

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision : 30.01.2013

+ LPA 747/2004

THE PRINCIPAL DELHI COLLEGE OF ARTS & COMMERCE

..... Appellant

Through: Mr. D.N. Goburdhan with Mr. Aayush, Advocates

versus

MRS. SUNITA SHARMA & ANR

..... Respondents

Through: Ms. Manisha Singh, Advocate for Respondent No.2.

Ms. Rajiv Sharma, Advocate for Respondent No.3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. The appellant questions a judgment and order of a learned single judge, of this Court, in which the respondent's petition under Article 226 of the Constitution of India was allowed, as a result of which she was directed to be reinstated into service, with arrears of salary to the post of Junior Assistant (LDC).

2. The brief facts are that the respondent was appointed to the post of Junior Assistant cum typist, on direct recruitment, pursuant to a public advertisement, in the Appellant-College's establishment (hereafter called

“the College”) on 17-6-1998. The advertisement stated that the vacancy to be filled was a permanent one. In the appointment letter issued to the petitioner, besides mentioning that she was appointed as a probationer, it was stated that her appointment was subject to the outcome of a writ petition (WP 2357/93), filed by one Shri. K.N. Pandey.

3. Admittedly, the post of Junior Assistant to which the respondent was recruited is filled by promotion to the extent of 50% from amongst departmental candidates and 50% by direct recruitment.

4. On 26-11-2002, the College terminated the respondent's appointment. The termination order, after reciting that the appointment letter issued to her was on the, “understanding”, that it was subject to the outcome of a writ petition filed by Shri Pandey; stated that the said petition was decided in favour of Shri Pandey, and the appeal against that order too was dismissed. The termination order then went on to state that:

“..This judgment will result in reversion of those who have been promoted to their original post but in this case since her appointment was a direct recruitment through General Category so the College has no option but to terminate her services. Since Sh. K.N. Pandey has been directed to join the General Administration on 27-12-2002 (forenoon) so the services of Mrs. Sunita Sharma stand terminated with effect from 26-12-2002(Afternoon)....”

5. The respondent's writ petition challenging her termination was contested by the College, which urged that there was no infirmity in its order. It urged that the respondent ought to have sought a reference impugning her termination order before the Tribunal, under the Industrial Disputes Act, 1947. It also urged that the respondent's service had to be

terminated as a result of this Court's order in Shri Pandey's writ petition because she was the junior most in the cadre of Junior Assistant. The learned single judge rejected both these contentions.

6. Mr. D.N. Goburdhan, learned counsel for the College, urges that the single judge fell into error in directing reinstatement and backwages. It was submitted that the course adopted by the College was reasonable and just, since the respondent concededly was junior most in the cadre of Junior Assistants. With the judgment in Shri Pandey's case, the new development that emerged was the necessity to make a reversion from existing holders of the post. Since the respondent was the junior most Junior Assistant, and a probationer, whose appointment was made expressly subject to outcome of that petition, there was nothing unfair or unreasonable in terminating her from employment. It was argued that once appointed, the source of recruitment (i.e. whether as a direct recruit or promotee) becomes an irrelevant detail in such contexts, and the employer acts reasonably in reverting or terminating the employment of the junior most incumbent in the cadre. Learned counsel relied on the judgment reported as *R.S. Deodhar v State of Maharashtra* 1974 (1) SCC 317 in that regard. Counsel also relied on the judgment reported as *U.P. State Bridge Corporation v U.P. Rajya Setu Nigam S. Karamchari Sangh* 2004 (4) SCC 268 in support of the argument that the respondent ought to have approached the forum provided under the Industrial Disputes Act and this Court should have desisted from exercising its jurisdiction under Article 226 of the Constitution of India.

7. The single judge, in his impugned judgment, after noticing the contradictory averments of the appellant/College in the counter affidavit,

held that the situation emerging as a result of Shri Pandey's writ petition being allowed was that he had to be accommodated to a promotional post; that had nothing to do with the direct recruit vacancy to which the respondent had been appointed. This Court is of opinion that the reasoning of the learned single judge is sound and unexceptionable. The argument of the appellant, in support of its stand that the junior most in the cadre had to make way for Shri Pandey, which was the reason for her termination, by relying on *Deodhar*, in the opinion of this Court is ill-founded and misplaced. The well settled proposition stated in *Deodhar* that for purposes of seniority and promotion (especially the latter) those who enter one cadre lose their birth mark, as it were (either as direct recruit or promotee), cannot be invoked in the present case. The respondent was concededly appointed against a clear permanent direct recruit vacancy. The result of litigation involving correctness of someone else's right to be considered for promotion to a seat reserved under a separate and distinct promotion quota, could therefore hardly affect her. That her appointment was made subject to such litigation does not advance the College's case at all, because such a condition was irrelevant.

