
(2007) 03 CAL CK 0055
In the Calcutta High Court
Case No : W.P.C.T. No. 108 of 2006

Prof. Subhash Ch. Sehgal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-03-2007

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19

Citation : (2007) 3 CALLT 436

Hon'ble Judges : Dipankar Datta, J;Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : B.K. Das, for the Appellant;M.M. Mallick, for Respondent Nos. 1, 2, 4 and 5 and V.K. Rao, for the Respondent

Final Decision : Dismissed

Judgement

Dipankar Datta, J.—The Central Administrative Tribunal, Calcutta Bench was approached by the petitioner by filing an application u/s 19 of the Administrative Tribunals Act, 1985 which was registered as O.A. No. 6/A&N/2006. The petitioner questioned the validity and/or propriety of the selection process culminating in the decision taken by the authorities to fill up the post of Additional Director General, Indian Council for Medical Research (hereafter the said post) by appointing the respondent No. 5, Dr. S.K. Bhattacharya. He also challenged the appointment of the respondent No. 5 on the ground of procedural irregularity.

2. Having regard learned Counsel for the respective parties and upon consideration of the materials presented before it, the learned Tribunal reached a finding that the selection procedure culminating in appointment of the respondent No. 5 in the said post did not suffer from any infirmity, and accordingly, the selection procedure was not interfered with. By its Judgment dated 21st June, 2006 learned Tribunal dismissed the application.

Feeling aggrieved thereby, the petitioner has preferred the present writ application before this Court.

3. For the purpose of proper adjudication of the issues involved in this writ application, certain facts are required to be noted.

4. The said post fell vacant on 31.10.2004 due to superannuation of Dr. Padam Singh, the then incumbent. The said post was to be filled up in terms of the ICMR Research Cadre Rules, 1965 (hereafter the said Rules). At the time the said post fell vacant, the relevant recruitment rule provided as follows:

Method of Recruitment to Cadre:

Selection-I Recruitment by Promotion

5A-Additional Director General; the vacancy in the grade of Additional Director General shall be filled by selection on the basis of merit with due regard to seniority from amongst selection grade officers who have rendered not less than 5 years service in that grade.

However, by office order dated 1st September, 2005, the decision of the Governing Body of the Indian Council of Medical Research (hereafter the said Council) approving amendment in the said Rules, in so far as the same related to the said post, was notified. The amended rule provides as follows:

Method of Recruitment to Cadre:

Selection-I Recruitment by Promotion

5A-Additional Director General: The vacancy to the grade of Additional Director General shall be filled by selection on the basis of merit with due regard to seniority from amongst Directors Sr. DDGs. who have rendered not less than 5 years service in the grade.

6. The petitioner, along with ten other eligible candidates including the respondent No. 5, was considered by the Selection Committee in a meeting held on 2nd September, 2005. The Selection Committee comprised of the Secretary (Health), Ministry of Health and Family Welfare, Government of India, the Director General of Health Services, New Delhi, the Secretary, Department of Bio-Technology, a former Vice-Chancellor of Jawahar Lal Nehru University, New Delhi and the Director General of the said Council, Sri N.K. Ganguly.

7. In the said selection meeting it was, inter alia, resolved as under:

After considering the assessment of ACRs. Bio-data including number and quality of publication and other relevant factors like recognitions received for qualitative work in the sector and so on of the eligible officers, and also with due regard to the seniority, the Committee recommends Dr. S.K. Bhattacharya, Director, NICED, Kolkata for the post of Additional Director General in the scale of pay of Rs. 22400-24500 in the Indian Council of Medical Research (ICMR).

8. Pursuant to the aforesaid selection, by an order dated 22nd February, 2006, the respondent No. 5 was offered appointment in the said post whereupon he duly assumed charge thereof on the same date. However, sometime thereafter,

the petitioner on attaining the age of superannuation retired from the post of Director, Regional Medical Research Centre (RMRC), Port Blair on 31st July, 2006.

9. In this writ application, this Court has been called upon to determine as to whether the selection procedure, in view of the points raised by the petitioner, suffered from infirmities and further as to whether the learned Tribunal was justified in dismissing the writ application.

