(2012) 09 P&H CK 0393

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Writ Petition No. 7332 of 2012 (O and M)

B.K. Srivastava		APPELLANT
	Vs	
State of Punjab, Department of Personnel and Another		RESPONDENT

Date of Decision: Sept. 20, 2012

Acts Referred:

- Commissions of Inquiry Act, 1952 - Section 3(1)
- Constitution of India, 1950 - Article 162, 226, 309
- Evidence Act, 1872 - Section 83

Citation: (2013) LabIC 1108

Hon'ble Judges: Tejinder Singh Dhindsa, J

Bench: Single Bench

Advocate: Puneet Sharma, for the Appellant; Ashok Aggarwal, General, for Punjab, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Tejinder Singh Dhindsa, J.

The petitioner joined the Indian Administrative Service in the year 1977. He was promoted to the scale of Financial Commissioner on 8.1.2004. On 12.10.2009, the petitioner was promoted to the grade of Chief Secretary. Services of the petitioner were placed at the disposal of Department of Technical Education and Industrial Training for appointment as Chairman, Punjab State Board of Technical Education and Industrial Training (hereinafter to be referred as "the Board") in terms of order dated 163-2012. It has been pleaded that in terms of order dated 21.3.2012, the petitioner was appointed as the Chairman of the Board under the provisions of the Punjab State Board of Technical Education and Industry Training Act, 1992 (hereinafter to be referred as "1992 Act"). The petitioner is stated to have taken over

the charge of the office of the Chairman of the Board on 27.3.2012. Vide order dated 20.4.2012, the petitioner has been transferred and posted as Financial Commissioner (Appeals-1) against a vacant post. The challenge in terms of filing the present writ petition under Article 226 of the Constitution of India is to the order dated 20.4.2012, Annexure-P4. It has been asserted that such impugned order dated 20.4.2012 has been passed in contravention of the statutory provisions of 1992 Act apart from raising other grounds of challenge.

2. Upon notice of motion having been issued, a reply of the Special Secretary, Personnel, Punjab on behalf of respondent No. 1 was filed. Such reply was adopted by respondent No. 2. In terms thereof, a stand has been taken that the petitioner had merely been posted as the Chairman of the Board and since no Gazette notification had been issued, the petitioner had never been appointed as the Chairman of the Board in the light of Section 21 of the 1992 Act. It has also been stated that even with respect to the predecessor of the petitioner i.e. Shri Karan A. Singh, IAS as also Shri G.S. Cheema, IAS, simple posting orders as Chairman of the Board had been issued and thereafter, the aforementioned officials had also been transferred from such post. Still further, the instance of Professor (Ms.) Sushil Mahajan was also cited who had been appointed as Chairperson of the Board in terms of issuance of a Gazette notification under subsection (1) Clause 5 of Section 21 of the 1992 Act (Annexure-R3, along with reply). In the case of such appointment, specific terms and conditions had been stipulated in the notification itself. In a nut shell, the stand taken by the State is that the petitioner had been merely posted as the Chairman of the Board and the impugned order cannot be construed as an order of removal but it is merely an order of transfer of the petitioner.

3. The petitioner has appeared in person and was heard at length.

4. It was strenuously argued by the petitioner that in terms of his appointment to the post of Chairman of the Board vide order dated 21.3.2012, he was holding a tenure post for a period of three years and as such, a Chairman could not have been removed without following the procedure u/s 21(5) of the 1992 Act. The petitioner would place reliance upon the decision of the Hon''ble Supreme Court in Dr. L.P. Agrawal Vs. Union of India and others, to contend that a person who is appointed to the tenure post, his appointment to such office begins when he joins and comes to an end on the completion of tenure unless curtailed on justifiable grounds. The submission raised is that a person holding a tenure post does not superannuate but relinquishes office only upon completion of the tenure.

