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

Date of Decision: May 01-02, 2013

+ **W.P.(C) 332/2013**

MS. SHALOO BATRA AND ORS Petitioners
Represented by: Ms.Jyoti Singh, Sr.Advocate with
Mr.K.Venkatraman and Ms.Saahila
Lamba, Advocates

versus

HIGH COURT OF DELHI Respondent
Represented by: Mr.Rajeev Bansal, Advocate with
Mr.Devvrat Singh Raghav and
Ms.Swati Verma, Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE V. KAMESWAR RAO

PRADEEP NANDRAJOG, J. (ORAL)

1. In exercise of the power conferred under Article 226 of the Constitution of India the '*Delhi High Court Establishment (Appointment & Conditions of Service) Rules 1972*' have been framed. As per Rule 4 thereof the Establishment of the Delhi High Court consists of posts listed in Schedule I to the Rules, as amended from time to time. As per the Schedule, inter-alia, 79 posts of Private Secretaries have been sanctioned.
2. Being a Group 'A' post, the post of a Private Secretary is a '*Selection*' post, requiring 25% of the vacant posts to be filled by promotion on the basis of seniority-cum-merit and 75% of the vacant posts to be filled by selection on merit on the basis of a written examination comprising of one paper in English language (Essay, Grammar and Translation); one paper

of shorthand dictation, to be transcribed on a computer; and a viva-voce test. The Rule stipulates a minimum transcribing speed in English shorthand of 120 words per minute and a minimum typing speed of 45 words per minute.

3. Eligibility is 5 years' service as a Stenographer in the senior scale and 7 years' service as a Stenographer in the junior scale.

4. On August 21, 2012, 31 vacant posts of Private Secretaries in the 75% test quota were notified to be filled by inviting applications from eligible candidates. The cut off date for eligibility prescribed was September 10, 2012.

5. Those who were desirous of competing at the selection process and were eligible, submitted their respective applications and took the English language test as also shorthand dictation followed by typing test, which we may hereinafter loosely call '*the skill test*'.

6. Soon after the skill test was conducted, representations were submitted on November 07, 2012, by 35 candidates raising an issue pertaining to the skill test. Briefly noted, the grievance was that the diction of the person who read out the passage was not clear and as a result there was a likelihood of mishearing and thus wrong noting of the passage read out and thereafter typed by the candidates. The Committee constituted by the Hon'ble Chief Justice of the Delhi High Court took cognizance of the representation and on December 20, 2012, decided that those who had qualified i.e. obtained marks above the cut off prescribed would be called for viva-voce and those who had failed in the skill test but cleared the language test would be entitled to take a fresh skill test. It was noted that only two candidates had successfully cleared the language and the skill test,

and the Registry was directed to intimate to these two candidates the date on which they were to appear for the viva-voce.

7. Instant writ petition came to be filed on January 21, 2013 probably for the reason the skill test was scheduled to be held on January 27, 2013.

8. Pleading in the writ petition that the process of selection begins with the issuance of an advertisement inviting applications from eligible candidates and ends with the preparation of a select list for appointment and that law does not permit a selection process to, on the one hand reach its destination when list of successful candidates is published, and simultaneously the selection process continues by permitting candidates who had failed in the selection process to retake a paper or a skill test; ill advised by the counsel who drafted the writ petition, the three writ petitioners prayed that even they be permitted to take the skill test scheduled for January 27, 2013 and thereafter they be subjected to an English language test; but we note that in the alternative a prayer was made to quash the decision to permit candidates who had failed the skill test to take a fresh skill test. The three writ petitioners pleaded that having rendered the requisite service in the senior/junior scale of stenographers on November 12, November 28 and December 05, 2012, the three writ petitioners had now become eligible to be appointed as Private Secretary.

9. Listed for preliminary hearing on January 22, 2013, while issuing notice in the writ petition to the respondent, interim orders were passed that the skill test scheduled for January 27, 2013 may be held but result thereof would not be declared.

10. The two candidates who had successfully cleared the English

language and the skill test were called for interview and since both successfully cleared the selection process the result of the selection was declared resulting in the said two candidates being promoted as Private Secretaries on January 28, 2013 i.e. the selection process, which commenced with the notice dated August 21, 2012 inviting applications from eligible candidates, reached its destination with the declaration of the result followed by the successful candidates being promoted as Private Secretary.

11. It is in the aforesaid backdrop of the facts that we are called upon to decide the question: *‘Whether with the declaration of the result of selection by publishing the merit list can the respondent continue with the process of selection by permitting candidates who had failed to clear the skill test to retake a fresh skill test?’* and this question would subsume the issue: *‘Whether appointment to a selection post requiring seniority to be as per the merit position in the selection process, can be made with reference to merit position obtained by candidates with reference to two different tests without a principle or norm of equalization/standardization?’* and the question would also subsume the issue: *‘Whether the respondent is empowered to permit failed candidates to retake a test in which they had failed?’* and the question would further subsume the issue: *‘Whether with the declaration of result of an examination the unfilled vacancies lapse; to be carry forward to the next selection process?’*

12. But before we decide the question and the related issues which fall for determination and are listed in para 11 above, we would be called upon by Mr.Rajiv Bansal, learned counsel for the respondent, to decide the *locus* of the writ petitioners to maintain the instant writ petition.

