

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

% Judgment Reserved On: 22nd November, 2010
Judgment Delivered On: 24th November, 2010

+ **W.P.(C) 3586/2008**

R.P.NAUTIYAL & ORS. Petitioners
Through: Ms.Avnish Ahlawat, Advocate
With Mr.Nitesh Singh, Ms.Simran
and Ms.Latika Chaudhary,
Advocates

versus

GOVT. OF NCT OF DELHI & ORS. Respondents
Through: Mr.M.K.Bhardwaj, Advocate

W.P.(C) 4132/2008

CHIEF SECRETARY, GOVT. OF NCT OF
DELHI & ORS. Petitioners
Through: Mr.Amiet Andlay, Advocate

versus

CHETAN SWAROOP Respondent
Through: Mr.M.K.Bhardwaj, Advocate

W.P.(C) 4143/2008

CHIEF SECRETARY, GOVT. OF NCT OF
DELHI & ORS. Petitioners
Through: Mr.Amiet Andlay, Advocate

versus

SATYAVIR KUNDU & ORS. Respondents
Through: Mr.M.K.Bhardwaj, Advocate

W.P.(C) 4144/2008

CHIEF SECRETARY, GOVT. OF NCT OF
DELHI & ORS. Petitioners
Through: Mr.Amiet Andlay, Advocate

versus

B.S.GUSAIN & ANR. Respondents
Through: Mr.M.K.Bhardwaj, Advocate

W.P.(C) 10255/2009

GOVT. OF NCT OF DELHI Petitioners
Through: Mr.V.K.Tandon, Advocate

versus

SUNDER SINGH & ORS. Respondents
Through: Mr.M.K.Bhardwaj, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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

PRADEEP NANDRAJOG, J.

1. Order under challenge in W.P.(C) No.3586/2008, W.P.(C) No.4132/2008, W.P.(C) No.4143/2008 and W.P.(C) No.4144/2008 is dated 2.1.2008 allowing OA No.1152/2007, OA No.1167/2007 and OA No.1227/2007. In three writ petitions the challenge is by the Government of NCT Delhi and in the fourth the challenge is by private individuals who are aggrieved by the decision, but we note who were not impleaded as respondents before the Tribunal. Order under challenge in W.P.(C) No.10255/2009 is dated 17.11.2008 allowing OA No.569/2006 which has simply followed the earlier order dated 2.1.2008 allowing OA No.1152/2007, OA No.1167/2007 and OA No.1227/2007.

2. Holding that it is settled law that vacancies to be filled by promotion has to be filled in the panel year, the Tribunal has held that vacancies which had accrued to the

posts in Grade II of Delhi Administration Subordinate Services (DASS) prior to 7.6.2007, on which date the Delhi Administration Subordinate Services (Amendment) Rules 2007, were promulgated and as a result the Delhi Administration Subordinate Services Rules 1967 were amended were required to be filled up as per the pre-amended rules. The three set of applicants before the Tribunal who had filed OA No.1152/2007, OA No.1167/2007 and OA No.1227/2007 succeeded and the decision is to the detriment of the writ petitioners of W.P.(C) No.3586/2008 who we note were not impleaded as respondents before the Tribunal. As noted hereinabove, OA No.569/2006 was allowed vide order dated 17.11.2008 by simply noting that the issue was covered in favour of the applicants therein vide order dated 2.1.2008 allowing OA No.1152/2007, OA No.1167/2007 and OA No.1227/2007. Thus, for purposes of referring to the relevant facts and the past history which resulted in the litigation, we propose to refer to the facts as brought out in W.P.(C) No.3586/2008 and W.P.(C) No.4144/2008.

3. In exercise of power under Article 309 of the Constitution of India, pertaining to the Ministerial Executive staff working under the then Delhi Administration, now Government of NCT Delhi, in the year 1967 'Delhi Administration Subordinate Services Rules' 1967 (hereinafter referred to as DASS Rules 1967) were promulgated. As per the Rules, at the constitution of the service, 4 Grades, Grade I, Grade II, Grade III and Grade IV were constituted. Promotions being from Grade IV upwards till Grade I.

4. Besides, the DASS Ministerial Cadre, posts were created in the Stenographer Cadre having posts in Grade I, Grade II and Grade III as per separate rules which were like wise notified.

5. Relevant would it be to state that Stenographers earned promotion in their own cadre and the Ministerial staff earned promotion in their own respective cadre, till it was realized somewhere in the year 1968 that due to many fold increase in the posts of Stenographers resulted in stagnation, some further avenues of promotion were required for them and as a result, from time to time the DASS Rules 1967 were amended by prescribing eligibility of Stenographers Grade II to be promoted as Officers in Ministerial Grade I posts as also to promote Stenographers Grade III to the post in Ministerial Grade II. It is apparent that as a result of the amendments, Stenographers could earn promotions not only in their own cadre but even in the Ministerial Cadre i.e. the Stenographers had a dual channel of promotion.

