

PETITIONER:
NOHIRIA RAM

Vs.

RESPONDENT:
THE UNION OF INDIA AND OTHERS(with connected appeal)

DATE OF JUDGMENT:
08/11/1957

BENCH:
DAS, S.K.
BENCH:
DAS, S.K.
BOSE, VIVIAN
DAS, SUDHI RANJAN (CJ)
AIYYAR, T.L. VENKATARAMA
SARKAR, A.K.

CITATION:
1958 AIR 113 1958 SCR 923

ACT:

Civil Servant-Cadre-Additional post to regular establishment
Whether an integral part of regular Cadre-Creation of post
outside Cadre-Competence-Transfer of incumbent of such post
on foreign service-Effect-Fundamental Rules, Rr. 9(4), 111,
113, 127-Civil Services (Classification, Control and Appeal)
Rules, rr. 24, 44.

HEADNOTE:

The appellant was originally employed as a civilian clerk in the Royal Air Force, Quetta, but subsequently on application made by him to the Director General of Indian Medical Service, he was appointed as an additional clerk in the office of the Director General to deal with the work of the Indian Research Fund Association on the understanding that the average cost of the appointment together with leave and pensionary contributions thereon was to be recovered from the Association. The Public Service Commission approved of the appointment subject to the condition that this would not give him any claim to appointment in the Central Secretariat or its attached offices. On June 12, 1930 the appellant was confirmed in the additional post with effect from April 1, 1930), and on April 10, 1931, he was transferred on "foreign service" under the Indian Research Fund Association, where he continued to serve till September 17, 1944. As a result of certain representations made by him in which he submitted that the post which he held was a permanent post in the regular establishment of the Director General, Indian Medical Service, Government decided that while continuing to hold the extra-cadre post which was originally sanctioned for the work of the Indian Research Fund Association, he would in future be employed on ordinary work in the office of the Director General, but would continue to be subject to the existing disqualifications, namely that he would no claim to appointment in the regular cadre of the ministerial establishment of the office.

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Ultimately on March 30, 1948, he instituted a suit against the Union of India for a declaration that he was in the

service of the Union of India as a member of the permanent regular ministerial establishment of the office of the Director General, Indian Medical Service. He contended, inter alia (1) that as the post in which he was permanently appointed in 1930 was not constituted into a separate cadre, that post must be held to be an addition to the regular establishment of the Director General, Indian Medical Service and, therefore, an integral part of the same cadre, and (2) that, in any case, as under the rules relating to "foreign service" in the Fundamental Rules, members of the regular establishment only could be sent on "foreign service" and as admittedly Government had sanctioned the transfer of the appellant on "foreign service," he must be held to be a member of the regular establishment of the Director General.

Held, (i) that it was within the competence of the appropriate authority to create an additional post outside the regular cadre of a particular office to which the post may be attached for purposes of administrative control, and Fundamental Rule 127 only lays down the principles in accordance with which the cost of the additional post shall be recovered;

(2) That Fundamental Rule 113 was not applicable to the case as "he appellant did not belong to a cadre immediately before his transfer on "foreign service."

The question whether it was open to the Public Service Commission to impose a condition on or give conditional concurrence to, the appointment of the appellant, was left open.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 116 and 117 of 1957.

Appeals by special leave from the judgment and order dated October 30, 1953, of the Circuit Bench of the Punjab High Court at Delhi in Civil Regular First Appeal No. 190 of 1951 and Civil Writ No. 82-D of 1952.

D.R. Prem, T. S. Venkataraman and K. R. Choudhry, for the appellant.

R. Ganapathy Iyer, Porus A. Mehta and R. H. Dhebar, for the respondents.

1957. November 8. The Judgment of the Court was delivered by

S. K. DAS J.-These are two appeals by special leave. Pt. Nohiria Ram is the appellant in both appeals. He had also filed a petition (petition No. 397 of 1955) under Art. 32 of the Constitution in which he had prayed for the issue of an appropriate writ to the Union of India, respondent 1, and the

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Director General of Health Services, New Delhi, respondent 2, directing them to forbear from giving effect to an order of dismissal passed by respondent 2 against the petitioner on October 3, 1955. That petition was, however, dismissed, as withdrawn. Therefore, the present judgment is confined to the two appeals, and the relevant facts relating thereto are stated below.