5. The second submission raised by the petitioner is that the impugned order dated 20.4.2012, Annexure-P2, has been passed by the Department of Personnel, respondent No. 1, which had no competence to do so under the provisions of the 1992 Act. It has been argued that an order of appointment of the Chairman of the Board as well as removal has to be made by the Government in the Department of Technical Education as has been defined in Section 2(h) of the 1992 Act. Still further,

the petitioner has raised the plea of estoppel against the State. The petitioner has argued that the impugned order dated 20.4.2012 has resulted in an "opportunity loss". The submission raised is that in case the petitioner would not have been appointed as the Chairman of the Board, then he would have superannuated from the Indian Administrative Service on 30.6.2012 upon attaining the age of 60 years and upon such eventuality, he was vested with the option of having applied for some other Office. The petitioner has also raised a categoric submission to the effect that issuance of a notification as regards the appointment to the post of Chairman of the Board could at best be construed as a procedural infirmity and, accordingly, his tenure on the post of Chairman and protection against an arbitrary removal therefrom would prevail over the formality of the issuance of a notification. The petitioner contends that it was not open for the State Government to take advantage of its own omission having failed to notify his appointment to the post of Chairman of the Board.

6. The petitioner in furtherance of his submissions has relied upon the following judicial precedents:--

1. Chandigarh Administration through the Director Public Instructions (Colleges), Chandigarh Vs. Usha Kheterpal Waie and Others,

2. United Bank of India Vs. Naresh Kumar and others,

3. Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh and Another,

7. Per contra, learned Advocate General, Punjab has referred extensively to Section 21 of the 1992 Act to point out that the mandate of the statute was for the appointment of a Chairman of the Board in terms of notification of such appointment in the official Gazette. It was further argued that in terms of Section 21(1) of the 1992 Act, the Chairman was to be appointed from amongst four distinct categories i.e. (i) a serving or retired Vice Chancellor of the University, or (ii) a serving or retired member of the Indian Administrative Service who is or has been a Financial Commissioner, or (iii) an eminent educationist having an experience of Professor or its equivalent post in a recognized University or Degree College for a minimum period of ten years, or (iv) an eminent Scientist or Technologist having an experience of teaching in the rank of a Professor or its equivalent post in an Institution of Technical Education and Training for a minimum period of ten years. The submission made on behalf of the State on the strength of Section 21 of the 1992 Act is that the requirement of appointment to the post of Chairman of the Board in terms of a notification in the official Gazette is mandatory and not merely procedural. Accordingly, it has been submitted that in terms of order dated 21.3.2012, the petitioner had been merely posted on the post of Chairman of the Board and no appointment came to vest in him in terms of Section 21 of the Act, Towards furtherance of such submission, it has also been argued by the learned Advocate General that the exercise of consideration of a person from amongst the

four categories identified u/s 21(1) of the 1992 Act for appointment to the post of Chairman had never been undertaken. Even on such count, it was asserted that the petitioner had not been appointed to the post of Chairman. Consequentially, the protection of Section 21(5) of the 1992 Act that the petitioner was claiming prior to his removal from the Office of the Chairman of the Board was also not available as per submission raised by the Advocate General.

8. That apart, it has been urged on behalf of the State by referring to the order dated 21.3.2012 that the terms and conditions of the appointment of the petitioner to the post of Chairman at no point of time had been stipulated and settled. It was argued that in the absence of any terms and conditions governing the appointment of the petitioner to the post of Chairman, the challenge to the impugned order dated 20.4.2012 transferring him as Financial Commissioner (Appeals-I) cannot sustain.

9. Having heard the petitioner in person, learned Advocate General, Punjab and having perused the pleadings on record, the precise question that arises for adjudication in the present petition is to the effect "as to whether the petitioner came to be appointed as Chairman of the Board under the provisions of the Act so as to vest in him the right of a tenure post as also the protection from removal from the post of Chairman in the light of Section 21(5) of the Act?"

10. It would be apposite at this stage to refer to Section 21 of the Act which reads as follows:--

21. Appointment of Chairman.--The Government shall by notification in the Official Gazette appoint a person to be the Chairman from amongst the following, namely:--

i) a serving or retired Vice-Chancellor of a University; or

ii) a serving or retired member of the Indian Administrative Service who is or has been a Financial Commissioner; or

iii) an eminent educationist having an experience as Professor or its equivalent post in a recognised University or Degree College for a minimum period of ten years; or

iv) an eminent scientist or technologist having an experience of teaching in the rank of a Professor or its equivalent post in an institution of Technical Education and Training for a minimum period of ten years.

(2) No person shall be appointed be Chairman if he has attained the age of sixty-two years.

(3) Subject to the provisions of sub-section (2), the term of office of the Chairman shall be three years and he shall be eligible for reappointment.

(4) The Chairman shall be entitled to such salaries and allowance and shall be governed by such conditions, as may be prescribed.

