(2007) 09 AHC CK 0179

Allahabad High Court

Case No: None

Indian Council of Agricultural Research		APPELLANT
	Vs	
Central Administrative Tribunal, Allahabad Bench and Pankaj Kodesia		RESPONDENT

Date of Decision: Sept. 27, 2007

Acts Referred:

- Constitution of India, 1950 - Article 14, 16

Citation: (2008) 5 AWC 5067 : (2008) 1 UPLBEC 18

Hon'ble Judges: B.S. Chauhan, J; Arun Tandon, J

Bench: Division Bench

Final Decision: Allowed

Judgement

B.S. Chauhan, J.

This is a strange case where respondent No. 2 who could by no means be eligible for submitting the application for a post being admittedly overaged by several years and there could be no relaxation of age in his case, succeeded before the Central Administrative Tribunal, only on the ground that while passing the order of termination principle of natural justice had not been observed.

2. This writ petition has been filed challenging the impugned judgment and order dated dated 23.05.2007 (Annex.7) passed by the learned Central Administrative Tribunal, Allahabad Bench, Allahabad (hereinafter called the ''Tribunal''), by which the Original Application No. 1128 of 2006 filed by respondent No. 2, Pankaj Kodesia, has been allowed, placing reliance upon the judgment rendered in Original Application No. 1250 of 2006, Anuragh Kumar Johri v. Union of India and Ors., which was allowed only on the ground of non-observance of principles of natural justice.

3. The facts and circumstances giving rise to this case are that the petitioners issued an advertisement dated 5th November, 2005 for appointment on various posts as mentioned in the advertisement, including one post of Security Supervisor. The eligibility for the post of Security Supervisor was that the candidate should possess Senior Secondary Certificate or the qualification equivalent thereto from a recognised Board of education; he should be between the age limit of 18-27 years as on 01.08.2005, which could be relaxed in the case of candidates belonging to SC/ST and OBC and Ex-serviceman, as per rules. The advertisement further provided that preference would be given to Ex-serviceman and persons having professional qualifications of courses like Fire Fighting maintenance of fire fighting equipments, maintenance of arms and ammunition etc. from Government recognised Institutes. The said post was to carry the Pay Scale of Rs. 45,00-125-7,000 plus usual allowances.

4. The respondent No. 2, who belongs to general category, applied for the said post and was selected. Thereafter, he was offered appointment vide appointment order dated 15/17.04.2006 (Annexure A-7 to the Original Application). In the said appointment order, it was clearly indicated that his appointment was made in terms of conditions laid down in Office Memorandum No. F.1-4/Estt./Rectt./2005/2784 dated 31.03.2006. The date of birth of the petitioner, in the said appointment order dated 15/17.04.2006 has been recorded as 31.03.1975. It appears from the record that some enquiry was conducted with regard to the appointments made in pursuance to the aforesaid advertisement by a Committee consisting of three Members of Indian Council of Agricultural Research during the period Shri Rajveer Singh, was the Director, Central Avian Research Institute, Izatnagar, Bareilly, U.P., and it surfaced that large number of irregularities had been committed including appointment of his daughter, son-in-law and relatives of other officials of the said Institution. Out of total eight appointments made, 6 persons were sons/daughter/son-in-law of the Director, Senior Scientist or other employees of the Institute and out of remaining two one was overage and the other appointment was made against an unadvertised post. All such persons were working on probation. After examining the investigation report and considering the irregularities committed In these appointments, the services of all such candidates including the respondent No. 2 were terminated applying the provisions of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965 (hereinafter called the ''Rules of 1965''). The said order was challenged by the respondent No. 1 by filing Original Application before the learned Tribunal, which has been allowed, as explained above, placing reliance upon the judgment in Original Application No. 1250 of 2006, Anuragh Kumar Johri v. Union of India and Ors., basically holding that the principles of natural justice have not been complied with. Hence the present writ petition.

5. Large number of issues have been agitated before us by Shri G.K. Singh, learned Counsel appearing for the petitioners and Shri Mahesh Gautam, learned counsel appearing for respondent No. 2, including the issue as to whether a probationer can

be removed from service by applying the Rules of 1965; and as to whether in the facts of this case, principles of natural justice could be Invoked.

6. Shri Gautam, has fairly conceded that the date of birth shown by the respondent No. 2 in the affidavit filed in the Original Application before the learned Tribunal as well as that disclosed in the letter of appointment is correct.

