

Avinash Swaroop Vs. the State and anr.

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Court : Rajasthan

Decided On : Jul-08-1974

Reported in : 1974WLN647

Judge : Kan Singh, J.

Appeal No. : S.B. Civil Writ Petition No. 1568 of 1972 and 98 of 1973

Appellant : Avinash Swaroop

Respondent : The State and anr.

Disposition : Petition dismissed

Judgement :

ORDER

Governor is hereby pleased to appoint Dr. M.M. Doshi, Deputy Director (Head Quarters) Animal Husbandry Department as officiating Director of Animal Husbandry for a period of one year with effect from 4 h April. 1972.

He will continue to hold the additional charge of the post of Deputy Director (Head-quarters) until relief therefrom.

By order

sd/

Agriculture Production Secretary

The Government sought the concurrence of the Public Service Commission for continuing the appointment of Shri Doshi beyond one year by the letter dated 2nd of April, 1973. By letter dated 30th June, 1973, the Rajasthan Public Service Commission gave their concurrence to the temporary appointment of Shri Doshi as Director Animal Husbandry upto 15th August, 1973 or till the candidate selected by the Commission was made available whichever was earlier. On receipt of the letter conveying the concurrence of the Public Service Commission the Government ordered that the term of Shri Doshi as officiating Director of Animal Husbandry extended upto 15th of August, 1973, or till a candidate selected by the Commission was made available whichever was earlier. It appears that the Government sought the further concurrence of the Public Service Commission for continuing Shri Doshi as Director in officiating capacity beyond 15th of August, 1973. The Public Service Commission by the letter dated 8-10-1973 conveyed their concurrence to the extension of the term of Shri Doshi as officiating Director from 16-8-1973 to 30th September, 1973. On 6.10.73 the Government passed an order granting extension to Shri Doshi as officiating Director from 15th August, 1973 to 30th September 1973 or till a candidate selected by the Commission was made available, whichever was earlier. At this stage I may mention that two amendments in the Rules (sic) made during the (sic) of the writ petition, the first one is dated 17th February, 1973 published in the Rajasthan Rajpatra of 19th February, 1973 and the second is dated the 17th of March, 1973 published in the Rajasthan Rajpatra of 24th March, 1973 I will be referring to these amendments a little later when I proceed to deal with the salient features of the Rules. On coming into force of these amendments both the writ petitioners amended their writ petition with the leave of the Court Shri Avinas Swaroop challenged the vires of the two amendments; whereas Shri Chhabra attacked the validity of the Government orders by which the term of Shri Doshi as officiating Director was extended from time to time,

9. In assailing the validity of Shri Doshi's appointment as officiating Director the petitioner Shri Chhabra contended; (1) that the action of the Government in making the amendments in the Rules was mala fide. The petitioner proceeded to

say that the Government had allowed him to cross the efficiency bar in group B and that his service record was spotless so much so that he was even appointed as a Joint Director in group A. The Government had appointed a junior person. Shri Dosht, as Director & then with a view to help him were making the amendments with retrospective effect.

10. It was further pointed out that there were certain executive instructions governing the making of officiating appointments and these instructions were honoured in their breach. (2) That the amendment could not have been made retrospect so to as to validate the appointment which was invalid at its inception. (3) That the concurrence of the Public Service Commission was sought almost at the fag end of the period of one year. It was pointed out that the Govt. had not convened any meeting of the D P O almost for 9 years & there was no urgency for the temporary appointment (4) That the extension of the appointment after the first extened period had expired was null & void (5) That the amendment was bad also for the reason that the methed Rules make an incumbent eligible only on account of his gaining experience as Deputy Director in officiating capacity. In other words according to the petitioner experience as Deputy Director in substantive capacity could not have been equated with experience in officiating capacity which was done solely to help respondent No 2 (6) That Government had amended only one set of Rules applicable to group A although they did not make any similar amendment for group B. (7) That the tenor of the amendment went to show that a joint Director could not be appointed without five years' experience as Deputy Director and yet for making a Joint Director eligible for appointment as Director, it has been laid down that a Joint Director with five years' experience including that as Deputy Director would be eligible.

11. Shri Avinas Swaroop further contended (1) That the Rules could not be made retrospective and further as the provision regarding the coming in to force of the Rules on 27 11 71 was bad, the amendment cannot be said to have yet come into force even for the future (2) That the Government had no power to make Rules with retrospective effect regarding the conditions of recruitment including one for eligibility for entry into service or for appointment to a post, though it could make rules with so retrospective effect so far as conditions of service as such are

concerned. (3) That the amendment was discriminatory inasmuch as Shri Doshi's appointment was made a fait accompli by the Government.

