

Dr. P. K. JAISWAL

v.

Ms. DEBI MUKHERJEE AND ORS.

JANUARY 7 , 1992

[A.M. AHMADI AND S. C. AGRAWAL, JJ.]

Service Law : Assistant Director General (Prevention of Food Adulteration)—Recruitment to—Requisition to Union Public Service Commission—Whether Government can withdraw before process of selection commences.

The Union Government sent a requisition to the Union Public Service Commission for selection of a candidate to the post of Assistant Director General (Prevention of Food Adulteration) in the Ministry of Health and Family Welfare which, under the extant rules, was to be filled in only by direct recruitment. However, before the Commission could advertise the post, the Government informed it not to proceed with the process of selection as it was examining to fill up the post by promotion of Assistant Secretary. But inspite of this, the commission advertised the post and the appellatant was called for an interview whereupon Respondent No. 1, an Assistant Secretary who was expecting her promotion to the post on amendment of the rules, obtained an interim order from Central Administrative Tribunal, staying the process of selection initiated by the Commission. The appellatant, feeling affected by the said order, unsuccessfully moved the Tribunal for impleadment. Meanwhile two further layers above that of Assistant Secretary, though in higher pay-scales but with no separate designations, were created by an amendment of rules in pursuance of this Court's direction. The Tribunal disposed of the application directing to provide promotional avenues to Respondent No. 1 who, while functioning as Assistant Secretary, had also occasionally held the charge of Assistant Director General. Aggrieved, the appellatant preferred the appeal by special leave to this Court.

It was contended by the appellatant that once the process for selection had started, it was not open to the Government as well as to the Tribunal to freeze the process and the Commission was entitled to complete the selection; and that the fact of creation of two layers by the amendment of the rules was wrongly overlooked by the Tribunal.

Dismissing the appeal, this Court,

A HELD : 1.1 If the Government is at a given point of time considering the question of amending the recruitment rules with a view to providing for promotion to a particular post, it can, before an advertisement is issued by the Commission and the process of selection is under way, request the Commission to withhold the same till it decides on the question of amending the rules. [p. 5E-F]

B 1.2 Whether to provide for promotion as a mode of appointment to the post in question is a matter of policy left to the Government to decide. [p. 6AB]

C 1.3 Once the decision of the Government to withdraw the requisition was communicated to the Commission before it had set the process of selection in motion by issuing an advertisement, it was not open to the Commission to go ahead with the selection process as the Government could amend the recruitment rules retrospectively, if it so desired, with a view to providing for appointment by promotion. Such an exercise by the Commission would be one in futility, waste of public time and money and hardship to candidates who seek appointment. [pp. 5GH; 6A]

D The action of the Commission was somewhat hasty and unjustified. [p. 6B]

E 2.1 If the Commission issues an advertisement at the behest of the Government and pursuant thereto calls a candidate for interview, the candidate has a right to be considered for selection but not a right to be selected or to appointment to the post in question. The right to selection crystallises only after the candidate is called for interview pursuant to the advertisement. [p. 5 C-D]

F *N.T. Devin Katti & Ors. v. Karnataka Public Service Commission & Ors.*, [1990] 3 SCC 157 and *Jatinder Kumar & Ors. v. State of Punjab & Ors.*, [1985]1 SCR 899, referred to.

G 2.2 In the instant case, the decision of the Government to withdraw the requisition sent to the Commission before the issuance of the advertisement does not interfere with any vested right of selection because that stage had yet not reached. [p. 5F]

H 2.3 Before the appellant acquired a right to be considered for selection the Government had already intimated that it was examining the question of amending the recruitment rules with a view to providing for appointment by promotion to the post in question. [p. 5G]

2.4 The appellant, therefore, cannot claim any vested right. Nor can the Tribunal's omission to notice that two new layers were created have a bearing on the Government's decision to place the process of selection in hibernation till a final decision is taken on the proposal to provide for promotion to the post. [p. 6BC]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 138 of 1992.

From the Judgment and Order dated 30.8.1991 of the Central Administrative Tribunal, Principal Bench, New Delhi in O.A. No. 1177 of 1987.

G.D. Gupta and Ashok K. Mahajan for the Appellant.

K.T.S. Tulsi, Hemant Sharma and Vijay K. Mehta for the Respondents.

The Judgment of the Court was delivered by

AHMADI, J. Special leave granted.

Heard counsel on both sides. The facts giving rise to this appeal, briefly stated, are as under :

One Mr. Jaisani, a direct recruit, was holding the post of Assistant Director General (Prevention of Food Adulteration) in the Ministry of Health and Family Welfare of the Government of India. On his passing away sometime in July 1989, a vacancy arose which was required to be filled under the extant recruitment rules. The recruitment rules which were then in operation provided for the said post being filled in by direct recruitment only. A requisition was sent to the Union Public Service Commission ('Commission' hereafter) sometime in November, 1989 for selection of a candidate for filling in the vacancy in question.

