

(1986) 09 MAD CK 0041

In the Madras High Court

Case No : Writ Appeal No. 987 of 1985 against W.P. No. 7189/85

V.P. Gulati

APPELLANT

Vs

The Union of India (UOI) and Another

RESPONDENT

Date of Decision : 17-09-1986

Acts Referred:

Constitution of India, 1950 — Article 134A, 311
Industrial Disputes Act, 1947 — Section 25F

Citation : (1987) 13 ECC 328

Hon'ble Judges : V. Ratnam, J; V. Ramaswami, J

Bench : Division Bench

Final Decision : Allowed

Judgement

V. Ratnam, J.—This writ appeal is directed against the dismissal of the writ petition in W.P. No. 7189 of 1985 filed by the appellant for the issue of a writ of certiorari to quash the order of the first respondent herein in F.No. A22012/20/84. Ad. II (TRIB) dated 27-6-1985, cancelling its earlier order in F.No. 22012/20/84/Ad. II (TRIB) dated 23-4-1985, appointing the appellant as Technical Member of the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as "CEGAT").

2. The appellant joined the Customs and Central Excise Service--Group "A" in July, 1963 and after successfully completing a probation period of two years, worked as Assistant Collector of Customs, Madras, till about December, 1973. He was thereafter promoted as Deputy Collector and with effect from, February, 1982, he functioned as Collector of Customs and Central Excise, Madras., From the middle of June, 1983, the appellant worked as Collector of Customs (Appeals), which post he held till 28-6-1985. Some time in the middle of April, 1984, the appellant was asked if he was willing for being considered for appointment as Technical Member in the CEGAT and by letter dated 7-5-1984, the appellant signified his willingness. Thereupon, the appellant was interviewed by a Selection Committee, headed by a Judge of the Supreme Court of India and

consisting of the President of the Tribunal and three other Secretaries to Government of India, on 28-6-1984. By communication F.No.A. 22012/20/84-Ad. II (TRIB) dated 29-8-1984, the appellant was offered the appointment as Technical Member of CEGAT on the following terms and conditions:

1. The said post of Technical Member in the Customs, Excise and Gold (Control) Appellate Tribunal belongs to the General Central Services (Group "A") and carries a pay of Rs. 3,000 (fixed) per month.
2. In addition he will be entitled to allowance of such rates and subject to such conditions as may be admissible to Central Government Officers of his category from time to time.
3. The said post is permanent, but the appointment will initially be temporary.
4. The appointment carries with it the liability to service in any part of India.
5. The age of superannuation in this post subject to other provisions of relevant rules or orders in force from time to time will be 60 years.
6. Unless Shri V.P. Gulati is confirmed as a Technical Member, the Central Government may at any time revert him to his parent cadre by giving him one month's notice in this behalf and he will also have the notice (sic) to revert to his original cadre by giving one month's notice. In the event of such reversion, his age of superannuation will be regulated by the general rules in force in this behalf.
7. Travelling allowance will be admissible according to rules for joining the appointment.
8. The other conditions of the service will be the same as are applicable to Central Government servants under the rules.
9. Shri V.P. Gulati is requested that in case he is willing to accept the offer of appointment as Technical Member in the Customs, Excise and Gold (Control) Appellate Tribunal on the terms and conditions as mentioned above, his acceptance may be sent to this Ministry immediately and in any case by the 5th September, 1984 at the latest.
10. If he accepts this offer, his first posting is likely to be at Bombay and he will be expected to assume charge of the post immediately.

On receipt of the aforesaid offer, the appellant sent a telex message on 5-9-1984 and followed it up by a letter dated 6-9-1984 accepting the offer on the terms and conditions set out in para. (1) therein. By its order F.No.A. 22012/20/84/Ad.II (TRIB) dated 23-4-1985, the 1st respondent appointed the appellant as Technical Member of CEGAT on terms and conditions laid down in the memorandum F.No.A. 22012/20/84/Ad. II (TRIB) dated 29-8-1984, with effect from the date the appellant took over charge and until further orders. By that order, the appellant was also posted to Delhi Bench of CECAT and it was further

