

(2010) 07 DEL CK 0360

Delhi High Court

Case No: Writ Petition (C) No. 5429 of 1998

Om Prakash Singh and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: July 13, 2010

Acts Referred:

- Constitution of India, 1950 - Article 226, 227

Hon'ble Judges: Valmiki J Mehta, J; Sanjay Kishan Kaul, J

Bench: Division Bench

Advocate: M.P. Raju and Maria, for the Appellant; Saroj Bidawat, for Respondents 1 and 2 and R.K. Saini, for Respondents 4 and 5, for the Respondent

Final Decision: Allowed

Judgement

Valmiki J Mehta, J.

This petition under Articles 226 and 227 of the Constitution of India challenges the Judgment dated 16.9.1998 passed by the Central Administrative Tribunal (for short "CAT"), and by which Judgment, the CAT dismissed the Original Applications (OAs) which were preferred by the present petitioners challenging the seniority list prepared pursuant to impugned order dated 30.11.1995 by respondent No. 3 (Director of Respondent No. 2) in the OA and also respondent No. 2 herein.

2. The facts of the case are that the petitioners were appointed as Senior Translators on the basis of a written examination held on all India basis followed by an interview and medical examination. The appointment of the petitioners were, however, called as ad hoc appointments. Since there was threat of termination of services of the petitioners, OAs were preferred before CAT, being OA Nos. 1917/1988 and 2240/1988, in which a direction was sought to restrain respondents 1 & 2 herein from terminating the services and a further direction was sought for regularization of their services w.e.f. the date of their initial appointment. These OAs were allowed by the CAT vide its order dated 4.3.1994. The operative portion of the order dated

4.3.1994 reads as under:

4. On a consideration of all the circumstances, since the applicants have continued in service for a long duration and interim order has continued to be operative till date and the only infirmity pointed out to resist the claim of the applicants for regularization, was the requirement in the service rules in consultation with the UPSC, we direct the respondents to regularize the services of the applicants in both the OAs w.e.f. the respective dates of their original appointment on ad hoc basis in consultation with the Union Public Service Commission and on evaluation of their Confidential Reports in respect of the period from the dates of their respective appointments within a period of six months from the date of receipt of a copy of this Judgment. No costs.

(emphasis supplied)

3. In implementation of the said order dated 4.3.1994, a fresh provisional seniority list was drawn up. The private respondents being aggrieved by the drawing up of such provisional seniority list in which the present petitioners were placed higher than the private respondents herein, a petition came to be filed before CAT being OA No. 1448/1995. The apprehension expressed by the private respondents herein in this OA was that in view of the provisional seniority list some of these private respondents who were holding higher post of Translation Officer on ad hoc basis would be reverted on the basis of the provisional seniority list prepared pursuant to the order dated 4.3.1994. The Union of India in the said OA No. 1448/1995 took up a categorical stand that the provisional seniority list had been prepared only pursuant to the directions given by CAT in its Judgment dated 4.3.1994. This OA No. 1448/1995 was disposed of by CAT vide its Judgment dated 31.10.1995 by observing that the Union of India should consider the representation of the private respondents herein (applicants in the said OA) after duly considering all aspects including the representations as also the earlier Judgments.

4. This led to passing of the impugned order dated 30.11.1995 by the respondent No. 3, which denied the benefit to the present petitioners of the Judgment dated 4.3.1994 as per which the present petitioners were to be regularized from the respective dates of their original appointment. This order dated 30.11.1995 placed the private respondents senior to the present petitioners.