However, before the Commission could advertise the post, the Union Government informed the Commission by letter dated December 29, 1989 received by the Commission on January 1, 1990 not to proceed with the process of selection because it was examining the question of opening up an avenue for promotion from Assistant Secretary to the post in question. Notwithstanding the said communication, the Commission advertised the post in January 1990. The appellant applied for the same and was called for an interview on December 13, 1990. Thereupon the first respondent, Mrs. Debi Mukherjee, who was then serving as Assistant Secretary, and was hoping to be promoted as Assistant Director General on the amendment of

A the recruitment rules, approached the Central Administrative Tribunal, New
Delhi and obtained an interim order staying the process of selection initiated
by the Commission. It may here be mentioned that in the meantime two
B further layers above that of Assistant Secretary came to be created providing
for higher pay-scales by an amendment of the rules pursuant to the directions
given by this Court in Writ Petition No. 1118/89 read with the directions in
the Contempt Petition No. 5/90 dated May 4, 1990. The two layers thus
C created provided for higher pay-scales but no separate designations. The
question regarding the appointment to the vacancy created on the demise of
Jaisani, however, had still to be dealt with. The appellant who was affected
by the Tribunal's Order approached for impleadment/intervention but the
D Tribunal did not allow the same although we are told that the Tribunal gave
a hearing to the counsel for the appellant. The Tribunal ultimately disposed
of the petition with a direction to the concerned Ministry to provide promo-
tional avenues to the applicant who had functioned in the post of Assistant
Secretary for several years and had held the charge of Assistant Director
General as and when the occasion arose. Three months' time was granted to
the concerned Ministry to carry out the directions. The failure to carry out the
directions had led to the filing of a Contempt Application also.

The grievance of the appellant is two-fold. Firstly, he contends that
once the process for selection had started it was not open to the Government
as well as the Tribunal to freeze the process and the Commission was entitled
E to complete the selection. The second point urged was that the fact of the
creation of two layers by the amendment of the relevant rules had been totally
over-looked by the Tribunal even though its attention was drawn to the same
by counsel for the appellant.

In support of the first contention, strong reliance was placed on the
F decision of this Court in *N.T. Devin Katti & Ors. v. Karnataka Public Service
Commission & Ors.*, [1990] 3 SCC 157. In that case this Court observed that
a candidate who is eligible and otherwise qualified in accordance with the
relevant rules and the terms of the advertisement acquires a vested right of
being considered for selection in accordance with the rules as they existed at
G the date of advertisement. He cannot be deprived of that limited right on the
amendment of rules during the pendency of selection unless the amended
rules are retrospective in nature. While making these observations, it was
made clear that a candidate on making an application for a post pursuant to
an advertisement does not acquire any vested right of selection or of
H appointment to the post in question. This is obvious from the ratio of this
Court's decision in *Jatinder Kumar & Ors. v. State of Punjab & Ors.*, [1985]
1 SCR 899. In that case, it was clarified that an independent body like the

Commission is established to ensure selection of best available talent for appointment to the post in question to avoid arbitrariness and nepotism in the matter of appointment. The selection has to be made by the Commission and on the basis thereof the Government has to fill up the post adhering to the order of merit drawn up by the Commission. This Court emphasised that the selection by the Commission is only recommendary in nature and the final authority for appointment is the Government, and if the Government declines to accept the recommendation the Constitution enjoins the Government to place on the table of the legislature its reasons and report for so doing. Thereby the Government is made answerable to the elected representatives under the Constitution. This, however, does not clothe the selectee with any right to appointment that is to say that he cannot force the Government to accept the recommendation of the Commission but the Government has to make the appointment strictly in accordance with the recruitment rules and merits as determined by the Commission and it cannot disturb the list at its sweet will. Nor can the Government appoint a person whose name does not appear in the list. It is obvious from the ratio of these two decisions to which our attention was pointedly drawn that if the Commission issues an advertisement at the behest of the Government and pursuant thereto calls a candidate for interview, the candidate has a right to be considered for selection but not a right to be selected or to appointment to the post in question. The right to selection crystallises only after the candidate is called for interview pursuant to the advertisement. But in the instant case the question is whether the Government can withdraw the requisition sent to the Commission for initiating the process of selection because at the point of time no right had crystallised in anyone for being considered for selection. If the Government is at a given point of time considering the question of amending the recruitment rules with a view to providing for promotion to the post in question, the Government can before an advertisement is issued by the Commission and the process of selection is under way request the Commission to withdraw the same till it decides on the question of amending the rules. The decision of the Government to withdraw the requisition sent to the Commission in November 1989 before the issuance of the advertisement does not interfere with any vested right of selection because that stage had yet not reached. In the instant case, that is exactly what happened. Therefore, before the appellant acquired a right to be considered for selection the Government had already intimated that it was examining the question of amending the recruitment rules with a view to providing for appointment by promotion to the post in question. Once this decision was communicated to the Commission before it had set the process of selection in motion by issuing an advertisement, it was not open to the Commission to insist that it will go ahead with the selection process as the extant rule provided for

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- A promotion by direct recruitment and the Government could amend the recruitment rules retrospectively, if it so desired, with a view to providing for appointment by promotion. Such an exercise by the Commission would be an exercise in futility, waste of public time and money and hardship to candidates who seek appointment. Whether to provide for promotion as a mode of appointment to the post in question is a matter of policy left to the Government to decide and if it desired that the selection process should be held in abeyance till the question was examined and a final decision was taken thereon, it was not open to the Commission to ignore the communication of the Government in that behalf and proceed to set the selection process in motion. We think the action of the Commission was somewhat hasty and unjustified. The appellant, therefore, cannot claim any vested right as urged by his learned counsel. Nor can the Tribunal's omission to notice that two new layers were created have a bearing on the Government's decision to place the process of selection in hibernation till a final decision is taken on the proposal to provide for promotion to the post.

For the above reasons, we are of the opinion that the decision reached by the Tribunal does not require any interference at our hands in exercise of the power under Article 136 of the Constitution. Hence, the appeal fails and is accordingly dismissed with no order as to costs.

R.P.

Appeal dismissed.