

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

+ **W.P.(C) No. 6647/2008**

% **Date of Decision: 13.01.2011**

Union of India & Ors. Petitioners

Through Dr.Ashwani Bhardwaj, Advocate

Versus

Jai Prakash Kalwani & Ors. Respondents

Through Mr.Deepak Verma, Advocate for
respondent Nos.2, 4 & 7.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MS. JUSTICE VEENA BIRBAL

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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? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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1. The petitioners, Union of India & Others, through Secretary of Ministry of Finance, have challenged the order dated 30th July, 2007 in OA No.2012 of 2006 passed by the Central Administrative Tribunal, Principal Bench, New Delhi, titled 'Jai Prakash Kalwani & Others v. Union of India & Others', holding that for DEOs, Programme Assistant/ Console Operator, in the pay scale of

Rs.5500-9000 is the next higher grade in the hierarchy in the cadre, and therefore, the respondents/applicants before the Tribunal were entitled for the post of Programme Assistant/Console Operator, in terms of 1990 rules and entitled to be considered for promotion to the said grade on acquiring eligibility subject to availability of vacancies and the action of the petitioners in granting them first financial upgradation in the scale of Rs.5000-8000 by order dated 8th April, 2004 cannot be sustained in law.

2. Against the order dated 30th July, 2007 the above noted writ petition was filed by the petitioners. During the pendency of the present writ petition, respondent Nos.6 to 9, Sh.Surinder Kumar, Ms.Anupma Pahwa, Ms.Suman Sharma & Sh.Mahesh Chandra had filed an application being CM No.13121 of 2009, contending inter-alia, that they do not want to take or retain any benefit under the order dated 30th July, 2007 of the Principal Bench, Central Administrative Tribunal and they may be allowed to appear in the departmental examination for Income Tax Inspectors which was scheduled from 26th October, 2009 with all consequential benefits. On the application of respondent Nos.6 to 9, they were allowed to appear provisionally in the departmental examination pursuant to order dated 22nd October, 2009. The application was allowed by order dated 30th October, 2009 permitting respondent Nos.6 to 9 not

to avail the relief granted by the Tribunal by order dated 30th July, 2007 and the writ petition against respondent Nos.6 to 9 was allowed.

3. Later on, another application was filed by respondent Nos.1, 3, 5 & 8 also to withdraw their names from the present writ petition and to allow the writ petition against the said respondents. The said respondents also sought directions to the petitioners to grant them all those service benefits including the seniority benefit which would have been admissible to them had they not filed the petition before the Central Administrative Tribunal. The said application of respondent Nos.1,3,5 & 8 being CM No.14262 of 2008 was also disposed of by order dated 16th November, 2009. The writ petition was, however, contested by respondent Nos.2, 4, 7, 10 & 11.

4. The petitioners filed an application being CM No.13384 of 2010 seeking dropping of respondent Nos.10 & 11 from the array of respondents. The said application was allowed by order dated 4th October, 2010, and consequent to these applications, the petitioners were directed to file amended memo of parties. The amended memo of parties dated 28th September, 2010 was filed retaining the relief claimed in the writ petition against Manisha Pant, Deepak Kandhari & Anupama Pahwa.

5. The brief facts to comprehend the disputes between the parties are that the respondents with other applicants challenged the action of the petitioners in erroneously granting the scale of Rs.5000-8000 instead of Rs.5500-9000 w.e.f. respective dates in 2000/2001 by order dated 10th April, 2001. Respondent No.1 had become entitled for the higher scale from 31st January, 2001, whereas respondent No.2 Sh.Deepak Kandhari had become entitled from 16th May, 2000 and respondent No.3 Ms.Anupama Pahwa from 4th January, 2001. The respondents along with other applicants had made a representation dated 14th February, 2005 however, their representation was declined by order dated 8th April, 2004 which was challenged by the respondents by filing the petition under Section 19 of the Administrative Tribunal's Act, 1985.

