

(1979) 11 DEL CK 0015

In the Delhi High Court

Case No : Letter Patent Appeal No. 60 of 1979

S.K. Bhattacharya and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 12-11-1979

Acts Referred:

Citation : (1979) ILR Delhi 525(2) : (1980) RLR 234

Hon'ble Judges : V.S. Deshpande, C.J.; Harish Chandra, J

Bench : Division Bench

Advocate : B.N. Kirpal, Ravi Kher, K.N. Kataria, Madan Bhatia and B.K. Pal, for the Appellant;

Judgement

V.S. Deshpande, C.J.

(1) This is an appeal against the decision of H. L. Anand, J., holding that the petitioner respondents (petitioners in the writ petition) have been duly absorbed in the Post and Telegraph Department and that the Union of India cannot repatriate them to the Central Public Works Department without their consent. The question again, Therefore, is whether the petitioner-respondents had the right to the relief so obtained by them. Salmond has defined a right as "an interest recognised and protected by a rule of right". His editor, J. L. Parker, explains what is meant by "A rule of right" as follows :

"Here it means no more than a principle judicially enforced, so far as it is a legal rule." (Jurisprudence, Ninth Edition, page 287).

This case is an apt illustration of right being based on a rule of right in the above sense. The Facts :

(2) The petitioner respondents, that is, officers and subordinate employees belonged to the Cpwd which was doing the Civil Engineering work of the P&T Department also. On 4-5-1963 the Pat Department decided to set up a Civil Engineering Wing of itself with the concurrence of the Ministry of Works &

Housing. As a necessary consequence, on 28-6-1963 the Government of India, Ministry of Works & Housing, issued a memorandum stating that all the posts and incumbents of those posts in the Cpwd doing the Civil Engineering work for the P&T Department "will cease to be borne on the establishment of the Cpwd with effect from 1st July, 1963. these posts and units will form part of the P&T Department from that date..... Officers and staff including work charged staff belonging to the Cpwd cadres.....shall, until further orders, work under the P&T Department after the date of transfer on the same scale of pay and allowance as those applicable to them at present. They will not be entitled to any deputation (duty) allowance". The petitioner-respondents thus stood transferred to the P&T Department, Respondent No. 6, Shri S. R. Bantwal, was recruited to Central Engineering Service (Class 1) through a competitive examination held by the Union Public Service Commission in December, 1956 and thus joined the Cpwd in May, 1958. From June, 1961 he was working in the P&T Zone of the Cpwd as an Executive Engineer. Among the petitioner-respondents, he is the only person senior to the appellants. Other petitioner-respondents are junior to the appellants and are not rivals to the appellants for promotion.

(3) Since these posts in the P&T Zone of the Cpwd permanently stood transferred to the P&T Department, the respondents who were the incumbents of these posts were no longer needed in the Cpwd because there were no posts in the Cpwd which could be held by the petitioner-respondents. Either the petitioner-respondents had, Therefore, to be absorbed in the P&T Department in the same way as the posts had been permanently transferred or they would simply go out of employment. They did not cease to be in employment because until further orders they were also transferred to the P&T Department along with the posts. They were not given deputation allowance for the simple reason that their return to the Cpwd was not contemplated". They could not have gone back to the Cpwd at the only posts which they held had permanently gone to the P&T Department. The only reason why they also along with the posts were not permanently transferred to the P&T Department was that it was that department which had to take the decision to permanently absorb them.

(4) It was inconceivable that the incumbents of the posts transferred to the P&T Department should be suddenly thrown out of employment and the only course of action legally and morally left to Government was to absorb the incumbents along with the posts. Hence a decision was taken by the then Secretary of Ministry of Communications, Mr. L. C. Jain, the then Director General of P&T, and the then Minister for Communications, Mr. Satyanarain Sinha, in 1968 that the incumbents of the posts permanently transferred to the P&T Department should also be absorbed permanently in the P&T Department. The file containing this decision was not produced by the Government under the misconception that it was privileged, but the reference to the said decision of 1968 is contained at several places in the files which were actually produced before the learned single Judge. It is only because of that decision that the formal memorandum of the Government of India, Department of Communications, P&T Board, dated 20th

August, 1969 at page 93 of the paper-book was issued. It refers to the decision of 1968 in the following words :

"Some of the Cpwd Officers who are on deputation to this Department have requested for their permanent absorption in this" Department. The matter has been considered carefully and it is proposed to absorb some who are suitable for absorption in this Department. A provision to this effect has been made in the draft recruitment rules which are being framed for various gazetted cadres of the Civil Wing. The question of final absorption can be considered after the recruitment rules are finalised.....after obtaining the concurrence of the CPWD."

