

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

W.P.(C) No. 7718/2007 & CM No. 14707/2007

Date of Decision: February 27, 2009

Rajeshwar Kumar Gupta Petitioner
Through: Petitioner in person

Versus

Lt. Governor & Ors. ... Respondents
Through: Mr. Vikas Singh Sr. Adv.
with Ms. Zubeda Begum, Adv.

CORAM:

Hon'ble Mr. Justice Vikramajit Sen

Hon'ble Mr. Justice S.L. Bhayana

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| 1. Whether reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the digest or not? | Yes |

S.L. BHAYANA, J.

1. This Writ Petition has been filed by a practicing Advocate of this Court under Article 226 and 227 of the Constitution of India and prayed for the issuance of a Writ, Order or Direction in the nature of Quo warranto & Certiorari or in the nature of Mandamus or any other appropriate Writ/Order or Direction in the nature of the case thereby commanding the Respondents to act strictly in accordance with law and to quash/ set aside the notification No. F.47/

Coop/ 16/ Policy/ 05/ ii/ 690-98 and F.47/ coop/ 16/ Policy/ 05/ ii/ 699-707 dated 26.5.2006, whereby the Respondent Nos. 1 to 3 constituted the Delhi Co-operative Tribunal i.e Respondent No.4 unconstitutionally and contrary to the mandate of law and being void ab initio in view of specific provisions of section 114 of Delhi Co operative Societies Act 2003 (herein after referred as DCS Act 2003) and prevailing provisions of Rule 143 & 144 of the Delhi Co-operative Societies Rules (herein after to be referred as DCS Rules, 1973) and for striking down Rule 3 of the Delhi Cooperative Tribunal Rules (herein after to be referred as DCT Rules, 2006) with the direction to the Respondents to constitute a proper and valid Delhi Co operative Tribunal strictly in accordance with the provisions of the DCS Act 2003 and DCS Rules 1973.

2. The main question that came up for consideration in this Writ Petition is that whether the constitution of D.C. Tribunal is constitutional, legal and as per the rules or not.

3. To support his case the main thrust of the Petitioner's arguments is that Respondent No.1 to Respondent No.3 while constituting the DC Tribunal/ Respondent No.4 failed to

consider the provision of the Section 114 (2) of the DCS Act, 2003 which provides that the Tribunal shall consist of a Chairman and not more than two other members possessing such qualifications as may be prescribed. Section 114 (2) of the DCS Act, 2003 further provides that the chairman and the members shall possess such qualification as may be prescribed but since no Rules are framed under the DCS Act 2003, the qualifications prescribed in the DCS Rules, 1973 or in the DCT Rule 2006 have to be adhered to and the Tribunal has to be constituted accordingly.

4. To buttress his above said arguments, it is submitted by the Petitioner that the DCS Rules, 1973 were framed under the provisions of the DCS Act, 1972 and the Act, 1972 stands repealed with effect from 1.4.2005 since when the DCS Act, 2003 came into force but the DCS Rules, 1973 which were framed under the DCS Act, 1972 are not repealed. Rule 144 (2) of the DCS Rules, 1973 prescribes that the Presiding Officer or the President of the Tribunal shall be the person who has been a judge of any High Court, or a retired Distt. Judge or a person who has for not less than 10 years been an advocate or a pleader, or who has held the office of the

Registrar, Joint Registrar, or Deputy Registrar for not less than continuous period of three years at a time, or has not less than five years' judicial experience at his credit. Provided that the Lt. Governor shall be competent to relax the qualifications in case of any person otherwise qualified in his opinion, which shall not be called in question in any Civil or Revenue Court.

5. Petitioner during arguments pointed out towards Notifications No. F.47/Coop/16/Policy 05/ii/690-98 with regard to constitution of D.C. Tribunal and No. F. 47/Coop/16/Policy 05/699-707 with regard to framing of the DCT Rules, 2006. He argued that both were issued simultaneously but they are not in consonance with the provisions of DCS Act, 2003. Present constitution of the Respondent No.4/ Tribunal by said Notification dated 26.5.2006 consists of a Chairman and only one member who exercise the powers and discharge the functions under the DCS Act, 2003 and are also conferred with the powers to dispose of the pending appeals under the provisions of the DCS Act, 1972.

