

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved On: 25th July, 2011
Judgment Delivered On: 7th September, 2011

+ W.P.(C) 8951/2003

CSIR Petitioner
Through: Mr.V.K.Rao, Senior Advocate
with Mr.Vaibhav Kalra, Advocate

versus

S.C.LALI & ORS. Respondents
Through: Mr.D.K.Aggarwal, Senior
Advocate with Mr.Suryakant
Singla and Ms.Shagun
Bhatnagar, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SUNIL GAUR

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. Pertaining to relaxing standards in favour of members belonging to Scheduled Castes and Scheduled Tribes in relation to promotion, Government of India issued OM No. 8/12/69-Estt. (SCT) dated 23.12.70. It reads as under:

"Subject :- Relaxation of standards in favour of Scheduled Castes/Scheduled Tribes candidates in departmental competitive examinations for promotion and in departmental confirmation examinations.

Attention of the Ministry of Finance etc. is invited to Ministry of Home Affairs O.M. No. 1/1/70-Est. (SCT) dated 25th July, 1970, in which it has been provided that in case of direct recruitment, whether by examination or otherwise, if sufficient number of Scheduled Castes/Scheduled Tribes candidates are not available on the basis of the general standard to fill up the vacancies reserved for them, candidates belonging to these communities may be selected to fill up the remaining vacancies reserved for them provided that they are not found unfit for appointment to such posts or post. A question has been raised whether relaxation in the qualifying standards could be granted to Scheduled Castes/Scheduled Tribes candidates on the same basis in promotions made through departmental competitive examinations and in departmental confirmation examinations where such examinations are prescribed to determine the suitability of candidates for confirmation. The matter has been carefully considered and it has been decided that in promotion/confirmations made through such examinations, Scheduled Castes /Scheduled Tribes candidates who have not acquired the general qualifying standards in such examinations could also be considered for promotions/confirmations. In other words the qualifying standards in these examinations could be relaxed in favour of Scheduled Castes/Scheduled Tribes candidates in keeping with the above criterion.”

2. A perusal of the Office Memorandum would reveal that in matters of promotion, qualifying standards could be relaxed by the Departmental Promotion Committees in relation to members belonging to the Scheduled Castes and Scheduled Tribes.

3. The OM of the year 1970 was clarified, on the subject where promotion was based on seniority subject to fitness; and on the issue of fitness qua members belonging to the

Scheduled Castes and Scheduled Tribes, by an Office Memorandum No.30021/10/76-Estt.(SCT) dated 21.1.1977.

It reads as under:-

"Subject:- Relaxation of standards in the case of Scheduled Castes/Tribe candidates in qualifying examinations for promotion to the higher grade on the basis of seniority subject to fitness.

The undersigned is directed to refer to this Department's Office Memorandum No. 8/12/69-Estt. (SCT) dated, the 23rd December, 1970 in which it has been provided that in promotions made through departmental competitive examinations and in departmental confirmation examinations, if sufficient number of Scheduled Caste/Scheduled Tribe candidates are not available on the basis of the general standard to fill the vacancies reserved, for them Candidates belonging to these communities who have not acquired the general qualifying standard should also be considered for promotion / confirmation provided they are not found unfit for such promotion/confirmation. A question has been raised whether relaxation in qualifying standards should be granted to Scheduled Castes and Scheduled Tribes candidates on the same basis, in promotions on, the basis of seniority subject to fitness, where fitness is decided on the basis of qualifying examination. The matter has been carefully considered and it has now been decided that in promotions made on the basis of seniority subject to fitness in which there is reservation for Scheduled Castes and Scheduled Tribes in accordance with this Department's Office Memorandum No. 27/2/71- Estt. (SCT), dated the 27th November, 1972 and where a qualifying examination is held to determine the fitness of candidates for such promotion, suitable relaxation in the qualifying standard in such examinations should be made in the case of Scheduled Caste/Scheduled Tribe candidates. The extent of relaxation should, however, be decided on each

occasion whenever such an examination is held taking into account all relevant factors including (i) the number of vacancies reserved, (ii) the performance of Scheduled Caste/Scheduled Tribe candidates as well as general candidates in that examination, (iii) the minimum standard of fitness for appointment to the post, and also (iv) the overall strength of the cadre and that of Scheduled Castes and Scheduled Tribes in that cadre.”

