STATE OF ODISHA & ORS.

v.

KAMALINI KHILAR & ANR.

(Civil Appeal No.1694 of 2021)

APRIL 28, 2021

[UDAY UMESH LALIT AND K. M. JOSEPH,* JJ.]

Service Law: Termination from service – Claim for back wages – On facts, appointment of Government teacher – Respondent No. 2 obtained higher rank than respondent No. 1 in the Category of S.E.B.C (Women) – However, respondent no. 1 appointed since appointment letter could not be delivered to respondent no. 2 being wrongly addressed and apparently, respondent no. 2, did not join – Application by respondent no. 2 before the tribunal – Tribunal issued appointment order in favor of respondent no. 2 while terminating appointment of respondent no.1 and also issued direction for creation of supernumerary post – However, the High Court set aside the direction for creation of the supernumerary post and thereafter, directed the appointment of the respondent No. 1 in any vacancy available –On appeal, held: In the case of wrongful termination of service reinstatement with the continuity of service and back wages is the normal rule – On facts, it was clear that the person appointed in place of the respondent no.2 was respondent no. 1 – Respondent no. 1 has only a few months for attaining the age of superannuation and has not secured any alternative employment and also has not been able to work based on the direction of the tribunal or of the High Court – Furthermore, nearly two decades have gone by and failure to afford opportunity of being heard to respondent no 1 cannot have adverse effect – More so, the High Court has not found that the termination of the service of the respondent no. 1 was ab initio void or illegal as such – High Court in fact rightly set aside the direction of the tribunal to reinstate by creating a supernumerary post – There was no basis for the High Court to have thereafter directed the appointment of the respondent no. 1 in any vacancy available – Termination of the service of the respondent no. 1 was unavoidable in the light of the binding order of the tribunal – Thus, the claim of respondent no. 1 for back wages from the date of termination is untenable – Order of the High Court to the extent impugned is set aside.

* Author

Allowing the appeal, the Court Held:

1.1 The Order of the Tribunal passed in O.A. No. 650 of 2000 was binding on the department. This Court cannot at this stage sit in judgment over the correctness of the order passed in the said O.A. Apparently, though the Respondent No. 2 having obtained higher rank than the Respondent No. 1 in the Category of S.E.B.C (Women) had been favoured with an appointment letter, it was not delivered to her as it was addressed wrongly. The Respondent No. 2, therefore did not join as apparently, she did not receive the appointment order. At least these are the findings of the Tribunal. In fact, the matter had engaged the attention of the 1st Appellant (govt) and it took a decision dated 24.02.2000 therein. The Tribunal directed that if the post had been filled up the District Inspector of schools was to carry out the direction, that is dispense with the service of the candidate who had been appointed in place of Respondent No. 2. The Government had directed that the junior most candidate would be removed in order to enable the Respondent No. 2 to join. The direction of the Tribunal has become final. [Para 13]

1.2 While it may be true the Respondent No. 2 was not a party to the O.A. in law nothing prevented her from challenging the said order. It may not be open to her to contend that as she was not a party, the said order cannot be and should not be implemented in letter and spirit. It is an order passed by a Tribunal which had jurisdiction in the matter. The finding that the Respondent No. 2 could not join because of the letter of appointment being issued in the wrong name cannot be open to challenge. The Tribunal was therefore, setting right an illegality and injustice caused to Respondent No. 2. There is no dispute that there were only 16 vacancies to be filled up of the category of S.E.B.C. (Women). For complying with the order of the Tribunal the Appellants had to dispense with the service of the person appointed in place of Respondent No. 2. [Para 14]

1.3 Under the resolution and procedure adopted, separate lists were prepared for various categories. Vacancies were earmarked for different groups. Merit list was also based on this classification. The Respondent No. 1 figured in the merit list at S.no. 22 for the category S.E.B.C. Women. The surest way to find out whether the termination of service of Respondent No. 1 was in tune with the direction issued by

the tribunal in the earlier O.A. filed by the Respondent No. 2 is to find out as to whether the Respondent No. 1 would have secured the appointment, if the appointment letter was issued in the name correctly of the Respondent No. 2 and she had joined on the said basis. If the Respondent No. 1 would not secure the appointment if the Respondent No. 2 had so joined and in other words, the appointment of the Respondent No. 1 was only because of the non-joining of the Respondent No. 2, then it is the Respondent No. 1 who is the person who was appointed in place of the Respondent No. 2 within the meaning of the order passed in O.A. No. 650 of 2000. [Para 15]

