

* **HIGH COURT OF DELHI : NEW DELHI**

+ **Writ Petition (Civil) No.7521 of 2008**

Judgment reserved on: February 13, 2009

% Judgment delivered on: March 20, 2009

1. Union of India
Represented by Secretary to Government
Ministry of Finance
South Block
New Delhi.

2. Union of India
Represented by Secretary to Government
Department of Legal Affairs
Ministry of Law and Justice
Shastri Bhavan
Dr. Rajendra Prasad Road
New Delhi-110001.

...Petitioners

Through Mr. P.P. Malhotra, ASG with Mr.A.K.
Bhardwaj and Ms. Jagriti Singh, Advs.

Versus

B. Krishna Mohan
S/o Late B.S.R. Anjaneyulu
H. No. 18-531/1 "Sri Sai Krupa"
Road No. 5, Kamalanagar
Dilsukhnagar
Hyderabad-500060.

...Respondent

Through Mr.Vishwanathan Shetty, Sr. Advocate
with Ms.Sunita Rao and Mr. R. Kumar,
Advs.

WITH

2. Writ Petition (Civil) No.7523 of 2008

1. Union of India
Represented by Secretary to Government
Department of Legal Affairs
Ministry of Law and Justice
Shastri Bhavan
Dr. Rajendra Prasad Road
New Delhi-110001.

2. The Appointment Committee of Cabinet
Through Cabinet Secretary
Government of India
South Block
Raisina Hill
New Delhi.

...Petitioners

Through Mr. P.P. Malhotra, ASG with Mr.A.K.
Bhardwaj and Ms. Jagriti Singh, Advs.

Versus

Inturi Rama Rao
S/o I, Subba Rao
Age 43 years, Chartered Accountant
II, No. 8-3-319/b/24/9
Behind Saradhi Studios
Yellareddyguda, Ameerpet
Hyderabad.

...Respondent

Through Mr. A.K. Behera with Mr. K.R.
Prasad, Advs.

3. Writ Petition (Civil) No.7526 of 2008

1. Union of India
Represented by Secretary to Government
Department of Legal Affairs
Ministry of Law and Justice
Shastri Bhavan
Dr. Rajendra Prasad Road
New Delhi-110001.

2. The Appointment Committee of Cabinet
Through Cabinet Secretary
Government of India
South Block
Raisina Hill
New Delhi.

...Petitioners

Through Mr. P.P. Malhotra, ASG with Mr.A.K.
Bhardwaj and Ms. Jagriti Singh, Advs.

Versus

Pradip Kumar Kedia
Having Office at 208
Blue Moon Chamber, Nagindas
Master Road, Near Welcome Restaurant
Fort, Mumbai-400001.

Residing at B-1104, Gaurav Geet
Gaurav Garden Complex
Near Hindustan Naka
Charkop Kandivili West
Mumbai-400067.

...Respondent

Through Mr. A.K. Behera with Mr. K.R.
Prasad, Advs.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE SURESH KAIT

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

MADAN B. LOKUR, J.

The Petitioner (Union of India) is aggrieved by an order dated 31st July, 2008 passed by the Central Administrative Tribunal, Principal Bench in OA No.1024/2008, OA No.1036/2008 and OA No.1037/2008.

2. The Respondents are an advocate (Shri B. Krishna Mohan) and two Chartered Accountants (Shri Inturi Rama Rao and Shri Pradip Kumar Kedia). They all belong to the general or unreserved category and have been held entitled to appointment as a Judicial Member and Administrative Members respectively in the Income Tax Appellate Tribunal (for short the ITAT).

3. On 22nd January, 2005 the Union of India issued an advertisement for filling up 22 vacancies of members in the ITAT. Of these vacancies, three were for Judicial Member (JM) in the unreserved category (UR) and five were for Accountant Members (AM) also in the unreserved category (UR). The advertisement specifically stated that the number of vacancies is approximate and is liable to increase or decrease due to unexpected circumstances that might occur upto 31st December, 2005.

4. For filling up the above 22 vacancies, a Selection Board was chaired by Hon'ble Ms. Justice Ruma Pal (then a Judge of the Supreme Court of India) and two members Shri R.L. Meena, Law Secretary, Government of India and Shri Vimal Gandhi, President of the ITAT. The magnitude of the task facing the Selection Board can be gauged from the fact that it interviewed as many as 286 candidates over a period of 14 days in four different cities of the country.

5. The Selection Board gave its recommendations on 22nd September, 2005 and the applicants found most suitable for appointment were mentioned in Appendix I (both for JM as well as for AM). The

Appendix also included a number of wait-listed candidates including the Respondents, who could be considered for appointment in case any of the candidates included in the select list were not available or found unsuitable for appointment after verification of their antecedents etc.