(5) The Chairman may be removed from the office by the Government, if he,--

(a) wilfully refuses to carry out the provisions of this Act; or

(b) abuses the powers vested in him; or

(c) is adjudged an insolvent; or

(d) is convicted by a Court of law for an offence involving moral turpitude; or

(e) if it appears to the Government that this continuation in office is detrimental to public interest:

Provided that no order under this sub-section shall be passed without giving him a reasonable opportunity of being heard and after recorded reasons therefor.

11. A bare reading of the statutory provision would make it apparent that the mandate cast upon the Government insofar as appointment of a person to be the Chairman of Board is in terms of a notification in the official Gazette. The language of the statute is couched in unambiguous and clear terms. It is settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone. Still further, every word of the statute has to be given its due meaning. In terms of Section 21 of the Act, a power has been conferred by the legislature upon an Authority to exercise a power and as such, such authority i.e. the appropriate Government in the facts of the present case would be mandated to exercise that power in strict compliance with the requirements of the provision conferring that power. It cannot be held on a bare reading of Section 21 of the Act that the requirement of appointment of the petitioner to be the Chairman of the Board in terms of the appropriate Government issuing a notification in the official Gazette is a mere formality and procedural in nature.

12. The Hon''ble Apex Court in the case of I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others, was seized of the question as to whether the publication of the exemption notification in the Andhra Pradesh Gazette as required by Section 11, sub-clause (i) of the Andhra Non-Agricultural Lands Assessment Act, 1963 is mandatory or merely directory. While adjudicating and examining such question, it had been held in the following terms:--

The first question we have to answer is whether the publication of the exemption notification in the Andhra Pradesh Gazette, as required by Section 11(1) of the Act, is mandatory or merely directory? Section 11(1) requires that an order made thereunder should be (i) published in the Andhra Pradesh Gazette and (ii) must set out the grounds for granting the exemption. The exemption may be on a permanent basis or for a specified period and shall be subject to such restrictions or conditions as the Government may deem necessary. Shri Sorabjee''s contention is that while the requirements that the power u/s 11 should be expressed through an

order, that it must contain the grounds for granting exemption and that the order should specify whether the exemption is on a permanent basis or for a specified period are mandatory, the requirement of publication in the Gazette is not. According to the learned counsel, the said requirement is merely directory. It is enough, says the counsel, if due publicity is given to the order. He relies upon certain decisions to which we shall presently refer. We find it difficult to agree. The power u/s 11 is in the nature of conditional legislation, as would be explained later. The object of publication in the Gazette is not merely to give information to public. Official Gazette, as the Very name indicates, is an official document. It is published under the authority of the Government. Publication of an order or rule in the Gazette is the official confirmation of making of such an order or rule. The version as printed in the Gazette is final. The same order or rule may also be published in the newspaper or may be broadcast by radio or television. If a question arises when was a particular order or rule was made, it is the date of Gazette publication that is relevant and not the date of publication in a newspaper or in the media (See M/s. Pankaj Jain Agencies Vs. Union of India and others, . In other words, the publication of an order or rule is the official irrefutable affirmation that a particular order or rule is made, is made on a particular day (where the order or rule takes effect from the date of its publication) and is made by a particular authority; it is also the official version of the order or rule. It is a common practice in Courts to refer to the Gazette whenever there is a doubt about the language of, or punctuation in, an Act, Rule or Order. Section 83 of the Evidence Act says that the Court shall presume the genuineness of the Gazette. Court will take judicial notice of what is published therein, un like the publication in a newspaper, which has to be proved as a fact as provided in the Evidence Act. If a dispute arises with respect to the precise language or contents of a rule or order, and if such rule or order is not published in the Official Gazette, it would become necessary to refer to the original itself, involving a good amount of inconvenience, delay and unnecessary controversies. It is for this reason that very often enactments provide that Rules and/or Regulations and certain type of Orders made (hereunder shall be published in the Official Gazette. To call such a requirement as a dispensable one-directory requirement is, in our opinion, unacceptable. Section 21 of the Andhra Pradesh General Clauses Act says that even where an Act or Rule provides merely for publication but does not say expressly that it shall be published in the official Gazette, it would be deemed to have been duly made if it is published in the official Gazette. As observed by Khanna, J., speaking for himself and Shelat, J. in Sammbhu Nath Jha Vs. Kedar Prasad Sinha and Others, , the requirement of publication in the Gazette "is an imperative requirement and cannot be dispensed with". The learned Judge was dealing with Section 3(1) of the Commissions of Inquiry Act, 1952 which provides inter alia that a Commission of Inquiry shall be appointed "by notification in the Gazette". The learned Judge held that the said requirement is mandatory and cannot be dispensed with. The learned Judge further observed:--

