P.B. Roy vs Union Of India (Uoi) on 11 February, 1972

Equivalent citations: AIR1972SC908, 1972LABLC437, (1972)3SCC432, [1972]3SCR449

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Bench: S.M. Sikri, A.N. Grover, A.N. Ray, D.G. Palekar, M.H. Beg

JUDGMENT

M.H. Beg, J.

1. This is an appeal by grant of a Certificate of the Delhi High Court under Article 132 read with Article 133(1)(b) and (c) of the Constitution.

2. The Appellant had filed a petition under Article 226 of the Constitution for quashing an order dated 10.3.1960 and had prayed for a consequential order also in the nature of a mandamus. Information of the impugned order (Annexure 'C' to the petition), given to the petitioner, reads as follows:

> The Union Public Service Commission have in pursuance of Rule 5 of the Central Information Service Rules, 1959, recommended Shri P.B. Roy, at present officiating as Editor in the Publications Division, for appointment, in a substantive capacity, to Grade 3 of the service at its initial Constitution. Shri Roy is informed that the President has been pleased to post him as an Assistant Editor in the Publications Division with immediate effect.

3. Those relevant facts, preceding and following the impugned order, which are admitted by both sides may now be mentioned.

4. In 1955, the post of Editor, Publications Division, in the Department of Information and Broadcasting of the Government of India (hereinafter referred to as 'the Department'), was advertised. The appellant, who had applied for the post, was selected by the Union Public Service. Commission, and, on its recommendation, was offered a temporary post of Editor in the Publications Division of the Department on an initial salary of Rs. 720 per month in the scale of Rs. 720-40-1000 together with the usual allowances. The material terms and conditions of this employment were:

> (1) The post is to be gazetted Class I;

(2) The temporary post was sanctioned upto 28.2.1957 but was likely to continue;

(3) Shri Roy (the Appellant) will be governed by the Central Civil Services (Temporary Service Rules) and other Rules applicable to temporary Govt. servants of his category;

(4) He was to be on probation for 6 months which may be extended at the discretion of the appointing authority.

5. The Appellant had reported for duty on 1st August, 1956, as directed. On 27.3.1957, the Appellant's probation was extended by three months. Immediately thereafter, on 28.3.57, the Appellant's services were terminated under Rule 5 of the Central Civil Services (Temporary Service) Rules 1949, (Annexure 'D' to the Rejoinder Affidavit of 20th February, 1964). On 5.3.1957, the Appellant made a representation against this termination of his service (Annexure 'B' to the Rejoinder Affidavit). On 27.4.1957, in response to this representation, the above-mentioned termination to the Appellant's service was rescinded (Annexure 'F' to the Rejoinder Affidavit). On 28.4.1958, the President was pleased to terminate the probationary period of the Appellant and permitted him to continue in his post in a temporary capacity (Annexure 'B' to the Affidavit supporting the Petition)

6. On 16.2.1959, the President of India, in exercise of powers conferred by the Proviso to Article 309 of the Constitution of India, promulgated the Central Information Service Rules, 1959 (hereinafter referred to as the Rules), which came into force on 21.2.1959. These rules were meant; for the creation of a Central Information Service with prescribed grades and their strengths. Entry into this service was open to "departmental candidates" by a procedure laid down in Rule 5 for the initial Constitution of the service. In accordance with this procedure, the Appellant was required to appear before a Selection Committee on a given date, and, after selection, he was posted by the impugned order as indicated above. On 11.3.1960, the Appellant assumed charge of the post thus assigned to him on the recommendation of the Union Public Service Commission. The Appellant then made a representation, dated 11.3.1960 (Annexure 'E' to the Rejoinder Affidavit), against his appointment in Class 2 grade 3 post. He made other similar representations after that. His last representation was made on 25.8.1962. The Appellant received a communication dated 10.12.1962 forwarding extract of an order dated 26.11.1962 which said:

The representation from Shri P.B. Roy has been carefully considered in the Ministry. All relevant facts were fully taken into account, by the Departmental Promotion Committee, before drawing up the recent panel of Grade 3 officers considered suitable for promotion to Grade 2. Shri Roy may be informed accordingly.

