

(1998) 12 AHC CK 0070
In the Allahabad High Court
Case No : C.M.W.P. No. 15467 of 1997

Dr. Avneesh Kumar and others

APPELLANT

Vs

Director, Indian Veterinary Reserch Institute, Bareilly and
others

RESPONDENT

Date of Decision : 09-12-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1999) 2 AWC 1337 : (1999) 3 UPLBEC 113

Hon'ble Judges : S.H.A. Raza, J;B.K. Sharma, J

Bench : Division Bench

Advocate : Prakash Padia and A.K. Dave, for the Appellant; Rameshwar Prasad and Rakesh Tewari, for the Respondent

Final Decision : Allowed

Judgement

S. H. A. Raza, J.—The controversy pertains to the promotion to the extent of 33-1/3 per cent quota from the departmental quota as provided in Technical Service Rules made by the Departmental Promotion Committee to promote the eligible candidates from Grade T-5 to Grade T-6.

2. It has been alleged that after perusing the service record of the petitioners and verifying the same, the Departmental Promotion Committee has recommended the promotion of the petitioners. The Director accepted the recommendation of the Departmental Promotion Committee and issued the promotion order dated 28th June, 1996 through his Chief Administrative Officer, by which all the petitioners were promoted from T-5 grade to T-6 grade. The order indicated that on the recommendation of the Departmental Promotion Committee, the Director was pleased to promote the petitioners from T-5 grade to the post mentioned against each, in the scale of Rs. 2,200-4,000, provisionally in a temporary capacity with effect from the dates they assumed the charge of the post at the place of posting, until further orders against 33-1/3% promotion quota.

3. In pursuance of the said appointment order, it was averred that the petitioners were relieved from their posts of T-5 grade by their respective Head of Departments on the same day, i.e., 28.6.1996 and they joined on their respective T-6 grade posts on the same day, i.e., 28.6.1996, which is evident from the order dated 29.6.1996 issued by the Scientist Incharge, National Bio-Technology Centre.

4. The basic pay scale of T-6 grade post is 2,200-4,000 while the pay scale of T-5 grade post is only 2,000-3,500. They Joined the T-6 grade on 28.6.1996. They continuously worked till 16.7.1996, when an order was issued by the Assistant Administrative Officer (Establishment-1), Bareilly, U. P., by means of which the earlier order of promotion of the petitioner dated 28.6.1996 was kept in abeyance for implementation with immediate effect and the petitioners were reverted on the posts of T-5 grade till further orders.

5. The office order dated 16.7.1996 Indicated that the Director, Indian Veterinary Research Institute has decided to keep the promotions of T-5 technical personnel to grade T-6 made vide this office order of even number dated 28.6.1996 in abeyance from being implemented with immediate effect. Accordingly, the concerned persons mentioned in the office order dated 28.6.1996 referred to above were thereby reverted to their original positions in grade T-5, until further orders.

6. Being aggrieved against the said order, the petitioners invoked the jurisdiction of Central Administrative Tribunal, Allahabad by filing Original Application on 17th April. 1997. The original application preferred by the petitioner was dismissed by the Central Administrative Tribunal, mainly on three grounds ; firstly, that the order was administrative in nature ; secondly, that the order being administrative, the Director was within his power to have the complaint investigated and pending the final outcome of the investigation, could have passed the impugned order keeping the promotions in abeyance and ; thirdly, that the rule audi alteram partem is not applicable in such administrative matters. Thereafter, the petitioners have knocked the door of this Court by filing the present writ petition.

7. In the counter-affidavit, it is more or less admitted that in pursuance of the said selection, the petitioners were promoted to T-6 grade and they joined the posts after being relieved from T-5 grade, but it was submitted that although the recommendation of the Departmental Promotion Committee was accepted and order dated 28.6.1996 was passed, but complaints were received to the effect that ; firstly, that the persons, who did not possess requisite essential qualifications have been promoted ; secondly, that persons junior in the T-5 grade have been promoted to the post of T-6 grade ignoring the seniority ; thirdly, that the criteria of constant 5 years having "very good" confidential report has not been taken into account by the Departmental Promotion Committee, as per Instruction of Indian Council of Agriculture Research dated 17.4.1990 ; and lastly, that persons, who did not possess required experience of

5 years were considered and promoted to the posts of T-6 grade. On account of these irregularities and illegalities, the promotions of the petitioners to T-6 grade were kept in abeyance and they were ordered to be reverted to T-5 grade.

8. It was submitted by the respondents that principle of natural justice did not come into play in such circumstances. The order was administrative in nature and it was within the power of the Director review his earlier order. It was also stated that the promotions were not cancelled, but it was kept in abeyance.

9. During the course of argument, it was pointed out that the impugned order of reversion was quashed by the authority concerned, but the writ petition had not become infructuous as the petitioners are entitled to get the back arrears of salary and other benefits till the date, the fresh order may be passed against them.

