

(2021) 01 JH CK 0129

In the Jharkhand High Court

Case No : Writ Petition (S) (DB) No. 3586 Of 2020

Priyesh Kumar Verma

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 12-01-2021

Acts Referred:

Administrative Tribunal Act, 1985 — Section 20, 20(2)(b), 21, 22(2)

Air Corporations Act, 1953 — Section 34

Constitution Of India, 1950 — Article 13(3)(a), 77, 77(1), 77(2), 166(1), 166(2)

Citation : (2021) 01 JH CK 0129

Hon'ble Judges : Rajesh Kumar, J;H.C. Mishra, J

Bench : Division Bench

Advocate : Kamal Nayan Chaubey, Ambuj Nayan Choubey, Bhanu Kumar, Bharat Kumar, Bharti Kumari, Rajiv Ranjan, Piyush Chitresh

Final Decision : Disposed Of

Judgement

Rajesh Kumar, J

1. The present writ petition has been filed by the writ petitioner for setting aside the order dated 21.10.2020 passed in O.A.No.050/00287/2020 (Shashi

Nandkeolyar Vs. The Union of India and Ors.), by the Central Administrative Tribunal, Patna Bench, Patna, whereby the said O.A. has been

admitted for hearing, rejecting the preliminary objection raised by the present petitioner.

2. Heard learned counsels for the parties and perused the record.

3. The dispute relates to the appointment to the post of Principal Chief Conservator of Forest (Head of Forest Force), Jharkhand. The selection

process was initiated for selection and appointment to the said post, by a committee headed by the Chief Secretary of the State of Jharkhand. The said

committee, vide its recommendation dated 17.02.2020, as contained in Annexure-4 to the writ application, recommended the W. P. (S) (DB) No. 3586

of 2020 names of three persons, i.e. one Lal Ratnakar Singh, Shashi Nandkeolyar, the respondent No. 5, and Priyesh Kumar Verma, the present writ

petitioner. On culmination of the selection process, finally the present writ petitioner had been appointed to the post of Principal Chief Conservator of

Forest (Head of Forest Force), Jharkhand, vide notification dated 24.06.2020, as contained in Annexure-9 (Srs.) to the writ application. This

appointment was objected by the present respondent No. 5 by filing representation to the Principal Secretary, Department of Forest, Environment &

Climate Change, Government of Jharkhand, Ranchi, on 30.06.2020. It appears that thereafter, the matter has been brought to the litigation by filing O.

A. No. 050/00287/2020 before the Central Administrative Tribunal, Patna Bench, Patna, (hereinafter referred to as the 'Tribunal'). As per the present

petitioner, this O.A. has been filed on 16.07.2020. Filing of this O.A. by the respondent No. 5 has been objected by the present petitioner raising

preliminary objections mainly on two grounds:

(i) Non-joinder of necessary parties.

(ii) Non-exhaustion of statutory alternative remedy as provided under Section 20 of the Administrative Tribunal Act, 1985. The Tribunal, after hearing

the parties, has decided the preliminary objection in favour of the present respondent No. 5, by holding that O.A. is maintainable, vide impugned order

dated 21.10.2020, which has been challenged by filing the present writ petition.

4. Learned senior counsel for the petitioner, though has also taken the point of non-joinder of necessary parties, in the present writ application, but in

course of arguments, very fairly confined his arguments to the point of non-exhaustion of statutory alternative remedy, operating as a bar under

Sections 20 and 21 of the Administrative Tribunal Act, 1985, (hereinafter referred to as the 'Act'). Learned senior counsel has also pointed out that

there are several mistakes of facts in the impugned order, due to which the impugned order is vitiated, being based on wrong assumptions. One such

factual mistake, which has vitiated the impugned order is that the Tribunal has proceeded on the wrong assumption that the petitioner before it

(respondent No.5 herein), was going to superannuate on 31.12.2020, and thus, he had no time to exhaust the alternative remedy, whereas actually the

respondent No.5 is going to superannuate in the month of April 2021, and he could wait for his representation being disposed of, or for a period of six

W. P. (S) (DB) No. 3586 of 2020 months, the statutory period under Section 20(2)(b) of the Act, after which his O.A. could be entertained by the

Tribunal. The basic objection is that against the order of appointment dated 24.06.2020, representation had been filed on 30.06.2020 by the respondent

No. 5. In this background, as per the mandate of Sections 20 and 21 of the Act, O.A. could have been filed only within the period of one year after

the lapse of six months from the date of representation or after disposal of the representation, whichever was earlier. The present O.A. has filed on

16.07.2020 and neither the representation dated 30.06.2020 had been disposed of by the competent authority, nor the period of six months had expired.