Formerly, the appellant held a permanent appointment as a civilian clerk in the office of the Royal Air Force, No. 3 (Indian) Wing, Quetta. On March 17, 1928, he applied for the post of a clerk in the office of the Director General, Indian Medical Service, New Delhi (now known as the Director General, Health Services, New Delhi). The appellant

succeeded in his application and on March 28, 1928, he was told that there was a vacancy in the office of the Director General in the grade of Rs. 75-4-155, it was further stated that the appointment would be for one year in the first instance, though there was likelihood of its being made permanent; and if the appellant agreed to accept the post, he was directed to join in the office of the Director General at Simla on April 16, 1928. A request was also made to the authorities of the Royal Air Force to grant the appellant a lien on his permanent post in the Royal Air Force till February 28, 1929, by which date the question of the permanency of the appointment in the Director General's office was to be decided. The appellant joined his Dew post on April 16, 1928. On February 26, 1930, the Government of India in the Department of Education, Health and Lands, which was the controlling Department so far as the office of the Director General, Indian Medical Service, was concerned, conveyed sanction to the appointment, with effect from April 1, 1930, of an additional clerk in the office of the Director General in the grade of Rs. 75-4-155 to deal with the work of the Indian Research Fund Association on the understanding that the average cost of the appointment together with leave and pensionary contributions thereon was to be recovered from the Association. On April 30, 1930, the Director General, Indian Medical

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Service, wrote to the Secretary, Public Service Commission, intimating that the appointment of an additional clerk had been sanctioned by the Government of India for work of the Indian Research Fund Association; the Director General then stated that the incumbent of the additional post was the appellant, who formerly held a permanent post in the Royal Air Force, Quetta, and as he was not a candidate who had passed through the Public Service Commission the Commission was asked to give approval to his permanent appointment in the said post. To this the Secretary, Public Service Commission, gave the following reply:

" With reference to your letter No. 219/516 dated the 30th April, 1930, I am directed to say that the Public Service Commission have no objection to the confirmation of the temporary clerk who is at present employed on the work of the Indian Research Fund Association subject to the condition that this will not give him any claim to appointment as a Routine Division clerk in the Secretariat and its attached offices."

This reply of the Public Service Commission was shown to the appellant and he was specifically asked to note the condition that he would have no claim to an appointment as a routine division clerk in the Secretariat or attached offices, the office of the Director General, Indian Medical Service, being an office attached to the Secretariat. On May 26, 1930, the appellant saw the letter of the Public Service Commission and noted-"Seen. Thanks". On June 12, 1930, the appellant was confirmed in the additional post with effect from April 1, 1930. On April 10, 1931, the appellant was transferred on foreign service under the Indian Research Fund Association as a second grade assistant in the grade of Rs. 120-8-160-10-350 on condition that the Association would continue to pay the average cost of the post together with leave and pensionary contributions etc. The appellant continued to serve under the Indian Research Fund Association till September 17, 1944, with some breaks for small periods during which he reverted to the office of the Director General to officiate as

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assistant, first grade or special grade, on Rs. 200-12-440. On June 10, 1932, the Governor General-in-Council sanctioned the transfer of the appellant to foreign service under the Indian Research Fund Association with effect from April 10, 1931. On August 15, 1944, the appellant made a representation to the Secretary, Indian Research Fund Association, in which he made a request that he should be reverted to his parent office. The reason given was that the appellant was "being treated indifferently and there had been some misapprehensions in the past and there might be similar misapprehensions in the future." On September 11, 1944, the Secretary, Indian Research Fund Association, wrote to the appellant to say that his application for reversion to the office of the Director General was granted and that the appellant should revert to the office of the Director General with effect from September 18, 1944. As the previous consent of the Director General had not been obtained to the reversion, there was naturally some trouble and the Director General asked the appellant to report himself for duty to the Indian Research Fund Association. The appellant then made certain representations in November 1944 and January 1945 in which he submitted that the post which he held was a permanent post in the regular establishment of the Director General, Indian Medical Service, and that he should be treated, on reversion to the parent office, as a senior assistant who was entitled to all increments and promotions available to a permanent member of the regular establishment of the Director General, Indian Medical Service. To these representations, the appellant received the following reply :