stated that the appellant may assume charge of the post immediately at the office at the Registrar, CEGAT, New Delhi. Upon receipt of that communication, the appellant sent a telex message on 27-4-1985 requesting time till the end of June, 1985, for joining and also stated that a letter followed. In his letter dated 10-6-1985, the appellant referred to his earlier telex message dated 27-4-1985 requesting time to join till the end of June, 1985 and stated that it may not be possible for him to join by the end of June, 1985, as he had to settle certain urgent personal matters including finalisation of arrangements for the construction of a house and medical treatment for his eyes. That letter wound up with a request that the appellant may be allowed to join by the end of August, 1985. While matters stood thus, the first respondent in F.No. A.22012/20/84-Ad. II (TRIB) dated 27th June, 1985, (which date is disputed by the appellant, according to whom it was issued in July, 1985) passed an order to the following effect:

The President is pleased to cancel the order issued under this Ministry's F.No. 22012/20/84/Ad. II (TRIB) dated 23-4-1985 regarding the appointment of Shri V.P. Gulati as Technical Member of the Customs, Excise and Gold (Control) Appellate Tribunal.

By yet another order No. 89/85 dated 27th June, 1985, the Department of Revenue, Ministry of Finance, Government of India, transferred and posted certain Officers of the Indian Customs and Central Excise Service-Group "A" and thereunder, the appellant was posted as Officer on Special Duty, Directorate of Inspection, Nagpur.

3. The appellant, in his writ petition, challenged the cancellation of his appointment on the ground that a concluded contract of appointment had come into existence on his acceptance of the offer made by the first respondent for appointing him as Technical Member, CEGAT, which cannot be cancelled unilaterally or arbitrarily and that no removal from service by cancellation of the appointment order can be made, without complying with the provisions of Article 311 of the Constitution of India. The cancellation was also characterised as arbitrary and as one opposed to the principles of natural justice and not in accordance with law.

4. In the counter affidavit filed by the first respondent, it contended that the appointing authority had every right to cancel the appointment before the incumbent assumed charge of the post, which was purely in the nature of an administrative matter, not liable to be questioned in a Court of law. It was also claimed that even under the terms of the offer for appointment, the first respondent had the right to revert the appellant and therefore, the appellant did not have any cause for complaint. The first respondent also attempted to justify the cancellation of the order of appointment of the appellant on the ground that the appellant failed to join duty immediately, as directed in the order dated 23-4-1985. According to the first respondent, as part of a general scheme and for administrative reasons, the appellant and certain other Officers were transferred

and posted to various other posts and that was responsible for the cancellation of the order appointing the appellant as Technical Member, CEGAT. In the reply affidavit filed by the appellant, he refuted the stand taken by the first respondent; in its counter and reiterated his case that the cancellation of the order of his appointment as Technical Member, CEGAT, was improper and illegal.

5. Sathiadev, J. while upholding the order cancelling the appointment of the appellant and dismissing the writ petition, took the view that as the appellant had not assumed charge of the office pursuant to the order dated 23-4-1985, he cannot claim to have been appointed as Technical Member, CEGAT and further that the appellant had not acquired any right to or in that post and therefore, despite the non-disclosure of the reasons for the cancellation, the authority which passed the order of cancellation, had the power to do so before the implementation of the order of appointment.

6. In support of this appeal, learned Counsel for the appellant made the following submissions:

(a) The appointment of the appellant to the post of Technical Member, CEGAT, was complete, when all the formalities in connection therewith had been completed and the appointing authority communicated the order of appointment to the appellant and in any event, the appellant, at least, secured a right thereunder to be appointed to the post of Technical Member, CEGAT, which was unaffected in any manner by the appellant not joining within any particular or stipulated time.

(b) The issuance of the order of appointment and the communication thereof to the appellant could not be revoked by the first respondent, except under the powers vested in the appointing authority either by the rules or the terms of appointment and since there was no such power, the cancellation of appointment is bad.

(c) The cancellation of the appointment of the appellant to the post involved the exercise of administrative power, which resulted in civil consequences and therefore, such cancellation cannot be effected without notice, but if so done, it is violative of the principles of natural justice, as no opportunity had been given to make representations against the passing of the prejudicial order.

(d) De hors any question of natural justice, the impugned order is arbitrary, as it does not contain any reason or no reason can be spelt out, as having a nexus to the cancellation order passed.

(e) The impugned order is violative of Article 311 of the Constitution of India, as it results in loss of higher pay, status and reputation, insofar as the appellant is concerned and would amount to an order of punishment and not merely one of termination.