7. The Appellant, treating this as the rejection of his last representation, filed his petition on 11.1.1963 which was allowed by a learned Judge of the Punjab High Court, sitting on the Circuit Bench at Delhi. A Letters' Patent Appeal against this decision had been allowed by a Division Bench of the Delhi High Court which then granted a certificate on 12.8.1968 for leave to Appeal primarily because it held that the required test relating to valuation of the subject matter had been satisfied.

8. The learned Judge who had initially heard the petition had pointed out that the representation of the Appellant was first rejected on 29.7.1960 and that it did not matter that the petitioner had continued making subsequent representations. The learned Judge had noticed the explanation that the petitioner could not approach the Court as he was admitted to a Tuberculosis Clinic in June, 1961. The learned Judge, having found that this was not sufficient to explain the delay between 29.7.1960 and June 1961 was disposed to reject the petition on the ground of laches. But, in view of the decision of the majority of the Full Bench of the Punjab High Court in S. Gurmej Singh v. Election Tribunal, Gurdaspur [1964] P.L.R. p. 589 the delay in filing the petition was overlooked on the ground that, after the admission of a Writ Petition and hearing of arguments, the rule that delay may defeat the rights of a party is relaxed and need not be applied if his case is "positively good".

9. The learned Single Judge had come to the conclusion, on the facts stated above, that the petitioner's case would be governed by the decision of this Court in Moti Ram Deka and Ors. v. General Manager, North East Frontier Railway as the petitioner's prospects and emoluments were adversely affected by the impugned order. The learned Judge thought that the mere fact that the Department was reorganised and that the petitioner was to be fitted into an appropriate category by the procedure laid down in Rule 5 did not take away the effect, that is to say, the loss of his emoluments, of the procedure to which the petitioner had been subjected. This view implied that Article 311 of the Constitution was attracted by the case despite the above mentioned creation of the Central Information Service by the rules.

10. The Division Bench which heard the Appeal of the Union of India was not inclined to interfere with the discretion of the learned Single Judge in rejecting the objection to the petition on the ground of delay. We too will not enter into this question which was not argued before us.

11. The Division Bench, after reviewing facts leading to the absorption of the Appellant into a newly constituted Central Information Service, in accordance with the procedure laid down in Rule 5 mentioned above, held that the "News and Information Cadre" of the Department, in which the Appellant was initially appointed, had been superseded by the cadres and grades constituted by the rules of the new service. It overruled the contention of the Petitioner that the effect of the rules was merely to transfer employees in existing posts to corresponding posts with new designations. It held that the Rules did create an altogether new service. It pointed out that the process of entry into the new service was of selection of each individual candidate after an examination of his individual record and qualifications by a Selection Committee before which he appeared so that there could be no automatic fitting into some corresponding appropriate post of a pre-determined class and grade. The rules and process for the Constitution of the new service did not guarantee the class or grade or emoluments enjoyed by any candidate in a cadre in which he served prior to the setting up of the new service. It, therefore, held that no question of demotion or reduction in rank, without observing the procedure laid down in Article 311 of the Constitution arose at all in the instant case.

12. Mr Anthony, appearing on behalf of the Appellant, has assailed the correctness of the decision of the Division Bench of the Delhi High Court on five grounds. We will take up and consider each of these seriatim.

13. Firstly, it is contended that the Division Bench had erred in allowing an affidavit to be filed on 26.6.1967 before it, without affording an opportunity to the Appellant to repel its contents by filing a counter-affidavit. It was urged that the result was that an altogether new case, neither argued before nor referred to by the learned Single Judge, had been allowed to be raised. This ground is no doubt mentioned among the grounds on which a certificate of the fitness for an appeal to this Court was sought. The Judgment of the Division Bench mentions that, in the course of arguments, the question arose whether the post of Editor in the Publications Division was abolished or had ceased to exist. It appears that an affidavit was then allowed to be filed before the Division Bench on behalf of the Union of India in which it was stated that two posts of Editors in the scale of Rs. 720-40-1000 in the Publications Division had ceased to exist as a consequence of the inclusion of two posts in the revised grade of Rs. 700-40-1100-50/2-1250 with effect from 1.7.1959 in the Central Information Service constituted from 1.3.1960. There is nothing in the Judgment or anywhere else to show that the petitioner had asked for any opportunity to controvert any statement made in the affidavit dated 26.7.1967 and had been denied that.