12. The writ petitions have been opposed by the State. It is denied that the amendments to the Rules were null and void or that the appointment of Shri Doshi as officiating Director was bad on any of the grounds pointed out by the petitioners. It was maintained on behalf of the State that the Governor was competent to make Rules under Article 309 of the Constitution retrospectively or prospectively as he deemed fit and once the two amendments were incorporated in the Rules, Shri Doshi's appointment as officiating Director would be rendered valid from the date it was first made or when it was extended from time to time with the concurrence of the Rajasthan Public Service Commission. It was further submitted that even while making the temporary appointment of Shri Doshi as officiating Director the cases of the writ petitioners were also considered. Finally it was submitted that since then the Departmental Promotion Committee had met on 22-8-1973 in accordance with the Rules and the case of Shri Chhabra had been considered by the D P C along with that of Shri Doshi. It is pointed out that on the day the D.P.C. had met Shri Avinas Swaroop had already retired and, therefore, there could hardly be any question of the D.P C considering his case on 22-8-1973. It was further submitted that on account of a stay order granted by this Court on 26th April, 1973, the Government had not issued the order for the substantive appointment of Shri Doshi as Director of Animal Husbandry but in the light of the stay order had issued only an order of officiating appointment on 29th October, 1973. For appreciating the contentions raised on either side, it will be convenient to read the Rules at this point. The Rules were first published in the Rajasthan Rajpatra extraordinary of 9th April, 1963 from which date they came into force. Rule 4 of the Rules lays down that the nature of post included in each category of the service shall be as specified in column 2 of the schedule. Rule 5 provides for the initial constitution of the service. It shall consist of (a) persons holding substantively the posts specified in the schedule, (b) persons recruited to the service before commencement of these Rules and (c) persons recruited to the service in accordance with the provisions of the Rules. The Schedule contains 3 groups. The first group is of the Director. It carried a pay scale of 1050-50-1500. The source of recruitment for the post is shown to be 100 percent by promotion.

Column 5 laid down the post from which appointment by promotion is to be made. Under it, it was laid down that holder of posts in group B will be eligible Column 6 laid down the minimum experience and qualification required for promotion and it was laid down there under that five years' experience on a post in group B was the requirement. Group B included six categories of posts : (i) Deputy Director (ii) Live Stock Development Officer, (iii) Gosbala Development Officer, (iv) Dairy Development Officer, (v) Deputy Director Key Village and (vi) Serologist. The grade pay was 550 30 820-EB-30 850 50 950 Then there was group C which included a number of categories of posts It carried the time scale of 225 20 25-5-435 EB 2 60-30 890 For the posts in group B also it was laid down that they were 100 percent by promotion. The promotion was to be from the holders of posts in group C. Then under column 6 certain academic qualifications as well as the requirement of experience were laid down. In 1971 provision was made for the creation of the post of a Joint Director This was done by an amendment dated 22nd November, 1971 Is was laid down that the amendment was to come into force at once Then in the schedule appended to the Rules the words 'holders of posts in group B' occurring under column 5 mere deleted and replaced by the words 'Joint Director. Then further under group As new entry was inserted as follows:

S. No.	Name of post	Source of recruitment	Qualifications	Post from which with percentage for direct appointment promotion recruitment is to be made
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1 2 3 4 5

2. Joint Director 100% by promotion Dy. Directors or
equivalent posts in

group 'B'

Minimum experience and qualifications Remarks
required for promotion

6 7

5 Years experience of post in group B

It will be observed from this that after 22nd November, 1971 only a joint Director could alone be eligible for appointment as Director

