East Coast Railway & Anr vs Mahadev Appa Rao & Ors on 7 July, 2010

Equivalent citations: AIR 2010 SUPREME COURT 2794, 2010 AIR SCW 4210, 2010 LAB. I. C. 3096, 2011 (2) AIR JHAR R 31, 2010 (3) AIR KANT HCR 692, (2010) 127 FACLR 880, (2010) 5 ALL WC 4572, (2010) 5 ANDHLD 16, (2010) 8 MAD LJ 194, 2010 (6) SCALE 432, 2010 (7) SCC 678, (2010) 5 SERVLR 563, (2011) 1 SERVLJ 101, (2010) 3 LAB LN 587, (2010) 3 ESC 393, (2010) 3 SCT 505, (2010) 6 SCALE 432

Bench: T.S. Thakur, Aftab Alam

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICITION

CIVIL APPEAL NO. 4964 OF 2010
ARISING OUT OF SLP (CIVIL) NO.27153 OF 2008

East Coast Railway & Anr. ...Appellants

Versus

Mahadev Appa Rao & Ors. ...Respondents

WITH

CIVIL APPEAL NOS. 4965-4966 OF 2010
ARISING OUT OF SLP (CIVIL) NOS.27155-27156 OF 2008

K. Surekha ...Appellant

Versus

Mahadev Appa Rao & Ors. ...Respondents

JUDGMENT

1. Leave granted.

2. These appeals arise out of an order passed by the High Court of Andhra Pradesh at Hyderabad whereby Writ Petition No.15196 of 2007 has been allowed and the order passed by the Central Administrative Tribunal, Hyderabad Bench in OA No.748 of 2006 set aside.

3. Senior Divisional Personnel Officer, East Coast Railway, Visakhapatnam, issued a notification proposing to conduct a written/practical typewriting test for filling up the vacant posts of Chief Typists in the pay-scale of Rs.5500-9000. In response as many as 12 candidates appeared in the test held on 30th October, 2006 the result whereof was announced on 22nd November, 2006. Some of the candidates who failed to qualify made a representation complaining about the manner in which the test was conducted alleging that defective typewriting machines provided to them placed them at a disadvantage vis-a-vis candidates declared successful. The successful candidates also appear to have made a representation impressing upon the authorities to go ahead with the interviews and to complete the selection process expeditiously. Since that did not happen, OA No.748 of 2006 was filed before the CAT by one of the successful candidates for a direction to respondent to proceed with the selection. In the meantime the Divisional Manager of the appellant-Railways issued an order on 14th of December, 2006 cancelling the typewriting test conducted on 30th October, 2006. By another notification of even date a fresh typewriting test was notified to be held on 16th December, 2006 for all the 12 in-service candidates who had appeared in the earlier test. By an interim order passed by the Tribunal the railway authorities were allowed to conduct the proposed second test in which the applicant before the Tribunal could also appear. The applicant was at the same time permitted to amend the prayer in the OA to assail the order passed by the Divisional Manager of the Railways cancelling the earlier test.

4. It is not in dispute that pursuant to the said notification and the order passed by the Tribunal a fresh test was indeed conducted in which all the eligible in-service candidates appeared although the result of the said test has not been announced so far. The Tribunal eventually dismissed OA No.748 of 2006 holding that the test earlier conducted was rightly cancelled inasmuch as the candidates were made to take the test in batches and no option was given to them to bring their own typewriters. The Tribunal further held that although some of the candidates had made representation as early as on 23rd October, 2006 seeking permission to use computers their request was not considered. All this according to the Tribunal justified the cancellation of the typewriting test held on 30th October and the issue of a notification for a fresh test.

5. Aggrieved by the order passed by the Tribunal Shri Mahadev Appa Rao declared successful in the first test filed Writ Petition No.15196/2007 before the High Court of Andhra Pradesh which has by the order impugned in the present appeal allowed the same and set aside the order passed by the Tribunal as also the order by which the earlier test was cancelled. The High Court further directed the respondent to proceed with the selection process pursuant to notification dated 18th October, 2006 and the practical test conducted on 30th October, 2006 in terms thereof. The present appeals, as noted above, assail the correctness of the said order.

6. We have heard learned counsel for the parties at some length and perused the record. The High Court has found fault with the order cancelling the earlier test primarily because the same was unsupported by any reasons whatsoever. The said order is in the following words:

> "The practical test conducted to Hd. Typists in scale Rs.5000-8000 (RSRP) on 30.10.2006 in connection with the selection of Chief Typist in scale Rs.5500-9000 (RSRP) to form a panel of 4 UR + 1 SC and the results published vide O.A. No.