1.4 This is not a case involving disciplinary proceedings against Respondent No. 1. No stigma is attached to the Respondent No. 1. The whole exercise was necessitated no doubt as a result of a mistake committed by the Appellants in not sending the appointment letter at the correct address to Respondent No. 2. In view of the fact that order O.A. No. 650 of 2000 had become final the Appellants were obliged to comply with the order. If they had nothing to offer by explanation to the case of the Respondent No. 2 that she was not served with the letter of appointment, the Respondent No. 1 would not be justified in contending that the Appellant should have challenged the order of the Tribunal. [Para 15]

1.5 Having regard to the Resolution under which the entire appointment were carried out, the matter is to be governed by the separate merit lists which were prepared. In the nature of the facts which make up the dispute in this case, it only means that the Respondent No. 1 was the junior most in the category of S.E.B.C (Women). The order of the Tribunal to be complied with contemplated dispensing the service of the candidate who was appointed in place of the Respondent No. 2. What is clear is that the person appointed in place of the Respondent No.2 was the Respondent No. 1. [Para 16, 17]

1.6 In such circumstances it cannot possibly be held that other candidates who may have secured lesser marks but who it must be noted were treated as falling in different categories for which separate list were prepared, should have been shown the door to comply with the order of the Tribunal. The Respondent No. 1 was considered under the SEBC (Women) as being a woman, she could aspire with the age relaxation. [Para 18]

1.7 The Respondent No. 1 has only a few months for attaining the age of superannuation. It may be true that she has not secured any alternative employment as stated in her affidavit and also projected in the written submissions. She has also not been able to work based on the direction of the Tribunal or of the High Court. [Para 19]

1.8 It is no doubt true that the Respondent No. 1 was offered appointment and was appointed. However, the Appellants suffered an order by a competent Tribunal which it was duty bound to implement. It would be remiss if the principles of natural justice were to be discarded as inapplicable. No doubt there was no need to hold any enquiry as the termination was not on disciplinary grounds. No stigma is attached to Respondent No. 1. But a notice given to the Respondent No. 1 as to why in terms of the order of the Tribunal the Respondent No. 1 should be treated as the person whose services was to be dispensed with should have been issued. However, on the materials placed before the Court, with 16 vacancies alone earmarked for S.E.B.C (Women), and the Respondent No. 2 being the 16th and the last of the candidates entitled in the said Category, not joining in the circumstances resulting in the Respondent No. 1 being appointed and the order of the Tribunal being binding on the Appellants, in the instant case, the failure to afford an opportunity to the Respondent No.1 to show cause as to why her services should not be terminated cannot be held to be fatal. This Court cannot loose sight of the fact nearly two decades have gone by and only for the reason that the Respondent was not offered an opportunity of being heard in the facts of this case, the order of the High Court in directing the appointment of the Respondent No. 1, cannot be supported. It is not as if the High Court has found that the termination of the service of the Respondent No. 1 was *ab initio* void or illegal as such. The Court in fact set aside the direction of the Tribunal to reinstate by creating a supernumerary post. This is not challenged by Respondent No. 1. It directed only that the appointment of the Respondent No. 1 be made in the vacancy. Therefore, the claim of Respondent No. 1 for back wages from the date of termination is at any rate clearly untenable. [Para 23]

1.9 In the case of wrongful termination of service reinstatement with the continuity of service and back wages is the normal rule. It was subject to the qualification that the Court may inter alia take into consideration the length of service and the nature of misconduct if any proved, the financial condition of the employer and similar other factors. [Para 24]

1.10 The High Court rightly set aside the direction for creation of the supernumerary post. There is no basis for the High Court to have thereafter directed the appointment of the Respondent No. 1 in any vacancy available. The termination of the service of the Respondent No. 1 was unavoidable in the light of the binding order of the Tribunal in O.A. No. 650 of 2000. Consequently, the order of the High Court to the extent impugned is set aside and the order passed in the O.A. no. 917 of 2002 filed by the Respondent No. 1 will stand set aside. [Paras 24, 25]