" In reply to a recent communication from the Secretary, I. R. F. A., the Government of India, E.H. & L. Department, affirmed that Mr. Nohiria Ram was governed by the orders contained in their letters No. F. 9-22/39-H dated the 8th August, 1939, and No. F. 37-13/41-H, dated the 27th November, 1941. These orders clearly state-

(1)that the substantive post of Mr. Nohiria Ram is attached to this office for the work of the I.R.F.A;
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(2) that it is outside the regular cadre of this office;

(3)that Mr. Nohiria Ram should not be absorbed in the regular cadre of this office on the occurrence of a vacancy in that cadre; and

(4)that the post should continue to be retained outside this cadre until Mr. Nohiria Ram retires.

Mr. Nohiria Ram was confirmed in the above post only after he had accepted in writing the condition that he would have no claim to a post on the regular establishment of this office. This condition was imposed as he is an "unqualified clerk."

The appellant was, however, dissatisfied with this order and continued to make further representations, and ultimately on December 17, 1945, he expressed his inability to work in the office of the Indian Research Fund Association, which he characterised as a "private body". It appears that the appellant was then suspended with effect from December 14, 1945, the date on which he was to have joined his duty in the post of a clerk attached to the office of the Director General, Indian Medical Service, for work of the Indian Research Fund Association. A charge sheet was served on the appellant on January 10, 1946, to the effect that on the expiry of his leave for ten days, he had refused to return to duty to his substantive post of clerk attached to the office of the Director General, Indian Medical Service, for work of the Indian Research Fund Association. The appellant

submitted a written statement and made certain further representations. On September 5, 1946, the orders of suspension etc. were modified, and the following order was passed :

" Mr. Nohiria Ram is informed that in modification of the existing orders on the subject the Government of India have decided that while continuing to hold the extra cadre post which was originally sanctioned for the work of the I.R.F.A. he will in future be employed on the ordinary work of this office. He will continue to be subject to the existing disqualifications, namely, that he will have no claim to appointment as a routine division clerk in the Secretariat or

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its attached Offices or to inclusion in the regular cadre of the ministerial establishment of this office.

In accordance with the above decision, Mr. Nohiria Ram is directed to report himself for duty to Captain J. M. Richardson, D.A.D.G. (P), in this office at Simla immediately. He will be posted in the Indian Medical Review Section."

In pursuance of the aforesaid order, the appellant joined at Simla and on March 30, 1948, he instituted a suit against the Union of India asking for a declaration that he was in the service of the Union of India as a member of the permanent regular ministerial establishment of the office of the Director General, Indian Medical Service. He also claimed certain other reliefs which were, however, given up. The suit was decreed by the learned Subordinate Judge of Delhi on March 10, 1951. The Union of India filed an appeal, being First Appeal No. 190 of 1951. This appeal was allowed by the Punjab High Court by its judgment dated October 30, 1953. The result was that the appellant's suit was dismissed. The appellant asked the Punjab High Court for a certificate for leave to appeal to this Court. That application was refused. The appellant then moved this Court and obtained special leave, and Civil Appeal No. 116 of 1957 has been filed in pursuance of the special leave granted by this Court and is directed against the judgment and decree of the Punjab High Court dated October 30, 1953, in First Appeal No. 190 of 1951.

Civil Appeal No. 117 of 1957 continues the story of the appellant's alleged grievances after he had obtained his decree from the learned Subordinate Judge of Delhi. We have stated before that against that decree the Union of India filed an appeal on July 24, 1951. During the pendency of that appeal, the appellant moved the Punjab High Court by means of a petition under Art. 226 of the Constitution for the issue of a writ directing the Director General, Health Services, New Delhi, to disburse immediately the pay and allowances to which the appellant said he was entitled for the month of November, 1952. What happened was this. In October, 1952, the appellant

