

UNION OF INDIA AND ANR.

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v.
MALTI SHARMA

FEBRUARY 24, 2006

[S.B. SINHA AND P.P. NAOLEKAR, JJ.]

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Administrative Law:

Administrative action—Abolition of post—Writ petition filed by employee challenging her termination order—During pendency of writ petition, post abolished—Legality of—Held: Action clearly illegal and malafide—Service law—Abolition of post.

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Respondent, an Inspector under the Nursing Council Act was terminated from service. She filed Writ Petition in High Court challenging the Termination Order. However, during pendency of Writ Petition, Executive Committee ratified the order passed by President of Nursing Council.

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Union of India had filed Affidavit stating that though there was proposal for abolition of post but it had not been abolished but converted into the post of Assistant Secretary.

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Single Judge of High Court after hearing both the parties reserved its judgment. Before the pronouncement of judgment, Government of India (GOI) issued a letter dated 17.6.1999 directing the council to issue order of abolition of post of Inspector. GOI in terms of office memorandum dated 3.5.1993, declared that post of inspector stood abolished.

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Single Judge held that affirmation of termination was passed without taking note of the fact that Writ Petition was pending. Single Judge also opined that having regard to the fact that post of Inspector which was statutory post was abolished, consequent relief of reinstatement cannot be granted. However, it gave liberty to respondent to challenge the order dated 17.6.1999.

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A Respondent filed LPA against the said judgment which was dismissed holding that it would be open for her to file a fresh petition challenging order of abolition. In view of this observation, respondent filed another writ petition before High Court which was allowed by Single Judge holding that termination of respondent was mala fide. On appeal, Division Bench dismissed the appeal having regard to the finding of fact arrived at by Single Judge. Hence the present appeal.

Union of India contended that it was not apprised that Writ Petition was pending and that the Council had merely informed that the post was lying vacant for more than one year.

C Allowing the appeal, the Court

HELD: 1. The Division Bench of the High Court was right in saying that in the facts and circumstances of this case it was not necessary for it to go into the question as to whether the post of Inspector carries a statutory status or not. [554-F]

2. It is neither denied nor disputed that the post of Inspector is an essential one so as to enable the Council to carry out its statutory function. He inspects the colleges only for the purpose of grant of recognition and on the basis of the report of the Inspector alone, the Executive Council

E considers the proposal for grant of recognition of such institution. The main purpose of the Council, therefore, cannot be performed in absence of an Inspector or a person authorised to perform the said duties. In any event, the Office Memorandum dated 3.5.1993 will have no application in the instant case as the post was not held in abeyance. It was filled but the services of the Respondent were terminated which was questioned by her by filing a writ petition before the High Court. The said writ petition was admittedly pending. In fact, the judgment was reserved. Despite the fact that the writ petition was pending for a period of three years, why the Government of India was approached for the purpose of obtaining a direction that the post stood abolished is not known. Even in view of the

G findings of fact recorded by the High Court, the concerned authority took recourse to *suppressio veri* and *suggestio falsi*. It had not been disclosed that a writ petition was pending. [555-C-G]

H 3. It is furthermore not in dispute that after the judgment of the High Court, the Respondent has been reinstated. Whether the post had been revived before such reinstatement again has not been disclosed. It is,

therefore, evident that the Appellant No. 2 tried to overreach the court. A
Its action was plainly *mala fide* both on facts as well as in law.

[555-G-H; 556-A]

Union of India Through Govt. of Pondicherry and Anr. v. V. Ramakrishnan and Ors., [2005] 8 SCC 394, referred to. B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1053 of 2004.

From the Final Judgment and Order dated 2.9.2003 of the Delhi High Court in L.P.A. No. 112 of 2003.

V.S.R. Krishna, Yash Pal Dhingra for the Appellant. C

Sunil Gupta, Pramod Dayal, Vivek Vishnoi and Pranab Kalra for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. The Appellant No. 2 herein is a statutory body constituted under the Nursing Council Act (for short "the Act"). It exercises statutory powers. Section 13 of the Act reads as under:

"13. Inspections :- (1) The Executive Committee may appoint such number of inspectors whether from among members of the Council or otherwise, as it deems necessary to inspect any institution recognised as a training institution, and to attend examinations held for the purpose of granting any recognised qualification or recognised higher qualification.