As such, the O.A. was premature and the Tribunal had no jurisdiction to entertain the impugned proceeding due to statutory bar as envisaged under

Sections 20 and 21 of the Act. Learned senior counsel has submitted that in any event the respondent No.5 had himself chosen to file the

representation before the competent authority, and now it is too late for him to argue that against the order of petitioner's appointment, he had no

alternative remedy than to move before the Tribunal, or that his representation could not be taken as the alternative remedy as envisaged under

Section 20(2) of the Act. Learned senior counsel has drawn our attention towards the Office Memorandum No.25/34/68-Est.(A) dated 20.12.1968, as

clarified by Office Memorandum No.11013/08/2013-Estt.(A)-III dated 06.06.2013, issued by the Govt. of India, which have been brought on record, in

order to show that representations are the means to avail the alternative remedy.

5. Learned senior counsel has further pointed out that the other factual mistake that has vitiated the impugned order is that the Tribunal has proceed

under yet again wrong assumption that the selection committee had recommended the names of only two persons, i.e., Lal Ratnakar Singh and Shashi

Nandkeolyar, the respondent No. 5, and not of the petitioner, which is against the record. Learned senior counsel, accordingly, submitted that the

impugned order was based on erroneous assumptions and untenable reasons, and thus, was suffering from manifest unreasonableness.

6. Learned Advocate General appearing on behalf of the respondent State has defended the order of Government by which the writ petitioner has

been appointed to the post and has adopted the arguments advanced by the learned senior counsel for the writ petitioner.

7. Learned ASGI, appearing for the Central Government has submitted that there is no illegality in the impugned order passed by the W. P. (S) (DB)

No. 3586 of 2020 Tribunal, as only the O.A. has been admitted for hearing and any decision in accordance with law, may be taken by the Tribunal

after hearing the parties. It is submitted that once the O.A. is filed, the Tribunal is duty bound to decide the matter as envisaged under Section 22(2) of

the Act.

8. Learned counsel for the respondent No. 5 has defended the impugned order of the Tribunal dated 21.10.2020 by advancing his argument that the

bar envisaged under Section 20(2) of the Act, is available only in the case, if the remedy is available under the relevant service Rules. Mere

representation is not covered under Section 20(2) of the Act, and the Office Memoranda, relied upon by learned senior counsel for the petitioner are

neither issued in the name of the President of India, nor published in the official Gazette of the Central Government, and as such, they may be treated

to be policy, but they cannot have the force of law. In support of his contention, learned counsel relied upon the decision of the Hon'ble Apex Court in

Gulf Goans Hotels Co. Ltd. & Anr. Vs. Union of India & Ors., reported in (2014) 10 SCC 673, wherein the law has been laid down as follows:-

14. The cases of the respective parties having been noticed the necessary discourse may now commence. In Bennett Coleman & Co. v. Union of

India, a "Newsprint Policy", notified by the Central Government for imposing conditions on import of newsprint came to be challenged on the ground of

violation of the fundamental rights. Beg, J., in a concurring judgment, observed: (SCC pp. 826-27, para 93) "93. What is termed 'policy' can become

justiciable when it exhibits itself in the shape of even purported 'law'. According to Article 13(3)(a) of the Constitution, 'law' includes 'any ordinance,

order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law'. So long as policy remains in the realm of

even rules framed for the guidance of executive and administrative authorities it may bind those authorities as declarations of what they are expected

to do under it. But, it cannot bind citizens unless the impugned policy is shown to have acquired the force of 'law'." (emphasis supplied) *** *** ***

19. Article 77 of the Constitution provides the form in which the Executive must make and authenticate its orders and decisions. Clause (1) of Article

77 provides that all executive action of the Government must be expressed to be taken in the W. P. (S) (DB) No. 3586 of 2020 name of the President.