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was working in the Public Health Section 1, and on October 3, 1952, he proceeded on leave on average pay till October 11, 1952. On his return from leave on October 13, 1952, he submitted a joining report and asked for posting orders. He was asked to work in the Public Health Section I from where he had gone on leave. He refused to do so, and asked for an interview with the Director General. This was refused, and the appellant was told that unless he resumed duty in the Public Health Section I, he would be deemed to have been absent from office without permission. The appellant still continued in the recalcitrant attitude which he had adopted,

presumably in the belief that after the decree in his favour he was entitled to all promotions and increments available to a permanent member of the regular establishment. He came to office, but instead of going to the Public Health Section 1, he occupied the seat meant for the record sorter in the General Section. In other words, since October 13, 1952, the appellant did no work. He was paid his salary till the end of October, 1952, but payment was withheld for November, 1952. On December 20, 1952, the appellant filed his petition under Art. 226. On the same date on which the appeal of the Union of India was allowed, the application under Art. 226 was also dismissed by the Punjab High Court on the ground that the appellant was guilty of disobedience and insubordinate conduct and was not entitled to any relief. Against this order the appellant has filed Civil Appeal 117 of 1957, after having obtained special leave from this Court.

The crucial question for decision in these two appeals is if the appellant held a post in the permanent and regular ministerial establishment of the office of the Director General, Indian Medical Service, New Delhi. The High Court has held that the post in which the appellant was made permanent was no doubt a post attached to the office of the Director General for the purpose of the work of the Indian Research Fund Association, but it was a post outside the regular cadre of the office of the Director General, and this was made clear to the appellant from the very beginning.

The High Court found that the appellant knew and had accepted the condition on which he was appointed; and the grievance he made after a lapse of about 14 years was unsubstantial and fanciful.

Learned counsel for the appellant has contested the correctness of the aforesaid findings. It is not disputed that the appellant did know the condition which the Public Service Commission had imposed in approving of the appointment of the appellant on May 16, 1930. The argument before us is (1) that on a true construction of the relevant rules and Government orders governing the conditions of the appellant's service, the appellant on his confirmation with effect from April 1, 1930, became a permanent member of the regular establishment of the office of the Director General, Indian Medical Service, and (2) that the Public Service Commission had no authority to impose any condition in derogation of those rules and orders.

Let us now examine the rules and orders on which the appellant relies. Fundamental Rule 9 (4) explains what is meant by a cadre; it means in effect the strength of an establishment or service (later amended to include a part of a service) sanctioned as a separate unit. The establishment we are concerned with in the present case is the establishment of the office of the Director General, Indian Medical Service. The total sanctioned strength of that establishment was 30. In their letter of February 26, 1930, the Government of India conveyed sanction to the appointment of an additional clerk to deal with the work of the Indian Research Fund Association on the understanding that the average cost of the post plus leave and pensionary contributions would be recovered from the Association. The question is if this additional post was a permanent increase of the regular cadre or was a post outside the cadre. In 1934 the Accountant General, Central Revenues, raised the question and enquired of the Director General, Indian Medical Service, how the pay of 31 persons was shown in his establishment as against the sanctioned strength of 30 only.

The Director General, Indian Medical Service, replied that the number 31 included the post of the additional 931

clerk, though the post was not included in the sanctioned strength of his office. In 1935 the Director General, Indian Medical Service, wrote to Government and said : " In practice the post has since been considered outside the regular cadre of my office." The Director General, Indian Medical Service, then added:

" I consider that F. R. 127 is the only rule under which additions to a regular establishment can be made for the performance of the work of private bodies. As this rule does not seem to contemplate the, constitution of two separate establishments in one and the same office I am of opinion that the two posts in question should be regarded as additions to the strength of my office and as such they must remain under my administrative control."