4. The Constitutional validity of the Office Memorandums above-noted was challenged, on the ground that the Constitution of India empowered the Legislature to make Laws and in the absence of a legislation, the Executive to make reservations, for members of the Scheduled Castes and Scheduled Tribes, but did not empower the Executive to relax, in favour of members of the Scheduled Castes and Scheduled Tribes, the qualifying norms to be attained for promotion.

5. The challenge succeeded and the decision is reported as 1996 (8) JT (SC) 643 S. Vinod Kumar vs. UOI.

6. In view of OM dated 23.12.1970 and OM dated 21.1.1977 being held to be ultra-vires the Constitution, the Government of India issued Office Memorandum dated 22.07.1997, which reads as under:-

“Subject: Reservation in promotion-
Prescription of lower qualifying marks/ lesser
standard of evaluation.

The undersigned is directed to say that in terms of instructions noted in the margin, certain relaxations/concessions in the matter of qualifying marks/standards of evaluation of performance are to be made in favour of candidates belonging to the Scheduled Castes and the Scheduled Tribes

while considering them for promotion.

2. The validity of such lower qualifying marks/lesser standards of evaluation was called into question in Courts in the context of the judgment of the Supreme Court in the case of Indira Sawhney Vs Union of India. The Supreme Court, in the case of S.Vinod Kumar Vs. Union of India (JT 1996 (8) S.C.643) has held that the provision for lower qualifying marks/lesser level of evaluation, in the matter of promotion, provided for candidates belonging to the Scheduled Castes and the Scheduled Tribes under Government's instructions, is not permissible under Article 16(4) in view of the command contained in Article 335 of the Constitution. The Court has further observed that even if it is assumed for the sake of argument that reservation is permitted by Article 16(4) in the matter of promotion, a provision for lower qualifying marks or lesser level of evaluation is not permissible in the matter of promotion, by virtue of Article 335. The Court also held that the protection for reservation in promotion for five years, given by the Supreme Court, vide para 829 of the judgement in Indira Swahney's case, did not save the provisions for lower qualifying marks/lesser level of evaluation.

3. It has accordingly been decided to withdraw the instructions contained in this Department's O.M. No.8/12/69-Estt. (SCT) dated 23/12/70 and O.M. No. 36021/10/76-Estt. (SCT) dated 21.1.1977, so far as these provide for lower qualifying marks for Scheduled Castes/Scheduled Tribes candidates in departmental qualifying/competitive examinations for promotion. Similarly, the relevant portions of para 6.3.2 of the DPC guidelines circulated vide this Department's O.M. No.22011/5/86-Estt.(D) dated 10.4.1989, to the extent that

they provide for consideration of Scheduled Castes/ Scheduled Tribes candidates without reference to merit and the prescribed "bench mark", are hereby rescinded.

4. It is clarified that the effect of these instructions is that henceforth there shall be no separate standards of evaluation for candidates of the Scheduled Castes/Scheduled Tribes for promotion and assessment of all candidates for this purpose will be with reference to uniform standards. Any other instructions of the Government, which provide for lower qualifying marks/lesser standards of evaluation in matters of promotion for candidates belonging to the Scheduled Castes/Scheduled Tribes, may also be treated as having been modified to this extent.

5. These instructions take immediate effect.

6. All Ministries/Departments are also requested to bring these instructions to the notice of their Attached/Subordinate Offices and Autonomous Bodies/Public Sector Undertakings under their control for compliance."

