent authority to issue a charge-sheet to him."

5. Undisputedly, there are two levels of posts in the Ministry. One is Board Level and the other is below the Board Level and the post of the Director, Personnel, is a Board Level post. In this respect, Annexure 10 and Annexure 10/1 to the writ petition are relevant. Annexure 10/1, which is an office memorandum issued in the year 1999 provides for retention of lien to the lower post for a maximum period of 5 years in case of the appointment to the Board Level post. This order was communicated to all the Administrative Ministries and they were advised to comply with the above decision of the Government. From this letter, it is clear that even in the face of appointment of an employee to the Board Level posts, the employee's lien under the Departmental Rules on the lower post did not end, rather the employee so appointed to Board Level post retained the lien on the earlier post for 5 years. Had not there been such a provision, then it could have been said that if with the appointment to the Board Level, the lien on the earlier post expired, then non-extension on the newly appointed Board Level post will be *mala fide*. The appellant himself being a Director is expected to be well aware of the fact that though he was working on the Board Level post, but his lien to his lower post had not expired. No employee can keep two liens on two posts simultaneously. The Apex Court in the similar circumstances in *Ramlal Khurana (Dead) By Lrs. Vs. State of Punjab and Others*, held that If an employee holds two liens in two different departments at the same time and once he is appointed substantially, his lien to another post disappears; non-confirmation in the other post is not relevant. From this, it is clear that if a person holds a lien to the earlier post, then he can not hold lien to the other post to which he has been appointed. The earlier lien ends, new one can be created only when the appointment is substantial. One of the tests of the substantial appointment will be whether his lien to the earlier post still continues. If it continues by operation of law or under some administrative decision, then it indirectly means that the appointment of the person to the new post is not substantial. It may be noted here that the appellant's appointment to the Board Level post was for a period of 5 years and the retention of the lien under the new policy on the lower post is

also for 5 years, meaning thereby that the administration was alive to the situation; thus in the event of the extension or non-extension of tenure in the Board Level appointment, the Board Level employee, as he holds lien to earlier post, will revert back to the earlier post without any hardship to him and therefore, his lien was allowed to survive for that period. Mere perusal of the appointment letter makes it amply clear that the appointment was for a period of 5 years or until further orders whichever is earlier and it was made on contract and subject to the option of termination on the part of both the parties with the notice of 3 months. This appointment and service condition, Annexure 1/1, was to be controlled by that service rules with regard to pay and other allowances and the disciplinary proceeding under the terms of the contract itself. So this was not an appointment in a regular manner to be guided by another service rules applicable to the Government servants in general. Therefore, the appointment, in my opinion, was not a substantial appointment, but contractual appointment to be regulated by the terms and conditions as stated in Annexure 1/1.

6. The question now is whether Annexure-9 by which his tenure was not extended and by which he has been sent back to the original post, which is lower than the post held by him, amounts to his reversion. Annexure-9 firstly I find that his appointment was as per the appointment letter itself for a fixed period and could be extended for further period. Therefore, the extension is not a matter of routine, had it been a routine matter, then there could be no reason for first appointment or for each appointment for a fixed tenure of five years. Here the question is whether the appellant has a right to the post as so had a right to get extension. In contractual service conditions, the right to extension is not traceable. Annexure 9 is a plain and simple order, which does not contain anything which could be attributed as stigma cast on the appellant. Therefore, if the appellant did not hold the post substantially and he had no right to the post and therefore, no right to get extension, then even in absence of anything that looks like allegation, the appointment could be terminated by three months' notice, then in that circumstances also this will not amount to his reversion. If this does not amount to reversion, the article 311 of the Constitution is not attracted. I support my view from the decision reported in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, followed in *Tulsipur Sugar Company Ltd. Vs. State of U.P. and Others*, where the Apex Court held that if the termination of the service is founded on the right flowing from a contract or the service rules, then prima facie termination is not a punishment and carries no evil consequences. If the stigma is attached, then only it is reversion.