1.11 It is made clear that if the cost of Rs. 50,000 ordered as condition to condone delay in filing the SLP is not paid as aforesaid the impugned judgment would stand, the application for condoning delay would stand dismissed and the leave granted would stand revoked and this judgment would stand recalled. If the cost is deposited, the same can be withdrawn by the Respondent No. 1. [Para 26]

Basudeo Tiwary vs. Sido Kanhu University and Ors. **AIR 1998 SC 3261 – distinguished.**

Deepali Gundu Surwase vs.Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Ors. **(2013) 10 SCC 324 – relied on.**

Union of India and Ors. vs. Dalbir Singh and Ors **(2009) 7 SCC 251;** *Delhi Transport Corporation vs. D.T.C.Mazdoor Congress and Ors.* **AIR 1991 SC 101;** *Surendra Kumar Verma and Ors. vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Ors.* **(1980) 4 SCC 443;** *Hindustan Tin Works Pvt. Ltd. vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Ors.* **(1979) 2 SCC 80 – referred to.**

CIVIL APPELLATE JURISDICATION : Civil Appeal No. 1694 of 2010.

From the Judgment and order dated 05.12.2019 passed by the High Court of Orissa at Cuttack in W. P. (C) No. 32419 of 2011.

Gaurav Khanna and Ms. Nikita Kalia, Advs. for the Appellants.

Pranaya Kumar Mohapatra, Srisatya Mohanty, SPM Tripathi, V.K. Shukla and Satish Kumar, Advs. for the Respondents.

The Judgement of the Court was delivered by

K. M. JOSEPH, J.

1. There is a delay of 247 days in filing the SLP. Having considered the matter, we are inclined to condone delay but on condition that a sum of Rs. 50,000 is paid as costs to the Respondent No. 1. Accordingly, the application to condone delay is allowed subject to payment of Rs. 50,000 to the Respondent No. 1 by the Appellant depositing the same in the Registry within 4 weeks from today. Leave granted.

2. The Appellant No. 1, namely the State of Odisha, passed a resolution dated 12.03.1996 prescribing the procedure for recruitment of Government teachers in primary schools. The Appellant No. 3 namely the District Inspector of Schools, Bhadrak-II, Bhadrak had to determine the number of vacancies to be filled up through direct recruitment. Appellant No. 3 had to also determine the number of vacancies which were required to be reserved for each reserved category. It is the case of the Appellants that based on the same, on 29.07.1996 by letter dated 29.07.1996, it was communicated to the Respondent No. 1 that her name was sponsored by the District Employment Exchange for the post of primary school teacher. She was called upon to submit her application along with her documents. The Respondent No. 1 was directed to attend the viva-voce examination. A merit list was made. The Respondent No. 1 secured the 22nd position in the SEBC (Women) Category. There were only 16 vacancies which were to be filled by SEBC (Women) Category candidates. Respondent No. 1 was favoured with an order of appointment dated 04.04.1998. She was issued such appointment according to the Appellants on the basis that one of the successful candidates, namely the Respondent No. 2 who secured the 16th

position could not join within time. The Respondent No. 1 joined based on the joining letter dated 20.04.1998.

3. While so complaining that she was not served with the appointment order and that order was issued in a wrong name, Respondent No. 2 filed representation which based on an order in an application before the Tribunal was disposed of with certain directions by the 1st Appellant O.A No. 650 of 2000 was thereafter filed by Respondent No. 2 before the Hon'ble Orissa Administrative Tribunal. The Tribunal allowed the O.A. by order dated 21.09.2001.

The operative part reads as follows:-

"For the reasons indicated above, we allow the Original Application with the direction to the State Respondent in General and D.I of Schools (O.P. No. 3) in particular to issue appointment order in favour of the applicant within one month from the date of receipt of the copy of this order and if the post has been filled up by the D.I of Schools is to carry out direction issued by Respondent No. 1 under Annexure-6 in dispensing with the service of the candidate who had been appointed in place of Minati Pradhan, the applicant."

4. This led to order dated 16.04.2002 which was an order of appointment of Respondent No. 2 by the Appellant No. 3 and another order of the same date by which the services of the Respondent No. 1 came to be terminated. This led to the present round of litigation, namely O.A. No. 917 (C) of 2002 filed by the Respondent No. 1 before the tribunal. The Tribunal after exchange of pleadings allowed the application filed by the Respondent No. 1.