(5) The options of the Officers of the Cpwd occupying the posts transferred to the P&T Department for permanent absorption in the P&T Department were called for. The unconditional options for being absorbed in the P&T Department were exercised by the petitioner respondents. The concurrence of the Cpwd was obtained. A Selection Committee consisting of the senior Officers of Pat Department considered the suitability of the petitioner respondents and approved them for permanent absorption in the P & T Department. The proposal to permanently absorb them was put up to the Secretary and the Minister and both of them approved it on 10-12-1971. The effect was given to this approval on 14-12-1971. when Mr. I. K. Gupta, Member (TD) of the P & T Board ordered that three Executive Engineers and five Assistant Engineers from Cpwd may now be absorbed in the Civil Wing of the P & T Department. The decision to absorb the petitioner respondents was not formally promulgated by a Government order, but was published in two different ways. Firstly, a representation by the appellants who were recruited in November, 1964 directly through the Upsc examination to the Civil Wing of the P & T Department had represented to the Government against the decision taken on 10-12-1971 to absorb the respondents permanently in the P & T Department. This representation was rejected by a formal letter from the Government of India, Ministry of Communications, P&T Board, dated 8th March, 1972 addressed to the Honorary Secretary of the P & T Civil Wing Direct Recruits Engineers Association, in the following words :

"In taking a decision to absorb some officers of the Cpwd in the Pat Civil Wing, the prospects of promotion to direct recruit were kept in view. In view of the likely extension on the Civil Wing side, the absorption of a few officers of the Central Public Witness D. is hardly going to hamper the promotional prospects of the direct recruits in the Pat Civil Wing."

Secondly, by a formal letter, dated 17th April, 1972 the President was pleased to appoint Mr. S. R. Bantwal to officiate as Superintending Engineer, P & T Civil Circle No. 1, on purely ad hoc and temporary basis and until further orders. This promotion was made without reference to the Cpwd and on the basis of seniority in the Pat Department only. This formal order could be passed only on the basis of the decision of 10-12-1971.

(6) The appellants recruited directly to the Civil Wing of the P A T Board from

November, 1964 onwards continued to press the Government that the respondents regarding the permanent absorption of whom a decision had already been taken should still be repatriated by a reversal of the said decision. When the request for reversal was being considered, the Government consistently justified the decision of 10-1-71 up to July, 1972 on all the relevant grounds, namely, (1) the direct recruits were junior to the transferees Shri Bentwal recruited in 1956 was 7 or 8 years senior to the appellants recruited in November, 1964; (2) the appellants had put in only about two years service as Executive Engineers and could not be appointed as Superintending Engineers until five more years of service; (3) a nucleus of experienced staff already provided by the transferees could not be sent back without detriment to the service; (4) the deputation is normally for about four years only and cannot last beyond that period and the respondents who were kept in the P & T Department beyond four years had to be absorbed in the P & T Department, and (5) the deputation allowance was denied to the respondents only because right from the beginning the intention was that they had gone to the P & T Department and were not to come back to the Cpwd as there were no posts thereafter in the Cpwd to which the respondents could return".

(7) Surprisingly enough on 19th July, 1972 the Government of India letter addressed to the respondents suddenly states that after careful consideration it has been decided that "all such officers will be repatriated back to the Central Public Works Department in due course and no C.P.W.D. officer will be permanently absorbed in the P&T Department". This letter is signed by the Director Staff and is contrary to the decision of the Government of India taken at the level of the Minister on 10-12-1971 and also in 1968. It was against this letter that the writ petition was filed by the respondents firstly praying that they be absorbed in the P & T Department permanently and thereafter claiming that they had been already absorbed on 10-12-1971 and in 1968 and, Therefore, the Government may be restrained from repatriating them to the Cpwd where there are no posts which they can occupy.