13. *Locus* of the petitioners was questioned by urging that the

advertisement inviting applications from eligible candidates for being appointed as Private Secretary had the eligibility cut off date September 10, 2012, by which date, admittedly the writ petitioners had not rendered the requisite length of service as Senior/Junior Stenographers. Learned counsel urged that since writ petitioners were not eligible to be appointed as Private Secretary as of the cut off date, no right of theirs being affected, they could not maintain the present action.

14. The issue of *locus* of the writ petitioners is inextricably linked with the issue: ‘*Whether with the declaration of result of an examination the unfilled vacancies lapse; to be carry forward to the next selection process,*’ which falls for consideration; and since the petitioners have acquired eligibility when the result of the selection process was declared at which certain, nay most of the vacancies notified remained unfilled, the petitioners would have a *locus* to maintain the action. Suffice would it be to state that maintainability of an action is distinct vis-a-vis the action being sustainable. Pertaining to writ proceedings, the maintainability of an action has to be determined with respect to the pleadings, both of law and facts, to be treated as correct. Of course, if thereafter on merits it is found that the petitioners have no case in law i.e. the pleadings of law as set out in the writ petition are not sustainable, the writ petition would be dismissed holding that the action could not sustain itself. For otherwise, whenever a writ petition fails on merits it would be required to be held that the writ petitioners had no *locus* to maintain the action. This is a paradox of law with which all those who are in the field of litigation are familiar with.

15. That apart, it may happen, as in the instant case, that issues of maintainability of an action i.e. the *locus* is inextricably linked with the issue

of sustainability of the action, requiring the issue to be decided on merits.

To be continued on May 02, 2013

16. In the decision reported as 1990 (2) SCC 669 A.P.Public Service Commission Hyderabad & Anr. Vs. B.Sarat Chandra & Ors., the Supreme Court held, in paragraph 7, that the process of selection begins with the issuance of advertisement and ends with the preparation of select list for appointment. It consists of various steps like inviting applications, scrutiny thereof and rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva-voce and preparation of list of successful candidates. On facts, the Supreme Court was dealing with the issue of specifying a date by which eligibility had to be acquired. But the legal concept of the span of the sweep of a selection process, as highlighted in the decision, is relevant to be noted. The decision aforesaid guides us that with the declaration of results a selection process reaches its destination.

17. A learned Single Judge of the Punjab & Haryana High Court, deciding a writ petition (unfortunately the number of the writ petition has been omitted to be noted in the decision) on July 23, 2010, titled Arjun Yadav Vs. Kurukshetra University, opined that the moto 'Try Try again' had no application in selection in service law and thus the authority effecting appointments by selection could not resort to grace marks being awarded. Thus mandamus could not be issued by a Court to the authority to grant grace marks. A similar view was expressed by a Division Bench of the High Court of Kerala, when O.P.Nos.39672/2002 and 12264/2003 were decided on September 03, 2003 titled M.Sebi Louis & Ors. Vs. UOI & Ors. The Division Bench of the High Court of Kerala was dealing with a decision

passed by the Central Administrative Tribunal which had directed the competent authority to pass appropriate orders regarding grant of grace marks to candidates, holding that the question paper was '*tough*'. The Division Bench highlighted that it was not a case where a portion of the question paper was '*out of syllabus*'. The Division Bench noted that there was no rule or law providing for award of grace marks. It was not a case where the prescribed standard of the questions was wholly arbitrary. The petitions were allowed and the decision of the Tribunal was set aside.

18. In the present case, the situation is somewhat analogous. The grievance of the failed candidates is that the diction of the speaker who dictated the passage was inaudible. But we do not find any such grievance made when the diction was on. Surely, in a skill test pertaining to shorthand taking and thereafter transcribing the same, if in the examination hall, a candidate or candidates find that the diction is inaudible, we see no reason why the candidate/candidates would not tell the speaker to be loud and hence audible. The situation would be akin to a candidate being handed over a question paper which is illegible due to the ink on the paper smudging the same during printing process or the imprint being dim. It is reasonably expected that the candidate/candidates would immediately require the invigilator to replace the illegible question paper with a legible one. It has to be kept in mind that two candidates successfully cleared the skill test.