7. The question as to whether the respondent No. 2, being probationer, could be removed from service applying the Rules of 1965 or as to whether in such a fact situation, the principles of natural justice could have any application or not a becomes irrelevant for the reason that respondent No. 2 belongs to the general category and the question of relaxation of age in his case cannot arise in terms of the conditions mentioned in the advertisement. His date of birth is admittedly 31.03.2005 and as per requirement of the advertisement, a prospective candidate must be within the age of 18 to 27 years as an 1st August, 2005 for the post in question. By a simple mathematical calculation, we find that on the said date, the age of the petitioner was about 30 years and six months. Thus, he was not eligible co apply for the post in question. The respondent No. 2 is not in a position to deny this fact and this was the specific case taken by the present petitioners before the Tribunal, as is evident from the pleadings in their counter affidavit filed therein. The Tribunal had not taken note of said vital fact. Therefore, we are of the opinion that the appointment of respondent No. 2 itself was void ab initio, as he was by no means eligible to submit his application for the said post Thus, question of his apoointment could not arise.

8. Shri Mahesh Gautam, learned Counsel appearing for respondent No. 2 submits that under the advertisement preference to the Ex-serviceman and persons having the professional qualifications like courses on Fire Fighting, maintenance of fire fighting equipments, maintenance of arms and ammunition etc., was provided. The petitioner who was having such additional qualifications has therefore been appointed on preferential basis even after it was found that he was overage. We find no force in said submission for the simple reason that there is a clear-cut distinction between the essential eligibility and preference. Eligibility brings a candidate within the zone of consideration. Preference comes when other things are equal amongst two or more eligible candidates securing equal merit.

9. In Sher Singh Vs. Union of India (UOI) and Others, the Hon''ble Supreme Court examined the provisions of Section 47(1) of the Motor Vehicles Act, 1939 providing for preference to the State Transport Undertaking by grant of permit and explained the meaning of ''preference'' as under:

6... The expression ''preference'' amongst others means prior right, advantage, precedence etc. But how would it be possible to give precedence one over the other? It signifies that other things being equal, one will have preference over the others.... Their merits and demerits must be ascertained keeping in view the

requirements of (a) to (f) of Section 47 (1) and after comparing the merits and demerits of both, not with the yardstick of mathematical accuracy but other things being equal, the application of the Undertaking will have preference over others Qualitative and quantitative comparison on broad features of passenger transport facility such as fleet facilities to travelling public and other relevant consideration may be undertaken and after balancing these factors other things being equal, the application of the Undertaking shall be given preference over other applicants. There is no question of eliminating private operators merely because the Undertaking applies for a stage carriage permit under Chap TV.... Competition is the essence of improved commercial service. After ensuring competition in matter of rendering more efficient transport service a public sector Undertaking is assured statutory preference, remember no monopoly, there is no denial of equality guaranteed by Article 14.... That while considering the application for stage carriage permit u/s 47, the private operator has an equal chance to get a permit even on inter-State route if it shows that the Undertaking is either unable to provide efficient and economical service or that the private operator is better equipped to render the same. Preference in this context would mean that other things generally appearing to be qualitatively and quantitatively equal though not with mathematical accuracy, statutory provision will tilt: the balance in favour of the Undertaking....

10. In Executive Officer Vs. E. Tirupalu and others, C.R. Siva Reddy and another, T. Venkateswarlu and another, C. Vani, the Hon''ble Supreme Court held that where rules provide for preference to a particular class of candidates, that preference under the Rules cannot be applied irrespective of the merit of candidates, the inmates have to be given appointment. It means that the merit of the candidates being equal, preference would be given to the inmates of the class which is to be given preferential right and it certainly does not mean an automatic appointment without considering the cases of other candidates. Therefore, even if the rules provide for preferential right, candidates having such subjects would have preferential right only when they compete with other candidates and are found on equal footings, otherwise not.

