

(2001) 11 AP CK 0010

In the Andhra Pradesh High Court

Case No : Writ Petition No. 23990 of 1999 7 November 2001

Union of India

APPELLANT

Vs

K.S. Devasahayam

RESPONDENT

Date of Decision : 07-11-2001

Acts Referred:

Citation : (2002) 120 TAXMAN 511

Hon'ble Judges : S.R. Nayak, J; L. Narasimha Reddy, J

Bench : Full Bench

Advocate : J.V. Prasad, for the Revenue, S.R. Sanku, for the Assessee, for the Appellant;

Judgement

Nayak, J.

This writ petition is directed against the order of the Central Administrative Tribunal, Hyderabad Bench, (the CAT) in O.A. No. 289 of 1999 dated 14-10-1999 allowing the original application filed by the respondent herein and setting aside the proceedings of the third petitioner in C.R. No. 39/Estt/98, dated 1-2-1999, terminating the services of the respondent, with effect from 1-2-1999 and permitting him to appear for the departmental examination, to be conducted in future.

2. The respondent was selected and appointed as Inspector of Income Tax by proceedings dated 22-5-1990 of the Director of Income Tax (Inv.), Hyderabad. The appointment order reads:

"ORDER

No. 9 : The undermentioned candidate is appointed as Inspector of Income Tax provisionally in the scale of Rs. 1640-60-2600-EB-75-2900 and such allowances as may be sanctioned by the Government of India from time to time and is posted as such to the office noted against his name :

Sl. No.

Name & address of the candidate

Roll No.

Office to which posted

1.

Sri K.S. Devasahayam H. No. 55/73/1, C.K. Colony, Sainikpuri (Post)
Secunderabad-500 594.

6033192

Office of the Director of Income Tax (Inv.), 9th Floor, Aayakar Bhavan, L.B.
Stadium Road,

Hyderabad-500 004.

2. The appointment is made on the following conditions :

(i) The candidate is required to take an oath of allegiance to the Constitution of India in the format given below :

"I do swear/solemnly affirm that I will be faithful and bear true allegiance to India and to the Constitution of India as by law established that I will uphold the sovereignty and integrity of India and that I will carry out the duties of my office loyally, honestly and with impartiality."

(ii) His appointment is subject to the production of

(a) Medical certificate of fitness from a Civil Surgeon, and

(b) A statement of declaration in the accompanying form and signed in the presence of Medical Officer and attested by him (Annexure-A).

(iii) His retention in service is further subject to his being suitable for government service in all respects.

(iv) If he claims to be a member of SC/ST, he should state specifically to which of the Caste or tribe mentioned in the Constitution (Scheduled Caste) Order, 1956 or under the Constitution (Scheduled Tribe) Order, 1956 he belongs.

(v) He is warned that furnishing of incorrect information or any points will render him liable to disciplinary action.

(vi) He is warned that his appointment will be purely on a provisional basis. He will initially be on probation for a period of two years. If in the opinion of the government, his work or conduct is unsatisfactory or shows that he is unlikely to become an efficient Income Tax Inspector, the government may discharge him at any time.

(vii) He should state whether he is having more than one wife living and in the event of the declaration in the negative being found to be incorrect after his

appointment, he will be liable to be dismissed from service.

(viii) His appointment will be subject to the rules and regulations framed by the Government of India from time to time for the employees of the Income Tax Department.

(ix) He must produce original certificates in proof of his academic qualifications and age to the head of the office of posting.

(x) He must also produce the original relieving certificate received from their previous employer.

(xi) He is also informed that he will have to pass departmental examination for Inspector of Income Tax within a period of two years.

(xii) He should report to duty at the office of his posting within ten days of receipt of this order failing which this order will be treated as cancelled and he will not be allowed to join later unless permitted to do so.

Sd/

(S. Govindarajan)

Director of Income Tax (Inv.), Hyd."

3. As per condition (vi) of the appointment order, the respondent was placed on probation for a period of two years. The respondent as stipulated in condition No. (xi) did not pass the departmental examination for Inspector of Income Tax within a period of two years. Despite this fact, the department declared the respondents probation by its proceedings dated 9-9-1992. When the matter stood thus, the services of the respondent were terminated by proceedings dated 1-2-1999 obviously invoking the power reserved to the department under condition (vi) of the appointment order. The respondent being aggrieved by the said action of the department instituted O.A. No. 289 of 1999 before the CAT. The learned Tribunal has opined that when the termination order was passed on 1-2-1999, the respondent was not a temporary government servant and having declared his probation earlier, in the fact situation of the case, the services of the respondent ought not to have been terminated without notice to him and without giving fair opportunity of being heard. In that view of the matter, the learned Tribunal has set aside the termination order dated 1-2-1999. The operative portion of the impugned order reads thus :

"The impugned termination order No. 39/Estt/98 dated 1-2-1999 (Annexure-I) is hereby set aside. The applicant should be reinstated into service forthwith. But the period from 1-2-1999, till he joins duty should be treated as leave due to him. The applicant if so advised should pass the examination within two attempts in any one of the two examinations to be held immediately after the issue of this order. In case, the applicant fails to qualify in any of those examinations, the respondents are at liberty to terminate the services of the applicant after giving him a notice."