(8) The learned single Judge was rightly impressed by the overwhelming in weight of facts in favor of the petitioner respondents. The only worthwhile defense made by the appellants in resisting the petition was that the decision of the Government taken on 10-12-1971 was not formally put in the form of an order authenticated by an authorised officer according to the Rules of Business made under Article 77 of the Constitution. The learned single Judge held that such a formal order was neither a constitutional nor a statutory requirement. From the contract angle the learned Judge held that the proposal to absorb the respondents was an offer made by the Government and the options exercised by the respondents constituted the acceptance of such a proposal bringing to existence a concluded contract between the parties. The writ petition was Therefore allowed. Hence this appeal.

(9) Again before us the only worthwhile argument addressed on behalf of the

appellants was that a mere decision of the Government taken on the file to absorb the respondents did not create a rights in favor of the respondents enforceable through a writ petition under Article 226 of the Constitution. The decision could, Therefore, be reversed by the Government and the petitioner respondents had no legal right to contest the said decision. Reliance was placed on the Supreme Court decisions in Kedar Nath Bahl Vs. The State of Punjab and Others, , Bachhittar Singh Vs. The State of Punjab, , and the State of Punjab v. Sodhi Sukhdev Singh, Air 7961 Sc 493.

(10) The Questions ". Two questions, Therefore, arise for consideration, namely,

(1) Whether the permanent absorption of the petitioner respondents in the P & T Department became complete by the decision of 10-12-1971 as published by the Government of India letter addressed to the appellants on 8th March, 1972 and by the Presidential notification appointing Mr. Bantwal as Superintending Engineer on 17-4-1972 on the basis that he permanently belonged to the P & T Department and was no longer on deputation from the CPWD. (2) Whether the decision of 10-12-1971 so published could be reversed later by the Government.

(11) Question 1 : In applying the decision of the Supreme Court like any other law, the particular facts of the case have to be borne in mind. This is the only way to distinguish between the various decisions and apply only the relevant ones. The facts before us are that from 1963 onwards the respondent petitioners have been working in the P & T Department. The normal rule is that they stand permanently transferred to the P & T Department because the very posts which they held in the Cpwd have been permanently transferred to the P & T Department. They cannot go back to the Cpwd as there are no posts for them in the CPWD. They could not continue on deputation for more than four years as that is the maximum period for which any deputation can last. They were deliberately not paid deputation allowance from the very beginning because the Government never intended that they should go back to the Cpwd as the Government knew that there were no posts for them in the CPWD. Their permanent absorption in the P & T Department did not injure the interests of any one because the direct recruits to the Civil Wing of the Pat Department came only from November, 1964 onwards. Only Mr. Bantwal, one of the respondents, is senior to the appellants. He is senior by seven or eight years to the seniormost appellant. He has been appointed as Superintending Engineer in the P & T Department by a formal Presidential notification of 17th April, 1972. This is conclusive evidence to show that the decision of 10-12-1971 was formally published in accordance with the Rules of Business under Article 77 of the Constitution. The fact that his appointment was ad hoc and temporary has no significance at all. This fact is relevant only to show that Mr. Bantwal could not claim that he has been permanently appointed and that he cannot be reverted. But that aspect is totally irrelevant. The only thing relevant is that the President has been pleased to appoint Mr. Bantwal as Superintending Engineer in the Pat Department only because Mr. Bantwal had been permanently absorbed by the

decision of 10-12-1971 in the P&T Department. Had he not been so absorbed he could not have been promoted in the P & T Department. The rule is that a deputationist holds a lien in his parent department and there must first be his promotion in the parent department by a pro-forma order before he can be promoted in the department to which he is sent on deputation. This did not happen because there was no post held by Mr. Bantwal in the Cpwd after 10-12-1971. His lien stood terminated when he was absorbed in the Pat Department. Hence the P & T Department could unilaterally promote him without referring to the CPWD.