11. In Government of Andhra Pradesh Vs. P. Dilip Kumar and Another, , the Hon''ble Supreme Court held as under:

The matter may be looked at from another viewpoint. The word ''preference'' as understood in ordinary parlance means preferring or choosing as more desirable, favouring or conferring a prior right. What then is the purpose and object sought to be achieved by the insertion of the preference clause in the rule? There is no doubt that preference v as sought to be granted under Note 1 to post-graduates in the larger interest of the administration. How would the interest of the administration be served by granting preference to post-graduates? It is obvious that it was thought that on account of their higher mental equipment the quality of performance that the State will receive from highly qualified engineers would be

better ana of a high order. In other words the State considered It necessary to strengthen the engineering service by recruiting post-graduates to the extent available so that the State may benefit from their higher educational qualifications and better performance. If this was the objective surely it would not be realized unless post-graduates are treated as a class and given preference en bloc over the graduates.... It is true that notwithstanding the preference rule it is always open to the recruiting agency to prescribe a minimum eligibility qualification with a view to demarcating and narrowing down the field of choice with the ultimate objective of permitting candidate with higher qualifications to enter the zone of consideration. It was, therefore, held that screening a candidate out of consideration at the threshold of the process of selection is neither illegal nor unconstitutional if a legitimate field demarcating the choice by reference to some rationale formula is carved out. Thus the challenge based on Articles 14/16 of the Constitution was repelled.

12. In Secy. (Health) Deptt. of Health and F.W. and Another Vs. Dr. Anita Puri and Others, the question raised before the Supreme Court was answered as follows:

...The question then arises is whether a person holding a M.D.S. qualification is entitled to be selected and appointed as of right, by virtue of the aforesaid advertisement conferring preference for higher qualification? The answer to the aforesaid question must be in the negative. When an advertisement stipulates a particular qualification as the minimum qualification for the post and further stipulates that preference should be given for higher qualification, the only meaning it conveys is that some additional weightage has to be given to the higher qualified candidates. But by no stretch of imagination it can be construed to mean that a higher qualified person automatically is entitled to be selected and appointed. In adjudging the suitability of person for the post, the expert body like Service Commission in the absence of any statutory criteria has the discretion of evolving its mode of evaluation of merit and selection of the candidate. The competence and merit of a candidate is adjudged not on the basis of the qualification he possesses but also taking into account the other necessary factors like career of the candidate throughout his educational curriculum, experience in any filed in which the selection is going to the held, his general aptitude for the job to be ascertained in course of interview, extracurricular activities like sports and other allied subjects, personality of the candidate as assessed in the interview and all other germane factors which the expert tody evolves for assessing the suitability of the Candidate for the post for which the selection is going to be held.

13. The Supreme Court in The Secretary, Andhra Pradesh Public Service Commission Vs. Y.V.V.R. Srinivasulu and Others, dealing with the ssue held as under:

The "preference" envisaged in the Rules, in our view, under the scheme of things and contextually also cannot mean, an absolute en bloc preference akin to reservation or separate and distinct method of selection for them alone. A mere rule of preference meant to give weightage to the additional qualification cannot be

enforced as a rule of reservation or rule of complete precedence.... It is not to be viewed as a preferential right conferred even for taking up their claims for consideration. On the other hand, the preference envisaged has to be given only when the claims of all candidates who are eligible are taken for consideration and when any one or more of them are found equally positioned, by using the additional qualification as a tilting factor, in their favour vis-a-vis others in the matter of actual selection.

Whenever, a selection is to be made on the basis of merit performance involving competition, and possession of any additional qualification or factor is also envisaged to accord preference, it cannot be for the purpose of putting them as a whole lot ahead of others, dehors their intrinsic worth or proven inter se merit and suitability, duly assessed by she competent authority. Preference, in the context of all such competitive scheme of selection would only mean that other things being qualitatively and quantitatively equal, those with the additional qualification have to be preferred. There is no question of eliminating all others preventing thereby even an effective and comparative consideration on merits, by according en bloc precedence in favour of those in possession of additional qualification irrespective of the respective merits and demerits of all candidates to be considered.... The word first has to be construec in the context of even giving preference only in the order and manner indicated therein, inter se among more than one holding such different class of degrees in addition and not to be interpreted vis-a-vis others who do not possess such additional qualification, to completely exclude them en bloc.

14. In State of U.P. and Another Vs. Om Prakash and Others, , after considering the earlier judgments on the issue, the Hon''ble Apex Court held that the word "preference" would mean that when the claims of all candidates who are eligible and who possess the requisite educational qualification prescribed in the advertisement are taken for consideration and when one or more of them are found equally positioned, then only the additional qualification may be taken as a tilting factor, in favour of candidates vis-a-vis others in the merit list prepared by the Commission. But "preference" does not mean en block preference irrespective of inter se merit and suitability.

15. In view of the above, it is evident that the question of any preference to be given will arise only if the person claiming preference stands on equal footings with others, and not otherwise. But first of all he should be eligible for the post, as prescribed by the Authority concerned.

