

L. G. Chaudhari

Vs

Secretary, L. S. G. Department, Government of Bihar and Others

Civil Appeal No. 152 of 1969

(R.S. Sarkaria, D.A. Desai, O. Chinnappa Reddy JJ)

29.10.1979

JUDGMENT

CHINNAPPA REDDY, J. –

1. Curious indeed are the ways of the powers that be, in Bihar. The Bihar Public Service Commission published an advertisement inviting application for the post of a Town Planner in the Government of Bihar. The post was stated to be permanent but the appointment was to be made initially on contract basis for five years. The selected candidate was to be on the probation for one year with the benefit of Contributory Provident Fund. Shri L. G. Chaudhari original appellant in this appeal - he having died during the pendency of the appeal, his legal representative are now the appellants - was selected and by a notification dated August 20, 1955, the Government of Bihar appointed him as Town Planner with effect from August 20, 1955. The order of appointment recited that he would be on probation for a period of one year. Though the post was initially created on a permanent, non-pensionable basis and appointment to it was made on contract basis for five years, the Council of Ministers, on August 7, 1956, considered a proposal to make the post permanent and pensionable and to appoint Shri L. G. Chaudhari to that post on a permanent and pensionable basis, initially on probation for one year. The proposal was approved by the Council of Minister on August 14, 1956. On August 20, 1956, the Secretary to the Government L.S.G Department wrote to the Accountant General informing him that the post of Town Planner had been made permanent and pensionable with effect from August 5, 1955, the date on which Shri L. G. Chaudhari had joined the post and that Shri Chaudhari was no longer entitled to subscribe to be Contributory Provident Fund. He was to be treated as 'an ordinary permanent Gazetted Government Servant'. On September 28, 1956, the Accountant General wrote to the Government enquiring as to the date from which Shri Chaudhari was to be treated as a permanent Government servant. On November 28, 1956, the Under-Secretary to the Government addressed a communication to the Accountant General the contents of which are in some controversy. The communication beings with the statement : "I am directed to refer to your letter No. GA4 PH-Eng.-3803 September 28, 1956 and to say that Shri L. G. Chaudhari has been appointed on permanent substantive basis with effect from August 5, 1955, with probation for one year with effect from the date of his appointment." Next follow two sentences which are in controversy. The communication ends with the sentence : "In the circumstances Shri Chaudhari may be treated as a permanent Government servant with effect from August 5, 1955". The two controversial sentences according to the appellant are "he has been confirmed on his post after the expiry of the period of probation viz August 5, 1956 and necessary notification to this effect has been issued. A copy of the same had been sent to you". The two sentences according the Government are "he is being confirmed on his post after the expiry of the period of probation viz. August 5, 1956 and necessary notification to this effect is being issued. A copy of the same will be sent to you in due course". The original letter said to have been written by

