

Union Of India & Anr vs Narendra Singh on 13 December, 2007

Author: C.K. Thakker

Bench: C.K. Thakker, J.M. Panchal

CASE NO.:

Appeal (civil) 5865 of 2007

PETITIONER:

UNION OF INDIA & ANR.

RESPONDENT:

NARENDRA SINGH

DATE OF JUDGMENT: 13/12/2007

BENCH:

C.K. THAKKER & J.M. PANCHAL

JUDGMENT:

J U D G M E N T ARISING OUT OF SPECIAL LEAVE PETITION (C) NO. 2041 OF 2005 C.K. THAKKER, J.

1. Leave granted.

2. The present appeal is directed against the order dated May 12, 2000 passed by the Central Administrative Tribunal, Jabalpur, Camp Indore (Tribunal for short) in Original Application No. 76 of 1997 and confirmed by the Division Bench of High Court of Madhya Pradesh, Jabalpur (Indore Bench) on August 26, 2004 in Writ Petition No. 1329 of 2000.

3. Brief facts of the case are that the respondent herein was working as Accountant in the Office of the Accountant General, Madhya Pradesh, Branch Office, Bhopal. By an order dated January 1, 1990, he was mistakenly promoted as Senior Accountant (Functional). After about four years, the Department realized that the promotion given to the respondent was erroneous and he was not eligible to be promoted. The mistake was, therefore, sought to be corrected. A notice under Rule 31-A of the Fundamental Rules, 1922 was issued to the respondent informing him that he could not have been promoted as Senior Accountant as he had not passed Departmental Examination of Accountants as required by law. He was, hence, asked to show cause why the promotion given to him erroneously should not be cancelled. By a reply dated February 16, 1994, the respondent contended that he was eligible and qualified for getting promotion and accordingly he was promoted. He also asserted that he was performing his functions and discharging his duties efficiently and there was no occasion to revert him. According to him, there was no need to clear Departmental Examination for Accountants and the notice was required to be discharged.

4. After considering the reply submitted by the respondent, the Principal Accountant General, vide his order dated March 29, 1994, cancelled the promotion. The respondent challenged the cancellation of promotion by filing Original Application No. 275 of 1994 in the Tribunal. The Tribunal, on March 12, 1996, allowed the petition and directed the Authorities to reconsider the case of the respondent.

5. In compliance with the order passed by the Tribunal, the appellant considered the case of the respondent and rejected his prayer. Accordingly, by an order dated June 24, 1996, the promotion was cancelled.

6. The respondent again challenged the order of reversion by approaching the Tribunal and the Tribunal allowed the petition. The order was confirmed by the High Court. The said decision is challenged in the present appeal by the Union of India and the Accountant General.

7. Notice was issued and keeping in view the fact that the respondent was due to retire shortly, the Registry was directed to place the matter for final hearing which was placed before us on December 5, 2007.

8. We have heard learned counsel for the parties.

9. Learned counsel for the appellants submitted that the action taken by the appellant could not be said to be illegal, unlawful or otherwise improper. He stated that the respondent was not qualified to be promoted as Senior Accountant as he had not passed the relevant examination required by law. It was due to mistake on the part of the Department that he was promoted in spite of his ineligibility. The said mistake was, therefore, corrected after issuing notice calling upon the respondent to show cause why the mistake should not be corrected. It was submitted that as per the direction issued by the Tribunal, the case of the respondent was considered and the Department rejected the prayer. The action of the appellant which was in consonance with law could not have been set aside by the Tribunal. By interfering with the said action, the Tribunal had committed an error of law. The High Court confirmed that order. Both the orders, therefore, are liable to be set aside.