Estt/Pers/52/2006, Dt. 22.12.2006 are hereby cancelled."

7. The High Court was also of the view that no reasons for cancellation of the test having been recorded even on the file contemporaneously maintained for that purpose, the same could not be supplied in the affidavit filed in reply to the Writ Petition challenging the said order, especially when the cancellation of the test was not according to the High Court necessitated by any irregularity in the conduct of the test or any mala fides vitiating the same. In the absence of any such infirmity the cancellation of the examination was arbitrary and unsustainable, declared the High Court.

8. There is no quarrel with the well-settled proposition of law that an order passed by a public authority exercising administrative/executive or statutory powers must be judged by the reasons stated in the order or any record or file contemporaneously maintained. It follows that the infirmity arising out of the absence of reasons cannot be cured by the authority passing the order stating such reasons in an affidavit filed before the Court where the validity of any such order is under challenge. The legal position in this regard is settled by the decisions of this Court in Commissioner of Police, Bombay v.

Gordhandas Bhanji (AIR 1952 SC 16) wherein this Court observed :

> "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. "

9. Reference may also be made to the decision of this Court in Mohinder Singh Gill and Anr. v. Chief Election Commissioner, New Delhi and Ors. (1978) 1 SCC 405 where this Court reiterated the above principle in the following words:

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

10. Later decisions of this Court in R. Vishwanatha Pillai v. State of Kerala & Ors. (2004) 2 SCC 105 and Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai & Ors. (2005) 7 SCC 627 have re-stated the legal position settled by the earlier two decisions noticed above.

11. Relying upon the decision of this Court in Union of India and Ors. v. Tarun K. Singh and Ors. (2003) 11 SCC 768, Mr. Malhotra all the same argued that the challenge to the order cancelling the test was legally untenable as no candidate had any legally enforceable right to any post until he was

selected and an order of appointment issued in his favour. Cancellation of the selection process on the ground of malpractices could not, therefore, be subjected to judicial scrutiny before a Writ Court, at the instance of a candidate who had not even found a place in the select list.

12. A Constitution Bench of this Court in Shankarsan Dash v. Union of India (1991) 3 SCC 47 had an occasion to examine whether a candidate seeking appointment to a civil post can be regarded to have acquired an indefeasible right to appointment again such post merely because his name appeared in the merit list of candidates for such post. Answering the question in the negative this Court observed:

> "It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in the State of Haryana v. Subhash Chander Marwaha 1974 (3) SCC 220;
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> Neelima Shangla (Miss) v. State of Haryana 1986(4) SCC 268 or Jitender Kumar v. State of Punjab 1985 (1) SCC 122."

13. It is evident from the above that while no candidate acquires an indefeasible right to a post merely because he has appeared in the examination or even found a place in the select list, yet the State does not enjoy an unqualified prerogative to refuse an appointment in an arbitrary fashion or to disregard the merit of the candidates as reflected by the merit list prepared at the end of the selection process. The validity of the State's decision not to make an appointment is thus a matter which is not beyond judicial review before a competent Writ court. If any such decision is indeed found to be arbitrary, appropriate directions can be issued in the matter.

14. To the same effect is the decision of this Court in Union Territory of Chandigarh v. Dilbagh Singh and Ors. (1993) 1 SCC 154, where again this Court reiterated that while a candidate who finds a place in the select list may have no vested right to be appointed to any post, in the absence of any specific rules entitling him to the same, he may still be aggrieved of his non-appointment if the authority concerned acts arbitrarily or in a malafide manner. That was also a case where selection process had been cancelled by the Chandigarh Administration upon receipt of complaints about the unfair and injudicious manner in which the select list of candidates for appointment as conductors in CTU was prepared by the Selection Board. An inquiry got conducted into the said complaint proved the

allegations made in the complaint to be true. It was in that backdrop that action taken by the Chandigarh Administration was held to be neither discriminatory nor unjustified as the same was duly supported by valid reasons for cancelling what was described by this Court to be as a "dubious selection".