7. It be highlighted that vide OM dated 22.7.1997, OMs dated 23.12.1970 and 21.1.1977 were expressly withdrawn.

8. The Constitution 82nd Amendment Act 2000 amended Article 335 of the Constitution of India by adding a proviso thereto, which reads as under:-

"Provided that nothing in this Article shall prevent in making of any Provision in favour of the members of the Scheduled Castes and Scheduled Tribes for relaxation in qualifying marks in an Examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in

connection with the affairs of the Union or of a State."

9. Having empowered itself under the Constitution to relax qualifying marks or to lower the standards of evaluation for purposes of induction as also promotion in favour of members belonging to the Scheduled Castes and Scheduled Tribes, on 3.10.2000 the Government of India issued an Office Memorandum which reads as under:-

"Subject: Reservation in promotion -- Prescription of lower qualifying marks/lesser standard of evaluation.

The undersigned is directed to refer to Department of Personnel & Training's OM No. 36012/23/96-Estt. (Res) dated 22nd July, 1997 vide which various instructions of the Government providing for lower qualifying marks/lesser standards of evaluation in matters of promotion for candidates belonging to the Scheduled Castes and Scheduled Tribes had been withdrawn, on the basis of Supreme Court's judgement in the case of S. Vinod Kumar Vs. Union of India.

2. The undersigned is further directed to say that the matter has been reviewed, consequent to which the following proviso to Article 335 has been incorporated in Constitution by the Constitution, (Eighty-Second Amendment) Act, 2000:-

"Provided that nothing in this Article shall prevent in making of any Provision in favour of the members of the Scheduled Castes and Scheduled Tribes for relaxation in qualifying marks in an Examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State."

3. In pursuance of the enabling proviso of Article 335 of the Constitution, it has now been decided to restore, with immediate effect, the relaxations/concessions in matters of promotion for candidates belonging to SCs/STs by way of lower way of lower qualifying marks, lesser standards of evaluation that existed prior 22.7.1997 and as contained in the instructions issued by the Department of Personnel and Training from time to time including OM No. 8/12/69-Estt. (SCT) dated 23.12.1970, No. 36021/10/76-Estt. (SCT) dated 21.1.1977 and para 6.3.2 of the DPC guidelines contained in Department of Personnel and Training's OM No. 22011/5/86- Estt.(D) dated 10.4.1989. In other words, the effect of these instructions would be that the Department of Personnel and Training's OM No. 36012/23/96-Estt.(Res) dated 22nd July, 1997 becomes inoperative from the date of issue of this OM.

4. These orders shall take effect in respect of selections to be made on or after the date of issue of this OM and selections finalised earlier shall not be disturbed.

5. All Ministries/Departments are requested to bring these instructions also to the notice of their Attached/Subordinate Offices and Autonomous Bodies/ Public Sector Undertakings tinder their control for compliance.”

10. A perusal of the Office Memorandum dated 3.10.2000 would reveal that in view of the enabling proviso i.e. the proviso to Article 335 of the Constitution, the Government of India reintroduced the relaxation in favour of members belonging to the Scheduled Castes and Scheduled Tribes pertaining to promotions and, by way of incorporation by way of reference, the policy restored was as per the OMs dated 23.12.1970 and 21.1.1977 which were expressly withdrawn vide OM dated 22.7.1997.

11. The petitioner, issued a Circular Letter No.17/66/94-PPS dated 08.12.2000, which reads as under:-

“Sub:-Relaxation in threshold marks for normal assessment for SC/ST employees under para 2.4 of revised MANAS

I am directed to state that as per the decision of the Government of India notified vide DoPT O.M.No.36012/23/96-Estt(Res.)-Vol.II dated 3.10.2000 to restore with immediate effect, the relaxation/concessions in matter of promotion for candidates belonging to SCs/STs by way of lower qualifying marks, lesser standard of evaluation that existed prior to 22.7.97, the instructions contained in DoPT OM No. 36012/23/96-Estt.(Res.) dated 22.7.1997 for withdrawing instructions for lower qualifying marks/ lesser standard of evaluation for promotion for candidates belonging to SCs/STs, become in operative from the date of issue of above Govt. of India, DoPT, OM dated 3.10.2000.