16. In the instant ease, if the petitioner was not eligible being overage, his application ought not to have been considered and thus, his appointment is void. It, therefore, makes no difference as how he has been removed from service.

17. So far as the issue of non-observance of principle of natural justice is concerned, the Hon''ble Supreme Court in State of Uttar Pradesh Vs. Om Prakash Gupta, , has

observed that Courts have to examine whether the non-observance of any statutory provision or principle of natural justice have resulted in deflecting the course or justice.

18. In S.L. Kapoor Vs. Jagmohan and Others, the Hon''ble Supreme Court has held that where from admitted or undisputed fact, only one conclusion is possible and under the law only one course is permissible to be adopted, the Court should not enforce the observance of principles of natural justice for the reason that it would amount to issuing a futile writ.

The aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in the areas not covered by any law validly made. In other words, they do not supplant the law of the land but supplement it.... Whenever a complaint is made before the Court that some principles of natural justice had been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.

19. Therefore, whether the application of principles of natural justice should be applied in a given case, depends upon the facts and circumstances of that case. In case the principles have not been applied, but if even after their observation result would be the same, enforcing the observance of such principles would be a futile exercise, (Vide Khem Chand Vs. The Union of India (UOI)and Others, and Laxmi Shankar Pandey Vs. Union of India and others,

20. In M.C. Mehta v. Union of India and Ors. AIR 1999 SC 253, the Hon''ble Supreme Court observed as under:

It is, therefore, clear that if on the admitted or indisputable factual position, only one conclusion is possible and permissible, the Court need not issue a writ merely because there is violation of the principles of natural justice.

21. In Aligarh Muslim University and Others Vs. Mansoor Ali Khan, the Hon''ble Supreme Court after referring the aforesaid decisions of the Supreme Court in S.L. Kapoor (supra) and M.C. Mehta (supra), observed that if on the admitted or undisputed facts only one view was possible, then any notice or compliance of principles of natural justice does ot make an, difference.

22. In The Chairman, Board of Mining Examination and Chief Inspector of Mines and Another Vs. Ramjee, the Court: has observed that natural justice is not an unruly horse, no lurking landmine, nor a judicial cureall. If fairness is shown by the decision-maker to the man proceeded against the form, features and the fundamentals of such essential procedural propriety being conditioned by the facts and circumstances of each Situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference of the administrative realities and other facters of a given case, can be exasperating. The Courts cannot

look at law in the abstract or natural justice as a mere artefact. Nor can they fit into a rigid mould the concept of reasonable opportunity. If the totality of circumstances satisfiy the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures.

23. In Union of India and Another Vs. Tulsiram Patel and Others, the Hon''ble Supreme Court held:

Though the two rules of natural justice, namely, nemo judex in causa sua and audi alteram partem, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal straitjacket. They are not immutable but flexible.

24. Principles of natural justice must not be stretched too far as held by the Supreme Court in Sohan Lal Gupta (Dead) thr. L.Rs. and Others Vs. Smt. Asha Devi Gupta and Others, Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., and Canara Bank and Others Vs. Shri Debasis Das and Others,

25. In Hira Nath Mishra and Others Vs. The Principal, Rajendra Medical College, Ranchi and Another, , the Supreme Court held that principles of natural justice are not inflexible and may differ in different circumstances. Rules of natural justice cannot remain the same applying to all conditions.

26. The Constitution Bench of the Supreme Court in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., made reference to its earlier decisions and observed:

In A.K. Kraipak and Others Vs. Union of India (UOI) and Others, , it was held that the rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose, there is no reason why, they should not be made applicable to administrative proceedings also especially when it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect than a decision in a quasi-judicial inquiry. It was further observed that the concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on the farts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice has been contravened, the Court has to decide whether the

observance of that rule was necessary for a jast decision on the facts of that case. The rule that inquiry must be held in good faith and without has and not arbitrarily or unreasonably is now induded among the principles of natural justice.

(Emphasis added)

27. In U.P. Junior Doctors'' Action Committee Vs. Dr B. Sheetal Nandwani and Others, , the students had got admission in M.B.B.S. Course by making misrepresentation. The Supreme Court rejected the plea of applicability of the rules of natural justice observing that under the circumstances in which such benefit had been taken by the candidates concerned, do not justify attraction of the said rules by providing them an opportunity of hearing. Even in a case where an applicant may not be responsible for playing fraud, his appointment can, also, be cancelled without affording an opportunity of hearing to him in case the Authority comes to the conclusion that the appointment had been made by playing fraud by the Members of the Selection Committee though the candidate had not played any part/mischief in the said selection

28. In Krishan Yadav and another Vs. State of Haryana and others, the Hon''ble Apex Court observed that when the entire selection was stinking "conceived in fraud and delivered in deceit", individual''s innocence has no place as fraud unravels everything.