10. Learned counsel for the respondent, on the other hand, supported the order passed by the Tribunal and affirmed by the High Court. According to him, the respondent was not required to pass any examination. He had sufficient experience. All those factors were considered by the Department when he was promoted as Senior Accountant. There is no allegation that the respondent had concealed facts or by playing fraud, got the promotion. Even if it is assumed that there was mistake on the part of the Department, the respondent should not suffer. It was further urged that in earlier litigation, directions were issued by the Tribunal, but they had not been complied with. The Comptroller and Auditor General of India ought to have relaxed the condition as to passing of examination. Moreover, the Tribunal has merely directed to consider the case of the respondent and there was no illegality in it. The High Court, therefore, rightly did not interfere with the said order. Finally, it was submitted that the respondent was promoted on January 1, 1990 and thus he has completed about seventeen years of service on the promoted post. He will be retiring within a few days i.e. after the office hours of December 31, 2007. Hence, even if this Court holds that his

promotion was not strictly legal, the Court may not interfere with the said order and allow him to continue on that post for few days more.

11. Having heard learned counsel for the parties, in our opinion, the appeal deserves to be partly allowed. So far as the promotion of the respondent is concerned, it is not in dispute that he was promoted as Senior Accountant (Functional) on January 1, 1990. It is not the allegation of the appellant that the respondent had obtained such promotion by concealing fact or by playing fraud.

12. At the same time, however, in our opinion, the learned counsel for the appellants is right in submitting that the respondent was not eligible and qualified to be promoted to the post of Senior Accountant. In this connection, he invited our attention to Article 148 of the Constitution. Clause (1) of the said Article declares that there shall be a Comptroller and Auditor-General of India who shall be appointed by the President by warrant under his hand and seal. Clause (5) deals with staff of Comptroller and Auditor-General of India and reads thus:

(5) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor-General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-

General.

13. In exercise of the power under Clause (5) of Article 148, the President, after consultation with the Comptroller and Auditor General of India, framed rules known as The Indian Audit and Accounts Department (Senior Accountant) Recruitment Rules, 1988 (hereinafter referred to as the Rules). Rule 3 provides for method of recruitment, age limit, qualifications, etc. of Senior Accountants and reads as under;

3. Method of recruitment, age limit, qualifications etc. The method of recruitment, age limit, qualifications and other matters relating to the said post shall be as specified in columns 5 to 14 of the said schedule.

14. The Schedule to the Rule expressly states that a person may be appointed as Senior Accountant by promotion, failing which by transfer on deputation (Column

11). Column 12 is material and relevant part reads thus:

12. In case of recruitment by promotion / deputation / transfer, grades from which promotion/ deputation/transfer to be made :

Promotion : On seniority basis, subject to rejection or unfit from among Accountants in the grade of Rs.1200-2040, with three year s regular service in the grade having passed the departmental examination for Accountants.

(emphasis supplied)

15. Bare reading of Rule 3 with Schedule thereof makes certain things clear. Firstly, the Rules are framed by the President of India in consultation with the Comptroller and Auditor General of India in exercise of power under Clause (5) of Article 148 of the Constitution. The Rules are thus statutory in nature. Secondly, the Rules provide for mode of appointment to the post of Senior Accountant by promotion, failing which by transfer on deputation. Thirdly, promotion is based on seniority subject to rejection or unfit from among Accountants, generally known as negative test. Fourthly, an Accountant must have three years regular service. Finally, such Accountant must have passed Departmental Examination for Accountants.

16. It is not the case of the respondent that he had passed the Departmental Examination for Accountants. It is, thus clear that the respondent was not qualified for promotion to the post of Senior Accountant under the Rules.

17. The respondent, however, urged that even if it is held that passing of Departmental Examination was necessary, the Authorities ought to have relaxed the rule by exercising power under Rule 5. A grievance was also made that the direction of the Tribunal in earlier case had not been complied with and the prayer of the respondent was rejected mechanically.

18. We are unable to agree with the submission of the learned counsel. Rule 5 confers discretionary power on the Comptroller and Auditor General of India to relax the provisions of the Rules. It is relevant and may be reproduced:

5. Power to relax. Where the Comptroller and Auditor General of India is of the opinion that it is expedient or necessary so to do, he may by order and for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons.