In the light of the above decision of the Govt. of India, the provisions made under the assessment scheme made applicable to S&T employees of CSIR for less threshold marks for assessment of SC/ST candidates was also required to be restored.

The matter has been considered by the competent authority and has approved restoration of the provision of relaxation in the prescribed threshold marks for normal assessment of SC/ST candidates as contained under para 2.4 of revised MANAS, which was subsequently modified to 10 marks uniformly vide CSIR circular No.17/66/94-PPS, dated 28.1.97, for the assessments under Revised MANAS as well as erstwhile Bye-law 71 (b) scheme falling due on or after 3.10.2000.

It is requested that the above decision may kindly be brought to the notice of all concerned in your Lab./Instt. for their information, guidance and necessary action.”

12. It is apparent that petitioner's circular dated 8.12.2000 was notifying the applicability and the requirement to implement the Government of India's OM dated 3.10.2000.

13. Pertaining to the respondent, the relevant facts are that his entitlement to be assessed to be promoted in the next higher grade became due on 9.10.1999. The assessment was not done and the year 2001 was reached. An appraisal Self Assessment Report was rejected by the Competent Authority and the result thereof was petitioner's appraisal being downgraded and this was conveyed to the petitioner on 12.7.2001 granting him 4 weeks' time to submit a representation if he so desired. Before the 4 weeks expired the Appraisal Assessment Committee on 16.7.2001. Respondent and others were appraised. All were appraised on the same criteria and it be highlighted that the respondent is a member of a Scheduled Caste. In the appraisal, 30% weightage had to be accorded to the appraisal reports of the candidates, and needless to state, the respondent was affected by his Self Appraisal Report being downgraded.

14. Not being placed in the higher scale, the respondent filed an Original Application before the Central Administrative Tribunal and urged therein 2 grounds: (i) that he was adversely affected by the assessment committee having met on 16.7.2001 inasmuch as his representation against the lowering of his self assessment as per the appraisal was still pending; and (ii) since by the date the appraisal committee met, the Government of India OM dated 3.10.2000 was in force, there was no need to apply the same prospectively and

ought to have been applied retrospectively i.e. for members belonging to Scheduled Castes and Scheduled Tribes a lower qualifying eligibility norm had to be prescribed.

15. On the matter of self-assessment report, the Tribunal held: *"... on communication of APAR grading on 12.07.2001, holding of assessment on 16.07.2001 deprives the applicant a reasonable opportunity and as such the selection/promotion in violation of the rules vitiates it."*

16. On the claim for relaxed standards, the Tribunal held: *"...if the selection is held after 03.10.2000 relaxed standards are to be accorded. As such the decision of the respondents taken on 08.10.2000 where as per para 2.4 of the revised MANAS are applicable to the assessment falling due after 03.10.2000 cannot be sustained. In the present case, as the assessment relates to 1999, but the assessment has taken place only on 16.07.2001, i.e., after the OM dated 03.10.2000, the selection which is not yet finalised even for the year 1999, relaxed standards are to be applied. Accordingly, the decision of the respondents not to extend relaxed standard and marks as envisaged in para 2.4 of the Scheme is unsustainable in law."*

17. Accordingly, the Tribunal directed petitioner to reassess the respondent by relaxing the standards in his favour.

18. As regards the fault found by the Tribunal of the Appraisal Committee making assessment as on 16.7.2001 in the teeth of the respondent being afforded an opportunity on 12.7.2001 to make a representation against his self appraisal being downgraded, learned counsel for the petitioner conceded that the view taken by the Tribunal was correct but in respect of the direction issued by the Tribunal wanted this

Court to record a fact; that the representation made by the respondent had been rejected on 27.12.2001 and thus if any re-assessment had to be done, it had to be with respect to the downgraded appraisal of the respondent.