5. The present petitioners, therefore, preferred the subject OAs which resulted in passing of the impugned Judgment dated 16.9.1998. By the impugned Judgment, CAT has dismissed the OAs by holding that the second Judgment of the CAT dated 31.10.1995, in fact, appeared to have thrown open the issues, once again, which had been concluded by the first Judgment dated 4.3.1994 of CAT. We reproduce below para 13 of the present impugned Judgment dated 16.9.1998, which holds so, as under:

13. We are of the view that the order of the Tribunal dated 31.10.95 had opened the gates for a review of the provisional seniority list and the principles on which it was based. In accordance with the statements made by the rival parties, it was only a provisional seniority list. Objections were invited for the same. It was open to review and correction. There was nothing final about that seniority list. The applicants have already filed a representation and this Tribunal by its order dated 31 .10.1995 gave complete freedom to the respondents to consider all judicial authorities and objections of the direct recruits and departmental promotes as well as the case law cited. Accordingly the basic principle relied upon is that the date of commencement of seniority is from the date the UPSC has given its approval. That date for the applicants was 16.9.94. Approval of the UPSC is a pre-condition for a regular appointment and is not merely a procedural irregularity. The appointment itself becomes ad hoc and stop gap for a limited period without the approval of the UPSC. Regularization and seniority are two different concepts. It would be an inappropriate imputation that the UPSC regularized their services with effect from the date of their initial appointment when it gave its approval only on 16.9.94. Even if it had done so, as was argued, UPSC must be held to have exceeded in its jurisdiction. While considering seniority, competing claims of various streams have to have adjudged and adjudicated. It is in this view of the matter that we find Hague's case to be more relevant. In that case also the petitioners worked as ad hoc employees by way of stop gap arrangement. In accordance with the court's order passed in 1987-99, they were regularized in service and appointed as Assistant Medical Officers. It was only by the orders of the court that the appointments were regularized by a special procedure laid down by the court. The Supreme Court had to contend with three classes: namely, the outsider direct recruits, the in service direct recruits and the ad hoc employees. The Supreme Court held that the seniority of the direct recruits both outsiders and insiders, have to determine according to the dates of their regular appointment through the UPSC and the applicants to be placed in the seniority list after the direct recruits recruited till date.

6. Before us, the counsel for the petitioners has emphasized three basic issues: - (i) the Judgment dated 4.3.1994, admittedly inter parties is res judicata and it was not open to respondent No. 3 to disturb the finality of that Judgment by relying upon the observations in the subsequent Judgment dated 31.10.1995. It was further contended that by the impugned Judgment CAT has wholly misunderstood the operative portion of the Judgment dated 31.10.1995 by holding that the Judgment dated 30.11.1995 had opened the gates for review of the provisional seniority list, meaning thereby, the Judgment dated 4.3.1994 was not res judicata; (ii) it was contended that the direction in the Judgment dated 4.3.1994 so far as the petitioners were concerned was only for consultation with UPSC and therefore, the CAT erred in taking this issue of consultation with UPSC as a retrospective appointment of the petitioners without any basis because the consistent stand of the Union of India has been that the Judgment dated 4.3.1994 requiring

regularization of the petitioners from their initial dates of appointments was being implemented by drawing up the provisional seniority list pursuant thereto and which was not upset by the subsequent Judgment dated 31.10.1995; and (iii) it was finally argued that the appointment of the petitioners was though called as ad hoc, however, the same appointments were not such which could have been said to be illegal because as per the relevant recruitment rules appointment to the post was done by conduct of examinations and which examination as per relevant rule was not required to be conducted by the UPSC and nor were the appointments to be with "prior" consultation with the UPSC. The relevant Rule pertaining to the petitioners appointment which is relied upon reads as under:

Consultation with the UPSC necessary while making direct recruitment.

7. The counsel for the private respondents, in reply, argued that the subsequent Judgment dated 31.10.1995, in fact and in substance had set aside the finality of the Judgment dated 4.3.1994 and therefore it was permissible for respondent No. 3 to not act as per the directions in the Judgment dated 4.3.1994 and thereby respondent No. 3 validly denied the benefit of regularization of the services to the present petitioners from the dates of their initial appointments. It was also secondly contended, a stand which was supported by the counsel appearing for the Union of India, that the appointments of the petitioners is illegal because the examinations in this case, pursuant to which the petitioners were appointed was not a valid and legal examination because the examination ought to have been conducted by the UPSC but such examination was not conducted by the UPSC and it was done only by respondents 1 & 2 herein.

