

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

+ WRIT PETITION (CIVIL) NO. 4107/2010
AND
CM APPL. NOS. 8159/2010 & 13311/2010

Date of Decision: May 24, 2011

TILAK RAJ GANDHI Petitioners
Through Mr. Anil Sapra, Sr. Advocate
with Mr. Rajesh Baweja, Advocate

versus

Union of India & Ors. Respondent
Through Mr. A.S.Chandiok, ASG with
Mr. D.S.Mahendru, Ms. J.J.Sarkar,
Advocates
Mr. Prashant Bhushan, Advocate for the
intervener.

CORAM:
HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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? Yes

SUDERSHAN KUMAR MISRA, J.

1. The matter was reserved after arguments on the question of maintainability of this petition before this Court were concluded.

2. The petitioner, Mr. T.R. Gandhi, has invoked the extraordinary jurisdiction of this court under Article 226 of the Constitution of India praying, inter alia, that a communication dated 18th February 2010 stating that the Appointments Committee of the Cabinet has not approved the proposal for appointment of the petitioner as the Director (Finance) of the BSNL, and has issued further directions for initiation of the process afresh, be quashed. He has also prayed that mandamus be issued to the respondents to appoint him to the post of Director (Finance), and the selection process for that post, which has been initiated by the respondents, be stopped.

3. The matter is still at the preliminary stage pursuant to a notice to show cause issued by this Court. A preliminary objection has been raised by the respondents with regard to the maintainability of this petition. It is urged that the scope of the dispute raised by the petitioner falls squarely within the jurisdiction of the Central administrative Tribunal in terms of The Administrative Tribunals Act 1985, and therefore, this court ought not to exercise jurisdiction in the matter. On November 15, 2010, counsel for the respondent categorically stated that pursuant to a notification issued on 31st of October 2008, under section 14 (2) of the Administrative Tribunals Act, 1985, the Central Administrative

Tribunal is vested with jurisdiction on this matter. This objection was recorded by this Court on 15th November, 2010 as follows;

"in addition, counsel also states that the respondents are seriously pressing their objections with regard to the maintainability of the petition before this court in view of their stand that the matter falls under the jurisdiction of the Central Administrative Tribunal pursuant to a notification issued on 31st of October 2008, under section 14 (2) of the administrative tribunals act, 1985."

4. In response, petitioner's counsel stated that notwithstanding the fact that a notification has been issued under section 14 (2) Of the Administrative Tribunals Act, this Court should not decline the matter because no specific stand has been taken by the respondent to the effect that the appointment to the post in question falls under section 14 (3) of that Act. According to counsel for the petitioner, the mere issuance of a notification under section 14 (2) does not and cannot bring into play provisions of section 14 (3). In other words, the stand of the petitioner is that the objection to the exercise of jurisdiction by the writ court raised specifically by counsel for the respondent at the bar, and duly recorded by the court whilst the matter is at a preliminary stage, does not constitute sufficient Traverse on the issue of jurisdiction.

5. I do not agree. Section 14 of the Administrative Tribunal's Act 1985 falls in chapter 3 of that act and is titled, "jurisdiction, powers and authority of the Central Administrative Tribunal". Subsection 2 of section 14 states as follows;

"(2) the Central government may, by notification, apply with effect from such date as may be specified in the notification the provisions of subsection (3) to local or other authorities within the territory of India or under the control of the government of India and to corporations or societies owned or controlled by government, not being a local or other authority or corporation or society controlled or owned by a State government:"

A reading of the above makes it obvious that it is open to the Central government to issue a notification directing the application of section 14 (3) to the entities mentioned in section 14 (2). This is exactly what the government has done, and it is precisely such a notification which is being relied upon by the government to oust the jurisdiction of this court. It follows therefore that, the objection to the exercise of the jurisdiction of this court on the basis of the notification issued by the government under section 14 (2) has been adequately raised, and it was not necessary for the respondent to have further specifically stated that, pursuant to the aforesaid notification under section 14 (2), the provisions of section

14 (3) will apply, and that jurisdiction of the court ought not to be exercised for that reason. The nature of the objection to the exercise of jurisdiction by this Court, as well as its scope and content, are obvious and, to my mind, the counsel for the petitioner is being hyper technical and fails to persuade this court to reject the petitioners objection on such a ground.

6. Counsel for the petitioner has then taken another approach. He submits that the appointment to the post of Director (Finance) in the BSNL, with which these proceedings are concerned, is not contemplated under section 14 (3) of the Act because it does not amount to a, "recruitment", and therefore, notwithstanding the aforesaid notification under section 14 (2) of the Act, the Tribunal has acquired no jurisdiction in the matter under Section 14 of the Central Administrative Tribunals Act.