19. Indeed, the fault found by the Tribunal on the first count is correct, but we would have expected the Tribunal to have noted the fact that in view of respondent's representation being rejected, it would be useless to direct that the reassessment would be necessitated on account of the taint. It is settled law that a wrong which results in no meaningful effect, has to be ignored.

20. The second finding of the Tribunal, unfortunately for us, is without any reasoning from the Tribunal. A finding by way of conclusion has been stated sans any reason.

21. The second issue raises the question as to what was the effect of the decision of the Supreme Court in S.Vinod Kumar's case (supra) on the 2 OMs dated 23.12.1970 and 21.1.1977 in light of the Constitution 82nd Amendment empowering the lowering of standards and relaxing qualifying marks in matters of promotion of members belonging to Scheduled Castes and Scheduled Tribes.

22. The Doctrine of Eclipse in relation to enactments or executive instructions held to be ultra vires the Constitution, after the cause of unconstitutionality is removed, guides us that, being on the Statute Book, the enactment held unconstitutional will operate '*proprio vigore*' when the Constitutional bar is removed i.e. there is no need for a fresh legislation to give effect thereto. We may only highlight one decision of the Supreme Court on the subject AIR 1958 SC 468 MPV Sundaramier vs. State of A.P.

23. Can it be said that after the Constitution 82nd Amendment the OMs dated 23.12.1970 and 21.1.1977 become operative proprio vigore i.e. on their own strength?

24. They would have, but for the fact that on 22.7.1997, both Office Memorandums were expressly withdrawn. This is evident from paragraph 3 of the OM dated 22.7.1997 which uses the expression that the instructions contained in the 2 OMs are withdrawn. Para 4 makes it further clear that henceforth uniform standards of evaluation would have to be followed while assessing unreserved candidates and members of the Scheduled Castes and Scheduled Tribes. Thus, it cannot be said, in the facts of the instant case that after the Constitutional bar was overcome, the 2 Office Memorandums became operative on their own strength inasmuch as the Constitutional Amendment came in the year 2000 and 3 years prior thereto in the year 1997, the 2 Office Memorandums were expressly withdrawn. It was only on 3.10.2000 that the Government reintroduced the relaxed norms for members belonging to the Scheduled Castes and Scheduled Tribes and merely because, by way of reference, the policy laid down in the Office Memorandums dated 23.12.1970 and 21.1.1977 was incorporated in the OM dated 3.10.2000 would not make the said 2 OMs operative between the time they were expressly withdrawn i.e. 22.7.1997 and till the OM dated 3.10.2000 was issued.

25. Now, no conscious decision was taken by the Government to make applicable the relaxed norms from a retrospective date and none can be inferred by implication based on the strength of the decision reported as (2006) 6 SCC 289 Vijay vs. State of Maharashtra & Ors. for the reason

a conscious decision was taken to make the OM applicable prospectively and law being that where a Departmental Promotion Committee or an Appraisal Committee meets belatedly and considers matters as of an anterior date, Rules and Law as applicable on the date as of which assessments have to be made would govern the procedures to be followed and norms to be adopted as existing for the date on which appraisals have to be done, unless a conscious decision is taken by the Government to retrospectively change the rules of the game, and finding no such conscious decision taken and on the contrary the conscious decision being to apply the law prospectively, the inevitable conclusion has to be that the direction issued by the Tribunal is contrary to law and thus we dispose of the writ petition setting aside the impugned judgment and order dated 10.9.2003. The writ petition is allowed and OA No.2949/2002 filed by the respondent is dismissed.

26. There shall be no order as to costs.

PRADEEP NANDRAJOG, J.

SUNIL GAUR, J.

SEPTEMBER 07, 2011
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