6. The respondents had contended that respondent Nos.2 and 3 were appointed as Data Entry Operators in accordance with the relevant recruitment rules in 1988, whereas respondent No.1 was recruited in 1989. They continued in the same post till the order under the Assured Career Progression Scheme in the year 1999 was passed on the recommendation of 5th Central Pay Commission. The ACP scheme had contemplated financial upgradation on completion of 12 years of regular service. Under the said scheme, the financial upgradation had to be given to the next higher grade in accordance

with existing hierarchy in a cadre/category of posts without creating new post for the purpose.

7. The respondents asserted that as per the recruitment rules prevalent in their department, the next higher grade to Data Entry Operator is “Programme Assistant/Console Operator” which recruitment was governed by the DIT(Systems) Programme Assistant/Console Operator Rules, 1990. According to the said rules, Data Entry Operators with 10 years regular service were eligible for promotion as Programme Assistant/Console Operator, and therefore, for Data Entry Operators, the next higher grade was Programme Assistant/Console Operators.

8. The specific plea of the respondents was that the above noted rules for the post of Programme Assistant/Console Operators had not been abrogated or amended or modified. The respondents relied on certain decisions of the Central Administrative Tribunal, Principal Bench, New Delhi and Hyderabad and of the Division Bench of Delhi High Court and Hyderabad High Court holding that the above noted rules were not abrogated, or amended, or modified and the higher grade in the existing hierarchy for Data Entry Operator is Programme Assistant/Console Operators.

9. The respondents contended that after they became eligible for financial upgradation to the next higher grade of Programme Assistant/Console Operators, the order dated 8th April, 2004 was issued, however, instead of giving upgradation to the scale of Rs.5500-9000, the financial upgradation to the scale of Rs.5000-8000 only was given. The respondents did not challenge the date from which the financial upgradation was given, however, challenged the scale to which the financial upgradation was given. The petition filed before the Administrative Tribunal was contested by the petitioners, contending inter-alia, that the respondents had joined as Data Entry Operators in the pay scale of Rs.1200-30-1560-EB-40-2040. It was further pleaded that a Committee was constituted to suggest the re-organization of existing Electronics Data Processing posts and prescribed uniform pay scales and designations in consultation with the Department of Personnel. The said Committee recommended the division of posts of DEO into five posts of DEO Grade 'A', 'B', 'C', 'D' & 'E' with a pay scale of Rs.1150-1500, 1350-2000, 1400-2300, 1600-2660 and 2000-3500 respectively. The recommendations of the Committee were introduced by the Ministry of Finance by Office Memorandum F-7(1)/I C/86/(44) dated 11th September, 1989. It was also decided that in future adequate number of posts of DEO will be created in the grade of DEO Grade-C and DEO grade-D. The petitioners also asserted that the Recruitment

Rules, 1987 of DEOs which was a feeder cadre for promotion to the post of PA/CO were superseded by the Recruitment Rules of 1994. In the cadre of DEOs Grade-A and B, the Recruitment Rules 1994 was duly notified which were notified under the Gazette Notification No.GSR-21 dated 30th December, 1994. According to the petitioners, thus, feeder cadre of PA/CO i.e. of DEO ceased to exist for publication of DEO Grade A and B Recruitment Rules 1994. Consequently, it was contended that post of DEO through which the cadre of DEOs was re-structured into four separate cadres of DEOs Grade A, B, C & D. Reliance was also placed on the contentions from the Ministry of Finance, Department of Expenditure OM. F-7(1)/I C/86/(44) dated 11th September, 1989, deciding to re-structure of PA/CO in two grades viz. Data Processing Assistant grade A (Group C post) and Data Processing Assistant grade B (Group B post) in the pay scale of Rs.1660-2660 and 2000-3200. Reliance was also placed on recruitment rules for the post of Assistant Director (Systems) notified on 27th July, 2001 contemplating requisite requirement for promotion to the post of Assistant Director (Systems) laid down that DPA Grade B with five years service failing which combine regular service of eight years in DPA in Grade A and B and minimum of two years in Grade B. The petitioners also made reference to Memorandum dated 22nd November, 2002 issued vide F.No.A-11013/8/2001-Ad.-VII granting an ex-post-facto sanction to the

relaxation of recruitment rules for Group C and D post, and consequently, the respondents were promoted to the post of senior tax Assistant w.e.f. 29th June, 2001.