13. To continue further with the Rules, I may observe that part 3 relates to the recruitment Rule 6 lays down that recruitment shall be by two methods (1) by direct recruitment in accordance with part 4 of the Rules and (11) by promotion in accordance with Part 5 of the Rules Part 3 inter alia makes provision for qualifications like nationality, age, character, physical fitness and academic and technical qualifications Part 4 lays down the procedure for direct recruitment We are not concerned with this as the post of a Director can be filled only by promotion Part 5 lays down the procedure for recruitment by promotion Rule 23 occurring therein lays down the criterion for selection. It reads 'the person enumerated in column 5 of the schedule shall be eligible on the basis of seniority-cum-merit, for promotion to posts specified in column 2 subject to their possessing minimum qualifications and experience specified in column 6 Then in the same Rule it is laid down that in selecting candidates for promotion regard shall be had to their academic qualifications and experience; tact, initiative and energy;

intelligence and ability; character including integrity and previous record of service. Rule 24 lays down the procedure for selection. It lays down that as soon as it is decided that a certain number of posts shall be filled by promotion the Director shall prepare a correct and complete list containing names not exceeding 5 times the number of vacancies, out of senior most members of the service, who are qualified under the Rules for promotion to the class of posts concerned. The Director shall forward this list along with their confidential rolls and personal files to the Secretary to the Government in the Animal Husbandry. Further when a vacancy of the post for Director is to be filled this list shall be prepared by the Secretary to the Government in the Animal Husbandry Department. Then the Rule further lays down what is to be the composition of the Selection committee and how it is to be convened. The Committee is to consider the cases of all persons included in the list. It shall interview such of them as it may deem necessary and shall prepare a list containing the names of the suitable candidates up to twice the number of such posts as are indicated. In case of promotion to the post of Director, the Director shall not be a member of the committee. It is further provided that the names of candidates selected as suitable shall be arranged in the order of seniority. The list prepared by the committee is to be sent to the Government together with confidential rolls and personal files of the candidates including in them, as also all those superseded, if any. The Government shall approve the list with such modification as may appear reasonable to them. Part 6 provides for appointments, promotion and confirmation. Rule 25 therein lays down that appointments to posts in group A and B shall be made by the Government out of the list prepared under Rule 24 on the basis of seniority-cum-merit. Rule 36 provides for temporary or officiating appointment and I may read this Rule in full:

26. Temporary or Officiating appointment:

(2) A temporary vacancy in a senior post may be filled by the Appointing Authority by appointing thereto in an officiating capacity an Officer whose name is included in the list prepared under Sub-rules (2) and (3) of Rule 24:

Provided that till the preparation of the first list or in case the list is exhausted, a vacant post may be filled by the Appointing Authority by appointing thereto a

member of the service eligible for appointment to the post by promotion or by appointing thereto temporarily a person eligible for appointment by direct recruitment to the service under the provisions of these rules.(2) A temporary vacancy in the junior post may be filled by the Appointing Authority by appointing thereto temporarily a person eligible for appointment by direct recruitment to the service under the provisions of these rules.

(3) No appointment made under Sub rules (1) and (2) above, shall be continued beyond a period of six months without referring it to the Commission for their concurrence and shall be terminated immediately on their refusal to concur.

Then I may notice the two impugned amendments The first amendment of which a reference has already been made in the earlier part of the judgment was as follows:

G S.R. 163.-In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Rajasthan hereby makes the following amendment to the various Service Rules specified in the Schedule appended hereto, namely:

AMENDMENT

In each of the Service Rules specified in column No. 2 of Schedule appended hereto, for the existing rule mentioned against each column No. 3 thereof, the following shall be substituted and shall always be deemed to have been substituted, namely:

Urgent Temporary Appointment:

A vacancy in the Service which Cannot be filled in immediately either by direct recruitment or by promotion under the rules may be filled in by the Government or by the Appointing Authority, as the case may be, by appointing in an officiating capacity thereto an officer eligible for appointment to the post by pr motion or by appointing temporarily thereto a person eligible for direct recruitment to the Service, where such direct recruitment has been provided under the provisions of these Rules:

Provided that such an appointment will not be continued beyond a period of one year without referring the case to the Commission for concurrence, where such concurrence is necessary, and shall be terminated on its refusal to concur:

Provided further that in respect of a Service or a post in a Service for which both the methods of recruitment have been prescribed, the Government shall not fill the temporary vacancy by appointing a person eligible for direct recruitment unless no suitable person eligible for promotion is available.

In the schedule at item No. 27 is mentioned Rule 26 of the Animal Husbandry Service Rules, 1963 The second amendment was as follows:

GSR 71-In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Rajasthan makes the following rules to amend the Rajasthan Animal Husbandry Service Rules, 1963, namely:

1. These rules may be called the Rajasthan Animal Husbandry Service (Amendment) Rules, 1973.

2 These rules shall be deemed to have come into force on 27-11-71.

3. In the schedule appended to the Rajasthan Animal Husbandry Service Rules, 1963.

(a) Under Group 'A' against S. No. 1:

(i) In column 5, the following shall be added:

If Joint Director is not eligible, or not found suitable for promotion, or if the post of Joint Director is vacant or abolished, holder of post in Group 'B' in substantive or officiating capacity.(ii) The existing entry under Column 6, shall be substituted by the following:

Joint Director, with 5 years' experience including experience on posts in Group 'B' or holder of post in Group 'B' in substantive or officiating capacity with 7 year's experience on posts in Group 'B'.(No. F. 1(25) Agr. IV/70)

By Order

Sd/-Mohan Mukerjee (Hindi)

Agriculture Production Secretary.