6. We are concerned only with the vacancies for JM/UR and for AM/UR.

For the three vacancies of JM/UR, the candidates recommended and appointed were Smt. Asha Vijayraghavan, Shri George George K. and Shri George Mathan. Therefore, all the three vacancies of JM/UR were filled up.

As far as the AM/UR vacancies are concerned, of the five advertised vacancies, three of them were filled up by Shri B. Ramakotaiah, Shri Abraham P. George and Shri Amarnath Pahuja. Shri R.N. Dash was selected but did not join, while the name of Shri Satya Prakash was not sent to the Appointments Committee of the Cabinet (ACC) because his vigilance clearance was not available and we were told that even today

it is not available. In any case, he has not been appointed as a member of the ITAT. There are, therefore, two clear vacancies in the category of AM/UR.

7. In so far as the post of JM/UR is concerned, it has come on record that Shri Vishnu Chander Gupta (selected against a JM/UR vacancy advertised in 2003) declined the offer on 21st March, 2005 and consequently the offer given to him was cancelled and withdrawn by the Department of Legal Affairs by its letter dated 6th April, 2005. It has also come on record that Shri Sanjeev Sharma (selected against a JM/UR vacancy advertised in 2003) joined duties on 9th March, 2005 but subsequently resigned and his resignation was accepted with effect from 10th May, 2005 vide Notification dated 9th May, 2005 issued by the Government of India, Ministry of Law and Justice.

8. Against the above two vacancies of JM/UR arising from the selection made in 2003, the Union of India recommended the name of Shri Pradeep Kumar Mahajan and Ms. Neera Gupta, who were in the waiting list of 2003 but by a letter dated 3rd October, 2005 the ACC did not approve their appointment. Shri Mahajan and Ms. Gupta challenged

the failure of the Union of India to appoint them by filing writ petitions in the Supreme Court being WP (C) No. 637/2005 (Pradeep Kumar Mahajan vs. Union of India) and WP (C) No. 22/2006 (Neera Gupta vs. Union of India). Both the writ petitions were dismissed on 24th September, 2007.

9. On these broad facts, the case of Shri B. Krishna Mohan JM/UR is simply this: as per the advertisement issued on 22nd January, 2005 it was clearly stated that the number of vacancies is liable to increase due to unexpected circumstances that may occur upto 31st December, 2005. Unexpectedly, two vacancies did arise with Shri Vishnu Chander Gupta (JM/UR) declining to join the ITAT and the offer given to him having been withdrawn on 6th April, 2005 and Shri Sanjeev Sharma (JM/UR) tendering his resignation which was accepted on 9th May, 2005. Consequently, two unexpected vacancies arose in 2005 (though from the 2003 selection) against which Shri B. Krishna Mohan could be appointed. It was submitted that the failure of the Union of India to appoint him is completely arbitrary and contrary not only to the advertisement issued but also the recommendation of the Selection Board.

10. As far as the two AM/UR vacancies are concerned, the submission of Shri Pradip Kumar Kedia and Shri Inturi Rama Rao is that there were admittedly two clear vacancies because, of the five AM/UR vacancies, only three were filled up (with Shri R.N. Dash refusing to join and Shri Satya Prakash not having been granted vigilance clearance). Therefore, Shri Pradip Kumar Kedia and Shri Inturi Rama Rao who were the first two in the wait list ought to have been offered appointment as AM/UR. The failure of the Union of India to do so is completely illegal and arbitrary.

11. As can be seen from the fact situation mentioned above, the issues raised are not at all complicated. Undoubtedly, there are vacancies available both in the category of JM/UR as well as in the category of AM/UR. In the category of JM/UR two unexpected vacancies arose before 31st December, 2005 which were not considered by the Union of India against which Shri B. Krishna Mohan could be appointed. In so far as AM/UR vacancies are concerned, there is no dispute that there are two clear vacancies against which Shri Pradip Kumar Kedia and Shri Inturi Rama Rao could be appointed.

12. Before the Tribunal, one of the questions that had arisen was whether the 2005 select panel was still valid or not. The Tribunal was of the view that the 2005 select panel was very much alive. The learned Additional Solicitor General did not agitate or contest this issue before us at all. We are, therefore, proceeding on the basis that the select panel recommended by the Selection Board on 22nd September, 2005 is still valid. The learned Additional Solicitor General also did not contest before us that the two unexpected vacancies of 2003 could not be carried forward till 2005. We are, therefore, proceeding on the basis that the two unexpected vacancies of JM/UR were available for being filled up through the 2005 selection process.

