

Subhra Roy

Vs.

Union of India & Ors.

Mr. Kallol Basu,

Mr. Suman Banerjee.

... for the petitioner.

Mr. Nilanjan Bhattacharyya.

... for the Union of India.

The petitioner was beleaguered with the ultimate decision of the Tribunal directing the respondent authorities to issue a show cause notice and after affording an opportunity of giving reply and personal hearing the final decision shall be taken, which constrained the petitioner to move the instant writ petition.

Though the specific relief claimed in the tribunal application is extended to the petitioner, indubitably the petitioner was appointed to the post of Lower Division Clerk, i.e. Junior Passport Assistant on compassionate ground on 3rd January, 2002. The order of appointment was passed on 13th March, 2002 and the service was confirmed on 3rd July, 2008.

The Rules applicable to such establishment postulate clearing of the type writing test, which was attempted after a gap of nearly seven years since the appoint was confirmed, but to her dismay she could not succeed. However, she was promoted to the post of Senior Passport Assistant on 9th January 2009 and subsequently to the post of Assistant (Group – B) on 12th October, 2015 having stood at the 8th rank in the departmental examination conducted in this regard.

To the utter surprise the petitioner was served with two notices dated 4th November, 2020 and 11th November, 2020 revoking all the appointments at the promotional post and relegating the petitioner back to the original post of Junior Passport Assistant on the premise that the petitioner could not succeed in type writing test, which is imperative and mandatory for all such employee.

The mistake was sought to be rectified taking decision unilaterally and in gross violation of the principles of natural justice. Such drastic steps taken by the respondent authorities prompted the initiation of a proceeding before the Central Administrative Tribunal being OA 350/01153/2020 seeking various reliefs more particularly quashing, canceling and/or setting aside the orders dated 4th November, 2020 and 11th November, 2020 with the consequential relief to continue at the promotional post.

The Tribunal held that the aforesaid notices is palpably bad and smack of non-adherence of the principles of *audi alteram partem* and proceeded to rescind and/or cancel the said order with further direction to proceed upon issuance of the show cause notice and other ancillary reliefs which would flow therefrom.

We are in fix when the writ petition was moved by Mr. Basu, learned Advocate appearing for the petitioner, in ascertaining the prejudice or grief which the petitioner might have presumed.

According to Mr. Basu, certain observations have been made in the impugned order which would vitally affect not only the right accrued to the petitioner but

may have persuasive effect at the time of considering the proceeding launched on the basis of the show cause notice. According to him, the authorities have misinterpreted the office memorandum dated 22nd April, 2015 providing exemption from passing the type writing test after completion of 8 years of service or on attaining the age of 45 years, whichever is earlier, to be not applicable to the petitioner, as according to the Tribunal such exemption can only be activated in the event the Lower Division Clerk could not pass the type writing test before the date of the said Office Memorandum having made two genuine attempts.

The Tribunal was of the view that the applicability of the said exemption provision is relatable to the unsuccessful genuine attempt by the Lower Division Clerk twice and not otherwise.

Mr. Basu was very much vocal in his submission in referring the letter dated 18th May, 2012 issued by the Passport Granting Officer to the Pay & Accounts Officer, Ministry of External Affairs; wherein such mistake was realized and made patent and despite the same the promotion was given and, in fact, the petitioner discharged her duties attributable to the promotional post.

However, in course of hearing we have been taken to an application being CAN 1 of 2022 filed in the instant application seeking stay of operation of the impugned order, more particularly the so-called show cause notices dated 25th January, 2022 being an outcome of malice and predetermined mind. It has been brought to our notice that even after quashing or setting aside the order dated 4th November, 2020 and 11th November, 2020 reverting the petitioner to the

initial post, the respondent authorities are still treating the petitioner at such post and paying the salary fixed thereat.

Such being the position, we invited the respondents to address us. It is arduously submitted that there has been an apparent mistake in granting promotion to the petitioner, as she could not pass the typing test, which is inflexible as per the statutory Rules. According to the learned Advocate, the mistake cannot be perpetuated for all time to come and if the authorities thought it fit to rectify, there is no fetter on their part to rectify the same, as no right can be accrued nor fructify in favour of the petitioner because of such mistake.

