
(1980) 07 GUJ CK 0002
In the Gujarat High Court

Dr. S.C. Kaushik

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 09-07-1980

Acts Referred:

Constitution of India, 1950 — Article 14, 14, 16, 16, 226

Citation : (1980) 21 GLR 997

Hon'ble Judges : M.P. Thakkar, J;A.N. Surti, J

Bench : Division Bench

Judgement

M.P. Thakkar, J.—Replacing an officer who has "not" been selected by another who "has" been selected by the Selection Committee is understandable and accords with principle and policy. But to replace an official who has acquired 5 years" experience but has not been successful at the selection, by a fresh recruit, who has not yet been selected so far, smacks of irrationality, arbitrariness and caprice which are frowned upon by Articles 14 & 16 of the Constitution of India. Such is the proposition canvassed by two Assistant Medical Officers employed by the Railway Administration who have instituted these two allied petitions under Article 226 of the Constitution of India raising identical questions on similar facts.

2. The facts which are not in dispute in both the petitions are as under:

The petitioner in Special Civil Application No. 1871/77 is a medical graduate holding a Degree of M.B.B.S. He was appointed as an Assistant Medical Officer, Class II, on June 22, 1972 as per order at Annexure "I" dated 9/13th June 1972. Initially the appointment was for a period of six months. Thereafter it was extended from time to time. Ultimately as per order at Annexure "H" dated November 19, 1977 the services of the petitioner along with 51 other Assistant Medical Officers similarly situated as him were extended upto 31st December 1977. The petitioner in Special Civil Application No. 1872/77 is a medical graduate holding a degree of M.B.B S. He was appointed as an Assistant Medical Officer, Class II, on 1st June 1973 as per order Annexure T dated 31st May 1973.

Initially the appointment was for a period of six months. Thereafter it was extended from time to time. Ultimately as per order at Annexure "II" dated 19th November 1977 the services of the petitioner along with 51 other Assistant Medical Officers similarly situated as him were extended upto 31st December 1977. It was in terms mentioned in the said order that their appointment was being made on ad hoc basis for further periods as shown against their names or till they are replaced by U. P. S.C. candidates whichever is earlier subject to the condition that their services are liable to be terminated at any time without assigning any reason during the extended period. Though the services of 50 Assistant Medical Officers were extended along with those of the petitioners upto 31st December 1977, the petitioners only were selected for being served with an order of termination as per Annexure "B" dated December 9, 1977. Thereupon the petitioners have invoked the jurisdiction of this Court under Article 226 of the Constitution as stated hereinabove.

3. What is obvious need not be stressed. Neither logic nor principle can justify replacement of one unselected person by another. Nor fair play or public interest or expediency can come to the rescue. What public good is served when a tried and tested Medical Officer who has not been found wanting in any respect for 5 years or more is replaced by a fresh recruit who has yet to be tried and tested and has yet to gain experience? And which is the principle to which obeisance is made? A search for a rational justification leads one to a blind alley. No further test is necessary to uphold the charge of arbitrariness for the services of a public servant, even if appointed on an ad hoc basis, cannot depend on the whim or caprice of the appointing authority. Discrimination can be easily practised, and practised with impunity, if such-a situation were to be countenanced. Counsel for the Railway Administration is unable to show even today in ... July 1980, 3 years after the impugned order of termination, and 3 years after the institution of these petitions, that any doctors selected by public Service Commission are available, even now, to replace the doctors who have not been successful at the selections. Will they go on replacing unselected doctors by unselected doctors every three years? They may do so on one occasion in respect of one lot or some of them. They may not do so in respect of another lot or some of them. On what principle will it be done? The posture assumed by the respondent is: "the petitioner has been engaged on a contract of service which entitles us to terminate his service without reasons. It is, therefore, not the concern of the Courts and no question of offending the Constitution can arise if we act according to the contract." What one of us (Thakkar J.) had an occasion to say on an earlier occasion under similar circumstances may be reiterated in the present context. The argument advanced by the respondent virtually amounts to saying that it is none of the business of the courts and it has no constitutional dimension. This argument completely ignores the real content of Article 16(1) of the Constitution and the spirit underlying it. Of what use is the guarantee enshrined in Article 16 of the Constitution if it can be set at naught merely by entering into a contract which virtually enables the State to do what it is

prohibited from doing? Surely considerations relating to the law of contract cannot wipe out the constitutional safeguard relating to a fundamental right guaranteed by the Constitution. In order to accept the contention of the respondent it will have to be held that the tenure of service of a citizen who takes up employment with the State will depend on the pleasure or whim of the competent authority unguided by any principle or policy. One would also have to come to the conclusion that the service of a citizen employed by the State can be terminated even though there is no rational ground for doing so (apart from the argument that the contract of employment so empowers the State to terminate the employment) even arbitrarily or capriciously. To uphold this right is to accord "magna carta" to the officers invested with these powers to practise uncontrolled discrimination, at their pleasure and caprice, on considerations not based on the welfare of the State, but based on personal likes and dislikes, personal sympathies and prejudices. The competent authority would then have a charter to indulge in unbridled arbitrariness. An employee may be retained solely on the ground that he is a sycophant and indulges in flattery, whereas the services of one who is senior to him and more meritorious (but who is wanting in the art of sycophancy and temperamentally incapable of indulging in flattery) may be terminated. The competent authority may even prefer to retain a junior employee whilst terminating the services of his more meritorious senior solely on the ground that the, former belongs to the same religious faith or is the disciple of the same teacher or holds opinions congenial to him.