(12) The Substance v. The form : When equity and justice heavily point towards the particular conclusion overwhelmingly, what is the duty of the courts ? As Holmes said courts create law "interstitially". But this is precisely how the law develops by judicial decisions. Reverting to Salmonds definition of a legal right, the principle which would be enforced by the court will be a rule of right. Thus law is made to coincide with equity and justice. Fortunately for the petitioner respondents on precisely the same facts, the Supreme Court in *The state of U.P. and Others Vs. Ram Naresh Lal*, , has given a decision which completely covers the question No. 1 in the present case. Ram Naresh Lal and others were on deputation to the Development Commissioner's Department. The only formal order was the order of 21st May, 1958 by which the Government was pleased to transfer these persons to the Development Department. The second paragraph of the order is that options should be called from these persons for being permanently transferred to the Planning Department or the Development Commissioner's Department. The analogy of the present case to the case before the Supreme Court is complete. The transfer by the formal order was not a permanent transfer. It was a transfer on deputation. But by the same formal order options were given to the transferees to become permanently transferred. The letter at page 93 of the paper-book is also formal order of the Government of India by which the decision in principle to absorb the petitioner respondents is formally announced subject to three conditions, namely, (1) selection by the senior Officers, (2) consent of the Cpwd, and (3) finalisation of the draft rules in which provision for such absorption was already made.

(13) In *State of U.P. v. Ram Naresh Lal* (supra), the Deputy Commissioner on 7-7-1978 sent the prescribed forms of exercising the options. In this form it was made el-clear that after the option is exercised the persons so absorbed would be reappointed by the Deputy Commissioner to that Department. No such formal order of reappointment was ever issued. In paragraph Ii of the Air report the Supreme Court held that no such formal order was necessary. The case before us is stronger in favor of the respondents because the formal order of 20th August, 1969 did not contain any condition that a formal order of absorption will be issued. Hence this case is completely covered by the decision of the Supreme Court that even without such a formal order the permanent absorption was valid.

(14) The only condition which was not fulfilled was that the draft rules were not

finalised before the decision of 10-12-1971. But it was entirely competent for the Government to absorb the respondents permanently without waiting for the finalisation of the draft rules. If that condition had been insisted upon the respondents could not have pressed the Government that they should be permanently absorbed before the rules were finalised. But the Government could waive that condition and permanently absorb the respondents without waiting for the finalisation of the draft rules as they actually did on 10-12-1971.

(15) Similarly, in *N. Lakshmana Rao and Others Vs. State of Karnataka and Others*, , in para 22 the Supreme Court observed that the exercise of the option was to conclude a contract between the teachers and the Government. In view of these decisions, by which we are bound, it is not possible to appreciate the contention of the appellants that the issue of a formal order was nevertheless necessary before the absorption could be deemed to be legally complete. The decisions cited by the appellants are distinguishable.

(16) Need for Publication or Communication of Law, Executive Action or Contract : Enforceable rights can be based either on law or contract. For, ultimately law or contract has to be the source of all exercise of power. Each of them requires to be published before it can be operative.

(17) Just as a contract does not come into force unless the acceptance of the offer is communicated by the offeree to the offerer section 3 of the Contract Act and *Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co. and Others*, a Government decision affecting civil rights of persons does not come into force unless it is published or communicated. Publication may be general, such as by the framing of rules or the issue of administrative instructions intended to be a general communication to the persons affected thereby. Alternatively, particular communications may be issued to the affected persons by orders or letters addressed to them. Article 74(2) of the Constitution which protects the secrecy of the advice given by the Council of Ministers to the President is based on the principle that mere advice or deliberations of the Government are for the purpose of the information of the Government alone to enable the Government to formulate policies and to take action. nothings on the file are, for instance, the record of the consideration by the Government and its officers. Linless the Government decides to take action after such consideration the decisions taken on the file will not be published. Before publication, such decisions are open to reconsideration and reversal. This principle is a part of the wider principle based according to the Supreme Court (Bose J.) on "the fundamental principles of natural justice" that any law or exercise of power by the Government cannot come into force unless it is first published [*Harla Vs. The State of Rajasthan*, and is also established by the decisions of the Supreme Court in *Kedar Nath Bahl*, *Bachhittar Singh* and *Sodhi Sukhdev Singh*, referred to above, as the ones relied upon by the appellants. The same principle governs when it is held that probation or temporary status does not end unless a positive order of confirmation or declaration of quasi permanency is made and published.

