

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

Judgment Reserved on May 06, 2013

Judgment Delivered on May 20, 2013

+ **W.P.(C) 1056/2012**

MUNICIPAL CORPORATION OF DELHI Petitioner
Represented by: Ms.Manpreet Kaur for Mr.Arun
Bhardwaj, Advocate

versus

ASHISH PUNWANI AND ORS. Respondents
Represented by: Mr.Ajesh Luthra, Advocate

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

V.KAMESWAR RAO, J.

1. Order dated November 02, 2010 passed by the Central Administrative Tribunal allowing OA No.879/2010 and the orders dated February 03, 2012 and February 17, 2012 passed by the Central Administrative Tribunal in CP No.322/2010 filed by the respondents alleging non-compliance of the order dated November 02, 2010 passed by the Tribunal are under challenge in the above captioned writ petition.

2. The issue before the Tribunal pertained to promotion to the post of Upper Division Clerk (UDC) from the post of Lower Division Clerk (LDC) under the 25% quota through a Limited Departmental Competitive Examination (LDCE).

3. As per the respondents, selection process for LDCE-2007 commenced

when applications were invited from the eligible candidates to appear at the LDCE. The circular inviting applications did not mention the number of vacancies proposed to be filled. Conducting the examination on September 30, 2007 and declaring results thereof in November 2007 promotions were effected. OA No.879/2010 was filed by the respondents whose merit position as per the pleading in the list ranged between serial No.147 to 215. Under orders dated June 19, 2008, July 04, 2008 and July 30, 2008 promotions were effected; and the last promoted candidate was at rank No.145. The grievance raised before the Tribunal was that promotions were not effected each year to fill up the vacancies in the quota prescribed for LDCE; the examination was conducted every alternate year i.e. once every two years. It was stated by the respondents that anticipated vacancies likely to arise in the next two years had to be taken into account while drawing up the select panel. They also raised a grievance pertaining to wrong calculation of the existing vacancies.

4. As per MCD the examination was conducted to fill up 132 vacancies which included 120 existing vacancies with additional reserved panel of 10% of the existing vacancies i.e. 12; $120 + 12 = 132$ was the simple linear equation formula projected. But it was admitted in the reply filed to the original application that there was an error in calculating the vacancies which had to be 154. It was pleaded that 154 vacancies have been filled up. It was categorically pleaded that it was not permissible to take into account the anticipated vacancies likely to fall due in the next two years; and if they were this would amount to depriving candidates who acquired eligibility in the year of the vacancy to take the LDCE.

5. Agreeing with the stand of the respondents and disagreeing with the one taken by the petitioner pertaining to anticipated vacancies in the next

two years which were likely to fall due, vide decision dated November 02, 2010, relying upon the decisions of the Supreme Court reported as (2008) 1 SCC (L&S) 21 S.B. Bhattacharjee vs. S.D. Majumdar & Ors. and (1991) SCC (L&S) 649 O.S. Hussain (Dr.) vs. UOI. The Tribunal concluded in Para No.6 as under:-

“The non-holding of the regular examinations under the 25% quota as well as non-indication of the vacancies are clear lapses on the part of the respondents, revealing non-observance of the prescribed instructions. However, we are not dealing with a PIL nor does the same fall within the limited jurisdiction of the Tribunal. Hence, setting aside the selection process on the ground of certain vitiating factors is not an option before us; it is also not the prayer in the OA. What we cannot ignore is the fact of non-assessment of the vacancies in accordance with the DOPT instructions.

As per the respondent’s own admission, they have calculated the existing vacancies up to the date of second circular i.e. 4.12.2006. According to the MCD norms, the examinations under the 25% quota are required to be held every two years and the DOPT instructions prescribe computation of ‘anticipated vacancies’ along with the existing vacancies. Even if we disregard the fact of the examination in question being conducted subsequently in the month of September, 2007 and the merit list being declared in November, 2008; the non-accounting of the clear anticipated vacancies as on 4.12.2006, is not found to be in accordance with the DOPT instructions. Again, since as per the MCD norms, the limited examinations are required to be held every two years, in this case, there would be a requirement for calculation of such vacancies for at least two years taken from the date of 4.12.2006.

The contention of the respondents that such an action would affect the right of the employees becoming subsequently eligible for promotion on the basis of future tests would not be applicable in this limited context. Again the “anticipated vacancies” are not to be confused with “future vacancies”.