6. He has again contended that there is no doubt that the present appointed Chairman fulfills the qualification under Rule 4 of the Rules dated 26.5.2006, but the same is contrary to the intention of the legislature while introducing the DCS Act 2003. To buttress this he pointed out towards Clause 40 of the 2nd Report of the Review Committee dated 31st August 1998, Annexure P-10, wherein it is specifically stated that *“Chairman of the Tribunal shall be either a retired High Court Judge or a person equivalent to District Judge”* and again towards Clause 61 of the Report of the Review Committee dated 20.9.2000, Annexure P-11, which specifically states that *“Bill provides for three member Tribunal with the Chairman who shall be either a retired High Court Judge or a person equivalent to District Judge. Tribunal shall have powers of appellate court as conferred by section 97 and order XLI of First Schedule to the Code of Civil Procedure 1908 (clause 114).*

7. Petitioner has vehemently argued before us that respondents have deliberately not called any application regarding this post from any person of judicial background and therefore selection process adopted by the respondents

was perverse/ malafide/ arbitrary and in violation of rules/ law.

8. He argued that Notification regarding DCT Rules, 2006 was neither framed nor published in the Gazette till date as required under Section 137 nor the Tribunal has framed its Rules & Regulations under Section 114 of the Act 2003. Moreover, the rules, which were framed later on, are contrary to the provisions of Section 23 of the General clauses Act, 1897.

9. At the outset of the reply, learned Senior counsel for the Respondents stated that the present Petition is a motivated petition filed with malaise motive. In reply to the above mentioned arguments of the petitioners, learned counsel for the Respondents argued that constitution of Tribunal is proper and as per Rule 4 of the Gazette Rules dated 26.5.2006 the Chairman of the Tribunal has functioned as an Appellate Authority from 1985-88. He further argued that reliance of DCS Rules 1973 is misplaced as the DCS Act, 1972 has been superseded by the new DCS Act of 2003. Section 114 DCS Act 2003 contemplates that the Tribunal shall consist of 3 members in all, including Chairman as head

and there is no bar that the Tribunal can initially appoint one member along with the Chairman for constituting Tribunal.

10. The stand of the Respondent has been that the appointments were made in accordance with law after notifying the DCS Rules, 2006 vide Notification dated 26.5.2006 under the powers conferred under Section 137 of DCS Act, 2003 read with Section 114 of DCS Act, 2003. After the notification of the said DCT Rules, 2006, the Chair person and one member were appointed by the Government as per the qualification as mentioned in the DCT Rules, 2006. As the DCS Rules, 1973 pertaining to the Tribunal have been superseded by these Rules of 2006 and therefore no reliance can be placed on the old Rules.

11. We have heard both the parties at length.

12. DCS Act, 1972 was enacted in 1972 and Section 78 of the said Act provides for the constitution of DCS Tribunal of not more than 3 members possessing such qualifications as may be prescribed. The Tribunal has to frame regulations consistent with the provisions of the Act and the Rules made there under for Regulating the procedure and disposal of its business including Appeals.

13. In 1973 DCS Rules were framed and notified .On 1.4.2005 DCS Act 2003 came into force and 1972 Act was repealed. Section 114 of the new Act also provides for constitution of Tribunal but the Government has not framed the rules and regulations as per the mandate of the new Act. On 26.5.2006 Government has constituted a Tribunal consisting of Chairman and only one member and simultaneously they notified the DCS Rules, 2006. There is no doubt that the Respondents adopted casual and capricious approach while making appointments to form a co-operative Tribunal and while prescribing Rules dated 26.5.2006. There is a violation and non compliance of Sec 137(2) of DCS Act, 2003 as the Rules, 2006 were never laid before the Legislative Assembly of N.C.T .of Delhi. Moreover, the said Rules were not published with a prior notice inviting objections or suggestions from the persons affected thereby as required by section 23 of General Clauses Act. There is no material on the record, which shows that there was any previous publication of the proposed rules and byelaws for the information of persons likely to be affected thereby apparent transgression from Section 23 of General Clauses

Act, 1897. Tribunal was constituted and DCS Rules, 2006 were notified on the same day i.e 26.5.2006.

14. In the present circumstances when there is only one member besides the Chairperson, Rule 27 of Rules, 2006 appears to be otiose and redundant. Rule 27 deals with the judgments to be delivered by the Tribunal which reads as under:-

“Decision of the Tribunal.- Where the Tribunal consists of more than one member, the decision of the majority shall prevail. Where the members, are equally divided, the decision of the Chairman shall be the decision of the Tribunal in that case.”