(2) Inspectors appointed under this section shall report to the Executive Committee on the suitability of the institution for the purposes of training and on the adequacy of the training therein, or as the case may be on the sufficiency of the examinations.

(3) The Executive Committee shall forward a copy of such report to the authority or institution concerned, and shall also forward copies with the remarks, if any, of the authority or institution concerned thereon to the Central Government and to the State Government and State Council of the State in which the authority or institution is situated."

Five posts of Zonal Inspector were created by the Executive Council in H

A terms of a Resolution dated 22.2.1965. The Appellant No. 1 herein was approached by the Appellant No. 2 for creation of five permanent posts of Inspector but only one regular post of Inspector was sanctioned. The Respondent herein was appointed as an Inspector on an adhoc basis on 1.6.1992. She was later on selected on a regular basis. Her selection was approved by the General Body of the Council in the year 1994. She was put on probation for a period of two years. On 3.4.1996, she was asked to submit a self-appraisal report. However, without waiting for the receipt thereof, recommendation was made on or about 8.4.1996 by the Departmental Promotion Committee that her services might not be confirmed. On 9.4.1996, the Respondent submitted her self-appraisal report. On the same day, her services were terminated with immediate effect by an order of the President of the Council although admittedly the Executive Council alone had jurisdiction in relation thereto. A writ petition was filed by the Respondent questioning the said order of termination dated 9.4.1996. Only during pendency of the said writ petition, the Executive Committee ratified the order passed by the President of the Council dated 8.5.1996 which was in turn ratified by the General Body on 5.7.1996. An affidavit was filed by the Appellant herein stating:

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- (i) the post of Inspector to which the respondent was appointed was created not under S. 13 but under S. 8(2) (d) of the INC Act, 1947;
- (ii) on 08.04.96 the said post was proposed to be abolished by the EC. However, the post has not been abolished but has been converted into post of Assistant Secretary (Nursing) in the same pay scale as Inspector (Rs. 2000-3500); and
- F (iii) the necessary sanction/ approval from GOI is awaited for filling the said post of Assistant Secretary (Nursing).

G From the said affidavit, therefore, it would appear that merely nomenclature of the post of Inspector had been changed to that of Assistant Secretary. In support of the said allegation, no record was produced. The learned Single Judge of Delhi High Court upon hearing the parties reserved its judgment on 16.2.1998.

H Before the judgment could be pronounced, the Government of India issued a letter dated 17th June, 1999 directing the Council to issue order of abolition of the post of inspector in the following terms:

"The undersigned is directed to enclose a copy of the statement regarding vacant posts in your organization. The posts mentioned in the statement were lying vacant for more than one year as per communication received from your office and as such are deemed abolished as per instructions of Ministry of Finance. A

It is requested that formal orders of abolition may be issued in respect of the vacant posts which are deemed abolished and a report sent to this Ministry, urgently." B

The Government of India purported to be on the basis of a communication sent by the Council to it in terms of its letter dated 17.6.1999 declaring the post of Inspector could have been abolished in terms of Office Memorandum bearing No. 7(1)-E.(Coord)/93 dated 3rd May, 1993 the relevant clause whereof is as under: C

"Points	Clarifications
b. If a post is vacant or held in abeyance for some time, whether the post can be filled up or revived as the case may be, by the administrative Department/ Ministry.	If a post is held in abeyance or remains unfilled for a period of one year or more, it would be deemed to be abolished. Integrated Finance of each Ministry/ Department may monitor abolition of such posts and ensure that abolition orders are issued within one month of the post remaining unfilled/ held in abeyance for the period of one year. If the post is required subsequently, the prescribed procedure for creation of new posts will have to be followed, i.e., as briefly set out below" D

The learned Single Judge by a well considered judgment held : E

(i) "In the light of the facts as stated in the writ petition, the motive of the respondent, however, becomes apparent from the fact that the memorandum dated 22nd May 1995 rejecting the application for ex post facto sanction of leave sent by the petitioner on 26th April 1994 was issued almost one year after the petitioner's application." F

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A (ii) "The approval of the DPC is of no material significance in view of the hasty action taken by the DPC even without waiting for the self appraisal report of the petitioner."