19. Reading of the order dated June 24, 1996, passed by the Deputy Accountant General (Administration), Gwalior, makes it clear that the Deputy Accountant General considered Rule 5 and observed that he did not find any valid reason/ground to relax Recruitment Rules in view of the facts mentioned in the order. It was inter alia observed that Rule 5 conferred power on the Comptroller and Auditor General of India to relax the Rules, if he is of the opinion that it is expedient or necessary so to do by recording reasons in writing. But he proceeded to state that such power should be exercised with respect to any class or category of persons. Normally, the power should be invoked if eligible candidates are not available for promotion or for similar valid grounds/reasons. The power, however, should not be exercised to perpetuate a mistake. Since the respondent did not fulfill the condition of Recruitment Rules and a large number of Accountants who had passed Departmental Examination were available and awaiting promotion, it would be against their interests to deprive them of promotion and to continue the respondent who had not passed the examination.

20. In our considered opinion, the reasons recorded by the Deputy Accountant- General were in conformity with the Statutory Rules. The Tribunal, therefore, should not have interfered with the well reasoned order passed by the Deputy Accountant-General. The Tribunal, while dealing with this aspect, observed; The reasons given for not according relaxation to the applicant is that the power to relax is generally to be invoked only in respect of class or category of persons and is resorted to only in cases when eligible persons are not available for consideration for promotion or for any valid reasons/grounds, and the power is not conferred to perpetuate a mistake. We do not think that the grounds taken for rejection of the case of the applicant are valid. This Court has specifically directed with certain observation to consider the case of the applicant for relaxation under the powers vested under rule 5 and the respondent were duty bound to consider it in accordance with the order of this Tribunal .

21. We are unable to persuade ourselves as to how the Authorities did not carry out the order in letter and spirit as contended by the learned counsel for the respondent. We are also unable to agree with the Tribunal that the reasons recorded for rejection of the case of the respondent were not valid . On the contrary, in our judgment, the Deputy Accountant General was right in keeping in view relevant considerations, such as, the power should be exercised with respect to any class or category of persons , normally there should not be any relaxation in Recruitment Rules unless the eligible and qualified candidates are not available; relaxation should not be exercised to perpetuate mistake; a large number of Accountants who are eligible and qualified but they could not be appointed only because of non- availability of sufficient vacancies.

22. In this connection, it may be profitable to refer to a decision of this Court in Keshav Chandra Joshi & Ors. v. Union of India & Ors., (1992) Supp (1) SCC 272 where this Court was called upon to consider the ambit and scope of relaxation- clause in Recruitment Rules. Rule 27 of the U.P. Forest Service Rules, 1952 invested in the Government power of relaxation which read thus:

Where the Governor is satisfied that the operation of any rule regarding 'the conditions of service' of the members of the service causes undue hardship in any particular case, he may, in consultation with the Commission, notwithstanding anything contained in the rules applicable to the case, by order dispense with or relax the requirements of that rule to such extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner .

23. The Court held that such power should be exercised to the extent as may be necessary to ensure satisfactory working or removing hardship in just and equitable manner but the Government cannot consciously and deliberately deviate from the Rules exercising the power of relaxation.

24. Interpreting the relaxation-clause and the power of the Governor, this Court observed;

Satisfaction of the Governor that the operation of the rules regarding the conditions of service would cause undue hardship in a particular case or cases and the need to relieve hardship and to

cause just and equitable results is a pre-condition. Even otherwise the court cannot substitute its satisfaction for the satisfaction of the Governor in exercise of the power of deemed relaxation.

25. The counsel for the respondent, no doubt, submitted that in the impugned order, the Tribunal merely directed the authorities to consider the case of the respondent for relaxation of Rules and no grievance could be made by the appellants.

26. We are unable to uphold the contention. Para 6 of the order issued by the Tribunal is explicitly clear. It reads thus:

. In view of aforesaid discussions, we feel that this is fit case for according relaxation under Rule 5.