To substantiate the aforesaid contentions, reliance was placed upon a number of decisions, to some of which we shall make a reference later in the course of this

judgment. On the other hand, learned Counsel for the respondents submitted that the appellant had not acquired any right at all either to be appointed or to the post and such a right, if at all, would be available only as and when he reported to work or took charge and not earlier and that at any time prior to that, the appointment can be cancelled. Considerable reliance was placed in this connection by the learned Counsel upon the decision in *Amarjit Singh v. State of Punjab* AIR 1975 SC 985 . The cancellation of the order of appointment of the appellant as Technical Member, CEGAT, was also sought to be justified on the ground that the holding of the post by the appellant was subject to the pleasure of the President of India.

7. The question that has to be first considered is, whether the appellant acquired any right at all, and if so, what is the nature and the content of that right? It is seen from the Memorandum dated 29-8-1984 in F.No.A. 22012/20/84/Ad.II (TRIB) that the appellant was offered appointment as Technical Member, CEGAT, on certain terms and conditions. By his letter dated 6-9-1984, the appellant had accepted this offer on the terms and conditions set out in that Memorandum. It was only after such acceptance by the appellant, by order F.No.A. 22012/20/84-Ad. II(TRIB) dated 23-4-1985, the appellant was appointed as Technical Member, CEGAT, though with effect from the date he took charge and until further orders. It is thus seen that the order of appointment of the appellant as Technical Member, CEGAT, had originated in an offer, which was accepted by the appellant. On the issue of the order of appointment dated 23-4-1985 in favour of the appellant, after the acceptance of the offer by him, he had been named and designated to hold the office of Technical Member, CEGAT, after having been earlier subjected to a process of selection by a Committee. The appellant, in our view, had secured thus at least a right to be appointed to the office of Technical Member, CEGAT. It is true that the order of appointment stated that the appointment will be effective from the date the appellant took charge. All that was meant by that was, the appointment would be effective or successful in producing in the appellant the status and position of Technical Member, CEGAT when he actually took charge. In other words, though by reason of the order of appointment, the appellant had been named to the office of Technical Member, CEGAT and had therefore acquired a right to be appointed to that post, his functioning as such Technical Member and discharging the duties pertaining to that office became effective only upon his taking charge or reporting to work. It is significant that the order dated 23-4-1985 is silent as to what would happen, in the event of the appellant not taking charge as stated therein. There is no indication in that order that if the appellant does not take charge, he would even lose his right to get appointed to that office. There is no power reserved under the terms of the order of appointment or some other rule to cancel the right to the appellant to get appointed as Technical Member, CEGAT. Thus, on the terms of the offer as made and accepted, as well as the order of appointment, we are of the opinion that the appellant had acquired at least a right to be appointed as Technical Member, CEGAT.

8. We may now consider whether the appellant had in any manner lost or forfeited his right to get appointed to the post of Technical Member, CEGAT. We have already drawn attention to the terms of appointment, which do not entail any forfeiture of the right to appointment, in the event of the appellant not joining the post immediately. We also find that the appellant had expressed his inability to take charge immediately as Technical Member, CEGAT, owing to personal reasons. He has sent a telex message requesting time till the end of June, 1985 for joining and by another letter dated 10-6-1985, he had prayed for further extension of time till the end of August, 1985. These communications had admittedly been received by the respondents, as seen from paras. 6 and 7 of the counter affidavit of the first respondent: but the appellant had not been informed whether the extension prayed for by him had been granted or declined. Under those circumstances, the appellant was quite in order in entertaining a bona fide belief that his requests for extension of time for joining duty were under consideration and that appropriate orders would be passed. Though the appellant had sent two communications praying for extension of time on some grounds, nothing was done with reference to those requests so made by the appellant. It cannot therefore be said that there was a failure on the part of the appellant to take charge and that had resulted in the forfeiture of the right of the appellant to get appointed to the post of Technical Member, CEGAT.