14. The case and the contention on behalf of the Appellant have been that the new posts in the services are really old posts in a new garb. This raised what was primarily a question of law, depending for decision upon an interpretation of the relevant rules of which the Court takes judicial notice. The rules certainly did not provide for the continuance of any ex-cadre posts outside the new service introduced by the rules. Facts stated in the Affidavit of 26.7.1967 could have some bearing on the question whether there were two posts in the revised scale which could be considered as corresponding posts. They could, if they had any effect on the respective stands, perhaps help the Appellant's case that there was nothing more than a re-designation of posts with same dirties and corresponding scales. And, this seems to explain why there is nothing to show that the Petitioner-Appellant asked for an opportunity to meet any allegation made in the affidavit of 26.7.1967 filed on behalf of the Union.

15. Moreover, what the fresh affidavit contained about the disappearance of the temporary post given to the Petitioner in 1956 before the Rules came into force flowed logically from the order of Petitioner's initial appointment in a temporary post which was to continue only upto 28.2.1957, unless its life was shown to have been extended for some definite or indefinite period. The Petitioner had not averred anywhere that the post was continued beyond 28.2.1957 for any period by any order or rule. Indeed, the very argument advanced on behalf of the Appellant, that his initial post merged in another corresponding post, implied that the post to which he was initially appointed at least lost its identity or could not be deemed to continue without a transmutation. The question whether the Constitution of the Central Information Service did or did not involve fresh appointments to new posts but was simply an automatic process of transmutation by the pooling together of existing incumbents of certain posts to form a new service, as the appellants alleged, was already the subject matter of assertion made in the Rejoinder Affidavit of the Petitioner and counter-assertions in a reply filed to the Rejoinder on 2.4.1964. The affidavit of 24.6.1967 did not introduce anything new but only clarified the position still more. We find no force in the first objection.

16. Secondly, it is contended that the impugned order constitutes, on the face of it, a reduction in rank of the petitioner. Looking at the communication dated 10.3.1960, set out above, we find

nothing there to indicate that the petitioner had been demoted as a measure of punishment. To hold, as it was suggested that we should, Chat the procedure laid down by Rule 5 was adopted as a cloak to cover up an intended reduction in rank and emoluments of an officiating Editor, by appointing him in a permanent substantive capacity of a grade carrying lesser emoluments in the new service, would necessitate going behind the order of 10.3.1960. At any rate, on the face of it, the order discloses no such devious action against the Appellant.

17. Thirdly, it was contended that the impugned order violates Articles 14 and 16 of the Constitution inasmuch as it places an employee who was serving as an Editor in a post of lower grade with less emoluments whereas no such result had followed in the case of any other employee in the Information and Broadcasting Department. We are unable to see how an order which has the effect of terminating an officiating appointment, in which the petitioner had no right to continue, and which gives him a fresh appointment, with a different designation but permanent tenure and prospects, constitutes a violation of either Articles 14 or 16 of the Constitution simply because the process which resulted in such an order did not have a similar effect upon the position or rights of any other servant in the Department. Indeed, the Selection Committee had, apparently after taking into account the special features of the petitioner's individual case, recommended the maximum pay, in the class and grade of the post given to him, and the petitioner got this exceptional pay. Even his prospects improved to the extent that from the precarious position of a temporary servant he had moved into a permanent service. It could not be definitely stated that his position had worsened on the whole. He was at least no longer subject to the hazards of temporary employment which could be terminated by a month's notice at any time. The results of applying Rule 5 to the facts of individual cases could not be expected to be identically similar in all cases.

18. All candidates were subjected to the same process or procedure contemplated by Rule 5. It is not the Appellant's case that the Selection Committee did not function honestly or that its proceeding were vitiated by any defect in its Constitution or of any bias on its part or any unfairness or inequality of the test applied in judging the merits of the Appellant as against other candidates. The alleged defect with the material said to have been used by the Committee is another matter which we will consider last.

19. Fourthly, it was urged that Rule 5 mentioned above is itself void for conflict with the provisions of Articles 311 and 14 and 16 of the Constitution.