10. More or less a similar question cropped up in *Tagin Litin Vs. State of Arunachal Pradesh* and another, . In the said case, the Deputy Commissioner, who was the competent authority under the Regulation, had passed an order on 31.1.1994 approving the appointment of the petitioner and Shri Atteng Sitek as Head Gaonburah and second Head Gaonburah of Simong village and had directed that appointment order be issued. Thereafter, the W.T. message dated 15.2.1994 was sent to the Additional Deputy Commissioner to inform the petitioner and Shri Atteng Sitek about the approval of their appointment as Head Gaonburah and Second Head Gaonburah of Simong village from 31.1.1994. Although, the petitioner was communicated by the said W.T. message, but the order dated 31.1.1994 was not formally communicated to the petitioner. The question arose before the Hon"ble Supreme Court as to whether the said order of appointment as contained in the W.T. message dated 15.2.1994 had become effective by having been communicated to the petitioner prior to 8.3.1994 when the same was kept in abeyance for the time being. In the light of the aforesaid circumstances, Hon"ble Supreme Court held :

"An appointment to a post or office postulates-

- (a) a decision by the competent authority to appoint a particular person ;
- (b) incorporation of the said decision in an order of appointment ; and
- (c) communication of the order of appointment to the person who is being appointed.

All the three requirements must be fulfilled for an appointment to be effective."

In order to be effective, an order passed by the State or its functionaries must be communicated to the person who would be affected by that order and until the order is so communicated, the said order is only provisional in character and it would be open to the authority concerned to reconsider the matter and alter or rescind the order.

It was further observed :

"There is no question of any such communication being made to him after 8.3.1994 because in W.T." message dated 3.3.1994 there was a clear direction that the said appointment to be kept in abeyance. In these circumstances, it must be held that prior to the issuance of the order dated 19.4.1994, there was no communication of the order dated 15.2.1994 to the petitioner with regard to his appointment as Head Gaonburah of Simong village. In the absence of any such communication, the said order of appointment had not come into effect and the order dated 19.4.1994, whereby Tagin Litin was appointed as Head Gaonburah and the petitioner was appointed as Second Head Gaonburah cannot be regarded as an order for removal of the petitioner as the Head Gaonburah. The Impugned Judgment of the High Court setting aside the order dated 19.4.1994 regarding appointment of Tagin Litin as Head Gaonburah and the petitioner as Second Head Gaonburah and directing that the petitioner should be treated as Head Gaonburah by virtue of W.T. message dated 15.2.1994 cannot, therefore, be upheld and has to be set aside."

11. In the present case all the three requirements, i.e., a decision by the competent authority to appoint a particular person, incorporation of the said decision in an order of appointment and communication of the order of appointment to the person who is being appointed have been fulfilled for an appointment to be effective. Furthermore, in the present case, the petitioners were placed in most advantageous and beneficial circumstance that in pursuance of the said order of appointment, they joined the posts of T-6 grade after being relieved from T-5 grade posts and worked on T-6 grade for 19 days when their promotions were kept in abeyance and they were reverted to the T-5 grade.

12. Senior Counsel, Dr. R. G. Padia, has assailed the order of the Director keeping the promotions in abeyance and reverting the petitioners and order of the Central Administrative Tribunal mainly on three grounds. Firstly, that the order is violative of principle of audi alteram partem ; secondly, that the order issued by the Director indicated no reason, it is thus, arbitrary and violative of Article 14 of the Constitution of India ; and thirdly, that the recommendation of the Departmental Promotion Committee, which consisted of experts, who recommended the names of the petitioners after verifying the record, cannot be brushed aside.

13. It is well settled in the case of Shrawan Kumar Jha and others v. State of Bihar ASR 1991 SC 309, wherein it was observed by Hon"ble Supreme Court that if an appointment has been cancelled, then it is incumbent upon the authority passing such an order to give an opportunity to show cause to the person against whom such an order was passed.

14. No doubt a candidate or candidates do not acquire any vested right to be appointed on the recommendation of the Departmental Promotion Committee on any post, but if in pursuance of the recommendation, an appointment order has been passed by the competent authority and communicated to a candidate or candidates and in pursuance of that appointment order, a person or persons Join

the post and worked for some time, the position would be different, inasmuch as the competent authority may cancel the appointment after giving an opportunity to such a candidate or candidates to show cause as to why his or their appointment be not cancelled.

15. In *Inderaj v. Financial Commissioner*. (1994) 3 SCC 683, the appellant was appointed as Headman by the District Collector. The Financial Commissioner upset the appointment on the ground that the appellant was in arrear to the land mortgage bank, although the appellant had paid all the dues before his appointment. It was held that cancellation of appointment was improper. The appellant could not be said to be in financial debt within the meaning of Rule 12C (iii) (b) of Haryana Land Revenue Rules.

