

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Appeal No. 599 of 2015

Smt. Kiran Mahapatra W/o Shri Sanjay Mahapatra, Aged About 39 Years R/o H. No. B 22, Galaxi Residency Amlideeh, Post Ravigram, P.S. New Rajendra Nagar, Tah Raipur, Civil & Revenue District Raipur Chhattisgarh Pin. 492006

---- Appellant

Versus

1. The State Of Chhattisgarh Through The Secretary, Department Of Labour, Mahandi Bhawan, New Raipur, P.S. Rakhi Civil And Revenue District Raipur Chhattisgarh Pin. 492001
2. The Director, Employees State Insurance Services, Directorate, Indrawati Bhawan, New Raipur, P.S. Rakhi, Civil And Revenue District Raipur (Chhattisgarh) Pin : 492001

---- Respondents

For Appellant:

Shri Amiyakant Tiwari , Advocate

For Respondents/State:

Shri B. Gopa Kumar, Dy. Advocate
General

Hon'ble The Chief Justice

Hon'ble Shri Justice P. Sam Koshy

Order On Board

Per Navin Sinha, Chief Justice

15/12/2015

1. The present appeal arises from order dated 28.09.2015 dismissing Writ Petition (S) No. 204 of 2015 and analogous cases (including Writ Petition (S) No. 2374 of 2015 filed by the present Appellant).
2. The controversy relates to appointment on the posts of Staff Nurse, Misrak, Assistant Grade-III, Dresser, Ward Sewak, Watchman and Aaya, etc. pursuant to two advertisements dated 14.11.2001 and 12.05.2003. The Petitioners were dismissed by an identical order dated 19.11.2014 passed by the Director, State Employees' Insurance Services only mentioning their individual names at the end of each

order. The appeals have therefore been heard together but are being disposed by individual orders to ensure that the facts of each case are adequately taken note of for proper adjudication. The present order shall therefore primarily consider the questions of law arising for consideration in the batch of appeals.

3. Learned Counsel for the Appellant submitted that she was an applicant for the post of Assistant Grade-III under the advertisement dated 14.11.2001. The advertisement mentioned only one vacancy. The eligibility prescribed in the advertisement was Higher Secondary pass with knowledge of Shorthand and Typing along with proficiency in Hindi Typing from the Madhya Pradesh Examination Board. The Appellant was at serial no.1 of the merit panel dated 22.02.2002 and was therefore appointed validly against the advertised vacancy. If two more persons were appointed as Assistant Grade-III purportedly in excess of advertised vacancies her appointment cannot be held to be invalid. The ex-parte enquiry report dated 9.2.2007 noticed by the Learned Single Judge in paragraph-18 of the Judgment does not mention that the appointment of the Appellant was illegal. It does not state that she did not possess the essential eligibility or that she had brought undue influence upon the Selection Committee which therefore favoured her with the appointment. No copy of the inquiry report was given to the Appellant with an opportunity to defend her appointment. The show cause notice dated 23.03.2008 was vague and did not state how the authorities were satisfied that she did not possess the essential eligibility for appointment. It does not state on which member of the selection committee the Appellant had exercised undue influence and in what manner because of which she was favoured by the appointment. The show cause notice was thus at complete variance with the enquiry report. The Appellant filed her reply on merits dated

10.11.2008 taking the specific objection that she possessed the essential qualification of being Higher Secondary pass with shorthand experience and had passed Hindi Typing examination from the Madhya Pradesh Examination Board as part of the course in Office Management. She was not only interviewed on 13.12.2002 but was again required to demonstrate proficiency in Hindi Typing leading to her appointment. She specifically took an objection that the show cause notice was vague hindering her from submitting a proper reply, unable to understand the mind of the Respondents why and how they were classifying her as invalid appointee. It was reiterated that she was not aware of any inquiry conducted and was never associated with the same, thus violating the principles of natural justice. She had not concealed anything or made any wrong representation with regard to her candidature. Lastly, she specifically raised an objection that she may be provided a copy of the inquiry report where after she would be in a better position to deny the allegations sought to be made against her in the show cause notice.

4. The Respondents then passed the impugned order dated 19.11.2014. It does not deal with the cause shown by the Appellant. The order was in a standard form in common language with regard to all the appointees and only the individual name was added at the end. The grounds mentioned in the order were that according to the State Government circular dated 17.07.2003, appointment on backlog vacancies were to be made after preparation of a merit list based on educational qualifications only without interviewing the candidates. Interview was held contrary to the same. 30 marks had been fixed for interview instead of maximum 10 marks provided in Circular dated 23.03.1999 because of which persons with lesser marks for educational qualifications had been appointed and more meritorious

candidates were left out. It is thus evident that the final order was at complete variance with the grounds mentioned in the show cause notice. The order wrongly stated that since the Appellant was on probation removal would not amount to termination. The ground of being a probationer was but a camouflage for a punitive termination without opportunity of defence. The foundation of the order was based on the illegality of the appointment. The order was therefore not sustainable in absence of a proper opportunity of defence being stigmatic in nature..