It is undisputed that the petitioner was unsuccessful in the typing test, but equally it is evident from the record that the authorities promoted her to the higher post. There is no other allegations against her attributable to her conduct in discharging her duties. Once the right is created, such right can only be diminished taking recourse to law as opposite to capricious, whimsical or arbitrary steps. The service of the petitioner is governed by statutory Rules and the respondent authorities cannot wriggle out therefrom but must travel within the peripheral thereof. Any action beyond the circumference of the statutory Rules cannot seek blessings of the Court nor the power of judicial review should be the conservatively exercised. The power of the judicial review gets activated against every action of the authority which per se is in violation of the statutory provisions or tainted with malice arbitrariness or of like nature.

The Tribunal, in fact, found the existence of such elements and did not give any nod to such action and quashed the same, which in our opinion, does not require any interference; the reason being once the authorities have knowingly promoted the petitioner to the promotional post bearing in mind that she could not successfully clear the type writing test, even if it is termed as a mistake for the sake of appreciation, yet the petitioner cannot be put to its original post without adherence to the statutory Rules.

Since none of the procedures provided in the statutory Rules were followed, the order relegating the petitioner back to the post of Junior Passport Assistant falls on the anvil of natural justice, which is the hallmark of any administrative or judicial action before embarking the journey of deciding the right accrued or not accrued in favour of the person.

The recourse available in the statutory Rules is within the domain of the employer or the institution for which it is framed and if any mandate is given for strict adherence to such Rules, the infraction or departure therefrom is susceptible for interference as per se illegal or perceived to be so. Furthermore, the Court cannot direct the authority to act contrary to the provisions of the statute or its Rules nor to make any departure therefrom but must keep the authority within the bounds of law, as any departure therefrom would entail such action liable to be quashed and set aside in exercise of power of judicial review. In fact, the Tribunal has simply activated the statutory provisions to be resorted to by the respondent authorities, which cannot be conceived to be an outcome of irregularity and/or illegality.

So far as the findings, which according to Mr. Basu, may be projected against his client, are concerned, those are restricted to the said application and relatable to the ultimate goal to be achieved while granting relief. It would neither attain finality nor intend to achieve so, but restricted to the reliefs claimed therein. Furthermore, the authority upon issuing the show cause notice in terms of the statutory provisions shall be guided by the materials produced before it and shall not be swayed by the adverse observations made in the order, because such proceeding is independent and not arising from the tribunal application.

The apprehension in the mind of the petitioner is unfounded more particularly that such adverse remarks would be the guiding tool in the proceeding originated from the show cause notices.

We seriously took note of the facts disclosed in course of the instant writ petition that despite the orders dated 4th November, 2020 and 11th November, 2020 having quashed and set aside by the Tribunal, the petitioner is still treated to have been posted at the relegated post and paid the salary in commensurate therewith. The moment the order reverting the petitioner to the original post is set aside by the Tribunal or Court, such order cannot be whittled down nor the effect can be brushed away taking a circuitous route, which is unfounded and contrary to the fundamental principle of the service Rules. The moment the orders dated 4th November, 2020 and 11th November, 2020 are set aside, the logical inference flows therefrom is that the petitioner remained at the post which she held at the time of passing the said order and it is incongruous to

suggest that she would remain in the relegated post and shall be paid the salary attached to such post.

The respondent authorities are directed to pay the salary attached to the post which was held by the petitioner before the order relegating her to the original post was passed and shall be paid the differential amount within three weeks from date.

Since we do not find the ultimate decision of the Tribunal to be infirm or illegal, we dispose of the instant writ petition in the light of the observations made hereinabove.

Nothing in this order shall be construed to have any impact on the merit of the proceeding to be initiated on the basis of the show cause notices, which shall be decided independently and on the basis of the materials disclosed therein and in accordance with law.

(Harish Tandon, J.)

(Rabindranath Samanta, J.)