29. The ratio laid down by the Hon''ble Supreme Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud by entertaining the petitions on their behalf.

30. Every order passed by the Authority or the Government has to be tested on the touchstone of Doctrine of Prejudice. Unless in a given situation, an aggrieved party makes out a case of prejudice or injustice, some infraction of law would not vitiate the order. (Vide Rajendra Singh Vs. State of Madhya Pradesh and others, State of U.P. Vs. Shatrughan Lal and Another, State of U.P. Vs. Harendra Arora and Another, and Debotosh Pal Choudhary Vs. Punjab National Bank and Others,

31. In Ajit Kumar Nag Vs. General Manager (P.J.), Indian Oil Corporation Ltd., Haldia and Others, , the Hon''ble Supreme Court held hat principles of natural justice must yield to and change with exigencies of situation. They must be confined within their limits and cannot be allowed to run wild.

32. In P.D. Agrawal Vs. State Bank of India and Others, , the Hon''ble Supreme Court observed that the principles of natural justice have, in recent times, undergone a sea change. As the principles of law is that some real prejudice must have been caused to the complainant, the Court has shifted from its earlier concept that even a small violation shall result in order being rendered in nullity. While deciding the said case, reliance had been placed by the Supreme Court upon its earlier judgments in

S.L Kapoor (supra); Viveka Nand Sethi Vs. Chairman, J and K Bank Ltd. and Others, State of U.P. v. Neeraj Awasthi (2006) 1 SCC 66.

33. Therefore, a party has to establish that non-observance of principles of natural justice has caused prejudice to him, in absence of which interference by the Court may not be warranted.

34. In Suresh Pathrella Vs. Oriental Bank of Commerce, the Hon''ble Supreme Court observed that the termination simplicitor of a probationer after holding a summary enquiry to determine only suitability to continue in service, is enough. While deciding the said case, the Hon''ble Apex Court considered its earlier judgments in Samsher Singh Vs. State of Punjab and Another, ; Bishan Lal Gupta Vs. The State of Haryana and Others, ; Anoop Jaiswal Vs. Government of India and Another, and Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others,

35. A similar view has been reiterated by the Hon''ble Supreme Court in Marwar Gramin Bank and Another Vs. Ram Pal Chouhan, and The Secretary, A.P. Social Welfare-Residential Educational Institutions Vs. Sri Pindiga Sridhar and Others, .

36. In Mohd. Sartaj and Anr. v. State of U.P. and Ors. (2006) 7 SCC 315, the Hon''ble Supreme Court considered a similar case where the petitioners-appellants therein had been appointed without being qualified. The Court held as underl:

In view of the basic lack of qualifications they could not have been appointed nor their appoint nents could have been continued. Hence the appellants didi not hold any right over the post and, therefore, no hearing was required before cancellation of their services, In the present case, the cancellation order has been issued within a very short span of time giving no probability of any legitimate expectations to the appellants regarding continuance of their services.

37. In view of the above, it is clear that the respondent No. 2 admittedly was overage and, therefore, was not eligible even to apply for the post what to talk of giving appointment to him. This is not a case where the said respondent had been removed during the period of probation on the ground ot unsuitability. The said respondent cannot be permitted to take any advantage merely on technicalities. The Courts are meant to do substantial justice.

38. More so, it is also settled legal proposition that writ Court should not quash the order if it revives a wrong and illegal order, Vide Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, ; Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others, Mallikarjuna Mudhagal Nagappa and Others Vs. State of Karnataka and Others, and Chandra Singh Vs. State of Rajasthan and Another,

39. In view of the above, if we maintain the order of Tribunal which has set aside the order of termination dated 06.10.2006, an illegal and void order of appointment of

respondent No. 2 would revive, therefore, in order to meet the ends of justice, such a course is not permissible and in view thereof, the petition deserves to be allowed and judgment and order impugned is liable to be set aside.

40. The petition succeeds and is allowed. The judgment and order dated 23.05.2007 (Annex.7) passed by the Tribunal, is set aside.

41. In the facts of the case, there shall be no order as to costs