HIGH COURT OF MADHYA PRADESH AT JABALPUR

WRIT APPEAL NO.783/2015

APPELLANT : SMT. MEENA KADA

Vs.

RESPONDENTS **:** STATE OF M.P
AND OTHERS.

Present : Hon'ble Shri Justice R.S. Jha,
Hon'ble Shri Justice Sanjay Dwivedi, JJ.

For the appellant : Shri Mohd. Ali, Advocate.

For the respondent/State: Shri Himanshu Mishra, Govt. Advocate.

For respondent no.6 : Shri V.K. Sharma, Advocate.

Whether approved for reporting: **YES**

Law Laid down :

Significant para nos. :

J U D G M E N T
(27/03/2019)

Per R. S. Jha, J.

This appeal has been filed by the appellant under section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, being aggrieved by order dated 17.08.2015 passed by the learned Single Judge in W.P No.12764/2009, whereby the petition filed by the appellant against the order passed by the Commissioner, Sagar Division, Sagar, dated 31.8.2009 has been dismissed affirming the order of remand passed by the Commissioner.

2. The brief facts, leading to filing of the present appeal, are that the appellant as well as respondent no.6 participated in the proceedings for appointment on the post of Anganwaadi Karyakarta in Pathla Mohalla Ward, Tikamgarh. The appellant was appointed as an Anganwaadi Karyakarta vide order dated 29.6.2007. The respondent no.6, being aggrieved by the appointment of the appellant, filed an appeal before the Collector which was dismissed by order dated 29.11.2007. The respondent no.6, being aggrieved by the order of the Collector, filed an appeal before the Commissioner, Sagar Division, Sagar which was partly allowed to the extent that the matter was remanded and remitted back to the Collector for reconsideration on the basis of certain observations made by the Commissioner.

The appellant, being aggrieved by the order of the Commissioner dated 31.8.2009 remanding the matter back to the Collector, had filed a petition before this Court which was registered as W.P No.12764/2009.

The sole ground on which the order of the Commissioner was assailed by the appellant was that the Commissioner had no jurisdiction to entertain a Second Appeal against the appointment of the appellant as an Anganwaadi Karyakarta as the appellant was appointed

on 29.6.2007 on which date the circular governing appointment on the post of Anganwaadi Karyakarta did not provide for filing a second appeal before the Commissioner and that the circular of the Government providing for filing of a second appeal before the Commissioner was for the first time notified on 10.7.2007.

3. The learned counsel for the appellant, by placing reliance on the decision of the Supreme Court rendered in the case of **A. A. Calton vs. The Director of Education and another,** AIR 1983 SC 1143 and **Jose Da Costa and another vs. Bascora Sadasiva Sinai Narcornin and others,** AIR 1975 SC 1843, submits that the right of appeal is a substantive right that can be created by a statute alone and that the rights and remedies that are available in accordance with the law prevailing on the date of appointment alone can be applied to and can be permitted to be availed by a person aggrieved by the proceedings. It is submitted that as the circular of the State Government prevailing and existing on 29.6.2007 i.e. the date of appointment of the appellant did not provide for filing of a second appeal in cases of dispute but only provided for one single remedy of an appeal before the Collector, therefore, the subsequent circular of the Government dated 10.7.2007 creating a

remedy of a second appeal would have no applicability to the case of the appellant who was appointed prior to issuance of the circular dated 10.7.2007 and, therefore, the Commissioner had no right or authority to entertain a second appeal in respect of the appointment of the appellant on the post of Anganwaadi Karyakarta. The learned counsel for the appellant submits that the learned Single Judge has wrongly concluded that the Commissioner had the power to entertain an appeal against the order of the Collector in view of the circular dated 10.7.2007 as the said circular had no applicability to the appellant's case.

4. The learned counsel for the respondents, per contra, submits that though the appellant was appointed on the post of Anganwaadi Karyakarta on 29.6.2007 as per the old circular, however, immediately thereafter i.e. within a span of 12 days a new circular governing appointment of Anganwaadi Karyakarta was issued by the State Government on 10.7.2007 and that the respondent no.6 had infact filed an appeal in accordance with the subsequent circular dated 10.7.2007 before the Collector on 29.8.2007.

5. It is submitted that in such circumstances, as the appeal before the Collector had been filed in view of the

circular dated 10.7.2007 which also provides for filing of a second appeal before the Commissioner, therefore, the respondent no.6 has rightly filed an appeal before the Commissioner after passing of the order of the Collector on 29.11.2007 which was rightly entertained and partly allowed by the Commissioner by order dated 31.8.2009. It is submitted that in such circumstances there is no infirmity or illegality in the order passed by the learned Single Judge warranting interference in this appeal.