The department being aggrieved by the above order of the CAT has preferred this writ petition.

4. Sri J.V. Prasad, the learned standing counsel for the Income Tax Department appearing for the petitioners, while assailing the validity of the impugned order of the CAT would maintain that since the services of the respondent were not confirmed by the department, there was no need for the department to issue prior notice and to give him opportunity of being heard before the impugned termination order was passed on 1-2-1999. The learned counsel would contend that since the respondent admittedly did not pass the departmental examination as stipulated in condition No. (xi) of the appointment order within the stipulated time, he was not entitled to continue in service as Inspector of Income Tax and, therefore, there is no irregularity on the part of the department in terminating the services of the respondent without notice. In support of the contention, the learned standing counsel would cite the decisions of the Supreme Court in *Municipal Corporation, Raipur Vs. Ashok Kumar Misra*, *State of Uttar Pradesh Vs. Akbar Ali Khan*, *Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others*, and *Union of India and Others Vs. Rakesh Kumar etc.*, The learned counsel would also further contend that granting two more opportunities to the respondent to pass the departmental examination as has been done by the learned Tribunal is beyond the legitimate power of the Tribunal and such a direction cannot be issued to the department. On the other hand, Sri P. Gangarami Reddy, the learned counsel, appearing for the respondent, would support the impugned order and would maintain that the department having declared the probation period of the respondent ought to have seen, that the respondent acquired a vested right in the post and such a right would not have been taken away without complying with the principles of natural justice and fair play in action.

5. In the light of the contentions of the learned counsels for the parties, two questions arise for our decision:

(i) Whether the termination of the services of the respondent with effect from 1-2-1999 is vitiated on account of violation of principles of natural justice and fair play in action ?

(ii) Whether the learned Central Administrative Tribunal, Hyderabad Bench has exceeded its jurisdiction in granting two more opportunities to the respondent to pass the departmental examination, prescribed in condition No. (xi) of the appointment order ?

6. Adverting to the first question, suffice it to state that the department, having declared the probation of the respondent ought to have seen that by that action, the respondent acquired a vested interest in the post. It is well settled that if the affected is not apprised, there is no compliance of principles of natural justice and on that ground itself, the administrative action vitiates. It is not that the department, despite the expiry of two years continued the probationary period of

the respondent till it chose to terminate the services of the respondent with effect from 1-2-1999. Even, according to the learned counsel for the department, the probation of the respondent was declared with effect from 1-6-1990 by proceedings dated 9-9-1992. The judgments cited by the learned Standing Counsel for the Income Tax Department are of no help to the department and they have no bearing in decision-making in this case. In those cases, the questions dealt with were whether the department can terminate the services of the probationer during the probationary period; in the event of the department not passing any order on completion of the probationary period stipulated in the appointment order or under the relevant rules, whether an employee would continue to be a probationer or not or such an employee should be deemed to have been confirmed in the service, etc. None of the authorities cited, by the learned Standing Counsel are the authorities to state that having declared the probation of an employee, the employer could terminate the services of such an employee without issuing notice to him. As already pointed out *supra*, declaration of probation results in investing an enforceable interest and right in the post held by such an employee and such legal interest accrued to the employee cannot be taken away unilaterally without apprising the affected employee. In that view of the matter, nobody can take any exception to the view taken by the learned Tribunal. However, coming to the second question, we should state that the direction issued by the learned Tribunal falls within the domain of discretionary power, vested in the department. Whether, the respondent should be granted some more chance to appear and pass the departmental test/examination or not, it is very much within the domain of the discretionary power, vested in the department and the service rules, and neither the Tribunal nor the court can usurp the discretion vested in the department. In that view of the matter, we do not find any justification to sustain that part of the direction issued by the learned Tribunal.

7. In the result and for the foregoing reasons, we allow this writ petition in part and set aside that part of the impugned order, which permits the respondent to make two more attempts in departmental examinations to be held in future. In all other respects, the impugned order of the Tribunal stands. However, we make it very clear that this order shall not preclude the petitioner-department from initiating action against the respondent in conformity with the principles of natural justice and the relevant regulations. In the facts and circumstances of the case, there shall be no order as to costs.