10. Mr. Das, learned Counsel for the petitioner has raised the following points in support of the application:

(i) The petitioner had been assessed as "Very good" during the year 2001-2002 and as such an entry in this behalf was made in his Annual Confidential Report (hereafter ACR). However, for the subsequent years, i.e. 2002-2003 and 2003-2004 he was assessed as good and the same were reflected in the ACRs. It is his contention that this downgrading from "very good" to "good" was not communicated to him and therefore in the process of selection for appointment to the said post, he suffered prejudice. It is his contention that unless the downgrading was communicated, the same could not have been acted upon. In this connection, learned Counsel has relied on a decision of the Apex Court reported in *U.P. Jal Nigam and others Vs. Prabhat Chandra Jain and others*,

(ii) The constitution of the Selection Committee was defective since Dr. N.K. Ganguly, the Director of the said Council being the respondent No. 3 was included as a member thereof despite objections raised by the petitioner to the effect that he was biased against him. Elaborating on this point, learned Counsel has invited the attention of this Court to an order passed by the Central Administrative Tribunal, Principal Bench, New Delhi dated 20th July, 2005 on O.A. No. 749 of 2005. By the said order the learned Tribunal, while considering the allegation of the petitioner that respondent No. 3 ought not to be included in the Selection Committee because he was biased against the petitioner, had disposed of the application by directing the respondents to take a decision on the representation of the petitioner at the earliest. However, the representation of the petitioner was not considered prior to the selection meeting, which was held on 2nd September, 2005, and thereafter an order dated 12th September, 2005 was passed purporting to be disposal of the representation in terms of the order of the learned Tribunal dated 20th July, 2005. In the said order, the specific objection raised by the petitioner regarding inclusion of the respondent No. 3 in the Selection Committee was not dealt with at all and as such the petitioner had been left with no other alternative but to have his claim for appointment to the said post considered by a biased selector. It is thus contended that there has been gross violation of the principles of natural justice and in this connection a decision of the Apex Court, reported in *Arjun Chaubey Vs. Union of India (UOI) and Others*, has been relied on.

(iii) The petitioner has been serving in a remote area for a substantially long period of time and for such service he was entitled to extra weightage in terms of

Appendix 9 of the FR & SR, which was not given.

(iv) In terms of the instructions of the Government prevailing at the time the selection was made, it was the obligation of the respondent authorities to obtain the approval of the Appointments Committee of the Cabinet (hereafter ACC) prior to issuing offer of appointment to the respondent No. 5. The approval of the ACC not having been obtained prior to offering appointment to the respondent No. 5, it is contended that the process of appointment stood vitiated and that is a good ground for interfering with the appointment of the respondent No. 5. Having regard to the fact that this requirement of obtaining approval of the ACC had undergone an amendment, learned Counsel has contended that the instructions which were prevailing on the date the selection was finalized ought to have been followed in the absence of the amendment being made effective retrospectively. In this connection, he relied on another decision of the Apex Court reported in K. Kuppusamy and Another Vs. State of T.N. and Others, .

(v) The petitioner prayed for review of the proceeding of the Selection Committee by his representation dated 10th February, 2006. This request for review was declined by the competent authority by its communication dated 3rd March, 2006. This order of the authority was assailed on the ground that the same was an unreasoned and cryptic order.

11. In course of advancing argument learned Counsel for the petitioner has also referred to Part VI and Part IV of Swamy's Compilation on Seniority and Promotion and has invited the attention of this Court to clauses 18.1, 18.4.1, 18.4.3, 6.2.1 and 12.1 in support of his submission. Part VI deals with review DPCs and Part IV deals with procedure to be observed in respect of objective assessment of the suitability of the candidates. It is the contention of learned Counsel that these provisions have been observed in breach.

12. Based on the aforesaid submissions, he has prayed for setting aside of the selection and consequent appointment of the respondent No. 5 and for computation of retiral benefits of the petitioner taking into consideration the entitlements of the said post.

13. Mr. M.M. Mallick, learned Counsel for the respondents 1, 2, 4 and 5 has opposed this application by submitting that there is absolutely no merit in the various contentions raised by the petitioner. He contends that the selection process is free from any infirmity and this Court would be loath to interfere therewith.

14. Mr. V.K. Rao, learned Counsel appearing for the respondent No. 3 has also opposed this application by submitting that the process of decision making leading to selection of the respondent No. 5 and the subsequent steps taken for offering appointment to the respondent No. 5 do not suffer from any illegality. He has placed before this Court the minutes of the Selection Committee held on 2nd September, 2005 whereby the respondent No. 5 came to be selected. He has also placed before this Court the summary rating of the candidates who were

considered for selection to the said post from their respective ACRs for the period between 1998-99 and 2003-2004. He has submitted that taking into consideration all the relevant factors the members of the Selection Committee, who are highly qualified and experts in their respective fields, have made an objective assessment of the merits and demerits of all the candidates and such assessment of experts may kindly not be interfered with by the Court. He has placed reliance on the decision of the Apex Court reported in Union of India (UOI) and Another Vs. Major Bahadur Singh, to contend that the decision in U.P. Jal Nigam (supra) has been held to have no universal application and that the Judgment itself showed that it was intended to be made only for the employees of the U.P. Jal Nigam. He further submits that the learned Tribunal upon meticulous consideration of the facts presented before it arrived at the finding that the contentions raised in the application before it were untenable and accordingly dismissed it. He has accordingly prayed for dismissal of the writ application too.