8. As regards the question of exercise of jurisdiction under Article 226, this Court is of opinion that the reasoning of the learned single judge that while the doctrine of availability of alternative remedy exists to limit this Court's jurisdiction, at the same time it, "*does not mean that under no circumstances or in no case where alternative remedy exist would the Court refuse to exercise jurisdiction under Article 226 of the Constitution of India*" is equally unexceptionable. We may add that a writ court's reluctance to

entertain a proceeding under Article 226 in some cases, is a matter of discretion, and not an invariable rule. In the light of the fact that in the instant case, the Court has entertained the writ petition in the year 2003 and disposed it in the year 2004; while the appeal has come up about nine years after the writ was originally entertained by this Court; the approach adopted by the Supreme Court of India in *Krishan Lal v. Food Corporation of India and Ors.* (2012) 4 SCC 786” commends itself to this Court. There it has concluded that,

“18. Availability of an alternative remedy for adjudication of the disputes is, therefore, not a ground that can be pressed into service at this belated stage.....”

Similarly, in *State of H.P. and Ors. v. Gujarat Ambuja Cement Ltd. and Anr.* (2005) 6 SCC 499 the Supreme Court observed that,

“22. When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational.....”

In the same judgement, the Supreme Court also noticed the ratio of its earlier decision in *L. Hirday Narain v. Income Tax Officer, Bareilly* AIR 1970 SC 33 to the effect that,

“23. if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non exhaustion of statutory remedies.....”

In our view, therefore, the approach and conclusions of the learned

single judge on this aspect too, do not call for interference.

9. Counsel for the college had argued that the respondent would gain undue benefit by the dismissal of this appeal, since she would be entitled to full arrears of salary without working on the post. This Court is of opinion that the College invited such a result, if it can be characterized as such, upon itself by preferring this appeal. To compound this, it sought a stay of the impugned judgment, which resulted in the respondent being denied work and the entitlement to earn salary. Furthermore, this Court is of opinion that in such cases, there cannot be a blanket “no backwage” rule as is sought to be urged. An employee denied benefit of work and pay, is as much entitled to restitution in law, as a businessman whose contract is terminated capriciously. In the latter case, the courts award damages, a head which often include damages for loss of profit, and further direct payment of interest. Similarly, a tax payer who is made to pay amounts which cannot be legitimately recovered, is entitled to interest for the duration the amounts are retained by the tax authorities. A plaintiff who sues for illegal termination of contract of service (i.e a managerial cadre official in a private enterprise) on proof of illegal termination can succeed in getting damages. In the case of public employment, where the employee is terminated for no justifiable cause, surely restitution has to be likewise complete. Therefore, the Court upholds the impugned judgment and order of the learned single judge as regards full consequential benefits to the respondent.

10. During pendency of proceedings in appeal, this Court had permitted Shri Y.S. Chauhan to be impleaded as a third respondent, and made appropriate orders. The third respondent had sought impleadment on the

ground that the impugned judgment contained certain observations and reference to him, which might prove to be prejudicial. It was pointed out on his behalf that by an order/ letter dated 16-3-2005 (DCAC/2005/579) four officials were permitted to continue holding certain posts; these included the fact that Shri Y.S. Chauhan would continue as Assistant and that the approval of post of Section Officer would “nullify” the reversion that had taken place earlier as a result of the outcome in K.N. Pandey’s case. This Court notes only this submission, and records that this order may be taken into consideration by the College. However, the respondent shall under no circumstances be adversely affected by this development, since she was appointed to the post, as a direct recruit and is entitled in her own right to further benefits flowing from that status.

11. In view of the above discussion the Court holds that the appeal has to fail as lacking in merit; it is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

SUDERSHAN KUMAR MISRA
(JUDGE)

JANUARY 30, 2013