The following points fall for consideration:

- (1) Whether the order of Shri Doshi's appointment as officiating Director made on 18-9-1972 was valid?
- (2) Whether the two impugned amendments to the Rules were valid particularly in that the amendments were retrospective.?
- (3) If the appointment of Shri Doshi as officiating Director by order dated 18-9-1972 was not valid then whether as a result of the amendments, if they were held valid it would ipso facto be rendered valid?
- (4) Whether in view of the Departmental Promotion Committee having met on 22nd of August, 1973, and it having recommended Shri Doshi for promotion as Director, the petitioner is still entitled to any relief?

14. Re. 1 :-Rule 23 of the Rules clearly lays down that the persons enumerated in column 5 of the schedule shall be eligible for promotion to posts specified in column 2 subject to their possessing minimum qualifications and experience specified in column 6. On 18.9.1972 when the impugned order was passed appointing Shri Doshi as officiating Director, the relevant provision under group A of the schedule was that only a joint Director having 5 years' experience including experience on posts in group B was eligible. Parties are on common ground that on this date neither Shri Doshi nor any of the petitioners were eligible for appointment as Director. Rule 26 which empowered the Government to make temporary or officiating appointments laid down that a temporary vacancy in a senior post (And the Director was a senior post) may be filled by appointing authority by appointing thereto in an officiating capacity an officer whose name is included in the list prepared under Sub-rule (2) & (3) of Rule 24 of the Rules; provided that till the preparation of the first list or in case the list is exhausted a

vacant post may be filled by the appointing authority by appointing thereto a member of the service eligible for appointment to the post by promotion or by appointing thereto temporarily a person eligible for appointment by direct recruitment to the service under the provisions of these Rules. It is thus clear that on 18 9 1972 a Joint Director alone could have been appointed in temporary or officiating capacity under Rule 26 of the Rules. The appointment of Shri Doshi, therefore, being in clear contravention of the Rules as they then stood was, a nullity. It could not confer any title on Shri Doshi to hold the post.

15. Re.2. : In B.S. Vadera v. Union of India : (1970)ILLJ499SC their Lordships of the Supreme Court had occasion to examine the ambit of a Governor's power to make Rules under the proviso to Article 309 of the Constitution. Their Lordships observed:

It is also significant to note that the proviso to Article 309, clearly lays down that any rules so made shall have effect, subject to the provisions of any such Act.' The clear and unambiguous expression, used in the Constitution, must be given their full and unrestricted meaning unless hedged-in by any limitations. The rules, which have to be subject to the provisions of the Constitution', shall have effect, 'subject to the provisions of any such Act.' That is, if the appropriate Legislature has passed an Act, under Article 309, the rules, framed under the Proviso, will have effect, subject to that Act but in the absence of any Act, of the appropriate Legislature, on the matter, in our opinion, the rules, made by the President or by such person as he may direct, are to have full effect, both prospectively and retrospectively. Apart from the limitations, pointed out above, there is none other, imposed by the proviso to Article 309, regarding the ambit of the operation of such rules. In other words, the rules, unless they can be impeached on grounds such as breach of Part III, or any other constitutional provision, must be enforced, if made by the appropriate authority.

In view of what their Lordships have laid down there is no manner of doubt that the Government may make the Rules as would be having retrospective as well as prospective effect. It therefore follows that an amendment in the Rules could likewise be prospective as well as retrospective as the case may be. The validity

of an amendment which is retrospective would, however, depend on the question whether it is in accordance with the other provisions of the Constitution. Learned Counsel for Shri Chhabra endeavoured to show that the amendments were mala fide. The Governor when he makes rules under Article 309 of the Constitution does not act in his executive capacity but exercises a legislative power conferred on him by the Constitution itself. A legislative measure cannot be attacked on the ground that it is a mala fide though it could be challenged on the ground of incompetence of the legislative body or the legislative measure being in contravention of the provisions relating to fundamental rights or against any other provision of the Constitution. Therefore, I am, unable to hold that the two amendments were invalid merely because they were made retrospective.

