

L.G. Chaudhari vs Secretary, L.S.G. Department, ... on 29 October, 1979

Equivalent citations: AIR 1980 SC 383, 1980 SUPP(1) SCC 374, 1979(11) UJ 926(SC), AIR 1980 SUPREME COURT 383, 1980 LAB IC 215, 1979 UJ(SC) 926, (1980) 1 SERV LR 115, (1980) SCJ 393, (1980) LAB LN 319, 1981 SCC (L&S) 280

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Bench: D.A. Desai, O. Chinnappa Reddy, R.S. Sarkaria

JUDGMENT

O. Chinnappa Reddy, J.

1. Curious indeed are the ways of the powers that be, in Bihar. The Bihar Public Service Commission published an advertisement inviting applications for the post of a Town Planner in the Government, of Bihar. The post was stated to be permanent but the "appointment was to be made initially on contract basis for five years. The selected candidate was to be on probation for one year with the benefit of Contributory Provident Fund. Shri L.G. Chaudhari, original appellant in this appeal he having died during' the pendency of the appeal, his legal representatives are now the appellants--was selected and by a notification dated 20th August, 1955, the Government of Bihar appointed him as Town Planner with effect from 5th August, 1955. The order of appointment recited that he would be on probation for a period of one year. Though the post was initially created on a permanent non-pensionable basis and appointment to it was made on contract basis for five years, the Council of Ministers, on 7th August, 1956, considered a proposal to make the post permanent and pensionable and to appoint Shri L.G. Chaudhari to that post on a permanent and pensionable basis, initially on probation for one year. The proposal, was approved by the Council of Ministers on 14th August, 1956. On 20th August, 1956, the Secretary to the Government L.S.G. Department wrote to the Accountant General informing him that the post of Town Planner had been made permanent and pensionable with effect from 5th August, 1955, the date on which Shri L.G. Chaudhari had joined the post and that Shri Chaudhari was no longer entitled to subscribe to the Contributory Provident Fund. He was to be treated as 'an ordinary permanent Gazetted Government servant'. On 28th Sept., 1956, the Accountant General wrote to the Government enquiring as to the date from which Shri Chaudhari was to be treated as a permanent Government servant. On 28th November, 1956, the Trader Secretary to the Government addressed a communication to the Accountant General the contents of which are in some controversy. The communication begins with the statement: "I am directed to prefer to your letter No. GA4 PH-Eng.-- 3803 Dated 28th September, 1956 and to say that Shri L.G. Chaudhari has been appointed on permanent substantive basis with

effect from 5th August, 1955, with probation for one year with effect from the date of his appointment." Next follow two sentences which are in controversy. The communication ends with the sentence: "In the circumstances Shri Chaudhari may be treated as a permanent Government servant with effect from 5th August, 1955". The two controversial sentences according to the appellant are "he has been confirmed on his post after the expiry of the period of probation viz. 5th August, 1956 and necessary notification to this effect has been issued. A copy 'of the same had been sent to you," The two sentences according" to the Government are "he is being confirmed on his post after the expiry of the period of probation viz. 5th August, 1956 and necessary notification to this effect is being issued. A copy of the same will be sent to you inv due course". The original letter said to have been written by the Government to the Accountant General was not produced on the ground that it was not available. What was produced by the Government was the draft of the letter containing corrections, the words "has been" occurring twice in the first controversial sentence being scored out and replaced by the words "is being" and the words "has been" in the second controversial sentence being Replaced by the words "will be". On the face of it the stand of the Government on the contents of this letter appears to be 'contradicted by the internal evidence afforded¹ by the alleged draft. In the 'first place if Shri Chaudhari 'had not yet been confirmed there was no need for the Government to inform the Accountant General that he was being confirmed and that a notification was being issued. Neither the letter of 20th August, 1956, nor the letter of 28th November, 1956. need have been written. In the second place that would be inconsistent with the first sentence Stating that Shri Chaudhari had been appointed "on a permanent, substantive basis with effect from 5th August, 1955, with probation for one Year and the last sentence stating that in the circumstances Shri Chaudhari might be treated As permanent Government servant with effect from 5th August, 1955. Whatever, that: be, the Accountant General proceeded on the basis that Shri Chaudhari was to be treated as permanent Government servant with, effect from 5th August, 1955 and therefore, allowed increments for the years 1956, 1957 and 1958. In fact from the annual report of the Bihar Public Service Commission which was produced before the High Court as Annexure 'C' it appears that the Public Service Commission recommended the confirmation of the appellant as Town Planner and that the recommendation was accepted by the Government, After the appellant had drawn increments for three years the Accountant General thought fit to address a communication to the Government on 16th August, 1958 requesting that Government orders formally confirming Shri L.G. Chaudhari might be sent to the Accountant General's office at an early date. A reply was sent by the Under Secretary to the Government on 15th September, 1958, requesting the Accountant General to furnish a copy of the letter dated 28th November, 1956 as no such letter appeared to have been sent from the Department. It is to be noticed here that at the hearing of the Writ Petition the Government purported to produce the draft of the letter dated 28th November, 1956, already referred to by us, though in their letter to the Accountant General on 15th September, 1958, they said that no such letter appeared to have been sent by the Department. By a letter dated 30th September, 1958, the Accountant General informed the Government that the original of the letter dated 28th November, 1956 was not available but that an extract as noted in the Audit Register was being sent. This extract was on the same lines as the draft produced by the Government. On 6th November, 1958, the Government wrote to the Accountant General that the question of issuing orders of confirmation was still under Government's consideration. On 8th August, 1959 the Accountant General once again wrote to the Government requesting that formal notification confirming Shri Chaudhari in his appointment might be sent so that a pay slip