6. Over a period of time the stagnation in the cadre of Stenographers reduced rapidly. As a matter of fact it may be noted that between the years 1997 till the year 2000 74% Stenographers opted for promotion in the Ministerial DASS Cadre and only 26% opted for promotion in their own i.e. Stenographer Cadre. With passage of time the situation got reversed. Stenographers started earning quick promotions and the Ministerial staff faced stagnation.

7. This was noted for the first time by UPSC and as reflected in a letter dated 2.11.1999 addressed by the Commission to the Secretary Government of NCT Delhi. On 13.12.2000, a Departmental Promotion Committee made similar observations and this set the Government to rethink. At the first instance, vide notification dated 28.5.2002, the Delhi Administration Subordinate Services (Amendment) Rules 2002 were promulgated as per which clause (b) of Rule 6 of the DASS Rules 1967 was deleted. Needless to state the provision which was deleted enable Stenographers Grade II to

be promoted to posts in Ministerial Grade I. The effect of the deletion was that Stenographers Grade II could henceforth earn promotion to the posts in Stenographer Grade I i.e. had a single channel of promotion and the second channel available to them to be promoted in the Ministerial cadre was closed.

8. For unexplainable reasons the Government did not withdraw similar benefit available to Stenographers Grade III and they continued to have the benefit of a dual channel promotional avenue. This was notwithstanding the fact that there were only 1420 sanctioned posts in the Ministerial Cadre of DASS Grade II and there were 3819 posts in the Ministerial DASS Grade III Cadre. 895 Stenographers Grade III were eligible to a dual channel of promotion notwithstanding there being 163 Stenographers Grade II posts available. Thus 895 Stenographer Grade III could seek promotion to the 163 posts of Stenographers Grade II as also the 1420 sanctioned posts in the Ministerial Cadre of DASS Grade II.

9. It needs to be noted here that with the promulgation of the Assured Career Progression (ACP) Scheme introduced on 9.8.1999, a clarification was issued by the Government of India on 18.7.2001 as per which dual channel of promotion, wherever available, was to be done away with.

10. The Stenographers' Welfare Association filed OA No.1500/2003 praying that dual channel of promotions which was hitherto available qua posts in DASS Grade I which was withdrawn was required to be set aside i.e. the amendment incorporated vide notification dated 28.5.2002 be quashed. The challenge failed when the Tribunal dismissed the OA.

11. Since Ministerial Cadre DASS Grade III was facing stiff competition from Stenographer Grade III to be promoted to Ministerial Cadre Grade II, some officers filed OA No.1795/2006 before the Tribunal praying that a direction be

issued to the Government to amend DASS Rules 1967 and delete the provision enabling Stenographers Grade III to be promoted to posts in Ministerial Cadre Grade II in which an assurance was made that the Government would be soon amending the Recruitment Rules and finally on 7.6.2007 a notification was issued amending DASS Rules 1967; the result of the amendment was the deletion of the portion of existing Rule 6 of the DASS Rules 1967 i.e. the provision relating to eligibility of Stenographers Grade III for purposes of promotion to Grade II posts (Ministerial).

12. An issue was raised by persons holding post of Stenographer Grade III. They alleged that since 2001 promotions were not affected to the post of Ministerial Grade II posts and that such posts which had fallen vacant prior to 7.6.2007 ought to be filled up under the pre-amended rules and for which plea they urged that they had already opted for promotion to the post in the Ministerial Cadre Grade II prior to 7.6.2007.

13. They succeeded before the Tribunal inasmuch as they successfully showed that it was incumbent upon the department to draw up the year wise panel in respect of the vacancies to the posts in Grade II of the Ministerial Cadre and fill up the same from amongst the eligible candidates in the year when the vacancy arose and as per the Recruitment Rule in vogue in the year in question. The Tribunal has relied upon the fact that the applicants before it had foregone the right to be promoted to the posts in Stenographer Grade II which had probably enured in their favour in the year 2004.

14. A perusal of the decision by the Tribunal would reveal that the Tribunal has not considered whether a conscious decision taken by the Government to not effect promotions in the year of the vacancy was of any

consequence. We may note that for the reason there was no issue raised of the 2007 amendment being retrospective, the said issue has not been gone into by the Tribunal and thus we find the Tribunal resting its view on the accepted legal position that Service Jurisprudence requires vacancies to be filled up as per the rule in vogue in the year when the vacancy arose. Needless to state, learned counsel for the parties did not dispute that this would be subject to rules being amended retrospectively. In the instant case, learned counsel for the petitioners conceded that there was nothing indicated in the amendment rules notified on 7.6.2007 that the same were retrospective.