(18) Similarly, departmental instructions which are meant only for the guidance of the officials concerned are not meant to be a publication or communication to private persons. If the concerned officials fail to act according to the departmental instructions he may be liable for disciplinary action by the Government. But as a question of fact, in each case it is for the court to decide whether particular instructions are merely for the guidance of the officials or they are also a communication to the interested persons. If they are meant only for the officials then a private person cannot base on them a right to enforce these instructions in his favor and seek relief from the court under Article 226 of the Constitution. This was so held in *G.J. Fernandez Vs. State of Mysore and Others*, *Shri Raghunandan Panda Vs. State of Orissa and Others*, and *State of Tamil Nadu and Others, etc. Vs. S.K. Krishnamurthi, etc. etc.*, . On the other hand, if such instructions were for the benefit of private persons and were intended to be communicated to them a writ petition could be filed for their enforcement as was held in *Union of India (UOI) Vs. K.P. Joseph and Others*, . It is in the light of this law that we have to consider whether the decision taken by the Government in 1968 and finalised in 1971 for the absorption of the respondents into the Civil Wing of the P&T Department was meant to be published either generally or to be communicated to the persons concerned namely the respondents and was so published and/or communicated.

(19) It is on the anvil of this distinction that the three Supreme Court decisions relied upon by the appellants, namely *Kedar Nath Bahl*, *Bachhittar Singh* and *Sodhi Sukhdev Singh*, fall into the class of those decisions which were never intended to be published or communicated and were not so done by the Government. It was for that reason that no right could be based on those decisions by the petitioners concerned. On the contrary, the intention of the Government to publish and implement the decision taken on 10-12-1971 to absorb the respondents permanently into the P&T Department and its action on it is clear. It is only the respondents who were to be primarily affected by the said decision. The decision was published and communicated to the respondents when the Presidential notification, dated 17th April, 1972 appointing Mr. Bantwal as Superintending Engineer was published and communicated to the Manager, Government of India Press, Faridabad, for being published in the Gazette of India, Part I Section II, to the officer concerned, to the Director of Audit and Accounts, Delhi, to all Superintending Engineers, to P.A. to Chief Engineer [Civil/Member (TD)], to C.A. to Member (Admn.), to Phb Section to the Directorate, to G.M.T., New Delhi, and to the Engineer-in-Chief, Cpwd, New Delhi. The occasion for such publication arose in respect of Mr. Bantwal and hence the publication was embodied in the order of appointment of Mr. Bantwal. The occasion to pass such similar orders in the case of the other respondents did not arise. But no distinction was intended to be made between Mr. Bantwal and other respondents. The publication of the order of Mr. Bantwal was, Therefore, publication of the decision in general to all the respondents. The appellants were to be adversely affected by the said decision. When they represented against

the decision they were told by the formal communication, dated 8th March, 1972 that the decision was taken after considering the interests of the appellants also. The Government did not take the stand that the decision was a secret one and was not to be acted upon and was not, Therefore, to be published. They did not tell the appellants that no right had accrued to the appellants to seek any relief against the said decision because the said decision had not come to the stage of implementation and was, Therefore, merely in the state of consideration. The appellants were also, Therefore, publicly informed of the decision. Since both the sets of persons affected by the decision were informed by the Government of the said decision, the Government clearly intended to publish the decision and also acted upon it. The present case is thus clearly distinguishable from the three Supreme Court decisions mentioned above.