The celebrated author H.M. Seervai in Constitutional Law of India, 4th Edn., Vol. 2, 1999 describes the consequences of government orders or

instructions not being in accordance with clauses (1) or (2) of Article 77 by opining that the same would deprive the orders of the immunity conferred

by the aforesaid clauses and they may be open to challenge on the ground that they have not been made by or under the authority of the President in

which case the burden would be on the Government to show that they were, in fact, so made. In the present case, the said burden has not been

discharged in any manner whatsoever. The decision in *Air India Cabin Crew Assn. v. Yeshaswinee Merchant*, taking a somewhat different view can,

perhaps, be explained by the fact that in the said case the impugned directions contained in the government letter (not expressed in the name of the

President) was in exercise of the statutory power under Section 34 of the Air Corporations Act, 1953. In the present case, the impugned guidelines

have not been issued under any existing statute.

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21. In the absence of due authentication and promulgation of the guidelines, the contents thereof cannot be treated as an order of the Government and

would really represent an expression of opinion. In law, the said guidelines and their binding effect would be no more than what was expressed by this

Court in *State of Uttaranchal v. Sunil Kumar Vaish* in the following paragraph of the report: (SCC p. 678, paras 23-24) ""23. It is settled law that all

executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of

the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the President

or the Governor of a State, as the case may be, are required to be authenticated in the manner specified in the rules made by the President or the

Governor, as the case may be [Articles 77(2) and 166(2)]. In other words, unless an order is expressed in the name of the President or the Governor

and is authenticated in the manner prescribed by the rules, the same cannot be

treated as an order on behalf of the Government."" (Emphasis supplied).

9. Learned counsel for the respondent No. 5 has further submitted that in any event, even if it is taken that the petitioner had to wait for a period of six

months after submitting his representation, the said period has also expired and even if this writ application is allowed, the necessary W. P. (S) (DB)

No. 3586 of 2020 consequence would only be that the respondent No.5 would be required to file the same very O.A. again before the Tribunal, which

is now the only remedy left to him. As such this shall only be a futile exercise. Learned counsel accordingly, submitted that there is no merit in this

writ application, and the same is only fit to be dismissed.

10. It is prudent judicial principle that the Court must decide only those issues, which are necessary for disposal of the dispute between the parties and

the issue must be borne out from the facts of the case. In the present case, the sequence of facts are that the order of appointment has been issued on

24.06.2020, the date of representation is 30.06.2020 and O.A. has been filed on 16.07.2020. The period of six months from the date of representation

has crossed in the month of December, 2020 itself. Thus, even if objection of the petitioner is considered in his favour without deciding the issue, the

bar to the jurisdiction of Central Administrative Tribunal has lapsed on 31.12.2020 and it appears that at present there is no legal bar in entertaining the

dispute between the parties by the Central Administrative Tribunal. Even if the issue is decided in favour of the writ petitioner, the consequences will

be that the respondent No. 5 has to file a fresh O.A. and this will only delay in resolving the dispute between the parties.

11. It is also prudent principle of law that the dispute between the parties must be resolved as early as possible and further no party can be made

remediless. We have been informed that next date of hearing of O.A. has been fixed on 12.01.2021 and date of retirement of respondent No. 5 is

April, 2021, which again, is in near future only.

12. From the discussions made hereinabove, it is evident that at present the Tribunal has the jurisdiction to decide the dispute between the parties and

in the interest of justice, the dispute should be resolved by the statutory Tribunal formed for this specific purpose. Accordingly, we find no reason to

interfere with the impugned order of Tribunal passed on 21.10.2020 in O. A. No. 050/00287/2020, as by the said order only the O.A. has been

admitted by the Tribunal, and presently there is no finding by the Tribunal on the merits of the case, either in favour or against the respective parties.

The Tribunal is yet to decide the dispute on merits, for which the Tribunal now admittedly has the jurisdiction, whether or not at the time of filing the

O.A. the representation filed by the respondent No.5 could have operated as a bar to the jurisdiction of the Tribunal under W. P. (S) (DB) No. 3586

of 2020 Sections 20 and 21 of the Act. In the facts of this case, we refrain to decide this issue, as the same shall only be a futile academic exercise.

13. But at the same time, before parting, we must observe that there are certain factual mistakes in the impugned order passed by the Tribunal, as

indicated above, which is also very fairly admitted by learned counsel for the respondent No. 5. Without going into those factual aspects in detail, we

direct the Tribunal to decide the issue between the parties with open mind and after carefully considering the factual matrix of the case. As the

respondent No. 5 is going to superannuate in the month of April, 2021, we direct that the Tribunal shall decide the O.A. as expeditiously as possible.

14. This writ petition accordingly, stands disposed of with the observations and directions as above.