16. Re. 3 : This question takes me once again to the ambit of Article 309 of the Constitution. I may read Article 309 of the Constitution:

309 Recruitment and conditions of service of persons serving the Union or a State-Subject to the provisions of this Constitution, acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State: Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union and for the Governor...of a State or such person as he may direct in the case of service and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

It is only in respect of regulating the recruitment and conditions of service of persons appointed to public service posts in connection with affairs of any State that the Governor may make rules regulating the recruitment and conditions of service of persons appointed to such service and posts until provision in that behalf is made by order under an Act of the appropriate legislature under this Article.

17. The subject-matter of this Article is the regulation of the recruitment and conditions of service. This Article does not relate to the making of appointments as such of persons to any post or service. Appointments are made by the Government in exercise of their executive power under Article 310 for that matter I have no manner of doubt that the power of validating an appointment which is void at its inception does not vest in the rule making authority i.e. Governor under Article 309 of the Constitution.

18. In *State of Mysore v. Padmanabhacharya* : (1966) 11 LLJ 147 SC the Governor of Mysore had made a rule under the proviso to Article 309 of the Constitution regarding validation of certain executive orders of the Government concerning retirement. It was to the following effect:

Notwithstanding anything contained in Note 4 to Article 294 of the Mysore Service Regulation (Eighth Edition), Government Servants who have been retired from service on the attainment of the age of fifty five, during the period between 7th day of June, 1957 and the 28th day of October, 1958 shall be deemed to have been validly retired from service on superannuation

It was in this context that their Lordships considered the question whether such a rule could be made by the Governor. Their Lordships observed:

We are of opinion that such a rule cannot be made under the proviso to Article 309 of the Constitution. We are expressing no opinion as to the power of the legislature to make a retrospective provision under Article 309 of the Constitution wherein the appropriate legislature has been given the power to regulate the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union or of any State by passing Acts under ' Article 309 of the Constitution read with Item 70 of List I of the Seventh Schedule or Item 41 of List II of the Seventh Schedule. The present rule has been made by the Governor under the proviso to Article 309. That proviso lays down that it shall be competent for the Governor or such person as he may direct in the case of services and posts in connection with the affairs of the State to make rules regulating the recruitment and the conditions of service of persons appointed, to such service and posts until provision in that behalf is made by or under an Act by

the appropriate legislature. Under the proviso the Governor has the power to make rules regulating the recruitment and conditions of service of persons appointed to such services and posts in connection with the affairs of the State. The question is whether the notification of March 25, 1959 can be said to be such a rule. We are of opinion that this notification cannot be said to be a rule regulating the recruitment and conditions of service of persons appointed to the service and posts in connection with the affairs of the State. All that the rule does is to say in so many words that certain persons who had been, in view of our decision on the first point, invalidly retired should be deemed to have been validly retired from service on superannuation. It would if given effect contravene Article 311 of the Constitution. Such a rule in our opinion is not a rule contemplated under the proviso to Article 309. Under the proviso the Governor can make rules regulating the recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the State. But all that this notification or rule does is to say that certain persons who had been wrongly retired must be treated to have been rightly retired. This power of validating an order which was invalid when it was made does not in our opinion flow from the power conferred on the Governor to make rules regulating recruitment and conditions of service of persons appointed to services and posts in connection with the affairs of the State. It is certainly not a rule regulating recruitment of such persons; nor can it be said to be a rule regulating conditions of services of such persons. The rules relating to recruitment and conditions of service contemplated by the proviso to Article 309 are general in operation, though they may be applied to a particular class of Government servants. But what this notification or rule does is to select certain Government servants who had been illegally required to retire and to say that even if the retirement had been illegal, that retirement should be deemed to have been properly and lawfully made. We are of opinion that such a declaration made by the Governor and this is all that the notification or the rule does—cannot in any sense be regarded as a rule made under the proviso to Article 309 governing the conditions of service of persons appointed to services and posts in connection with the affairs of the State. In this view of the matter it is not necessary to decide whether a rule of this kind which is purely retrospective could be made as a rule governing conditions of service of persons appointed in connection with the affairs

of the State.