(20) Need for formality : Article 77 in its insistence upon the formality of Government orders is analogous to Article 299 of the Constitution which also insists on the form in which the Government contracts have to be executed. Just as the reason for insistence on a formal contract under Article 299 is to protect the Government from ill-considered decisions of subordinate officers, similarly the compliance with the form under Article 77 ensures that a decision at the appropriate level has been taken and is regarded as final. In *Union of India (UOI) Vs. A.L. Rallia Ram*, the contract was not a formal instrument but was by correspondence. It was not expressly made in the name of the Governor General or the President. Nevertheless it was expressed to be in the name of the Government of India and the correspondence was signed by the authorised officers. This was held to be sufficient compliance with Article 299 (pages 174-175 of the report). In the present case also the formal letter of August 1969 satisfies the requirement of form prescribed by Article 77. It says that the decision was already arrived at by the Government and was final. This letter has to be regarded as an offer subject to three conditions, namely (1) selection of the officers. (2) concurrence of the Cpwd, and (3) promulgation of the draft rule's. The exercise of the option by the respondents and their selection by the committee fulfilled the first condition, and the concurrence of the Cpwd fulfilled the second condition. Since the Government in its discretion waived the third condition, no fault can be found if the Government completed the decision to absorb the respondents without waiting for the finalisation of the rules. While the form was thus observed at one end, namely, the beginning of the process of absorption, it was also observed at the other end, namely, by the appointment of Mr. Bantwal as Superintending Engineer by a Presidential Order. If the form under Article 299 was satisfied in *A. L. Rallia Ram*'s case, then on the same analogy the formal requirements of Article 77 are also satisfied in the present case. Thus, even the extreme contention of the appellants that unless and until the form is satisfied the decision to absorb the respondents permanently is incomplete is not tenable.

(21) The Rule of Right: All the considerations of service, propriety, equity, justice and right are on the side of the respondents. They constitute the rule of right in

the present case. This court would, Therefore choose to apply to the appella"nts the law laid down in State of U.P. v. Ram Naresh Lal (supra) and N. Lakshmana Rao, (supra), Union of India v. A. L. Rallia Ram (supra), and Union of India v. K. P. Joseph (supra") referred to above, as distinguished from the law laid down in the decisions relied upon by the appellants. This brings the law also on the side of the respondents. On the other hand. not a single reason which can be sustained in law has been adduced by the appellants to justify the reversal of the decision of 10-12-1971 by the Government. That reversal seems to have been based only on the pressure brought to bear on the Government by the appellants.

(22) Question 2: The question whether an administrative decision is revocable has been fully discussed in the Full Bench decision in K. R. Raghavan v. Union of India, etc. C.W. 725 of 1977, decided on 4-5-1979 (13), to which one of us (V. S. Deshpande, C.J.) was a party. The criterion of a reviewable or a non-reviewable decision followed there was that laid down by Prof. S. A. De Smith in his "Judicial Review of Administrative Action, 3rd Edn. page 94, as follows :

"The interest"s of fairness to individuals whose interests will otherwise be directly and prejudicially affected may lead the courts to attribute binding effect to administrative acts and decisions which the competent authority wishes to repudiate or rescind. Indeed, it would seem that the legal competence of administrative bodies to rescind their decisions depends at least as much on considerations of equity and public policy as on conceptual classification."

(23) Another criterion of the distinction is laid down by H. W. R. Wade, in his Administrative Law, 4th Edn. page 214: ""For this purpose a distinction has to be drawn between powers of a continuing character and powers which, once exercised, are finally expended so far as concerns the particular case." The decision to permanently absorb was a decision which was final by its very nature. It was not a decision of a continuing character. For, the permanent absorption is made only once. Because it is permanent, it cannot be reopened.

(24) Lastly, it was emphasised by the Full Bench in K. R. Raghavan"s (supra) case that the power to reopen an administrative decision can be exercised only to redress an injustice and for good reason and not arbitrarily and particularly not contrary to law. In the present case no reason of equity or justice can be given in favor of reopening the decisions of the Government arrived at in 1968 or 1971. Since the nature of those decisions was final they could not have been reopened.

(25) For the above reasons, the decision of the learned single Judge is upheld and the Letters Patent appeal is dismissed. There will be no order as to costs.

(26) For same reasons, L.P.A. 98 of 1979 is also dismissed without any order as to costs.