7. In this context, it is his case that since the recruitment rules of the BSNL are silent with regard to the appointment to the post in question, of Director (Finance), in that organization, and do not contemplate appointments to the Board of Directors, therefore, any appointment to the post of a Director, including that of Director (Finance), would not amount to a recruitment under section 14 (3). According to him, since the extant recruitment rules apply only to recruitment of employees below the level of the Board of Directors; therefore, the appointment of only these employees can be said to

be a "recruitment", of the type contemplated under section 14 (3) of the Administrative Tribunals Act.

8. The organization in respect of which relief is sought by the petitioner is, admittedly, a government company incorporated under the Companies Act, 1956. Its entire shareholding is held by the President of India. The power to appoint persons to carry out different functions in that company emanates from its Memorandum and Articles of Association. Depending upon the class of persons to be appointed, two different methods of appointment have been prescribed by the Articles of Association. Article 111 which empowers the President of India to appoint and remove Directors is as follows:

"111. PRESIDENT OF INDIA'S POWERS TO APPOINT AND REMOVE DIRECTORS

- (i) to appoint whole-time or part-time Chairman, whole-time Managing Director(s) or whole-time Chairman-cum-Managing Director and other whole time Directors;
- (ii) to appoint the Directors representing the Government of India;
- (iii) to appoint non official part-time Directors;
- (iv) to remove any Director including the Chairman or the Chairman-cum-Managing Director or Managing Director, if any from office at any time in his absolute discretion;
- (v) to fill any vacancy in the office of Chairman, Chairman-cum-Managing

Director, Managing Director or Director(s) caused by removal, resignation, death or otherwise;

- (vi) to determine the tenure of office for the Directors so appointed from time to time.

The Directors appointed by the President shall hold office until removed by him or until their resignation, retirement, death or otherwise."

Similarly, article 143(17) vests the following powers in the Board of Directors to appoint employees, "below the board level";

"143. SPECIFIC POWERS GIVEN TO BOARD

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(17) to create and windup posts, to appoint persons there to and at their discretion to move or suspend all employees below the board level by whatever designation they are called viz., Chief General managers, managers, secretaries, assistants, supervisors, clerks, agents and servants are permanent, temporary or special services as they may from time to time thinks it, and to determine their power and duties and fix their salaries or monuments or remuneration, and to require security in such instances and to such amount as they may think fit."

From the above, it emerges that while article 111 envisages the appointment of the Chairman, and other Directors, by the President of India; article 143 (17) empowers the Board of Directors to appoint all persons in the company, "below the Board level".

Different processes for effectuating these powers have also been put in place. Indisputably, the process for appointment of a Director of the company envisages, inter alia, an examination of, and selection from, the recommendations made by the Public Enterprises Selection Board (PESB), by the Appointments Committee of Cabinet, before the matter is put up to the President of India for making the appointment. For making all other appointments below the Board level in the exercise of the power conferred by article 143 (17), the Board of Directors have put in place certain rules called the, "recruitment rules".

9. To my mind, learned counsel for the petitioner quite misunderstands the matter. Merely because the methodology put in place by the Board of Directors for exercising its powers under article 143(17) for appointing personnel to posts below the Board level, has been given the nomenclature, "recruitment rules" by the Board itself, does not, and cannot mean that the appointment of persons to posts at the level of the Board of Directors of the company, for which a different methodology is envisaged under the Articles of Association of the Company, is not a recruitment, "to any...post in connection with the affairs of such Corporation...", as envisaged under section 14(3) of the Administrative Tribunals Act. I also notice that the expression, "recruitment" has not been defined either under the Administrative Tribunals Act, 1985, or even by the

Memorandum and Articles of Association of the BSNL. The ordinary meaning of the word, "recruit", when employed as a noun, is as follows;

"n. A new member of a society or organisation."

The word, "recruitment", is also a noun that has been accorded the same meaning.

(See the concise Oxford dictionary of current English eighth edition). In fact, the word recruitment is an abstract noun defining the act of recruiting.