The above Rule 27 in present scenario appears to be contrary to the law and is not in consonance with the provisions of the DCS Act 2003, when Tribunal consists of only a Chairman and a member while there should be two members besides the Chairman.

15. It is no doubt that the business of DCT under the DCA 2003 is besides others, to hear and dispose of quasi judicial matters of Appeal and the presently appointed Chairman has got no legal back ground at all. It seems that Rules are also

framed in haste. Moreover, Respondents herein have miserably failed to place any material on record to show as to why the requirement of Rules providing for appointment of a judicial Officer for the post of Chairman could not be fulfilled as Rule 4 of DCS Rules 2006, notified on 26/5/2006 itself specifically provides “Qualification of chairman.- A person shall not be qualified to be appointed as a Chairman of the Tribunal unless he-

(a) is, or has been, or is qualified to be a District Judge, or has for, at least, two years, held the post of a Joint Secretary to the Government of India or any other post under the Central Government or the Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India and has for, at least, two years functioned as a quasi-judicial authority at the appellate level; and

(b) in the opinion of the Government, is a person of ability, integrity and standing and has adequate knowledge or experience in dealing with the problems relating to economics, law, public affairs, administration or revenue laws, etc.

16. It is to be borne in mind that the recruitment to the post of Chairman is in the nature of public employment, being a public employment, transparency and merit are the two criteria which are required to be appreciated. It is the duty of the government to see that once any policy is framed by the government then it is supervised/ followed in its letter and spirit. It is very shocking and revolting by looking at the record that there is nothing on record to show as to whether the respondents have made any effort to find out a suitable judicial candidate for the post of Chairman and in case there was any such candidate having judicial experience, why his candidature was not considered for the said post of Chairman of the D.C. Tribunal.

Principal of equality includes fair opportunity of consideration to all eligible candidates. A fair consideration must emerge from the record itself. There is no good reason placed before us as to why the other candidates of judicial background were not called for or considered by the respondents.

17. Constitution of Tribunal in the scheme of administration of justice is to provide an additional forum. It is, therefore,

very important to see as to whether the constitution of Tribunal is proper, effective and efficacious in exercising the power to hear and dispose of quasi-judicial matters of Appeal and others, which require some basic knowledge of law. Petitioner placed few decisions of tribunal, which shows that there is a lack of judicious approach while making decisions. It is the fundamental principle that nobody is infallible, even the courts and tribunals, anybody who claims himself /herself to be infallible would be committing a serious mistake, that is why it is expected from them to support their decisions with reasons. The respondents herein are discharging a public duty and are a repository of public trust. They owe a duty to all the citizens of India to act fairly and judicially.

These Tribunals make decisions about fundamental issues, which affect the rights of the general public/ parties, and those decisions can also have long lasting impact. It is, therefore, very critical that these very Tribunals must make fair decisions with some basic knowledge of law, independent and free from any political and economic influences. These Tribunals like Courts have sacrosanct duty

to administer justice and have been given so many powers to keep the course of the justice free and effective and in result, therefore, it is a requirement of the present hour that those who adjudicate upon these questions should have some basic knowledge and familiarity of law. Surely there can be no two views that these Tribunals must enjoy the same degree of independence and freedom as is enjoyed by higher judiciary but it hampered the justice delivery system when the officers lack the basic knowledge of particular subject on which they deliver the verdict. Tribunals are conferred with discretion to adjudicate upon quasi judicial matters but at the same time such discretion is governed by maxim “Discretio est discerere per legem quid sit justum” (Discretion consists in knowing what is just in law). Discretion denotes knowledge of law and prudence. It has to be done after critically examining what is proper and correct coupled with caution and that is why while constituting these like Tribunals government should also take note of the fact that candidates to be appointed on such posts should satisfy the basic criteria and merits namely (i) sufficient legal knowledge (ii) professional qualities (intellectual ability, decisiveness,

authority, skills) (iii) experience (iv) personal qualities (integrity, understanding of people and society, courtesy and humanity) so that they will be able to properly deal with complex issues that come before them. While appointing such officers or constituting such Tribunals there is a requirement to apply certain safeguards. Arbitrariness even in Government action is antithesis to rule of law and fair play.