15. Applying these principles to the case at hand there is no gainsaying that while the candidates who appeared in the typewriting test had no indefeasible or absolute right to seek an appointment, yet the same did not give a licence to the competent authority to cancel the examination and the result thereof in an arbitrary manner. The least which the candidates who were otherwise eligible for appointment and who had appeared in the examination that constituted a step in aid of a possible appointment in their favour, were entitled to is to ensure that the selection process was not allowed to be scuttled for malafide reasons or in an arbitrary manner. It is trite that Article 14 of the Constitution strikes at arbitrariness which is an anti thesis of the guarantee contained in Articles 14 and 16 of the Constitution. Whether or not the cancellation of the typing test was arbitrary is a question which the Court shall have to examine once a challenge is mounted to any such action, no matter the candidates do not have an indefeasible right to claim an appointment against the advertised posts.

16. What then is meant for arbitrary/arbitrariness and how far can the decision of the competent authority in the present case be described as arbitrary? Black's Law Dictionary describes the term "arbitrary" in the following words:

> "1. Depending on individual discretion; specif., determined by a judge rather than by fixed rules, procedures, or law. 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact. This type of decision is often termed arbitrary and capricious."

17. To the same effect is the meaning given to the expression "arbitrary" by Corpus Juris Secundum which explains the term in the following words:

> "ARBITRARY - Based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; capricious; exercised according to one's own will or caprice and therefore conveying a notion of a tendency to abuse possession of power; fixed or done capriciously or at pleasure, without adequate determining principle, nonrational, or not done or acting according to reason or judgment; not based upon actuality but beyond a reasonable extent; not founded in the nature of things; not governed by any fixed rules or standard; also, in a somewhat different sense, absolute in power, despotic, or tyrannical; harsh and unforbearing. When applied to acts, "arbitrary" has been held to connote a disregard of evidence or of the proper weight thereof; to express an idea opposed to administrative, executive, judicial, or legislative discretion; and to imply at least an element of bad faith, and has been compared with "willful".

18. There is no precise statutory or other definition of the term "arbitrary". In Kumari Shrilekha Vidyarthi and Ors. v. State of U.P. and Ors. (AIR 1991 SC 537), this Court explained that the true import of the expression "arbitrariness" is more easily visualized than precisely stated or defined and that whether or not an act is arbitrary would be determined on the facts and circumstances of a given case. This Court observed:

"The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that `be you ever so high, the laws are above you'. This is what men in power must remember, always."

19. Dealing with the principle governing exercise of official power Prof. De Smith, Woolf & Jowell in their celebrated book on "Judicial Review of Administrative Action"

> emphasized how the decision-maker invested with the wide discretion is expected to exercise that discretion in accordance with the general principles governing exercise of power in a constitutional democracy unless of course the statute under which such power is exercisable indicates otherwise. One of the most fundamental principles of rule of law recognized in all democratic systems is that the power vested in any competent authority shall not be exercised arbitrarily and that the power is exercised that it does not lead to any unfair discrimination. The following passage from the above is in this regard apposite:
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> "We have seen in a number of situations how the scope of an official power cannot be interpreted in isolation from general principles governing the exercise of power in a constitutional democracy. The courts presume that these principles apply to the exercise of all powers and that even where the decision-maker is invested with wide discretion, that discretion is to be exercised in accordance with those principles unless Parliament clearly indicates otherwise. One such principle, the rule of law, contains within it a number of requirements such as the right of the individual to access to the law and that power should not be arbitrarily exercised. The rule of law above all rests upon the principle of legal certainty, which will be considered here, along with a principle which is partly but not wholly contained within the rule of law, namely, the principle of equality, or equal treatment without unfair discrimination."

20. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed

by a public authority must disclose due and proper application of mind by the person making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable.

21. In the instant case the order passed by the competent authority does not state any reasons whatsoever for the cancellation of the typing test. It is nobody's case that any such reasons were set out even in any contemporaneous record or file. In the absence of reasons in support of the order it is difficult to assume that the authority had properly applied its mind before passing the order cancelling the test.