10. The Tribunal held that 1995 rules since had not been published in any official gazette could not have been resorted to and do not apply. The Tribunal also noticed that as per DOPT OM dated 18th July, 2001 particularly in response to query No.41, the benefit of ACP Scheme is to be allowed as per the existing hierarchy as on the date of the employees becoming eligible for financial upgradation. Relying on a decision of Co-ordinate Bench in O.A.No.925 of 2002 in 'Dal Chand & Ors. v. UOI & Ors.' dated 22.05.2003, it was held that the Rules of 1995 were not applicable till the respondents became eligible for upgradation under the Assured Career Progression Scheme. The Tribunal has observed that no order, notification/RR etc. have been pointed out or produced to establish that the said rules of 1990 have either been modified, abrogated, or amended making DEOs liable to be considered for promotion to the said grade. Consequently, it was held that the Programme Assistant/Console Operator, placed in pay scale of Rs.5500-9000 w.e.f. 1st January, 1996 is the next higher grade in the existing hierarchy in a cadre for which feeder grade is DEOs and consequently, the financial upgradation granted by order dated 8th April, 2004 in the pay scale

of Rs.5000-8000 is not proper and justified scale. Reliance was also placed on para 2 of the said Rules of 1994 which was an exception carved out contemplating that existing Date Entry Operators drawing pay scale of Rs.1200-2040 shall continue to draw in that scale of pay till the time they vacate the post or ceased to draw as pay scale and the respondents continued to remain in the said scale till the financial upgradation under the ACP scheme was granted. Para 2 of the rules of 1994 is as under:-

“2.Number of posts, clarification and scale of pay- The number of the said posts, its classification and the scales of pay attached thereto shall be specified in Columns (2) to (4) of the said Schedule.

Provided that the existing Data Entry Operators drawing pay in the scale of Rs. 1200-2040 shall **continue** to draw pay in that scale of pay till the time they **vacate the post or ceased to draw pay in the scale** of Rs. 1200-2040 (highlighted for emphasis).”

11. The Tribunal also noted and observed that the recruitment rules of Date Entry Operators Grade A & B were neither approved by the competent authority, nor published in the official gazette and consequently, no reliance could be placed on them.

12. The contention of the petitioners that the cadre of DEO grade B was merged with the cadre of Senior Tax Assistant in the pay scale of Rs.5000-8000 and as such the respondents were promoted to the post of Senior Tax Assistant w.e.f. 29th June, 2001 was repelled as nothing was produced by the petitioners in support of the said contentions. No order promoting the respondents to the said cadre or any document or material was produced by the petitioners and in the circumstances, it could not be inferred that the respondents were promoted and the plea of the petitioners was rejected. The tribunal also placed reliance on the fact that in OA No.925 of 2002, four DEOs were promoted to the grade of Programme Assistant/Console Operators w.e.f. 1st October, 1998 vide order dated 10th November, 2005 which fact could not be disputed by the petitioners and thus, they became entitled for financial upgradation under the ACP scheme. Thus, it was held that for DEOs, Programme Assistant/Console Operator, in the pay scale of Rs.5500-9000 is the next higher grade in the existing hierarchy and consequently, the respondents are entitled for grant of first financial upgradation in the scale of Rs.5500-9000 and not to the scale of Rs.5000-8000 and thus, set aside the order dated 8th April, 2004.