7. I now further proceed to examine whether the aforesaid non extension of the tenure was discriminatory and mala fide. It has been argued on behalf of the learned counsel for the appellant that the appellant was even interviewed and from the fact that the status quo was directed to be maintained, which was drastically reduced to three months and subsequently, to one month are the circumstances to show that something fishy was being collected. The question is what is meant by the term "under consideration"? In absence of any term in the

service condition that the extension was to be automatic, it necessarily implies that before the term is extended, the suitability of the candidate for granting further extension has to be considered. "Consideration" means "to think seriously or carefully, to deliberate, to look at definitely or carefully" and "under consideration" means "being considered or dealt with". Therefore, when the matter was under consideration, it definitely means that it was being considered whether or not extension had to be given. The result of consideration may end in either way and during consideration, many things may weigh in the minds of the persons, who were entrusted with the task of such consideration. But undisputedly, only these facts which are relevant are to be considered and such consideration should not be vitiated by something which is completely irrelevant or absolutely created to defeat or to create a situation for positive or negative result of such consideration.

8. Here the question as alleged by the appellant is that a vague vigilance enquiry was used at the fag end of the tenure for denying him the extension.

It has already been stated above that by Annexure 10, during the period of his tenure, he was truncated of some of the portions of his job against which he had represented and in that representation in the capacity of the Director. He protested against the status quo being ordered, he also challenged that he had not been given any opportunity of his explanation before passing of Annexure 8. From this, it is clear that the appellant was knowing that something were adverse and they were also being considered. When a communication is made that a particular matter is under consideration, it does not amount to any admission on the part of the communicator that the consideration is to result in favour of the person so considered. Any expectation on the part of the appellant that such consideration meant that extension was going to be granted is not a legitimate expectation, particularly in the aforesaid circumstances, when the Annexure 8 had been issued, against which he has represented. During this period of the first status quo, it appears on perusal of Annexure 12 that the appellant had already received certain allegations communicated to him from the Chief Vigilance Officer, Coal India Limited, and he replied to that on 2.6.2002. These were certain allegations relating to his tenure as Chief General Manager in the year 1995. In his representation, the appellant made out a case that such irregularities had now been allegedly raised to deprive him of the extension of his tenure. If this was the representation in reply to the letter dated 19/20 June, 2002, issued by the CBO, then it looks that these materials for this letter were with the concerned CBO during the period of status quo.

9. Here the question is whether such an investigation could have been undertaken at this juncture on the allegation for the period prior to his appointment to Board Level.

The case of the appellant is that when he was appointed to the Board Level post, then any matter which related to the earlier period will be deemed to have already been considered, if not consider, then it cannot be used subsequently for

denial of his further extension or promotion. In this context, annexure-C, D, E, F and G annexed with counter affidavit of the respondents to the writ petition are relevant. The policy under Annexure-C was that the Ministry/Department concerned should ensure that officials/ persons, whose appointment are proposed for consideration of the ACC, are of absolute integrity and are clear from the vigilance angle as well. In case, it comes to notice that the official/ person concerned was under a cloud after the appointment has actually been made, the responsibility for the lapse will be of the Secretary of the Ministry/ Department concerned. From Annexure - E which is also a letter issued on 12th July, 1999, by the Central Vigilance Commission, it is found that the Government has evolved a system for according clearance, in particular, after the issuance of D.O.P.T.'s OM No. 27(5)-EO/88(ACC) dated 4th August, 1988. In keeping with this instruction, the Commission is consulted for vigilance clearance in respect of those officers, who are holding Board Level Posts, and are considered for others board/ higher board level posts. Clause 3 of the letter reads that "in order to remedy the defects arising from existing procedure, it has been decided that vigilance clearance should be obtained from the Commission in respect of all candidates/officers recommended by the PSSB for appointment to any Board Level position in PSEs, irrespective of their holding in Board Level or below Board Level post at that point of time".