6. Two directions were issued by the Tribunal:-

- (i) *To re-determine the existing number of vacancies.*
- (ii) *To include the anticipated vacancies.*

7. It appears that initially the MCD proceeded to comply with the directions issued but faced a problem in implementing the same and this consumes time. This evidences the delay in filing the writ petition in the year 2012 laying a challenge to the order dated November 02, 2010 along with laying a challenge to the orders dated February 03, 2012 and February 17, 2012 passed in CP No.322/2010 which alleged violation of the order dated November 02, 2010.

8. MCD has challenged the order dated November 02, 2010 as well as the order dated February 03, 2012 and the order dated February 17, 2012. On the grounds that the Tribunal could not have directed anticipated vacancies likely to fall due in the next two years to be taken into account while drawing up the select panel for the reason eligibility had to be acquired by the prescribed cut off date and that for vacancies accruing in the future the candidates who acquired eligibility in the year of the vacancy could not be excluded. It is also the case of MCD that the life of the panel drawn up could not directed to be extended.

9. When the contempt petition was filed MCD stated that notwithstanding the direction issued by the Tribunal as per its order dated November 02, 2010 been contrary to law, it had re-calculated the vacancy position up to December 31, 2008 which came to 163 and out of which 153 candidates have been appointed. It was pleaded that the remaining 10 vacancies were reserved: ST-09 and PH-01. Without indicating the reasons as to why the Tribunal opined that the MCD was wilfully disobeying the

directions issued by the Tribunal, vide order dated February 03, 2012 it was directed that the Commissioner of the Corporation would personally appear before the Tribunal and application filed by the MCD seeking exemption for its Commissioner to appear was dismissed vide order dated February 17, 2012.

10. This compelled MCD to file the above captioned writ petition.

11. A perusal of the order dated November 02, 2010 would reveal that the fulcrum of the reasoning of the decision by the Tribunal are OMs dated April 20, 1998, September 08, 1998 and October 13, 1998, legal effect whereof could be summarized as under:-

- (i) *O.M dated April 20, 1998, which specifically deals with the subject of determination of regular vacancies. According to the said instructions, the DPC should take into account vacancies which are clear arising in a post/ grade/ service due to death, retirement, resignation, regular long term, promotion and deputation etc.*
- (ii) *O.M dated September 08, 1998 read with O.M dated October 13, 1998, which inter-alia prescribes that the DPC should be convened at regular intervals and panel must be drawn which could be utilized for making promotions against vacancies occurring during the course of the year. O.M also enjoins duties upon the concerned authority to initiate action to fill up the existing as well as anticipated vacancies well in advance.*

12. The moot question which would arise is: Whether the said OMs relied by the Tribunal would be applicable when the recruitment is affected through Limited Departmental Competitive Examination (LDCE). While coming to the conclusion that they do, in the impugned order, the Tribunal has overlooked two OMs being G.I Department of Personnel and Training,

O.M Nos.22011/5/86-Estt.(D), dated 10th April, 1989 as amended by O.M No.22011/5/91-Estt.(D), dated 27th March, 1997, which stipulates the functions of DPC. According to the OMs, the DPCs should be formed in each ministry/ department/ office to judge the suitability of officers for the following purposes:-

- “(i) promotions to “Selection-cum-Seniority” and “Selection by Merit” as well as ‘non-selection’ posts;*
- (ii) confirmation in their respective grades/ posts;*
- (iii) assessment of the work and conduct of probationers for the purpose of determining their suitability for retention in service or their discharge from it or extending their probation; and*
- (iv) consideration of cases of Government servants for crossing the Efficiency Bar.”*

13. A perusal of the aforesaid OMs would show that the Limited Departmental Competitive Examination (LDCE) is not included in the functions of DPC. Rightly so. The DPC does not hold an examination. It only assesses an officer for promotion on the basis of ACRs, integrity certificate and seniority list. The consideration by DPC is on attaining the eligibility period as per the Recruitment Rules, whereas for the purpose of recruitment under the LDCE quota, the consideration is on the basis of examination, which is subject to meeting eligibility and the candidate who is desirous of being considered under the LDCE quota applies pursuant to a notification issued by the concerned Ministry/ Department/ Office.

14. In the instant case the notification was issued inviting applications from candidates who had become eligible as of December 04, 2006 i.e. had completed 3 years regular service as LDC. If the finding of the Tribunal is accepted, then the persons who would have attained eligibility in the next

two years should also have been allowed to apply pursuant to the notification. This has admittedly not been done. We are conscious of the fact that the recruitment process is of the year 2006-07. Much time has elapsed thereafter. Moreover, even on the calculation of vacancies till December 2008, the respondents do not get appointed. We do not say anything further except the OMs relied upon by the Tribunal have no applicability for the purpose of LDCE examination, as such the conclusion of the Tribunal is unsustainable.