5. We may refer to the following part of the order:-

"In so far as, it is obvious that Smt. Snehalata Nayak who has secured less marks and did not figure in the physically handicapped list, has been given appointment under the "physically handicapped" quota and has been allowed to continue along with several others, including S.E.B.C (male) and General (male) candidates who have secured less mark than the applicant, (Ref. Letter No. 3235 dtd. 22.10.2001 or D.I. of Schools, Bhadrak-II). Moreover, at least a show-cause notice should have been issued and an opportunity to show-cause before discharge allowed to the applicant even if for argument sake only it is accepted that her service can be terminated, as decided by the Hon'ble Apex Court in the case on Basudeo Tiwari-Vrs-Sido

Kandhu University and others (AIR,1998 SC 3261). As no show-cause notice was issued and no opportunity to be heard was allowed and the principle of 'Audi alteram partum' was not observed, even if the applicant is deemed to be the junior most in the S.E.B.C (Women) list, her termination is illegal. Hence, Annexure-6, i.e., her termination order vide office No. 981 dtd. 14.4.2002, is quashed. The applicant be reinstated in service immediately with all attendant service benefits by creating another supernumerary post if necessary, as termination of her service was not as per the prescribed procedure or in accordance with the law of the land."

6. It is this order, which led to the passing of the impugned order by the High Court. By the impugned judgment, the High Court quashed the direction of the Tribunal to reinstate the Respondent No. 1 by creating a supernumerary post. Thereafter, it was however ordered as follows:-

"However, since the vacancy is available, the petitioners will give appointment to opposite party No. 1 Smt. Kamalini Khilar against one of such vacancies available in Bhadrak district within a period of four weeks hence, the writ petition is allowed the aforesaid extent."

7. It is feeling aggrieved by the judgment that the present appeal has been filed. We heard Learned Counsel for the Appellants and Respondents No. 1 and 2 as well.

Submission of Appellants

8. The Learned Counsel for the Appellants would complain that the High Court while granting limited relief of quashing the direction to create a supernumerary post, erred in the issuance of the direction to appoint the Respondent No. 1 in the vacancy. This is after having interfered with the order of the Tribunal as noted. The Respondent No. 1 came to be appointed only on the basis that Respondent No. 2 who admittedly had secured higher rank than the Respondent No. 1 had not reported for joining. It was only in compliance with the order of the Tribunal, that the services of Respondent No. 1 had to be terminated. It is further contended that as things stand there is no provision for making any appointment as the method of appointment has been altered to absorption from trained junior teachers.

9. Reliance was placed on the terms of the Resolution dated 12th March, 1996. It is contended that the selection was made based on the same. The Employment Exchange sponsored eligible candidates

separately for general vacancies and for each reserved categories. It is contended that the sports person or physically handicapped person from any Category could apply as much. Reference is made to clause 8 of the Resolution. It is contended that the maximum age as on the 1st of January of the year of requisition was fixed as 32 years. Relaxation was however given by 5 years for women candidates interalia. Separate list was to be prepared for each of the reserved categories. Separate select list of the candidates had to be prepared for the vacancies notified in respect of that category of candidates under clause 16 of the Resolution. Clause 17a provided that the District Inspector was to make appointment against the sanctioned posts strictly in the order in which the names occurred in the respective select lists. 16 vacancies were notified for the category of S.E.B.C. (Women). It is pointed out that the Respondent was born on 15.07.1961. She was 34 years, 5 months and 17 days as on 01.01.1996. She therefore, got the relaxation as she had applied as S.E.B.C (Women) in the Category. She secured the 22nd rank and the Respondent No.2 was at S.no. 16.