To this letter the Government of India replied to the effect that though the post was under the administrative control of the Director General, Indian Medical Service, it was a post outside the regular establishment and the incumbents of this post as also of another similar post should be absorbed in the regular establishment when vacancies occurred in future. This order was partially modified in 1939 when it was said: "The Government of India have decided that the post of clerk attached to your office for the work of the Indian Research Fund Association, which is outside the regular cadre of your office, should not be absorbed in that cadre on the occurrence of a vacancy. It should continue to be retained outside the cadre as at present until Mr. Nohiria Ram remains on deputation to a post under the Indian Research Fund Association and the Association should continue to pay the leave and pension contributions to Government on account of the latter post. In the event of Mr. Nohiria Ram's reversion to his substantive post the Association will, as originally stipulated in this Department letter No. 467-H. dated 26th February, 1930, be required to pay the average cost of the post plus leave and pension contributions. The post will be abolished on retirement of Mr. Nohiria Ram from service."

it is quite clear from the aforesaid orders that the 932

post to which the appellant was appointed permanently in 1930, was a post outside the cadre of the regular establishment of the Director General, Indian Medical Service. Indeed, on April 2, 1935, the Home Department (as it was then called) ruled on a reference made to it that "the strength of the ministerial staff of the Director General, Indian Medical Service, was exclusive of the two posts the cost of which was recovered from the Indian Research Fund Association."

The sheet anchor of the case of the appellant as presented by his learned counsel is Fundamental Rule 127 in Section 111, Chapter XII, read with rules 24 and 44 of the Civil Services (Classification, Control and Appeal) Rules, 1930. The case so presented is this: it is argued that under the Classification, Control and Appeal Rules the Governor General in Council was alone competent to constitute a cadre by declaring the sanctioned strength of the establishment of the Director General, Indian Medical Service and Fundamental Rule 127 lays down how the recovery of the cost is to be made when an addition is made to a regular establishment for the benefit of private persons or bodies, and the argument proceeds to state that as the post in which the appellant was permanently appointed in 1930 was not constituted into a

separate cadre, that post must be held to be an addition to the regular establishment of the Director General, Indian Medical Service and., therefore, an integral part of the same cadre. We are unable to accept this argument as correct. It is true that the additional post in which the appellant was made permanent was not constituted into a separate cadre; the obvious reason was that it was an additional post outside the regular cadre. None of the rules to which learned counsel has drawn our attention prevents the appropriate authority from creating an additional post outside the regular cadre of a particular office, to which the post may be attached for purposes of administrative control. F. R. 127 on which learned counsel has placed so much reliance is in these terms:
F.R. 127. "When an addition is made to a regular

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establishment on the condition that its cost, or a definite portion of its cost, shall be recovered from the persons for whose benefit the additional establishment is created recoveries shall be made under the following rules :

(a) The amount to be recovered shall be the gross sanctioned cost of the service, or of the portion of the service, as the case may be and shall not vary with the actual expenditure of any month.

(b) The cost of the service shall include contributions at such rates as may be laid down under Rule 116 and the contributions shall be calculated on the sanctioned rates of pay of the members of the establishment.

(c) A local Government may reduce the amount of recoveries or may entirely forego them."

The Rule corresponds to Art. 783 in Chapter XLI of the Civil Service Regulations, and lays down the principles in accordance with which the cost, or a definite portion of the cost, of the additional post shall be recovered. It does not decide the question if the post is part of the cadre or not; that depends on the decision of the appropriate authority, and we know that in the present case the appropriate authority had decided from the very beginning that the additional post which the appellant held was outside the regular establishment of the Director General, Indian Medical Service.

It has been next argued that under the relevant Rules members of the regular establishment alone could be sent on foreign service and as admittedly Government sanctioned the transfer of the appellant to foreign service with effect from April 10, 1931, the appellant must be held to be a member of the regular establishment of the Director General, Indian Medical Service. In our opinion, this argument is also equally fallacious. The Rules relating to 'I Foreign Service' are to be found in Section III, Chapter XII and the particular Rules to which our attention has been drawn are Fundamental Rules 111 and 113. Insofar as it is relevant for our purpose, Fundamental Rule I 1 1 says that a transfer to foreign service is not admissible

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unless the Government servant transferred holds a lien on a permanent post; Fundamental Rule 113 says that a Government servant transferred to foreign service shall remain in the cadre or cadres in which he was included in a substantive or officiating capacity immediately before his transfer and may be given such substantive or officiating promotion in those cadres as the authority competent to order promotion may decide. In the present case, the appellant held a lien on the additional post in which he was confirmed; therefore, his transfer on foreign service was admissible under

Fundamental Rule 111. He did not, however, belong to a cadre immediately before his transfer, and Fundamental Rule 113 had no application in his case.