20. It was urged that Rule 5 permits violation of Article 311 of the Constitution inasmuch as it enables that to be done indirectly which could not be done directly. The Rule reads as follows:

> 5. INITIAL CONSTITUTION OF THE SERVICE:
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> (1) The Commission shall constitute a Selection Committee with the Chairman or a Member of the Commission as President and not more than three representatives of the Ministry of Information and Broadcasting as members, to determine the suitability of departmental candidates for appointment to the different grades and to prepare an order of preference for the initial Constitution of the service;

(2) On receipt of the Committee's report the Commission shall forward its recommendations to the Government and such recommendations may in elude a recommendation that a person considered suitable for appointment to a grade may, if a sufficient number of vacancies are not available in that grade, be appointed to a lower grade;

(3) Vacancies in any grade which remain unfilled after the appointment of departmental candidates selected under Sub-rules 1 and 2 above shall be filled by direct recruitment, through the Commission.

21. Rule 3 indicates that appointments to the newly created service could take place either by selection under Rule 5 or by direct recruitment with which we are not concerned here. The grades and the fixation of an authorised strength of each grade are provided for by Rule 4. Only posts in the first 3 grades are classified as Class I (Gazetted) posts. Rule 5(2) enables the Selection Committee to recommend that a "departmental candidate" considered suitable for appointment to a post of a particular grade be actually appointed in even a lower grade if sufficient number of vacancies are not available in the grade for which he may be found fit. In other words, even between candidates found fit for a particular grade, the recommendation may be for an appointment to a lower grade. As between those found fit for a particular grade, the preferences had to be and were, presumably, determined by fair and honest appraisements of their merit. Such preferences due to honest assessments, which are not above possibilities of error, have never been held to cast, any reflection which could be equated with punishment If the view of the Division Bench of the Delhi High Court is correct, as we think it is, that the rules had the effect of constituting a new service, with a fair and reasonable procedure for entry into it, the procedure could not be characterised as a device to defeat the provisions of Article 311 or a fraud upon the Constitution simply because the results of subjection to the process of appraisement of the merits of each candidate may not meet the expectation of some candidates.

22. Article 311 affords reasonable opportunity to defend against threatened punishment to those already in a Government service. Rule 5 provides a method of recruitment or entry into a new service of persons who, even though they may have been serving the Government, had no right to enter the newly constituted service before going through the procedure prescribed by the Rule. If the petitioner had already been appointed a permanent Government servant, there may have been some justification for contending that Rule 5 could not be so applied as to deprive him of a permanent post without complying with Article 311 as such deprivation would have been per se a punishment. The mere possibility of misuse of Rule 5 could not involve either its conflict with or attract the application of Article 311. The fields of operation of Rule 5 and Article 311 of the Constitution are quite different and distinct so that the two do not collide with each other.

23. The learned Counsel for the Appellant then contended that each person placed in the category of Departmental candidates by Rule 2 had to be treated alike, but Rule 5 enables the Selection Committee to treat them differently by assigning different grades to them. In other words, the contention was that Rule 5 gives too wide a power of selection to the Selection Committee. It was also submitted, though not quite so clearly, that Rule 5 must itself be so interpreted as to operate

automatically and place all persons falling within the definition of Departmental candidate" in a single class if Rule 5 is to be upheld as valid. It was urged that the interpretation placed on Rule 5 by the Division Bench involved not merely its conflict with the definition of a "departmental candidate" in Rule 2(b) but also with Articles 14 and 16 of the Constitution, as it meant that those treated equally by Rule 2(b) could be treated unequally by the Selection Committee. This argument rests on a misconstruction of Rule 2(b).

24. The definition of a Departmental candidate given by Rule 8(b) is:

> 2(b) "departmental candidate" means-
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> (1) a person in the Ministry of Information & Broadcasting or any of its attached and subordinate offices who was holding or would have held, but for his absence on deputation, a duty post, on the 1st November, 1957, and who is holding, or has a lien on a duty post in a substantive capacity at the commencement of these rules; or who has been declared quasi-permanent in a duty post, on, or prior to, the 1st July 1957; or who was eligible to be declared quasi-permanent in a duty post, on, or on any date prior to, the 1st My 1957; or who was appointed to a duty post on the basis of selection by the Commission or whose appointment thereto was approved by the Commission, before the commencement of these rules;
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> (2) any other person in the Ministry of Information and Broadcasting or any of its attached and subordinate offices whom the Government may declare as such on the basis of his qualification and experience";

25. It is clear that this definition of a "departmental candidate" is meant only as an aid in interpreting Rule 5 and was not intended to operate as a fetter on the functions and powers of the Selection Committee. We may add that the validity of Rule 5 does not appear to us to have been assailed in arguments before the High Court. And, in any case, the attack on it must fail on merits.