22. Mr. Malhotra's contention that the order was passed entirely on the basis of the complaint received from the unsuccessful candidates is also of no assistance. The fact that some representations were received against the test or the procedure followed for the same could not by itself justify cancellation of the test unless the authority concerned applied its mind to the allegations levelled by the persons making the representation and came to the conclusion that the grievance made in the complaint was not without merit. If a test is cancelled just because some complaints against the same have been made howsoever frivolous, it may lead to a situation where no selection process can be finalized as those who fail to qualify can always make a grievance against the test or its fairness. What is important is that once a complaint or representation is received the competent authority applies its mind to the same and records reasons why in its opinion it is necessary to cancel the examination in the interest of purity of the selection process or with a view to preventing injustice or prejudice to those who have appeared in the same. That is precisely what had happened in Dilbagh Singh's case (supra). The examination was cancelled upon an inquiry into the allegations of unjust, arbitrary and dubious selection list prepared by the Selection Board in which the allegations were found to be correct. Even in Tarun K. Singh's case (supra) relied upon by Mr. Malhotra an inquiry into the complaints received against the selection process was conducted no matter after the cancellation of the examination. This Court in that view held that since the selection process was vitiated by procedural and other infirmities cancellation thereof was perfectly justified.

23. That is not, however, the position in the instant case. The order of cancellation passed by the competent authority was not preceded even by a prima facie satisfaction about the correctness of the allegations made by the unsuccessful candidates leave alone an inquiry into the same. The minimum that was expected of the authority was a due and proper application of mind to the allegations made before it and formulation and recording of reasons in support of the view that the competent authority was taking. There may be cases where an enquiry may be called for into the allegations, but there may also be cases, where even on admitted facts or facts verified from record or an enquiry howsoever summary the same maybe, it is possible for the competent authority to take a decision, that there are good reasons for making the order which the authority eventually makes. But we find it difficult to sustain an order that is neither based on an enquiry nor even a prima facie view taken upon a due and proper application of mind to the relevant facts. Judged by that standard the order

of cancellation passed by the competent authority falls short of the legal requirements and was rightly quashed by the High Court.

24. We may hasten to add that while application of mind to the material available to the competent authority is an essential pre-requisite for the making of a valid order, that requirement should not be confused with the sufficiency of such material to support any such order. Whether or not the material placed before the competent authority was in the instant case sufficient to justify the decision taken by it, is not in issue before us. That aspect may have assumed importance only if the competent authority was shown to have applied its mind to whatever material was available to it before cancelling the examination. Since application of mind as a thresh-hold requirement for a valid order is conspicuous by its absence the question whether the decision was reasonable having regard to the material before the authority is rendered academic. Sufficiency or otherwise of the material and so also its admissibility to support a decision the validity whereof is being judicially reviewed may even otherwise depend upon the facts and circumstances of each case. No hard and fast rule can be formulated in that regard nor do we propose to do so in this case. So also whether the competent authority ought to have conducted an enquiry into or verification of the allegations before passing an order of cancellation is a matter that would depend upon the facts and circumstances of each case. It may often depend upon the nature, source and credibility of the material placed before the authority. It may also depend upon whether any such exercise is feasible having regard to the nature of the controversy, the constraints of time, effort and expense. But what is absolutely essential is that the authority making the order is alive to the material on the basis of which it purports to take a decision. It cannot act mechanically or under an impulse, for a writ court judicially reviewing any such order cannot countenance the exercise of power vested in a public authority except after due and proper application of mind. Any other view would amount to condoning a fraud upon such power which the authority exercising the same holds in trust only to be exercised for a legitimate purpose and along settled principles of administrative law.

25. The next question then is whether the selection should be finalized on the basis of the test held earlier or the matter allowed to be re-examined by the authority in the context of the representation received by it. In our opinion the latter course would be more in tune with the demands of justice and fairness especially when a second test has been conducted in which all the in service candidates have appeared. The result of this examination/test has not, however, been declared so far apparently because of the pendency of these proceedings. If upon due and proper consideration of the representation received from the candidates who were unsuccessful in the first examination, the competent authority comes to the conclusion that the test earlier held suffered from any infirmity or did not give a fair opportunity to all the candidates, it shall be free to pass a fresh order cancelling the said examination after recording such a finding in which event the second test conducted under the directions of the Tribunal would become the basis for the selection process to be finalized in accordance with law. In case, however, the authority comes to the conclusion that the earlier test suffered from no procedural or other infirmity or did not cause any prejudice to any candidate, the second test/examination shall stand cancelled and the process of selection finalized on the basis of the test held earlier. The order passed by the High Court is to that extent modified and the present appeals disposed of leaving the parties to bear their own costs. In order to avoid any delay in the finalization of the process of appointments which have already been delayed, we direct that the

competent authority shall pass an appropriate order on the subject expeditiously but not later than two months from today.

.....J. (AFTAB ALAM) .....J. (T.S. THAKUR) New Delhi July 7, 2010