9. We may now refer to the reliance placed by the learned Counsel for the respondents upon the expression "with effect from the date he takes over charge" found in the order dated 23-4-1985, and the support sought to be drawn from the decision of the Supreme Court in Amarjit Singh's case AIR 1975 SC 984. We have earlier pointed out how the right to get appointed to a post and such an appointment becoming effective or successful, are two different aspects, though together they may produce the result of an effective appointment. To ripen into an effective appointment, the person appointed must not only have secured a right to get appointed, but must also have taken charge of the post. In most cases, both these stages are completed either at the same time or even after an interval, resulting in a full-fledged and effective appointment. In others, as for instance in this case, the first stage of securing a right to get appointed to a particular post alone might have been completed, the next stage remaining to be completed. That, at best, can have only the effect of rendering incomplete the appointment to the post, in the sense that the person appointed cannot, until he takes charge, function, perform and discharge the duties pertaining to that Office; but that cannot mean that the right to get appointed to the post itself is lost for the non-completion of the second or subsequent stage. We are therefore unable to agree with the submission of the learned Counsel for the respondents that the appellant did not acquire any right at all or that right to the office became available to him only when he took charge as Technical Member of the CEGAT and not before. We now proceed to consider the decision in Dr. Amarjit Singh Ahluwalia Vs. The State of Punjab and Others, relied on by the learned Counsel for the respondents. In that case, the question of inter se seniority in

the integrated service of Officers consequent upon the integration of two services, viz., Provincial Civil Medical Service and Public Health Service, came to be considered. Adverting to the claim for seniority by some of the Officers based on the order of appointment, irrespective of when they assumed charge of the post, the Supreme Court elaborated upon the different kinds of appointment and their effect. It was in that context, the Court pointed out that where the order of appointment is to take effect from the date one assumes charge of the post, the appointment would be effective, only when the person appointed assumes charge of the post and that would be the date of his appointment. We have already pointed out how even without recourse to taking charge, the appellant, had at least secured a right to get appointed to the post of Technical Member, CEGAT, on the basis of the offer, acceptance, as well as the order of appointment. Therefore, there is no question of the right of the appellant to get appointed to the post of Technical Member, CEGAT, becoming available to him only on his taking charge and the decision will not have any application to the facts of this case.

10. We may now refer to some of the decisions to which our attention was drawn by the learned counsel for the appellant in support of the securing of a right by the appellant to be appointed to the post of Technical Member, CEGAT. *Arya Chandra Kumar v. The State* (1973) 1 SLR 744 dealt with the case of a person, who was appointed to a post and had also reported to duty, when the order of appointment was cancelled. The cancellation was supported on the ground that the name of the person appointed had been included in the list of persons selected owing to typing mistake, The Court pointed out that the person appointed should have been given an opportunity to place his case before the concerned authorities and the order of cancellation without affording such an opportunity, was not only mala fide, but also arbitrary and opposed to the principles of natural justice. In *E.S.M. Casteline v. State of Kamataka* (1980) 5 SLR 612, by a notification dated 12-7-1979, the petitioner came to be posted and placed in independent charge of the post of Principal of the School of Nursing, Bangalore, relieving another, who was previously holding that post. Though the petitioner made attempts to take charge of the post, she did not succeed; but meanwhile, on 19-9-1979, the earlier notification, under which the petitioner was appointed as Principal, was rescinded, which was challenged on the ground that it was made behind her back and therefore, opposed to principles of natural justice. The Court held that the petitioner had secured a temporary right to the post and that if she were to be deprived of that right, she ought to have been heard before it was cancelled. In *S. Govindaraju v. K.S.R.T.C. & Anr.* (Civil Appeal No. 1339 (NL) of 1986--Judgment dated 15-4-1986), the Supreme Court considered the question whether the termination of the service of the appellant therein was void and illegal for non-compliance with Section 25-F of the Industrial Disputes Act, 1947. The appellant was selected as a Conductor in the K.S.R.T.C. and was placed in the select list prepared by the Selection Committee. Though he was not given regular appointment, he was appointed to

work as a Conductor in a temporary vacancy, in which capacity he had worked for more than 240 days, when his services were terminated on the ground of his being found unsuitable for the post. The order of termination was challenged by means of a writ petition, which was dismissed, and on appeal to the Supreme Court, the Court referred to the inclusion of the name of the appellant in the list of workers and the appellant being given employment pursuant thereto and observed that,

Once a candidate is selected and his name is included in the select-list for appointment in accordance with the Regulations, he gets, a right to be considered for appointment as and when vacancy arises. On the removal of his name from the select list, serious consequence entail, as he forfeits his right to employment in future. In such a situation, even though the Regulations do not stipulate for affording any opportunity to the employee, the principles of natural justice would be attracted and the employee would be entitled to an opportunity of explanation, though no elaborate enquiry would be necessary. Giving an opportunity of explanation would meet the bare minimal requirements of natural justice. Before the services of an employee are terminated, resulting in a forfeiture of his right to be considered for employment, opportunity of explanation must be afforded to the employee concerned. The appellant was not afforded any opportunity of explanation before the issue of the impugned order. Consequently, the order is rendered null and void, being inconsistent with the principles of natural justice.