the Government to the Accountant General was not produced on the ground that it was not available. What was produced by the Government was the draft of the letter containing corrections, the words "has been" occurring twice in the first controversial sentence being scored out and replaced by the words "is being" and the words "has been" in the second controversial sentence being replaced by the words "will be". On the face of it the stand of the Government on the contents of this letter appears to be contradicted by the internal evidence afforded by the alleged draft. In the first place if Shri Chaudhari had not yet been confirmed there was no need for the Government to inform the Accountant General that he has being confirmed and that a notification was being issued. Neither the letter of August 20, 1956, nor the letter of November 28, 1956, need have been written. In the second place that would be inconsistent with the first sentence stating that Shri Chaudhari had been appointed 'on a permanent substantive basis with effect from August 5, 1955, with probation for one year and the last sentence stating that 'in the circumstances Shri Chaudhari might be treated as permanent Government servant with effect from August 5, 1955. Whatever that be, the Accountant General proceeded on the basis that Shri Chaudhari was to be treated as permanent Government servant with effect from August 5, 1955 and therefore, allowed increments for the years 1956, 1957 and 1958. In fact from the annual report of the Bihar Public Service Commission which was produced before the High Court as Annexure 'C' it appears that the Public Service Commission recommended the confirmation of the appellant as Town Planner and that the recommendation was accepted by the Government. After the appellant had drawn increments for three years the Account and General though fit to address a communication to the Government on August 16, 1958 requesting that Government orders formally confirming Shri L. G. Chaudhari might be sent to the Accountant General's office at an early date. A reply was sent by the Under Secretary to the Government on September 15, 1958, requesting the Accountant General to furnish a copy of the letter dated November 28, 1956 as no such letter appeared to have been sent from the Department. It is to be noticed here that at the hearing of the Writ Petition the Government purported to produce the draft of the letter dated November 28, 1956, already referred to by us, though in their letter to the Accountant General on September 15, 1958, they said that no such letter appeared to have been sent by the Department. By a letter dated September 30, 1958, the Accountant General informed the Government that the original of the letter dated November 28, 1956 was not available but that an extract as noted in the Audit Register was being sent. This extract was on the same lines as the draft produced by the Government. On November 6, 1958, the Government wrote to the Accountant General that the question of issuing orders of confirmation was still under Governments consideration. On August 8, 1959 the Accountant General once again wrote to the Government requesting that formal notification confirming Shri Chaudhari in his appointment might be sent so that a pay slip authorising drawal of increments could be issued. Shri Chaudhari was also informed by the Accountant General to the same effect. Apparently there appears to have been further correspondence between the Accountant General and the Government. Further the increment were stopped to the appellant by the Accountant General. The appellant appears to have protested against the stoppage of increments. The result was that on July 16, 1960 the Government enquired from the Accountant General under what rule he had withheld the increments of Shri L. G. Chaudhari. Further correspondence appears to have followed and even as late as on March 18, 1967 the Government requested the Accountant General to issue the necessary pay slip authorising Shri Chaudhari to draw his annual increments. In the letter dated March 18, 1967, the Government referred to the query raised by the Accountant General in his letter dated September 28, 1956 regarding the exact date from which Shri Chaudhari was to be treated as a permanent Government servant and stated that the Government had already replied to the query on November 28, 1956. It was mentioned that a copy of the letter was also enclosed. The Government further mentioned that Shri Chaudhari had complained that he was not being allowed increments

since 1959 and that the Government did not know why the increments were being withheld. As the increment due to him continued to remain unsanctioned the appellant once again addressed the Government on May 1, 1967 and this brought forth a reply from the Government that his probation had been extended up to September 15, 1967 and that he should show cause why his employment as probationer should not be terminated. Thereafter the appellant filed a writ petition in the High Court praying that the order of the Bihar Government dated September 18, 1967 may be quashed and that all increments that had accrued to him on and after August 5, 1959 should be directed to be paid to him. The Patna High Court quashed the order dated September 18, 1967 to the extent that it called upon the appellant to show cause why his probation should not be extended but declined to quash the order extending the period of probation to September 15, 1967. The High Court declined to quash the part of the order relating to extension of period of probation because it was of the view that the question whether the service of the appellant had been confirmed or not was a disputed question of fact in view of the stand taken by the Government before the High Court. Before the High Court the Government took the stand that no notification confirming the appellant in the post of Town Planning was issued as no medical certificate had been produced by the appellant and in the meanwhile certain complaints were received concerning the efficiency and integrity of the appellant. According to the Government the allegation made against the appellant was found to be true and therefore it was finally decided to extend the period of probation and terminate his service.

2. Shri Chitale learned counsel for the appellant argued that apart from the approval given by the Council of Minister to the appointment of the appellant as Town planner with effect from the date of his original appointment, the undisputed correspondence that passed clearly showed that the services of Shri Chaudhari had been confirmed as claimed by him. We agree with him. The letter dated August 29, 1956 from the Government to the Accountant General contains a clear recital that the post of Town planner had been made permanent and pensionable with effect from August 5, 1955, the date on which Shri Chaudhari had joined the post and that Shri Chaudhari was therefore, to be treated as an ordinary permanent gazetted Government servant. In his letter dated September 28, 1956, the Accountant General did not raise any query whether the appellant had been confirmed but raised the limited query as to the date from which he was to be treated as a permanent Government servant. Again in the letter dated March 18, 1967, the Government reiterated the position that the appellant had been appointed against a permanent and pensionable post and that he was to be treated as a permanent Government servant. The Government wanted to know why the Accountant General was withholding the appellant's increment. In the face of these two letters it appears to us be futile for the Government to contended that the appellant had not been confirmed and that he continued as a probationer till September 1967. Even the controversial letter dated November 28, 1956, contains two significant undisputed statements : "..... Shri Chaudhari has been appointed on permanent, substantive basis with effect from August 5, 1955, with probation for one year" and "in the circumstances Shri Chaudhari may be treated as a permanent Government servant with effect from August 5, 1955". The draft of the letter dated November 28, 1956 with the words "is being" and "will be" substituted for the words "has been" was sought to be put forward as a correct copy of the original on the basis of the extract from the Audit Register. On that basis it was claimed that there was no order confirming the service of the appellant. We may mentioned here that the original letter received by the Accountant General was not produced on the ground that it was not traceable. We are unable to place any reliance on the extract from the Audit Register for the reason that in the counter-affidavit filed on behalf of the Accountant General it was stated that the entry in the Audit Registers was attested in September, 1958, while in the letter dated September 15, 1958, it was clearly stated that the original letter was not available. If so, how could the entry in the Audit Register have been attested in September, 1958 ? We do not desire to further probe into the loss of