18. We are fortified in our view by the decision of Hon'ble Supreme Court in **S.P. Sampat Kumar Vs. Union of India and Others- (1987) 1 SCC 124**, where it has been observed as under:

5. It is necessary to bear in mind that service matters which are removed from the jurisdiction of the High Court under Articles 226 and 227 of the Constitution and entrusted to the Administrative Tribunal set up under the impugned Act for adjudication involve questions of interpretation and applicability of Articles 14, 15, 16 and 311 in quite a large number of cases. These questions require for their determination not only judicial approach but also knowledge and expertise in this particular branch of constitutional law. It is necessary that those who adjudicate upon these questions should have same modicum of legal training and judicial experience because we find that some of these questions are so difficult and complex that they baffle the minds of even trained Judges in the High Courts and the Supreme Court. That is the reason why at the time of the preliminary hearing

of these writ petitions we insisted that every bench of the Administrative Tribunal should consist of one judicial member and one administrative member and there should be no preponderance of administrative members on any bench. Of course, the presence of the administrative member would provide input of practical experience in the functioning of the services and add to the efficiency of the Administrative Tribunal but the legal input would undeniably be more important and sacrificing the legal input or not giving it sufficient weightage would definitely impair the efficacy and effectiveness of the Administrative Tribunal as compared to the High Court. Now Section 6 provides that the Chairman of the Administrative Tribunal should be or should have been a Judge of the High Court or he should have for at least two years held office of Vice-Chairman or he should have for at least two years held the post of Secretary to the Government of India or any other post under the Central or State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India. I entirely agree with Ranganath Misra, J. that the Chairman of the Administrative Tribunal should be or should have been a Judge of a High Court or he should have for at least two years held office as Vice-Chairman. If he has held office as Vice-Chairman for a period of at least two years he would have gathered sufficient experience and also within such period of two years, acquired reasonable familiarity with the constitutional and legal questions involved in service matters, But substituting the Chief Justice of a High Court by a Chairman of the Administrative Tribunal who has merely held the post of a Secretary to the Government and who has no legal or judicial experience would not only fail to inspire confidence in the public mind but would also render the Administrative

Tribunal a much less effective and efficacious mechanism than the High Court. We cannot afford to forget that it is the High Court which is being supplanted by the Administrative Tribunal and it must be so manned as to inspire confidence in the public mind that it is a highly competent and expert mechanism with judicial approach and objectivity. Of course, I must make it clear that when I say this, I do not wish to cast any reflection on the members of the Civil Services because fortunately we have, in our country, brilliant civil servants who possess tremendous sincerity, drive and initiative and who have remarkable capacity to resolve and overcome administrative problems of great complexity. But what is needed in a judicial tribunal which is intended to supplant the High Court is legal training and experience. I am, therefore, of the view, in agreement with Ranganath Misra, J. that Clause (c) of Section 6 (1) must be struck down as invalid.

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7. That takes me to another serious infirmity in the provisions of the impugned Act in regard to the mode of appointment of the Chairman, Vice-Chairman and members of the Administrative Tribunal. So far as the appointment of judicial members of the Administrative Tribunal is concerned, there is a provision introduced in the impugned Act by way of amendment that the judicial members shall be appointed by the Government concerned in consultation with the Chief Justice of India. Obviously no exception can be taken to this provision, because even so far as Judges of the High Court are concerned, their appointment is required to be made by the President inter alia in consultation with the Chief Justice of India. But so far as the appointment of Chairman, Vice-Chairmen and, administrative

members is concerned, the sole and exclusive power to make such appointment is conferred on the Government under the impugned Act. There is no obligation cast on the Government to consult the Chief Justice of India or to follow any particular selection procedure in this behalf. The result is that it is left to the absolute unfettered discretion of the Government to appoint such person or persons as it likes as Chairman, Vice-Chairman and administrative members of the Administrative Tribunal. Now it may be noted that almost all cases in regard to service matters which come before the Administrative Tribunal would be against the Government or any of its officers and it would not at all be conducive to judicial independence to leave unfettered and unrestricted discretion in the executive to appoint the Chairman, Vice-Chairmen and administrative members; if a judicial member or an administrative member is looking forward to promotion as Vice-Chairman or Chairman, he would have to depend on the goodwill and favourable stance of the executive and that would be likely to affect the independence and impartiality of the members of the Tribunal. The same would be the position vis-a-vis promotion to the office of Chairman of the Administrative Tribunal. The administrative members would also be likely to carry a sense of obligation to the executive for having been appointed members of the Administrative Tribunal and that would have a tendency to impair the independence and objectivity of the members of the Tribunal. There can be no doubt that the power of appointment and promotion vested in the executive can have prejudicial effect on the independence of the Chairman, Vice-Chairmen and members of the Administrative Tribunal, if such power is absolute and unfettered. If the members have to look to the executive for advancement, it may tend, directly or indirectly, to influence their decision-