authorising drawal of increments could be issued. Shri Chaudhari was also informed by the Accountant General to the same effect. Apparently there appears to have been further correspondence between the Accountant General and the Government, Further increments were stopped to the appellant by the Accountant General. The appellant appears to have protested against the stoppage of increments. The result was that on 16th July, 1960 the Government enquired from the Accountant General under what rule he had withheld the increments of Shri L.G. Chaudhari. Further correspondence appears to have followed and even as late as on 18th March, 1967 the Government requested the Accountant General to issue the necessary pay slip authorising Shri Chaudhari to draw his annual increments. In the letter dated 18th March, 1967, the Government referred to the query raised by the Accountant General in his letter dated 28th September, 1956 regarding the exact date from which Shri Chaudhari was to be treated as a permanent Government servant and stated that the Government had already replied to the query on 28th November, 1956. It was mentioned that a copy of the letter was also enclosed. The Government further mentioned that Shri Chaudhari had complained that he was not being allowed increments since 1959 and that the Government did not know why the increments, were being withheld. As the increments due to him continued to remain unsanctioned the appellant once again addressed the Government on 1st May, 1967 and this brought forth a reply from the Government that his probation had been extended up to 15th September, 1967 and that he should show cause why his employment as probationer should not be terminated. Thereafter the appellant filed a Writ Petition in the High Court praying that the order of the Bihar Government 'dated 18th September, 1967 may be quashed and that all increments that had accrued to him on and after 5th August, 1959 should be directed to be paid to him. The Patna High Court quashed the order dated 18th September, 1967 to the extent that it called upon the appellant to show cause why his probation should not be extended but declined to quash the order extending the period of probation to 15th September, 1967. The High Court declined to quash the part of the order relating to extension of period of probation because it was of the view that the question whether the service of the appellant had been confirmed or not was a disputed question of fact in view of the stand taken by the Government before the High Court. Before the High Court the Government took the stand that no notification confirming the appellant in the post of Town Planning was issued as no medical certificate had been produced by the appellant and in the meanwhile certain complaints were received concerning the efficiency and integrity of the appellant. According to the Government the allegation made 'against the appellant was found to be true and therefore it was finally decided to extend the period of probation and terminate his services.

2. Shri Chitale learned Counsel for the appellant argued that apart from the approval given by the Council of Ministers to the appointment of the appellant as Town Planner with effect from the date of his original appointment, the undisputed correspondence that passed clearly showed that the services of Shri Chaudhari had been confirmed as claimed by him. We agree with him. The letter dated 29th August, 1956, from the Government to the Accountant General contain a clear recital that the post of Town Planner had been made permanent and pensionable with effect from 5th August, 1955, the date on which Shri Chaudhari had joined the post and that Shri Chaudhari was therefore, to be treated as an ordinary permanent gazetted Government servant. In his letter dated 28th September, 1956 the Accountant General did not raise any query whether the appellant had been confirmed but raised the limited query as to the date from which he was to be treated as a permanent Government Servant. Again in the letter dated 18th March, 1967 the Government