(iii) "No dates were given to the petitioner's absence nor any unsatisfactory nature of the petitioner's misconduct or misbehaviour has been set out. Thus this makes it clear that in the guise of simple termination of the services of the petitioner, in fact punitive action has been taken against the petitioner. Significantly even the General Body Meeting of 5th July 1996 was apprised of the filing of the writ petition by the petitioner and that the same meeting sought to affirm the termination of services of the petitioner by the President. The meeting could as well have deferred this issue in view of the pendency of the writ petition."

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D (iv) "This order has obviously been passed without taking note of the fact that the writ petition was pending in this Court challenging the order of termination dated 9th April 1996 subsequent to which the post is said to have been lying vacant."

E The learned Judge also opined that in view of the findings recorded therein, the Respondent would have been entitled to consequent relief of reinstatement but having regard to the fact that the post of Inspector which was a statutory post was abolished, directed:

F "As the position stands today, the post has been abolished and the consequent relief of reinstatement cannot be granted. However, it would be open to the petitioner to take such steps in law in respect of abolition of the post by the order dated 17th June 1999 as she may be advised. Nothing stated in this judgment would have any bearing on the legality and validity of the aforesaid abolition of the said post of the Inspector by the order dated 17th June 1999."

G No appeal having been preferred thereagainst by the Appellant herein, the same attained finality. The Respondent filed a Letters Patent Appeal against the said judgment and order which was dismissed by an order dated 14.09.2000 holding that it would be open for her to file a fresh petition challenging the order of abolition dated 17.6.1999.

H In view of the aforementioned observations, another writ petition marked as CW 1162 of 2002 was filed by the Respondent before the Delhi High

Court. The said writ petition was allowed by a learned Single Judge *inter alia* A opining that the post of Inspector is a statutory post. It was further observed that the judgment and order dated 22nd November, 1999 passed in CWP No. 1582 of 1996 attained finality stating :

“Therefore, the said post is statutory and could not have been abolished by the respondents. Knowing fully well that the challenge to the termination of the services from the said statutory post was pending disposal before this Court, a wrong statement was made to respondent no.1 by respondent no.2 that the post is lying vacant, the same was not a proper representation of the statement of fact by respondent no.2 to respondent no.1. Mr. Bhushan had clearly stated that it was not brought to the notice of Union of India that any petition by the holder of said post was pending in the High Court. For the simple reason that the post was a statutory post, the same was not lying vacant as the vacancy was created by respondent no.2 and was being challenged by the petitioner who got her writ petition allowed but for the said abolition of the post, got the prayer of the re-instatement but could not be reinstated. I do not find any merit in the contention of respondent no.2 that the post was not statutory. As respondents have not challenged the findings of CWP No.1582/96, that has become final. Respondents cannot be permitted to challenge the same. The whole exercise was mala fide and to deprive the petitioner of her rightful re-instatement.” E

F In the Letters Patent Appeal filed by the Appellant, the main contention raised on behalf of the Appellant was that it had wrongly been held that the post of an Inspector is a statutory post. The Division Bench, however, without going into the aforementioned question dismissed the appeal having regard to the finding of fact arrived at by the learned Single Judge.

G Mr. V.S.R. Krishna, learned counsel appearing on behalf of the Appellant would contend that a statutory post carries a distinct meaning as it must be a post which the statute itself provides for by laying down the conditions of service as also qualification, duties and functions attached thereto. Thus, only because Section 13 speaks of posts of Inspector and provides for certain duties, the post shall not become a statutory one. It was urged that there was no reason for the Appellant to question the earlier decision as it was not only held that the post had been abolished, no opinion was expressed as regard the legality or validity of the direction of the Central Government. It was further H

A submitted that the Appellant declared the post having been abolished in view of the legal fiction created under the Office Memorandum dated 3rd May, 1993 and in view of the admitted fact that the post had been lying vacant for more than one year, the abolition took place of its own.