10. Significantly, the Articles of Association of the company, which constitute the regulations for the management of the company, do not mention the word, "recruitment" anywhere. They simply provide two channels for the appointment of two types of personnel in the company. While the Chairman and Board of Directors are appointed by the President of India, personnel below the Board of Directors are appointed by the Board itself. There is nothing in the Articles of Association of the company to suggest that any appointment being made by the President of India to the Board of Directors is not a consequence of recruitment as envisaged by section 14 (3) of the Administrative Tribunals Act. As a matter of fact, both article 111, which empowers the President of India to appoint the Chairman and Directors of the company; as well as article 143 (17), which empowers the Board of Directors to appoint

persons below the board level, use same expression while granting the requisite power. In both cases, the words employed are, "to appoint". The expression, "to appoint", is a transitive verb meaning, "assign a post or office to (*appointed governor; appoint him to govern; appointed to the post*)"--- see concise Oxford dictionary of the English language eighth edition. Significantly, there is no other power conferred by the Articles of Association on anyone to select or recruit persons for carrying out the functions of the company. Consequently, if the literal dictionary meaning were to be accorded to the expression, "to appoint", it would amount to both the Board, as well as the President of India, being empowered to assign posts to persons in the Company without the power to first employ any process for their selection and recruitment. This was obviously not the intent of the Articles of Association, which must be read meaningfully and holistically. Therefore, the expression, "to appoint" employed by the articles of the company qua both the directors; as well as persons, "below the board level", must be taken to mean the entire process from selection and recruitment right upto appointment. At the same time, there is nothing to suggest, and indeed learned counsel for the petitioner has been unable to cite any precedent to show, that the expression, "recruitment", has been used in section 14(3)(a) of the Administrative Tribunals Act, 1985, in any restricted sense. In fact,

his entire argument has been confined to the submission that any appointment to the Board of Directors cannot be said to be a "recruitment" as envisaged under section 14(3) because the recruitment rules adopted by the Board of Directors for exercising their powers to appoint personnel below the Board of Directors in terms of article 143 (17) of the Articles of the company, do not apply to the appointment of a director of that company.

11. While it is true that sometimes in service law, the expression, "appointment" and "recruitment" are not synonymous and may have different meanings in the sense that whilst a recruitment may signify selection of a person, the word, "appointment" could mean the actual posting of a person to a particular office; however, that is not the case here. In the instant case, what has arisen for consideration is the true scope and meaning of the language employed by the Articles of Association of BSNL empowering, the President of India to appoint persons as Directors, and the Board of Directors to appoint other persons to carry out the functions of the company, "below the Board level". Admittedly, both the methods envisage a process of selection. Although, only the process evolved by the Board of Directors, for employing persons below the Board level, has been given the nomenclature, "Recruitment Rules", while the process of appointment of Directors by the President of India, has not,

nonetheless, keeping in mind the scope and object of the Articles of Association of the company, which have also been examined in the preceding paragraphs, both processes are concerned with recruitment in the sense contemplated under section 14(3) of the Administrative Tribunals Act. In other words, in the case at hand, as soon as someone is appointed by being assigned a post or office, he becomes a member of the organisation and can be said to have been duly recruited to that organization, thus satisfying the test of section 14 (3)(a) of the Act which confers jurisdiction on the Tribunal in relation to, "recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such... Corporation...". Admittedly, the Central government has in fact issued a notification under section 14 (2) of the administrative tribunals act, 1985 applying the provisions of subsection (3) of section 14 of that Act to the BSNL. As a result, and for all the aforesaid reasons, recruitment and matters concerning recruitment to any post in connection with the affairs of the BSNL shall fall within the jurisdiction of The Central Administrative Tribunal. This would also include the post of a director in that organisation.

12. The third line of argument adopted by the learned counsel for the petitioner in support of his plea that the matter does not come under jurisdiction of the Tribunal under section 14 (3) of the Administrative Tribunals Act, 1985, is that even the respondent

does not consider appointment to the post of Director (Finance), which is the subject matter of the instant petition, to be a recruitment, and therefore, the respondents cannot be heard to claim that the matter is covered under section 14 (3). The factual basis on which learned counsel rests this plea is a request for information under the Right to Information Act moved by the petitioner on 21st January 2011 and again on 2nd February 2011. The information sought, and the response thereto, have been filed by the petitioner in court on 17th February 2011. To appreciate this in the correct perspective it is necessary to keep in mind that the petitioner had moved this Court on 3rd June 2010 and, in the hearing on 15 November 2010 respondents counsel made it clear that he is seriously pressing his objections with regard to the maintainability of the petition on the ground that jurisdiction lies with the Central Administrative Tribunal in terms of Section 14 of the Administrative Tribunals Act. It is this that appears to have prompted the petitioner to move those applications under the Right to Information Act to buttress his case on the issue of maintainability. In his first query on 21 January 2011, the petitioner requested for the following information;

“(i) Does the Govt. has issued any Notification/Order/Policy that Public Enterprises Selection Board is a ‘Recruitment Agency’.