The commission of inquiry is appointed for the purpose of making an inquiry into some matter of public importance. The schedule containing the various allegations in the present case was a pan of the notification, dated March 12, 1968 and specified definite matters of public importance which were to be inquired into by the Commission. As such, the publication of the schedule in the Official Gazette should be held to be in compliance with the statutory requirement. The object of publication in an official Gazette is two-fold to give publicity to the notification and further to provide authenticity to the contents of that notification in case some dispute arises with regard to the contents.

13. Still further, it was held in the following terms:--

The above decisions of this Court make it clear that where the parent statute prescribes the mode of publication or promulgation that mode has to be followed and that such a requirement is imperative and cannot be dispensed with.

14. The Hon''ble Apex Court in the case of Dhananjaya Reddy etc. Vs. State of Karnataka, had also held that where law requires a thing to be done in a certain manner, it has to be done in that manner alone or not at all.

15. In the light of such settled position as regards interpretation of statutes, I have no hesitation in holding that in terms of the appropriate Government not following the mandate of Section 21, sub-clause (i) of the Act, whereby no notification had been issued in the official Gazette as regards appointment of the petitioner to the post of Chairman of the Board, the order dated 21.3.2012, Annexure-P3, cannot be construed as a valid appointment on the post of Chairman, Punjab State Board of Technical Education and Industrial Training in the light of Section 21 of the Act. Having held so, the impugned order dated 20.4.2012, Annexure-P4, cannot be construed as an order of removal so as to attract the protection envisaged, in terms of Section 21(5) of the Act.

16. The plea of estoppel raised by the petitioner is also without merit. Once the statute requires a particular act to be done in a particular manner and it is found that the Government has not complied with the mandatory requirement of law, then it cannot be held that notwithstanding such non-compliance still the same would constitute a ''promise'' or a ''representation'' for the purpose of invoking the rule of promissory/equitable estoppel. Even such plea as raised by the petitioner came to be dealt with and examined by the Hon''ble Apex Court in I.T.C. Bhadrachalam Paper-boards (supra) and it was held in the following terms:--

Sri Sorabjee next contended that even if it is held that the publication in the Gazette is mandatory yet G.O. Ms. No. 201 can be treated as a representation and a promise and inasmuch as the appellant had acted upon such representation to his detriment, the Government should not be allowed to go back upon such representation. It is submitted that by allowing the Government to go back on such representation, the appellant will be prejudiced. Learned counsel also contended

that where the Government makes a representation, acting within the scope of its ostensible authority, and if another person acts upon such representation, the Government must be held to be bound by such representation and that any defect in procedure or irregularity can be waived so as to render valid which would otherwise be invalid. Counsel further submitted that allowing the Government to go back upon its promise contained in G.O. Ms. No. 201 would virtually amount to allowing it to commit a legal fraud. For a proper appreciation of this contention, it is necessary to keep in mind the distinction between an administrative act and an act done under a statute. If the statute requires that a particular act should be done in a particular manner and if it is found, as we have found hereinbefore, that the act done by the Government is invalid and ineffective for non-compliance with the mandatory requirements of law, it would be rather curious if it is held that notwithstanding such non-compliance, it yet constitutes a "promise" or a "representation" for the purpose of invoking the rule of promissory/equitable estoppel. Accepting such a plea would amount to nullifying the mandatory requirements of law besides providing a licence to the Government or other body to act ignoring the binding provisions of law. Such a course would render the mandatory provisions of the enactment meaningless and superfluous. Where the field is occupied by an enactment, the executive as to act in accordance therewith, particularly where the provisions are mandatory in nature. There is no room for any administrative action or for doing the thing ordained by the statute otherwise than in accordance therewith. Where, of course, the matter is not governed by a law made by a competent Legislature, the executive can act in its executive capacity since the executive power of the State extends to matters with respect to which the Legislature of a State has the power to make laws (Article 162 of the Constitution). The proposition urged by the learned counsel for the appellant falls foul of our constitutional scheme and public interest. It would virtually mean that the rule of promissory estoppel can be pleaded to defeat the provisions of law whereas the said rule, it is well-settled, is not available against a statutory provision. The sanctity of law and the sanctity of the mandatory requirement of the law cannot be allowed to be defeated by resort to the rules of estoppel. None of the decisions cited by the learned counsel say that where an act is done in violation of a mandatory provision of a statute, such act can still be made a foundation for invoking the rule of promissory/equitable estoppel. Moreover, when the Government acts outside its authority, as in this case, it is difficult to say that it is acting within its ostensible authority. If so, it is also not permissible to invoke the principle enunciated by the Court of Appeal in Wells v. Minister of Housing and Local Government ((1967) 2 All ER 1041).