10. There is no challenge at any point to the resolution dated 12.03.1996 or the selection procedure. The last person to get an appointment from the list of S.E.B.C (Women) Category was Respondent No.1. In order to comply with the directions of the Tribunal in O.A. No. 650 of 2000, the services of the Respondent No. 1 were dispensed with. It was only the Respondent No. 1 who got the appointment against one of the vacancies notified for S.E.B.C (Women) Category because the Respondent No.2 was not served the appointment order. If the Respondent No.2 had been served the appointment letter, then the Respondent no. 1 would not have been given an appointment based on her position in her merit list for S.E.B.C (Women) Category. The Respondent No. 1 never objected to the method of preparing the select lists and is therefore not entitled to raise objection now to the preparation of the separate list. Reference is made to judgment of this Court in Union of India and Ors. vs. Dalbir Singh and Ors[1]. The Respondent No.1 was always aware of the separate list for each Category. She got the benefit of relaxation of age by applying as a S.E.B.C (Women) candidate. Her non-inclusion in any other list or the selection procedure interalia was never challenged by her. It is

1 (2009) 7 SCC 251

pointed out that in the written submission of the Respondent No. 1, a misleading statement is made that the vacancy occurred prior to 03.06.1996 which is why the government proceeded to fill up the vacancy by calling upon the Respondent No. 1. It is pointed out that the letter written by the 3rd Appellant to the 2nd Appellant was about complying with the order of the Tribunal in the application filed by the Respondent No. 2. The 3rd Appellant refers to the vacancy having being filled by his predecessor. All the vacancies covered by the selection process in question occurred prior to 30.06.1996. It is also further contended that the none of the decisions relied upon by the Respondent No.1 are relevant having regard to the circumstances surrounding the appointment of the Respondent No.1 and the specific directions issued by the Tribunal.

The Case of Respondent No.1.

11. There is a violation of principles of natural justice. The termination of her services is wholly illegal arbitrary and capricious. The Appellants delayed the matter. The Respondent No.1 was a permanent employee having impeccable four years of continuous service record. The finding that her services was terminated in view of the order dated 21.09.2001 is erroneous and not sustainable having regard to the following aspects.

The Respondent No. 1 was not a party in the O.A. filed by the Respondent No. 2. Secondly, the Tribunal had not directed removal of the Respondent No. 1 but only directed the removal of the person who had taken the place of the Respondent No. 2. It is pointed out that at Page no. 64 of the SLP Paper Book which is the letter dt. 22.01.2001 written by the 3rd Appellant and also referring to the list of junior most candidates of different categories appointed as primary school teachers at S.No. 3 the candidate is a general category male who had secured 109.10 marks. S.No. 5 is candidate from SEBC (Male) who secured 110.75 marks.

At S.No. 7 Jagatanand Panigrahi is specifically earmarked as Physical Handicapped Category but S.No. 8 named as Snehalata Nayak who is specifically earmarked at S.No. 31 of SEBC Category and secured only 110.36 marks but is given appointment as PH illegally whereas she belongs to SEBC Category. The Respondent No. 1 belongs to SEBC Category had secured 112.75 marks which was more than what the above persons obtained.

Therefore, the Respondent No. 1 was not the person whose services was to be terminated in terms of the order of the tribunal in the earlier proceedings, it is contended.

12. It is contended that the Respondent No. 1 was not party to the earlier proceeding. The order adversely affecting the Respondent No. 1 should not have been passed and the government should have challenged the order passed in the earlier proceeding. There is the bar under Section 115 of the Indian Evidence Act, 1872. In other words, there is estoppel. Reliance is placed on the judgements of this court in Delhi Transport Corporation vs. D.T.C. Mazdoor Congress and Ors.[2], Surendra Kumar Verma and Ors. vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Ors.[3]and Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Ors.[4] . Reliance is also sought to be placed on the judgements of this Court in Hindustan Tin Works Pvt. Ltd. vs. The Employees of Hindustan Tin Works Pvt. Ltd. and Ors.[5]and Basudeo Tiwary vs. Sido Kanhu University and Ors.[6]

There were persons who secured lesser marks than the Respondent No.1 who are allowed to be retained in service and it was the Respondent No. 1 who was harassed and victimised. The delay in litigation is solely attributed to the government. There is a delay of almost 7 years in filing reply by the government. After the passing of the order by the Tribunal to reinstate the Respondent No. 1 with all service benefit it woke up only when contempt proceeding was initiated and the order was challenged only after a lapse of two years. The career of the Respondent No. 1 was spoiled due to the illegal termination. She could not properly bring up her children and spent the entire period of litigation in distress and financial hardship. Had she been continued she would have become head mistress now. She being a lady and married woman residing in rural area she could not get any employment elsewhere due to want of the same in the locality and affidavit is also filed indicating that she could not get suitable employment elsewhere.