B Mr. Sunil Gupta, learned senior counsel appearing on behalf of the Respondent, on the other hand, would submit that the fact of the matter is replete with unreasonable attitude and malafide act on the part of the authorities of the Respondent. In particular, the learned counsel drew our attention to the following statements made in the writ petition :

C "The grievance of the petitioner arises on account of her plea that the action against the petitioner is mala fide and has been taken at the behest of one Shri R.N. Singh, who was at one time the member of the Executive Committee and who was inimical to the petitioner because of the adverse entries made by the petitioner during an inspection of an institute at Madhurai in January 1995, which institute was sponsored by the said Shri R.N. Singh. It is the petitioner's case that due to the adverse reports by her in respect of the said Institute sponsored by Shri Singh, he started creating trouble for the petitioner in the Nursing Council and started entertaining frivolous complaint against the petitioner. In this view of the matter the petitioner contended that the termination of her services were punitive in nature and the President of the Council could not have taken the impugned action and the subsequent ratification by the Executive Council, particularly, when Shri R.N. Singh was associated with the Executive Council's decision could not have been upheld and was tainted with ulterior motives and *malafide*."

F We agree with the Division Bench of the High Court that in the facts and circumstances of this case it was not necessary for it to go into the question as to whether the post of Inspector carries a statutory status or not.

G It has been found by the learned Single Judge of the Delhi High Court that the service of the Respondent was terminated mala fide. The learned Single Judge also commented upon the conduct of the authorities of the Appellant Council. It was observed therein that the post was declared to be abolished mala fide. Apart from that, as noticed hereinbefore, the nomenclature of the post was changed during pendency of the writ petition.

H The learned counsel appearing on behalf of the Union of India, as

noticed hereinbefore, categorically stated that it was not apprised that a writ petition was pending. An Officer of the Appellant No. 2- Council merely brought it to the notice of the Government that the post was lying vacant for more than one year. It might not have even been disclosed to the competent authority of the Central Government that name of the post had been changed and the said post had been filled up. It has also not been shown before us that in relation to day to day affairs of the Council, the Union of India had a statutory power to intervene. It may be that it has the power of granting approval as regard creation of post by the Executive Committee but in absence of any statutory power in this behalf, evidently it could not issue a direction which would be binding upon the Council. Nothing has been brought on records to show as to how the said Office Memorandum dated 3rd May, 1993 would apply in the case of the officers of the Council.

In any event, out of five posts only one post was sanctioned by the Government of India. It is neither denied nor disputed that the post of Inspector is an essential one so as to enable the Council to carry out its statutory function. The learned Single Judge has clearly indicated that the Inspector plays an important role in the Council. He inspects the colleges only for the purpose of grant of recognition and on the basis of the report of the Inspector alone, the Executive Council considers the proposal for grant of recognition of such institution. The main purpose of the Council, therefore, cannot be performed in absence of an Inspector or a person authorised to perform the said duties. In any event, the aforementioned Office Memorandum dated 3rd May, 1993 will have no application in the instant case as the post was not held in abeyance. It was filled but the services of the Respondent were terminated which was questioned by her by filing a writ petition before the High Court. The said writ petition was admittedly pending. In fact, the judgment was reserved. Despite the fact that the writ petition was pending for a period of three years, as to why the Government of India was approached for the purpose of obtaining a direction that the post stood abolished is not known. Even in view of the findings of fact recorded by the High Court, the concerned authority took recourse to *suppressio veri* and *suggestio falsi*. It had not been disclosed that a writ petition was pending.

It is furthermore not in dispute that after the judgment of the High Court pronouncement the Respondent has been reinstated. Whether the post had been revived before such reinstatement again has not been disclosed.

It is, therefore, evident that the Appellant No. 2 tried to overreach the

A court. Its action was plainly mala fide. both on facts as well as in law.

In *Union of India Through Govt. of Pondicherry and Anr. v. V. Ramakrishnan and Ors.*, [2005] 8 SCC 394, this Court observed:

B “But, even where the tenure is not specified, an order of reversion can be questioned when the same is mala fide. An action taken in a post haste manner also indicates malice. [See *Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia and Ors.*, [2004] 2 SCC 65, para 25]”

C For the foregoing reasons, we are of the opinion that no case has been made out for our interference with the impugned judgment. The appeal is dismissed with costs. The Counsel’s fee assessed at Rs. 5000.00.

D.G.

Appeal allowed.