15. The only issue which needs to be decided is whether a conscious decision taken by the Government not to fill up the existing vacancies pending amendment to the rules was a good justification to fill up the vacancies as per the amended rules.

16. In the decision reported as 1997 (3) SCC 59 Dr.K.Ramulu & Anr. Vs. Dr.S.Suryaprakash Rao & Ors., the Supreme Court had set aside a decision of the Tribunal which directed promotion to be made by preparing the panel with respect to the year when the vacancy arose and as per the rules then in vogue.

17. It may be noted that the rules pertaining to AP Animal Husbandry Service were amended on 12.6.1996 and the vacancies had accrued for the panel year 1995-96 and there was nothing in the amended rules to indicate the same to be retrospective. However, in view of a conscious decision taken not to fill up the vacancies which had accrued for the panel year 1995-96 since the existing rules were under amendment, the Supreme Court reversed the decision of the Tribunal.

18. In para 6 of the decision the Supreme Court has categorically noted that: *It is also clear from the record that the Government had taken a decision not to fill up any of the vacancies until the repealed rules were duly amended.*

19. It is true that in para 7, the Supreme Court noted that the pre-amended Rule 4, which continued to exist post-amendment, vide clause (ii) of the 2nd Proviso, gave the power to the State Government not to prepare the panel and to consider the cases though the vacancies were available at a later stage evidenced by the expression '*or where the appointing authority does not consider it necessary*' and thereafter once again noted a conscious decision not to fill up any pending vacancy till the process of amendment was completed, and notwithstanding that under the rules being considered by us there is no such provision, yet we feel that the ratio of law laid down by the Supreme Court in Dr.K.Ramulu's case (supra) is attracted; evidenced by the observations of the Supreme Court in para 12 of the decision in Dr.K.Ramulu's case (supra). The process of reasoning relates to the applicability of the ratio of law laid down by the Supreme Court in the decision reported as 1983 (3) SCC 284 Y.V.Rangaiah Vs. J.Sreenivasa Rao. The Supreme Court observed:-

"Therefore, the mere fact of subsequent amendment does not take away the right to be considered in accordance with the existing Rules. As a proposition of law, there is no dispute and cannot be disputed. But the question is whether the ratio in *Rangaiah* case would apply to the facts of this case. The Government therein merely amended the Rules, applied the amended Rules without taking any conscious decision not to fill up the existing vacancies pending amendment of the Rules on the date the new Rules came into force. (Underline emphasized)"

20. Thereafter, in para 13 of the decision in Dr.K.Ramulu's case (supra), the Supreme Court once again re-emphasized: '*it is seen that since the Government have taken a conscious decision not to make any appointment till the amendment of the rules.....*'

21. Since we have rested our decision on the law, as we understand it to be, flowing out of the decision of the Supreme Court in Dr.K.Ramulu's case, we need not deal with the decision cited by learned counsel for the respondents on the issue of retrospective application of an amending rule. We are not dealing with the same for the reason it is not in dispute that neither the amending rule of 2007 states it expressly that it is retrospective nor is there anything in the rule which indicates it to be of retrospective operation. The debate at the bar was not on the issue of retrospectivity. At the crux of the debate is the effect of a conscious decision taken by the Government not to fill up the posts in DASS Grade II pending amendment to the rules constituting the service.

22. On facts we have noted hereinabove as to how the amendments incorporated in the original rules framed in the year 1967 caused immense hardship to the Ministerial Cadre and the requirement to amend the existing rules and in respect whereof the hardship was first noted in the year 1999 and thereafter steps taken to undo the wrong and till the wrong was undone, a conscious decision taken not to effect promotions.

23. But, we would be failing if we do not redress a grievance of the respondents who claim that they had foregone promotions to the post of Stenographer Grade II as they had submitted options for promotion in DASS Grade II Ministerial. In the absence of any proof that any persons junior to the applicants before the Tribunal working as Stenographer

Grade III have been promoted to the post of Stenographer Grade II, but should this have happened, a direction needs to be issued that the Government would remedy the same by convening review DPCs to consider the promotion of the applicants to the post of Stenographer Grade II and for which they would be entitled to benefits with effect from the date persons junior to them were promoted including notional seniority and pay fixation in the grade applicable, except actual wages. Ordered accordingly.

24. The writ petitions are allowed, but subject to the direction issued in para 23 above. The two impugned orders dated 2.1.2008 and 17.11.2008 are set aside. OA No.1152/2007, OA No.1167/2007, OA No.1227/2007 and OA No.569/2006 are dismissed.

25. No costs.

PRADEEP NANDRAJOG, J.

SIDDHARTH MRIDUL, J.

November 24, 2010
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