2 AIR 1991 SC 101
3 (1980) 4 SCC 443
4 (2013) 10 SCC 324
5 (1979) 2 SCC 80
6 AIR 1998 SC 3261

FINDINGS

13. The Order of the Tribunal passed in O.A. No. 650 of 2000 was binding on the department. We cannot at this stage sit in judgment over the correctness of the order passed in the said O.A. Apparently, though the Respondent No. 2 having obtained higher rank than the Respondent No. 1 in the Category of S.E.B.C (Women) had been favoured with an appointment letter, it was not delivered to her as it was addressed wrongly. The Respondent No. 2, therefore did not join as apparently, she did not receive the appointment order. At least these are the findings of the Tribunal.

In fact, the matter had engaged the attention of the 1st Appellant (govt) and it took a decision dated 24.02.2000 therein. The decision of the Government as extracted in the order of the Tribunal reads as follows:-

"I am desired to invite a reference to the Order Memo No. 106/OAT, dated 07.01.2000 of the Hon'ble OAT, Bhubaneswar on the subject noted above. It had been reported by the D.I. of Schools, Bhadrak-II in his letter No. 388, dated 31.01.2000 with copy to you in Memo No. 389, dated 31.01.2000 that though one Minati Pradhan was selected and is to be appointed, but the appointment order was dispatched in the name of Minakhi Pradhan. Hence, before taking steps to comply with the order of the Tribunal to appoint Minati Pradhan, please check the fact in the Office of D.I. of Schools, Bhadrak-II to ascertain whether any other person named Minakhi Pradhan has been appointed on the basis of incorrectly addressed letter. If yes, the applicant in the writ petition will join in her place if not the junior most candidate will be removed to let her join unless if Government decides to permit the applicant to join in a post subsequently fallen vacant."

The Tribunal directed as already noted that if the post had been filled up the District Inspector of schools was to carry out the direction of the Respondent No. 1 which we have extracted that is dispense with the service of the candidate who had been appointed in place of Respondent No. 2. Interestingly, we may notice that the Government had directed that the junior most candidate will be removed in order to enable the Respondent No. 2 to join. The direction of the Tribunal has become final.

14. While it may be true the Respondent No. 2 was not a party to the O.A. in law nothing prevented her from challenging the said order. It may not be open to her to contend that as she was not a party, the said order cannot be and should not be implemented in letter and spirit. It is an order passed by a Tribunal which had jurisdiction in the matter. The finding that the Respondent No. 2 could not join because of the letter of appointment being issued in the wrong name cannot be open to challenge. The Tribunal was therefore, setting right an illegality and injustice caused to Respondent No. 2. There is no dispute that there were only 16 vacancies to be filled up of the category of S.E.B.C. (Women). For complying with the order of the Tribunal the Appellants had to dispense with the service of the person appointed in place of Respondent No. 2. Therefore, the only question which survived for consideration is whether it is the Respondent No. 1 who was appointed in place of the Respondent No. 2.

15. It would appear to be clear that under the resolution and procedure adopted, separate lists were prepared for various categories. Vacancies were earmarked for different groups. Merit list was also based on this classification. The Respondent No. 1 figured in the merit list at S.no. 22 for the category S.E.B.C. Women. The surest way to find out whether the termination of service of Respondent No. 1 was in tune with the direction issued by the tribunal in the earlier O.A. filed by the Respondent No. 2 is to find out as to whether the Respondent No. 1 would have secured the appointment, if the appointment letter was issued in the name correctly of the Respondent No. 2 and she had joined on the said basis. If the Respondent No. 1 would not secure the appointment if the Respondent No. 2 had so joined and in other words, the appointment of the Respondent No. 1 was only because of the non-joining of the Respondent No.2, then it is the Respondent No. 1 who is the person who was appointed in place of the Respondent No. 2 within the meaning of the order passed in O.A. No. 650 of 2000.

This is not a case involving disciplinary proceedings against Respondent No. 1. No stigma is attached to the Respondent No. 1. The whole exercise was necessitated no doubt as a result of a mistake committed by the Appellants in not sending the appointment letter at the correct address to Respondent No. 2. In view of the fact that order O.A. No. 650 of 2000 had become final the Appellants were obliged to comply with the order. If they had nothing to offer

by explanation to the case of the Respondent No. 2 that she was not served with the letter of appointment, the Respondent No. 1 would not be justified in contending that the Appellant should have challenged the order of the Tribunal.