17. The reliance placed by the petitioner in the case of Chandigarh Administration through the Director Public Instructions (Colleges), Chandigarh Vs. Usha Kheterpal Waie and Others, is wholly misplaced. Therein, Draft Rules had been framed and published in the public Gazette. However, such Rules had not been notified by the

President in terms of Article 309 of the Constitution of India. Nevertheless, the qualifications prescribed under such rules had been held to be valid construing the same in the nature of administrative instructions issued in the exercise of executive powers in the absence of any other rules governing the matter. In the facts of the present case, the appointment of a person as a Chairman of the Board is clearly covered by a statutory provision. The mandate thereof shall govern.

18. The judicial precedents in the case of United Bank of India Vs. Naresh Kumar and others, as also Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh and Another,) would also have no applicability to the facts of the present case. In the aforenoticed judicial precedents, it was the non-compliance with a procedural requirement relating to pleadings, memorandum of appeal/application/petition for relief that had been held to not entail automatic dismissal or rejection subject to the rider that unless the relevant statute or rule so mandates.

19. For the reasons recorded above, I find no infirmity in the impugned order dated 20.4.2012, Annexure-P4, whereby the petitioner stood transferred and posted as Financial Commissioner (Appeals-1).

20. There is one more aspect of the matter which would require notice. During the pendency of the present writ petition, an order dated 29.6.2012 came to be passed by the Department of Personnel, Government of Punjab and the same read in the following terms:--

GOVERNMENT OF PUNJAB DEPARTMENT OF PERSONNEL
(I.A.S. BRANCH)

ORDER OF THE GOVERNOR OF PUNJAB

Consequent upon the superannuation of Shri B.K. Srivastava, IAS on 30.6.2012, S. Sarwan Singh Channy, IAS, Principal Secretary, Cultural Affairs, Archives, Archaeology and Museums and in addition Principal Secretary, Technical Education and Industrial Training, Punjab will also hold the additional charge of the post of Chairman, Punjab State Board of Technical Education and Industrial Training, in addition to his present assignments, till further orders.

These orders will be subject to the orders of Hon''ble Punjab and Haryana High Court in CWP No. 7332 of 2012, Sh. B.K. Srivastava, IAS v. State of Punjab.

Dated, Chandigarh
The 29th June, 2012

RAKESH SINGH
Chief Secretary to the Government of Punjab

21. In terms thereof, the date of superannuation of the petitioner i.e. 30.6.2012 had been clearly noticed and consequent thereupon, Mr. S.S. Channy, IAS had been directed to hold the additional charge of the post of Chairman, Punjab State Board

of Technical Education and Industrial Training. The petitioner filed CM No. 8991 of 2012 for amendment of the writ petition so as to impugn such order dated 29.6.2012. However, for reasons best known to the petitioner himself, on 17.7.2012 the petitioner having appeared in person made a statement before this Court that he does not wish to press CM No. 8991 of 2012 whereby amendment of the writ petition had been sought so as to impugn the order dated 29.6.2012 and, accordingly, in terms of his own statement, the CM had been dismissed as withdrawn.

22. The petitioner having confined his grievance only as regards the order of transfer dated 20.4.2012, Annexure-P4, and thereafter having chosen not to impugn the subsequent order dated 29.6.2012 whereby the charge of the post of Chairman was sought to be vested with Mr. S.S. Channy, IAS upon his superannuation i.e. with effect from 30.6.2012 has also weighed with this Court while declining relief to him.

23. For the reasons recorded above, there is no merit in the petition. Petition is dismissed. All pending Civil Misc. applications shall also stand disposed of.