6. Having heard the learned counsel for the appellant and having considered the rival submissions of the learned counsel for the parties, we are of the considered opinion that the learned Single Judge has rightly held that the Commissioner had the power to entertain the second appeal. Our opinion is based on the fact that the appointment on the post of Anganwaadi Karyakarta is itself governed only by the circular and not by any statutory provisions or rules.

7. The appellant was appointed as per the procedure prescribed under the old administrative instructions which was substituted by a new notification dated 10.7.2007. Admittedly, the right of appeal before the Collector

existed even under the old circular that was governing the appointment of Aaganwadi Karyakarta prior to 29.6.2007. It is also an undisputed fact that the appeal filed by the respondent No.6 against the order of appointment of the appellant dated 29.6.2007 was filed before the Collector on 29.8.2007 after coming into force and existence of the subsequent instructions and policy for appointment of Aaganwadi Karyakarta by circular dated 10.7.2007 and, therefore, it is an undisputed fact that the appeal filed by the respondent No.6 was infact filed in accordance with the circular dated 10.7.2007 that came into existence subsequent to the appointment of the appellant.

8. The fact that the respondent No.6 has filed an appeal before the Commissioner as per the stipulations contained in Clause 6 of the circular dated 10.7.2007, is also undisputed. It is also an undisputed and admitted fact that the appellant did not raise any objection or challenge to the jurisdiction of the Commissioner in the second appeal filed by the respondent No.6 and has raised this issue, for the first time, before this Court in the writ petition.

9. In the backdrop of the aforesaid admitted and

undisputed facts, the contention of the learned counsel for the appellant is rejected.

10. The learned counsel for the appellant, by placing reliance on the decision of the Supreme Court in the case of **A. A. Calton** (supra), submits that the proceedings and procedure for appointment was initiated by the respondent authorities under the circular existing prior to 10.7.2007 and, therefore, the only rights and remedy that was available to the respondent, if aggrieved by the appointment of the appellant, were restricted and confined to the procedure and the rights of appeal available on the date of appointment under the old circular. It is submitted that subsequent creation of another right of appeal, i.e. filing of second appeal before the Commissioner, would not apply to the cases like the appellant's case wherein the appointment was made prior to issuance of the circular dated 10.7.2007.

11. The learned counsel for the appellant submits that in such circumstances, retrospective application given to the circular dated 10.7.2007 by the learned Single Judge and consequently holding that the respondent no.6 had the right to file a second appeal before the Commissioner under the circular dated 10.7.2007 is contrary to law.

12. Having perused the decision of the Supreme Court in the case of **A. A. Calton** (supra), we are of the considered opinion that the aforesaid judgment has no applicability to the facts of the present case. In the aforesaid case, the petitioner had participated in the selection process for appointment as Principal of Ranikhet Intermediate College, Ranikhet, which was a minority institution and during the proceedings for selection he was found qualified in the year 1973 and, therefore, his name was recommended by the Selection Committee along with the names of two other persons. The recommendation of the Selection Committee was not approved by the Regional Deputy Director of Education and the matter was remitted back to the Selection Committee, which thereafter again recommended the name of the petitioner and another respondent by assigning higher rank to the other respondent, which selection was again disapproved by the Deputy Director and, therefore, a third recommendation was made by the Selection Committee. The petitioner, before the Supreme Court, assailed the selection proceedings at that stage before the High Court which was allowed by the High Court and a direction was issued to the Director of Education to make appointment in accordance with

Section 16 (F) (4) of the U.P. Intermediate Education Act, 1921. Pursuant to the direction of the High Court, the Director thereafter appointed the respondent No.2, who was before the Supreme Court, to the post of Principal. The petitioner, before the Supreme Court, thereafter, filed a fresh petition before the High Court assailing the appointment of the respondent No.2 on the ground that the appointment of the respondent No.2 was opposed to the statutory provisions as it stood on the date of appointment, as by that date the U.P. Intermediate Education Act, 1921, had been amended on 18.8.1975, denuding the Director of the powers to make appointment in relation to minority institutions.

13. The Supreme Court, in the backdrop of the aforesaid facts, held that the selection process that had commenced under the unamended Act conferred powers on the Director to issue orders of appointment which powers would not be affected by any subsequent amendments in the Act as the selection process had already commenced. It was in the backdrop of the aforesaid facts that the Supreme Court held that a subsequent amendment in the statutory provisions denuding the appointing authority of its power to appoint,

would not effect the power of the appointing authority to make appointment in respect of selections that have already commenced prior to coming into force of the amendment as rights of the candidates selected and recommended at each stage of the proceedings had crystallized.