16. We find merit also in the contention of the Appellants that having regard to the Resolution under which the entire appointment were carried out, the matter is to be governed by the separate merit lists which were prepared. In the nature of the facts which make up the dispute in this case, it only means that the Respondent No. 1 was the junior most in the category of S.E.B.C (Women). The order of the Tribunal to be complied with contemplated dispensing the service of the candidate who was appointed in place of the Respondent No. 2.

17. It may not be possible to find that any person other than the Respondent No. 1 was the candidate who was appointed in place of the Respondent No. 2. Both the Respondent No. 2 and the Respondent No. 1 were considered for appointment from the Category of S.E.B.C (Women) for which Category, 16 vacancies were earmarked. The merit list of SEBC (female) (page 49) shows that the Respondent No. 2 with 117.46 marks was at the 16th position. Snehalata Nayak is no doubt at Serial No. 31 of SEBC (Women) list. But she is shown in the category of P.H in the list of junior most of different categories in letter dt. 22.11.2001 sent by the Appellant No. 3. The person at Serial No.7 Jagatanand Panigrahi is shown P.H. has secured lesser marks than Snehalata Nayak. It is not clear how in the letter dt. 22.11.2001, persons at Serial No. 7, and 8 are both mentioned under the category as P.H. and as being the junior most candidates. No doubt under the name of Snehalata Nayak, it is shown S.no. 31 of SEBC Category. Does it mean that Snehalata was appointed from SEBC but under the category of physically handicapped? The office order terminating the service of the Respondent No.1 refers to the letter no. 7119 dated 16.03.2002 sent by the 2nd Appellant Director. It is not produced. However, what is clear is that the person appointed in place of the Respondent No.2 was the Respondent No. 1.

18. In such circumstances we cannot possibly hold that other candidates who may have secured lesser marks but who it must be noted were treated as falling in different categories for which separate list were prepared, should have been shown the door to comply with the

order of the Tribunal. The Respondent No. 1 was considered under the SEBC (Women) as being a woman, she could aspire with the age relaxation.

19. We may incidentally notice that the Respondent No. 1 has only a few months for attaining the age of superannuation. It may be true that she has not secured any alternative employment as stated in her affidavit and also projected in the written submissions. She has also not been able to work based on the direction of the Tribunal or of the High Court.

20. The decisions relied upon by the Respondent No. 1 may not assist her.

As far as the decision in the Delhi Transport Corporation (supra) is concerned, the Court was dealing with constitutionality of the power under the regulation to dispense with the service of a permanent employee without holding any enquiry. This Court took the view that dispensing with the service of the permanent and confirmed employee by merely issuing a notice without assigning reasons could not be countenanced. The decision clearly cannot apply in a situation where the Appellants being under the legal obligation to implement the order of the Tribunal dispensed with the services of the employee in accordance with the directions. The decisions in Hindustan Tin Works Pvt. Ltd. (supra) and Surendra Kumar Verma (supra) relate to Industrial Law and the effect of illegal termination of a workman. An order which is passed pursuant to a direction which is binding on the employer cannot possibly be described as illegal. Therefore, the said case law cannot advance the case of the Respondent.

21. In Basudeo Tiwary (supra) the services of the Appellant had been terminated. The Appellant was appointed as a lecturer. The college was taken over by the University. The services was terminated on the basis that the appointment was not made validly. One of the contentions taken was there was violation of principles of natural justice. Though reliance was undoubtedly placed on Section 35 (3) of the Bihar University Act, 1951, and the same purported to provide that any appointment interalia contrary to the act statutes rules or regulation or in any regular or unauthorised manner shall be terminated at any time without any notice, we do notice para 12 of the said judgment: -