Accordingly, this O.A. is disposed of with a direction to the respondents to consider the case of the applicant for promotion to the post of Senior Accountant by relaxing the condition of qualifying in the examination and if found suitable, promote him to the post of Senior Accountant within a period of three months from the date of receipt of this order, subject to availability of vacancy. In case the said vacancy is not available, he shall be promoted immediately after the vacancy is made available.

However, in case there are persons who are senior to the applicant and who have already qualified the examination of Senior Accountant, the case of the applicant shall be considered immediately after the promotion of such persons or such persons are promoted . (emphasis supplied)

27. Plain reading of the above direction leaves no room for doubt that the Tribunal concluded that it was a fit case for according relaxation under Rule 5 . Moreover, the Tribunal directed the appellants to promote the respondent, if found suitable, within the stipulated period. The Tribunal further stated that if there is no vacancy, the respondent should be promoted after the vacancy is available. There is, therefore, no doubt that the question as to relaxation of rule was finally decided and the directions were to be carried out by the Authorities on the basis of such conclusion. It, therefore, cannot be said that direction was limited to consideration of the case of the respondent and to take an appropriate decision in accordance with law.

28. It is true that the mistake was of the Department and the respondent was promoted though he was not eligible and qualified. But, we cannot countenance the submission of the respondent that the mistake cannot be corrected. Mistakes are mistakes and they can always be corrected by following due process of law. In *Indian Council of Agricultural Research & Anr. v. T.K. Suryanarayan & Ors.*, (1997) 6 SCC 766, it was held that if erroneous promotion is given by wrongly interpreting the rules, the employer cannot be prevented from applying the rules rightly and in correcting the mistake. It may cause hardship to the employees but a court of law cannot ignore Statutory Rules.

29. As observed by us, Statutory Rules provide for passing of Departmental Examination and the Authorities were right in not relaxing the said condition and no fault can be found with the Authorities in insisting for the requirement of law. In the circumstances, the action of the

Authorities of correcting the mistake cannot be faulted.

30. True it is that before such an action is taken and a person is actually reverted, he must be given an opportunity to show cause why the proposed action should not be taken. He may be able to satisfy the Authorities that there was no such mistake. But even otherwise, principles of natural justice and fair play require giving of such opportunity to him. But as observed earlier, in the instance case, in accordance with Rule 31-A of the Fundamental Rules, notice was issued to the respondent- employee, explanation was sought and thereafter the order was passed. The said order, in our considered view, was just, proper and in consonance with law and it ought not to have been set aside by the Tribunal or by the High Court. To that extent, therefore, the orders impugned in this appeal deserve to be set aside.

31. The last prayer on behalf of respondent, however, needs to be sympathetically considered. The respondent is holding the post of Senior Accountant (Functional) since last seventeen years. He is on the verge of retirement, so much so, that only few days have remained. He will be reaching at the age of superannuation by the end of this month i.e. December 31, 2007. In our view, therefore, it would not be appropriate now to revert the respondent to the post of Accountant for very short period. We, therefore, direct the appellants to continue the respondent as Senior Accountant (Functional) till he reaches the age of superannuation i.e. upto December 31, 2007. At the same time, we hold that since the action of the Authorities was in accordance with Statutory Rules, an order passed by the Deputy Accountant-General canceling promotion of the respondent and reverting him to his substantive post of Accountant was legal and valid and the respondent could not have been promoted as Senior Accountant, he would be deemed to have retired as Accountant and not as Senior Accountant (Functional) and his pensionary and retiral benefits would be fixed accordingly by treating him as Accountant all throughout.

32. For the foregoing reasons, the appeal is partly allowed. Though the respondent is allowed to continue on the post of Senior Accountant (Functional) till he reaches the age of retirement i.e. December 31, 2007 and salary paid to him in that capacity will not be recovered, his retiral benefits will be fixed not as Senior Accountant (Functional) but as Accountant. In the facts and circumstances of case, there shall be no order as to costs.