13. This court heard the learned counsel for the parties in detail. This is not in dispute that under the provisions of 1990 Rules, DEO with 10 years regular service in the grade becomes eligible for promotion to said selection post. The plea for consideration is whether the Rules of 1990 were superseded by RRs of 1994. The tribunal has held that despite the queries raised, no order, notification/RRs etc. were either pointed out or produced to establish that the said Rules of 1990 had been modified, superseded or amended making the DEOs ineligible for promotion to said grade. The Tribunal thus held that in absence of material it is not possible to hold that the Rules of 1990 were superseded by RRs of 1994 and thus concluded that the next higher grade w.e.f 1.1.1996 is Rs.5500-9000 in the existing hierarchy in cadre for which feeder grade is DEOs and therefore granting first financial upgradation vide order dated 8.4.2004 in the pay scale of Rs.5000-8000 which was given to the respondent was not proper and justified. Tribunal also noticed that no notification or order was passed re-designating the respondent as DEO grade B pursuant to alleged restructuring of post of DEOs vide letter dated 22.12.1993 with reference to Ministry of Finance, Department of Expenditure OM dated 11.09.1989 in grades of DEOs Gr.A, B, C, D & E. Noticing para 2 of the Rules, 1994 providing for exception that DEOs drawing pay scale of 1200-2040 shall continue to draw in that scale of pay till the time they vacate

the post or cease to draw the said scale, it was held that the recruitment rules of 1994 providing for DEOs Gr. A & B were not approved by competent Authority nor published in official Gazette.

14. The plea of the petitioners that the cadre of DEOs Grade-B was merged with the cadre of Sr. Tax Assistant in pay scale of Rs. 5000-8000 and the respondents were promoted to the post of Sr. Tax Assistant w.e.f. 29th June, 2001 was also not accepted as no document or material was produced in support of this plea. The Tribunal had held that there had been no element of promotion in treating the respondent as Sr. Tax Assistant w.e.f. 29th June, 2001. In the totality of facts and circumstances, the Tribunal has thus held that Recruitment Rules which were applicable in 1990 remained in force and could not be ignored unless they had been amended, substituted or superseded. Since the respondents became eligible for promotion, however, they were not promoted and though they were entitled for benefit of ACP Scheme only in 2000-2001, therefore, they became entitled for up-gradation to the next scale in the cadre of 5500-9000 from DEOs to Programme Assistant/Console Operator and thus the order dated 8.4.2004 granting them scale of 5000-8000 could not be justified.

15. The learned counsel for the petitioner has referred to the promotion order dated 29th June, 2001 for Non- Gazetted Group-C DEOs to the Cadre of Sr. Tax Assistants. Perusal of the said order, however, reveals that it is not pertaining to respondents No. 2 & 3. No other order has been produced to show that respondent Nos. 2 & 3 were promoted to the cadre of Sr. Tax Assistant. There is no order produced by the petitioners even to show that the respondents were promoted to non-Gazetted Group-C. Consequently, there is no order for promotion to the cadre of Sr. Tax Assistant in respect of respondent Nos. 2 & 3 and since there is no order for promotion of the respondent No. 1 to Non-Gazetted Group-C, the alleged promotion to the cadre of Sr. Tax Assistant of respondent No. 1 also cannot be accepted. The Tribunal order to this effect therefore, cannot be faulted by the petitioners.

16. It is well settled that the norms regarding recruitment and promotion of officers belonging to the Civil Services can be laid down either by:

- a law made by the appropriate Legislature or
- by rules made under the proviso to Article 309 of the Constitution of India or
- by means of executive instructions issued under Article 73 of the Constitution of India in the case of Civil Services under the Union of India and
- under Article 162 of the Constitution of India in the case of Civil Services under the State Governments.

The Supreme Court had held in *Union of India & ors. Vs Somasundaram Viswanath & ors*, (1989) 1 SCC 175 that If there is a conflict between the executive instructions and the rules made under the proviso to Article 309 of the Constitution of India, the rules made under proviso to Article 309 of the Constitution of India prevail, and if there is conflict between the rules made under the proviso to Article 309 of the Constitution of India and the law made by the appropriate Legislature the law made by the appropriate Legislature prevails. However, in the present case there is no conflict in instructions and rules but the approval of rules framed subsequently and the rules being not notified. The rules for Group A & B though were made in 1994 but have not been approved nor notified and rules for Group C, D & E have not even been made. In the circumstances the reliance could not be placed on these rules to determine as what is the next grade to determine the pay scale of the respondent for the purposes of up-gradation under the ACP scheme. In (1998) 4 SCC 114, *Vimal Kumari Vs The State of Haryana & ors* it was held by the Supreme Court that in the absence of any decision of the State Government that so long as the Draft Rules were not notified, the service conditions of the appellant or the respondent and their other colleagues would be regulated by the "Draft Rules" prepared in 1983, it was not open either to the Government or to any other authority, nor was it open to the High Court, while disposing of