15. This Court before proceeding to examine the issues raised on merits would remind itself of the law laid down by the Constitution Bench of the Apex Court in the decision reported in The University of Mysore and Another Vs. C.D. Govinda Rao and Another, to the effect that in matters relating to selection made by expert bodies, the Courts should be slow to interfere with the opinion expressed by the experts, and it would normally be wise and safe for the Courts to show due regard to such opinion, unless the selection is vitiated by mala fides or is made in contravention of a binding rule or ordinance. Although the said decision was rendered in respect of an academic matter, the principles are applicable here.

16. Now, keeping in mind the above principle, it would be the endeavour of this Court to examine the contentions raised on behalf of the petitioner and to ascertain as to whether the writ application merits interference or not.

17. Regarding the contention of the petitioner relying on U.P. Jal Nigam (supra) that communication of downgrading of rating from "very good" to "good" for the last two years was obligatory, learned Counsel for the respondent No. 3 is right in his submission that in view of the decision in Major Bahadur Singh (supra), the decision in U.P. Jal Nigam (supra) has no universal application and is meant for the employees of the U.P. Jal Nigam only. The entry "good" in the ACR is not an adverse entry and as such would not require communication. However, when the entry "good" in a particular year of the ACR of an employee is preceded by an entry "very good" and both these entries are taken into account when the employee concerned is considered for selection to a higher post, that might involve an element of adverse effect in it, for his competitors, who may have been assessed as "very good" for the relevant period, would steal a march over him. But in the absence of a binding rule governing the terms and conditions of service of the petitioner which obliges the respondents to communicate the entry regarding rating for the succeeding year which is below the rating of the preceding year to the concerned employee as in the present case, the petitioner

cannot be said to have an enforceable legal right to claim that the subsequent rating as "good" should have been communicated and that in absence thereof, it cannot be acted upon. The contention thus stands rejected.

18. There is another reason for which this Court is unable to accept the contention. The petitioner had been awarded "good" for the years 2002-2003 and 2003-2004 preceded by "very good" in 2001-2002. In terms of the extant guidelines of the Govt. relating to promotion to the revised pay scale (grade) of Rs. 12,000-16,500 and above, the bench mark of promotion by selection shall be "very good". The petitioner, it appears, for the years 1999-2000 and 2000-2001 was rated "good". Even if he had been rated as "very good" for the years 2002-2003 and 2003-2004 when he was rated "good", the summary rating from the ACRs of the respective candidates as placed before this Court reveals that there were at least two candidates who were rated as "outstanding" and Respondent No. 5 was rated "outstanding" twice and excellent once for the relevant years and all along had a better track record compared to the petitioner insofar as assessment of their respective performances is concerned. The rating of the petitioner as "very good" in the years 2002-2003 and 2003-2004 would not have made much of a difference. This Court upon perusal of the materials presented Committee in the process of selecting the respondent No. 5. Accordingly, the first contention of the petitioner is rejected.

19. The second contention of one of the members of the Selection Committee i.e. the respondent No. 3, being biased against the petitioner also does not appear to be a valid ground for invalidating the selection. As would be evident from the quorum of the Selection Committee referred to supra, the same consisted of highly qualified persons having expertise in their own field. A collective decision was required to be taken and it appears from the records placed before this Court that it was indeed the collective decision of the members of the Selection Committee to select the respondent No. 5 as the most suitable candidate for the said post having regard to the various factors enumerated in the resolution. Although having regard to the apprehension expressed by the petitioner that he would not receive justice from the respondent No. 3 it would have been better if the respondent No. 3 had not been included in the Selection Committee, but being the Director of the said Council his presence in the selection meeting was absolutely necessary for briefing the other members of the Committee regarding the duties attached to the said post [as appears from Para 4 (xxiv) of the counter affidavit of the respondents 1, 2 and 3 to the application filed by the petitioner before the learned Tribunal]. In fact, the learned Tribunal upon perusal of records placed before it recorded that in view of the objection raised by the petitioner, respondent No. 3 had offered to step down from the Committee but the concerned Minister having found his participation in the process of selection to be absolutely necessary, had asked him to continue as a member of the Committee. In view of the application of the doctrine of necessity, the inclusion of the respondent No. 3 in the Selection Committee cannot be faulted. In this connection, the decision of the Apex Court on the concept of the

doctrine of necessity as propounded in the decision reported in Election Commission of India and another Vs. Dr. Subramanian Swamy and another, may be referred to.