(Emphasis supplied)

Their Lordships had held as above that the impugned rule could not be said to be one regulating recruitment and conditions of service of persons appointed to the service of post in connection with the affairs of the State. All that the rule should be deemed to have validly retired from service on superannuation-did say was that certain persons who had been invalidly redirected. Such a rule would if given effect to contravene Article 311 of the Constitution. In *State of Mysore v. H. M. Krishna Murthy* AIR SLR 832 their Lordships laid down that the power of making rules under Article 309 of the Constitution relating to recruitment and conditions of service could not be used to validate unconstitutional discrimination in promotional chances of Government servants belonging to the same category. In *R. N. Nanjundappa v. Thimminh* 1972 SLR 94 their Lordships again held that the rule which regularises the appointment notwithstanding any rules cannot be said to be in exercise of power under Article 162 of the Constitution and further the Government cannot be said to have acted also under Article 309 of the Constitution of India, in the same breath as the two Articles operate in different areas. In this case their Lordships further pointed out that where the relevant rules at the material time as to promotion and appointment are infringed, the impeached rule cannot be termed to stand to operate as a regularisation of appointment of one person in utter defiance of rules requiring consideration of seniority and merit in the case of promotion and consideration of appointment of selection or by competitive examination.

19. Since Article 309 regarding the laying down of the conditions of service and Article 162 of the Constitution under which appointments are made (read with Article 310 of the Constitution) operate in different spheres the rules cannot ipso-facto render an appointment valid if at the time it was made it was in clear contravention of the rules and therefore null and void.

20. In other words by merely making rules under Article 309 of the Constitution with retrospective effect appointments which were a nullity at the time they purported to be made cannot be made valid. The right course for the Government

in such a situation was to have passed a fresh order of appointment the rules stood amended with retrospective effect. This has never been done in the case of Shri Doshi as officiating Director.

21. Therefore, though I hold that the amendments aforesaid are valid and they are also retrospective they cannot in the very nature of things make valid an appointment which was altogether null and void under the rules in the absence of any fresh order of appointment by the competent authority after such amendments.

22. Re-4 : Whether any writ, direction or order be issued now in view of the Departmental Promotion Committee having met on 22-8-1973 and Shri Doshi having been recommended by the Departmental Promotion Committee for appointment as Director:

The Government had passed an order after the recommendation of the Departmental Promotion Committee in the following terms:

That

Shri Doshi

be appointed as Director of the Department of Agriculture and Animal Husbandry

with effect from 1-10-73. The Government further directed that the Departmental Promotion Committee be constituted by the Government of India, Ministry of Agriculture and Animal Husbandry, to recommend the appointment of Shri Doshi as Director of the Department of Agriculture and Animal Husbandry.

Shri Doshi

be appointed as Director of the Department of Agriculture and Animal Husbandry

It does appear that but for the stay order issued by this court on 26-4-73 the Government would have proceeded to make a substantive appointment in the light of the recommendations of the Departmental Promotion Committee. The stay order dated 26-4-73 runs as follows:

Hon'ble Shinghal J.

26-4-73. Mr. S.K. Keshote for the petitioner,

Mr. A.K. Mathur Dy. G.A.

Heard learned Counsel. Issue notice of the stay application to the remaining respondents. Meanwhile, while it will not be desirable to make any order restraining the respondent State from holding a meeting of the Departmental Promotion Committee, it is ordered that the respondent State shall not make any substantive appointment to the post until the disposal of the stay application.

As the petitioner is due to retire shortly, the main writ petition may be listed for hearing, after the part-heard cases, in the month of August, 1973.

Sd/-

It is on account of this stay order that the Government have made only an officiating appointment even after the recommendation of the Departmental Promotion Committee. The order is, therefore, clearly in pursuance of the stevedored of this Court. Both the writ petitioners have by now retired from service. No useful purpose would be served at this stage by issuing a writ direction or order against the Government, except observing that the initial order of Shri Doshi as officiating Director was a nullity. Since the initial order of Shri Doshi as officiating Director was a nullity, the concurrence asked for from the Public Service Commission or one accorded by the Public Service Commission were altogether of no avail as there can be no concurrence to the appointment of a person who was not eligible for appointment at the relevant time in accordance with the rules then in force. I however express no opinion whatsoever regarding the validity, of the proceedings before the Departmental Promotion Committee or the order that the Government might pass in the light of the recommendations of the Departmental Promotion Committee because that is not a subject matter of challenge in the two writ petitions.

23. In view of what I have held above, I vacate the stay order dated 26-4-73 and dismiss the two writ petitions. The parties are left to bear their own costs.