10. The vires of this circular has not been challenged; Obvious it is that in cases of even existing holder of Board Level post, the Vigilance Clearance has to be taken in cases of promotion. No doubt that this circular does specifically provide whether this rule will apply in cases when the extension of the tenure is being considered but this cannot be interpreted so as to exclude the vigilance clearance in cases of those whose cases are under consideration. Annexure F, which is also a letter of the Personnel Department, Central Government issued in the year 1991, reads that "it has been noticed that in some cases the terms of the Executives of some public sector enterprises have been terminated without reference to and approval of ACC. The Prime Minister, in the ACC, has desired that it may be ensured that such cases are invariably sent to the ACC, following the existing instructions on the subject".

11. On the basis of the discussions made above, it can safely be said that only the persons of integrity could be appointed to the Board Level post and the persons, who were under cloud, could not have been appointed and even for extension, the integrity of a person is sine qua non. The materials that were being considered indicate that though they related to the earlier period, i.e. the period prior to his appointment to Board Level post, show that he was already under cloud. Therefore, consideration of these materials for the purpose of extension/non-extension is not an irrelevant material being used for the purpose of denying extension.

12. The next question is whether the appellant had been discriminated. The learned Single Judge in the impugned judgment has elaborately discussed this

aspect of the matter. The appellant had pleaded that he has been discriminated against G.R. Choudhary and S.N. Joshi whose tenure were extended without obtaining CVC clearance and, therefore, obtaining CVC clearance in the case of the appellant was only discriminatory.

It is argued by the learned counsel for the respondents that even if it is presumed for the argument's sake that enquiry was pending, so their extension was illegal, then also there cannot be any law legitimizing that illegality.

As I have already said that integrity is the main criterion and if some person of cloudy integrity is not given any extension, then this by itself cannot be a ground for saying that other persons of doubtful integrity have been given privilege of extension. I also agree with the submission of the respondents that there has been no discrimination in this case.

13. The next question that was raised by the learned counsel for the appellant is that if at all there was an allegation against him necessitating enquiry; then also he could have been proceeded in terms of Clause (xiii) of the condition of service under contract. It appears to me that this provision will be applicable if the allegations relate to the period of his tenure, but for some allegations relating to the period prior to his tenure, the same cannot be attracted and therefore, if the allegations relating to the period prior to his tenure are also being considered, then that are to be considered according to the general rules applicable to his service and not under the contract.

Deputation and contractual appointments are two different things. Contractual appointment can also be there when the appointment is made from open market and not from the lower cadre, the departmental proceeding under the terms and conditions of the contract is more relevant for those appointments from the outside cadre to whom no departmental proceeding under the rules applicable to regular Government Servant cannot be applied. It is, therefore, that in the condition (xiii) of the Contract, the Government retains the right not to even accept resignation against whom a departmental proceeding is contemplated therefore, the non-application of the said condition in the case of the appellant is not bad.

This plea is, therefore, also dismissed.

14. The peculiar circumstance in this case is that on the date on which lien granted to him for the lower post expires, the appellant was already on the Board Level post, when extension matter was also being considered. Therefore, if the authority was not willing to extend, then they should have asked the appellant to join the lower post prior to the date of expiry of his lien on the lower post, which was not done. It, thus, leaves the appellant in quandary because on the one hand, he is not given the extension and on the other hand, his lien expired, meaning thereby that the appellant had no post to revert back. This situation is the creation of the authorities themselves. Therefore, in this peculiar circumstances, his lien despite the existence of the circulars, will be deemed to

have been continuing after its expiry and the appellant can hold that post of G.M.

15. In the result, I find that the Board Level post held by the appellant was not a substantive post held by him, he has no right to that post, the extension of the tenure was not a matter of right and only because his case was being considered did not confer him any legitimate expectation of his further extension on the post because even for extension, the integrity of the holder of the Board Level post may be examined and considered. Consequently, there is no merit in this appeal, but one thing which requires some attention is that under Annexure F, the letter issued in the year 1999, even in the matter of termination, the ACC's approval was necessary which does not appear to have been complied. In such circumstances, the appellant will hold the post of G.M. which he is occupying at present and he is given liberty to file representation, which will be considered by the authorities in the light of their circulars, particularly the circular contained in Annexure F. The appeal is dismissed.

Gurusharan Sharma, J.

16. I agree.