We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situation, it would impede the course of justice itself and the defaulting party would benefit therefrom. Takes the case of a certain taxing statute which taxes certain perquisites allowed to judges. If the validity of such a provision is challenged who but the members of the judiciary must decide it. If all the judges are disqualified on the plea that striking down of such a legislation would benefit them, a statement situation any develop. In such cases the doctrine of necessity comes into play. If the choice is between allowing a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making.

20. The said doctrine has been applied in another recent case, as would appear from the decision of the Apex Court reported in State of U.P. Vs. Sheo Shanker Lal Srivastava and Others, It has been held in that decision that "in a case where doctrine of necessity is applicable compliance with the principles of natural justice would be excluded."

21. This Court is of the considered view having regard to the aforesaid fact that inclusion of respondent No. 3 in the Selection Committee was absolutely essential and was necessitated in the better interest of the said Council, no exception can be taken in respect thereof. For the same reason, it cannot be held that the selection procedure is tainted with malice.

22. This Court, however, would hasten to add that having regard to the order passed by the Central Administrative Tribunal. Principal Bench, New Delhi dated 20th July, 2005, it would have been desirable if communication of the reasons which compelled the respondents to include the respondent No. 3 in the Selection Committee had been made to the petitioner prior to the selection meeting. This Court cannot but express its dissatisfaction in this respect. But, only on this ground it would not be fair on the part of this Court to upset the selection, particularly, when this Court is satisfied on consideration of the materials on record that there is no lack of transparency in the process of selection and the petitioner has not been able to demonstrate contravention of any binding rule.

23. The contention regarding non-consideration of the petitioner's service in remote areas is also not tenable. From Appendix 9 of the FR & SR which has

been referred to by the learned Counsel for the petitioner, this Court is unable to find any provision which requires granting of weightage while proceeding to select a suitable incumbent in very high posts like the present one.

24. The next contention regarding failure to obtain approval of the ACC before offering appointment to the petitioner has also failed to impress this Court. In this connection, reference may be made to the Office Memorandum dated 30th November, 2005 issued by the Secretary, ACC. By the said Office Memorandum, certain directions of the ACC were conveyed and one of such directions was that the panel prepared by the Search-cum-Selection Committee would have to be implemented by the Ministry/Department in toto. It is the case of the respondents that in the present case, proceedings of the Selection Committee was approved by the Minister concerned and thereafter appointment was offered and, as such, there is no illegality in the procedure adopted. Even if there be any irregularity or illegality in the mode of appointment of the respondent No. 5, it does not follow that the petitioner would be entitled to the said post. In any event, this Court is of the view that there being no infirmity in the process of selection, the petitioner as an unsuccessful candidate does neither have any legal right to question the mode of appointment of the successful candidate nor any defect, if there be any, not affecting the merits of the selection itself and which is a curable one, would render the selection vitiated.

25. The final contention raised by the petitioner that his request for review of the proceeding of the Selection Committee was turned down without furnishing any reason, in the view of this Court, cannot make the selection vulnerable. The authorities were of the considered opinion that the selection procedure was proper and valid and accordingly regretted the prayer of the petitioner. This Court having found the selection not to be vitiated, the very fact that the order rejecting the petitioner's request for review is not supported with reasons cannot justify interference with the selection.

26. For the reasons aforesaid, all the contentions raised on behalf of the petitioner fail. The Judgment of the learned Tribunal holding the selection and appointment of the respondent No. 5 as proper is affirmed. The writ application stands dismissed, but without any order as to costs.

27. Before parting, this Court deems it necessary to dwell on one aspect. The learned Tribunal while concluding its Judgment admonished the petitioner for having questioned the attitude of the respondent No. 3 towards him and for calling him biased. This Court is of the view that the petitioner, by his pleadings, gave vent to his feeling of anguish being frustrated by the inaction of the respondents to dispose of his representation (objecting to inclusion of the respondent No. 3 in the Selection Committee) prior to the meeting of the Selection Committee, which admittedly was not considered at all in the proper perspective. There may be some justification for the petitioner to react in the manner he did, but the finding of the Tribunal that this detrimentally affected the health of the Institution appears to be a finding based on no evidence at all. The

harsh criticism of the petitioner's conduct made by the learned Tribunal is not fully justified. This Court, in the circumstances, would treat the disparaging remarks of the learned Tribunal in the penultimate paragraph of the Judgment directed towards the petitioner as expunged.

Urgent xerox certified copy of this order, if applied, be furnished to the applicant at an early date.

Ashim Kumar Banerjee, J.

28. I agree.