- (ii) If so, a copy of the said Notification/Order/Policy may be provided.
- (iii) Does the Government has issued any Order/Policy that Functional Directors on the Board of a Govt. Company can be appointed by way of 'Recruitment'.
- (iv) If so, a copy of 'Recruitment Rules' for appointment of Functional Directors on the Board of Govt. Company may be provided.
- (v) Please provide a copy of Order/Policy/Guidelines under which it can be stated that Meeting held in PESB in February 2009 for selection for the post of Director (Finance), BSNL was a case of appointment by 'Recruitment'."

In his second request, the petitioner sought the following information;

- "i) Are the Functional Directors on the Board of a Public Sector Undertaking/Government Company appointed by way of recruitment.
- ii) Name of persons who have been appointed as Functional Director in a Public Sector Undertaking/Government Company by way of recruitment in the year 2009 & year 2010.

- iii) Whether proposal received by DOP&T from DOT in the year 2009 for my appointment as Director (Finance), BSNL (which was not approved by ACC) was a case of appointment by recruitment?"

13. In response to both these communications, which has been given by an Under Secretary to the Government of India in his capacity as the CPIO appointed under the Right to Information Act, the respondent has pointed out that there are no Recruitment Rules in place for appointment of Directors on the Board of the company. It has also taken the position that the directors on the Boards of Government Companies are merely selected and not recruited. Be that as it may, to my mind, these responses do not further the case of the petitioner as regards maintainability, which is to be tested from the standpoint of the scope and application of section 14 (3) of the Administrative Tribunals Act. The real issue to be answered is not whether the respondents treat the appointment of directors envisaged under the Articles of Association of BSNL as a recruitment. It is whether the appointments being made in terms of those articles to various posts under the company, fall within the purview of the expression, "recruitment", employed in Section 14 (3) of the Administrative Tribunals Act. Whatever may be the understanding of the expression, "recruitment", of the respondents themselves in the matter, that cannot be taken to define or whittle

down or in any way restrict the scope of that expression under Section 14 (3) of the Act. I might also add that this is purely a matter of judicial interpretation, and the responses of the CPIO of the respondents under the Right to Information Act to the aforesaid information sought by the petitioner would also not create any estoppel preventing the respondents from raising this issue before the court. It was for the petitioner to demonstrate, either through precedent, or by way of systematic logical reasoning, that the expression, "recruitment", has been employed by the Legislature in Section 14 (3) of the Act in a specific or restricted sense to exclude any appointment made to a post by employing a method of selection to which the appellation, "recruitment" or "recruitment rules", has not been given. This he has failed to do. In that view of the matter, this contention of the petitioner's counsel must also be rejected, particularly in the light of the aforesaid discussion and the conclusions reached with regard to the scope and application of section 14 (3) of the Central Administrative Tribunals Act in the preceding paragraphs.

14. At this juncture, I might notice one more aspect of the matter. On 25th August 2010, whilst preliminary arguments were being addressed, counsel for the petitioner pressed for interim orders to restrain the respondent from proceeding with the selection process after the respondents informed the court that interviews for

selecting candidates for the post in question were to be held the next day. After a small hearing, and with the consent of counsel for the respondent, this court ordered as follows; "let the interview be conducted as per schedule fixed, however, no final appointment to the post of director (Finance) be made by the respondent no.3". Thereafter, whilst addressing arguments on the preliminary objection regarding maintainability, the learned Additional Solicitor General of India pointed out that a regular appointment to the post in question is vital to the functioning of BSNL. This court recorded his submissions thus, "..... However, Mr Chandhiok, learned ASG, who appears for the respondent, states that the appointment in question, which is of the Director (Finance) in the BSNL is vital to the functioning of the enterprise which has a turnover of more than 32,000 crores. He states that due to a number of developments, matters concerning the functioning of this organisation are agitating the nation, and concern has been expressed at various fora, including the Parliament. Furthermore, vital decisions with regard to various processes including the adaptation of new and diverse technologies are being actively considered, but the progress of decision making with regard to those technologies and their financial impact has been seriously undermined because of the lack of a Director (Finance). He further submits that in terms of the interim orders passed on 25th of August 2010, the necessary

interviews for the selection of the new incumbent have been completed, however, no final appointment to the post of Director (Finance) has been made. He submits that under the circumstances, the respondents be permitted to complete the process of appointment and to appoint somebody so that the functioning of BSNL does not suffer." It was in keeping with the urgent necessity expressed by him that, before concluding his arguments on maintainability, Mr. Chandhiok expressed his willingness to agree to a consent order permitting the petitioner to withdraw the petition and to approach the Central Administrative Tribunal in a time bound manner, provided the respondents are permitted to proceed with the appointment, subject to any further orders that might be passed by the Tribunal in case the petitioner were to approach that forum within the time granted. This was rejected by counsel for the petitioner.