8. We have given our anxious consideration to the arguments of the counsels for the parties.

9. We are of the view that the impugned Judgment deserves to be set aside and the contentions raised by learned Counsel for the petitioners are correct. In our opinion, there are two basic issues which, if addressed, would result in the impugned order being set aside and the present petition being allowed:

i. The first issue is that the Judgment dated 4.3.1994 inter parties whereby the appointment of the petitioners were regularized w.e.f. the date of their respective dates of original appointments is not an issue whose finality can be challenged in any manner. This Judgment, admittedly became final, and there was no challenge to this Judgment either by the private respondents herein or by the Union of India, who were parties to the said Judgment. Further, in our opinion, when the order dated 31.10.1995 asked the Union of India to consider the representations of the private respondents herein it cannot be said that by that Judgment the finality of the Judgment dated 4.3.1994 could at all have been affected. Neither does the Judgment dated 31.10.1995 reflect so nor can any law permits a Co-ordinate Bench of CAT in collateral proceedings to set aside an earlier binding Judgment given by a different

Bench earlier of the same Tribunal. Thus, both the respondent No. 3 as also CAT in the impugned Judgment, has fallen into a grave error by holding that by the order of the Tribunal dated 30.11.1995 gates have been opened for review of a provisional seniority list by ignoring the first Judgment dated 4.3.1994. By observing so it is quite clear that without using the technical expression *res judicata*, respondent No. 3 and CAT by the impugned Judgment are in effect diluting and affecting the finality of the principle of *res judicata* qua the Judgment dated 4.3.1994. The findings and observations of the Tribunal in the impugned Judgment are, therefore, totally against the record and the facts of the case and are, therefore, set aside. In our opinion, there is no reason to hold that the finality of the Judgment dated 4.3.1994 has been in any manner affected by the subsequent Judgment dated 31.10.1995 of the Tribunal, and therefore, it was not permissible for the Tribunal by the impugned Judgment to hold so.

ii. The second basic issue is that the subject rule, as already reproduced above, does not require that the examination should be conducted by the UPSC. Not only this, the counsels appearing both for the Union of India and the private respondents have failed to show us any pleading either in this Court or before the Tribunal that the examination conducted by respondent No. 2 herein can be said to be violative of the Rules because the examination, in fact, ought to have been conducted by the UPSC and not by respondent No. 2 herein. It needs to be borne in mind at this stage that the labeling of the appointments of the petitioners as *ad hoc* cannot be strictly said to be a pick and choose method because appointments of the petitioners was through regular All India Examination and they were appointed after interviews were conducted and their having cleared the medical examination. Further, the requirement of the Rule was not with regard to any "prior" consultation with the UPSC but only consultation with the UPSC. It is for this reason that the operative portion of the first order dated 4.3.1994 directed regularization of the appointments of the petitioners, subject to "consultation" With the UPSC. UPSC has not denied the benefit to the petitioners for regularization in employment from the dates of their initial appointment, being fully in the know of the fact that only a consultation process with the UPSC was not carried out there being no requirement of "prior" consultation. U PSC cannot be said to have given "retrospective appointments" as per its actions because UPSC was only acting in accordance with the mandate of the Judgment of the CAT dated 4.3.1994 and as per Rules.

10. We are persuaded to exercise our powers under Article 226 of the Constitution of India in the facts of the present case because if the impugned Judgment is allowed to stand grave injustice will be caused to the petitioners who would be denied benefits and seniority which flows from the binding nature of the Judgment dated 4.3.1994 inter parties which had become final as neither the Union of India nor the private respondents have ever challenged the same in any manner whatsoever.

11. In view of the above the impugned Judgment dated 16.9.1998 and the impugned order dated 30.11.1995 are set aside. The appointment of the petitioners shall be taken pursuant to the Judgment dated 4.3.1994 w.e.f. the respective dates of their original appointment and as also so approved by the UPSC. A fresh seniority list in accordance with our present Judgment be now drawn up within a period of two (2) months from today.

12. The petition is, therefore, allowed leaving the parties to bear their own costs.