15. Regrettably, it is seen that the Tribunal entertains the contempt application No.322/2010 filed by the respondents and proceeded to adjudicate as to whether the calculation of vacancies by the petitioners is justified. The Tribunal could not have gone into the veracity of computation of vacancies under its contempt jurisdiction. The remedy lies elsewhere. It is not a case of the respondents herein that the petitioners did not calculate the vacancies. The petitioners did calculate the vacancies and issued office orders dated May 04, 2011 and January 27, 2012, wherein petitioners concluded that the vacancies were 163. The issuance of the orders would be in compliance with the orders passed by the Tribunal and nothing more was to be adjudicated under the contempt jurisdiction. The scope of contempt jurisdiction by a High Court and Central Administrative Tribunal has been considered by the Supreme Court with reference to the provisions of Contempt of Courts Act, 1971 and Administrative Tribunal's Act, 1985 in two decisions reported as (1996) 6 SCC 291 J.S Parihar vs. Ganpat Duggar & Ors. and 1999 6 SCC 403 Union of India vs. J.R Dhiman.

16. In J.S Parihar's case (supra), in para No.6 the Supreme Court has held as under:

“The question then is: whether the Division Bench was right in setting aside the direction issued by the

learned single Judge to redraw the seniority list. It is contended by Mr.S.K. Jain, learned counsel appearing for the appellant, that unless the learned Judge goes into the correctness of the decision take by the Government in preparation of the seniority list in the light of the law laid down by three benches, the learned Judge cannot come to a conclusion whether or not the respondent had willfully or deliberately disobeyed the orders of the Court as defined under Section 2(b) of the Act. Therefore, the learned single Judge of the High Court necessarily has to go into the merits of that question. We do not find that the contention is well founded. It is seen that, admittedly, the respondents had prepared the seniority list on 2.7.1991. Subsequently promotions came to be made. The question is: whether seniority list is open to review in the contempt proceedings to find out, whether it is in conformity with the directions issued by the earlier Benches. It is seen that once there is an order passed by the Government on the basis of the directions issued by the Court, there arises a fresh cause of action to seek redressal in an appropriate forum. The preparation of the seniority list may be wrong or may be right or may or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review. But that cannot be considered to be the willful violation of the order. After re-exercising the judicial review in contempt proceedings, afresh direction by the learned single Judge cannot be given to redraw the seniority list. In other words, the learned Judge was exercising the jurisdiction to consider the matter on merits in the contempt proceedings. It would not be permissible under Section 12 of the Act. Therefore, the Division Bench has exercised the power under Section 18 of the Rajasthan High Court Ordinance being a judgment or order of the single Judge, the Division Bench corrected the mistake committed by the learned single Judge. Therefore, it may not be necessary for the State to file an appeal in this Court against the judgment of the learned single

Judge when the matter was already seized of the Division Bench.”

17. In J.R Dhiman’s case (supra), the Supreme Court in para No.4 has held as under:

“The contention put forth before us is that under Rule 24 of the Central Administrative (Procedure) Rules, 1987, the Tribunal may make such orders or give such direction as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. A perusal of the order made by the Tribunal on the application for contempt goes far beyond the original order and issued directions to the revisional authority the manner in which the order has to be made when originally the order made by the revisional authority was set aside and the matter was remitted for fresh consideration after taking into note of the pleadings raised in the original application before the Tribunal and any fresh contention that may be advanced. It is clear that the order made by the Tribunal is that it could not have passed an order other than what had been passed earlier, namely, one of a penalty reducing the time scale of pay of the two stages for a period of two years and certain other directions. It is not permissible at all for the Tribunal to direct the revisional authority to pass such a punishment alone and any higher punishment could not be imposed. When the order made by the revisional authority had been set aside and the matter was remitted for fresh consideration certainly, after consideration of all aspects of the matter it could pass an appropriate order in accordance with law.”

18. Thus, the Tribunal was not justified in directing the appearance of the Commissioner of MCD before it.

19. In any case, as we have held that the order dated November 02, 2010

passed by the Tribunal in O.A No.879/2010 is unsustainable, the contempt proceedings initiated for non-compliance of the said order must also be set aside. We do so and we hereby allow the writ petition setting aside the order passed by the Tribunal dated November 02, 2010, passed in O.A No.879/2010 and quash CP No.322/2010 filed in O.A No.879/2010. OA No.879/2010 is dismissed.

20. There shall be no orders as to costs.

(V.KAMESWAR RAO)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

MAY 20 2013
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