making process particularly since the Government would be a litigant in most of the cases coming before the Administrative Tribunal and it is the action of the Government which would be challenged in such cases. That is the reason why in case of appointment of High Court Judges, the power of appointment vested in the executive is not an absolute unfettered power but it is hedged in by a wholesome check and safeguard and the President cannot make an appointment of a High Court Judge without consultation with the Chief Justice of the High Court and the Chief Justice of India and a healthy convention has grown up that no appointment would be made by the Government which is not approved by the Chief Justice of India. This check or safeguard is totally absent in the case of appointment of the Chairman, Vice-Chairmen and administrative members of the Administrative Tribunal and the possibility cannot be ruled out- indeed the litigating public would certainly carry a feeling-that the decision-making process of the Chairman, Vice-Chairmen and members of the Administrative Tribunal might be likely to be affected by reason of dependence on the executive for appointment and promotion. It can no longer be disputed that total insulation of the judiciary from all forms of interference from the coordinate branches of Government is a basic essential feature of the Constitution. The Constitution makers have made anxious provision to secure total independence of the judiciary from executive pressure or influence. Obviously, therefore if the Administrative Tribunal is created in substitution of the High Court and the jurisdiction of the High Court under Articles 226 and 227 is taken away and vested in the Administrative Tribunal, the same independence from possibility of executive pressure or influence must also be ensured to the Chairman, Vice-Chairmen and members of the

Administrative Tribunal. Or else the Administrative Tribunal would cease to be an equally effective and efficacious substitute for the High Court and the provisions of the impugned Act would be rendered invalid. I am, therefore, of the view that the appointment of Chairman, Vice-Chairmen and administrative members should be made by the concerned Government only after consultation with the Chief Justice of India and such consultation must be meaningful and effective and ordinarily the recommendation of the Chief Justice of India must be accepted unless there are cogent reasons, in which event the reasons must be disclosed to the Chief Justice of India and his response must be invited to such reasons. There is also another alternative which may be adopted by the Government for making appointments of Chairman, Vice-Chairmen and members and that may be by setting up a High Powered Selection Committee headed by the Chief Justice of India or a sitting Judge of the Supreme Court or concerned High Court nominated by the Chief Justice of India. Both these modes of appointment will ensure selection of proper and competent persons to man the Administrative Tribunal and give it prestige and reputation which would inspire confidence in the public mind in regard to the competence, objectivity and impartiality of those manning the Administrative Tribunal. If either of these two modes of appointment is adopted, it would save the impugned Act from invalidation. Otherwise, it will be outside the scope of the power conferred on Parliament under Article 323-A. I would, however hasten to add that this judgment will operate only prospectively and will not invalidate appointments already made to the Administrative Tribunal. But if any appointments of Vice-Chairmen or administrative members are to be made hereafter, the same shall be made by

the Government in accordance with either of the
aforesaid two modes of appointment.

19. It is well settled that judicial review is a basic and essential feature of the constitution and there should also be judicial restraint while making judicial review of Government actions. The Court should also be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability like illegality, irrationality and procedural impropriety. Administrative action on the part of the Government should be so crystal clear and without any fallacy so that there is no possibility of anybody raising any finger. There should not be breach of any Rule. Fairness in the action and non-arbitrariness in essence and substance is the heartbeat of the fair play. There is no doubt that Government actions are amenable in the panorama of judicial review only to the extent that the Government must act validly for discernible reasons, not whimsically or for any ulterior purpose. A question whether the Government action is arbitrary or not is to be ultimately answered on the facts and circumstances of the given case.

20. Consequently, we have no hesitation in setting aside the Notifications No. F.47/Coop 16/Policy/05/ii/690-98 dated 26.5.2006 as it is not sustainable and is liable to be quashed and we further direct the Respondents to constitute a proper DCT, and they should take note of the fact that since Chairman has to perform quasi-judicial function, therefore, the Chairman of the Tribunal should be a judicial member preferably a retired District Judge. Jurisconsults of recognised competence are the requirement of present hour to preside over such Tribunals.

21. The writ petition is allowed only to the extent that Notifications No. F.47/Coop 16/Policy/05/ii/690-98 dated 26.5.2006 is set aside.

22. The writ petition stands disposed of.

S.L. BHAYANA, J.

VIKRAMAJIT SEN, J.

February 27 , 2009