16. In *Union of India v. Satya prakash* 1994 2 SCC 52, notional appointment from due date was granted for the purpose of seniority and retrial benefit only and not for other purposes, Hon"ble Supreme Court observed that promotion already made cannot be disturbed.

17. In *Bhagwan Shukla v. Union of India and others* 1994 SCC (L & S) 1320, on promotion, the pay of the petitioner was fixed, but it was reduced without giving any opportunity to the petitioner, Hon"ble Supreme Court held that the order was violative of principle of natural justice.

18. There is no dearth of cases on that subject that principle of audi alteram partem is applicable in such matters, but the principle of audi alteram partem is not strait-jacket formula, as observed in the following precedents.

19. In *Ram Chandra Tripathi Vs. U.P. Public Services Tribunal IV and Others*, , the appellant was made permanent as Junior Engineer, in violation of the Interim order of injunction passed by the High Court, which prohibited the respondents from confirming any Junior Engineer. In such a situation the finding of the Tribunal that the impugned order of termination was passed without any stigma and not as a punitive measure, as has been upheld by the High Court but the Supreme Court found no justification in taking a contrary view simply because the appellant was a President of local union at Kanpur and on that behest he has made demand for the employees. That observation was made in view of the fact that the order of confirmation was made in violation of injunction order and mistake committed in passing the confirmation order was correct, and hence the appellant was not required to be given an opportunity of being heard for correcting such mistake because there was no occasion to take one view or the other in the matter of correction of the said mistake on the basis representation to be made by the appellant.

20. In *State Bank of Patiala and others v. S. K. Sharma* (1996) SCC 364, it was held :

"Justice means justice between both the parties. The interests of justice equally demand that the guilty should be punished and that technicalities and

irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be a counter-productive exercise. These principles cannot be put in a strait-jacket. Their applicability depends upon the context and the facts and circumstances of each case."

21. The Central Administrative Tribunal was of the view that as the promotions of the petitioners were not cancelled, but were only kept in abeyance, the principle of natural justice cannot be attracted.

22. We are of the view that the Central Administrative Tribunal has committed a mistake apparent on the face of the record.

23. In the present case, a decision by the competent authority to promote the petitioners was taken, on the basis of the recommendation of the Departmental Promotion Committee, the said decision was incorporated in an order of appointment, which was communicated to the petitioners. The petitioners were relieved from T-5 grade and they joined the T-6 grade and worked for 19 days on the said posts, when the order of their promotions was kept in abeyance and they were reverted from T-6 grade to T-5 grade.

24. When all the requirements of valid promotions were fulfilled, there remains nothing to keep the promotions of the petitioners in abeyance and the petitioners could have not been reverted. The fact that the order of reversion was later on withdrawn, itself shows that the respondents have realised their mistake in reverting the petitioners to the posts from which they were promoted. It is not a case where the promotion was non-est, meaning thereby that it was without Jurisdiction or contrary to the rules. No doubt the order does not indicate as to why the promotions were kept in abeyance, resulting into reversion of the petitioners to the lower posts.

25. It has been pointed out that complaints were received by the respondents regarding certain irregularities or illegalities in the said promotions. When the order of promotions became effective, we are of the view that the principle of audi alteram partem demanded that the petitioners be served with show cause notice indicating that they were wrongly appointed. It is not a case where the petitioners themselves have committed any irregularities. It is also not the case of the respondents that the petitioners have concealed or suppressed certain facts or committed any fraud in getting themselves to be promoted on higher grade. Hence, for that reason, we are of the view that the order of reversion suffers from violation of principle of natural justice, which is embedded in Article 14 of the Constitution of India.

26. As we have pointed out hereinbefore that the order did not indicate any reason for taking such an action, which has certainly been indicated in the counter-affidavit, but whether such a ground can be supplemented by indicating reason in the shape of affidavit or otherwise deserves to be considered.

27. In *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, . It was observed :

"When a statutory functionary makes an order based on certain grounds. Its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise an order bad in the beginning may by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out."

28. In *C. B. Gautam v. Union of India* 1992 (6) SC 78. Hon"ble Supreme Court in a matter of compulsory purchase of a property, where the State was deprived of the Income Tax, as the sale consideration was below the market price, observed :

"Recording of reasons which lead to the passing of the order is basically Intended to serve a twofold purpose :

(1) that the "party aggrieved" in the proceedings before acquires knowledge of the reasons and, in a proceeding before the High Court or the Supreme Court (since there is no right of appeal or revision), it has an opportunity to demonstrate that the reasons which persuaded the authority to pass an order adverse to his interest were erroneous, irrational or irrelevant, and

(2) that the obligation to record reasons and convey the same to the party concerned operates as a deterrent against possible arbitrary action by the quasi-judicial or the executive authority invested with judicial powers."