Lastly, it has been argued that the Public Service Commission had no authority to impose a condition that the appellant would not have any claim to appointment as a Routine Division Clerk in the Secretariat or its attached Offices. In one of his representations the appellant said that he signed the note which drew his attention to the condition on "the understanding that it had no value whatsoever, being contrary to the rules and Government orders". The contention of the appellant is that the Public Service Commission which was constituted in 1926 and functioned under the rules published in the Home Department notification No. F. 178/14/24 Ests. dated October 14, 1928, dealt with the recruitment of class I and class 11 officers of the Civil Services in India, and the rules then in force did not provide for the discharge of any function by the Public Service Commission in respect of the recruitment to and control of the subordinate service to which the appellant belonged. This contention was accepted by the learned Subordinate Judge. The High Court, on appeal, held that the appointment of the appellant was governed by the instructions laid down in an office memorandum of the Government of India in the Home Department dated December 8, 1928, paragraph VIII whereof stated-
Special cases.-To meet cases where a candidate,
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though not possessing the prescribed educational qualification, has acquitted himself satisfactorily in examinations of a higher or equivalent standard, or has acquired great experience of Government service outside the ministerial staff or possesses special qualifications for a particular class of work, the Public Service Commission are empowered (a) to admit to the examination persons possessing educational qualifications other than those prescribed, and (b) to exempt from the examination or to admit to a particular Division persons who by reason of their previous record can in their opinion properly be exempted or admitted as the case may be. In the case of persons already in Government service such action will be taken only on the recommendation of the Department concerned. In view of the discretion vested in the Commission by this provision, it will no longer be open to Departments to recruit independently for their offices or subordinate offices men with special or technical qualifications. Before making any such appointment they will be required to secure the Public Service Commission's concurrence."

The case of the appellant, who had not passed the qualifying examination held previously by the Staff Selection Board whose place the Public Service Commission took in 1926, was presumably referred to the Public Service Commission under the aforesaid paragraph. Learned counsel for the appellant has contended that even the instructions contained therein do not justify the imposition of a condition by the Public Service Commission, and the only powers the Public Service Commission could exercise were those mentioned in (a) and (b) thereof.

We think that it is unnecessary to examine the validity of these contentions on the present occasion. Assuming but without deciding that it was not necessary to refer the case of the appellant to the Public Service Commission or that the Public Service Commission could not impose any condition on the appointment of the appellant, the fact still remains that the appropriate authority which sanctioned the

additional post made it quite clear that the post was outside the

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regular cadre and the Director General, Indian Medical Service, said that the post had been treated in practice as being outside the regular establishment, though attached to his office for purposes of administrative control. That being the position, it matters little what powers the Public Service Commission had with regard to the case of the appellant referred to it. We must make it clear, however, that we do not express dissent -it being unnecessary for us to do so-from the view expressed by the High Court that in giving concurrence to the appointment of the appellant, it was open to the Public Service Commission to give a conditional concurrence.

This brings us to a close of the case of the appellant in Civil Appeal 116. Only a few words are necessary to dispose of Civil Appeal 117. That appeal requires no serious exegesis of any recondite service rule or obscure departmental order. In view of the finding that the appellant was not a member of the 'regular establishment' of the Director General, Indian Medical Service, he was not entitled to claim seniority in that office. It is true that the appellant obtained a decree from the learned Subordinate Judge; it was, however, a declaratory decree only, as the appellant did not press for the other reliefs as to increment, promotion etc. Even the declaratory decree was put in jeopardy when respondent No. 1 appealed from it. In these circumstances, how could the appellant refuse to do the work given to him? We have referred to the circumstances in which the appellant refused to do work in the Public Health Section to which he was allotted; he did not work from October 13, 1952 and got no pay from November, 1952. The appellant has to thank himself for the predicament in which he is placed. All that we can say is that if he had shown patience, good sense and moderation, he could have avoided a great part of the trouble he brought on himself.

In the result, both appeals fail and are dismissed with costs; as the appeals were heard together there will be one hearing fee to be shared by the respondents in the two appeals.

Appeals dismissed,

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