reiterated the position that the appellant had been appointed against a permanent and pensionable post and that he was to be treated as a permanent Government servant. The Government wanted to know why the Accountant General was withholding the appellant's increments. In the face of these two letters it appears to us to be futile for the Government to contend that the appellant had not been confirmed and that he continued as a probationer till September, 1967. Even the controversial letter dated 28th November, 1956, contains two significant undisputed statements. "...Shri Chaudhari has been appointed on permanent, substantive basis with effect from 5th Aug, 1955, with probation for one year" and "in the circumstances Shri Chaudhari may be treated as a permanent Government servant with effect from 5th August, 1955". The draft of the letter dated 28th November, 1956 with the words "is being" and "will be" substituted for the words "has been" was sought to be put forward as a correct copy of the original on the basis of the extract from the Audit Register. On that basis it was claimed that there was no order confirming the services of the appellant. We may mention here that the original letter received by the Accountant General was not produced on the Ground that it was not traceable. We are unable to place any reliance on the extract from the Audit Register for the reason that in the counter-affidavit filed on behalf of the Accountant General it was stated that the entry in the Audit Register was attested in September, 1958 while in the letter dated 15th September, 1958 it was clearly stated that the original letter was not available. If so, how could the entry in the Audit Register have been attested in September, 1958. We do not desire to further probe into the loss of the original letters, the alleged interpolations in the draft etc. as we are clearly satisfied on the basis of the letters dated 20th August, 1956 and 18th March, 1967, that the appellant was confirmed in his post as Town Planner as claimed by him. To say the least the stand taken by the Government that the appellant continued as a probationer till 15th September, 1967 is ludicrous. On more than one occasion the Government asked the Accountant General why the appellant's increments had been withheld despite the appellant having been appointed on a permanent and substantive basis. The stand of the Government before the High Court and before us is incapable of being justified in any way. It is clear that some mischief was afoot in the Bihar Secretariat and official records had either disappeared or had been tampered with the appellant was not to blame for it. The mischief makers who were trying to make out that the appellant had not been confirmed were apparently responsible. We think the less said about these matters the better.

3. The learned Attorney General who appeared for the State of Bihar argued that there was no formal order of confirmation in terms of Article 166 of the Constitution and that under the provisions of Article 163(3) the proceedings of the Cabinet could not be looked into. He urged that the question whether the appellant had been confirmed in the post of Town Planner was a disputed question of fact and therefore, the High Court was right in not venturing to decide the Question. We do not agree with the learned Attorney General. In the absence of a formal order drawn up in terms of Article 166 of the Constitution it was certainly open to the appellant to prove by evidence allude that he had been appointed on permanent and substantive basis. In *B. Chitrallekha v. State of Mysore* ; it was pointed out that the provisions of Article 166 of the Constitution were only directory and not mandatory and, if they were not complied with it could be established as a question of fact that the order was issued by the State Government. The learned Attorney General urged that the order, if any, was never communicated to the appellant and, therefore, was of no effect. He relied on *Bachitter Singh v. State of Punjab* 1969 Supp (3) SCR 713. We may at once say that no such plea was ever raised before the High Court and the appellant cannot at this stage be non-suited on the ground

that the order of confirmation was never communicated to him. We do not consider it necessary to express any opinion on the question whether Article 163(3) of the Constitution bars the Court from looking into the proceedings of the Cabinet. It is one thing to say "the question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be Inquired into in any Court", and altogether a different thing to say that the proceedings of the Council of Ministers cannot be looked Into even if produced without objection and without any claim of privilege. We do not desire to say anything more on this aspect of the case, since there is enough other material in the case.

4. We are also unable to find any force in the submission of the learned Attorney General that the High Court was quite right in refusing to decide the question whether the appellant had been confirmed or whether he continued as a probationer till 15th September, 1967 on the ground that it was a disputed question of fact. As already observed by us the communications addressed by the Government to the Accountant General are clear on the point and the stand taken by the Government for the first time in 1967 that the appellant was continuing on probation till then was ludicrous. To refuse to decide the question when the entire material was before the Court it is not suggested that there was any other material and to direct the appellant to go to a Civil Court would only be to shirk our responsibility.

5. In the result we allow the appeal and quash Letter No. 7949 L.S.G. dated 18th September, 1967, from the Government to the appellant. To avoid any further debate we direct the respondents to treat Shri L.G. Chaudhari as appointed to the permanent post of Town Planner with effect from 5th August, 1955 and further direct the respondents to sanction all annual increments that fell due on and after 4th August, 1959 and to pay all arrears to the legal representatives of the original appellant. The appellants will be entitled to the costs throughout.