4. The competent authority may even do so on the ground that an employee belongs to his region, or his" caste, or is related to him while the other is not though he is senior and efficient. Provincialism, castism, nepotism, religious fanaticism and several other obnoxious factors may in that case freely operate on the mind of the competent authority in deciding whom to retain and whom to get rid of. An employee may be got rid of merely to make way for the favourite of the competent authority. And these dangers are not imaginary ones. They are very much real in an organisation like Western Railway where there is a confluence of employees streaming in from different States. It is therefore not possible to uphold the view propounded by the learned Counsel for the respondent as it would result in robbing a citizen of India (who takes up an employment with the State) of security of service and even his individual dignity. It would make him a supine person whose destiny is at the mercy of his superior officer (whom he must humor) notwithstanding the constitutional guarantee enshrined in Article 16(1), which enures during his continuation in office and does not stop short at the initial stage of obtaining appointment or employment with the State. To hold otherwise is to hold that the fundamental right embedded in Article 16(1) is a mere paper tiger and that it is so ethereal that it can be voided or eschewed by a simple device of obtaining from each employee a signature on a contract of service containing a stipulation similar to the one in the present case.

5. It would be arbitrary and irrational to terminate the service of a Medical

Officer who has served the Railway for more than five years just in order to replace him by another Assistant Medical Officer who is similarly situated like him in the sense of not having been selected by the Public Service Commission so far. In fact it would be detrimental to the public interest to do so. No doubt the services of those who have not been selected can be terminated provided Assistant Medical Officers who have been selected are available. Learned Counsel for the Union of India is unable to show even today in July 1980 that during the pendency of these petitions from 1977 onwards they have been able to select any Medical Officers who can replace the officers who have not been able to get themselves selected meanwhile. The order of termination is, therefore, arbitrary, capricious and violative of Articles 14 and 16 of the Constitution of India.

6. The impugned order is challenged from another standpoint on the ground that it is arbitrary and discriminatory in character. It is contended -" that while the services of 52 Assistant Medical Officers were extended upto 31st December 1977 as per Annexure "II" dated November 19, 1977 the services of only two of the 52, namely, petitioner in Special Civil Application No. 1871/77 and the petitioner in the allied matter (Special Civil Application No. 1872/77) were terminated. The services of the rest of the 59 Assistant Medical Officers were not terminated then. What is more, the affidavits placed on record go to show that out of the original 52 appointees 26 are still in service. They have not been served with any termination order so far notwithstanding the fact that they are similarly situated as the petitioners. According to the respondent Union of India, they have exhausted all the three chances available for being selected by the Public Service Commission. A list as per Annexure "I" has been produced along with the affidavit sworn by Harcharan Singh, Senior Personnel Officer (Gazetted) of the Western Railway, Bombay, on 4th July 1980. Column 7 of this statement shows that none of the 26 persons who are still retained, has yet to avail of any chance for being selected. In other words, all of them have exhausted all the chances available to them. Thus, the 26 Assistant Medical Officers who have been retained so far are similarly situated as the petitioners. That being the position as at present (which we cannot shut our eyes to) the services of the petitioners cannot be terminated except by recourse to the principle of "last come first go". Learned Counsel for the Railway Administration contends that at the point of time when the order of termination was served on the petitioners in 1977 their colleagues who have been retained had one more chance to pass at the examination. Assuming that it is so, having regard to the position which obtains at present inasmuch as admittedly there are 24 other Assistant Medical Officers who have not been selected and who have exhausted their chances it would not be desirable to operate the order of termination only against the petitioners selectively. In any view of the matter, therefore, the order of termination cannot be sustained. In our opinion, the services of the juniormost out of 26 have to be terminated first in point of time. Thereafter the services of the remaining can be terminated on the above principle. To the extent that the petitioners have been singled out for discriminatory treatment, the impugned

order cannot be sustained.

7. We, therefore, direct that the petitioners' services shall not be terminated except in order to replace them by Assistant Medical Officers who are selected by the Public Service Commission. When the petitioners are to be so replaced, the principle of "last come first go" must be applied so that from out of those who are similarly situated as the petitioners the services of the juniormost are terminated first and no arbitrariness creeps in. The petitions are allowed. Rule is made absolute to the aforesaid extent in each petition. There will be no order regarding costs in each petition.