15. The issue of interim protection, if any, to be afforded to the petitioner assumes some significance in the light of the stand taken by counsel for the petitioner refusing the offer of counsel for the respondents. Two grounds on which the High Court can refuse to entertain a matter under Article 226 of the Constitution of India are relevant here. These are, either the existence of an equally efficacious, alternative remedy, available to the petitioner or that it has no jurisdiction to entertain the matter. In the former case, it is

not as if the Court has no jurisdiction to entertain the matter, it only declines to entertain it on the basis of certain well settled principles which have crystallized into a self imposed restraint in granting access to what is known as an extra ordinary remedy. In other words, although the power is there, its exercise is declined on certain principles. In the other case, where the jurisdiction is not available at all, there is no question of declining the exercise of the power for any other reason such as the availability of an alternative remedy. Often, when it is demonstrated by the respondent that an equally efficacious remedy is available to the petitioner, in appropriate cases, the Court affords some interim protection to the petitioner, whilst granting him time to approach the appropriate forum; however, such an order cannot be passed even by a writ court, if it were to conclude that jurisdiction itself is not available.

16. Under the Administrative Tribunals Act, 1985, whilst Section 14 of the Act empowers the Central Administrative Tribunal in respect of certain matters, Section 28 of that Act expressly bars the exercise of any jurisdiction by this Court in relation to matters which come under the purview of the Central Administrative Tribunal. The scope and application of Section 28, as well as the validity thereof, has been the subject matter of a decision by the Supreme Court in **L.Chandra Kumar Vs. Union of India & Ors.** (1997) 3 Supreme Court Cases 261. By that decision although, the

Supreme Court has, in effect, watered down section 28 by holding, inter alia, that to the extent it divests the High Courts of their jurisdiction under Article 226 of the Constitution, it is unconstitutional because the power of judicial review vested in this Court under Article 226 is an integral and essential feature of the Constitution constituting part of its basic structure; it has nevertheless concluded that the Tribunals will continue to act as, “the only courts of first instance in respect of the areas of law for which they have been constituted.” It has further held, “it will not be open for litigants to directly approach the High Courts by overlooking the jurisdiction of the Tribunal concerned.” The only exception under which the High Court may be approached in the first instance is a case where the very legislation creating a particular Tribunal itself is challenged, which is not the case here. The language employed by the Supreme Court in this context makes the very limited and restricted jurisdiction available to this Court as a court of first instance, albeit in the exercise of jurisdiction under Article 226 of the Constitution, explicit, when it says,

“in all such cases alone, the High Court concerned may be approached directly.”

(emphasis added)

17. A reading of the decision of **L.Chandra Kumar’s case**

(supra), in the light of Article 141 of the Constitution of India,
WP(C) No. 4107/2010

makes it clear, therefore, that there remains an explicit bar on the High Court being approached directly in this matter, and it is not merely the availability of an equally efficacious, alternative remedy that obliges this Court to decline the examination of the petition. In fact this Court does not have the jurisdiction, as a Court of first instance, to examine the merits of the matter, even to a limited extent. It follows, therefore, that while it was always open to the respondent to offer to make any appointment to the post in question subject to any further orders that may be passed by the Tribunal, which may be recorded by this Court as a matter of consent inter parties; however, once that offer is declined by the petitioner, the matter must rest there. This is because this Court does not have the jurisdiction to issue orders granting or even continuing any interim orders if the matter itself is dismissed for want of jurisdiction.

18. Under the circumstances, especially in view of the decision of the Supreme Court in **L.Chandra Kumar Vs. Union of India & Ors.** (1997) 3 Supreme Court Cases 261, which has held, inter alia, that the Central Administrative Tribunal, shall continue to act like a court of first instance in matters covered under Section 14 of the Administrative Tribunals Act, 1985, and that it will not be open for the litigants to directly approach the High Court, and keeping in mind the conclusion I have reached to the effect that the

relief claimed by the petitioner falls within the purview of Section 14(3) of that Act, the writ petition is dismissed as not maintainable before this Court. Consequently, all pending applications have also come to an end and interim orders stand vacated.

SUDERSHAN KUMAR MISRA, J.

MAY 24, 2011