13. The learned Additional Solicitor General urged two issues before us – one on facts and the other on law. The factual issue urged was that no vacancy existed as regards JM/UR for accommodating Shri B. Krishna Mohan. This submission is factually incorrect as we have noted above. No submission was made before us of the non-availability of any vacancy to adjust Shri Pradip Kumar Kedia and Shri Inturi Rama Rao against the posts of AM/UR. Again, as we have already noted above, two vacancies did exist to accommodate them.

14. The controversy in law raised by the learned Additional Solicitor General is that waitlisted candidates have no right to be appointed and it is for this reason and this reason alone that the order passed by the Central Administrative Tribunal is sought to be faulted.

15. The learned Additional Solicitor General placed reliance on *Sanjoy Bhattacharjee v. Union of India and others*, (1997) 4 SCC 283 wherein it has been held by the Supreme Court that merely because a candidate has been put in the waiting list he does not get any vested right to an appointment.

16. This proposition of law is not only well settled but extends beyond what is submitted by the learned Additional Solicitor General. In *Shankarsan Dash v. Union of India*, (1991) 3 SCC 47, it has been held that even a candidate on the merit list does not have any indefeasible right to an appointment, even if a vacancy exists. A similar view has been taken in several other cases such as in *Asha Kaul and another v. State of Jammu and Kashmir and others*, (1993) 2 SCC 573 and *Food Corporation of India and others v. Bhanu Lodh and others*, (2005) 3 SCC 618.

17. However, what is of importance is what the Supreme Court recently said in *State of Madhya Pradesh and others v. Sanjay Kumar Pathak and others*, (2008) 1 SCC 456 that if a vacancy exists and it is not filled up, there must be some reasonable explanation for not doing so. In coming to this conclusion, the Supreme Court relied upon *K. Jayamohan v. State of Kerala*, (1997) 5 SCC 170 and *Munna Roy v. Union of India*, (2000) 9 SCC 283. Indeed, this view has been consistently expressed by the Supreme Court in several other decisions such as *R.S. Mittal v. Union of India*, 1995 Supp (2) SCC 230 and *A.P. Aggarwal v. Government of NCT of Delhi and another*, (2000) 1 SCC 600.

18. The law, therefore, seems to be quite well settled to the effect that no one has indefeasible or vested right to an appointment, whether he is on the waiting list or on the merit list, but at the same time there must be some reasonable basis for not filling up an existing vacancy or not offering an appointment to a meritorious candidate. If a reasonable or rational explanation does not exist, it would clearly fall foul of Article 14 of the Constitution.

19. In so far as the present case is concerned, the only explanation proffered by the learned Additional Solicitor General for not filling up the vacancies was that the Recruitment Rules were likely to be amended. In fact during the course of oral submissions, it was brought to our notice that an amendment to the Recruitment Rules was contemplated sometime in November, 2004. It was further brought to our notice that a Notification bearing GSR No. 742(E) dated 23rd December, 2005 was inserted through an amendment in Rule 4A in the Income Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963. Nothing in this amendment disqualifies any of the Respondents from being appointed as members of the ITAT, nor was any such argument advanced by the learned Additional Solicitor General. We are, therefore, unable to see the relevance of the amendment to the Rules, which is sought to be made the basis of denying appointment to the Respondents to the post of member of the ITAT.

20. Contrast this with the fact that the selection was conducted by a high-powered Selection Board presided over by a sitting Judge of the Supreme Court. No one can doubt that the recommendations of such

a Selection Board deserve to be given due respect, weightage and consideration. There is also no doubt that there is a huge backlog of cases pending in the ITAT and it does not serve anybody's interest if the backlog remains or increases. The only way of reducing the backlog is by filling up all vacancies at the earliest and by not doing so, the Union of India is merely prolonging the agony of a large number of assesseees, apart from depriving itself of its legitimate dues, depending on the verdict of the ITAT in the appeals pending before it. Therefore, far from being a reasonable or rational explanation for not filling up the vacancies, the explanation given is detrimental to the public interest and the interest of the Revenue.

21. We have also seen from a perusal of the impugned order passed by the Tribunal that there is no explanation whatsoever given by the Union of India for not filling up the vacancies except some proposed amendment to the Rules. Before us also there is no other explanation forthcoming. Consequently, we have no option but to dismiss the writ petitions and approve the view taken by the Tribunal. The Union of India is, therefore, directed to process the case for the appointment of the Respondents against the respective vacancies to which they may be

entitled and thereafter place the matter before the Appointments Committee of the Cabinet for further directions. The needful should be done by the Union of India within a period of 8 weeks from today.

22. The writ petitions are dismissed but there will be no order as to costs.

MADAN B. LOKUR, J

March 20, 2009
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SURESH KAIT, J

Certified that the corrected copy of the judgment has been transmitted in the main Server.