Though the aforesaid observations were made while considering the case of a person who had been selected and also given employment temporarily, we are of the view that the principle laid down therein would be applicable even here and that principle is that when once a person had secured a right to be appointed to a post, the removal of his name results in the forfeiture of his right to employment to that post in future and before such forfeiture is brought about, in fairness, he must be afforded an opportunity of explanation. In yet another case, in *Union of India v. Sri Pradeep Kumar Das SLP (Civil) No. 66 of 1986*--Order dated 8-5-1986, the Supreme Court considered the propriety of the screening out of 357 empanelled candidates, out of 790 successful candidates, declared" to be so by the Railway Service Commission. The screening was done on the basis of a report that unfair means had been adopted by them at the examination. The High Court was of the view that such screening without affording an opportunity to the affected persons was illegal, void and inoperative. On further appeal, the Supreme Court pointed out that the High Court was fully justified in its conclusion that the 357 empanelled candidates could not be screened out without giving them a reasonable opportunity of hearing, as they had acquired a right by their names being included in the original select list and they were therefore, entitled to be heard before any prejudicial action was taken. Thus the decisions of the Supreme Court, referred to above, clearly lay down that even in a case where a person had acquired a right to get appointed and that right is sought to be taken away, justice and fair play required that an opportunity

should be given to him to show cause against such deprivation.

11. We may now refer to Clause 6 of the Memorandum in F. No. 22012/20/84/Ad. II (TRIB) dated 29-8-1984 relied upon by the learned Counsel for the respondents. That clause contains a provision for reversion of a person appointed to the post of Technical Member, CEGAT, by giving such person a month's notice. Thereunder, the person appointed also can revert to his original cadre by giving a month's notice. The situation contemplated by Clause 6 is One arising after a person named to the office of Technical Member, CEGAT, takes charge, enters upon his duties and functions as such Member and not in a case like this, where even before that, the order of appointment itself had been cancelled. We are also of the view that on the facts of this case, there is no scope for invoking Article 311 of the Constitution of India or the pleasure doctrine and we are therefore refraining from expressing our views thereon.

12. We have already seen how on the facts and the circumstances of this case, the appellant had, on the acceptance of the offer and the issue of an order of appointment, secured a right to get appointed to the post of Technical Member, CEGAT, and if the first respondent was desirous of depriving the appellant of that right, in fairness, the appellant should have been afforded an opportunity. Admittedly, no such opportunity was given to the appellant. No reasons also are set out in the order cancelling the order of appointment. We may also observe that even before this Court, the circumstances which led to the cancellation of the order of appointment of the appellant as Technical Member, CEGAT, have not been placed, in the shape of the relevant files and records. The order cancelling the appointment of the appellant is thus opposed to principles of natural justice and is arbitrary as well.

13. We have earlier held that the appellant had acquired a right to be appointed to the post of Technical Member, CEGAT, and he was deprived of that right arbitrarily by the order of cancellation without affording an opportunity to the appellant. The order of cancellation, being opposed to principles of natural justice and being arbitrary as well, cannot be sustained. In the view we have taken, it is unnecessary to advert to the other points raised and decisions referred.

14. For the foregoing reasons, we allow the writ appeal and a writ of certiorari as prayed for by the appellant will issue. There will be, however, no order as to costs.

15. Learned Counsel for the respondents seeks oral leave to appeal to Supreme Court under Article 134-A of the Constitution. We are not satisfied that any substantial question of law of general importance which needs to be decided by the Supreme Court arises in the proposed appeal to the Supreme Court. In fact, we have only applied the ratio of the decisions of the Supreme Court to the facts of this case and no fresh law has been laid down by us. In the circumstances, we reject the oral leave to appeal to Supreme Court.