26. Fifthly and lastly, it was urged that the action against the Petitioner was visited by mala fides. We find no such ground taken either in the Writ Petition or argued at any stage in the High Court or mentioned in the grounds of appeal taken in the application for certifying the case as fit for appeal to this Court. It was, however, a ground taken by the Petitioner Appellant in his Rejoinder affidavit in attempting to reply to the affidavit filed in opposition to the Writ Petition.

27. It had been stated in the affidavit filed on behalf of the Union of India (UOI) that the Appellant's work was not found to be up to the mark even during the period of his probation which had to be extended thrice by two months on each occasion before the probationary period was at last terminated. It had also been pointed out that the Appellant had been given a warning that he should improve his work. Furthermore, it was stated that all the facts of the Appellant's case were carefully examined, from the point of view of his merit, by the Selection Committee. The case of the Union of India (UOI) was that the post actually held by the Appellant before his selection for appointment to the newly constituted service did not automatically or wholly determine the position of a

departmental candidate who offered himself to the process of appraisement of his merits by the Selection Committee to be made on the totality of relevant facts. That Committee had to be presided over either by the Chairman or a Member of the Union Public Service Commission and had officials of the Department on it who must have been in a position to correctly evaluate the petitioner's merit and to know the weight to be attached to such entries as the Appellant's confidential records contained.

28. In reply to the case of the Union of India (UOI), that the Appellant's merits were duly considered by the Selection Committee, the Appellant had characterised what had happened as an 'attempt to create prejudice against the Petitioner and to justify its mala fide reduction of rank of the Petitioner". He also said that this amounted to "raking up the past" which had no relevance to "the admitted case of the Appellant" that he was holding the temporary substantive rank of Editor when he was reduced to the rank of an Assistant Editor. This assertion was incorrect if it implied, as it seemed to, that it was admitted that the petitioner was being punished. The Appellant had also referred to assertions made by him, in his representation dated 5.4.57 (Annexure 'B' to the Rejoinder) to the Minister of Information and Broadcasting against the termination of his service by notice dated 23.3.57, and also to those contained in another representation dated 11.3.1960 (Annexure 'E' to the Rejoinder Affidavit) against the impugned order. In these representations, the petitioner had complained that he was a victim of the prejudice and machinations of an Officer in the Transport Ministry (not named by him) whose mistakes, in the publications of file Transport Ministry, had been pointed out by the Appellant. He had also referred to a number of his own publications. Thus, the Appellant's case on mala fides rests on allegations which had been examined by the Department and may also have been considered by the Selection Committee. The petitioner had assumed that there were some malicious reports against him which, according to him, he had no chance to meet and on which he thinks that the recommendations of the Selection Committee about him were based. The reply of the Union of India to this case of mala fides was that it was an after thought and that the assessment of the Selection Committee was based on the results of the interview given to the Appellant and a total assessment of all the facts concerning the Appellant which were before the Selection Committee.

29. Even if we were to assume that the Appellant had thus taken up a case of action vitiated by mala fides at its foundations and had supported it with necessary particulars and averments, it is evident that such a case could not be properly tried upon the materials on the record before us, without even impleading the official who was alleged to be the architect of his misfortunes. It could not, as it has been, argued seriously for the first time before us.

30. The fatal weakness in the Appellant's case arises from the fact that he was holding only a temporary post so that he could have no right to continue in it after it had ceased to exist. We think that the necessary effect of setting up of the Central Information Service, together with the determination of its classes and grades and their strengths was that the temporary posts in the Department which were not shown to have been continued, automatically came to an end. The appellant was offered a new Post altogether after going through the process of selection in accordance with Rule 5 to which, he subjected himself. Indeed, the Appellant had no option, if he wanted to continue in the service of the Department, except to go through the procedure provided

by the rules. We are unable to hold that the procedure contemplated by Rule 5 either automatically fixed the Appellant in any particular grade or post or could be held to be void for any reason whatsoever. Therefore, if the Appellant was selected for a particular post, by a process which, for the purposes of the case before us, must be assumed to have been fair, honest, and legal, he cannot complain that he was entitled to a better one.

31. We, therefore, dismiss this appeal. But, in the circumstances of the case, we leave the parties to bear their own costs through out.