"The said provision provides that an appointment could be terminated at any time without notice if the same had been made contrary to the provisions of the Act, statutes, rules or regulations or in any irregular or unauthorised manner. The condition precedent for exercise of this power is that an appointment had been made contrary to Act, Rules, Statutes and Regulations or otherwise. In order to arrive at a conclusion that an appointment is contrary to the provisions of the Act, statutes, rules or regulations etc. a finding has to be recorded and unless such a finding is recorded, the termination cannot be made but to arrive at such a conclusion necessarily an enquiry will have to be made as to whether such appointment was contrary to the provisions of the Act etc. If in a given case such exercise is absent, the condition precedent stands unfulfilled. To arrive at such a finding necessarily enquiry will have to be held and in holding such an enquiry the person whose appointment is under enquiry will have to be issued to him. If notice is not given to him then it is like playing Hamlet without the Prince of Denmark, that is, if the employee concerned whose rights are affected, is not given notice of such a proceeding and a conclusion is drawn in his absence, such a conclusion would not be just, fair or reasonable as noticed by this Court in D.T.C. Mazdoor Sabha's case. In such an event, we have to hold that in the provision there is an implied requirement of hearing for the purpose of arriving at a conclusion that an appointment had been made contrary to the Act, statute, rule or regulation eta and it is only on such a conclusion being drawn, the services of the person could be terminated without further notice. That is how Section 35(3) in this case will have to be read."

22. Finding that there was no notice issued to the Appellant therein and further noticing that the Appellant, had died during the pendency of the proceedings it was to be deemed that the Appellant had died in harness. He was allowed the benefit of payment of arrears of salary from the date of termination of the service till the date of his death.

23. We may notice the decision would appear to the distinguishable in terms of the facts in this case. It is no doubt true that the Respondent No. 1 was offered appointment and was appointed. However, the Appellants suffered an order by a competent Tribunal which it was duty bound to implement. We would be remiss if we were to discard

the principles of natural justice as inapplicable. No doubt there was no need to hold any enquiry as the termination was not on disciplinary grounds. No stigma is attached to Respondent No. 1. But a notice given to the Respondent No. 1 as to why in terms of the order of the Tribunal the Respondent No. 1 should be treated as the person whose services was to be dispensed with should have been issued. However, we would think that on the materials placed before the Court, with 16 vacancies alone earmarked for S.E.B.C (Women), and the Respondent No. 2 being the 16th and the last of the candidates entitled in the said Category, not joining in the circumstances resulting in the Respondent No. 1 being appointed and the order of the Tribunal being binding on the Appellants, we would think that in the present case, the failure to afford an opportunity to the Respondent No.1 to show cause as to why her services should not be terminated cannot be held to be fatal. We also cannot loose sight of the fact nearly two decades have gone by and only for the reason that the Respondent was not offered an opportunity of being heard in the facts of this case, we cannot support the order of the High Court in directing the appointment of the Respondent No. 1. It is not as if the High Court has found that the termination of the service of the Respondent No. 1 was ab initio void or illegal as such. The Court in fact set aside the direction of the Tribunal to reinstate by creating a supernumerary post. This is not challenged by Respondent No. 1. It directed only that the appointment of the Respondent No. 1 be made in the vacancy. Therefore, the claim of Respondent No. 1 for back wages from the date of termination is at any rate clearly untenable.

24. Deepali Gundu Surwase (supra), the matter arose under the Maharashtra Employees of Private Schools (condition of service) Regulation Act, 1977. This Court undoubtedly laid down that in the case of wrongful termination of service reinstatement with the continuity of service and back wages is the normal rule. It was subject to the qualification that the Court may *inter alia* take into consideration the length of service and the nature of misconduct if any proved, the financial condition of the employer and similar other factors. For the reasons which we have indicated in the facts of this case Respondent No. 1 cannot be permitted to draw any benefit from the said pronouncement.

The High Court rightly set aside the direction for creation of the supernumerary post. We find that there is no basis for the High Court to have thereafter directed the appointment of the Respondent No. 1 in any vacancy available.

25. The upshot of the above discussion is that the termination of the service of the Respondent No. 1 was unavoidable in the light of the binding order of the Tribunal in O.A. No. 650 of 2000. Consequently, the order of the High Court to the extent impugned is to be set aside. Resultantly, we allow the appeal and the order of the High Court impugned is set aside and the order passed in the O.A. no. 917 of 2002 filed by the Respondent No. 1 will stand set aside.

26. No order as to costs in the appeal. We make it clear that if the cost of Rs. 50,000 ordered as condition to condone delay in filing the SLP is not paid as aforesaid the impugned judgment will stand, the application for condoning delay will stand dismissed and the leave granted will stand revoked and this judgment will stand recalled. If the cost is deposited, the same can be withdrawn by the Respondent No. 1.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeal allowed.