29. In *Olga Telis and others v. Bombay Municipal Corporation and others* (1985) 2 SCR 51, as well as in *C. B. Gautam v. Union of India* (supra). Hon"ble Supreme Court read the principles of natural justice into the provisions which did not provide such a principle in the statutory rules, because in its absence the rule would become ultra vires.

30. In view of the aforesaid reasons, we are of the view that any order passed, which is non-speaking in nature, even in administrative in nature, is arbitrary and violative of Article 14 of the Constitution of India. As in the instant case, the impugned order passed by the Director dated 16.7.1996 is non-speaking, indicating no reason, hence such an order cannot be sustained on account of arbitrariness, which is the sworn enemy of equality clause contained in Article 14 of the Constitution of India.

31. We are of the opinion that the view of the Central Administrative Tribunal, that such an administrative order cannot be subject to judicial review, is not correct.

32. In *State of U.P. Vs. Ramesh Chandra Sharma and others*, , Hon"ble Supreme Court observed that State action of refusing renewal of appointment of District Government Counsel can be quashed if it is arbitrary,

33. The scope of judicial review has been well defined in (1947) 2 All ER 680, which is known as *Wednesbury Principles*, and Chief Constable of the North

Wales Police v. Evans, (1982) 3 All ER 141, 154. Lord Greene in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, (1947) 2 All ER 680, laid down the following principles :

".....It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority.....In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith ; and in fact, all these things run into one another."

It was further observed :

".....It must be proved to be unreasonable in the sense that the Court considers it to be a decision that no reasonable body can come to. It is not what the Court considers. Unreasonable... The effect of the legislation is not to set up the Court as an arbiter of the correctness of one view over another."

34. In C.C.S.U. case (1984) 3 All ER 935, the principles of judicial review of administrative action were further summarised by Lord Diplock, as illegality, procedural impropriety and irrationality. It was further observed :

".....Judicial review has, I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality" the second "irrationality" and the third "procedural impropriety"."

35. Hon"ble S. Mohan, J. In Tata Cellular v. Union of India (1994) 6 SCC 651 , relied upon the propositions made in Wednesbury and C.C.S.U.

36. In (1968) 1 All ER 694, it was observed that in exercising these powers, "the administrative powers" the Courts will take into account any reasons which the body may give for its decision, if it gives no reasons in a case when it may reasonably be expected to do so, the Courts may Infer that it has no good reason for reaching its conclusion, and act accordingly.

37. In Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , Hon"ble Supreme Court insisted that the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a

significant facet.

It was observed :

"There is no unfettered discretion in public law. A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is "fair play in action".

38. No doubt the Courts have always imposed judicial restraint in administrative action and never sit as a Court of appeal, it merely reviews the illegality, irrationality or procedural impropriety made in the decision-making process. The powers of review vested with the Courts, would be tested by the application of Wednesbury principle of unreasonableness as well as irrationality and procedural impropriety as indicated in *Chief Constable of the North Wales Police v. Evans*, (supra), that such State action should be free from arbitrariness.

39. In the light of the aforesaid principles if we test the present case on the scale of Article 14 of the Constitution of India, then we find that the impugned order suffers from violation of rules of audi alteram partem, unreasonableness and irrationality,

40. In the Supplementary Counter-affidavit, dated 8.12.1997, it has been stated that, subsequently on the recommendation of Departmental Promotion Committee, the petitioner No. 3 was promoted from T-5 to T-6 grade by the order dated 9.10.1997. Hence, the writ petition, so far as opposite party No. 3 is concerned, has become infructuous, but opposite party No. 3 will be entitled for the payment of difference of salary, during the period the order of the promotion of the opposite party No. 3 remained in abeyance.

41. In view of what has been indicated, hereinabove, the writ petition succeeds and is allowed. A writ in the nature of certiorari quashing the impugned order dated 16.7.1996 is issued. A writ in the nature of mandamus is also issued commanding the respondents to pay the petitioner Nos. 1, 2, 4 to 7 the salary for the post of Technical Grade T-6 in Indian Veterinary Research Institute, Izzatnagar, Bareilly. A writ in the nature of mandamus commanding the respondents not to interfere in the working of the petitioner Nos. 1, 2, 4 to 7 as Technical Grade T-6 in Indian Veterinary Research Institute, Izzatnagar, Bareilly is issued.

42. A writ in the nature of mandamus commanding the respondents to pay the petitioner No. 3, the difference of the salary between the period commencing from 16.7.1996 till 9.10.1997, during which the promotion of the petitioner was kept in abeyance is issued.

43. However, it will be open for the respondents to pass appropriate orders after giving reasonable opportunity to the petitioners.

44. Parties are directed to bear their own costs.