19. As noted by us, the post of Private Secretary is a selection post; required to be filled up from amongst the eligible Senior/Junior Stenographers through a competitive process consisting of an English language paper, a skill test and viva-voce; with marks assigned to each 3

compartments. Seniority is determined with reference to another merit position obtained. Thus, it would be an incongruent situation where pertaining to the same selection process marks reflected in the merit position for one set of candidates is with reference to one set of question paper(s) and for another set of candidates the merit position is with reference to another set of question paper. How would these two lists be merged to have one merit list? It is just not possible to do so unless standardization is resorted to and if law so permits: as is to be found in the selection to the All India Services through the All India Competitive Examination popularly known as All India Civil Services Examination.

20. That apart, it is settled law that with the declaration of results, unfilled vacancies lapse pertaining to the selection process and have to be carry forward to the next round of selection process. A selection process cannot become an unending selection process with the moto '*Try Try again*' till successful. This flows from the reasoning of the decision of the Supreme Court in B.Sharat Chandra's case (supra).

21. It is urged by Mr.Rajiv Bansal learned counsel for the respondent that Rule 12 of the Delhi High Court Establishment (Appointment and Conditions of Service) Rules 1972 contains a residual power to relax the rules in the Chief Justice of the Delhi High Court.

22. Firstly, no decision taken by the Chief Justice in exercise of the power vested in him by the Rule has been shown to us, but we would take it that the decision of the Committee constituted by the Chief Justice which supervise the selection process was placed before the Chief Justice and approval thereto was granted.

23. Rule 12 reads as under:-

“The Chief Justice may, by order, dispense with or relax the requirement of any Rule to such extent and subject to such conditions as he may consider necessary in any particular case.”

24. As we have noted above the requirement of the Rule pertaining to promotion to the selection post of Private Secretary requires 75% of the vacant post to be filled by selection on merit on the basis of written examination comprising of one paper in English language (Essay, Grammar and Translation) followed by a Shorthand dictation to be transcribed on Computer. The short-listed candidates to also undergo a viva-voce test. Further, pertaining to the shorthand dictation and its transcript on computer, the shorthand speed has to be 120 words per minute and typing thereof has to be minimum 45 words per minute. Thus, the residual power to relax could be only to relax anyone or more requirement of the Rule and that too by bringing out the necessity to do so. Under no circumstances can said power be read to mean a power conferred upon the Chief Justice to permit candidates who have failed at the skill test to retake one.

25. We were informed at the hearing that there is an acute shortage of Private Secretaries in the Delhi High Court and this is the justification to permit the failed candidates to retake the skill test.

26. In other words, it is the doctrine of necessity which is pressed into aid.

27. Now, the number of eligible candidates to take the selection test to be appointed as Private Secretaries is limited to the Senior/Junior Stenographers having 5 years' and 7 years' regular service in the grade. The number is hardly around 40. We see no reason why the examination for the subsequent period cannot be held forthwith. Besides, ad-hoc/temporary/stop

gap arrangements can always be made.

28. Mr.Rajiv Bansal, learned counsel for the respondent cites the opinion reported as (1990) 3 SCC 157 N.T.Devin Katti & Ors. Vs. Karnataka Public Service Commission & Ors. to urge that it is permissible to retrospectively amend the Rules pertaining to appointment even when an appointment process is under way.

29. There is no quarrel with the proposition laid down in the said decision that nobody has a vested right to be appointed to a post; not even when a selection process commences and that if a selection process is on, it is permissible to amend the appointment Rule with retrospective date. But, retrospectivity of the Recruitment Rule as amended has to be clearly spelt out either by so expressly recording or by implication retrospectivity to be deduced.

30. But the decision has no application in the instant case because no Rule has been amended, much less retrospectively.

31. We answer the question posed in para 11 by holding that if a selection process reaches its destination with the result being declared pertaining to a selection post, the destination reached exhausts the selection process and if all notified posts are not filled, the unfilled posts have to be returned as unfilled requiring the same to be filled up by initiating a fresh selection process and this would mean a new cut off date for eligibility to be prescribed at which all candidates who are eligible to be appointed as of the prescribed cut off date would be entitled to compete. Unless a power exists in a Rule, it is impermissible to permit failed candidates to retake a test in which they had failed. A merit based selection process cannot be bifurcated into two parts with two merit lists of successful candidates prepared unless a

power exists to do so and that too with the principle/norm of equalization/standardization in place. Of course, if a stage of a selection is irretrievably vitiated, a power would be read in the competent authority to take corrective action, and that would mean to correct the wrong which has resulted in the selection process by recommencing the onward journey at the stage where the wrong/error took place. But in said circumstance, all co-passengers in the journey would process ahead together from said stage till when the journey ends and at the end of the journey it would be determined as to who finds herself selected but even the order of merit position obtained.

32. The writ petition is accordingly allowed. The impugned orders dated 08/09 January, 2013 are quashed. Needless to state the respondent is restrained from permitting failed candidates to retake the skill test, and since the skill test has been retaken but result thereof has not been declared, the respondent is restrained from declaring the result. Needless to state it would be open for the respondent to conduct a fresh selection process for the unfilled posts and such further posts as have fallen due.

33. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(V. KAMESWAR RAO)
JUDGE

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