5. Leaned Counsel for the State submitted that the appointments were made contrary to the law evident from the inquiry report discussed in paragraph-18 of the judgment. The Appellant was a probationer and therefore the order of removal being innocuous would not affect further chances of appointment. There was no right in a probationer to seek confirmation in the guise of challenging an order of removal which was not stigmatic. The illegality in the appointment was not individual to the Appellant but ran across the entire spectrum of the appointments.

6. We having heard learned Counsel for the Parties and are satisfied that the appeals can be disposed off on a short issue of gross illegality in the decision making process.

7. It is not in dispute that an advertisement was issued followed by a selection procedure by a selection committee constituted for the purpose. The Appellant was at serial 1 of the panel. The Respondents held an ex-parte inquiry into the appointment culminating in a report dated 9.2.2007. On going through the sixteen grounds of illegality mentioned in the same we do not find any one of them related to the grounds mentioned in the show cause notice issued to the Appellant on 23.10.2008. The fact that a copy of the same was not furnished to the

Appellant does appear to be very relevant at this stage because prima facie, the show cause notice and the grounds in the report are completely at variance with each other.

8. The giving of a show cause and consideration of the reply is not an empty formality but an ingredient of the basic principle of natural justice that no person shall be condemned unheard. The show cause notice must be clear mentioning the grounds on which it is issued. Unless the person concerned is first able to understand what is passing the mind of the person issuing the show cause notice, what does the person reply to. If the show cause notice is vague and not specific it needs no emphasis that the person can hardly reply to it on assumptions of understanding with regard to what may be passing the mind of the person issuing the show cause notice. The show cause notice only stated that she did not possess the essential qualifications and had exercised undue influence upon the Selection Committee, which favoured her with the appointment. No further details were mentioned. We have already noticed that these grounds do not find place in the inquiry report dated 9.2.2007. To enable the Appellant to file a reply to the show cause notice, she had to be specifically told why she was considered ineligible for appointment and in what manner undue influence had been exercised on which member of the Selection Committee. It is difficult to accept that every candidate had exercised undue influence by making bald and generalized allegations. In her reply dated 10.11.2008 to the show cause notice, the Appellant took a specific defence that the show cause notice being extremely vague was hindering her from filing a proper reply and she had requested for a copy of the inquiry report which was never furnished to her. She took a specific defence that she possessed the essential eligibility and had also appeared at the Hindi Typing examination during interview. In

(2007) 5 SCC 388 (CCE v. Brindavan Beverages (P) Ltd) with regard to a vague show cause notice it was observed as follows :-

“14.....The show-cause notice is the foundation on which the Department has to build up its case. If the allegations in the show-cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show-cause notice.....”

9. If the Circular provided for selection by award of marks on basis of educational qualifications and interview was also conducted, we find no reason how it would make the selections arbitrary as educational qualifications by itself cannot be sufficient evidence for competency which can be revealed better in interview. While award of marks based on educational qualifications could be the basis of awarding marks the advantages of an oral interview was considered in 1986 Supp SCC 225 (Atul Khullar v. State of J & K) observing as follows :-

“24.....In our opinion, if a viva voce test is permissible for the purpose of adjudging the general intelligence of the candidates, there can be no doubt that the three components mentioned earlier would have some relevance. Presence of mind and expression can be considered as components of general intelligence. The presence of mind displayed by a candidate in answering a question is an index of general intelligence, and his power of oral expression is evidence of his ability to communicate intelligently. The third component, physical bearing, possesses a somewhat remote connection with general intelligence. But we may suppose that by physical bearing what is meant is the physical manner in which the candidate responds to the stress and tension experienced by him during the interview. It is a weak component, but even though tenuous it is not so unrelated to general intelligence that we should strike it down as an unreasonable element in deciding on a candidate's suitability.”

10. The grounds mentioned in the show cause notice and the impugned order are also at complete variance with each other and it alone vitiates the impugned order. The invalidity of an order issued on

grounds at variance with the show cause notice was considered in (2001) 6 SCC 260 (Tarlochan Dev Sharma v. State of Punjab) observing as follows :-

“13...We are, therefore, clearly of the opinion that not only the principles of natural justice were violated by the factum of the impugned order having been founded on grounds at variance from the one in the show-cause notice, of which the appellant was not even made aware of, let alone provided an opportunity to offer his explanation,.....”

11. The termination of a person from service alleging an illegal appointment is a serious matter. Discharge of a probationer for inefficiency is a completely distinct issue. A person terminated from service for having obtained appointment despite being ineligible to do so will certainly carry a taint in a candidature for any future employment. The entire discussion in the order dated 19.11.2014, if the veil is lifted reveals that the foundation of the order is not inefficiency in performance but illegality in the appointment. It casts an aspersion and was attempted to be camouflaged as an innocuous removal of a probationer. The Learned Single Judge in our considered opinion proceeded on the assumption that it was a mere innocuous order of removal of a probationer without lifting the veil. It is the essence of the order which has to be seen and not the mere language that has been used. In (1984) 2 SCC 369 (Anoop Jaiswal v. Government of India) it was observed :-

“12. It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee.”

12. We may not be misunderstood to have held that there were no irregularities or illegality in selection at all. The impugned order of

termination is not sustainable because of infirmities in the decision making process but without prejudice to the rights of the respondents afresh in accordance with law. The impugned order dated 19.11.2014 and the order under appeal are set aside.

13. The Appeal is allowed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE

Priya