14. The facts of the present case are totally different. In the instant case, the manner, procedure, powers and the authority for making appointment on the post of Aaganwadi Karyakarta have not been changed or affected nor have they been modified or the amended provisions in that regard been applied to appointment of the appellant. As stated earlier, and is an admitted and undisputed fact that, the appellant was appointed on the post of Aaganwadi Karyakarta in accordance with the circular that was in existence prior to 10.7.2007. The only change that has been brought about and which is subject matter of challenge before this Court is the provision of including the procedure of filing a second appeal against the order of the Collector passed in the first appeal by the circular dated 10.7.2007.

15. It is also pertinent to note and is also an admitted and undisputed fact that even the first appeal filed by the

respondent No.6 was infact filed after coming into force of the new circular dated 10.7.2007. In the aforesaid facts and circumstances, the question is, whether providing for an additional forum of filing an appeal by amending the administrative instructions affects any right, substantive or statutory, vested in the appellant.

16. As stated earlier, while deciding the issue, it is pertinent to keep in mind the fact that the appointment itself is not governed by any statutory provisions but is regulated by executive instructions and the procedure has also been prescribed in the executive instructions. In such circumstances, we do not find that any prejudice is caused to the appellant or his rights are in anyway affected by the circular dated 10.7.2007 issued by the respondent authorities providing for an additional forum of filing second appeal.

17. We find support from the view taken by us from the analysis made in the Principles of Statutory Interpretation, 14th Edition by Justice G. P. Singh, wherein on page 626, Chapter - 6, by referring to several Supreme Court decisions, it is stated as under:-

> "But the right to finality does not vest or accrue until the making of the order; and, therefore, if a new right of appeal or revision is conferred before making

of the order, although after institution of proceedings, the right of appeal or revision is available against all orders subsequently made. (**Indira Sohanlal v. Custodian of Evacuee Property,** AIR 1956 SC 77). It has, therefore, been held that an appeal will lie to the Supreme Court under Article 133 of the Constitution against a decree of a High Court in a Part B States (previously Princely States) made after the commencement of the Constitution in a previously instituted suit, even though when the suit was instituted, there existed no right of appeal to His Majesty in Council or the Federal Court. (**Nathoo Lal vs. Durga Prasad,** AIR 1954 SC 355, **Garikapati vs. N. Subbiah Choudhary,** AIR 1957 SC 540). The same principle can be said to have been applied when a Sales Tax Act was amended during the pendency of a revision, providing for a reference at the instance of Commissioner of Sales Tax. It was held that the Commissioner could apply for reference against the order made in the pending revision (**Tikaram & Sons v. Commr. Of Sales Tax, U.P.,** AIR 1968 SC 1286).

Alteration in law relating to appeals when it reduces already existing rights of appeal is, has already seen, presumed to be prospective and will not affect pending proceedings; but if such alteration increases rights of appeal, it will be presumed to be retrospective applying to orders subsequently made in pending proceedings, though it will not affect finality of orders already made.

xxx xxx xxxx

But, if a new Act provides that the orders made under the old Act are deemed to be made under the new Act as if it were in force on the day when the orders were made, the orders though made under the old Act will become appealable or revisable under the

> new Act (**Bishambhar Nath Kohli vs. State of U.P.,** AIR 1966 SC 573, **Mithoo Shahni vs. Union of India,** AIR 1964 SC 1536, **Special Military Estates Officer vs. Munnivenkataramaiah,** AIR 1990 SC 499). ”

18. We find that the law has been rightly summarized in the aforesaid paragraphs relying on the Supreme Court decisions referred therein.

19. In the circumstances, even if the aforesaid principles of statutory interpretation are applied to the administrative instructions in question, we do not find any illegality or infirmity in the order passed by the learned Single Judge, warranting interference by this Court in this appeal. The appeal, filed by the appellant being meritless is, accordingly, **dismissed**.

20. It is, however, observed that an interim order in favour of the appellant has been passed and is continuing since 27.10.2015 and was also in existence during the pendency of the writ petition as a result of which the appellant is still working on the post of Aaganwadi Karyakarta.

21. In the circumstances, while dismissing the appeal filed by the appellant, it is observed that pursuant to the order of the Commissioner, the matter shall now be taken

up by the Collector and decided in accordance with law expeditiously and that till a decision in this regard is taken by the Collector, the interim arrangement made by this Court shall continue to remain in existence.

22. The appeal, filed by the appellant is, accordingly, **dismissed** with the aforesaid directions.

Certified Copy as per rules.

(R. S. JHA)
J U D G E

(SANJAY DWIVEDI)
J U D G E

mms/-