the writ petition, to invoke any of the provisions of those Rules particularly as the Government has not come out with any explanation why the Rules, though prepared in 1983, have not been notified for the long period of more than a decade.

17. The learned counsel for the petitioner has also referred to letter dated 22nd December, 1989 reference No. F.No.A-11019/23/32-Ad.VII about restructuring of cadre of Data Entry Operators in the Income Tax Department giving restructured post Grade of Data Entry Operator of Group-A of Rs. 1160-1500 and data entry operator Group B having scale of Rs. 1350-2200. The learned counsel has also referred to the schedule regarding Data Entry Operator Grade-A and Data Entry Operator Grade B giving number of posts classification and scale of pay etc. however, it has also been observed by the Tribunal, that the learned counsel is unable to show any orders whereby the respondents who were data entry operators were re-designated as Data Entry Operators Grade B. The petitioners are also unable to show any approval by the competent authority of the said Recruitment Rules nor has anything been placed on record or shown to demonstrate that these rules were published in the official gazette.

18. If the rules were not approved and were not published and consequent thereto, no orders were passed by the petitioners, re-designating the respondent as, Data Entry Operator Grade B on the basis of alleged Recruitment Rules, it also cannot be held that the next pay scale would be Rs. 5000-8000 on the basis of these rules of 1994 and consequently, the order dated 8th April, 2004, will not be sustainable.

19. This has also not been denied that even according to the Rules of 1994 which though were not approved and published in the Official Gazette, the existing Data Entry Operators drawing pay in the scale of Rs. 1200-2040 would continue to draw in that scale of pay till the time they had vacated the post or ceased to draw pay in the scale of Rs. 1200-2040. If that be so, even on the basis of unapproved Rules, which were not officially gazetted, the next grade would be Rs. 5500-9000 as pursuant to reorganization of the post of Data Entry Operators, no Recruitment Rules for Group-C, D, E were even made. If there were no Rules for Group-C, D, E Posts and if it is assumed that the respondents were re-designated to the post of Data Entry Operators Grade-B, then, the next higher grade in absence of the Data Entry Operator Group C,D,E, will be of the Programme Assistant/Console operators in the pay scale of Rs. 5500-9000. Consequently, the order of the Tribunal holding that for DEOs,

Programme Assistant/Console Operator in the pay scale of Rs. 5500-9000 is the next higher grade in the existing hierarchy in the cadre and the action of the petitioner in granting them first financial up-gradation in scale of Rs. 5000-8000 by order dated 8th April, 2004, cannot be sustained in law, cannot be faulted.

20. In the facts and circumstances, the inference of the Tribunal that the respondents are eligible to the post programme Assistant/Console Operators in terms of 1990 Rules and are entitled to be considered for promotion to said grade on acquiring eligibility subject to availability of vacancies can also not be termed illegal or unsustainable.

21. In the circumstances, the learned counsel for the petitioners has not been able to make out any ground on the basis of which it can be held that the order of the Tribunal is illegal, unsustainable or contrary to any document produced by the petitioners and the respondents. If that be so, the order of the Tribunal dated 30th July, 2007 in OA No. 2012/2006 titled as Jai Prakash Kalwani & Ors. Vs. UOI & Ors. in respect of present respondents cannot be faulted and requires no interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

22. The writ petition, in the facts and circumstances, is without any merit and it is, therefore, dismissed. Considering the facts and circumstances, the parties are left to bear their own costs.

ANIL KUMAR, J.

JANUARY 13, 2011

'VK/rs'

VEENA BIRBAL, J.