the original letters, the alleged interpolations in the draft etc., as we are clearly satisfied on the basis of the letters dated August 20, 1956 and March 18, 1967, that the appellant was confirmed in his post as Town Planner as claimed by him. To say the least the stand taken by the Government that the appellant continued as a probationer till September 15, 1967 is ludicrous. On more than one occasion the Government asked the Accountant General why the appellant's increments had been withheld despite the appellant having been appointed on a permanent and substantive basis. The stand of the Government before the High Court and before us is in capable of being justified in any way. It is clear that some mischief was afoot in the Bihar Secretariat and official records had either disappeared or had been tampered with. The appellant was not to blame for it. The mischief makers who were trying to make out that the appellant had not been confirmed were apparently responsible. We think the less said about these matters the better.

3. The learned Attorney-General who appeared for the State of Bihar argued that there was no formal order of confirmation in terms of Article 166 of the Constitution and that under the provisions of Article 163(3) the proceeding of the Cabinet could not be looked into. He urged that the question whether the appellant had been confirmed in the post of Town Planner was a disputed question of fact and therefore, the High Court was right in not venturing to decide the question. We do not agree with the learned Attorney General. In the absence of a formal order drawn up in terms of Article 166 of the Constitution it was certainly open to the appellant to prove by evidence aliunde that he had been appointed on permanent and substantive basis. In *R. Chitrlekha v. State of Mysore* ((1964) 6 SCR 368 : AIR 1964 SC 1823), it was pointed out that the provision of Article 166 of the Constitution were only directory and not mandatory and, if they were not complied with it could be established as a question of fact that the order was issued by the State Government. The learned Attorney-General urged that the order, if any, was never communicated to the appellant and, therefore, was of no effect. He relied on *Bachhitar Singh v. State of Punjab* (1962 Supp 3 SCR 713 : AIR 1963 SC 39). We may at once say that no such plea was ever raised before the High Court and the appellant cannot at this stage be non-suited on the ground that the order of confirmation was never communicated to him. We do not consider it necessary to express any opinion on the question whether Article 163(3) of the Constitution bars the court from looking into the proceeding of the Cabinet. It is one thing to say "the question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court", and altogether a different thing to say that the proceedings of the Council of Minister cannot be looked into even if produced without objection and without any claim of privilege. We do not desire to say anything more on this aspect of the case, since there is enough of other material in the case.

4. We are also unable to find any force in the submission of the learned Attorney-General that the High Court was quite right in refusing to decide the question whether the appellant had been confirmed or whether he continued as a Probationer till September 15, 1967 on the ground that it was a disputed question of fact. As already observed by us the communications addressed by the Government to the Accountant General are clear on the point and the stand taken by the Government for the first time in 1967 that the appellant was continuing on probation till then was ludicrous. To refuse to decide the question when the entire material was before the court - it is not suggested that there was any other material - and to direct the appellant to go to a Civil Court would only be to shirk our responsibility.

5. In the result we allow the appeal and quash Letter No. 7949 L.S.G. dated September 18, 1967, from the Government to the appellant. To avoid any further debate we direct the respondents to treat Shri L. G. Chaudhari as appointed to the permanent post of Town Planner with effect from August 5, 1955 and further direct the respondent to sanction all annual increments that fell due on and after

August 4, 1959 and to pay all arrears to the legal representatives of the original appellant. The appellants will be entitled to the costs throughout.

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